# "THEIR PRESERVATION IS OUR SACRED TRUST"[1]—JUDICIALLY MANDATED FREE EXERCISE EXEMPTIONS TO HISTORIC PRESERVATION ORDINANCES UNDER *EMPLOYMENT DIVISION V. SMITH*

**Abstract:** Religious property owners have both successfully and unsuccessfully challenged historic preservation ordinances as burdens on the free exercise of religion. Courts considering this conflict typically rely on *Employment Division v. Smith*, in which the United States Supreme Court held that neutral laws of general applicability that incidentally burden religion are not subject to strict scrutiny. Ambiguities in *Smith*, however, have left courts free to use their own interpretive discretion and have made attempts to apply free exercise precedent particularly difficult in the historic preservation context. This Note reviews the historic preservation movement and free exercise jurisprudence, then analyzes cases that have attempted to balance these two often conflicting interests. The Note argues that the strictures of *Smith* are too rigid, producing results either over- or under-inclusive of free exercise rights. Only through the application of a case by case balancing test can courts adequately adjudicate inevitable free exercise/historic preservation conflicts.

## INTRODUCTION

The Framers of the Bill of Rights wrote the Free Exercise Clause to ensure that the United States government did not directly impose restrictions on any citizen's religious beliefs or practices.[2] Conflicts between government action and religious practice are inevitable, however, because United States citizens practice such a variety of religious faiths that, often, religious conduct necessarily conflicts with the regulations of either federal, state, or local governments.[3] Therefore,

---

[1] Hillary Rodham Clinton, *Preserving America's Story*, *in* SAVING AMERICA'S TREASURES 7, 8 (Dwight Young ed., 2001).

[2] U.S. CONST. amend. I; GREGG IVERS, REDEFINING THE FIRST FREEDOM: THE SUPREME COURT AND THE CONSOLIDATION OF STATE POWER 133 (1993).

[3] Braunfeld v. Brown, 366 U.S. 599, 606 (1961) (articulating that there were almost 300 religious denominations in the United States in 1961); *cf.* Employment Div. v. Smith, 494 U.S. 872, 888 (1990) (stating that the current diversity of religious beliefs prevents the Court from granting exemptions to neutral laws that incidentally burden religion).

throughout the history of free exercise jurisprudence, the United States Supreme Court has considered free exercise challenges to government regulations ranging from mandatory Sunday closing laws to compulsory school attendance laws.[4]

Currently, the debate whether the application of historic preservation ordinances to historic religious properties violates the Free Exercise Clause is one of the most prominent in free exercise jurisprudence.[5] Some religious property owners desire an exemption from landmark designation because it imposes upkeep costs and limits on renovation that are financially burdensome.[6] Municipalities are very reluctant to grant exemptions, however, because historic preservation has become such an important tool in building community character and revitalizing urban economies.[7] Litigation results when the two sides cannot compromise; and religious property owners have alleged in court that preservation ordinances impose an unconstitutional free exercise burden.[8] Courts are left with the difficult task of deciding whether the Constitution's protection of free exercise rights trumps the government's preservation interests and in turn requires an exemption to the preservation ordinance for the historic religious property owner.[9]

Courts considering this conflict typically rely on the U.S. Supreme Court's decision, in 1990, in *Employment Division v. Smith*.[10] Ambiguities in *Smith*, however, have left courts free to use their own

---

[4] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) ("[W]e granted the writ of certiorari in this case to review a decision . . . holding that respondents' convictions of violating the State's compulsory school attendance law were invalid under the Free Exercise Clause."); *Braunfeld*, 366 U.S. at 600 ("This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute, enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities.").

[5] *Compare* Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 402 (1991) (arguing for the exemption of historic religious properties from preservation ordinances in all cases because the ordinances infringe upon the free exercise of religion), *with* Laura S. Nelson, *Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 CARDOZO L. REV. 721, 730 (1999) (arguing for a denial of exemptions to preservation laws for religious property owners because of the detrimental effect it will have on communities).

[6] *See* Alan C. Weinstein, *The Myth of Ministry v. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 93 (1992).

[7] *See infra* notes 62–63 and accompanying text.

[8] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 353 (2d Cir. 1990).

[9] *See, e.g., id.*

[10] *See, e.g., id.* at 354.

interpretive discretion and have made judicial attempts to apply free exercise precedent particularly difficult in the historic preservation context.[11] Accordingly, courts deciding cases involving this free exercise/historic preservation conflict have interpreted *Smith* to produce contradictory decisions in what look like very similar cases.[12] The strictures of *Smith* require courts considering this conflict to either: 1) protect only preservation rights by applying the case's neutral holding to preservation laws and not scrutinizing their effect on free exercise rights; or 2) protect only free exercise rights by determining preservation laws fit into one of *Smith*'s exceptions and applying strict scrutiny.[13] The former will result in courts upholding the preservation ordinance no matter what the factual situation, and the latter will result in courts always striking down the ordinance regardless of the severity of its impact.[14] Consequently, with *Smith* as the controlling free exercise case, no legal framework exists that allows courts to balance free exercise rights with historic preservation interests to determine the most equitable outcome in this conflict.[15]

Part I of this Note reviews the history of historic preservation in the United States.[16] This part details the evolution of the preservation movement from its humble beginnings, to its role as an important municipal land use tool, to the Supreme Court's ratification of preservation as a valid use of the police power.[17] Part II introduces the Free Exercise Clause and traces the Supreme Court's ever-fluctuating interpretation of that clause's scope.[18] This part discusses the impact of *Smith*'s revolutionary holding on the Supreme Court's application of strict scrutiny in previous free exercise cases.[19] Part III considers *Smith*'s impact on cases involving the application of historic preservation ordinances to historic religious properties, and articulates how ambiguities in *Smith* left courts too much discretion.[20] Finally, Part IV analyzes the two general approaches courts apply to the free exer-

---

[11] *See infra* notes 187–271 and accompanying text.

[12] *Compare St. Bartholomew's*, 914 F.2d at 354 (holding that the New York Landmarks Law is a neutral law of general applicability under *Smith*), *with* First Covenant Church v. City of Seattle, 840 P.2d 174, 180 (Wash. 1992) (holding that the Seattle Preservation Ordinance is neither neutral nor generally applicable under *Smith*).

[13] *See infra* notes 272–294 and accompanying text.

[14] *See infra* notes 272–294 and accompanying text.

[15] *See infra* notes 272–294 and accompanying text.

[16] *See infra* notes 22–67 and accompanying text.

[17] *See infra* notes 22–67 and accompanying text.

[18] *See infra* notes 68–160 and accompanying text.

[19] *See infra* notes 111–160 and accompanying text.

[20] *See infra* notes 161–271 and accompanying text.

cise/historic preservation conflict and proposes a balancing test as an alternative and more equitable analysis for resolving the conflict.[21]

## I. The Evolution of the Historic Preservation Movement

### A. *Historic Preservation's Humble Beginnings*

Private individuals dedicated to preserving individual landmark buildings mounted the first preservation efforts in the United States.[22] Occasionally, these concerned citizens persuaded state and city governments to use public funds to purchase landmark buildings, but the government had no comprehensive plan for the preservation of important historic structures.[23] Congress, however, condemned several Civil War battlefield sites in the 1890s and preserved them as memorials.[24] In 1896, in *United States v. Gettysburg Electric Railway Co.*, the United States Supreme Court upheld Congress's purchase of Gettysburg as a valid use of eminent domain—the first Supreme Court case to consider historic preservation issues.[25] Government involvement was limited, however, and through the turn of the century the preser-

---

[21] *See infra* notes 272–355 and accompanying text.

[22] Christopher J. Duerksen & David Bonderman, *Preservation Law: Where It's Been, Where It's Going, in* Handbook on Historic Preservation Law 1, 1–2 (Christopher J. Duerksen ed., 1983). Typical of these early preservation efforts was the work of Pamela Sue Cunningham, who, in 1853, chartered the Mount Vernon Ladies' Association to acquire the deteriorating Mt. Vernon. *Id.* By appealing to other women with means and patriotic fervor, Cunningham raised enough money to purchase and restore George Washington's home. *See id.*

[23] *Id.* at 2. In 1816, the City of Philadelphia paid $70,000 to purchase the old state capitol known to Americans today as Independence Hall. *Id.* The nation at that time was much more interested in expansion and development than preservation because it was still dealing with creating a stronghold on what was a newly settled continent. *See* Carol M. Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 Stan. L. Rev. 473, 474 (1981). In the nineteenth century, the federal government's preservation efforts were focused on the natural environment and ancient Native American sites. Norman Tyler, Historic Preservation: An Introduction to Its History, Principles, and Practice 35 (2000). Congress designated Yellowstone National Park a protected area in 1872, and, in 1889, Congress designated the Casa Grande ruin in Arizona as the nation's first National Monument. *Id.* In 1888, Congress established Mesa Verde National Park to preserve the area's ancient cliff dwellings. *Id.*

[24] Tyler, *supra* note 23, at 35.

[25] 160 U.S. 668, 683 (1896). The Court reasoned that the national character and importance of the site mandated efforts to "show a proper recognition of the great things that were done there on those momentous days." *Id.* at 682. The Justices were not considering the constitutionality of historic preservation ordinances that regulate the use of the property of private citizens; rather, the Court ruled on whether preservation was a valid purpose for which Congress could exert its power of eminent domain. *Id.* at 680–81.

vation of landmark buildings continued to depend on the ability of concerned citizens to garner the attention of philanthropists.[26]

In 1926, in *Village of Euclid v. Ambler Realty Co.*, the Supreme Court forever changed the historic preservation framework when it held that zoning constituted a valid exercise of the police power.[27] Because they considered zoning and historic preservation to be analogous, various local groups became emboldened by the case's result and slowly began regulating entire historic districts in an attempt to preserve neighborhood character and urban identity.[28] In 1954, in *Berman v. Parker*, the Supreme Court upheld government regulation solely motivated by aesthetic purposes and provided a further boon to the preservation movement.[29] By the early 1950s, historic preservation had evolved from private and sporadic attempts to save significant

---

[26] *See* TYLER, *supra* note 23, at 37–38. In his attempts to preserve Colonial Williamsburg, Dr. William Goodwin attracted the attention of John D. Rockefeller by stating, "Williamsburg is the one remaining colonial village any man could buy." *Id.* (quoting GEORGE HUMPHREY YETTER, WILLIAMSBURG BEFORE AND AFTER: THE REBIRTH OF VIRGINIA'S COLONIAL CAPITAL 51 (1996)). Williamsburg was saved only because Rockefeller found the idea of purchasing and restoring an entire colonial village intriguing. *See id.* Similarly, in 1929, Henry Ford used his wealth to bring an entire community of historic structures to Dearborn, Michigan, and he rebuilt them at a site named Greenfield Village. *Id.*

[27] 272 U.S. 365, 396–97 (1926) (holding that the zoning ordinance passed by the village that prevented a realty company from using its property for commercial purposes and reduced the land value by ninety percent was a valid use of the police power); Daniel T. Cavarello, *From* Penn Central *to* United Artists' I & II: *The Rise to Immunity of Historic Preservation Designation from Successful Takings Challenges*, 22 B.C. ENVTL. AFF. L. REV. 593, 599–600 (1995).

[28] *See* Cavarello, *supra* note 27, at 599–600. In 1931, Charleston, South Carolina passed the first historic preservation ordinance providing for design control and architectural review in the antebellum section of the city, and other cities slowly followed suit. Duerksen & Bonderman, *supra* note 22, at 6.

[29] 348 U.S. 26, 33 (1954) (upholding as a valid exercise of the police power Congress's exercise of eminent domain over various areas of urban blight in Washington D.C. in an attempt to redevelop the neighborhoods). Notably, *Berman* states:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.... If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

*Id.* (citations omitted).

landmark buildings to a legitimate means of community-building through rehabilitation of community landmarks.[30]

### B. *The National Historic Preservation Act of 1966 and the Subsequent Growth of the Historic Preservation Movement*

During the 1950s and 1960s, federally funded highway and urban renewal projects fueled the decay of historic city neighborhoods and the suburbanization of America.[31] The resulting destruction of celebrated older buildings, like the original Pennsylvania Station in New York City, taught the public and government officials the drastic consequences of losing extremely important landmarks to the wrecking ball.[32] The resulting swell of support for historic preservation led Congress to pass the National Historic Preservation Act of 1966 ("NHPA").[33] The NHPA brought national attention to the need for historic preservation and set up a comprehensive legal framework to address America's concern for historic buildings.[34]

The NHPA has three major components.[35] First, the NHPA created the National Register of Historic Places, a list compiled by the Secretary of the Interior that encourages preservation by documenting the significance of historic structures.[36] Second, the NHPA created the Ad-

---

[30] *See* Rose, *supra* note 23, at 480. The modern preservation movement stresses the "sense of place" that older structures lend to a community, giving citizens orientation and a "sense of familiarity" in their surroundings. *See id.*

[31] *See id.* at 488. The shattered and abandoned inner-city neighborhoods that resulted from these projects forced the government to consider and evaluate the changing nature of America's cities. *See id.* at 488–89; *see also* Duerksen & Bonderman, *supra* note 22, at 8–9.

[32] *See* Duerksen & Bonderman, *supra* note 22, at 9 ("Out of the turbulence of building, tearing down and rebuilding the face of America, more and more Americans have come to realize that as the future replaces the past, it destroys much of the physical evidence of the past." (quoting U.S. CONFERENCE OF MAYORS, WITH HERITAGE SO RICH, 204 (1966))). McKim, Mead and White built Pennsylvania Station from 1905 to 1911 and it was the largest building since the pyramids constructed in a continuous operation. LELAND M. ROTH, A CONCISE HISTORY OF AMERICAN ARCHITECTURE 195 (1979).

[33] 16 U.S.C. §§ 470–470x (2000) "[T]he preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans." *Id.* § 470(b)(4).

[34] *See infra* notes 35–40 and accompanying text; *see also* TYLER, *supra* note 23, at 44–45.

[35] *See* 16 U.S.C. §§ 470–470x.

[36] *Id.* § 470a(1)(a). Listing on the National Register enables owners of historic properties to apply for federal grants to aid in the preservation of the property, and it also notifies the federal government of what areas and structures they must treat sensitively when forging ahead with government sponsored-projects. *See* TYLER, *supra* note 23, at 47. Listing, however, does not in any way restrict the rights of private property owners in the use of their land. *Id.*

visory Council on Historic Preservation, an independent executive agency that has the responsibility to review all federal agency action that affects historic properties listed on the National Register.[37] Finally, the NHPA established a federal grant program to encourage the creation of State Historic Preservation Offices ("SHPOs") to administer state-wide preservation efforts.[38] Although it provided national guidance to the preservation movement, along with federal tax and other economic incentives, the NHPA delegated the bulk of preservation work to the states.[39] In turn, enabling statutes passed by state legislatures delegated the actual regulation to local governments.[40]

Municipal preservation boards comprise the heart of the preservation movement because state legislatures authorize them to designate historic landmarks and regulate historic districts.[41] These boards establish procedures for the consideration of landmark nominations and criteria on which to base landmark status.[42] Typically, once a preservation board grants landmark status to a property, the owner must file a petition with the preservation board for permission to

---

[37] 16 U.S.C §§ 470i–j; *see also* Advisory Council on Historic Preservation, *Section 106 Regulations Summary* (2001), *at* http://www.achp.gov/106summary.html. The Advisory Council, in what is known as the Section 106 review process, reviews the impact government action will have on historic structures and provides opportunity for interested parties to comment. *Id.* Even if the Council finds adverse effects, it cannot mandate the project to stop; if the project goes forward, the Council works with state officials to minimize the impact on historic properties. *Id.* For more information on Section 106 implementing regulations and court opinions about compliance with Section 106, see ADINA W. KANEFIELD, ADVISORY COUNCIL ON HISTORIC PRESERVATION, FEDERAL HISTORIC PRESERVATION CASE LAW, 1966–1996: THIRTY YEARS OF THE NATIONAL HISTORIC PRESERVATION ACT 10–32 (1996).

[38] 16 U.S.C. § 470a(b)–(c). SHPOs have several roles: 1) to conduct a survey of historic properties and sites throughout the state; 2) to process nominations to the National Register; 3) to administer federal grants to individual projects within the state; and 4) to advise the regulations of local agencies. TYLER, *supra* note 23, at 52–53.

[39] TYLER, *supra* note 23, at 52–54.

[40] *Id.* at 54–55.

[41] *Id.* at 66. Preservation commissions grant "landmark" status to individual buildings whereas "historic district" designation affects all the buildings in a prescribed area. Weinstein, *supra* note 6, at 99.

[42] *See, e.g.*, CHI., ILL., MUN. CODE ch. 2-120 (1987), *available at* http://www.cityofchicago.org/Landmarks/pdf/Landmarks_Ordinance.pdf. The Chicago Landmarks Commission considers various criteria to determine a building's eligibility for landmark status including if: 1) it is a critical part of Chicago's heritage; 2) it is the site of a significant event; 3) it is associated with a significant person; 4) it is considered important architecture; 5) it was designed by an important architect; and 6) it has unique visual features. *Id.* at § 620.

make structural alterations or visible changes.[43] In addition, designation typically requires a property owner to keep the exterior of the property in good condition.[44]

Preservation ordinances were subject to takings challenges from the start, but state and federal courts usually upheld government regulatory actions as valid land use regulation.[45] Many courts reasoned that landmark designation was a rational use of the police power because preservation provided economic benefits to municipalities by increasing tourism and property values.[46] As of 1977, however, the Supreme Court had never explicitly upheld preservation as a valid use of a municipality's police power; therefore, state and federal courts were not bound to support preservation interests.[47]

### C. *The Landmark* Penn Central *Decision: The Supreme Court Upholds Historic Preservation as a Valid Use of the Police Power*

State and federal courts were bound shortly thereafter because in 1978, in *Penn Central Transportation Co. v. City of New York*, the Supreme Court conclusively decided the legality of historic preservation ordinances.[48] The Court upheld New York City's Landmarks Preservation Law against a challenge by the Penn Central Transportation Company ("Penn Central").[49] The conflict began when New York City's Landmarks Preservation Commission denied Penn Central's proposal to build an office tower atop Grand Central Station, an official New York City historic landmark.[50] Penn Central alleged that the denial consti-

---

[43] *See, e.g.*, *id.* at § 2-120-740 ("No permit for alteration, construction, reconstruction, erection, demolition, relocation or other work shall be issued to any applicant . . . without the written approval of the Commission . . . .").

[44] *See, e.g.*, NEW YORK CITY, N.Y., ADMIN. CODE § 25-311 (West, WESTLAW through Local Law 47 of 2002 and Chapter 698 of the Laws of New York for 2002) (stating that the owner of a landmarked building or building in a historic district must "keep in good repair (1) all of the exterior portions of such improvement and (2) all interior portions thereof, which if not so maintained, may cause or tend to cause the exterior portions . . . to deteriorate, decay or become damaged").

[45] *See* Weinstein, *supra* note 6, at 105.

[46] *See id.*

[47] *See* Duerksen & Bonderman, *supra* note 22, at 13 ("Even though more and more cities and towns were enacting local preservation ordinances, there were still gnawing doubts about whether the U.S. Supreme Court would uphold preservation restrictions.").

[48] *See* 438 U.S. 104, 138 (1978).

[49] *Id.* at 122.

[50] *Id.* at 116–17. The Commission rejected two separate proposals offered by architect Marcel Breuer for altering Grand Central Station. *Id.* at 116. The first consisted of a fifty-five story office tower resting on the roof of the terminal, and the second proposed a fifty-

tuted a taking of its property without just compensation under the Fifth and Fourteenth Amendments because the designation arbitrarily denied it full use of its property.[51] The Court engaged in what it called an "ad hoc" factual inquiry, considering the economic impact of the regulation, the investment-backed expectations of the property owner, and the character of the government action.[52] After detailed contemplation of these factors, the Court concluded that the Landmarks Law did not interfere with current or expected use of the property, and, accordingly, did not effect a taking.[53]

*Penn Central* clarified several important unresolved legal issues surrounding the preservation movement.[54] First, the Court observed that government regulation to preserve the character of a community and desirable aesthetic features was a valid exercise of the police power.[55] Justice William Brennan, writing for the majority, noted that the preservation of historic structures enhanced the quality of life for all citizens.[56] Second, the Court concluded that landmark laws do not constitute discriminatory or spot zoning.[57] Although decisions to landmark certain property may target particular individual structures, they are not arbitrary when based on a comprehensive plan.[58] Third, the Court noted that regulation to promote the general welfare often burdens some property owners more than others, but, standing alone, unequal treatment does not effect a taking.[59] Finally, the Court held that a substantial economic burden caused by a preservation law is constitutional as long as the property retains reasonable economic value.[60] Therefore, courts will uphold preservation ordinances even when they restrict land

---

three story office tower and the destruction of various portions of the station's facade. *Id.* at 117.

[51] *Id.* at 119.

[52] *Id.* at 124 (articulating the Court's inability to develop a "set formula" when determining whether the adverse economic effects of government regulation require just compensation).

[53] *Penn Central*, 438 U.S. at 138. The Court emphasized that the Landmarks Law in no way interfered with the current use of the terminal and what must have been the owner's primary expectation of income. *Id.* at 136. In addition, the transferred air rights under New York City's transferable development rights program would allow for the construction of an office tower on several adjoining properties. *Id.* at 137.

[54] *See infra* notes 55–63 and accompanying text.

[55] *Penn Central*, 438 U.S. at 129.

[56] *Id.* at 108.

[57] *Id.* at 132.

[58] *Id.*

[59] *Id.* at 133–34.

[60] *Penn Central*, 438 U.S. at 136 (highlighting that the Landmarks Law left Penn Central with a "reasonable return on its investment").

owners from exerting full control over their property.[61] After *Penn Central*, historic preservation moved into the mainstream and became a common tool used by city planners to revitalize downtown neighborhoods.[62] Adaptive reuse of older buildings, and the resulting increase in downtown visitors, generates revenue that ensures economic viability to otherwise struggling cities and towns.[63]

Religious structures, because of their stature, location, and architectural significance, frequently are subject to landmark designation or are located in historic districts.[64] The financial burden of landmark status can be substantial, and many churches find it interferes with their ability to run charitable or educational programs.[65] Although most challenges to preservation laws fail under the *Penn Central* analysis, religious organizations have gained exemptions from preservation laws based on the Free Exercise Clause.[66] One must consider the unsteady development of free exercise jurisprudence, however, before exploring whether the Constitution requires such exemptions for historic religious structures.[67]

---

[61] *See id.* at 136–38.

[62] *See* TYLER, *supra* note 23, at 51 ("Preservation also became an important tool of urban revitalization during this period."); Rose, *supra* note 23, at 513 ("It is only recently that historic districts have been viewed as potential contributors to urban revitalization. Whether or not these hopes are well-founded, they are a major force behind the burgeoning numbers of local districts created in the past ten years."); Elizabeth Williamson, City of Boerne v. Flores *and the Religious Freedom Restoration Act: The Delicate Balance Between Religious Freedom and Historic Preservation*, 13 J. LAND USE & ENVTL. L. 107, 148–49 (1997). *But see* Rose, *supra* note 23, at 513 (articulating concerns that, just like earlier federally funded urban renewal projects, the impact of this "revitalization" works to displace low-income community residents).

[63] *See* TYLER, *supra* note 23, at 51–52; Williamson, *supra* note 62, at 149–51. *See generally* BARBARA BAER CAPITMAN, DECO DELIGHTS: PRESERVING THE BEAUTY AND JOY OF MIAMI BEACH ARCHITECTURE (1988). The preservation and restoration of numerous art deco hotels and buildings in the 1980s was the impetus for the economic revitalization of Miami Beach, Florida—a world-famous tourist destination. *Id.*

[64] *See* Nelson, *supra* note 5, at 725 (stating that religious properties in particular need protection because they "serve as historic and architectural focal points in their communities").

[65] *See* Weinstein, *supra* note 6, at 93.

[66] *See id.* at 94.

[67] *See infra* notes 68–160 and accompanying text.

## II. The Evolution of Free Exercise Jurisprudence and the Ever-Changing Scope of the Free Exercise Clause

### A. *The Origins of the Free Exercise Clause and Its Inclusion in the First Amendment*

The First Amendment of the U.S. Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[68] The two religion clauses, known as the Establishment Clause and the Free Exercise Clause, erected the celebrated "wall of separation" between church and state so important to religious freedom in the United States.[69] In particular, the Free Exercise Clause prohibits government action that criminalizes or proscribes the practice or declaration of religious beliefs or that compels particular religious expression.[70]

Many consider the scholarship of Thomas Jefferson and James Madison to be the impetus behind the First Amendment's explicit protection of religious freedom.[71] The 150-year-old tradition of free exercise in the English colonies dramatically affected these two men.[72] Four English colonies were founded as havens for religious dissenters and had specific provisions in their charters aimed at creating an atmosphere of religious tolerance for all citizens.[73] Along with these

---

[68] U.S. Const. amend. I.

[69] Timothy L. Hall, Separating Church and State: Roger Williams and Religious Liberty 124 (1998) (quoting Letter from Thomas Jefferson to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association (Jan. 1, 1802) [hereinafter Jefferson's Letter]); Ivers, *supra* note 2, at 133.

[70] Ivers, *supra* note 2, at 133.

[71] *See* Reynolds v. United States, 98 U.S. 145, 163–64 (1878) (discussing works by Madison and Jefferson in determining the scope of the Free Exercise Clause); *see also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1449 (1990). *But see* Hall, *supra* note 69, at 117 ("This Jeffersonian dominance of First Amendment theory is historically untenable."). Conceding that Jefferson and Madison played a role in the development of First Amendment theory, Hall argues that the contributions of Roger Williams and others voicing evangelical dissent contributed more to the First Amendment than those relying on humanistic or Enlightenment rationalism. *See id.*

[72] *See* McConnell, *supra* note 71, at 1421, 1499.

[73] *Id.* at 1424–25. George Calvert, a Catholic proprietor, founded Maryland as a haven for Roman Catholics; Roger Williams, a Protestant dissenter kicked out of Massachusetts, founded Rhode Island for those similarly situated; and William Penn founded Pennsylvania and Delaware as havens for Quakers. *Id.* All four colonies extended religious freedom to groups other than their own. *Id.* In contrast, Massachusetts and Virginia set up state-sponsored churches, Congregationalism and Anglicanism, respectively, and actively persecuted religious dissidents. *Id.* at 1423–25.

early efforts in support of religious freedom, the scholarship of John Locke and Roger Williams also influenced the beliefs of both Madison and Jefferson.[74] Taking their cues from these advocates for religious freedom, both Madison and Jefferson articulated not only that the opinions of citizens should be beyond the jurisdiction of civil government, but that society as a whole suffered when citizens were forced to worship at the government's command.[75] Jefferson's conception of the scope of religious freedom, however, was narrower than Madison's—he felt it should extend only to religious belief and not to religious conduct.[76] He did not believe that state legislatures were a threat to religious belief, and, accordingly, he supported religious freedom only because it was in the best interests of society to allow people to follow their own convictions.[77] In contrast, Madison was a more fervent believer, and his concern for the separation of church and state evolved from what he perceived were state-imposed threats to religious practices.[78] Madison acknowledged the inevitable clash between religious conduct and secular law, and he felt that states should sustain free exercise rights in all but the most compelling circumstances.[79]

---

[74] HALL, *supra* note 69, at 124–25, 135; McConnell, *supra* note 71, at 1430–31, 1449.

[75] *See* HALL, *supra* note 69, at 118–19, 125, 133–35.

[76] *Id.* at 125–28 (discussing Jefferson's Virginia Bill for Establishing Religious Freedom that described religious liberty in reference to belief and opinions and not acts and conduct); McConnell, *supra* note 71, at 1451–52 ("Jefferson espoused a strict distinction between belief, which should be protected from governmental control, and conduct, which should not."). Jefferson failed to consider that a legislature could regulate in a way that might harm the individual conscience probably because his own religious beliefs were grounded in the rationalist philosophies of the Enlightenment, which did not require observances or actions that government regulation would affect. *See* HALL, *supra* note 69, at 130–31.

[77] In a letter to Madison, Jefferson wrote that "the declaration that religious faith shall be unpunished, does not give impunity to criminal acts dictated by religious error." HALL, *supra* note 69, at 130–31 (quoting Letter from Thomas Jefferson to James Madison (July 31, 1788), *in* THE PAPERS OF THOMAS JEFFERSON 442–43 (Julian P. Boyd ed., 1950)). Thus, Jefferson felt any conflict between religious conduct and government prohibitions could result only from religious error, not religious conviction. *See id.*

[78] *See* McConnell, *supra* note 71, at 1452–53. In a letter to William Bradford, Madison expressed his frustration at the jailing of several men for publishing their religious beliefs. *Id.* Madison's convictions contrasted sharply with those of Jefferson, whose writings never seemed to show compassion towards those who vigorously advocated their faith. *See id.*; *see also* HALL, *supra* note 69, at 133.

[79] *See* HALL, *supra* note 69, at 135. Hall argues that Madison's conception of religious liberty more closely resembled that of Roger Williams than that of Jefferson, because Madison advocated freedom "for religion," whereas Jefferson advocated freedom "from religion." *Id.* Madison, like Williams, believed that religious beliefs and actions required protection, not simply isolation, from the secular concerns of civil governments. *Id.* For

Based substantially on the strongly expressed convictions of these two political figures, the Framers included explicit provisions that would guarantee religious freedom and separation of church and state in the First Amendment of the Bill of Rights.[80] The language of the First Amendment, however, does not clearly articulate whether the Framers intended the scope of the Free Exercise Clause to reflect Jefferson's action/belief dichotomy or Madison's concept of religious protection being paramount to all but the most compelling state interests.[81]

### B. *Early Free Exercise Jurisprudence: From the Rational Basis Test to the Compelling Interest Test*

Initially, as drafter of the Bill of Rights and as its chief advocate in Congress, Madison's beliefs infused the popular understanding of the Free Exercise Clause.[82] In 1878, in *Reynolds v. United States*, however, the U.S. Supreme Court explicitly used Jefferson's action/belief dichotomy to define the Clause's scope.[83] The *Reynolds* court considered a constitutional challenge by George Reynolds, a Mormon convicted under a law prohibiting polygamy.[84] The Court, relying on the writings of Jefferson, concluded that, although Congress could not regulate religious belief, it could regulate any conduct in violation of "social duties or subversive of good order."[85] Therefore, Reynolds's conviction would stand because the law against polygamy was not impairing his religious beliefs.[86] The

---

further discussion of this ideological schism, which has continued into the present day, see generally Ira C. Lupu, *The Distinctive Place of Religious Entities in Our Constitutional Order*, VILL. L. REV. 37, 51–78 (2002) (discussing the Neutralist and Separationist views of the religion clauses and how subscribers of each ideology perceive certain Free Exercise and Establishment Clause cases and issues).

[80] *See* McConnell, *supra* note 71, at 1449, 1455.

[81] *See* U.S. CONST. amend. I.

[82] McConnell, *supra* note 71, at 1455.

[83] 98 U.S. at 164 (quoting excerpts from Jefferson's Letter, *supra* note 69, stating: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured.").

[84] *Id.* at 161–62.

[85] *Id.* at 164.

[86] *See id.* at 166. The Court introduced a parade of horribles to support its decision, implying that if the Court could not enforce the polygamy law, it in turn would not be able to prevent human sacrifice if done with a religious motive. *See id.* A Mormon exemption for polygamy, concluded the Court, would elevate religious conduct to a status above the law, and "permit every citizen to become a law unto himself." *Id.* at 167. For more information about the Church of Jesus Christ of Latter-day Saints, see generally MORMONS AND MORMONISM: AN INTRODUCTION TO AN AMERICAN WORLD RELIGION (Eric A. Elinson ed. 2001).

Court upheld the application of the criminal statute because the government had shown a rational basis for criminalizing polygamy.[87] Moving forward, the Court's rational basis standard hindered its ability to grant exemptions to criminal laws for religious conduct because the government needed only to provide a rational basis to legally impinge upon the religious conduct in question.[88]

*Reynolds* remained the most important free exercise case decided during the Clause's first 150 years.[89] In 1940, in *Cantwell v. Connecticut*, the U.S. Supreme Court extended the protections of the Free Exercise Clause to state action in its second major free exercise decision.[90] With the increase in regulation following the New Deal, and the inclusion of state laws within the scope of the First Amendment, the Court saw an increase in cases involving clashes between secular laws and religious conduct.[91] The Court continued to rely more or less on the rational basis analysis articulated in *Reynolds* when considering free exercise claims.[92] Therefore Jefferson's idea, that religious conduct could be burdened incidentally by state action as long as beliefs remained free from government influence, dominated free exercise analysis up through the 1950s.[93]

---

[87] *Reynolds*, 98 U.S. at 165 ("From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity.").

[88] *See id.* at 166.

[89] Terry Eastland, *Introduction* to RELIGIOUS LIBERTY IN THE SUPREME COURT: THE CASES THAT DEFINE THE DEBATE OVER CHURCH AND STATE 1, 1 (Terry Eastland ed., 1993).

[90] 310 U.S. 296, 303, 307 (1940) (holding that the conviction of a Jehovah's Witness under a Connecticut statute forbidding unlicensed solicitation of funds was a burden on his free exercise of religion). The Court concluded that the Fourteenth Amendment's Due Process Clause incorporated the protections of the Free Exercise Clause and made them applicable to the states. *Id.* For more information about Jehovah's Witnesses, see generally ANDREW HOLDEN, JEHOVAH'S WITNESSES: PORTRAIT OF A CONTEMPORARY RELIGIOUS MOVEMENT (2002).

[91] *See* Eastland, *supra* note 89, at 1 (articulating that the limited role the federal government played in the lives of American citizens provided few opportunities for federal action to burden religious conduct).

[92] *See, e.g.*, Braunfeld v. Brown, 366 U.S. 599, 603–04 (1961) (upholding mandatory Sunday closing laws against a challenge by Orthodox Jewish shopkeepers whose Sabbath was Saturday because the closing laws served a secular government purpose). For more information about Orthodox Judaism, see generally MURRAY HERBERT DANZGER, RETURNING TO TRADITION: THE CONTEMPORARY REVIVAL OF ORTHODOX JUDAISM (1989).

[93] *See* Eastland, *supra* note 89, at 6 ("The rational-basis test, which in most cases government can easily satisfy, virtually closed the door to constitutionally compelled exemptions that might be carved out by federal courts—until 1963, that is, when in *Sherbert v. Verner* the Court changed its mind.").

Madison's concern for protecting religious conduct, however, did not remain dormant.[94] In 1963, in *Sherbert v. Verner*, the U.S. Supreme Court radically changed the course of free exercise jurisprudence when it required the state to show a compelling interest in any state action that burdened the free exercise of religion.[95] The Court concluded it would apply strict scrutiny to any law or decision that incidentally burdened religious conduct even when religious beliefs were unaffected.[96] The Court, therefore, had shifted its conception of the scope of free exercise rights from Jefferson's action/belief dichotomy to Madison's support of religious conduct in all but the most compelling circumstances.[97] *Sherbert* involved Adell Sherbert, a Seventh-day Adventist fired by her employer because she refused to work on Saturday, her Sabbath celebration.[98] South Carolina had found her ineligible for unemployment benefits because, by refusing to work on Saturday, she had refused to accept both suitable and available work.[99]

The Court concluded that only a compelling state interest could justify the burden on religion imposed on Sherbert by the state, and the decision to deny her unemployment was therefore subjected to strict scrutiny.[100] Justice Brennan, writing for the majority, asserted that South Carolina's ruling essentially fined Sherbert for her Saturday worship; thus, the state's denial of benefits was tantamount to economically coercing Sherbert's religious beliefs.[101] The Court concluded that conditioning benefits on particular behavior infringed upon the Sherbert's freedom of religion because it required her to choose between abiding by the tenets of her faith and maintaining her livelihood.[102] In addition, because an exemption for Sherbert alone would not detrimentally affect the entire unemployment statutory scheme, the state had no com-

---

[94] *See id.*; *see also infra* notes 95–110 and accompanying text.

[95] 374 U.S. 398, 406 (1963).

[96] *See id.* at 403, 406.

[97] *See id.* at 406; Eastland, *supra* note 89, at 6.

[98] 374 U.S. at 399. The prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist Church. *Id.* at 402. For more information about the Seventh-day Adventist Church, see generally ANNE DEVEREAUX JORDAN, THE SEVENTH-DAY ADVENTISTS: A HISTORY (1988).

[99] *Sherbert*, 374 U.S. at 401. The South Carolina unemployment law provided that any claimant who failed, without good cause, to take work offered or available to him or her was not eligible for unemployment benefits. *Id.* at 400–01.

[100] *See id.* at 406–07.

[101] *See id.* at 404, 440.

[102] *Id.* at 404, 406.

pelling interest in denying her unemployment benefits.[103] Accordingly, the state's decision failed the Court's strict scrutiny analysis and Sherbert's benefits were reinstated.[104]

Similarly, in 1972, in *Wisconsin v. Yoder*, the U.S. Supreme Court again required an exemption from a neutral and generally applicable law to accommodate religious conduct.[105] In *Yoder*, Amish parents were convicted of violating Wisconsin's compulsory school attendance law because they refused to send their children to school after the eighth grade.[106] Relying on *Sherbert*, the Court subjected Wisconsin's compulsory school attendance law to strict scrutiny.[107] The Court noted that, because of the unique tenets of the Amish faith, compulsory high school attendance threatened to undermine an Amish child's unique religious development.[108] The Court concluded that the State's interest in providing universal education was not compelling because, when removed from school, the Yoders still planned to educate their children in a "learning-through-doing" vocational program.[109] Therefore, the State's very strong interest in education was not sufficient to overcome the law's incidental burden on the Amish faith, and the *Yoder* Court exempted the Amish from the law.[110]

---

[103] *Id.* at 408–09. The Court distinguished *Braunfeld*, the case in which it upheld mandatory Sunday closing laws against a challenge by Orthodox Jews, by reasoning that, in *Braunfeld*, the state did have a strong interest in providing a day of rest for all citizens. *Id.* In contrast to *Sherbert*, in which the Court concluded that an exemption would not alter the unemployment statutory scheme, the Court in *Braunfeld* felt that exemptions for Jews would disrupt the state's objective. *Id.*

[104] *See Sherbert*, 374 U.S. at 409–10.

[105] 406 U.S. 205, 234–35 (1972).

[106] *Id.* at 208. The Court noted the pervasive way in which Amish religion infuses the practices of daily life. *Id.* at 210. For more information on the Amish faith, see generally DONALD B. KRAYBILL, ON THE BACK ROAD TO HEAVEN: OLD ORDER HUTTERITES, MENNONITES, AMISH, AND BRETHREN (2001).

[107] *See Yoder*, 406 U.S. at 214–15.

[108] *Id.* at 211–12. The Court noted that the values taught at American high schools ("intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success and social life") are regarded by the Amish to be worldly influences at odds with their religious beliefs. *Id.* The Amish faith celebrates "informal learning-through-doing; a life of 'goodness' rather than a life of intellect; wisdom, rather than technical knowledge; community welfare, rather than competition; and separation from, rather than integration with, contemporary worldly society." *Id.*

[109] *Id.* at 213, 224–25.

[110] *See id.* at 234.

### C. *The* Smith *Revolution and the Death of Strict Scrutiny*

Until 1990, commonly it was understood that any free exercise claim resulting from an incidental or direct burden imposed by a neutral, generally applicable law would subject that law to strict scrutiny.[111] In *Sherbert* and *Yoder*, after the challenging parties showed that the challenged law infringed on free exercise rights, the burden shifted to the state to show the law had a secular purpose, advanced a compelling state interest, and constituted the only feasible means for achieving the state's purpose.[112] The Court's application of strict scrutiny made it virtually impossible for the government to sustain its burden, and as a result, it almost always struck down the challenged laws.[113]

In 1990, however, in *Employment Division v. Smith*, the U.S. Supreme Court did not apply strict scrutiny to a contested Oregon law that allegedly violated the Free Exercise Clause.[114] *Smith* involved two Native Americans whose bosses fired them when they were convicted for peyote use under an Oregon drug law, and to whom the state denied unemployment benefits.[115] Because the claimants ingested peyote for sacramental purposes at a ceremony of the Native American church, they alleged the denial of benefits burdened their free exercise of religion.[116] The claimants relied on what they perceived to be *Sherbert*'s holding—that when religious conduct resulted in a loss of employment, a state's refusal to provide unemployment benefits was a free exercise violation.[117] The Court rejected the claimants' position and concluded that in past cases, including *Sherbert*, it had never held that a religious burden exempted citizens from an otherwise valid and generally applicable law like the Oregon drug law.[118]

By not requiring Oregon to show a compelling state interest in its peyote ban, the Court revolutionized free exercise jurisprudence.[119] Writing for the majority, Justice Antonin Scalia stated that "the right of free exercise does not relieve an individual of the obligation to

---

[111] Carmella, *supra* note 5, at 420.

[112] *See id.*

[113] *See supra* notes 95–110 and accompanying text.

[114] 494 U.S. 872, 884–85 (1990).

[115] *Id.* at 874.

[116] *See id.* at 878. For more information on the Native American Church, see generally ONE NATION UNDER GOD: THE TRIUMPH OF THE NATIVE AMERICAN CHURCH (Huston Smith & Ruben Snake eds., 1996) and JAMES SYDNEY SLOTKIN, THE PEYOTE RELIGION: A STUDY IN INDIAN-WHITE RELATIONS (Octagon Books 1975) (1956).

[117] *Smith*, 494 U.S. at 876.

[118] *See id.* at 878–79.

[119] *See* Eastland, *supra* note 89, at 6–7.

comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[120] In other words, the Court concluded that as long as the state did not intend to burden religious conduct, the Court would uphold the state's interest against any free exercise challenge.[121] The Court concluded that the challenged peyote law was neutral and generally applicable; hence, it burdened only the conduct of the adherents and not their religious beliefs.[122] Accordingly, the Court held that the law did not violate the Free Exercise Clause because the burden it imposed on religion was incidental and not intentional.[123]

Essentially, *Smith* rejected the paramount protection for religious acts advocated by Madison and instead embraced Jefferson's support for government action that did not directly burden or coerce religious beliefs but significantly interfered only with religious conduct.[124] Relying on *Reynolds*, in which the Court upheld Jefferson's action/belief dichotomy, the Court stated that conditioning a person's responsibility to follow general laws on his religious beliefs effectively made each citizen a "law unto himself."[125] The diverse range of religious beliefs in America, Justice Scalia argued, would require exemptions from a staggering array of laws—including vaccination laws, drug laws, and animal cruelty laws—that would frustrate the important objectives of those laws.[126] Members of a particular religious group may desire exemptions to allow for conduct otherwise proscribed by law, but the Court concluded it was not constitutionally required to grant them.[127] Various state legislatures had made excep-

---

[120] *Smith*, 494 U.S. at 879 (quoting United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)).

[121] *See id.* at 878. Justice Scalia articulated that if the legislature did not intend to burden religion—such as by passing a law prohibiting the casting of statues used for worship—but the law merely had that incidental effect, then the law did not violate the First Amendment. *Id.*

[122] *See id.* at 877–78.

[123] *Id.* at 878–80.

[124] *See id.*

[125] *Smith*, 494 U.S. at 885 (quoting *Reynolds*, 98 U.S. at 167). To Justice Scalia, the idea that citizens could pick and choose the laws they would follow based on their religious beliefs contradicted "both constitutional tradition and common sense." *Id.*

[126] *Id.* at 889. In her concurrence, Justice Sandra Day O'Connor contended that Justice Scalia's parade of horribles was not reason enough to strike down the compelling interest test; rather, the cases he referenced showed how the Court, in many cases, had sensibly struck an appropriate balance between government interests and religious conduct with application of the compelling interest test. *See id.* at 902 (O'Connor, J., concurring).

[127] *Id.* at 890.

tions for peyote use in their drug laws before *Smith* was decided, and the Court concluded that the political process remained the most suitable place for such determinations.[128]

Although the Court rejected the application of strict scrutiny to most free exercise claims, Justice Scalia carved two exceptions from *Smith*'s basic holding to account for seemingly contrary precedent.[129] First, the Court distinguished past religious exemptions on the grounds that the challenged laws implicated the Free Exercise Clause in conjunction with other constitutional protections.[130] Therefore, when other constitutional violations were alleged in conjunction with a free exercise violation, such as the rights of parents to direct their children's education seen in *Yoder*, the Court would apply strict scrutiny and require the state show a compelling interest in the contested law.[131] The Court concluded that no hybrid rights were implicated when the state denied the *Smith* claimants unemployment benefits; hence, the incidental effects of the otherwise neutral law did not offend the claimants' First Amendment rights.[132]

Second, the Court concluded that *Sherbert*'s compelling interest test also applied to laws that had a state-imposed system of individualized exemptions.[133] Justice Scalia highlighted that, in *Sherbert*, South Carolina had the discretion to grant exemptions to unemployment eligibility because the "good cause" language in the statute invited consideration of the particular circumstances behind a claimant's unemployment.[134] The Court noted it had required that refusals in cases of religious hardship be subjected to strict scrutiny supported by a compelling government interest because individual considerations by government actors provided easy means to discriminate.[135] Because the peyote ban applied to all Oregon citizens and had no system of

---

[128] *Id.*

[129] *See infra* notes 130–136 and accompanying text.

[130] *Smith*, 494 U.S. at 881–82.

[131] *Id.* For example, in 1925, in *Prince v. Society of the Sisters*, the U.S. Supreme Court considered whether an Oregon law requiring all children to attend public schools was constitutional. 268 U.S. 510, 534–35 (1925). It held that the law violated the Fourteenth Amendment because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.*

[132] 494 U.S. at 882. Hereinafter, this first exception to *Smith*'s holding will be called the "hybrid rights" exception.

[133] *Id.* at 884. Hereinafter, this second exception to *Smith*'s holding will be called the "individualized exemption" exception.

[134] *Id.*

[135] *See id.*

individualized exemptions, the *Smith* Court distinguished *Sherbert* and refused to apply strict scrutiny.[136]

In 1993, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, the U.S. Supreme Court upheld *Smith* and, in striking down four city ordinances, attempted to clarify its controversial ruling.[137] The *Hialeah* Court considered the validity of ordinances the Hialeah city council passed to prohibit various types of animal sacrifice.[138] The newly formed Santeria community sued, arguing that the ordinances collectively burdened their free exercise rights by forbidding their most important ritualistic element—animal sacrifice.[139] The trial court held that the ordinances were a valid use of the police power because the City grounded its prohibition of animal sacrifice in public safety, animal cruelty, and sanitation concerns.[140]

The Court concluded that the Hialeah ordinances were facially neutral; but that facial neutrality alone did not make a law neutral and generally applicable under *Smith*.[141] The Court determined that the City "gerrymandered" the ordinances to proscribe only the religious sacrifices of the Santeria church, and not Kosher slaughter or other animal killings.[142] The laws directly targeted the Santeria faith because other regulations could have met the same ends without prohibiting animal sacrifice rituals, revealing the council's intent to end only Santerian practices.[143] The Court also determined that the ordinances did

---

[136] *Id.*

[137] *See Hialeah*, 508 U.S. 520, 531 (1993).

[138] *Id.* at 526. The Santeria religion is a fusion of the traditional African religion of the Yoruba people with Roman Catholicism. *Id.* It originated in the nineteenth century when colonists brought Yoruba tribe members to Cuba as slaves. *Id.* at 524. The religion involves the worship and development of a personal relationship with the Orisha, a sacred spirit, through animal sacrifice. *Id.* at 525. Adherents of Santeria believe that for nourishment purposes the Orisha needs the chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles that Santeria followers sacrifice. *Id.* For more information on the Santeria faith, see generally MICHAEL ATWOOD MASON, LIVING SANTERIA: RITUALS AND EXPERIENCES IN AN AFRO-CUBAN RELIGION (2002) and MARTA MORENO VEGA, THE ALTAR OF MY SOUL: THE LIVING TRADITIONS OF SANTERIA (2000).

[139] *Hialeah*, 508 U.S. at 528.

[140] *Id.* at 529–30.

[141] *Id.* at 533–34.

[142] *Id.* at 535–36, 542. The ordinances proscribe Santerian animal killings because they meet the two criteria articulated for unlawful slaughter: 1) they are done within the context of a ritual or ceremony and 2) their primary objective is not food consumption. *See id.*

[143] *Id.* at 538. The Court reasoned that, if sanitation was the aim of the ordinance, a constitutional regulation would provide rules for the disposal of organic garbage. *Id.* Moreover, if the City aimed to prevent animal cruelty with the ordinances, then it should have promulgated more specific regulations about how animals must be kept and the humane ways in which they could be slaughtered. *Id.* at 539. The animosity of members of

not fall within *Smith* because they were not generally applicable.[144] By, in effect, prohibiting only Santerian sacrifices, the Court found the laws substantially underinclusive and certainly distinguishable from the across-the-board criminal prohibition in *Smith*.[145] The Court noted that the ordinances aimed to protect public health and prevent animal cruelty.[146] Although the City should have distributed the responsibility to meet those aims evenly throughout the populace, the Hialeah ordinances imposed the burden only upon religious practices and not various secular killings.[147] Therefore, the ordinances were not generally applicable because they only applied to animal sacrifice performed in a religious context.[148]

Because the ordinances were neither neutral nor generally applicable under *Smith*, the Court subjected Hialeah's laws to *Sherbert*'s strict scrutiny analysis.[149] Justice Anthony Kennedy quickly dismissed the City's defense because the religious "gerrymandering" that he had previously noted proved that the City left unregulated most of the conduct that implicated its stated aims.[150] He concluded that the City's interest in those aims was far from compelling because the council failed to create means that met its articulated ends.[151] In addition, the ordinances were too underinclusive to meet the narrowly tailored standard precedent required.[152]

Despite the protections the Court's application of *Smith* provided to the Santeria adherents in *Hialeah*, legal scholars routinely criticized *Smith* for narrowing the scope of the Free Exercise Clause and ignoring thirty years of legal precedent that gave religious interests much broader protection.[153] Opponents of the decision also lamented that

---

the community and the city council toward the Santeria faith and its adherents bolstered the Court's finding that the law was not substantively neutral. *Id.* at 540–41.

[144] *Hialeah*, 508 U.S. at 543–44.

[145] *See id.* at 543.

[146] *Id.*

[147] *Id.* at 544.

[148] *Id.*

[149] *Hialeah*, 508 U.S. at 546 ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny.").

[150] *See id.*

[151] *Id.* at 546–47. The Court again highlighted that only religious conduct felt the brunt of these ordinances and therefore the asserted justifications did not justify the burden on religion. *Id.*

[152] *Id.*

[153] *See, e.g.*, Ira C. Lupu, Employment Division v. Smith *and the Decline of Supreme Court Centrism*, 1993 BYU L. REV. 259, 260 ("Like many others I believe *Employment Division v. Smith* is substantively wrong and institutionally irresponsible."); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120 (1990) (con-

*Smith* inadequately protected the free exercise rights of religious minorities whose practices more often conflict with neutral laws.[154] In addition, scholars criticized *Smith* because it left the state of free exercise jurisprudence in chaos.[155] In response to this popular outcry, in 1993, Congress passed the Religious Freedom Restoration Act ("RFRA") and restored *Sherbert*'s strict scrutiny as the legal analysis applicable to free exercise claims.[156] RFRA's reign was short lived because, in 1997, in *City of Boerne v. Flores*, the U.S. Supreme Court held RFRA unconstitutional.[157] In 2000, in response to *Boerne*, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[158] RLUIPA requires the government to show a compelling interest in any land use regulation that "substantially burdens" religion, effectively reinstating *Sherbert* as the controlling legal analysis.[159] Because the constitutional

---

cluding that the Court's use of precedent is "troubling, bordering on the shocking"); *see also Smith*, 494 U.S. at 891 (O'Connor, J., concurring) (stating that the *Smith* holding "dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty").

[154] Roald Mykkeltvedt, Employment Division v. Smith: *Creating Anxiety by Relieving Tension*, 58 TENN. L. REV. 603, 608 (1991) ("As a negative consequence of that ruling . . . the Court will have exposed minority religions to a potential 'tyranny of the majority.'"); *see also Smith*, 494 U.S. at 890 ("It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in . . . .").

[155] First, the Court failed to define with particularity what constituted a neutral and generally applicable law. *See, e.g.*, Douglas Laycock, *Religious Freedom and International Human Rights in the United States Today*, 12 EMORY INT'L L. REV. 951, 967 (1998) ("The great ambiguity is that no one knows what is a neutral and general applicable law."). Second, its brief consideration of the hybrid rights and individualized exemption exceptions to *Smith*'s general rule provided little guidance to lower courts. *See infra* notes 222–271 and accompanying text.

[156] *See* 42 U.S.C. §§ 2000bb-1 to -4 (2000). In its declaration of purpose, Congress expressly rejected *Smith*'s narrowing of free exercise protection and lent its support to the logic of both *Sherbert* and *Yoder*. *Id.* § 2000bb-(a)(4), (b)(1). With RFRA, Congress created a new statutory free exercise right that applied to federal and state law as well as any decision made by any agency, branch, or official of the federal or any state government. *See id.* § 2000bb-2.

[157] 521 U.S. 507, 536 (2000) ("RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control."). In *Boerne*, St. Peter's Catholic Church alleged that the City's denial of a demolition permit for its historic church building violated RFRA. *Id.* at 512. Unfortunately, because the law was found to be an unconstitutional use of Congress's powers under Section Five of the Fourteenth Amendment, none of the issues pertinent to this Note were decided by the Court. *Id.* at 529–33.

[158] *See* 42 U.S.C. § 2000cc.

[159] *See id.* The relevant language of the statute states:

status of the law is uncertain, few courts have decided RLUIPA claims on the merits and the few post-RLUIPA courts that have considered the conflict often have applied the more familiar *Smith* analysis.[160]

---

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling government interest; and (B) is the least restrictive means of furthering that compelling government interest.

*Id.*

[160] *See, e.g.*, Fifth Ave. Presbyterian Church v. City of New York, 293 F.3d 570, 574–76 (2d Cir. 2002) (upholding preliminary injunction under Free Exercise Clause analysis, allowing homeless individuals to sleep on church property). The challenges to RLUIPA are similar to those that litigants brought against RFRA: that in enacting the law, Congress exceeded its powers under Section Five of the Fourteenth Amendment. *Cf. Boerne*, 521 U.S. at 536. The constitutionality of RLUIPA is beyond the scope of this Note. If the U.S. Supreme Court determines that RLUIPA is constitutional, however, as the U.S. District Court for the Eastern District of Pennsylvania did in *Freedom Baptist Church v. Township of Middletown*, the analysis of the free exercise/historic preservation conflict under RLUIPA does not really differ from that under *Smith*. *See* 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002). Because the underlying assumption of § 2000cc(a)(2)(C) is that preservation ordinances have in place a system of individualized exemptions, the analysis pertinent to this Note is still applicable. *See* § 2000cc(a)(2)(C). Therefore, a court considering a claim under RLUIPA would agree with a court that concluded that preservations ordinances fit under *Smith*'s individualized exemption exception. *See* Hale O Kaula Church v. Maui Planning Comm'n, 229 F. Supp. 2d 1056, 1072–74 (D. Haw. 2002) (concluding that consideration of RLUIPA's constitutionality was moot and strict scrutiny would apply under *Smith* because the law had in place a system of individualized exemptions); Alan C. Weinstein, *Religious Land Use and RLUIPA Update*, *in* LAND USE INSTITUTE: PLANNING, REGULATION, LITIGATION, EMINENT DOMAIN, AND COMPENSATION 69 (A.L.I.-A.B.A. COURSE OF STUDY, Aug. 22–24, 2002), WL SH018 ALI-ABA 69 (articulating that the application of RLUIPA would result in courts applying the compelling interest test from "Pre-*Smith*" cases). If a court determines that RLUIPA is unconstitutional, or the burden imposed by the preservation ordinance is not "substantial," then it will also revert to the *Smith* analysis. *See, e.g.*, Elsinore Christian Ctr. v. City of Lake Elsinore, 270 F. Supp. 2d 1163, 1176–77 (C.D. Cal. 2003) (holding RLUIPA is an unconstitutional exercise of Congress's power, and supporting *Smith*'s application of the *Sherbert* compelling interest test only in the unemployment context); San Jose Christian Coll. v. City of Morgan Hill, 2002 WL 971779, at *1 (N.D. Cal. Mar. 5, 2002) (holding that RLUIPA did not apply and relying on *Smith* to deny plaintiff's motion for a preliminary injunction against application of a municipal zoning ordinance).

## III. The Effect of *Employment Division v. Smith*'s Ambiguities on Courts Considering Free Exercise Challenges to Historic Preservation Laws

### A. *An Introduction to the Free Exercise/Historic Preservation Conflict*

Preservation ordinances impose financial costs for upkeep and restoration that may drain funds from a religious group's charitable, educational, or religious missions.[161] Consequently, many congregations find that design control threatens their religious autonomy and burdens their free exercise of religion.[162] As discussed above, the nation's utmost concern for free exercise of religion resulted in its protection by the First Amendment—protection that runs to the present day.[163] Historic preservation, however, remains an important government interest and a tool used to maintain the character and economic integrity of urban spaces.[164] The U.S. Supreme Court has acknowledged and upheld the government's interest in preserving its built heritage, and the successes of the preservation movement are well documented.[165]

Since the U.S. Supreme Court's 1990 decision in *Employment Division v. Smith*, courts have ruled inconsistently on the impact of free exercise jurisprudence on the application of preservation ordinances to historic religious structures.[166] This judicial inconsistency is a result of *Smith*'s lack of clarity in articulating what constitutes a neutral law of general applicability and what triggers the hybrid rights or individualized exemption exceptions.[167] Without regard to the facts of a case, the strictures of *Smith* require courts to choose one of two alternatives: 1) follow *Smith* and conclude that incidental burdens imposed by preservation ordinances on the free exercise of religion are per-

---

[161] *See* Weinstein, *supra* note 6, at 93.

[162] *See, e.g.*, St. Bartholomew's Church v. City of New York, 914 F.2d 348, 354 (2d Cir. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174, 177–78 (Wash. 1992).

[163] *See supra* notes 68–160 and accompanying text.

[164] *See supra* notes 31–67 and accompanying text; *see also* Tyler, *supra* note 23, at 168–71 (recognizing that preservation allows communities to preserve important historic structures, protect against unwanted development, and promote economic stability and the image of the community).

[165] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 122 (1978); *see, e.g.*, Tyler, *supra* note 23, at 60–66.

[166] *Compare St. Bartholomew's*, 914 F.2d at 354 (concluding that application of the New York City Landmarks Law to the Church did not violate the Church's First Amendment rights), *with First Covenant*, 840 P.2d at 185 (concluding that the Seattle preservation ordinance violated the Church's free exercise of religion under the First Amendment).

[167] *See infra* notes 187–271 and accompanying text.

missible; or 2) determine that preservation ordinances fit into a *Smith* exception and thereby require an exemption for all religious structures.[168] These alternatives are familiar because courts still waver between the conflicting views of Jefferson and Madison as to the true scope of the Free Exercise Clause.[169]

### B. *Free Exercise and Historic Preservation Conflicts Decided Before* Smith *Under the* Sherbert v. Verner *Compelling Interest Analysis*

Before considering how courts decide free exercise and historic preservation conflicts under *Smith*, first it is important to consider how courts struck a balance between these two interests before the *Smith* revolution.[170] In the 1970s and 1980s, *Sherbert v. Verner*'s strict scrutiny dominated the analysis, and courts typically gave preferential treatment to religious denominations that brought lawsuits contesting the application of zoning ordinances to their worship spaces.[171] Few preservation cases were decided, but zoning ordinances that incidentally burdened religion failed strict scrutiny because, by failing to maintain community health or safety, they did not serve a compelling government interest.[172] Hence, under *Sherbert*, courts mandated exemptions to zoning and preservation ordinances for historic religious properties in almost all cases.[173]

Several courts deciding zoning cases that involved this clash of interests, however, interpreted the mandates of *Sherbert* less strictly.[174] For example, in 1983, in *Grosz v. City of Miami Beach*, the United States Court of Appeals for the Eleventh Circuit upheld the prohibition of religious services in a rabbi's home, which was located in an R-4 resi-

---

[168] *See, e.g., St. Bartholomew's*, 914 F.2d at 354–55; *First Covenant*, 840 P.2d at 182–83.

[169] *See supra* notes 68–81 and accompanying text.

[170] *See infra* notes 171–186 and accompanying text.

[171] *See* 374 U.S. 398, 403 (1963) (requiring that the law in question relate to "public safety, peace, and order" to be a compelling interest sufficient enough to justify burdening the free exercise of religion); Williamson, *supra* note 62, at 119.

[172] *See* Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 429 (1999) (concluding that, because preservation ordinances reflect only aesthetic interests, they categorically cannot justify substantial restrictions on religious freedom in the name of public safety).

[173] *See* Williamson, *supra* note 62, at 119 (discussing the more factually based analysis some courts performed, considering the clash between zoning and free exercise interests before *Smith*, but concluding that most courts gave deference to free exercise interests unless the government presented a compelling interest).

[174] *See, e.g.*, Congregation Beth Yitzchok v. Ramapo, 593 F. Supp. 655, 660 (S.D.N.Y. 1984) (holding that local occupancy and fire safety regulations did not burden a synagogue's free exercise of religion).

dential-only district.[175] He alleged that the city's ban on religious services in the R-4 district was a free exercise burden, so the court performed an ad hoc balancing of the two parties' interests.[176] The court did not apply strict scrutiny despite citing both *Sherbert* and *Wisconsin v. Yoder*.[177] Instead, it concluded that the rabbi's ability to walk only a few blocks to hold services swung the balance in the government's favor, even when the zoning ordinance did not serve a compelling government interest.[178] Therefore, the court upheld the city's interest in maintaining its residential-only zone because of the relative insignificance of the rabbi's free exercise burden.[179]

Similarly, in 1981, in *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, the Colorado Supreme Court balanced the interests of the Church with those of the City before deciding whether the government action was a violation of the Free Exercise Clause.[180] The City had conditioned the granting of building permits on the Church's willingness to undertake various public improvements for the surrounding streets and sidewalks.[181] The court concluded that the burden on the Church was minor considering the project's scope and the City's "substantial interest" in creating a safe flow of traffic around the Church's property.[182] Therefore, conditioning the permits was well within the scope of the City's police power and did not unconstitutionally burden the Church's free exercise of religion.[183]

The Eleventh Circuit's balancing in *Grosz* and the articulation of a substantial interest test in *Bethlehem Evangelical* did not represent

---

[175] 721 F.2d 729, 741 (11th Cir. 1983).

[176] *Id.* at 738–41 ("[A]n *ad hoc* balancing is appropriate when existing, broad principles do not command the result.").

[177] *Id.*

[178] *See id.* at 739. The balance weighed in favor of the City because the ordinance did not require the rabbi to stop practicing his religion under threat of criminal prosecution. *Id.* Rather, he simply had to establish his synagogue four blocks away, a minimal inconvenience compared to the burdens imposed in *Sherbert* and *Yoder*. *See id.*

[179] *See id.* at 741.

[180] *See* 626 P.2d 668, 674–75 (Colo. 1981). The Church wanted to enlarge its parish school by building a gymnasium and applied to the Department of Community Services of Lakewood for a permit. *Id.* at 669.

[181] *Id.* at 670. The Department conditioned the issuance of the permit on the Church's making street improvements around the property and dedicating a small parcel of land to the City of Lakewood as a public right of way. *Id.*

[182] *See id.* at 675 (citing Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1253 (Colo. 1973)).

[183] *See id.*

adequately the state of free exercise jurisprudence before *Smith*.[184] The cases did show, however, that courts have the ability to consider sensibly the implications for both parties when deciding whether the government or religious interest should prevail.[185] Though both cases involved zoning ordinances, courts typically treat historic preservation interests analogously.[186]

### C. *The Effect of* Smith*'s Neutral and Generally Applicable Requirement on the Free Exercise/Historic Preservation Conflict*

*Smith* created an entirely new legal framework within which courts must consider the collision between historic preservation interests and free exercise rights.[187] The *Smith* decision initially seemed to favor historic preservation interests because common sense dictated that preservation ordinances were facially neutral laws of general applicability.[188] Accordingly, under *Smith*, no exemptions would be granted when ordinances incidentally burdened the free exercise of religion.[189] For example, in 1990, in *St. Bartholomew's Church v. City of New York*, the United States Court of Appeals for the Second Circuit upheld the New York City Landmarks Preservation Law against a free exercise challenge by a midtown Episcopal church.[190] In 1967, pursuant to the Landmarks Law, New York City's Landmarks Preservation Commission had designated St. Bartholomew's Church and Community House historic landmarks.[191] Some fifteen years later, the church filed a petition with the Commission to replace the Community

---

[184] *See* Williamson, *supra* note 62, at 118–19 ("[A]s a whole, courts gave deference to free exercise interests unless presented with a compelling government interest.").

[185] *See Grosz*, 721 F.2d at 739–40; *Bethlehem Evangelical*, 626 P.2d at 675.

[186] *See, e.g., Penn Central*, 438 U.S. at 132 (rejecting all attempts by the property owner to distinguish preservation laws from zoning laws and finding the laws constitutional because of their similarity to zoning ordinances).

[187] *See infra* notes 188–271 and accompanying text.

[188] *See* 494 U.S. at 879; Nelson, *supra* note 5, at 734 (distinguishing preservation laws from the ordinances in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* that directly suppressed religious conduct); Williamson, *supra* note 62, at 123 ("[T]he facial application of the *Smith* doctrine would seem to place a pro-preservation slant on religious-preservation conflicts . . . .").

[189] 494 U.S. at 878–79; *see supra* notes 111–136 and accompanying text.

[190] 914 F.2d at 355.

[191] *Id.* at 351. The church was constructed in 1917 by Bertram G. Goodhue and is a notable example of the Venetian Byzantine style. *Id.* Goodhue incorporated the porch of the original Romanesque St. Bartholomew's Church built by McKim, Mead and White, the notable architects of famous buildings like the Boston Public Library and the former Pennsylvania Station in New York. *Id.* The Community House was built in 1928 by Goodhue's associates, and complements the church in scale, style and decoration. *Id.*

House with a fifty-nine story office tower.[192] The Commission denied that petition and two others that followed, and the Church brought suit alleging a violation of the Free Exercise Clause.[193]

The Second Circuit relied heavily on *Smith* in affirming the district court's decision.[194] The circuit court concluded that the Landmarks Law was facially neutral within the meaning of *Smith*, and thus, the incidental burden on religion it imposed did not violate the Church's free exercise rights.[195] The Church argued that, because over fifteen percent of the regulated buildings in New York were religious, the Landmarks Law was neither neutral nor generally applicable.[196] The Second Circuit reasoned, however, that such a high number reflected only that religious structures, more often than secular, fall into the neutral criteria the board developed.[197] In addition, the court found the law generally applicable because the Commission did not intend to discriminate against religion when it chose which buildings to landmark.[198] Many state courts followed *St. Bartholomew's* and held that preservation ordinances were neutral and generally applicable for *Smith* purposes.[199]

Courts looking to escape from the strictures of *Smith*, which many legal scholars believed was wrongly decided, held that preservation ordinances were neither neutral nor generally applicable.[200] If a law was not neutral or generally applicable, the *Smith* court had concluded it would apply strict scrutiny and require the law to further a

---

[192] *Id.*

[193] *Id.* at 352.

[194] *Id.* at 354–55.

[195] *St. Bartholomew's*, 914 F.2d at 354–55.

[196] *Id.* The church stated that, of the 600 landmarked sites in New York City in 1990, over fifteen percent were religious properties and over five percent were Episcopal churches. *Id.* The Second Circuit concluded that churches more often fit into the neutral criteria because of the "importance of religion, and of particular churches, in our social and cultural history, and because many churches are designed to be architecturally attractive." *Id.*

[197] *Id.*

[198] *Id.* at 354.

[199] *See, e.g.*, First Church of Christ, Scientist v. Ridgefield Historic Dist. Comm'n, 738 A.2d 224, 231 (Conn. Super. Ct. 1998) ("The commission's decision . . . has not interfered with the right of the plaintiffs or its members to express their religious views, or associate or assemble for that purpose."), *aff'd*, 737 A.2d 989 (Conn. App. Ct. 1999); City of Ypsilanti v. First Presbyterian Church, 1998 WL 1993029, at *1–2 (Mich. Ct. App. Feb. 3, 1998) (per curiam) ("[T]he ordinance is a facially neutral, generally applicable law requiring only minimal review to determine that prohibiting the free exercise of religion is not the object of the ordinance but merely the incidental effect.").

[200] *See, e.g., First Covenant*, 840 P.2d at 180–81.

compelling state interest.[201] For example, in 1992, in *First Covenant Church v. City of Seattle*, the Washington Supreme Court held that Seattle's Landmarks Preservation Ordinance was neither neutral nor generally applicable.[202] First Covenant sued for declaratory relief when the Seattle Preservation Committee conferred landmark status to a church building, alleging the designation burdened the congregation's free exercise of religion.[203] "Because the sites, improvements, and objects they govern are arbitrarily selected, and the selection process requires individual evaluation of each building, site or improvement," the court distinguished the ordinance from the generally applicable criminal law in *Smith*.[204] In addition, the ordinance lacked neutrality because it alluded to religious facilities and included a liturgical exception.[205]

*St. Bartholomew's* and *First Covenant* demonstrate how *Smith*'s ambiguity left leeway for different interpretations of what constitutes a neutral law of general applicability.[206] In the latter case, the Washington Supreme Court distinguished landmark ordinances from the criminal statute in *Smith* because such ordinances granted government actors the power and discretion to choose whether a building would be landmarked.[207] Advocates for religious property owners concurred and argued that targeting individual buildings in this manner opposes application of the words "generally applicable" to any part of the preservation scheme.[208] Because the preservation committee applied landmark

---

[201] 494 U.S. at 882–84.

[202] *First Covenant*, 840 P.2d at 180–81. The First Covenant Church challenged the constitutionality of landmark status that the Seattle Preservation Committee applied to its historic religious structure. *Id.* at 178. Unlike the church in *St. Bartholomew's*, the Church here did not attempt to overturn any particular committee decision. *Id.*

[203] *Id.*

[204] *Id.* at 180.

[205] *Id.* at 180–81. The court's treatment of this liturgical exception seems particularly disingenuous because the lawmakers included it to prevent the preservation committee from reviewing changes required by the congregation's religious liturgy. *See id.* at 178.

[206] *See Smith*, 494 U.S. at 882–84. Other than Oregon drug laws, and laws in previous cases like mandatory Sunday closing laws and social security taxes, Justice Scalia did not mention what other laws the Court might consider neutral and generally applicable for *Smith* purposes, and he also provided no criteria or guiding analysis to make such a decision. *See id.*

[207] *See First Covenant*, 840 P.2d at 180; Douglas Laycock, *State RFRAS and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 767 (1999).

[208] *See, e.g.*, Carmella, *supra* note 5, at 479 ("[D]esign control of houses of worship is neither generally applicable nor religion-neutral."); Laycock, *supra* note 207, at 767 ("Land use regulation is among the most individualized and least generally applicable bodies of law in our legal system.").

status only to particular buildings, several property owners argued that they unfairly bore the burden of maintaining a neighborhood's historic character.[209]

Government officials, however, only decide to landmark buildings that meet specific threshold criteria, which are predetermined, explicit, and not religiously motivated.[210] The decision to landmark does involve discretion and matters of taste, but, in 1978, in *Penn Central Transportation Co. v. City of New York*, Justice Brennan explicitly stated that subjective elements considered in the landmarking process do not make the final decision arbitrary.[211] Rather, like zoning, historic preservation is a form of land use planning that treats similar property in a similar manner within a generally applicable scheme.[212] Unlike the Santeria adherents in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, religious congregations subject to preservation ordinances do not alone bear the burden of maintaining an area's historic character.[213] The ordinances apply equally to adherents and non-adherents when their property meets certain criteria; thus, for *Smith* purposes, they are generally applicable laws.[214] In dicta, in 1997, in *City of Boerne v. Flores*, the U.S. Supreme Court itself referred to the preservation ordinance at issue as a law of general application.[215] Therefore, although earnest, the Washington Supreme Court was misguided when it concluded that preservation ordinances lack general applicability.[216]

---

[209] *See* Carmella, *supra* note 5, at 479–81.

[210] *See Penn Central*, 438 U.S. at 132 ("[T]he New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city . . . ."); *St. Bartholomew's*, 914 F.2d at 354; Nelson, *supra* note 5, at 733–34; *see, e.g.*, CHI., ILL., MUN. CODE § 2-120-620 (1987), *available at* http://www.cityofchicago.org/Landmarks/pdf/Landmarks_Ordinance.pdf.

[211] 438 U.S. at 132–33. Justice Brennan stressed that the designation of landmark status can be challenged in court as an arbitrary government action, and that courts were just as able to make that determination in the preservation context as in any other field. *Id.* Thus, no increased danger exists that cities will apply preservation laws haphazardly. *See id.*

[212] *Id.* at 131–32.

[213] Nelson, *supra* note 5, at 734; *see supra* notes 137–148 and accompanying text.

[214] *See Hialeah*, 508 U.S. 520, 542–44 (1993); Nelson, *supra* note 5, at 734–35.

[215] 521 U.S. 507, 535 (1997). The Court stated:

> [N]umerous state laws, such as the zoning regulations at issue here, impose a substantial burden on a large class of individuals. When the exercise of religion has been burdened in an incidental way by *a law of general application*, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs.

*Id.* (emphasis added).

[216] *See* Nelson, *supra* note 5, at 740, 760; *supra* notes 202–205 and accompanying text.

As to neutrality, preservation ordinances are both facially and substantively neutral as required by *Hialeah*.[217] On their face, they do not specifically target religious beliefs, groups, or practices for discrimination.[218] In effect, preservation commissions do not "gerrymander" preservation ordinances to target particular religious conduct like the laws in *Hialeah*, and they do not apply them to religious buildings at the exclusion of secular structures.[219] Finally, commissions do not apply landmark status only to property owners motivated by religious belief.[220] Therefore, though *Smith* may have been vague, careful consideration of the Court's opinion mandates that future courts consider preservation ordinances as neutral and generally applicable laws.[221]

### D. *The Effect of* Smith*'s Individualized Exemption Exception on the Free Exercise/Historic Preservation Conflict*

If the law in question is neutral and generally applicable, the second determination courts must make under *Smith* is whether it fits into one of the exceptions Justice Scalia articulated in the majority opinion.[222] Unfortunately, the *Smith* Court neglected to articulate the scope of the exceptions presented, leaving future courts wide latitude in determining what laws implicate hybrid rights or have in place a system of individualized exemptions.[223] Hence, courts considering clashes between free exercise and historic preservation that would prefer to subject the law in question to strict scrutiny often determine it fits within one of the *Smith* exceptions.[224] As evidenced by the cases decided before *Smith*, once the state is required to show a compelling government interest, the congregation alleging the free exercise burden will be exempt from honoring the municipality's preservation ordinance.[225]

In *Smith*, Justice Scalia distinguished *Sherbert* by carving out an exception to the Court's ruling for laws that have in place a system of

---

[217] *See* 508 U.S. at 533–34.

[218] *See, e.g.*, CHI., ILL., MUN. CODE § 2-120-620 (1987), *available at* http://www.cityofchicago.org/Landmarks/pdf/Landmarks_Ordinance.pdf.

[219] *See* Nelson, *supra* note 5, at 734.

[220] *See id.*

[221] *See id.* at 734–35; *supra* notes 210–220 and accompanying text.

[222] *See* 494 U.S. at 881–84.

[223] Nelson, *supra* note 5, at 740, 749–50; *see Smith*, 494 U.S. at 881–84.

[224] *See, e.g.*, Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885 (D. Md. 1996) (concluding that the Cumberland preservation ordinance had in place a system of individualized exemptions).

[225] *See supra* notes 170–186 and accompanying text.

individualized exemptions not present in the Oregon peyote law.[226] South Carolina's unemployment scheme, in *Sherbert*, had an exemption-granting process that vested a high degree of discretion in government officials to determine who could be exempt from the statutory requirements for unemployment compensation.[227] According to Justice Scalia, the *Sherbert* Court required strict scrutiny of the denial of unemployment benefits resulting from Sherbert's religious conduct because the government's open-ended discretion could have resulted in religious discrimination.[228] Courts, acting with little guidance as to whether the scope of this exception extends beyond the unemployment context, have disagreed on whether preservation ordinances contain a system of individualized exemptions.[229]

The New York City Landmarks Preservation Law had an economic hardship provision in place, which allowed for exemptions from landmark designation upon the demonstration of financial hardship, when the Second Circuit decided *St. Bartholomew's* in 1990.[230] The Church had even availed itself of that provision, but the Landmarks Commission determined it did not prove the necessary hardship and upheld the denial of the permit.[231] Therefore, the court knew that the Commission had the discretion, based on a careful review of a property owner's finances, to grant an exception to the Landmarks Law.[232] When deciding the case, however, the Second Circuit did not even consider whether the preservation ordinance fit within the individualized exemption exception articulated in *Smith*.[233] It is likely, as has been argued since, that the court felt that the exception was too targeted to include preservation laws.[234] The "good cause" standard that had guided the exemption-granting process in *Sherbert*—allowing anyone to be de-

---

[226] *See* 494 U.S. at 894 ("The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized government assessment of the reasons for the relevant conduct.").

[227] 374 U.S. at 400–01.

[228] *See Smith*, 494 U.S. at 884–85.

[229] *Compare St. Bartholomew's*, 914 F.2d at 355 (deciding that the New York City preservation ordinance was a neutral law of general applicability that fits under the neutral *Smith* analysis), *with Keeler*, 940 F. Supp. at 885 (holding that the Cumberland preservation ordinance had in place a system of individualized exemptions and thus was an exception to *Smith* that should be subjected to strict scrutiny).

[230] 914 F.2d at 352.

[231] *Id.*

[232] *See id.*

[233] *See id.* at 353–56.

[234] Nelson, *supra* note 5, at 746 ("[E]conomic hardship exemptions utilized in historic preservation ordinances are not open-ended and therefore do not invite discrimination on the basis of religion.").

nied unemployment for a "good cause"—had provided an easy opportunity for the government worker to discriminate, and forced the Court to apply strict scrutiny to counter the broad delegation of power.[235] The discretion of the preservation board in *St. Bartholomew's*, however, was limited to consideration of detailed economic criteria.[236] Accordingly, the court correctly applied the *Smith* standard because the decision-maker was unable to impinge upon the property owner's First Amendment rights.[237]

In contrast, in 1996, in *Keeler v. Mayor of Cumberland*, the U.S. District Court for the District of Maryland concluded that Cumberland's preservation ordinance did have in place a system of individualized exemptions.[238] In *Keeler*, Cardinal William H. Keeler sued on behalf of the Sts. Peter and Paul Roman Catholic Church when the City of Cumberland denied the church's request to tear down the monastery and chapel.[239] The historic chapel and monastery, in serious disrepair, not only drained the church's funds, but also inadequately met the needs of the current congregation.[240] The district court determined that the individualized exemptions in the Cumberland ordinance gave the city the discretion to grant exemptions from preservation laws for the following reasons: 1) financial hardships; 2) deterrents to major improvement programs; and 3) structures whose preservation would not serve the general welfare.[241] These provisions distinguished Cumberland's ordinance from the across-the-board criminal prohibition of pe-

---

[235] *Id.* at 743; *see also Smith*, 494 U.S. at 884 ("The 'good cause' standard created a mechanism for individualized exemptions." (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986))).

[236] *See* Nelson, *supra* note 5, at 743. The Commission on Chicago Landmarks has detailed criteria laid out in their Rules and Regulations to guide their consideration of applicants for the economic hardship exception. COMM'N ON CHI. LANDMARKS, RULES AND REGULATIONS, art. V (1990), *available at* http://www.cityofchicago.org/Landmarks/pdf/Landmarks_Ordinance.pdf. The Commission must consider the current level of economic return on the property and the feasibility of profitable alternatives by looking through the financial records of the property owner and estimates from architects and engineers. *Id.*

[237] *See* Nelson, *supra* note 5, at 743–45.

[238] 940 F. Supp. at 885. The court decided the case when RFRA was still valid law, and the Church also stated a cause of action under RFRA. *Id.* at 880. The district court, however, anticipating the U.S. Supreme Court's upcoming decision, found RFRA unconstitutional and relied on *Smith* to decide the case. *Id.* at 880–81.

[239] *Id.* at 880. Because the church and monastery comprised part of the Washington Street Historic District, the ordinance required the Church to submit demolition plans to the Cumberland Historic Preservation Commission. *Id.*

[240] *See id.* at 883.

[241] *Id.* at 886.

yote use in *Smith*.[242] Because the ordinance fell squarely within a *Smith* exception, the district court required the government to show a compelling interest for its refusal to grant an exemption for religious hardship when exemptions from landmark status were available for secular reasons.[243] Applying strict scrutiny was determinative because the court, like all other courts ever considering the issue, determined that historic preservation was not a compelling government interest.[244]

Where *Hialeah* provided guidance to courts on how to analyze whether laws were neutral or generally applicable, no analogous case exists to guide the determination of the meaning of the individualized exemption exception.[245] Despite the differences between the unfettered discretion employed by government officials in *Sherbert* and the guided decision making of preservation boards, the *Keeler* court read *Smith* broadly, and held that the preservation ordinance at issue contained individualized exemptions.[246] The *Keeler* court's analysis is suspect because, if a court stretched the individualized exemption exception to include preservation laws, the other laws that the exception would include would almost entirely swallow *Smith*'s holding.[247] If read literally to apply to any law with an enumerated exception to its main proposition, rather than limited to discretionary exemptions like *Sherbert*'s "good cause" standard, so many laws would be subject to the compelling interest test that *Smith* itself would become meaningless.[248] It is unlikely that Justice Scalia and the *Smith* majority intended to cre-

---

[242] *Id.* ("The ordinance embodies a legislative judgment that the City's interest in historic preservation should, under certain circumstances, give way to other interests . . . .").

[243] *Keeler*, 940 F. Supp. at 886.

[244] *Id.* ("[T]he City nowhere asserts that historic preservation is a compelling interest of government."); *see, e.g.*, *First Covenant*, 840 P.2d at 185 ("Preservation ordinances further cultural and esthetic interests, but they do not protect public health or safety."); Berg, *supra* note 172, at 429.

[245] *See* Nelson, *supra* note 5, at 740.

[246] *See supra* notes 238–244 and accompanying text; *see also* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions From* Smith, 74 N.Y.U. L. REV. 1045, 1067 (2000).

[247] *See, e.g.*, Kaplan, *supra* note 246, at 1067. Kaplan stated:

> If the holding in *Keeler*—that where the government provides an exception to its landmark preservation laws for secular reasons, it must also extend exceptions for religious reasons—was correct, then the holding in *Smith* would surely have been that where government exempts from prohibition certain secular, medical uses of drugs, it is required to exempt religious uses as well.

*Id.*

[248] *See id.* In addition, under this analysis, a planning commission that allowed a zoning variance for secular reasons would have to show a compelling interest if it denied a variance for religious reasons. *See id.*

ate an exception that vastly weakened *Smith*, particularly in light of their concern that exemptions to neutral laws would allow a citizen "to become a law unto himself."[249] In addition, the *Smith* Court chose not to overrule *Sherbert*, but to limit it through the individualized exemption exception—an exception the Court applied only in the unemployment context.[250] Therefore, the intent of the Court in *Smith* argues against the *Keeler* court's broad reading of the law and supports preservationists' notion that the economic hardship provisions in preservation ordinances do not implicate the individualized exemption exception.[251]

### E. *The Effects of* Smith*'s Hybrid Rights Exception on the Free Exercise/Historic Preservation Conflict*

Justice Scalia articulated a second exception to *Smith*'s basic holding—the hybrid rights exception—that is implicated when free exercise concerns are coupled with another constitutional infringement.[252] The *Smith* Court again failed to articulate adequately the scope of the exception and left another area of the law important to the free exercise debate open for disparate interpretation.[253] Accordingly, a circuit split has emerged over the meaning of the hybrid rights formula articulated in *Smith*.[254] Despite all this activity in the lower

---

[249] 494 U.S. at 885 (quoting Reynolds v. United States, 98 U.S. 145, 167 (1878)). Justice Scalia's language shows his reluctance to provide citizens with exemptions to generally applicable laws. *See id.*

[250] *See id.* at 883–84. Justice Scalia emphasized in *Smith* that the *Sherbert* test has never been used to invalidate any government action besides the denial of unemployment benefits and seemed inclined to limit its application to that context. *See id.* ("Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law.").

[251] Nelson, *supra* note 5, at 747.

[252] 494 U.S. at 881.

[253] *Compare St. Bartholomew's*, 914 F.2d at 355 (deciding that the New York City's Landmarks Law was neutral and generally applicable for *Smith* purposes), *with First Covenant*, 840 P.2d at 181–82 (concluding that Seattle's Landmarks Preservation Ordinance implicated hybrid rights).

[254] The U.S. Courts of Appeals for the First and District of Columbia Circuits acknowledge hybrid rights only when there is an independently viable constitutional claim along with the free exercise allegation. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 703–04 (9th Cir. 1999) (citing EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (holding that the addition of an Establishment Clause violation implicated the hybrid rights exception); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (noting the absence of an independent substantive due process claim prevented consideration under the hybrid rights exception)). The U.S. Courts of Appeals for the Ninth and Tenth Circuits require only a colorable claim that must not stand independ-

courts, few courts have considered in detail whether preservation ordinances implicate the hybrid rights exception.[255]

The Washington Supreme Court was willing to tackle the issue and, in *First Covenant*, it concluded that the Seattle preservation ordinance implicated the hybrid rights exception because the ordinance also burdened the congregation's free speech.[256] The Washington court noted that speech can be nonverbal if it is "sufficiently imbued with elements of communication."[257] Because congregations build houses of worship to convey a religious message, and First Covenant itself claimed its church building was "an expression of Christian belief and message," the court held that church architecture was equivalent to religious speech.[258] Accordingly, because the free exercise burden was coupled with an infringement on free speech, the preservation ordinance implicated hybrid rights.[259] Because it was held to be an exception to *Smith*, the court subjected the preservation law to strict scrutiny and concluded it did not serve a compelling government interest.[260]

Advocates for religious property owners also argue that preservation ordinances implicate constitutional rights other than free exercise rights when applied to houses of worship.[261] They claim that architectural changes that have followed in the wake of doctrinal changes prove that a house of worship is both a profession of faith and religious speech.[262] The physical arrangement of both the exte-

---

ently, but must be more than a simple allegation. *Id.* at 703 (citing Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (requiring a "colorable claim of infringement" to implicate the hybrid rights exception)). The U.S. Court of Appeals for the Sixth Circuit does not accept that the hybrid rights argument is a viable exception to *Smith* and articulated it will recognize the exception only upon further instruction by the U.S. Supreme Court. *Id.* at 704 (citing Kissinger v. Bd. of Trs. of Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993) (calling the hybrid rights exception "completely illogical" and refusing to consider its application)).

[255] *See* Nelson, *supra* note 5, at 751–52.

[256] 840 P.2d at 182.

[257] *Id.* (quoting Spence v. Washington, 418 U.S. 405, 409 (1974)).

[258] *See id.*; *see also* Carmella, *supra* note 5, at 490–98.

[259] *First Covenant*, 840 P.2d at 181–82.

[260] *Id.* at 182–83.

[261] *See, e.g.*, Carmella, *supra* note 5, at 478, 492–93.

[262] *Id.* at 452–65. One particularly powerful example of the symbiotic relationship between religion and architecture includes the radical modifications early Protestants made to previously Catholic churches. *Id.* at 457–58. The longitudinal basilica plan, which focused attention on the altar where the Eucharist had been consecrated, was not suitable for Protestant worship. *Id.* Therefore, basilica forms were rejected and replaced with churches with central one-room plans that focused the congregation's attention toward the reading of the gospel from the pulpit. *Id.* at 459. Thus, the centrality of the Word was embodied in the physical arrangement of both the interior and exterior of the building.

rior and interior of a religious structure, therefore, conveys messages of faith to its congregation that the state should not alter.[263] In addition, design control of religious structures allegedly implicates the Establishment Clause because it unconstitutionally entangles the government in the congregation's religious affairs.[264] Architectural choices made in design review affect the messages conveyed by a religious structure and, in turn, affect the congregation's spiritual formation.[265] As a result, a preservation committee's choices may require it to take sides in a religious dispute when that dispute involves ecclesiastical design choices.[266]

Preservationists rebut these theoretical assertions with the reality that no court, besides the Washington Supreme Court, has considered architecture a form of protected speech—religious or otherwise.[267] If courts accepted the "architecture-as-speech" proposition, they would also be required to subject zoning ordinances to strict scrutiny.[268] Accordingly, a municipality's land use capabilities would be severely hindered because it would have to grant exemptions for any minor economic burdens suffered by religious property owners resulting from the application of a zoning ordinance.[269] Preservationists argue that, as with the individualized exemption exception, the *Smith* majority

---

*See* Carmella, *supra* note 5, at 459. Even today, theologian Paul Tillich observes: "Churches that retain a central aisle leading to a removed altar as the holiest place, separated from other parts of the building, are essentially un-Protestant. . . . [O]nly by the creation of new forms can Protestant churches achieve an honest expression of their faith." *Id.* at 472–73 (quoting Paul Tillich, *On the Theology of Fine Art and Architecture*, *in* ON ART AND ARCHITECTURE 204 (J. Dillenberger & J. Dillenberger eds., 1989) (alteration in original)).

[263] *See id.* at 471 ("Architecture for churches is a matter of gospel."); *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group, 515 U.S. 557, 568–69 (1995) (holding that the choice of whom to allow to march in a St. Patrick's Day parade was a communicative expression warranting First Amendment protection).

[264] Carmella, *supra* note 5, at 478–79.

[265] *See id.* at 506–07.

[266] *See id.* at 489.

[267] *See* Nelson, *supra* note 5, at 750 (noting that the U.S. Supreme Court has never suggested that architectural expression requires the same protections as personal decisions, like the right to educate one's children); *cf.* Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 164 (3d Cir. 2002) (comparing the eruv, a delimited space used to designate sacred areas for Orthodox Jews, with "the walls forming a synagogue," and holding that an eruv is not communicative for First Amendment purposes), *cert. denied*, 123 S. Ct. 2609 (2003) (mem.).

[268] Courts, including the U.S. Supreme Court, have recognized the analogous nature of zoning and historic preservation ordinances. *See, e.g.*, *Penn Central*, 438 U.S. at 131–33.

[269] *Cf. Bethlehem Evangelical*, 626 P.2d at 672–73 (upholding the zoning ordinance against a free exercise challenge that constituted only a minor economic burden on the religious property owner because the zoning law represented a substantial government interest).

created the hybrid rights exception to distinguish precedent and not to swallow *Smith*'s basic holding.[270] The Washington Supreme Court incorrectly concluded that historic preservation ordinances implicate hybrid rights because the *Smith* majority intended courts to narrowly construe the hybrid rights exception.[271]

## IV. Analysis of the Current State of the Free Exercise/ Historic Preservation Conflict and a Proposal for a More Adequate Balance of Free Exercise Rights and Historic Preservation Interests

### A. *Analysis of the Failure of* Employment Division v. Smith *in Free Exercise Challenges to Preservation Ordinances*

Until the U.S. Supreme Court decides the constitutionality of RLUIPA, *Employment Division v. Smith* is controlling and courts must judge any free exercise claim guided by its holding.[272] If interpreted as intended by the majority, courts considering whether a particular preservation ordinance burdens free exercise will find for the local government because they will decide that preservation laws are neutral and generally applicable.[273] Therefore, courts will uphold these ordinances because they incidentally burden religion and do not target it directly.[274] Many scholars and courts do not find this result satisfying because the *Smith* decision does not provide sufficient free exercise protection in general and, in particular, endangers the rights of minority religious groups.[275] If the government refuses a permit for an addition to house a new liturgical practice and instead works with the church to incorporate the practice in the existing space, free exercise

---

[270] *See* Kaplan, *supra* note 246, at 1067 ("The second way in which courts have destabilized, if not eviscerated, the holding of *Smith* is by applying a very broad interpretation of the hybrid rights exception.").

[271] *See id.* at 1084 ("Ideally, the exception should apply only in cases that closely resemble, both substantively and factually, the so-called 'hybrid' precedents alluded to in *Smith*.").

[272] *See supra* notes 111–160 and accompanying text.

[273] *See* Employment Div. v. Smith, 494 U.S. 871, 892 (1990) (O'Connor, J., concurring) ("[T]he Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply."); *supra* notes 187–221 and accompanying text.

[274] *See Smith*, 494 U.S. at 878–80.

[275] *See, e.g.*, First Covenant Church v. City of Seattle, 840 P.2d 174, 187 (Wash. 1992); Mykkeltvedt, *supra* note 154, at 608; *see also Smith*, 494 U.S. at 892 (O'Connor, J., concurring).

concerns become very real.[276] First, by denying the permit, the commission interferes with the church's ability to celebrate its liturgy how it chooses.[277] Second, by working with the church, the commission creates an atmosphere of worship catered to its own desires and perhaps in violation of the congregation's wishes.[278] Though religion itself is not purposefully targeted by preservation laws, *Smith* is certainly underinclusive in its religious protections because it provides no relief, or even consideration, to congregations finding themselves in the bind articulated above.[279] The *Smith* analysis requires courts to focus only on the nature of the law—whether it is neutral and generally applicable—and pays no heed to the detrimental effect of the contested law on religious faith or conduct.[280]

If one of the *Smith* exceptions is determined to govern, or RLUIPA is found constitutional, however, the legal analysis is equally unsatisfactory.[281] The court will apply strict scrutiny and any preservation ordinance burdening a religious structure will fail because it was not enacted to protect the public's health or safety.[282] Accordingly, the court will grant all religious property owners exemptions from historic preservation laws, even for the most minor religious burdens, and create free exercise protections that are overinclusive.[283] If this *Sherbert/Yoder* standard governs, it will result in the alteration of important historic buildings for what are, in essence, economic reasons.[284] For example, a planning board's refusal to allow vinyl siding on a church does not en-

---

[276] *See Smith*, 494 U.S. at 893–94 (O'Connor, J., concurring) ("It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns."); Carmella, *supra* note 5, at 492, 494.

[277] *See* Carmella, *supra* note 5, at 494.

[278] *See id.* at 494–95.

[279] *See id.* at 422–23 ("*Smith* simply ignores the impact of general, secular laws on religious communities.").

[280] *See* 494 U.S. at 878–79.

[281] *See infra* notes 282–294 and accompanying text.

[282] *See, e.g.*, *First Covenant*, 840 P.2d at 185 ("Preservation ordinances further cultural and esthetic interests, but they do not protect public health or safety.").

[283] *See* Nelson, *supra* note 5, at 729–30, 750. Throughout her article, Nelson articulates that the so-called "free exercise" burdens alleged by religious congregations are really economic inconveniences. *See id.* Therefore, applying *Sherbert v. Verner* will result in exemptions for purely economic (and secular) reasons. *See id.* at 729–30.

[284] *Id.*; *cf.* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990) (holding that economic burdens, even if substantial, do not implicate free exercise rights because they do not burden the religious beliefs or expressions of the adherent). For a discussion of the *Sherbert/Yoder* standard, see *supra* notes 95–113 and accompanying text.

mesh the government in church affairs, control the focus of a congregation's worship, or compel the church to make any religious proclamations.[285] Yet, absent a compelling government interest, a court applying strict scrutiny would consider such a small burden to be sufficient grounds for an exemption, resulting in permitting a church to put vinyl siding (or anything else) on a historic religious property.[286] In addition, granting exemptions for purely economic burdens may also implicate the Establishment Clause because it involves treating similarly situated groups differently based on their religious beliefs.[287] Granting exemptions to religious property owners may constitute government support of religion because courts would not grant non-religious property owners the same exemptions.[288]

The literature attempting to make sense of the clash between historic preservation and free exercise rights typically advocates for either the under- or over-inclusive legal analysis the courts already employ.[289] Preservationists rely on the *Smith* analysis to uphold the government's historic preservation interests against the free exercise claims of religious congregations.[290] Advocates for religious groups attempt to move the analysis to the *Sherbert* standard by either refusing to apply *Smith* or by placing preservation ordinances into one of its two exceptions—the hybrid rights or individualized exemption exceptions.[291] A satisfactory

---

[285] *See* First Church of Christ, Scientist v. Ridgefield Historic Dist. Comm'n, 738 A.2d 224, 231 (Conn. Super. Ct. 1998) ("The commission's decision . . . has not interfered with the right of the plaintiffs or its members to express their religious views, or associate and assemble for that purpose."), *aff'd*, 737 A.2d 989 (Conn. App. Ct. 1999).

[286] *See* Sherbert v. Verner, 374 U.S. 398, 406 (1963) (requiring a state to show a compelling interest in any law that burdens the free exercise of religion); *First Covenant*, 840 P.2d at 185 (articulating that historic preservation is not a compelling government interest); Berg, *supra* note 172, at 429.

[287] Nelson, *supra* note 5, at 761. In 1971, the U.S. Supreme Court in *Lemon v. Kurtzman* articulated that to pass constitutional muster, any government action must: 1) serve a secular purpose; 2) have a primary effect that neither inhibits nor advances religion; and 3) avoid excessive state entanglement with religion. 403 U.S. 602, 612–13 (1971). Nelson argues that judicially granted exemptions to preservation laws under the Free Exercise Clause violate the second prong of the *Lemon* test because such exemptions benefit only religious adherents that worship in a communal structure. Nelson, *supra* note 5, at 766–67.

[288] Nelson, *supra* note 5, at 766–67.

[289] *Compare* Carmella, *supra* note 5, at 402–04 ("This article contends that governmental design control of houses of worship violates both the free exercise and establishment clauses of the first amendment."), *with* Nelson, *supra* note 5, at 722–24 ("United States Supreme Court precedent strongly supports those courts that have determined historic preservation laws to be 'neutral laws of general applicability,' and presumptively valid under the constitutional standard employed by the Court.").

[290] *See, e.g.*, Nelson, *supra* note 5, at 731–32.

[291] *See, e.g.*, Carmella, *supra* note 5, at 402–04.

and pragmatic solution seems to elude all who attempt to resolve this conflict of interests because courts and scholars alike remain polarized, clinging blindly to either Madison's or Jefferson's conception of the scope of free exercise rights.[292] Though having its own drawbacks, the best solution entails courts making an ad hoc factual inquiry into each set of circumstances that implicates this conflict.[293] Only through a close examination of each factual situation can a court determine whether the First Amendment requires an exemption from a preservation ordinance for a religious property owner.[294]

### B. *A Proposal for a Case by Case Balancing Test That Provides a More Equitable Judicial Analysis for Free Exercise and Historic Preservation Conflicts*

As described above, no legal test yet conceived under the federal constitution adequately has balanced constitutionally protected free exercise rights with constitutionally sanctioned historic preservation interests.[295] The conceptions of neither Jefferson nor Madison adequately determine the scope of free exercise rights guaranteed by the First Amendment, and the tests courts use based on these two philosophies are either under- or over-inclusive of free exercise rights.[296] Therefore, it seems that only through a case by case balancing test can a court adequately consider the interests of both the government and the religious congregation.[297]

Judicial balancing tests can be onerous because they involve detailed consideration of the facts of each particular case—including economic, social, and religious issues that judges may be reluctant to consider—and also lack bright-line rules that courts can easily apply.[298] In addition, balancing tests can create difficulties for those

---

[292] *Compare St. Bartholomew's*, 914 F.2d at 354–56 (following Jefferson's conception of the Free Exercise Clause and allowing government to burden religious conduct as long as beliefs are protected), *with First Covenant*, 840 P.2d at 182–83 (following Madison's beliefs and requiring a compelling interest for any burden inflicted upon religious conduct).

[293] *Cf.* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124–25 (1978) (articulating standards to consider in an ad hoc evaluation of whether the New York City Landmarks Law was a taking under the Fifth Amendment).

[294] *See infra* notes 304–355 and accompanying text.

[295] *See supra* notes 272–294 and accompanying text.

[296] *See supra* notes 272–294 and accompanying text.

[297] *Cf. Penn Central*, 438 U.S. at 123–24 (explaining the necessity to resort to a balancing test when the Court is "unable to develop any 'set formula' for determining when 'justice and fairness' require" the Court to declare that the government has effected a taking (quoting Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962))).

[298] *See infra* notes 299–355 and accompanying text.

looking to precedent for guidance because the cases often turn on minute factual distinctions.[299] Despite their difficulties, justice requires courts to apply a balancing test when religious congregations challenge preservation laws on free exercise grounds.[300] *Bethlehem Evangelical Lutheran Church v. City of Lakewood* and *Grosz v. City of Miami Beach*, two cases decided before *Smith*, show how a court sensibly can balance historic preservation interests and free exercise concerns.[301] Again, these cases considered zoning, but they offer an example of coherent analysis that allows for the adequate consideration of the interests of both the government and the religious congregation.[302]

As opposed to simply focusing on the law in question or the alleged free exercise burden, the *Bethlehem Evangelical* and *Grosz* courts carefully looked at the totality of the conflict.[303] Using these analyses as guides, a court deciding whether to uphold the government's interest in the preservation of historic religious properties against a congregation's free exercise allegation should consider 1) the character of the free exercise burden; 2) the impact on the religious congregation if the decision of the preservation committee is upheld; 3) the nature and necessity of the alteration being proposed; 4) the ar-

---

[299] In *Grosz v. City of Miami Beach*, the Eleventh Circuit stated: "Balancings must avoid constitutionalizing secularity or sectarianizing the Constitution. In this area, where religious guarantees of the Constitution compete with the rights of government to perform its function in the modern era, certitude is difficult to attain." 721 F.2d 729, 741 (11th Cir. 1983). Considering the uncertainties and inconsistencies courts have already created in this area, a balancing test certainly would not make the outcomes of these conflicts any less predictable. *See supra* notes 187–271 and accompanying text.

[300] *See supra* notes 272–294 and accompanying text. Despite the ongoing and charged debate over free exercise rights and historic preservation, the number of religious property owners that actually bring their cases to court is very limited. Weinstein, *supra* note 6, at 111–12 (citing informal studies done in New York and Philadelphia showing that most preservation committees usually granted requests by religious property owners to alter their property). Therefore, because courts would apply the test in a limited number of cases, the balancing test would not be that onerous to judges or the court system. *See id.*

[301] *See Grosz*, 721 F.2d at 733–41; *Bethlehem Evangelical*, 626 P.2d 668, 675 (Colo. 1981); *see also supra* notes 175–185 and accompanying text.

[302] *See Grosz*, 721 F.2d at 734 ("[T]he balance depends upon the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity."); *Bethlehem Evangelical*, 626 P.2d at 675 ("[W]e must balance the interests involved in the controversy before us and recognize that the state must show a substantial interest without a reasonable alternate means of accomplishment . . . ." (quoting Pillar of Fire v. Denver Urban Renewal Auth., 509 P.2d 1250, 1253 (Colo. 1973))). Both courts frame their balancing test as a substantial interest test, but the courts do engage in a clear balancing of both state and religious interests in both cases. *Grosz*, 721 F.2d at 733–41; *Bethlehem Evangelical*, 626 P.2d at 675.

[303] *See Grosz*, 721 F.2d at 733–41; *Bethlehem Evangelical*, 626 P.2d at 675; *see also supra* notes 175–186 and accompanying text.

chitectural or historic significance of the structure; and 5) the economic impact on the community that will result from the loss or alteration of the historic structure.[304]

The first two factors in the balancing test summarize the religious congregation's interest by considering not only the nature and extent of the free exercise burden but also the effect of forcing the congregation to pursue other options outside the desired architectural alterations.[305] The most important factor in the analysis, and also the most in need of clarification, is the character of the free exercise burden.[306] Although preservation laws never directly burden religious belief or expression, they do burden religious congregations by placing demands on their resources, or by forcing growing congregations to remain in smaller, older buildings.[307] The basis of most alleged free exercise burdens in the preservation context, therefore, is really economic.[308] Accordingly, a court must first determine the threshold question of whether the economic burden should be considered a

---

[304] As to the first two factors, the *Grosz* court stated: "The importance of the burdened practice within the particular religion's doctrines and the degree of interference caused by the government both figure into the calculus." 721 F.2d at 735. The court also emphasized the need to determine whether the law in question does indeed burden a religious practice. *Id.* at 735–36. The court in *Bethlehem Evangelical* differentiated between condemning a church in slum clearance, which resulted in the complete destruction of the church, and the situation at bar, in which the committee required the Church to upgrade the streets surrounding its property, clearly a much less onerous burden. 626 P.2d at 675. As to factors three through five, the *Grosz* court urged consideration of the underlying policy interest of the government's action and of the potential injury to those policy interests if the court granted an exemption. 721 F.2d at 734. In addition, the court required consideration of other means to effectuate the government's end that would lessen the alleged burden. *Id.* In *Bethlehem Evangelical*, the court considered the reasonableness of the government regulation and the validity of the end stipulated by the City. *See* 626 P.2d at 675.

[305] *See infra* notes 306–342 and accompanying text.

[306] *See infra* notes 307–336 and accompanying text.

[307] *See* Weinstein, *supra* note 6, at 93; *see, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 511–12 (1997) (discussing Church's need to expand because the church building could not accommodate some forty-sixty parishioners at Sunday masses); *St. Bartholomew's*, 914 F.2d at 351–52 (discussing Church's desire to tear down its community house and replace it with a forty-seven story office tower to generate revenue and provide room for its programs); Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 880–81 (D. Md. 1996) (discussing Church's desire to tear down historic monastery and chapel that were "a draining financial liability."). *But see* Carmella, *supra* note 5, at 498–99 (asserting that design review does directly burden religious expression).

[308] *See supra* note 307 and accompanying text.

sufficient free exercise infringement to be balanced against the municipality's historic preservation interests.[309]

Consideration of two cases already discussed provides two possible alternatives to guide this threshold consideration in the proposed balancing test.[310] Under the *Smith* standard, the determination of whether a law actually burdened free exercise hinged on "whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices."[311] Following *Smith*, as seen above, the U.S. Court of Appeals for the Second Circuit, in 1990, in *St. Bartholomew's* held that neutral regulations that diminish the income of religious organizations were not free exercise violations.[312] Thus, the court concluded that the denial of significant revenue did not implicate free exercise rights even when, as the Church alleged, the denial forced cuts in many charitable programs.[313] The ordinances imposed economic harms that simply made the practice of religion more expensive, and, therefore, they were not unconstitutional because they did not infringe directly upon religious beliefs.[314]

In contrast, in 1992, in *First Covenant Church v. City of Seattle*, the Washington Supreme Court conceded that moderate and generally applicable burdens like a sales tax did not implicate free exercise concerns.[315] The court reasoned, as previously discussed, that a more onerous financial burden, even if caused by a generally applicable law, could violate free exercise rights if it severely restrained religious activity.[316] The court concluded that landmark designation "so grossly diminishes the value of the Church's principal asset" that it unconstitutionally burdened the congregation's free exercise of religion, and it granted an exemption to the preservation ordinance.[317] Other relig-

---

[309] For a discussion of the necessity of such a threshold requirement, see Colin L. Black, Note, *The Free Exercise Clause and Historic Preservation Law: Suggestions for a More Coherent Free Exercise Analysis*, 72 TUL. L. REV. 1767, 1792–93 (1998).

[310] *See infra* notes 311–336 and accompanying text.

[311] *St. Bartholomew's*, 914 F.2d at 355 (quoting Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450–51 (1988)).

[312] *Id.* (citing Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 389–90 (1990)).

[313] *See id.*

[314] *Id.*; *see also* Braunfeld v. Brown, 366 U.S. 599, 605–06 (1961) (upholding a mandatory Sunday closing law against Orthodox Jews who closed their stores on Saturday to honor their Sabbath, thus requiring them to close two days a week and suffer a draining financial burden).

[315] 840 P.2d at 183 (citing *Jimmy Swaggart Ministries*, 493 U.S. at 389–90).

[316] *Id.* ("It is plain that a religious organization needs funds to remain a going concern." (citing Murdock v. Commonwealth, 319 U.S. 105, 111–12 (1943))).

[317] *Id.* at 184.

ious congregations also advocated for a broader understanding of free exercise because they believed the charitable and educational missions affected by preservation ordinances were equivalent to expressions of religious belief.[318] Therefore, they characterized regulations that affect such enterprises as free exercise burdens equivalent to the suppression or coercion of religion.[319]

The *First Covenant* articulation that economic burdens that extend beyond a mere nuisance can be legitimate free exercise burdens is the more appropriate analysis for this balancing test.[320] By considering a broader scope of economic burdens, the proposed balancing test honors the Constitution's explicit protection of religious freedom.[321] Although the U.S. Supreme Court also protects historic preservation interests, the sacred place religious freedom holds in United States history requires any doubt in this balance be resolved in favor of free exercise rights.[322] Therefore, even when a religious congregation articulates a burden that seems solely economic on its face, if it imposes more than a minor economic hardship, the court would balance the interest against the opposing preservation concern.[323]

In addition, allowing a broad articulation of free exercise burdens complies with the Court's mandate to protect the separation of church and state.[324] In *Smith*, the Supreme Court explicitly stated that the role of the judiciary does not include considering at length the centrality of a practice or act to a particular religion.[325] Hence, any appropriate judicial balance considering competing preservation and free exercise interests should require little, if any, judicial inquiry into what acts are necessary to the religious beliefs of any congregation.[326] By forcing courts to balance any economic burden imposed upon religious property owners that extends beyond a mere nuisance, this balancing test, in accord with *Smith*, keeps the judiciary from deciding what building

---

[318] *See, e.g., St. Bartholomew's*, 914 F.2d at 353–54; *Keeler*, 940 F. Supp. at 880–81; *see also* Carmella, *supra* note 5, at 406–07.

[319] *See St. Bartholomew's*, 914 F.2d at 353–54; *Keeler*, 940 F. Supp. at 880–81.

[320] *See infra* notes 321–336 and accompanying text.

[321] *See* U.S. CONST. amend. I.

[322] *See supra* notes 48–67 and accompanying text.

[323] *See infra* notes 328–336 and accompanying text.

[324] *See infra* notes 325–327 and accompanying text.

[325] 494 U.S. at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim.").

[326] *See id.*

plans, architectural symbols, etc. have religious meaning to a congregation.[327]

As applied, this threshold consideration would rule out alleged free exercise burdens that are purely secular concerns.[328] For example, in 1998, in *First Church of Christ, Scientist v. Ridgefield*, the Church alleged that the preservation committee's veto of the congregation's plan to vinyl side the church was a free exercise burden.[329] Under the *First Covenant* analysis, the refusal to allow vinyl siding on a church is more equivalent to the burden imposed by a sales tax than to anything that actually could implicate religious belief or expression.[330] It is difficult to imagine that the costs of maintaining the clapboard exterior posed significant financial burdens beyond the typical recurring maintenance costs any property owner faces.[331] Accordingly, under the proposed balancing test, a court would conclude that the burden is purely economic, and the free exercise challenge would fail.[332] In a case like *St. Bartholomew's*, where the economic loss imposed by the preservation law allegedly required cutting church programs and charitable missions, there is a potential free exercise burden because such losses may implicate religious belief or expression.[333] Even though the Church's new office tower would serve a purely secular function, the income would be used to enhance the

---

[327] *See id.*

[328] *See infra* notes 329–336 and accompanying text. This threshold requirement also ensures that any exemption granted to a neutral and generally applicable law is given for religious and not secular reasons. *See* Nelson, *supra* note 5, at 729–30. Some have argued that, in certain cases, courts granting exemptions to historic preservation ordinances violate the Establishment Clause because they grant protections to religious groups when only economic concerns are at stake—a government preference for religion that violates the First Amendment. *See Boerne*, 521 U.S. at 536–37 (Stevens, J., concurring) ("[T]he statute has provided the Church with a legal weapon that no atheist or agnostic can obtain."); Nelson, *supra* note 5, at 761.

[329] 738 A.2d at 231.

[330] The inquiry turns on a matter of degree, and an economic burden that does not extend beyond a mere nuisance like a sales tax cannot be considered a true free exercise burden. *Jimmy Swaggart Ministries*, 493 U.S. at 389–90.

[331] *Cf.* Nelson, *supra* note 5, at 729–30 (arguing that the hardships preservation ordinances place on religious property owners are analogous to the burdens placed on nonreligious property owners).

[332] If the Free Exercise Clause is not implicated, then the religious congregation has only a takings claim, which should be analyzed under the "charitable purpose" test of *Trustees of Sailor's Snug Harbor v. Platt*, 288 N.Y.S.2d 314, 316 (App. Div. 1968) (holding that a historic preservation ordinance as applied to a nonprofit organization may be unconstitutional if it physically or financially prevents the carrying out of the organization's charitable purpose).

[333] *See* 914 F.2d at 351.

worship and activities of the congregation necessary for its vitality as a religious community.[334] The financial burden imposed by the preservation ordinance in this case is much more onerous than a trifling nuisance like a sales tax because it arguably implicates religious expression.[335] Accordingly, the alleged burden would pass the threshold consideration, and the court would next weigh that burden against the City's historic preservation interests.[336]

The second factor in the proposed balancing test considers the congregation's alternatives in meeting its desired end without altering its historic structure.[337] For example, if an overcrowded house of worship is contemplating building an addition, adding additional liturgies could solve the problem without altering a historic structure.[338] The existence of what could be considered a viable alternative to renovation, demolition, or some other course harmful to the building would weigh heavily in the government's favor.[339] Likewise, the inability to find an alternative to alteration, coupled with an imposition on the congregation's worship, would weigh much more heavily on the property owner's side.[340] If the religious practices of a congregation were severely limited, the court should require that the government's interest be extremely strong to counteract such a burden.[341] These first two factors provide for the adequate judicial consideration of the free exercise burden that is lacking under the *Smith* analysis, which

---

[334] *See id.* at 351–52.

[335] *See id.* at 353.

[336] *Cf. Grosz*, 721 F.2d at 735 ("Courts, therefore, often restrict themselves to determining whether the challenged conduct is rooted in religious belief or involves only secular, philosophical or personal choices."). To prevent a searing inquiry into religious affairs, then, the religious congregation is given a certain amount of deference when it alleges a free exercise burden that, without much inquiry, seems plausible to the court. *See Smith*, 494 U.S. at 887.

[337] *Grosz*, 721 F.2d at 739 (considering the alternatives for a rabbi who was proscribed from holding services in his home if the decision of the City was upheld).

[338] *See, e.g., Boerne*, 521 U.S. at 511–12. Or perhaps, with the help of the city, the structure could be placed mostly underground so as not to affect the view of the structure. For a discussion about how compromise between the religious congregation and the city in question is an effective way to solve this conflict, see Williamson, *supra* note 62, at 152–54.

[339] *Grosz*, 721 F.2d at 737 (discussing the least restrictive means test, applied to both the government and the religious property owner, which requires both parties to attempt to reach their objectives through the least harmful means possible).

[340] *Cf. id.* at 736 (articulating the importance of focusing on the degree of interference caused by the government action); *Bethlehem Evangelical*, 626 P.2d at 675 (highlighting that church construction is subject to "reasonable regulations").

[341] *See Grosz*, 721 F.2d at 736.

considered only the nature of the law in question and not its effect on the religious property owner.[342]

The last three factors in this balancing test determine the extent of a municipality's interest in preserving a historic religious property.[343] First, the congregation must present plans to the court that detail how it proposes to change the historic structure so the court can consider the visual impact of the proposed alteration.[344] The greater the change in the structure, the stronger the city's interest is in maintaining the property in its current state.[345] In addition, the court should consider the relationship between the renovated structure and the surrounding properties—any addition or renovation should be in keeping with the architectural scale and style of the neighborhood.[346]

In determining the building's architectural and historic significance, the court must consider who built it, its place in American architectural history, and the significant historic events that took place there.[347] For the most part, the preservation committee will have on record the consideration of these factors that took place during the original determination of whether the building should be designated a historic landmark.[348] Although the court should not find these determinations controlling upon its decision, it should find readily available information detailing the facts the committee relied on in initially concluding that the building was worth protecting.[349]

---

[342] *See supra* notes 272–294 and accompanying text.

[343] *See infra* notes 344–355 and accompanying text.

[344] *See, e.g.*, CHI., ILL., MUN. CODE § 2-120-740 (1987), *available at* http://www.cityofchicago.org/Landmarks/pdf/Landmarks_Ordinance.pdf (requiring a permit for any physical alteration of a historic property). Therefore, this information should all be on the record from the presentation the religious property owner originally made to the preservation commission. *See id.*

[345] *See* TYLER, *supra* note 23, at 22 (discussing the importance in preservation of maintaining the "historic integrity" of a building and keeping as much original "fabric or features" as possible).

[346] *See id.* at 139–40 (discussing the importance of contextualism, a design approach that encourages compatibility between new and older architecture by encouraging architects to respect the scale, design and materials of historic buildings).

[347] *Cf. id.* at 93–95 (citing U.S. Dep't of the Interior: Nat'l Register Criteria for Evaluation (2002), *at* http://www.cr.nps.gov/nr/publications/bulletins/nrb15 (articulating criteria for applying to the National Register, which is very influential in the designation criteria established by local preservation commissions)).

[348] *See supra* notes 42–44 and accompanying text.

[349] *See, e.g.*, CHI., ILL., MUN. CODE § 2-120-620. Allowing the court to consider the records will save time because it will prevent the necessity of additional findings of fact on the historic and architectural status of the historic religious property in question. *See id.* (highlighting the preservation commission's detailed consideration of historical significance).

The court should draw its own conclusions about what weight to assign to the building's historic significance when balancing against the alleged free exercise burden.[350]

Finally, the court also should consider the economic impact granting an exemption to the religious property owner will have on the community.[351] The property owner must show the court that its proposed change will have minimal adverse effect on property values and tourism in the surrounding area.[352] If the structure, however, draws a significant amount of tourism to the city, and the property owner is proposing to replace it with a parking lot, the religious burden will have to be significant for the court to award an exemption to the preservation ordinance.[353] If the structure brings very little revenue to the city, then a minor economic burden might be sufficient to support a court-granted exemption.[354] The latter factors in the balancing test, therefore, provide for an adequate consideration of the government's interest, something missing when strict scrutiny under *Sherbert* was the guiding legal framework and preservation rights were effectively ignored.[355]

## CONCLUSION

*Employment Division v. Smith*, the currently binding U.S. Supreme Court free exercise case, created an inadequate legal framework for judicial consideration of free exercise and historic preservation conflicts. Under *Smith*, courts insufficiently protect free exercise rights because they do not scrutinize preservation ordinances when they

---

[350] *See, e.g., id.* A court applying this balancing test would know that the preservation committee determined the building at issue had historic significance; however, as the preservation committee would not have considered the issue in balance with the owner's constitutional rights, its landmark-status determination would not keep the court from granting an exemption following such balancing. *See id.*

[351] *Cf. Bethlehem Evangelical*, 626 P.2d at 674–75 (taking into account the effect on the community of not requiring the Church to facilitate the free flow of traffic).

[352] *Cf. Grosz*, 721 F.2d at 735 (considering costs to the community in weighing the effects of not upholding the zoning ordinance). For a discussion about how historic preservation districts stabilize property values, see TYLER, *supra* note 23, at 65. Tyler also concludes that historic preservation increases tourism, which in turn brings economic benefits to a community. *Id.* at 171. Therefore, in determining the government's interest, it is important to consider the effects that changing the community landscape will have on both tourism and property values. *See id.* at 65, 171.

[353] *Cf. Grosz*, 721 F.2d at 735 (suggesting that concerns that a religious-based exemption would be too costly are legitimate reasons for the denial of such an exemption).

[354] *See id.* at 734–35.

[355] *See supra* notes 111–113 and accompanying text.

burden a congregation's free exercise of religion. If courts conclude that preservation laws trigger either of the *Smith* exceptions, however, they apply strict scrutiny and fail to protect historic preservation interests because they conclude that preservation ordinances never further a compelling government interest. Hence, under both interpretations of *Smith*, either free exercise rights or historic preservation interests are left without adequate judicial protection. Only through the application of a case by case balancing test, which considers the nature of the free exercise burden and the extent of the government's interest in preserving the historic religious structure, can courts adequately adjudicate the inevitable free exercise/historic preservation conflicts. A balancing test will provide courts with the freedom to analyze each party's situation and ground their decisions in important social, economic and religious considerations ignored by courts trapped within *Smith*'s rigid strictures.

CATHERINE MAXSON