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Historic Preservation: First Amendment Considerations

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HISTORIC PRESERVATION:
FIRST AMENDMENT CONSIDERATIONS

By Andie Ross

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A C K N O W L E D G E M E N T S

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I. Introduction

The landscape of preservation is undeniably changing. Religious historic sites with active congregations have gained access to federal funding for preservation projects. The legal framework for preserving religious buildings is evolving and in an attempt to define the new boundaries, I have endeavored to research the jurisprudence within which the current framework has been conceived. *Historic Preservation: First Amendment Considerations* exhaustively details significant cases that have defined the First Amendment Religion Clause morphology. The awareness of this legal framework is indispensable if preservationists intend to maintain the recent Save America's Treasures triumph.

The land use regulation and historic preservation nexus is tumultuous and inherently polemical in nature. This is evidenced by inconsistent case law that has evolved from the struggle for continuity while facing larger issues and inevitable change. The framework for the historic preservation of religious sites is deceptively sturdy, seemingly resolved but the concept belies the tortuous issues including resistance to landmarking by religious institutions, the constitutionality of federal grants for religious sites, the tax exempt status of religious organizations, religious land use zoning, and emergency assistance to disaster stricken religious sites. The interplay between the underlying issues is compounded when proponents for religious freedom and proponents for historic preservation further frustrate the delicate tug of war between the competing interests. The two forces of personal religious freedom and necessary government protection of historic properties collide in any such preservation battle and works to significantly complicate the issues. The rights of religious entities, however, are set apart in the U.S. Constitution. The Religion Clauses of the First Amendment of the United States Constitution were intended to prevent Congress from

making a law that effects the establishment of religion or hinders the free exercise thereof. The sense of balance the intended guidance was created to establish was never achieved. Currently the debates continue, and beneath them writhe zealous sentiments on both sides.

The historic preservation of religious sites is a consummate legal balancing act. The scales of justice have balanced the interests of the parties based on judicial interpretation of the First, Fifth, and Fourteenth Amendments. These interpretations dictate the rights of religious institutions to resist control as well as the need for local, state, and federal governments to uphold their responsibilities to the citizens. The analysis of Religion Clauses jurisprudence is significant to preservationists even if only a handful of the cases deal directly with preservation. The historical trends and the nuances on which cases either differentiate from previous precedent or create new precedent are imperative for preservationists to appreciate. This Thesis treads on soft ground, impressed with the wandering steps of inconsistent courts and a heterogeneous society still divided over the ever-changing role of religion in society. The ultimate goal was to understand the constitutionality of federal grants to religious properties by tracing the development of the First Amendment Religion Clauses from Supreme Court's early interpretations of them to today's interpretation which allows the funding for the historic preservation of active houses of worship.

The historic preservation of religious properties begins with an understanding of the legal basis for preservation. The need for a structured and systemized land use arose from an increasingly complicated and rapid expansion of growth. "As society shifted from a rural to an urban society, public land regulation became important especially to city governments trying to control industry, commerce, and housing within its boundaries."[1] This culminated

[1] Legal Information Institute, "Land Use Law: An Overview." Found at http://www.law.cornell.edu/topics/land_use.html.

in an explosion of sophisticated techniques of preserving the country's cultural capital. In 1966, Congress passed the National Historic Preservation Act (NHPA) of 1966.[2] In response to the growing concern about the future of historically and culturally significant buildings and landscapes, the objectives the NHPA were outlined as follows:

> Congress finds and declares that -- (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage; (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency; (4) the 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.…[3]

The NHPA subsequently established the National Register to promote protection of nominated historic and cultural resources.[4] The Register was not empowered to regulate the use and care of the nominated resources, but a listing on it is one of the prerequisites for tax benefits to those structures that comply with the Secretary of Interior Standards. Sections 106 and 110 of the NHPA requires federal departments to consider the possible effects of their actions on properties that are either on or are eligible for the National Register.

The NHPA stimulated the enactment of a multitude of city based historic preservation ordinances, beginning in the 1970's, and provided the necessary guidance for state enacted legislation. State level legislation was developed with a similar structure and intention to that of the national level, but also had the additional power of enacting local enabling laws. These enabling laws granted the necessary police power to regulate historic preservation through preservation ordinances. Review boards or commissions review any

[2] National Historic Preservation Act. 16 U.S.C. 461 et seq.
[3] Ibid., Sec. 1(b).

private actions under the preservation ordinance in either an advisory or a binding capacity. Though governments at all levels may control growth, the majority of issues and ultimate cases that pertain to historic preservation evolve from local concerns. "Three typical situations involving…private entities and the court system are: suits brought by one neighbor against another; suits brought by a public official against a neighboring landowner on behalf of the public; and suits involving individuals who share ownership of a particular parcel of land."[5] The constitutionality of historic preservation ordinances under the First Amendment becomes an issue when a plaintiff brings suit claiming that a government action infringed on his or her Free Exercise rights or violated the Establishment Clause.

The Courts have increasingly recognized the legitimacy of historic preservation. The battle to preserve structures of significance began with a few cases that served to legalize government authorization of historic preservation. In *Berman v. Parker*[6], the United States Supreme Court upheld the right of the Washington, D.C. Redevelopment Land Agency to condemn property and transfer it, intact. "The acquisition and the assembly of real property and the leasing or sale thereof for redevelopment pursuant to a project area redevelopment plan…is hereby declared to be a public use."[7] Justice Douglas, delivering the opinion of the Court, explained that:

> owing to technological and sociological changes, obsolete lay-out, and other factors, conditions existing in the District of Columbia with respect to substandard housing and blighted areas, including the use of buildings in alleys as dwellings for human habitation, are injurious to the public health, safety, morals, and welfare; and it is hereby declared to be the policy of the United States to protect and promote the welfare of the inhabitants of the seat of the Government by eliminating

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[4] Ibid., Sec.a(a)(1)(A)
[5] Id., "Land Use Law: An Overview."
[6] *Berman v. Parker*, 348 U.S. 26 (1954).
[7] Ibid.

> all such injurious conditions by employing all means necessary and appropriate for the purpose.[8]

This ruling gave great impetus to preservationists who believed that aesthetic reasons justified their efforts to preserve. The District Court addressed the issue of using the power of eminent domain to acquire a non-blighted building and transferring it to another. Slum razing was distinct from taking "a man's property merely to develop a better balanced, more attractive community."[9] This distinction saved the Act by "construing it to mean that the Agency could condemn property only for the reasonable necessities of slum clearance and prevention, its concept of 'slum' being the existence of conditions 'injurious to the public health, safety, morals and welfare.'"[10] Public welfare was interpreted broadly:

> We do not sit to determine whether a particular housing project is or is not desirable. 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.[11]

This broad interpretation including physical, aesthetic, and economic values allowed for decisions based on health as well as beauty. "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."[12]

The significance of *Berman* lies in legitimizing the field of preservation by increasing the government's reach to regulate based on preservation interests alone. Similarly, the other major case that addressed historic preservation interests was *Penn Central Transportation Co. v.*

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[8] Ibid.
[9] Ibid.
[10] Ibid. 117 F. Supp. 705, 724-725.
[11] Ibid.
[12] Ibid.

City of New York[13] which sustained the constitutionality of the restrictions that designated landmark buildings. In 1978, the owners of Grand Central Terminal were denied permission to construct a fifty-story office tower because the New York City Landmarks Preservation Committee had designated it as a landmark. The owners filed suit claiming that the denial constituted a taking without just compensation. Justice Brennan explained that the recent surge in historic preservation was spurred by the rush of blanket renewal programs, especially in the inner cities, that were inconsiderate of historic structures. He explained that "large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways."[14] Local governments enacted ordinances because of their increasing belief that historic structures enhanced the quality of life. Brennan explained that "structures with special historic, cultural, or architectural significance enhance the quality of life for all."[15] The Court concluded that the New York City Landmarks Preservation Committee's intention was to promote the general welfare and that the landmarks law, as applied to the Grand Central Terminal, was not a taking. The decision was monumental for the field of preservation. It legitimized the efforts of preservationists and confirmed that police powers exercised in furtherance of historic preservation objectives benefited the general welfare.

Advocates of historic landmark and historic district ordinances face a much greater challenge and more uncertainty when the building to be preserved is a religious edifice. Freedom to exercise one's religion is fundamental and the built in conflict between the two religion clauses of the First Amendment raises difficult complexities based on countervailing

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[13] *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104 (1978).
[14] Ibid.
[15] Ibid.

considerations. Recently enacted legislation has tried to address the plight of religious organizations. For example, the Religious Land Use Institutionalized Persons Act was enacted in 2000 to provide greater protection of religious institutions from unfair treatment. The free exercise rights of these groups were endorsed by providing an exemption for religious land uses from otherwise constitutional zoning and landmarking legislation.

The solution to the mêlée between the Clauses has been a continuous tinkering that operates to balance the competing goals. This balancing act began in the 18th century but was only put to the test during the 19th and 20th centuries. The sixteen words of the First Amendment Religion Clauses forbid Congress from making a law respecting an establishment or prohibiting the free exercise of religion. As ratified in 1791, the First Amendment to the United States Constitution, states that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or of the right to peaceably assemble, and to petition the Government for a redress of grievances.[16]

The Framers of the Constitution applied the First Amendment to Congress and the federal government. This Clause was further strengthened when the Supreme Court incorporated it in the Due Process Clauses of the Fourteenth Amendment post-Civil War which ensured that the Clause was applicable to the States. The Fourteenth Amendment to the United States Constitution, as ratified in 1868, states that:

> no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[17]

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[16] United States Constitution. Amendment I. Please refer to Appendix B.
[17] United States Constitution, Amendment XIV. Please refer to Appendix B.

The interpretation of the Amendments has changed since their passage. The individual cases that interpret and apply these Amendments reveal a slow but deliberate trend from the endorsement of Separationism, or complete resistance of landmarking and grants, to one of Neutralism, or the allowance of grants and regulation.

According to Ira Lupu and Robert Tuttle, Professors of Law at the George Washington University Law School, "true Separationists oppose both the landmarking of worship sites and the payment of grants to owners of landmarked worship sites. Committed Neutralists, however, favor both the regulation and the support of landmarked worship sites precisely to the same extent and on the same terms that other structures are regulated and supported."[18] Lupu and Tuttle advocate Religion Clause symmetry e.g., what the government may regulate, it may also subsidize and specifically advocate "that the religion-specific line between permissible and impermissible subsidy (and regulation) should be drawn between the exteriors and interiors of houses of worship."[19] The persistent growth of the historic preservation field as well as the increasingly vociferous nature of religious groups that enter the public policy realm has lent significant support to Neutrality.

The trend towards Neutralism is evident in the most recent interpretation of the Constitution which allows for the preservation of religious sites with active congregations. The change in policy that enabled the Save America's Treasures grants to be applied to active religious historic properties can be traced to the internal deliberations of the Office of Legal Counsel (OLC). In the past, the OLC has maintained that grants to active houses of worship were unconstitutional. A memorandum written in 1995 by Walter Dellinger,

[18] Lupu, Ira C. and Tuttle, Robert W. "Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism." Boston College Law Review, Vol. 43, No. 5, September 2002. p. 1140.
[19] Ibid. p. 1139.

Assistant Attorney General, entitled the "Constitutionality of Awarding Historic Preservation Grants to Religious Properties"[20] was crucial to the Department's stance.

Dellinger's memorandum referred to several Supreme Court interpretations of the Constitution and was subsequently implemented as the Department's official guideline. He began by discussing *Tilton v. Richardson*[21] which approved federal school construction and repair grants even though the school in question was religiously affiliated. The case established that religious groups were not to be excluded automatically because of their religious nature. It was clarified, however, that the funds may be granted but may not go directly to any religious activities. The grants per se were not found to advance religion but the conveyance of the building to the institution after 20 years was and thus in part invalidated. The Dellinger memorandum also referred to *Committee for Public Education v. Nyquist*[22] that made essentially the same point. The Court invalidated certain maintenance and repair grants to parochial schools because it was determined that such unchecked grants may advance religion. The same logic was applied to *Hunt v. McNair*[23] in which grants to pervasively sectarian institutions were considered unconstitutional even if such grants were permissible in situations involving secular institutions. Dellinger commented that "nevertheless, we have no doubt that you are correct in assuming that most if not all active houses of worship would fall within this category. Indeed, the notion that religion plays something less than a vital and pervasive role in an active church's mission might appear inconsistent with a proper respect for religious institutions as well as with common sense."[24] Dellinger explained that the issue with preservation grants to pervasively sectarian

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[20] Walter Dellinger, "Constitutionality of Awarding Historic Preservation Grants to Religious Properties." October 31, 1995. Found at: http://www.usdoj.gov/olc/doi.24.htm.
[21] *Tilton v. Richardson,* 403 U.S. 672 (1971).
[22] *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973).
[23] *Hunt v. McNair,* 413 U.S. 734 (1973).

institutions was the ineluctable sectarian nature of these institutions. "As the Court has explained, the reason for the prohibition on direct monetary grants to pervasively sectarian institutions is the unacceptable risk that where secular and religious functions are 'inextricably intertwined,' government aid, though designated for a secular purpose, will in fact advance the institution's religious mission."[25] The extrication of the building from the religion it houses was problematical for Dellinger. What was ordinarily considered secular such as roof repair or window renovation was not considered secular when applied to a church. He stated that "though a structural element like a roof can be characterized as 'secular' rather than 'sectarian' in most contexts, the distinction cannot be maintained in any meaningful sense when the roof is a component part of an active church."[26] The conclusion was that the inability to separate the religious and secular elements of an active house of worship effectively denied grants to the historic preservation of such structures.

Dellinger also referred to *First Covenant Church of Seattle v. Seattle*[27] which endorsed the importance of free exercise over any such historic preservation rights. Dellinger revealed that the reasoning behind exempting religious houses of worship was persuasive and that the Free Exercise Clause limited the government in landmarking religious buildings. The separationist sentiment underlying the position of the OLC stance was further endorsed by the White House. "Both the [Ronald] Reagan and the [George H. W.] Bush Administrations took the position that direct financial support of active churches would be inappropriate in light of Establishment Clause concerns."[28] Dellinger concluded that a reversal of official protocol was not imminent. "We think, however, that a court applying current precedent is

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[24] Id., Dellinger Memorandum (1995).
[25] Ibid.
[26] Ibid.
[27] First Covenant Church of Seattle v. City of Seattle, 840 P.2d 174 (Wash. 1992).
[28] Id., Dellinger Memorandum (1995).

most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause."[29]

As of 1995, however, federal historic preservation grants were given to properties listed on the National Register. They were funded by the federal government and awarded by the states. Since the 1980's however, the influential separationist attitude has subsided and instead a more neutralist approach has been endorsed by the Supreme Court. The Dellinger Memorandum was antiquated even in 1995 when it was written. The qualifications necessary for National Register listing included that the property must prove "significance in American history, architecture, archeology, engineering, and culture," including "integrity of location, design, setting, materials, workmanship, feeling, and association."[30] Religious properties can qualify for National Register status if it "deriv[ed] primary significance from architectural or artistic distinction or historical importance,"[31] with the states being the final arbiter of worthiness.

In 1992, Congress amended the NHPA to authorize preservation grants to religious properties. The amended Act stated that:

> Grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant. Nothing in this paragraph shall be construed to authorize the use of any funds made available under this section for the acquisition of any property referred to in the preceding sentence.[32]

After a series of internal inquiries, on April 30, 2002, the OLC also amended its position and released its official opinion regarding the status of the restoration of historic religious

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[29] Ibid.
[30] National Register of Historic Places, 36 C.F.R. § 60.4 (1995).
[31] Ibid.

properties. The modified policy allowed for the federally funded preservation of religious properties.

The quintessential example of the application of such a grant was the Old North Church in Boston which is currently being restored by a grant from Save America's Treasures. Though the religious site is actively used by a congregation of 150, it is also a museum that opens its doors to 500,000 annual visitors. The federal grant of $317,000 to the foundation created by the congregation was intended for repair and renovation. The previous issue of dissecting the secular from the religious functions and the question of whether the aid intended for the secular function would advance the religious function were not advanced.

Save America's Treasures was established by the White House Millennium Council Executive Order 13072 on February 3, 1998. In part, the Order was established to:

> Make recommendations to the Secretary of the Interior regarding the provision of assistance from funds made available for Save America's Treasures in the Historic Preservation Fund to public and private entities that are protecting America's threatened cultural treasures. These treasures include significant documents, works of art, maps, journals, and historic structures that document and illuminate the history and culture of the United States….[33]

In total, President Clinton earmarked $95 million in federal grants from 1999-2001 and President Bush has proposed $30 million each year from 2002-2004. The grants, which are managed by the National Park Service, must be matched dollar-for-dollar with non-federal funding. "To date, over $242 million in public-private funds has been raised to save our nation's treasures. Together, the public and private commitments and the greater public awareness of the nation's needs will result in the largest increase in preservation

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[32] Id., 16 U.S.C. § 470a(e)(3) (2002).

activity in over thirty years."[34] The eligibility for a grant is still limited to 501(c)(3) nonprofit organizations including religious institutions, and local, state and tribal government agencies but has now been expanded to include religious properties with active congregations. "Historic properties and collections associated with active religious organizations are eligible to apply for grants. They must meet the Selection Criteria and Review Criteria, including national significance."[35] The grants may be used for preservation and conservation:

> Include[ing], but are not limited to, historic structure reports and conservation plans, structural engineering assessments, architectural planning, paint analysis, material conservation analysis, archeological investigation, ongoing maintenance plans, and site management plans. Landscape planning is eligible either as part of a historic structure report or as a separate conservation plan. Planning grants may be used for temporary emergency stabilization efforts implemented while the planning process is under way.[36]

The grants for bricks and mortar construction, historic resource surveys, as well as expenses pertaining to preparing nominations are expressly prohibited.

This thesis continues by first examining the Free Exercise Clause jurisprudence and is followed by the Establishment Clause jurisprudence. The ability to grant federal funds to religious historic properties with active congregations can only be truly understood in context as well as in magnitude by a careful analysis of the relevant judicial decisions.

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[33] White House Millennium Council Executive Order 13072, February 3, 1998. Found at: http://www.saveamericastreasures.org/about.htm.
[34] "Save America's Treasures." Found at http://www.saveamericastreasures.org/about.htm.
[35] Ibid.
[36] Ibid.

II. Free Exercise – Early Case History

The Religion Clauses of the First Amendment were intended to be mutually sustaining. Over time, however, the interpretation and the subsequently delineated boundaries have worked to enforce and perpetuate tension between the Clauses. This tension is described by Norman Redlich, author of *Understanding Constitutional Law*. He states:

> In our modern welfare state, stringent separation of government and religion may at times deprive religion of an otherwise generally available benefit; thus, free exercise is inhibited. Conversely, the Supreme Court has recently held that free exemptions of religious practitioners from otherwise generally applicable laws favor religion in a manner inconsistent with strict separation.[37]

These early cases are generally described as devoid of any unifying principles but are nevertheless significant. As history reveals, two sets of tests were established to determine whether a law violated either Clause. The Supreme Court first tested the Free Exercise Clause in 1878, over 100 years after the ratification of the Bill of Rights. "While 'neutrality' is still a central principle of both clauses, we have no single standard for determining what a religiously neutral act is. Instead, we must examine the neutrality or permissibility of a law in terms of the challenge to it."[38]

The *Reynolds v. United States*[39] case involved George Reynolds, a Mormon polygamist from Utah who did not agree with a federal anti-polygamy law and claimed that polygamy was part of his right to exercise his religion. He reasoned that his right was protected by the Free Exercise Clause which states that Congress cannot make any laws that prohibit the free exercise of religion. Reynolds was charged with bigamy after trying to marry Amelia Jane

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[37] Norman Redlich, et al. *Understanding Constitutional Law*. Matthew Bender & Company, Inc. San Francisco, CA. 1999. p. 505.
[38] John E. Nowak and Ronald D. Rotunda. *Principles of Constitutional Law*. 2004. p. 741.
[39] *Reynolds v. United States*, 98 U.S. 145 (1878).

Schofield while already being married to Mary Ann Tuddenham – specifically, in violation of section 5352 of the Revised Statutes law stating that:

> Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than $500, and by imprisonment for a term of not more than five years.[40]

The District Court sentenced Reynolds to two years hard labor and fined him $500. Chief Justice Waite examined the issue and concluded that the pertinent question is "whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land."[41] Waite concluded that "laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices."[42] His reasoning was justified by expounding on other exemptions that would be necessitated if polygamy was permitted.

> Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?[43]

Waite explained that if such exemptions were made, the laws created would lose their effectiveness. The laws created would be undermined by religious belief and relegated to a secondary position engendering a nation whose citizens each had their own set of laws. Waite explained that this would render "the professed doctrines of religious belief superior

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[40] Ibid.
[41] Ibid.
[42] Ibid.
[43] Ibid.

to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."[44]

Justice Waite thus set the precedent that government can step in and modify the behaviors of citizens even when they claim their actions are part of their religion. He stated "it matters not that his belief was a part of his professed religion: it was still belief and belief only."[45] The preservation of this authority is essential for the government to maintain its power and survive as more than a mere façade. Neutral, generally applicable laws, without specific implications for impact on religious beliefs became the standard. The lower court's decisions were upheld and the judgment was affirmed.

Exemptions from the law based on religious beliefs were tested again in 1963 with the *Sherbert v. Verner*[46] case. The appellant, Adell Sherbert, a member of the Seventh-day Adventist Church, was fired from a textile mill where she had worked for 30 years because of a new policy that required employees to work on Saturdays. This new policy conflicted with her religious beliefs, which required her to specifically not work on Saturdays, her Sabbath day. While unemployed, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act. The Employment Security Commission denied her benefits because they determined that she qualified for work, as opposed to being disabled, and thus did not qualify for benefits. Both the lower court and the South Carolina Supreme Court rejected *Sherbert's* claim that the South Carolina statute burdened her right to free exercise.

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[44] Ibid.
[45] Ibid.
[46] *Sherbert v. Verner*, 374 U.S. 398 (1963).

The 7-to-2 Supreme Court ruling reversed the decisions reached in the lower courts. The Supreme Court viewed the previous rulings as particularly harsh, in effect forcing Sherbert to choose between her job and religion – a mutually exclusive choice. Justice William Brennan equated this choice to a governmental fine imposed for Saturday worship. He explained the ruling:

> The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.[47]

Brennan further explained that the actions of South Carolina were discriminatory. "The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects."[48] The ruling established a threshold trigger to justify any encroachment on religious liberty: a compelling state interest must exist to justify an infringement of First Amendment rights. Brennan explained:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." No such abuse or danger has been advanced in the present case.[49]

If a compelling state interest was proven, the infringement on the free exercise of religion would be justified. No such compelling state interest was established in *Sherbert* and an exemption was made. The South Carolina Supreme Court was reversed and the case remanded.

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[47] Ibid.
[48] Ibid.
[49] Ibid.

Sherbert v. Verner set the precedent for exemptions. The way was cleared for religious believers to have reasons, justified by their religion, for them to be accommodated from otherwise generally applicable laws. It is important to note that the Court was greatly influenced by the civil rights litigation of the 1950s and 1960s. "It had become clear to Brennan that the Court must give a 'heightened scrutiny' to cases in which fundamental rights were at stake and require the state to demonstrate that the law in question served only the interests that were of paramount interest."[50] The substantiation of any encroachment on religious liberty via the establishment of a compelling state interest is a recurring element in future cases.

The 1968 *Westchester Reform Temple v. Frederick W. Brown*[51] case was a product of the exemption-based case law. This case clearly shows the power of religious institutions to justify, based on their right of Free Exercise, their unique societal position. Further, this case shows how this power is wielded to effectuate different treatment from laws that would, in other cases, be applicable to all other citizens.

Figure 1

Westchester Reform Temple in Scarsdale, New York.

[50] Clare Mullally, "Religious Liberty in Public Life." February 15, 2004. Found at: www.firstamendmentcenter.org/rel_liberty/free_exercise/index.aspx.
[51] *Westchester Reform Temple v. Frederick W. Brown et al, Constituting the Panning Commission of the Village of Scarsdale*, 239 N.E.2d 891 (N.Y. 1968).

The case involved the Westchester Reform Temple, a single-story synagogue, located on a 6.7 acre lot on a heavily traveled residential road in Scarsdale, New York. The Temple initiated measures to expand its facilities to meet the increasing needs of its Congregation. The Planning Commission rejected their proposals for expansion due to the unmet setback requirements. The plan called for a 62-foot setback on one side and a 29-foot side-yard on the other which was inconsistent with the required 130-foot and 40-foot requirements. The Temple claimed that the arbitrary setbacks violated their First Amendment rights.

The Planning Commission predicated its rejection of the expansion on the established zoning laws. The Temple, however, based their position on the Supreme Court's perception of the law as well as another New York case, *Matter of Diocese of Rochester v. Planning Board.*[52] In that case, clear rules were articulated about the status of religious entities. "Churches and schools occupy a different status from mere commercial enterprises and, when the church enters the picture, different considerations apply."[53] This distinctive status clearly resonates with existing Supreme Court developments. These precedents allowed the court in *Westchester Reform Temple v. Brown*[54] to analyze the case based on the peculiar status of religious institutions.

Westchester Reform Temple's status as a religious entity excluded its requirement to comply with generally neutral laws which were not unconstitutional per se. Judge Keating explains that an exception was made to established police powers:

> Religious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers, but the power of regulation has not been altogether obliterated.[55]

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[52] Ibid. Quote from *Matter of Diocese of Rochester v. Planning Board.*, 1 N Y 2d 508 (1956).
[53] Ibid.
[54] Ibid.
[55] Ibid.

Though Keating clarifies that the government still has some powers to regulate religious entities, he makes it clear that in this case the government does not. The opinion justifies the zoning procedure but concludes that the free exercise issue outweighs the benefits of zoning. Keating states:

> We have not said that considerations of the surrounding area and potential traffic hazards are unrelated to the public health, safety or welfare when religious structures are involved. We have simply said that they are outweighed by the constitutional prohibition against the abridgement of the free exercise of religion and by the public benefit and welfare which is itself an attribute of religious worship in a community.[56]

Though the Planning Commission's goal is to implement reasonable regulation, the power religious entities posses to evade generally applicable rules outweigh the Commission's objectives. The Court clearly follows this logic. Keating states that "where an irreconcilable conflict exists between the right to erect a religious structure and the potential hazards of traffic or diminution in value, the latter must yield to the former."[57] The court sided with the Temple and followed the established Supreme Court's direction. The First Amendment was the clear winner in this heavy-weight challenge between police power and First Amendment rights. Unmistakably, religious entities stand in a unique realm.

The 6-to-1 ruling in the 1972 *Wisconsin v. Yoder*[58] Supreme Court case involved two Amish fathers, Jonas Yoder and Wallace Miller, who refused to send their children to school after the completion of the eighth grade. These fathers, members of the Old Order Amish religion and the Conservative Amish Mennonite Church, had violated Wisconsin's compulsory school-attendance law which stated that children must attend school until the age of sixteen. The respondents were "charged, tried, and convicted of violating the

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[56] Ibid.
[57] Ibid.
[58] *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

compulsory-attendance law in Green Country Court and were fined the sum of $5 each."[59] Yoder and Miller claimed that the compulsory-attendance law violated their free exercise rights as stated in the Free Exercise Clause.

Chief Justice Burger explained that the compulsory-attendance law, though created neutral and underscored by a strong compelling state interest, effectively burdened Yoder. He states:

> However strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests. A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion.[60]

Burger advised that decisions should not be absolute, but balanced, depending on case specific circumstances. Though a facially neutral law such as compulsory school attendance has as its basis a compelling state interest, it may, without intent, burden the free exercise of religion. The impact of this compelling state interest objective was too harsh. Yoder's burden "is not only severe, but inescapable, for the Wisconsin law affirmatively compels them, under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs."[61] Thus, the Supreme Court again granted an exemption. The rights of Free Exercise, free of any substantial burden from a government action, were placed above a government's compelling interest. Burger explained that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[62]

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[59] Ibid.
[60] Ibid.
[61] Ibid.
[62] Ibid.

The facially neutral compelling state interest of uniform education was outweighed by First Amendment rights.

III. The Sherbert - Yoder Era

The free exercise of religion has proven to be a heavy-weight rival to government interests. The *Sherbert* and *Yoder* cases have safeguarded the First Amendment rights of people and organizations. Repeatedly, their precedents have outweighed government interests in the name of these rights and have paved the way for religious exemptions. The *Sherbert-Yoder* era produced mixed results, but consistently upheld the right of Free Exercise.

The first exception to the trend of upholding the rights of religion is the 1980 *Society for Ethical Culture in the City of New York v. Spatt*[63] case. In this case, the Court of Appeals of New York found that the designation of the Society for Ethical Culture's property, located on an entire Central Park West block at Two West 64th Street, New York, was not unconstitutional. The Society deemed the designation "a confiscation without due compensation and an interference with the free exercise of the Society's religious purpose."[64] Specifically, the Society believed "that it is improper to restrict its ability to develop the property to permit rental to nonreligious tenants."[65]

Figure 2

Exterior view of Society for Ethical Culture in New York.

[63] *Society for Ethical Culture in the City of New York v. Beverly M. Spatt et al., Constituting the Landmarks Preservation Commission,* 415 N.E.2d 922 (N.Y. 1980).
[64] Ibid.
[65] Ibid.

Founded in 1876 "to unite in one group, in one bond, those who had religious feeling and those who simply cared for moral betterment,"[66] the Society is known for its religious, educational and charitable endeavors. The Society is located in two five-story buildings on an approximately 20,000 square foot parcel. The suit involves only the historically designated Meeting House, built in 1910, not the Ethical Culture School, built in 1904. "Only the Meeting House has received landmark designation. It occupies approximately 40% of the Central Park West property, the value of which has been estimated at about $4,000,000."[67]

Figure 3

View from Society for Ethical Culture in New York.

New York City's Landmark Preservation Commission designated the Meeting House in 1974 for its exquisite art nouveau façade. The building was assessed as the:

> best piece of Art Nouveau architecture yet designed in this country, and compares well with the magnificent German department store buildings whose excellence is so great as to almost promise a future for this style.[68]

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[66] *Society for Ethical Culture in the City of New York v. Beverly M. Spatt et al., Constituting the Landmarks Preservation Commission* Supreme Court of New York, Appellate Division 416 N.Y.S.2d 246 (N.Y. 1979).
[67] Ibid.
[68] Ibid. From Determination of Landmarks Preservation Commission, July 23, 1974, No. 5, LP-0831.

Notwithstanding the contentious designation, the Meeting House was "a tangible symbol of the Society's permanent social contribution and a rich architectural element of the fabric of our City." [69] Although the trial court agreed with the Society regarding insufficient historical or architectural significance and found the designation unconstitutional, the Appellate Division reversed on the grounds that landmark designation is a permissible land use regulation. Justice Wachtler explained:

> we have recognized that despite this particularized burden on the owner, landmark designations, if not unreasonable, are not an undue imposition under proper circumstances.[70]

Unlike previous cases involving historic preservation, the legitimacy of designation was established. Equally shocking, Wachtler explained that the Society's role as a religious institution did not excuse it from following reasonable regulation, especially since the goals of the Society were secular in nature. He stated:

> although petitioner is entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts purely in secular matters."[71]

Furthermore, the Society's status as a charitable organization changes the equation of landmark designation restriction. Wachtler states:

> with this standard now set, and the emphasis properly placed on how the restriction effects the charitable activities of the organization, it is clear that on this record the landmark designation withstands constitutional scrutiny.[72]

This conclusion indicates the Court looked beyond the religious status of the Society and delved into the specific results of the designation and found that the designation did not impede its ability to perform charitable work.

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[69] Ibid.
[70] Ibid. *Society for Ethical Culture v. Spatt* 415 N.E.2d 922 (N.Y. 1980).
[71] Ibid.
[72] Ibid.

During the 1960's the Society decided to develop the property to take advantage of its lucrative location. The plan called for:

> the demolition of the school and Meeting House, high-rise development of the entire site, and lease of the property to a developer for 99 years at an annual ground rent of $ 175,000. According to this proposal, a high-rise, 800 unit, 240,000 square-foot luxury apartment building was to be built, in which the society would occupy 27,500 square feet on the lower floors.[73]

Ultimately, this plan was expected to generate a $ 2,000,000 mortgage loan. The Society justified its plans to demolish the building and develop the land by claiming that the increased revenue would contribute to furthering the goals of the charitable organization. The sorting of the facts led the court to pinpoint that "it appears that market conditions, and not the designation, prevented the society from taking remedial action to cure the buildings' shortcomings."[74] The Society insisted that both buildings be torn down to increase revenue and further their charitable work while eliminating the option of developing only the Ethical Culture School parcel of 60%. The plummet of the New York City real estate markets rendered the project worthless.

The court acknowledged the unique stance of religious institutions but looked deeper into the motives of the Society to conclude that the First Amendment rights were not violated. The Appellate Court decision was affirmed. Though the Court rejected the argument that a decline in market value impinged on the Free Exercise rights of a religious organization, the Court declined to further the Society's protection when it steps into the realm of purely secular matters. Though the *Society for Ethical Culture v. Spatt* case is not a distinctive victory for historic preservation in terms of the implementation of preservation values based on their societal merit, the case levels the field and furthers the religious property landmarking litigation.

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[73] Ibid.

The only consistent theme in religious property landmarking litigation is the inconsistent and sometimes contradictory rulings of the Courts. The next case, involving the Bethlehem Evangelical Lutheran Church, a Colorado non-profit Corporation that wanted to expand its facilities with the construction of a new gymnasium to meet the increasing needs of the community demonstrates such a reversal. The City of Lakewood Department of Community Services allowed the new construction, provided that certain conditions were met. The new construction would be approved if the Church would agree to supply a public right of way in addition to certain street improvements such as new curbs, gutters, and sidewalks.

Figure 4

Bethlehem Evangelical Lutheran Church
in Lakewood, Colorado.

The 1981 *Bethlehem Evangelical Lutheran Church v. City of Lakewood*[75] case determined that the conditions imposed on the Church were not an unconstitutional use of police power. Justice Lee, delivering the opinion, asserted that though the actual construction of the religious site may be regulated to ensure the public health, safety, and general welfare,

[74] Ibid.

"the law provides preferential treatment for churches"[76] This 'preferential treatment' was not the exemption of religious entities from police powers, but, as Lee explains, religious entities are subject to the police powers as long as the state justifies its imposition. This conditional relationship must be proved. Lee states that "this court has previously held that churches are subject to the police power when the state can show a substantial interest."[77] After the state justifies its substantial interest, the state must show that an alternative does not exist. Lee quoted from the 1973 case Pillar of Fire v. DURA[78] and DURA v. Pillar of Fire:[79]

> We 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 if the state is to be constitutionally allowed to take the birthplace of the Pillar of Fire Church.[80]

The Court decided that though the conditional requirement of public improvements in conjunction with the dedication of public lands was not unconstitutional in return for a permit, a compelling interest was not justified. The privileged treatment approved for religious entities is unmistakable. This restricted position, unassailable by neutral and generally applicable land use regulation continues to be a common theme in religious organizations' fight against Historic Preservation.

The contentious *City of Sumner v. First Baptist Church*[81] case of 1982 ended with a split decision, again representing the uneasy position of the Courts. Justice Floyd Hicks, writing for the concurring Justices intimated the heated judicial battle. He stated: "as is apparent from the extended period we have held the matter under consideration, the court has not

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[75] *Bethlehem Evangelical Lutheran Church v. City of Lakewood* 626 P.2d 668 (1981).
[76] Ibid.
[77] Ibid.
[78] Ibid., Referencing Pillar of Fire v. DURA 181 Colo. 411, 509 P.2d 1250 (1973).
[79] Ibid., Referencing DURA v. Pillar of Fire 191 Colo. 238, 552 P.2d 23 (1976).
[80] Ibid., Quoting from DURA v. Pillar of Fire 191 Colo. 238, 552 P.2d 23 (1976).
[81] *City of Sumner v. First Baptist Church*, 639 P. 2d 1358 (Wash. 1982).

been of one mind on the issues concerned."[82] The city tried to enjoin the First Baptist church-operated school after certain violations of the building and zoning regulations were identified. The Church claimed that the building code and zoning regulations violated its First Amendment right of religious freedom. This case is indicative of police power and religious entity skirmishes. Appallingly, the court sided with the rights of religious entities. The nature of the dispute places the health and safety of the public at risk for the sake of maintenance of the religious entity status.

The First Baptist Church created the Washington Christian Academy in 1978 to advance the education of its youngest members. The church-operated school, conducted in the basement of the church was cited for noncompliance with the building code safety standards, as applied to educational edifices. As dissenting Judge Dolliver explained, the evidence of multiple violations is overwhelming. The building is inadequate as a school for several reasons including:

> inadequate floor space, inadequate ventilation, no approved fire alarm system, no fire extinguishers, no fire detectors, no sprinkler system, no fire-retardant walls and ceilings, no lighted exit signs, no exit signs at all, stairs that are too narrow, doors that do not open out, and stairs of inconsistent rise and run. In addition to these violations which constitute a safety hazard, there are health code violations such as inadequate restroom facilities.[83]

Based on these violations, the trial court shut the school down until compliance could be confirmed. The trial court made explicit that the religious uses were not burdened. "The building's use as a church was not affected."[84] The Church complained that the "uncompromising enforcement…would deny to church members the right to guide the education of their children by sending them to their church-operated school, a fundamental

[82] Ibid.
[83] Ibid.

and constitutionally protected right."[85] The Church believed that even though the impact was not directly on religious practices, an impact nonetheless existed.

Justice Hicks explained that "where, as here, two legitimate and substantial interests collide, one may ultimately have to give way to the other. In such a situation, the court's function is to balance the interests of the parties and, if an accommodation cannot be effected, determine which interest must yield."[86] Hicks believed that the trial courts ignored this principle and did not balance the interests. He also believed that the trial court did not "determine that uncompromising enforcement of the building code and zoning ordinance constituted a governmental interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."[87] In addition to not balancing the interests of the parties and not determining a sufficient government interest, the trail court also did not consider other options to determine which accommodated the religious entity most. "Finally, the trial court did not consider whether the means chosen to enforce the governmental interest were necessary and the least restrictive available to achieve the ends sought."[88]

The religious status of one party changed the balance requirement. Hicks states "this case concerns more than the mere routine application of a building code and a zoning ordinance."[89] The solution, as purported by the Court, was to infuse the issue with flexibility. Hicks stated:

> There should be some play in the joints of both the zoning ordinance and the building code. An effort to accommodate the religious freedom of appellants while at the same time giving effect to the legitimate concerns of

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[84] Ibid.
[85] Ibid.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

> the City as expressed in its building code and zoning ordinance would seem to be in order.[90]

The Court dissolved the injunction and sustained the status of religious entities. As will soon be evident, the Washington State religious land use jurisprudence differs significantly from the U.S. Supreme Court Free Exercise Clause precedence. These issues have unavoidably "touched off a holy war." [91]

The 1986 *Church of St. Paul and St. Andrew v. Barwick*[92] case once more pitted the interests of historic preservation against the interests of a religious institution. The Church of St. Paul and St. Andrew is located at West End Avenue and 86th Street in New York City. The Church occupies a 150-foot by 125-foot parcel and includes a church, parish house and rectory. New York City Landmarks Preservation Commission designated the church and parish house as a landmark in 1982. It is a "brilliant exemplar of the eclecticism that spread through American architecture in the late 19th century representing a fusion of Early Christian, German Romanesque and Italian Renaissance styles." [93] Just before the designation, however, the Church determined that its financial situation revealed a bleak future. The meager financial resources were well documented in affidavits and described by dissenting Judge Meyer:

> In 1980, it was estimated that exterior repairs in the amount of $ 250,000 were required. When this action was commenced in 1982, that estimate had risen to $350,000. Other than the buildings and land and a small endowment of approximately $ 35,000, there are few assets. The church operates with annual pledge income and donations from its membership together with other contributions, which totaled approximately $ 60,000 in 1982 and barely met the most necessary of salary and maintenance expenses.[94]

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[90] Ibid.
[91] Beth Prieve, "Religious Land Use Jurisprudence: The Negative Ramifications for Religious Activities in Washington After *Open Door Baptist Church v. Clark County"*
Found at http://www.law.seattleu.edu/lawrev/vol26/262/prieve.html.
[92] *Church of St. Paul and St. Andrew v. Barwick,* 496 N.E.2d 183 (N.Y. 1986).
[93] Ibid.
[94] Ibid.

The Church concluded that its best option was to renovate the Church and develop the land.

> Because of the long-continued disrepair of the church, the expense of maintaining and heating it, and its meager financial resources, plaintiff had developed a rebuilding program which included plans for the complete renovation of the church and the construction of a commercial high-rise condominium on part of the property.[95]

The Church claimed that as applied, the Landmarks law was unconstitutional.

Justice Hancock delivering the opinion of the Court of Appeals stated that in New York, noncompliance with landmark designation is taken very seriously. "Violation of the maintenance and repair requirements subjects an owner to a fine of not more than $250 and not less than $ 25, or to imprisonment for not more than 30 days, or both."[96] Hancock explained that the Church plan to develop the land was intended to "provide a new building with appropriate facilities and income for plaintiff's continuing religious and charitable program, thereby assuring its survival."[97] Facing criminal sanctions however, the Church describes that it cannot afford to fulfill the requirements and obligations of the designation and Landmarks Law. The Church argues that the sheer size of the structure (it was built to seat a congregation of 1,400, but currently only caters to 250 members) renders it unmanageable.

The Church believed that the Landmarks Law amounted to a taking as well as burdened its First Amendment free exercise rights. Specifically, the Church claims that the Landmarks Law interferes with its charitable duties. "The statute, as applied, physically or financially prevents or seriously interferes with the carrying out of the charitable purpose."[98] The case, however, was deemed not ripe for judicial interpretation. The Court of Appeals

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[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] Ibid.

agreed with the Supreme Court that the case was not ripe. "The issue presented -- whether the alleged interference with plaintiff's ability to carry out its charitable purpose amounts to a constitutional injury -- is not ripe for judicial determination."[99] The Court explained the concept of ripeness as:

> administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether harm from it might be prevented or cured by administrative means available to the plaintiff.[100]

The Court found that the Church did not apply for a Certificate of Appropriateness[101] and thus never received approval or denial for its plans. The failure to get such Certificate brought the proceedings to a halt. The Court did however acknowledge the status of religious organizations but did not see the need to alter the application of the ripeness doctrine because of the religious status of the Church of St. Paul and St. Andrew. "Unless a special exception to the ripeness doctrine is to be created, plaintiff's status as a religious organization has no relevance."[102] The 4 to 3 decision concluded that the Constitutional infringement claim cannot be determined. Interestingly, this case differs from the 1980 *Society for Ethical Culture v. Spatt* in that the Church planed to renovate the Church as well as develop a certain area, not demolish it.

The *Church of St. Paul and St. Andrew* case caps the end of the *Sherbert-Yoder* era. Though these cases have produced mixed results, they have consistently upheld the right of Free Exercise. The next section, the Attempted Smith Shift revolved around the pivotal 1990 *Employment Division, Department of Human Resources of the State of Oregon v. Smith*[103] case. In effect, it reshuffled the heavyweight challenge and knocked religious entities out of their

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[99] Ibid.
[100] Ibid.
[101] Ibid.
[102] Ibid.

distinguished realm. As represented in the historic preservation regulation and religious rights battle, its intended effect however, was different than the outcomes.

[103] *Employment Division, Department of Human Resources of the State of Oregon v. Smith,* 495 U.S. 872 (1990).

IV. The Attempted Smith Shift

Employment Division, Department of Human Resources of the State of Oregon v. Smith,[104] was a pivotal 1990 case, indicating a shift in Supreme Court principles and set a new precedent. The plaintiffs Alfred Smith and Galen Black, both counselors at a drug rehabilitation center, were fired after ingesting peyote, and filed a suit after their applications for unemployment compensation were denied. The plaintiffs purported that since they ingested peyote for religious purposes in their Native American Church, the denial of their unemployment benefits violated their First Amendment religious right. In the 6-to-3 decision, the court boldly moved away from the sanctioned application of strict scrutiny guidelines to government actions as witnessed in *Sherbert-Yoder*. The *Sherbert-Yoder* era effectuated a standard in which religious free exercise rights were strongly protected. Instead, the court considered the case based on the general applicability of a law guideline, as established in the 1878 *Reynolds v. United States* case. The required heightened scrutiny standard for government actions that even unintentionally burden religious beliefs or practices was concluded.

Delivering the majority opinion, Justice Antonin Scalia, stated that the religious motivation for using peyote does not place Smith and Black beyond the grip of criminal law. Smith and Black believed that "their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice."[105] Scalia further stated that the contentions of Smith and Black are flawed. They believe that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that

[104] Ibid.
[105] Ibid.

his religious belief forbids (or requires)."[106] The Court rejected the "strict scrutiny test" and allowed religious beliefs to be burdened by laws generally applicable to everyone so long as they promote a substantial state interest. It was determined that religious beliefs do not excuse citizens from compliance with valid laws, even if they indirectly affect religious practices. Scalia stated:

> We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate....The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities.[107]

In reversing the Oregon Supreme Court decision, this Supreme Court returned to a standard instituted in *Reynolds v. US*. Scalia reaffirmed that a neutral, generally applicable law should govern conduct, without regard to indirect affects on religious practices. Scalia addressed that religions may have to tolerate disadvantages for the sake of democracy. He believed:

> 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; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

In spite of the burdens placed on Smith and Black, they were denied unemployment benefits. The Court specifically did not recognize the case as a pure employment benefits case such as *Sherbert* and *Yoder*. Instead, the Court really sidestepped the employment benefits issue. The most convincing rationale the Court used was its cogent explanation for not applying the *Sherbert-Yoder* compelling interest requirement. Scalia explained:

> The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met

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[106] Ibid.
[107] Ibid.

> before the government may accord different treatment on the basis of race, or before the government may regulate the content of speech, is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields -- equality of treatment and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly....[108]

This "private right to ignore generally applicable laws" is what Smith undermines. Had the respondents won the case, the First Amendment's protection of religion would be widened to include many exemptions not necessarily intended by the Framers. Scalia explains that:

> The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind -- ranging from compulsory military service to the payment of taxes to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws; to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.[109]

The intention of the *Smith* ruling was to ensure that such a Pandora's Box of exemptions is not opened and that neutral and generally applicable laws even if they incidentally burden religion pass Constitutional muster.

The 1990 *Society of Jesus of New England v. Boston Landmarks Commission*[110] case was decided in the Supreme Judicial Court of Massachusetts. The conflict began when the Boston Landmarks Commission designated the historic interior of the Church of the Immaculate Conception, located in Boston's South End. The Court admitted that "there are few finer examples of classic mid-Nineteenth Century church design." The Jesuits claimed that the designation of the interior of the church violated the free exercise clause of the First

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[108] Ibid.
[109] Ibid.
[110] *Society of Jesus of New England v. Boston Landmarks Commission,* 564 N.E.2d 571(Mass. 1990).

Amendment of the United States Constitution. The Superior Court already granted summary judgment to the Jesuits and the Supreme Judicial Court affirmed.

In light of dwindling membership, Church officials decided to renovate the building to better ensure their future financial needs. "The plan called for renovation of the main church into office, counseling, and residential space."[111] The Commission quickly designated the interior of the Church to stop the renovation. The designation restricted permanent alteration of the "nave, chancel, vestibule and organ loft on the main floor -- the volume, window glazing, architectural detail, finishes, painting, the organ, and organ case.[112]

Justice Lunch, writing for the majority, explained that designation of the interior was found to violate Article 2 of the Declaration of Rights of the Massachusetts Constitution. Article 2 states:

> No subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping GOD in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession or sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship.[113]

The Jesuits claimed that their inability to change the interior of their Church violated their rights. The Court concluded that "Article 2 protects the right freely to design interior spaces for religious worship, thus barring the government from regulating changes in such places, provided that no public safety question is presented."[114] Justice Lynch stated that the interior designation was exceedingly invasive. "The government intrusion here is substantially more invasive, reaching into the church's actual worship space."[115]

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[111] Ibid.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.

Figure 5

Interior view of Society of Jesus of New England in Boston.

Society of Jesus v. Boston Landmarks Commission deals Historic Preservation's battle to preserve religious buildings another blow. Lynch explained that the Court did consider the worthiness of preservation. He stated:

The government interest in historic preservation, though worthy, is not sufficiently compelling to justify restraints on the free exercise of religion, a right of primary importance. In short, under our hierarchy of constitutional values we must accept the possible loss of historically significant elements of the interior of this church as the price of safeguarding the right of religious freedom.[116] This consideration, however, was not favorable to the objectives of historic preservation. The landmark designation was found to burden religious worship and was deemed unconstitutional. The next case, however, was a long awaited triumph for preservationists. Unfortunately, its success was a mere speck on the regulation of historic religious property timeline.

[116] Ibid.

The next case, *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York*,[117] is a significant post-*Smith* case that directly addresses historic religious landmarking issues. St. Bartholomew's Church is a Protestant Episcopal Church built in 1917 and located on the east side of Park Avenue between East 50th and East 51st Streets in the City of New York. The Church brought suit after the New York Landmarks Preservation Commission denied their request to replace an adjacent structure, the Community House, with a fifty-nine story office tower. They claimed that landmark status violated the Free Exercise Clause, Establishment Clause and Takings Clause.

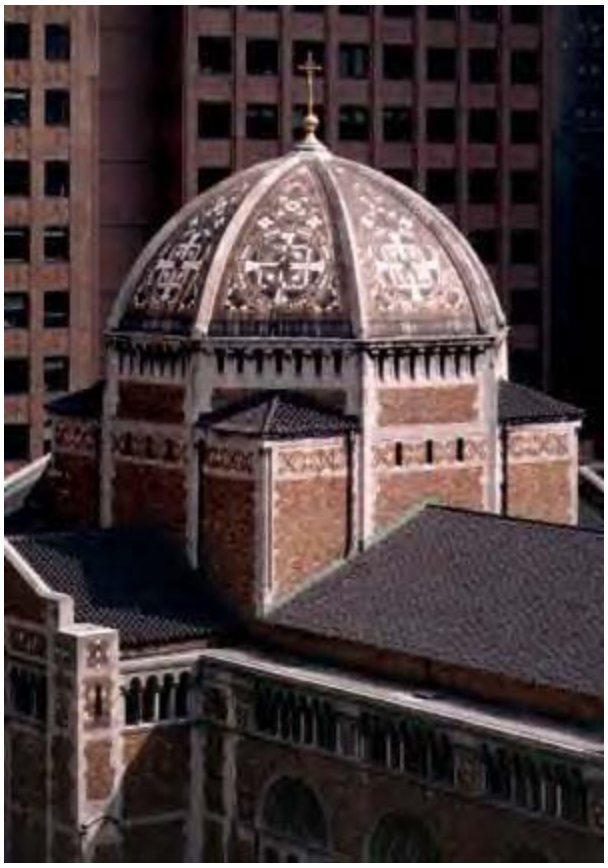

Figure 6

St. Bartholomew's Church in New York.

[117] *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York and the Landmarks Preservation Commission of the City of New York*, 914 F.2d 348 (2d Cir. 1990).

In 1967, the Landmarks Preservation Commission of the City of New York determined that pursuant to the Landmarks Law, St. Bartholomew's Church, the exterior of the Community House and the surrounding property should all be designated landmarks. The 1919 Church structure was designed by architect Bertram G. Goodhue. Justice Winter explains that:

> the Church building is a notable example of a Venetian adaptation of the Byzantine style, built on a Latin cross plan. Significant features include its polychromatic stone exterior, soaring octagonal dome, and large rose window. Perhaps most significantly, Goodhue incorporated into his building the Romanesque porch of St. Bartholomew's former Church building at Madison Avenue and 44th Street. Designed by the renowned architectural firm of McKim, Mead & White, the porch is composed of a high arched central portal flanked by two lower arched doorways, all supported by slender columns.[118]

Though not the point of contention in this case, the description of the Church is significant when determining the significance of the other structures. The relationship of the Church to the Community House, the focus of this case, is meaningful when determining the overall significance of the landmarked structures. The Community House is described by Justice Winter as a terraced seven-story structure located at the corner of Park Avenue and 50th Street just neighboring the Church. "Completed in 1928 by associates of Goodhue, the Community House complements the Church building in scale, materials and decoration."[119] The Landmarks Preservation Commission deduced that these architectural features as well as the inherent value based derived from the complementary relationships between the buildings warranted protection. The Commission affirmed "St. Bartholomew's Church and

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[118] Ibid.
[119] Ibid.

Community House have special character, special historical and aesthetic interest and value as part of the development, heritage and cultural aspects of New York City."[120] This uncontested designation necessitated special approval for any alteration or demolition of the landmarked structures.

Beginning in 1983, pursuant to the obligations of landmark status, several applications were filed for permission to change the Community House. The commission summarily rejected them. First, the Church requested a "Certificate of Appropriateness" to tear down the Community House and erect a 59-story tower in its stead. After altering its plans from a 59-story to a 47-story tower to appease the Commission, and then filing for a "hardship exception," the Church was denied again. Frustrated, the Church filed suit for declaratory and injunctive relief in 1986. Along with other claims, they declared that the state landmark designation burdened its free exercise of religion "by excessively burdening the practice of religion and entangling the government in religious affairs."[121]

The Church viewed the Landmarks Commission's denial to grant a permit for demolition and construction of the new office tower as an imposition on their rights as a religious institution. They claimed that the denial had negated its ability to "carry on and expand the ministerial and charitable activities that are central to its religious mission."[122] They claim that the development of an office tower was necessary to shore up their dwindling assets as well as provide additional space for their activities. "The Church concludes that the Landmarks Law unconstitutionally denies it the opportunity to exploit this means of carrying out its religious mission."[123] Circuit Judge Winter explained that the limitation was not severe enough to warrant any change of action. He explained that St.

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[120] Ibid.
[121] Ibid.
[122] Ibid.

Bartholomew's Church had three sources of funds with an overall endowment of $ 14.3 million. The Church claimed that their overall endowment could not sustain the imminent debt produced by the Commission's recommended renovation and that in effect, the renovations negatively impacted its future earnings potential.

> The Church's principal argument is that a major improvement expenditure of the type required to repair and renovate the Church building and Community House would severely damage this 'precarious' balance of revenues and expenses. Because such expenditure would come from endowment funds, the Church contends, future investment income will inevitably decline as the result of a depleted portfolio. Such a decrease in future revenues, it concludes, will produce 'severe deficits.'[124]

Though the designation did monetarily restrict the Church, the takings claims failed because of the *Penn Central Transportation Co v. New York City*[125] precedent. Circuit Judge Winter turned to *Employment Division v. Smith,*[126] the new shepherd, intended to guide.

Such an invasion into a religious entity's finances would never be allowed pre-*Smith*. The Court justified the Landmark Commission's actions of incidentally impinging on the activities of the Church and not the beliefs which are protected by the Free Exercise Clause. "No one seriously contends that the Landmarks Law interferes with substantive religious views." Additionally, Justice Winter defends the Landmarks Law by quoting from *Smith*.

> The Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions. It thus applies to 'any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value.'[127]

The Court of Appeals affirmed the Federal District Court's decision and ruled that the actions of the City of New York and the Landmarks Preservation Commission were constitutionally valid. The historic preservation ordinances were again deemed facially

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123 Ibid.
124 Ibid.
125 *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).
126 Ibid., *Employment Division v. Smith.*

neutral laws of generally applicability. The courts deemed that the Church's right to free exercise was not substantially burdened by the landmark designation and the subsequent denials of demolition permits. The Court also analyzed the impact of the *Smith* decision. The Court described that post-*Smith:*

> the right of free exercise does not relieve an individual of the obligation to 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). The critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented.[128]

As long as a law is determined to be generally applicable and does not target a specific religion or its practice, little governmental justification is necessary. Without the influence of a system of individualized exceptions in this case, regard as to whether the government had used the least restrictive means to further a compelling interest was not an issue. "In sum, the *Smith* case meant that the compelling interest standard would be applied under the U.S. Constitution to a much smaller number of cases than had previously been thought."[129] Finally, the hallowed realm that religious entities have held for so long have given way in favor of historic preservation! Or so preservationist's thought.

Just two years after *Smith*, in *First Covenant Church of Seattle v. City of Seattle,*[130] the rules changed once again. The promising headway that the *Smith* and *Saint Bartholomew* Courts made was uprooted to the dismay of preservation organizations. The First Amendment rights of religious organizations persevere as the relentless factor that determines the survival of the historic preservation of religious sites.

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[127] Ibid., *St. Bartholomew's Church v. City of New York*, Code § 25-302(n) (1986).
[128] Ibid.
[129] David W. Kinkopf. "Religious Freedom Litigation" March 31, 1999. Found at www.gejlaw.com/focuson/kinkopf.html
[130] *First Covenant Church of Seattle v. City of Seattle,* 840 P.2d 174 (Wash. 1992).

Figure 8
Sketch of First Covenant Church in Seattle, Washington.

The First Covenant Church is located at the corner of Pike and Bellevue Streets in Seattle. In October of 1980, the Seattle's Landmarks Preservation Board nominated the First Covenant Church as a landmark. The First Covenant Church fit the 1977 Landmarks Preservation Ordinance criteria:

> designate, preserve, [and] protect,…improvements and objects which reflect significant elements of the City's cultural, aesthetic, social, economic, political, architectural, engineering, historic or other heritage . . .[.][131]

Though the Church fit the necessary requirements, the Church vehemently opposed the designation. The opposition was to no avail and after several contentious public hearings the Board approved designation anyway in September 1985.

The case records indicate that "the church and City unsuccessfully negotiated about the controls that the City would impose on the church."[132] The controls the city exercised were delineated in the Designation Ordinance which required that while the Ordinance did not dictate any religious activity, it did require approval of any changes to the architecturally significant building. The Ordinance had several components that immediately impacted the Church upon designation including:

> interference with the Church's freedom to alter the exterior of the church structure; necessary secular approval of any proposed alteration of the facade requiring additional paperwork, negotiations and hearings; a limitation on the

[131] Ibid., Clerk's Papers, at 6 found in Seattle Municipal Code (SMC) 25.12.020(B) (1977).
[132] Ibid.

> Church's ability to sell its property; and uncertainty of discretionary approval confronting the Church in its planning of any exterior change.[133]

The designation also affected the market value. "In addition, an uncontroverted affidavit stated that landmark designation of the church resulted in a depreciation of the market value of the property from $700,000 to $400,000"[134] The application of the Ordinance is pivotal to First Covenant Church's claim that its First Amendment right of free exercise was violated. Justice Dore explained that "applying the City's ordinances to First Covenant burdened the church's right to free exercise of religion under the federal and state constitutions. And the majority, again for different reasons, concluded that the liturgy exemption did not mitigate the burden on free exercise."[135]

The landmark designation and subsequent regulation was found to violate First Covenant's Free Exercise rights. The rights of the Church were violated administratively and financially.

> The ordinances burden free exercise "administratively" because they require that First Covenant seek the approval of a government body before it alters the exterior of its house of worship, whether or not the alteration is for a religious reason. Further, they burden First Covenant financially, because they reduce the value of the church's property by almost half.[136]

The court dealt historic preservation another blow by determining that the preservation of historic structures is not a compelling interest. Justice Dore explained:

> We hold that the City's interest in preservation of aesthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.

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[133] Ibid., Clerk's Papers, at 345-46.
[134] Ibid.
[135] Ibid.
[136] Ibid.

The basis for this decision was the application of *Sherbert*. With this application, the majority concluded that historic preservation was not a compelling state interest "that justified the burden on First Covenant's right to free exercise and, therefore, that applying the City's ordinances to First Covenant violated First Covenant's free exercise rights under the state and federal constitutions."[137] The Washington Supreme Court, on remand from the Supreme Court, was required to use the *Smith* test and found the test to be inapplicable because they considered this case to be a "hybrid situation." *Smith* was not applied in this case because the church claimed infringement of its free exercise and free speech rights. The Supreme Court reversed the lower court's decisions and judged that the landmarks preservation ordinance unconstitutionally infringed on the religious organization's religious freedom.

The 1993 Supreme Court *Church of the Lukumi Babalu v. City of Hialeah*[138] decision reaffirmed the *Smith* standard as well as introduced many to the Santeria religion. The Santeria religion was established in the 19th century when Yoruba slaves from western Africa were transported to Cuba and were exposed to Roman Catholicism. "The resulting syncretion, or fusion, is Santeria, 'the way of the saints.'"[139] Justice Kennedy explains that the interesting amalgam created a worship of orishas. "The Cuban Yoruba express their devotion to spirits, called orishas, through the iconography of Catholic saints, Catholic symbols are often present at Santeria rites, and Santeria devotees attend the Catholic sacraments."[140] Problems arose when the city of Hialeah, Florida enacted a ordinances aimed at preventing the Church of the Lukumi Babalu, a not-for-profit corporation founded in

[137] Ibid.
[138] Church of the Lukumi Babalu v. City of Hialeah, 508 U.S. 520 (1993).
[139] Ibid.
[140] Ibid.

1973 from animal sacrifice, as required for religious purposes. The Church claimed these ordinances violated their First Amendment right to exercise freely.

As soon as the Church leased land in Hialeah, the city council passed five resolutions. The enactments included Resolution 87-66 which declared that "[t]he City reiterates its commitment to a prohibition against any and all acts of any and all religious groups which are inconsistent with public morals, peace or safety."[141] Ordinance 87-40 warned of criminal punishment to "[w]hoever . . . unnecessarily or cruelly . . . kills any animal."[142] Resolution 87-90 "declared the city policy 'to oppose the ritual sacrifices of animals' within Hialeah, and announced that any person or organization practicing animal sacrifice 'will be prosecuted.' Sacrifice is important to keep the spirits going. Kennedy explained:

> They depend for survival on the sacrifice. Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals.[143]

The city, however, exempted animal slaughter for food consumption. Justice Kennedy explained that "all ordinances and resolutions passed the city council by unanimous vote. Violations of each of the four ordinances were punishable by fines not exceeding $500 or imprisonment not exceeding 60 days, or both."[144]

The Supreme Court did not interpret these Resolutions and Ordinances as neutral or generally applicable. The compelling state interest was weak. Instead, the city council tailored the Resolutions and Ordinances to meet their specific objectives: removal or obstruction of

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[141] Ibid.
[142] Ibid.
[143] Ibid.

the Church of the Lukumi Babalu from the City of Hialeah. The Supreme Court reversed the judgment of the District Court. The District Court ruled in City of Hialeah's favor "although acknowledging that the foregoing ordinances are not religiously neutral."[145] The court concluded that:

> compelling governmental interests in preventing public health risks and cruelty to animals fully justified the absolute prohibition on ritual sacrifice accomplished by the ordinances, and that an exception to that prohibition for religious conduct would unduly interfere with fulfillment of the governmental interest, because any more narrow restrictions would be unenforceable as a result of the Santeria religion's secret nature.[146]

Justice Kennedy explained that "the ordinances' texts and operation demonstrate that they are not neutral, but have as their object the suppression of Santeria's central element, animal sacrifice"[147] The Ordinances were deemed gerrymandered. He stated: Moreover, the latter ordinances' various prohibitions, definitions, and exemptions demonstrate that they were 'gerrymandered' with care to proscribe religious killings of animals by Santeria church members but to exclude almost all other animal killings."[148] The Ordinances also do not show a compelling government interest. He stated:

> The legitimate governmental interests in protecting the public health and preventing cruelty to animals could be addressed by restrictions stopping far short of a flat prohibition of all Santeria sacrificial practice, such as general regulations on the disposal of organic garbage, on the care of animals regardless of why they are kept, or on methods of slaughter.[149]

In a concurring statement, Justice Scalia opined: "The ordinances ha[ve] every appearance of a prohibition that society is prepared to impose upon [Santeria worshippers], but not upon itself." This amounts to complete disregard to what 'general applicability' is supposed to

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144 Ibid.
145 Ibid.
146 Ibid.
147 Ibid.
148 Ibid.

enforce. To scold the City Council of Hialeah as well as remind governing bodies of their obligations, Kennedy states: "Legislators may not devise mechanisms, overt or disguised, designed to persecute oppress a religion or its practices."[150]

The *Church of the Lukumi Babalu* case was the last case argued before Congress intentionally treaded on this historically contested ground. Congress's objective was to implement a standard for all Courts to follow when deciding First Amendment claims. Overall, it was anticipate that the Religions Freedom Restoration Act of 1993 would add a measure of stability to the historically unpredictable Free Exercise Clause litigation.

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[149] Ibid.
[150] Ibid.

V. Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA)[151] of 1993 became law after a unanimous voice vote in the House and a 98-to-2 vote in the Senate.[152] RFRA was Congresses attempt to allay the burdening of religion even by neural and generally applicable laws as established by *Smith*. RFRA was an attempt to provide guidance and ultimately stabilize the tremendous latitude courts exhibited in their decisions. Both RFRA and the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 tried to shore up the First Amendment rights of religious organizations.

Congress initiated the research by returning to the roots of the issue – back to the Constitution itself and the need for the First Amendment. "The framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution."[153] They affirmed that the right to practice a religion was an unalienable right and should be protected. They acknowledged that even laws that were neural may burden the exercise of religion. "Laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise."[154] Congress ensured that RFRA protected First Amendment rights even from generally applicable laws. RFRA stated that "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability."[155] Congress also substantiated the necessity for a compelling state interest. "The compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between

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[151] Religious Freedom Restoration Act (RFRA) Pub. L. No. 103-141, § 3, 107 Stat 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (1994)). Found at http://www4.law.cornell.edu/uscode/42/ch21B.html.
[152] Id., David W. Kinkopf. "Religious Freedom Litigation."
[153] Ibid.
[154] Ibid.

religious liberty and competing prior governmental interests."[156] This compelling interest test was specifically addressed in the legislation by declaring that it was erroneously eliminated in *Employment Division v. Smith.*[157]

The purpose of RFRA was specific. Its ultimate goal was to protect the free exercise of religion. Congress believed that the most reliable way to ensure this was to restore the precedents established in *Sherbert v. Verner*[158] and *Wisconsin v. Yoder.*[159] The basis for this restoration was to reinstate the compelling interest test and to "guarantee its application in all cases where free exercise of religion is substantially burdened and to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[160] Exemptions, however, were allowed that enabled, in effect, the government to substantially burden a person's exercise of religion. The burden was permissible if the government proved that the action was "in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[161] Once the burden was satisfactorily established by the plaintiff, the government must prove that the action is in furtherance of a compelling government interest and has been carried out in the least restrictive way.

RFRA was thus intended to guide and stabilize. It was a response to *Smith's* sanctioned burdens on religion via the establishment of neutral and generally applicable laws. RFRA was designed to guarantee that religious institutions were not substantially burdened.

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155 Id., Religious Freedom Restoration Act (RFRA).
156 Id., David W. Kinkopf. "Religious Freedom Litigation."
157 Id., *Employment Division v. Smith* (1990).
158 Id., *Sherbert v. Verner* (1963).
159 Id., *Wisconsin v. Yoder* (1972).
160 Id., Religious Freedom Restoration Act (RFRA).
161 Ibid.

The response to RFRA has covered the entire spectrum, drawing harsh criticism as well as praise.

> Some have vilified RFRA as an 'unconstitutional grab for power' by Congress, while others remain steadfast in their belief that RFRA was a legitimate expansion of rights that correctly imposed 'the highest standard of constitutional protection from one of the most important freedoms guaranteed by the Constitution.'[162]

Unfortunately, it also placed Historic Preservation in an increasingly awkward position and perpetuated preservation's uphill battle.

Post-RFRA cases involving historic preservation are limited. Specifically, two cases directly address preservation. The first, *Cardinal William H. Keeler v. Mayor and City Council of Cumberland*[163] involves St. Peter and Paul's Roman Catholic Church, located in Cumberland, Maryland. Pursuant to the 1974 Historic Zoning Ordinance that created the town's Historic Preservation Commission, the historic religious structures became part of the Washington Street Historic District. Occupying an entire city-block, St. Peter and Paul's Roman Catholic Church, built between 1848 and 1889, is comprised of "a 'massive' monastery with a large chapel, and a corridor known as the 'White Elephant,' which connects the monastery to the sacristy of the Church."[164] The monastery and chapel, however, have been vacant since 1986 due to financial difficulties.

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[162] Kathryn S. Kanda. "Validity and Application of the Religious Freedom Restoration Act in the Tenth Circuit after City of Boerne v. Flores." Denver University Law Review. 79 Denv. U.L. Rev. 295 (2002).
[163] *Cardinal William H. Keeler v. Mayor and City Council of Cumberland,* 940 F. Supp. 879 (1996).
[164] Ibid.

Figure 9

St. Peter and Paul's Roman Catholic Church in Cumberland, Maryland.

Consequently, in 1995, the Church applied to the Cumberland Historic Preservation Commission for a Certificate of Appropriateness to demolish the structure and build a Church Annex. The choice to demolish was made on the basis that:

> the estimated cost for reconstruction simply to retain and adequately maintain the structure exceeds $380,000. . . plus significant annual maintenance costs…and the estimated cost for a complete renovation of the entire building exceeds $2 million dollars.[165]

The Church claimed that the financial burden impeded its ability to fulfill their duties. The inability to demolish the structure "is a significant financial liability and whose presence prevents the parish from meeting the religious needs of its congregation."[166] This Certificate was denied and the Church filed suit claiming that the Ordinance and denial of demolition

[165] Ibid., (Cmplt. PP 13 and 14).
[166] Ibid., (Cmplt. at P 2).

request violated the Religious Freedom Restoration Act and substantially burdened their First Amendment rights.

The City moved to dismiss on the basis that RFRA is unconstitutional. "This purely legal argument is appropriate for disposition on a motion to dismiss. If RFRA itself is invalid, then no set of facts alleged by the plaintiffs could entitle them to relief under that statute."[167] The United States District Judge Frederic N. Smalkin explained the complicated issues and found that both parties were confused about the application of RFRA.

> According to the defendants, the statute violates the separation of powers because it imposes a rule of constitutional interpretation upon the courts. The plaintiffs and the United States take the position that RFRA 'simply provides prophylactic statutory protection for the Fourteenth Amendment's free exercise guarantee, as substantively interpreted by the judiciary'.[168]

Notwithstanding the confusion, the objectives of historic preservation were promptly curtailed. The Court deemed that "the ordinance neither furthers a compelling government interest nor constitutes the least restrictive means of furthering possible interests of the government in historic preservation."[169] In effect, the City did not prove a compelling governmental interest enough to justify the refusal to demolish. In this extreme interpretation, historic preservation was deemed neither neutral nor a generally applicable regulatory law.

One issue raised was that of individual exemptions. The ordinance had detailed exemptions, e.g. for economic hardship, that allowed alterations if any of these criteria were met:

> (1) The structure is a deterrent to a major improvement program which will be of substantial benefit to the City of Cumberland;
> (2) Retention of the structure would cause undue financial hardship to the owner; or

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[167] Ibid.
[168] Ibid., (Memo. of United States at 18).
[169] Ibid..

(3) The retention of the structure would not be to the best interest of a majority of persons in the community.[170]

The Court ruled that the availability of exemptions for certain criteria allowed for the addition of other criteria, including religion. Judge Smalkin quoted from *Bowen v. Roy*[171] when he opined that "where the State has in place a system of individualized exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." Hence the Court moved away from *Smith* which "recognized that where the government enacts a system of exemptions, and thereby acknowledges that its interest in enforcement is not paramount, then the government 'may not refuse to extend that system [of exemptions] to cases of 'religious hardship' without compelling reason.'"[172] Historic preservation was not recognized as a compelling enough reason.

In a bold move, the Court held that Cumberland did not provide enough evidence of the compelling state interest to support Historic Preservation Ordinance No. 2970 and denial of Certificate of Appropriateness for the demolition. The Keeler Court did not apply *Smith* or *Saint Bartholomew* and found that Church's right of Free Exercise was violated. Historic Preservation was deemed not neutral or a law of general applicability. This is a trend that the Maryland State Courts predictably follow. Historic Preservation through landmark designation has been consistently rejected. RLUIPA, as we shall see, could possibly fuel these types of cases. This legislation may stimulate and further embolden the privileges that religious organizations have that enable them to exist above the general rules that apply to all other organizations.

The second post-RFRA case that involved the Free Exercise Clause and Historic Preservation directly was *First United Methodist Church v. Hearing Examiner for the Seattle*

[170] Ibid., Ordinance 2970, § 7.d.

Landmarks Preservation Board.[173] First United Methodist Church, built in 1907, and a corresponding chapel and community center, built in 1950, are located in downtown Seattle on the west side of 5th Avenue between Marion and Columbia Streets. The parcel of land is divided with the First United Methodist Church situated on the northern part of the property and the chapel and community center located in a separate building on the southern part of the property.[174] In spite of the highly contested landmark status, the Church was nominated in 1984 and approved in 1985. "In December 1984, Seattle's Office of Urban Conservation nominated both the interior and exterior of the church for landmark designation under the Landmarks Preservation Ordinance."[175] The 1910 structure was clearly meritorious of designation. The "Beaux Arts style sanctuary, with 66-foot high interior ceiling, brick and terra cotta façade, and orange tile-covered central dome"[176] was created by the well known Seattle based architects James Schack and Daniel Huntington.

Figure 10

First United Methodist Church in Seattle, Washington.

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171 *Bowen v. Roy,* 476 U.S. 693 (1986).
172 Ibid.
173 *First United Methodist Church v. Hearing Examiner for the Seattle Landmarks Preservation Board.* 916 P.2d 374 (Wash. 1996).
174 Ibid.
175 Ibid.

The Trial Court ruled that the Landmark Preservation Ordinance was unconstitutional. Justice Baker, opining for the Court of Appeals, explained that the Court agreed in part. The Court disagreed, however, and clarified that landmark designation itself does not interfere with the exercise of religion. "Merely designating property as a landmark…does not interfere with the free exercise of religion."[177] The Court deduced that only the application of the restrictions rendered the Ordinance unconstitutional. "It is the placing of restrictions on the property which causes the prohibited interference. We therefore hold that the portions of the LPO which place restrictions… cannot be applied to the church building owned by First United as long as the building is being used primarily for religious purposes." This ruling indicates that preservation was considered a legitimate government interest. Justice Baker explained that

> our ruling that these provisions cannot presently be applied to the church building does not invalidate the entire LPO. The City may still choose to designate the church building as a landmark, but the landmarks board cannot restrict modification of the structure in any way unless and until the structure ceases to be used primarily for religious purposes.[178]

The Court excused the Church from complying with the Ordinance as long as the structure was used for religious purposes. The Court further asserted that once the property changes to a use that does not include religious use, then the preservation ordinance would be in effect. "The Court of Appeals, reversing in part, held that the City could enact an ordinance designating the church a landmark as long as it refrained from imposing any controls 'until the structure ceases to be used for primarily religious purposes.'"[179] First United was not

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[176] "Washington State Supreme Court rules against Seattle landmark designation of First United Methodist Church on May 9, 1996." The Online Encyclopedia of Seattle / King County History. Found at: http://www.historylink.org/output.cfm?file_ID=3773.
[177] *First United Church v. Hearing Examiner for the Seattle Landmarks Preservation Board,* 887 P.2d 473 (Wash.1995).
[178] Ibid.
[179] Ibid.

satisfied and appealed to the Washington Supreme Court. They received a more favorable ruling.

Justice Durham explained in detail the Court's decision to reverse. In the 5 to 4 decision, the Washington Supreme Court concluded that the Landmarks Preservation Ordinance, as described in the Seattle Municipal Code, does impose an unconstitutional burden on the United Methodist Church. The Church appealed to the City's Hearing Examiner claiming that the Church's state of disrepair required significant attention and funds. Justice Durham explained that the Church believed that "repairs to the church would be affordable only absent government controls."[180] United Methodist also maintained it needed smaller sanctuary claiming that the size of the current building was too large for its congregation which was estimated at only half of its patronage of 40 years ago. "The present sanctuary is too large to foster as dynamic and meaningful worship services as desired."[181] The decline in patronage was attributed to the dynamic changes in city function significantly the "expansion of the commercial core of the city, the construction of the freeways, the construction of vastly expanded medical and commercial facilities on First Hill are some of the changes in Seattle which have contributed to the decline in the Church's membership.[182] First United Methodist Church believed that it was their right to utilize their property as they wished, especially in light of their financial situation. "United Methodist argued that it should be free to designate any portion of its property for commercial use in order to fund religious and social service programs."[183] The Washington State Supreme Court agreed with the First United Church on September 27, 1995.

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[180] Ibid.
[181] Id., *First United Methodist Church v. Hearing Examiner (1996).* Clerk's Papers at 27.
[182] Ibid.
[183] Ibid.

In a 5-to-4 decision, the Washington State Supreme Court reversed the Court of Appeals and reaffirmed that the Preservation Ordinance was unconstitutional. The Supreme Court deemed that the Court of Appeals did not apply the strict scrutiny analysis and ultimately, the Church did not prove that the landmark status burdened its right to free exercise. The Court did, however, reaffirm that the City could designate the church a landmark once the structures "cease[d] to be used primarily for religious purposes."[184] Specifically, the Court stated that Landmark status can be confirmed as long as the controls that were embodied in the designation were not enacted. The Court had issue with the 'primarily for religious purpose' phraseology which it deemed "wholly amorphous."[185] As the Christian Legal Society stated, this terminology implies that the

> burden will fall to the church to prove that its building is being used primarily for religious purposes, which will be open to interpretation. Suppose that the congregation rented the building to community groups each night of the week, so that the total number of hours for such "secular" use exceeded the number of hours spent in worship. Is that a cessation of primary use for religious purpose?[186]

The Christian Legal Society statement addresses the overall complexity of religious land use as well as the myriad of subtleties involved when deciding the impact on religious entities.

The Court went on to explain how landmark designation would restrict United Methodist and burden its First Amendment rights if the Church decided to sell its property.

> The very survival…of First United Methodist Church of Seattle... depends on its having the freedom to sell its sanctuary for demolition and commercial redevelopment. The record makes clear, however, that the Church is not claiming a right to maximize revenue for the purpose of commercial gain, but only for the purpose of furthering its Christian mission.[187]

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[184] Ibid.
[185] Ibid.
[186] Ibid., Br. of amici curiae Christian Legal Society at 11-12.
[187] Ibid.

The Supreme Court sided with United Methodist Church and acknowledged that this type of restriction is impermissible. The landmark status unduly burdened their free exercise rights by "creating administrative or financial burdens."[188] The impediment caused by First United Methodist Church's inability to sell its property and exploit the profit to advance their religion is excessively burdensome. Justice Durham reiterated that "The free exercise clause prevents government from engaging in landmark preservation when it has a coercive effect on religion. This protection does not cease if United Methodist sells its property."[189] Durham pinpointed that this case exemplifies exactly what the First Amendment was created to safeguard.

The *First United Methodist Church v. Hearing Examiner*[190] case concluded that even a nomination for landmark status can be declared unconstitutional. It is unclear precisely how the Court determined that this case was ripe for adjudication. It is evident that the realm of religious entities has remained strong - even withstanding the hefty blow from *Smith*. State enacted RFRAs are clearly not needed in some states where religious entities are afforded greater than average refuge. As has become evident in the Washington cases, the Washington State Constitution confers considerable protection for religious freedom – more than is afforded by the federal Constitution.

The *Munns v. Martin*[191] case of 1997 clearly illustrates the distinctive position of the Washington Supreme Court. In a 6-to-1 decision, the Court held that even the application of an ordinance that incorporated a demolition delay violated the Washington Constitution when applied to a structure owned by a religious entity. In 1996, Frank Munns, the Catholic

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188 Ibid.
189 Ibid.
190 Id., *First United Methodist Church v. Hearing Examiner.*

Bishop of Spokane, Washington, attempted to demolish St. Patrick's School in Walla Walla. The Bishop intended to demolish the structure and build a new pastoral center. Since its construction in 1928 the building was used as a school. Since 1974, the building had several functions including fulfilling educational, social, and community needs.[192] The new center would focus on Catholic education needs as well as other Church activities. "There is no dispute that the proposed functions of the pastoral center will be in furtherance of the church mission."[193]

In 1994, Frank Munns, the owner of the property located next to the Church, applied to the City of Walla Walla for a demolition permit. As stated in Walla Walla Municipal Code, the permit was required due to the nature of the change which included the conversion of a historic structure. The next day, Robert Martin, the City's Development Services Manager, consulted the community regarding the historic and architectural significance of St. Patrick's School. The response regarding the significance of the structure was overwhelming. "They contend the building is the only example of Romanesque revival architecture in Walla Walla, and was built to complement the Gothic architecture of the St. Patrick Church built in 1881."[194] This initial assessment was bolstered during the required 10-day stay. The Walla Walla demolition permit ordinance requires "a 10-day period for comments concerning the demolition of any structure over 50 years old, or 'places of historic value.'" [195] During this 10-day holding period, the community was allowed to respond to the proposed changes. "Based on the comments the City received during the 10-day holding period (numerous letters protesting demolition), on August 15, 1994, Martin

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[191] *Frank Munns, et al v. Robert C. Martin,* 930 P.2d 318 (1997).
[192] Ibid.
[193] Ibid.
[194] Ibid.
[195] Ibid., Walla Walla's demolition permit ordinance WWMC 20.146.040.

declared a 60-day stay in the issuance of the demolition permit to allow for a hearing before the Planning Commission."[196] The Trial Court found the issuance of the stay had a coercive effect on the practice of religion.

> This is not a deminimis delay. In our cases, the potential burden of an ordinance creates constitutional infirmity….More significantly here, the additional delay is specifically for the purpose of permitting opponents of the proposed demolition to attempt to broker various alternatives to the church's planned religious purpose for the structure. The ordinance indicates the delay is designed to provide an 'opportunity for acquisition, easement, or other preservation mechanism to be negotiated after the public hearing.'[197]

The potential for an additional time delay was deemed an administrative burden. The Trial Court ruled that both the municipal ordinance and the additional rule requiring the establishment of possible historic loss burdened Munns' First Amendment rights.

On appeal to the Superior Court of Walla Walla County, Justice Philip A. Talmadge clearly stated the issue.

> we are confronted yet again with the question of whether a local land use ordinance designed to further historic preservation and aesthetic purposes violates our State's free exercise of religion clause when applied to a structure that is part of a church's religious ministry.[198]

The Court investigated whether the state's Free Exercise clause pertains to a church building clearly used for religious purposes but is not considered the house of worship. Specifically, the Court investigated whether the established Walla Walla ordinance burdened the Roman Catholic Church's free exercise of religion either administratively or financially. Talmadge explained that the ordinance did in fact burden the Bishop administratively. "The Bishop's plans are in furtherance of his fundamental right to the free exercise of his religion. The

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[196] Ibid.
[197] Ibid.
[198] Ibid.

ordinance therefore has a coercive effect on the practice of religion. That being the case, the appellants have the burden of showing a compelling governmental interest in creating delay."[199] The Court also investigated the nature of the demolition permit ordinance's required 60-day stay or "cooling off period."[200] Initiated due to the nature of the religious ownership, the period is required "during which the religious organization is subject to negotiation with governmental and private authorities before an historic or architecturally significant structure can be demolished."[201] This 60 day stay was rescinded based on the decision reached in *First Covenant Church v. City of Seattle*[202] which determined that an historic preservation ordinance was not a compelling government interest and in effect violated the First Amendment. The Court reiterated that the "possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom."[203] The Superior Court affirmed the trial court's order to dismiss the appellant's petition for a writ of mandamus.

The *Munns v. Martin*[204] case clearly illustrates the immense latitude the states possess when deciding local land use issues. The Washington Court has historically not shown any leniency for historic preservation and continuously denies even the legitimacy of preservation. Its distinctive position is defined by consistently effortless religious freedom victories. The evolution of historic preservation, however, is hindered in the state of Washington as evidenced by the *Munns* ruling in which a landmark designation of an historic school owned by a religious entity is deemed unconstitutional. The Washington state allowances and protections are so entrenched that with or without the RFRA a religious

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[199] Ibid.
[200] Ibid.
[201] Ibid.
[202] Ibid.
[203] Ibid.

entity is given enhanced protection. But as the next case demonstrates, the ability of RFRA to affect the outcome of historic preservation versus religious freedom cases becomes incontrovertible.

The significance of the *City of Boerne v. Flores*[205] case lies in its verdict that the Religious Freedom Restoration Act is unconstitutional. The Supreme Court delved into the relevant Free Exercise case history and re-established the standard for scrutiny. The Supreme Court recognized that RFRA was a backlash to the *Smith* decision that did not apply the balancing test of *Sherbert v. Verner*[206] and tried to resolve the issue by setting a higher standard of scrutiny than that applied in *Smith*. Many historic preservationists looked to this ruling as heaven-sent. They hoped that the muscle behind the religious freedom protection clauses would deflate and allow opportunities for other legitimate purposes to exist. Many in the field had hoped that this standard of scrutiny would be applied in future free exercise claims jurisprudence.

The case began when the Catholic Archbishop of San Antonio, P.F. Flores, brought action under RFRA challenging the denial of a building permit to enlarge the church. The United States District Court for the Western District of Texas, San Antonio Division decided RFRA was unconstitutional under the Fourteenth and Tenth amendments. The Fifth Circuit Appellate Division reversed in part and declared RFRA constitutional. In 1997, the Supreme Court granted Certiorari, reversed, and declared RFRA unconstitutional. This decision rippled through the historic preservation community and rekindled a great hope in the field's validity. As witnessed previously, one step towards the embrace of preservation is unfortunately interpreted by the Courts in vastly different ways, usually to the dismay of

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[204] Ibid.
[205] *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997).

preservationists. Even with RFRA declared unconstitutional, religious freedom rights have been confirmed a time-honored foe.

Figure 11

Interior view of St. Peter Catholic Church in Boerne, Texas.

The 1923 mission style St. Peter Catholic Church located in the historic district of Boerne, Texas sparked a Supreme Court case and established Free Exercise case law precedent. Due to its inability to accommodate its parishioners, the parish decided to enlarge its structure. "Both the city and the parish were growing rapidly, and the church regularly had to turn away 40 to 60 parishioners for the 11:00 a.m. Sunday Mass. In response to the

[206] Id., *Sherbert v. Verner*.

overcrowding, the Archbishop of San Antonio, P.F. Flores, approved an expansion plan."[207] The 1993 plan included a complete rehabilitation that would consequently remove much of the Church's authenticity. Meanwhile, the Boerne City Council passed Ordinance 91-05[208] that authorized the city's Historic Landmark Commission to create historic districts and identify individual buildings as landmarks. This required that any changes to the structure be approved by the Historic Landmark Commission.

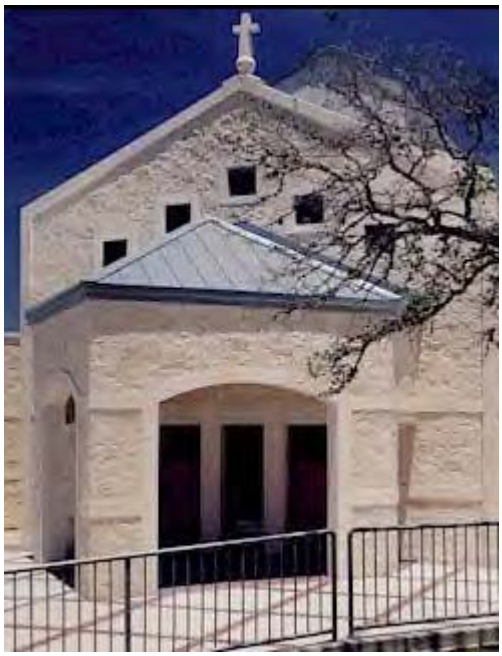

Figure 12

Exterior view of St. Peter Catholic Church in Boerne, Texas.

The earliest conflict centered on the actual boundaries of the Historic District. This was quickly solved by ensuring that the boundaries were redrawn. "Any dispute as to the actual boundaries of the City Historic District, as to whether the church was within the

[207]Jared Roberts. "City of Boerne v. Flores and the United States of America: Congress Versus the Court in a Struggle Over Free Exercise: Will Employment Division v. Smith Survive?" Found at http://www.dcl.edu/lawrev/98-4/roberts.htm.

district or not, were de facto answered when the City amended the boundaries of the Historic District to include the entire church structure."[209] The next issue arose when the Church filed a building permit that would "completely gut the church building, destroying the building itself, save for the distinctive mission-style façade."[210] This permit was rejected and a suit was filed by Archbishop Flores alleging that the preservation ordinance was unconstitutional and violated RFRA.[211] After the Solicitor General intervened on the Church's side to uphold the constitutionality of RFRA, the Senior District Judge, Lucius D. Bunton held RFRA unconstitutional. "The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet it is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary."[212] Congress reshuffled the separation of powers and assumed power it was not delegated.

The United States Court of Appeals for the Fifth Circuit reversed in part. They concluded that RFRA was constitutional because the judiciary's authority to interpret the Constitution was not removed. Instead, the new legislation created new protections in addition to the constitutional rights already recognized by the courts. The Supreme Court felt differently and deemed RFRA unconstitutional in a 6 to 3 decision. Justice Anthony M. Kennedy delivered the opinion of the Court. Kennedy began by defining the core issue: "the parties disagree over whether RFRA is a proper exercise of Congress' §5 power "to enforce" by "appropriate legislation" the constitutional guarantee that no State shall deprive any

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208 Ibid.
209 Ibid.
210 Ibid.
211 *Flores v. City Of Boerne*, 73 F.3d 1352 (5th Cir. 1996).
212 *Flores v. City Of Boerne* SA-94-CA-0421 (1995).

person of "life, liberty, or property, without due process of law" nor deny any person "equal protection of the laws."“[213]

The Court began the intricate process of delineating the issues by considering Congress's intent and method exercised when enacting the RFRA. The Court deduced that when enacting RFRA, Congress relied on §1 of the 14th Amendment which states in part that

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[214]

The safeguard that the state cannot deprive a person of these rights was coupled with §5 that states "the Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[215] This empowers Congress to enforce the guarantees of §1. Although the Court of Appeals for the Fifth Circuit ruled that RFRA was constitutional, the Supreme Court ruled otherwise. The Justices felt that the enforcement power conferred to the Congress was improperly applied and consequentially traversed the visible as well as invisible lines that entail the separation of powers. "RFRA is not a proper exercise of Congress' §5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal state balance."[216] Justice Scalia concurring in part, with whom Justice Stevens joined, wrote:

> The issue presented by Smith is, quite simply, whether the people, through their elected representatives, or rather this Court, shall control the outcome

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[213] Id., City of Boerne v. Flores (1997).
[214] "U.S. Constitution: Fourteenth Amendment – Rights Guaranteed Privileges and Immunities of Citizenship, Due Process and Equal Protection Amendment Text." Found at http://caselaw.lp.findlaw.com/data/constitution/amendment14/.
[215] Ibid.
[216] Id., *City of Boerne v. Flores*, (1997).

> of those concrete cases. For example, shall it be the determination of this Court, or ratherof the people, whether (as the dissent apparently believes) church construction will be exempt from zoning laws? The historical evidence put forward by the dissent does nothing to undermine the conclusion we reached in Smith: It shall be the people.[217]

The question before the Court centered on the issue of whether or not RFRA was deemed enforcement legislation under the 14th Amendment. If RFRA was characterized as enforcement legislation under the 14th Amendment, this triggered the question of whether Congress exceeded its constitutional power.

> RFRA's most serious shortcoming, however, lies in the fact that it is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections, proscribing state conduct that the Fourteenth Amendment itself does not prohibit. Its sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.

The answer was yes. The Court found that Congress' enactment of RFRA was substantive rather than remedial. The problem, as Justice Kennedy explains is that the legislation not only enforces the Clause, but also changes the meaning of the Free Exercise Clause. "Congress does not enforce a constitutional right by changing what the right is."[218] Kennedy admits that the "line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern."[219] Though difficult to discern, the line exists. Kennedy explains that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect."[220] This was the issue the Court dealt with. Congress does not have a

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[217] Ibid.
[218] Ibid.
[219] Ibid.
[220] Ibid.

substantive, non-remedial power under the Fourteenth Amendment. If it did, the Constitution would be subverted and Congress would reign. As Kennedy stated, "under this approach, it is difficult to conceive of a principle that would limit congressional power."[221] RFRA was deemed an intrusion too large to permit – RFRA was held unconstitutional as it applied to the states, concluding that it exceeded Congress's enforcement powers under § 5 of the Fourteenth Amendment.

Justice Stevens concurred that RFRA violated the First Amendment. He also placed the backlash against Smith in context. He gave a great example.

> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic Church, it is claimed that RFRA gives its owner a federal statutory entitlement to an exemption from a generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment.[222]

Boerne v. Flores breathed life into the historic preservation field. It reopened the door closed by RFRA on the preservation of religious landmarks. The optimism was fueled in part by the long anticipated voice from above – not from the heavens, but from the Supreme Court that held RFRA was unconstitutional because it trenched too hard on state sovereignty to regulate to promote the public welfare and because it transgressed the separation of power doctrine by trying to change first amendment principles that the US Constitution had articulated in the *Employment* decision. The Supreme Court ruling was expected to be the guide that would establish some uniformity in the arena of historic preservation and freedom

[221] Ibid.
[222] Ibid.

of religion cases. The *Boerne* much needed boost to the historic preservation field was heeded. The Post-*Boerne* era began with a small victory for historic preservation.

VI. Post - *Boerne*

The 1998 *Metropolitan Baptist Church v. District of Columbia Department of Consumer and Regulatory Affairs*[223] case culminated in a small victory for preservation. The Church claimed that its rights under the Free Exercise Clause and the RFRA were violated when the District of Columbia Historic Preservation Review Board refused its request to have a public hearing continuance.

The District of Columbia Historic Preservation Review Board established the Greater Fourteenth Street Historic District after the Logan Circle Community Association petitioned for designation. "According to the application, the area possessed unique historical and architectural characteristics related to the development of 14th Street, N.W., as a transportation corridor."[224] The appellant, Metropolitan Baptist Church, owned five rowhouses in the area located between 1701 and 1711 13th Street, N.W. The application described these rowhouses as "multi-storied brick buildings with multi-storied polygonal bays, corbelled cornices, stringcourses and other decorative brickwork."[225] Significantly, the Church's actual house of worship is not included in the historic district boundaries but is located nearby. A sixth property, also owned by the Church, is included in the district but not in the suit.

According to the statement given by Reverend Dr. H. Beecher Hicks, Jr., the pastor of Metropolitan Baptist Church, the first rowhouse was acquired by the Church in 1939. He explained that currently, the rowhouses were used by the Church for their Church-related functions. Specifically, the "five properties provided space for a variety of church projects

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[223] *Metropolitan Baptist Church v. District of Columbia Department of Consumer and Regulatory Affairs*, 718 A.2d 119 (D.C. App. 1998).
[224] Ibid.

including a pre-school, a Sunday school, food and clothing distribution centers, and self-help classes."[226] Hicks explained that the properties were imperative to the fulfillment of the Church's "Vision 2000" goals which included expansion of their ministry by building new structures where the five rowhouses currently exist. He stated:

> The church had incurred a debt of approximately two million dollars in connection with the five rowhouses, and a bank had secured the properties as collateral. Members of the church community would not have invested in these properties over the decades if they had anticipated that their plans would be 'so unjustly and unreasonably thwarted' by historic designation.[227]

With this background, the Court delved into ascertaining whether the District of Columbia Historic Preservation Review Board abused its authority and violated the Church's rights.

The Church believed that the designation would slow the Vision 2000 plan by requiring certain permits. They contend that the designation would impede their ability to renovate the rowhouses and thus unconstitutionally burden the church's free-exercise rights. "Because the rowhouses have been designated historic, however, the church would be required to comply with various permit procedures before it could begin renovations as part of its Vision 2000 plan."[228] Because the Church established the case depending on what might happen in the future, the Trial Court decided that the Church's free exercise rights were not burdened because the issue was not ripe yet. "The historic designation did not interfere with the church's current use of the properties for its social programs, and, as for the Vision 2000 plan, the church had not even tried to apply for a permit to alter or demolish the properties as it wishes."[229]

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[225] Ibid.
[226] Ibid.
[227] Ibid.
[228] Ibid.
[229] Ibid.

The trial court also concluded that the designation of the district and the inclusion of the Church's rowhouses were without problem. On the issue of First Amendment rights, the trial court found that the claim was not ripe.

> With respect to the church's religious-freedom claims, the court held that they were not ripe for adjudication because (1) there was no evidence that the church's current use of the rowhouses was impeded by the historic designation and (2) the church's future plans for the properties were not yet impeded because the church was free to apply for a permit to alter or demolish them, and such a permit might well be granted.[230]

The Church appealed this decision and Associate Judge Steadman delivered the opinion. Steadman agreed with the Trial Court decision that the Board "did not abuse its discretion or otherwise err in the denial of the motion."[231] RFRA was not pivotal in the appeal as evidenced by the Church's tactical switch since the Superior Court ruling. Due to the Supreme Court's 1997 decision in *City of Boerne v. Flores,*[232] the Church focused their case on proving that it was ripe for adjudication. Regarding the ripeness issue, the Court of Appeals affirmed the judgment of the Superior Court. Judge Steadman explained that "in any event, we are not persuaded that the particular record before us, even with the stricken exhibits, presents the question of unconstitutional burden in a sufficiently concrete factual form to ensure that a definitive constitutional ruling at this point would not be premature."

The *1998 City of Ypsilanti v. First Presbyterian Church*[233] case was the second post-*Boerne* era victory for historic preservation. The Michigan Court of Appeals applied the standards of *Smith, Boerne*, and *Saint Bartholomew's Church* to reject the Church's claim of First Amendment infringement.

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230 Ibid.
231 Ibid.
232 Id., *City of Boerne v. Flores* (1997).
233 *City of Ypsilanti v. First Presbyterian Church,* No. 191379 (Mich. App 1998).

Towner House 1999

Figure 14

The Towner House pre-restoration in Ypsilanti, Michigan.

Towner House 2002

Figure 15

The Towner House post-restoration in Ypsilanti, Michigan.

The Church purchased the "Towner House" in 1972. The property was built in 1837 and "represents the earliest example of post-log cabin living by settlers in the area."[234] The Towner House became part of a Historic District as created by the Ypsilanti Historic District Ordinance in 1978. Even before the designation, the Church planned to demolish the structure. "Ironically, it could have then done so, but it instead acceded to the wishes of preservationists who were, as it turns out, unable or unwilling to move the building."[235] The Church concluded that their attempt to deal with the preservationists was fair but unfortunately failed and resumed their original plans to demolish the structure by applying for the necessary permits. Ypsilanti denied two applications for demolition of the historic log cabin to make room for a parking lot. "Counterdefendants, through a succession of leases with defendant, organized in an attempt to forestall defendant's decision because of the Towner House's historical and architectural value."[236] The Church felt that the treatment they received was unfair, especially in light of their original attempts to work with the preservationists. They claim that

> After the designation, the necessary permits for the planned demolition were not only denied, but the church was required by the city to expend considerable amounts of scarce money to repair the building – a structure for which it had no particular use. In short, the city has forced the church to spend significant funds to repair a building it does not want.[237]

The second denial was appealed to the State Historic Review Board which agreed with the Historic Preservation Commission's decision.

The First Presbyterian Church argued that the City of Ypsilanti burdened its free exercise of religion rights under the RFRA. Due to RFRA's invalidation in *City of Boerne v*

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[234] Ibid.
[235] Ibid.
[236] Ibid.
[237] Ibid.

Flores[238] the Court used the standard of review established in *Employment Division v. Smith*[239] The Court believed that even buildings with religious uses are subject to generally applicable laws. The Court also believed that the Church's rights were not infringed upon specifically, rendering the law neutral and generally applicable. "Here, the ordinance applies to all building owners within the historic district without distinction. Thus, the ordinance is a facially neutral, generally applicable law requiring only minimal review to determine that prohibiting the exercise of religion is not the object of the ordinance but merely the incidental effect."[240] The court believed that the burdens, if there were any, were incidental in nature. The Court gave an example. "If allocating funds in defendant's budget for renovation of the Towner House would decrease the funds available for other areas of defendant's mission, this effect does not indicate that the ordinance singles out defendant for differential treatment."[241] The Court was confident that the burdens, incidental in nature, did not replace the authority of the Church with the goals of historic preservation. The Washtenaw Circuit stated:

> Although defendant's control of its financial resources may be fundamental to its free exercise of religion, the ordinance in question here does not directly force defendant into refraining from spending money in certain areas, such as outreach to the community….Thus, the ordinance in this case does not give the historic preservation commission authority over defendant's ecclesiastical decisions. In short, the ordinance is a law of general application which does not burden defendant any more than other citizens, let alone burden defendant because of its religious beliefs. [242]

The Court made it clear, through the use of *Smith* in *St. Bartholomew's* and *Boerne*, that the ordinance, as applied to all properties in the historic district, is facially neutral and generally.

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[238] Id., *Boerne v Flores* (1997).
[239] Id., *Employment Division v Smith* (1990).
[240] Id., *City of Ypsilanti v. First Presbyterian Church.*
[241] Ibid.

Figure 13

First Presbyterian Church in Ypsilanti, Michigan.

The Church's contention that the Ordinance was equivalent to a taking was also rejected. "The fact that the ordinance in this case affects defendant more severely than others does not itself result in 'taking'. Historical preservation benefits all the citizenry both economically and by improving the overall quality of life in Ypsilanti."[243] The Church's contention that the Historic District Commission abused its power was also rejected. The Church claimed that the demolition of the Church would have been granted if any of the following conditions existed:

> (1) The resource constitutes a hazard to the safety of the public or the occupants.
> (2) The resource is a deterrent to a major improvement program that will be of substantial benefit to the community.
> (3) Retaining the resource will cause undue financial hardship to the owner.
> (4) Retaining the resource is not in the interest of the majority of the community.[244]

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[242] Ibid.
[243] Ibid.
[244] Ibid., Historic District Ordinance, art 2, ch 55, § 5.334(3). See MCL 399.205(5); MSA 5.3407(5)(5).

The Court again reaffirmed the denial of the demolition permit and confirmed that these conditions did not exist. The Michigan Court of Appeals applied the established standards in *Smith, Boerne*, and *Saint Bartholomew's Church*. Using these standards, the Court of Appeals rejected the Church's claim of First Amendment infringement. Unfortunately, the historic preservation victories are short lived.

The *Diocese of Toledo v. Toledo City-Lucas County Plan Commissions*[245] began as another step forward in the progression of historic preservation but on Appeal, succumbed to "appellant's constitutional arguments [that were] rendered moot and found not well-taken."[246] The Lucas County Court of Common Pleas found that the denial of permission to demolish a house in an historic district to establish a parking lot did not burden the Diocese of Toledo's First Amendment Rights but the Court of Appeals of Ohio reversed the decision. The judgment was reversed again in favor of the Diocese of Toledo.

The Diocese of Toledo purchased a house in the historic district of the Old West End, Toledo, Ohio in January 1996.[247] Justice Knepper explained that "the house was purchased for $ 17,500. Prior to closing, appellant authorized the removal of interior leaded and stained glass windows and french doors. Also removed from the residence were exterior windows; however, there is no evidence that appellant authorized their removal."[248] After receiving two public nuisance notices, the Church applied for a Certificate of Appropriateness to demolish the house and build a parking lot.[249] The Old West End Historic District Commission denied the certificates and the Trial Court agreed. The incorporation of the house in the Historic District, though in need of repairs, still

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[245] *Diocese of Toledo v. Toledo City-Lucas County Plan Commissions,* No. L-98-1150 (Ohio App.1999).
[246] Ibid.
[247] Ibid.
[248] Ibid.
[249] Ibid.

contributed to the overall character of the neighborhood. "The structure does maintain the character of the historic district. It is considered a gabled cottage style house in the book American Vernacular Design."[250]

The Diocese appealed the Trial Court's decision which they believe "erred in affirming the decision of the Toledo City-Lucas County Plan Commission, denying a Certificate of Appropriateness to permit the Diocese of Toledo to demolish the property."[251] The Diocese explained that the retention of the house was a financial burden that impinged on their ability to promote their charitable activities. The Diocese tried to establish that other means of disposing of the liability were investigated. They explained that they searched for investors.

> It is the appraiser's understanding that the purchase price for the subject was $17,500 this coupled with a renovation cost of 110% of the estimate or $37,100 results in a total of $54,600. With [a] 'When Completed' value of $59,000, the estimated margin for a proposed developer would be less than ten percent. This is not adequate to attract a developer and realistically the project must be viewed as not feasible.[252]

The Trial Court entertained different appraiser estimates for repair. Other evidence was introduced that the property was so dilapidated that even repair was not feasible. "The property has so severely deteriorated over the past year through obvious abuse and neglect, that sadly, it cannot be economically restored today."[253] The Trial Court concluded that based on this evidence, denial of the demolition permit did not amount to an undue burden. The Court found that the method in which the Toledo City-Lucas County Plan

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[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Ibid., Panel's Report statement by Art St. John, Associate Broker for The Salsberry Company.

Commissions derived their decision "was supported by the preponderance of substantial, reliable, and probative evidence."[254]

The Court of Appeals contributed additional information which introduced evidence debunking the Diocese's position regarding the potential economic use of the property. "At the time of the Diocese's application, there was a reasonable economic use for the structure, rehabilitation by Neighborhood's in Partnership was economically sound, and the NIP offered a feasible and prudent alternative to demolition."[255] Significantly, the Court found that "if appellant established that there was no reasonable economic return for the structure and rehabilitation was not economically sound, then it was irrelevant, and appellant did not need to prove, whether the structure contained features of architectural or historic significance, contributed to maintaining the character of the historic district, or whether there was a feasible and prudent alternative to demolition."[256] The Court concluded that the estimates of rehabilitation and overall cost to the Diocese were too much. "We find as a matter of law that based on the economic information available at the time of the application, and the testimony from renovation experts and appraisers…the amount of gain after renovation could not earn a reasonable economic return."[257] The Court thus concluded that the Diocese should have been granted the demolition permit. "We find that the preponderance of substantial, reliable, and probative evidence establishes that appellant has met its burden."[258] The judgment of the Lucas County Court of Common Pleas was reversed and the goals of historic preservation undermined yet again.

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[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Ibid.
[258] Ibid.

The *First Church of Christ, Scientist v. Historic District Commission of the Town of Ridgefield*[259] can be considered another notch in the belt of historic preservation. The Church followed procedures to reclad their structure with vinyl siding instead of painting, an intensive procedure that would have to be intermittently repeated. Because of its location within an historic district, the applications for a Certificate of Appropriateness to allow the installation of vinyl siding on its church building were denied. The Church filed suit claiming that this denial to utilize the vinyl material on their structure violated their right to free exercise. The Appellate Court affirmed and adopted the decision of the lower court by applying the *Smith* analysis. Furthermore, the Court reiterated the importance of Historic Preservation and its legitimacy as a use of police power. The Church believed that the Historic District Commission decision should be reversed for two reasons: "should be reversed because it improperly (1) relied on undefined aesthetic considerations in denying its application for a certificate of appropriateness and (2) burdened its free exercise of religion." [260]

Justice Mihalakos delivered the opinion. He explained that vinyl siding as a material was investigated by the Historic District Commission and deduced to be an inappropriate material. "The record before the commission reflects that the plaintiff's proposal to 'reclad' its church with vinyl siding does not fall within the scope of "ordinary maintenance or repair.""[261] The Church claimed the motivation for the used of vinyl was its need to repair the structure. Unfortunately, the application of this material would harm the structure more than help and in effect destroy some of its authenticity. "The record reveal[ed] that the application of vinyl siding on the church [would] create a loss of trim detail, cause a substitution of V-groove for tongue in groove siding and change the clapboard width and

[259] *First Church of Christ, Scientist v. Historic District Commission of the Town of Ridgefield*, 738 A.2d 224 (1998).
[260] Ibid.
[261] Ibid.

shine."[262] Along with the loss of authenticity that would incur because of these changes, the material is foreign and not within the realm of general repair, hence requiring the Certificate of Appropriateness from the Historic District Commission. "Since the plaintiff is not proposing to reapply or restore the existing material, i.e., a coat of paint, the plaintiff's proposal falls outside the scope of "ordinary repair.""[263]

Figure 16

Exterior view of First Church of Christ Scientist in Ridgefield, Connecticut.

The Church claimed that the true issue is merely an aesthetic consideration. Even though the Connecticut case law has not defined the importance of aesthetic considerations, the Court reaffirmed that aesthetic control is legitimate. Justice Mihalakos cited "As for the plaintiff's contention that the commission abused its discretion by exceeding the bounds of permissible aesthetic considerations, our Supreme Court has stated that aesthetic considerations are valid in land use regulation."[264] The Church claimed that the Historic District Commission acted illegally and arbitrarily by not providing a fair hearing by

[262] Ibid.
[263] Ibid.
[264] Ibid., Quoting *Figarsky v. Historic District Commission*, 368 A.2d 163 (1976).

essentially predetermining that vinyl siding was not appropriate thus precluding the option of granting a Certificate of Appropriateness. They state that "no applications for Certificates of Appropriateness to install vinyl siding have ever been granted by the commission."[265]

Figure 17

Interior view of First Church of Christ Scientist in Ridgefield, Connecticut.

The Church claimed that the process and ultimate rejection of the Certificate of Appropriateness as part of the historical district regulations burdened its right of Free Exercise. The Connecticut Superior Court answered by reasserting the legitimacy of historic preservation. "The Supreme Court has recognized that the preservation of a historical area or landmark falls within the meaning of general welfare and, consequently, the police power."[266] The Court found that the laws applied to the Church were within the scope of the state's police power. Quoting from *Employment Division v. Smith*[267], the Court said "the first amendment cannot be extended to such an extent that a claim of exemption from the laws based on religious freedom can be extended to avoid otherwise reasonable and neutral legal

[265] Ibid.
[266] Ibid., Quoting from *Figarsky v. Historical District Commission*, supra, 171 Conn. 208.

obligations imposed by government."[268] In this case, the Court was able to look beyond the claims and legitimize the historic preservation discipline as well as deduce that in this case, the implications of preservation did not equate to diminishing the rights to of the plaintiff to assemble or express their religious views. Justice Mihalakos opined that the Free Exercise rights of the First Church of Christ were not violated and the plaintiff's appeal was dismissed.

[267] Id., *Employment Division v. Smith,* 494 U.S. 872 (1990).
[268] Id., *First Church of Christ, Scientist v. Historic District Commission.*

VII. Religious Land Use Institutionalized Persons Act

The invalidation of RFRA and the multiple post-Boerne historic preservation victories placed religious rights groups on edge. RFRA's attempt to restore the standard of strict scrutiny was invalidated by the Court which deemed that Congress was only permitted to develop laws that would enforce the standard of protection as opposed to establish new, stricter standards, as attempted by RFRA. In 1998 and 1999, Congress again attempted to implement a guide by enacting the Religious Liberty Protection Act (RLPA). The bill would have established:

> a 'strict scrutiny' test for state and local laws that infringe on the free exercise of religion. The new standard [would require]... that such laws must further a 'compelling interest' by 'the least restrictive means.' Under current law, state and local governments must prove only a 'rational relationship' to the government's interest. To trigger a claim against a state or local government under the [proposed] bill, an individual must demonstrate that the government 'substantially burdened' his freedom of religion and places the burden of proof on the government.[269]

The Act failed due to the Commerce Clause connection. RLPA would have "prohibited a State from placing a substantial burden upon a person's religious exercise under the following conditions: (1) in a State-operated program or activity that receives Federal financial assistance; or (2) in or affecting international or interstate commerce."[270] The Act failed to get support and also received negative press. While protecting one freedom, religious freedom, the Act would have negatively affected children in child abuse and neglect cases.

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[269] "Religious Freedom Restoration Acts." Found at http://www.religioustolerance.org/rfra3.htm.

> RLPA could have devastating effects for children whose parents disapprove of medical treatment due to religious beliefs. Parents could use RLPA as a defense for withholding needed medical care from their children or engaging in other child abuse or neglect if they cite religion as their reason for doing so. Therefore, a person could use the federal law as a defense in court against state or local child abuse or neglect charges.[271]

In 2000, to quell nervous feelings, President Clinton signed the Religious Land Use and Institutionalized Persons Act (RLUIPA)[272] into law after passing Congress almost unanimously. RLUIPA directly addressed the issues of zoning and landmarking and was established to settle what religious entities declared outrageous discrimination at the hands of land use regulations. It was carefully crafted to withstand claims of unconstitutionality by incorporating limits. RLUIPA protects religion through the Spending and Commerce Clause and did not rely, as did RFRA, on the Free Exercise Clause.

The Act reestablished the pre-Smith standard of demonstrating a burden by specifically reinstating the two-part analysis. The Act states:

> 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—
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> > (A) is in furtherance of a compelling governmental interest; and
> >
> > (B) is the least restrictive means of furthering that compelling governmental interest.[273]

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[270] Thomas, Legislative Information on the Internet, Bill Summary & Status on H.R. 4019 & S. 2148 (Aug. 29, 2001). Found at http://thomas.loc.gov/cgi-bin/bdquery.
[271] "Religious Liberty Protection Act: Possible Danger to Children." September 9, 1999. Found at http://www.aap.org/advocacy/washing/rlpa9_99.htm.
[272] Religious Land Use and Institutionalized Persons Act, 42 USCA § 2000cc. Found at http://www.usdoj.gov/crt/split/documents/rluipa.htm.
[273] Ibid.

RLUIPA clearly allows for a wide range of applicants and reinforces the protection of religious entities by bolstering the arsenals of religious organizations and solidifying their chances when disputing zoning and landmarking laws. The law defined land use regulation as a "zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest."[274] Specifically, RLUIPA defined religious exercise as including "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[275] RLUIPA also specified what the use or building meant. "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[276] A religious institution utilizing RLUIPA as a defense would still be required to initially prove that a burden exists. The burden of proof next shifts to the government that initiated the law and must prove that the burden furthers the government interest by the least restrictive means.

RLUIPA, as described in the text, addressed its broad construction but also delineated several restrictions. "This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."[277] To avoid future claims, RLUIPA's scope was limited to cases in which:

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[274] Ibid.
[275] Ibid.
[276] Ibid.
[277] Ibid.

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
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> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
>
> (C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.[278]

RLUIPA draws support from financial assistance under the Spending Clause listed in Part A, interstate commerce under the Commerce Clause in Part B, and §5 of the Fourteenth Amendment in Part C. RLUIPA is still in its infancy and still very susceptible to invalidation. The land use cases that have utilized RLUIPA have either validated the constitutionality of the Act, invalidated its application, or are still pending. The overwhelming majority of its application, however, has been related to institutionalized persons. "Although to date most of the litigation under RLUIPA has involved the religious exercise claims of prisoners, the statute provides a powerful tool for faith-based groups and religious property owners engaged in land use disputes with local government entities."[279]

Between 2002 and 2004, RLUIPA has steadily gained ground. Four federal courts of appeal have upheld the constitutionality of RLUIPA. The cases include *Mayweathers v. Newland*,[280] *Charles v. Verhagen,*[281] *Madison v. Riter,*[282] and *Midrash Sephardi Inc. v. Town of Surfside.*[283] In November 2003, however, the consistency and momentum of RLUIPA was

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[278] Ibid.
[279] *Mayweathers v. Newland,* 314 F.3d 1062 (2002).
[280] Ibid.
[281] *Charles v. Verhagen*, 348 F.3d 601 (2003).
[282] *Madison v. Riter*, 355 F.3d 310 (2003).
[283] *Midrash Sephardi Inc. v. Town of Surfside*, 366 F.3d 1214 (2004).

disrupted by the decision in *Cutter v. Wilkinson.*[284] The United States Court of Appeals for the Sixth Circuit held RLUIPA unconstitutional and reversed and remanded the decision reached by the United States District Court for the Southern District of Ohio. Approximately one year later on October 12, 2004, the United States Supreme Court granted a writ of certiorari. The Supreme Court opinion is still pending.

The 2002 *Mayweathers v. Newland*[285] case was initiated by several California Muslim state prisoners that claimed that their inability to attend a Friday afternoon religious service, known as Jumu'ah, violated their rights under RLUIPA. The United States Court of Appeals for the Ninth Circuit agreed. Senior Circuit Judge D. W. Nelson delivered the opinion of a unanimous Court. He stated that RLUIPA "intends a secular legislative purpose - to protect the exercise of religion in institutions from unwarranted and substantial infringement."[286] The Court determined that Congress did not exceed its Spending Clause power when enacting RLUIPA and that its legislative purpose was legitimate and ultimately promoted general welfare. Nelson stated that "protecting religious worship in institutions from substantial and illegitimate burdens *does* promote the general welfare. By ensuring that governments do not act to burden the exercise of religion in institutions, RLUIPA is clearly in line with this positive constitutional value. Moreover, by fostering non-discrimination, RLUIPA follows a long tradition of federal legislation designed to guard against unfair bias and infringement on fundamental freedoms."[287] The Court upheld RLUIPA. Significantly, the Court also addressed the *Smith* ruling:

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[284] *Cutter v. Wilkinson*, 349 F.3d 257 (2003).
[285] Id., *Mayweathers v. Newland* (2002).
[286] Ibid.
[287] Ibid.

> RLUIPA does not erroneously review or revise a specific ruling of the Supreme Court because the statute does not overturn the Court's constitutional interpretation in *Smith*….Rather, RLUIPA provides additional protection for religious worship, respecting that *Smith* set only a constitutional floor—not a ceiling—for the protection of personal liberty. Smith explicitly left heightened legislative protection for religious worship to the political branches.[288]

The Court found that the statute carried out the Supreme Court's interpretation of the First Amendment's requirement that religious practices be reasonably accommodated. Examples of religious practices that prisons have attempted to prevent, and which are protected by RLUIPA are receiving religious texts, Muslim inmates being forced to handle pork, Catholic prisoners wearing a crucifix, and Christian prisoners receiving communion wine or Jewish prisoners maintaining a kosher diet. [289] While the statute affected religious worship, it was not deemed unconstitutional because it did not provide any corresponding protections to secular activities or non-religious prisoners.

The next federal appeals court to address RLUIPA was the 2003 *Charles v. Verhagen*[290] case which, incidentally, also involved prisoners. The United States Court of Appeals for the Seventh Circuit affirmed the decision reached by the United States District Court for the Western District of Wisconsin. The case involved Jerry Charles, a Muslim prisoner at the Oshkosh Correctional Institution in Oshkosh, Wisconsin. He claimed that his inability to obtain prayer oils violated his rights under RLUIPA. "According to Muslim practices, Charles prays five times a day and undergoes ritual cleansing or purification, in part to

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[288] Ibid.
[289] "Constitutionality of RLUIPA to be Reviewed by the Supreme Court." Found at www.rluipa.com/cases/CutterSC.html.
[290] Id., *Charles v. Verhagen* (2003).

eliminate offensive body odors prior to prayer. This ritual cleansing often involves the application of fragrant prayer oil."[291]

The United States Court of Appeals for the Seventh Circuit agreed with the finding of constitutionality in *Mayweathers v. Newland*.[292] Circuit Judge Bauer reaffirmed that it was within the scope of Congress to create safeguards for prisoners' religious rights and to promote the rehabilitation of prisoners. This pursuit was clearly within Congress' pursuit of the general welfare under its Spending Clause authority and was not considered an advancement of religion. "The requirements of RLUIPA cannot fairly be said to amount to government advancement of religion through the government's own activities or influence…The statute does not promote religious indoctrination, nor does it guarantee prisoners unfettered religious rights, and not every challenge under RLUIPA will be deemed valid."[293] For the second time, the Court found that RLUIPA did not violate the Establishment Clause. It was upheld as a valid exercise of Congress' Spending Clause authority.

In 2003, the United States Court of Appeals for the Fourth Circuit heard *Madison v. Riter*.[294] Ira Madison, a prisoner at the Virginia's Buckingham Correctional Center, and a Hebrew Israelite, brought suit claiming that his inability to follow his special religious dietary needs violated RLUIPA. He claimed that his inability to maintain a kosher diet defined by the Virginia Department of Corrections as a 'common fare diet' violated his rights as a prisoner. On January 23, 2003, the U.S. District Court Judge James C. Turk held that the provision had an impermissible effect of advancing religion under the second prong of the *Lemon* test. "Because we find that Congress can accommodate religion in section 3 of

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[291] Ibid.
[292] Id., *Mayweathers v. Newland* (2002).
[293] Id., *Charles v. Verhagen* (2003).

RLUIPA without violating the Establishment Clause, we reverse. To hold otherwise and find an Establishment Clause violation would severely undermine the ability of our society to accommodate the most basic rights of conscience and belief in neutral yet constructive ways."[295] Section 3 of RLUIPA was held unconstitutional on the basis that it offered greater legislative protection for the religious rights of prisoners than for other fundamental rights.

On December 8, 2003, the U. S. Court of Appeals for the Fourth Circuit unanimously overturned the decision reached by the U.S. District Court for the Western District of Virginia. Circuit Judge Wilkinson, writing the opinion of the Court, again upheld RLUIPA and specified how it was constitutional under each prong of the *Lemon* test. According to Wilkinson, RLUIPA passed the secular purpose prong. "This secular goal of exempting religious exercise from regulatory burdens in a neutral fashion, as distinguished from advancing religion in any sense, is indeed permissible under the Establishment Clause. To be sure, Congress has no constitutional duty to remove or to mitigate the government-imposed burdens on prisoners' religious exercise. But the Supreme Court has held that Congress may choose to reduce government-imposed burdens on specific fundamental rights when it sees it appropriate."[296] Similarly, RLUIPA was not found to promote an impermissible effect by enacting a statute that reduces burdens on religious exercise while not considering other burdens. "There is no requirement that legislative protections for fundamental rights march in lockstep. The mere fact that RLUIPA seeks to lift government burdens on a prisoner's religious exercise does not mean that the statute must provide commensurate protections for other fundamental rights."[297] Finally, RLUIPA was not determined to create an excessive entanglement. Wilkinson commented that in fact,

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[294] Id., *Madison v. Riter* (2003).
[295] Ibid.
[296] Ibid.

RLUIPA does the opposite. "RLUIPA itself minimizes the likelihood of entanglement through its carefully crafted enforcement provisions."[298] *Madison* was the third federal court of appeal case raising RLUIPA and the third to declare its validity.

In the 1999 *Midrash Sephardi, Inc. v. Surfside*[299] case, Surfside sought to enjoin Midrash Sephardi and Young Israel of Bal Harbor, two small Orthodox Jewish congregations from meeting on the second floor of a bank building in Surfside's B-1 zoned district. In a unanimous decision on April 21, 2004, the United States Court of Appeals for the Eleventh Circuit issued a stay of the lower court injunction. In an opinion written by Circuit Judge Wilson, the Court held that "Surfside improperly targeted religious assemblies and violated Free Exercise requirements of neutrality and general applicability."[300] The Court warned that "while merely the mention of church or synagogue in a zoning code does not destroy a zoning code's neutrality, we must nevertheless be mindful of the potential for impermissible 'religious gerrymanders,' which may render a zoning code operatively non-neutral."[301] The Court rejected the notion that the Surfside ordinance violated RLUIPA by substantially burdening congregations and found, instead, that Surfside violated RLUIPA's equal terms provision. Surfside's exclusionary practice that disallowed churches and synagogues from an area in which it allowed private clubs and lodges was deemed impermissible. The Court also ruled that RLUIPA was constitutional. "RLUIPA's core policy is not to regulate the states or compel their enforcement of a federal regulatory program, but to protect the exercise of religion, a valid exercise of Congress's § 5 power under the Fourteenth Amendment, which

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297 Ibid.
298 Ibid.
299 Id., *Midrash Sephardi Inc. v. Town of Surfside* (2004).
300 Ibid.
301 Ibid.

does not run afoul of the Tenth Amendment's protection of the principles of federalism."[302] *Midrash* was the final case that ruled in favor of RLUIPA. The next case, *Cutter v. Wilkinson,*[303] which was actually heard before *Midrash* on November 7, 2003, halted RLUIPA's momentum and declared it unconstitutional.

The federal courts of appeal track record including the Fourth, Seventh, Ninth, and Eleventh Circuits seemed steady and positive until the Sixth Circuit's decision in *Cutter v. Wilkinson*. The Sixth Circuit consolidated three cases involving the Ohio Department of Rehabilitation and Corrections including *Cutter v. Wilkinson,*[304] *Gerhardt v. Lazaroff,*[305] and *Miller v. Wilkinson.*[306] The plaintiffs were prisoners in the Ohio State penitentiary system. They each practiced what are generally considered unconventional religions including Asatru, a religion followed by Vikings, Jesus Christ Christian religion, which promoted the separation of races, and finally Wiccan and Satanism.[307] They claimed that their rights under RLUIPA were violated by the Ohio Department of Rehabilitation and Corrections because they claim that that the prison did not allow them sufficient access to religious literature as well as the ability to conduct services.

On November 7, 2003, in an opinion by Circuit Judge Ronald Lee Gilman, the Sixth Circuit reversed and remanded the lower court ruling and declared that RLUIPA was unconstitutional. RLUIPA was found to violate the Establishment Clause. Prior to RLUIPA, prison official restrictions were assessed according to the rational-relationship review which included "(1) whether there is a 'valid, rational connection' between the prison regulation

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302 Ibid.
303 Id., *Cutter v. Wilkinson* (2003).
304 Ibid.
305 *Gerhardt v. Lazaroff,* 221 F. Supp. 2d 827 (2002).
306 *Miller v. Wilkinson,* No. 02-3299.
307 "Cutter v. Wilkinson." Found at http://www.becketfund.org/index.php/case/82.html.

and a legitimate government interest; (2) whether inmates have alternative means of exercising the right in question; (3) the impact of a requested accommodation of the right upon guards and other inmates; and (4) the absence of alternatives to the regulation."[308] RLUIPA imposed a strict scrutiny standard that placed the burden on officials to prove that the restriction or regulation furthered a compelling penological interest and was achieved by the least restrictive means. "As is well known from the history of constitutional law, the change that RLUIPA imposes is revolutionary, switching from a scheme of deference to one of presumptive unconstitutionality."[309] The Court decided that this additional protection granted specifically to religious rights rather than to other constitutionally protected rights violated the Establishment Clause. "It imposes strict scrutiny where the Establishment Clause requires only a rational-relationship review."[310] This highly controversial opinion is directly opposed to the recent trend that found RLUIPA constitutional in several federal court of appeals cases.

The Supreme Court heard the calls for action and granted a writ of certiorari. On October 12, 2004, the United States Supreme Court granted certiorari in *Cutter v. Wilkinson*, docket number 03-9877, in which it will review the constitutionality of RLUIPA. It is a widely anticipated decision that will confirm whether or not Congress violated the Establishment Clause when enacting RLUIPA.

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[308] Id., *Cutter v. Wilkinson* (2003).
[309] Ibid.
[310] Ibid.

VIII. The Establishment Clause

The Establishment Clause trends further exemplify the inconsistency of the courts. Beginning in the 1940's and 1950's the decisions in Establishment Clause cases have taken one of two possible routes. These competing interests still invoke passionate debate. Norman Redlich explains that "these approaches – the wall of separation between church and state, and the accommodation of religion – continue to dominate the Court's decisions today…Virtually all of the Establishment Clause decisions of the modern Court represent one or the other of these approaches. Often, both concerns occur in the same opinion."[311] Establishment Clause jurisprudence begins with the 1899 *Bradfield v. Roberts*[312] case. A strict-separationist's nightmare, the Court established that not every form of financial aid, in this case a federal construction grant, to religious organizations, in this case a hospital owned by a Roman Catholic order, violates the Religion Clauses.

In 1897 the Commissioners of the District of Columbia made an agreement with Providence Hospital, owned and operated by the Sisters of Mercy, whereby the District of Columbia would fund the construction of a new building on the existing hospital grounds to treat patients with contagious diseases. The plaintiff, Joseph Bradfield, believed that the contract between Washington D.C. and the Providence Hospital was illegal because the hospital was owned and operated by a Roman Catholic organization. He felt that as a taxpayer and a resident of Washington D.C., his First Amendment rights were violated. Bradfield believed the funding of the hospital and of its patients indirectly through his tax dollars and directly through the established federal appropriation violated the Establishment Clause and sued to enjoin the Treasurer of the United States, Ellis H. Roberts, from

[311] Id., Redlich (1999). p. 510.

allocating the funds. The District Court agreed that the funding was unconstitutional but the Court of Appeals[313] reversed the lower court's ruling that enjoined the Treasurer of the United States from paying any money to the Providence Hospital. The Supreme Court voted 8-to-0 to affirm the Court of Appeals' ruling.

The contract agreed upon between the Commissioners of the District of Columbia and the Directors of Providence Hospital signed on August 16 1897, provided that the "said building or ward [was] to be erected without expense to said hospital" and that "when [the] said building or ward is fully completed, it shall be turned over to the officers of Providence hospital."[314] The turn-over stipulated that two thirds of the beds were to be reserved specifically for citizens of the District of Columbia. The contract also directed the District of Columbia to pay for the use of the beds through the budget dictated and approved by Congress. "For each such patient, said Commissioners and their successors in office are to pay at the rate of two hundred and fifty dollars per annum, for such a time as such patient may be in the hospital, subject to annual appropriations by Congress."[315] The second condition was that those patients who had the means to pay for their treatment were allowed to seek treatment and pay the Hospital directly for its services. "Such persons will pay to said Providence hospital reasonable compensation for such treatment, to be fixed by the hospital authorities."[316]

The authority to create the contract was contained in the General Appropriation Act for the expenses of the District of Columbia and was approved March 3, 1897 under the

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312 *Bradfield v. Roberts*, 175 U.S. 291 (1899).
313 *Bradfield v. Roberts*, 12 App. D.C. 453 (1898).
314 Ibid.
315 Ibid.
316 Ibid.

general heading of "Health Department."[317] This authority was granted specifically to fulfill a need that the City previously tried unsuccessfully to account for. The Act states, in part, that:

> It is a matter of common knowledge that there is no hospital in the District for the isolation and proper care of persons suffering from even the 'minor contagious diseases,' so called in the contract aforesaid; and that all attempts heretofore made to meet the imperative demand therefore, through the erection of a suitable building by the District itself, have been thwarted by the opposition of residents and property owners who feared injury to person and property from its location in their neighborhood.[318]

The District of Columbia's need for the Hospital outweighed any attempts the citizens made to thwart the construction in their neighborhood. The City thus ensured that the General Appropriation Act assumed the responsibility for the members of society that could not necessarily afford treatment for their diseases. The solution was the agreement with Providence Hospital.

The issue Joseph Bradfield had with the Providence Hospital was that it was a "private eleemosynary corporation."[319] It was owned and operated by the Sisters of Charity of Emmettsburg, Maryland. It was part of the Roman Catholic Church and was incorporated by a special Act of Congress approved April 8, 1864. It was "invested specially with full power and all the rights of opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as may place themselves under the treatment and care of said corporation."[320] Bradfield believed that the exchange of services for money between this religious organization and the City "becomes a grant by law in aid of an establishment of religion, and is therefore within the prohibition of the First Amendment."[321]

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[317] Ibid.
[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Ibid.

Justice Shepard, delivering the opinion of the Court for the Court of Appeals, held that the contract and exchange of services for money was constitutional. He stated that "in respect, then, of its creation, organization, management and ownership of property, it is an ordinary private corporation, whose rights are determinable by the law of the land, and the religious opinions of whose members are not subjects of inquiry."[322] In other words, compensation for the services rendered should be paid. The Court reversed the lower court's ruling and deemed that the payment for the services were legitimate. Shepard asked two very important questions that explain the position of the Providence Hospital as well the Court's accommodation of the religious organization.

> If the United States were engaged in war, would they be denied the power, no matter how advantageous or necessary it might be in some instances, to contract with religious societies or associations for hospital supplies, or for nursing their sick and wounded soldiers in their own or in private hospitals? If a church or religious establishment were the lowest bidder on a proposition by the United States for the lease or sale of a building for any legitimate government use or purpose, would the power be denied to authorize the lease or purchase because of the character of the ownership of the offered property?[323]

These two questions place the relationship between the Hospital and the City in context. Jefferson's stiff wall melts when the reality of church and state relations is examined. The Court of Appeals' opinion and ultimate decision struck a chord with Supreme Court. Though the decisions in cases are often contradictory, the Supreme Court's ultimate accommodation of religious organizations is indicative of the cases to come.

Justice Peckham delivered the Supreme Court's reasoning for rejecting the Establishment Clause challenge. The Court did not find the fact that the Providence Hotel was owned and operated by a religious organization alarming. He stated that "nothing is said

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[322] Ibid.
[323] Ibid.

about religion or about the religious faith of the incorporators of this institution in the act of incorporation. It is simply the ordinary case of the incorporation of a hospital for the purposes for which such an institution is generally conducted."[324] The court ignored the owner of the building and instead highlighted the purpose of the building. The function of the hospital e.g., taking care of sick people with contagious diseases, rendered the appellant's argument void. Peckham stated that:

> The above-mentioned allegations in the complainant's bill do not change the legal character of the corporation or render it on that account a religious or sectarian body. Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation….[325]

The Supreme Court thus affirmed the judgment reached by the Court of Appeals and deemed the contract between the Providence Hospital and the City constitutional.

The Court's first probe into the Establishment Clause boundaries as exemplified in *Bradfield v. Roberts* is usually dismissed by academia and written off as perfunctory in nature. The case is considered cursory since it lacks an in-depth inquiry into the scope of the Establishment Clause. Though it is inadequate in that sense, the case at the same time illuminates the playing field and allows for the first glimpse of what will develop into a strong accommodationist spirit. The next case, *Quick Bear v. Leupp,*[326] demonstrates that the Court picked up just where it had left off nine years earlier – the torch of accommodation was raised again.

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[324] Id., *Bradfield v. Roberts* (1899).
[325] Ibid.
[326] *Quick Bear v. Leupp,* 210 U.S. 50 (1908).

The United States established annual contracts with various denominational schools for the purpose of educating Native Americans. In the 1908 *Quick Bear v. Leupp*[327] case, F. E. Leupp, the United States Commissioner of Indian Affairs, contracted with the Saint Francis Mission School to educate the Sioux Indian children on the Rosebud reservation. The case established that American Indians could use the monies provided them by the federal government for all future funding of schools like Saint Francis.

The Saint Francis Mission School was administered by the Bureau of Catholic Indian Missions, a Maryland corporation. In 1905, the Bureau of Catholic Indian Missions reapplied to the Commissioner of Indian Affairs for an annual contract to educate approximately 200 Sioux children. The contract specified that the Bureau of Catholic Indian Missions was charged with the "care, maintenance, and education during the year 1906…at the cost of $27,000."[328] The Secretary of the Interior approved the contract and specified that the funding in the amount of $24,000 would be derived from the 'Sioux Treaty Fund,' and $3,000 would be from the 'Sioux Trust Fund.'"[329] The Sioux Indians, represented by Reuben Quick Bear, found issue with the derivation of the funds. The lower court ruled in favor of an injunction against the expenditure of the $24,000 from the Treaty Fund, and allowed the $3,000 expenditure from the Trust Fund.[330]

The Court of Appeals of the District of Columbia[331], however, saw the matter in a different light in 1907 and reversed the lower court's decision. Justice Wright explained why the Court approved the injunction of the $24,000 and disagreed with the allowance of the $3,000. The Court of Appeals and the impending United States Supreme Court decision

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[327] Ibid.
[328] *Quick Bear v. Leupp,* 30 App. D.C. 151 (1907).
[329] Ibid.
[330] Ibid.
[331] Ibid.

depended on the definition as well as intention of the term "funds." This pivotal term allowed for a clear explanation as to why government funded sectarian schools on Indian land was not considered an establishment of religion and thus not in violation of the First Amendment.

The Sioux Treaty Fund was established by the Sioux Treaty of 1868.[332] This treaty established government funded education for Indian children for a term of twenty years between 1868 and 1888. Specifically, it stated that the United States "would provide for every thirty children of the Sioux tribe a house and a teacher competent to teach the elementary branches of an English education."[333] Two years later, an amendment was added that increased the type of education and established an additional amount of money to fund the added expense. Specifically, the provision stated that "entirely aside from treaty obligations, was appropriated $100,000 'for the support of industrial and other schools among the Indian tribes not otherwise provided for, to be expended under the direction of the Secretary of the Interior.'"[334] Nearly half way into the agreed upon 20-year term, the United States again amended the treaty to further increase Sioux educational support granted under the terms of the treaty. In 1877 the treaty was modified to read "schools and instruction in mechanical and agricultural arts."[335] At the end of the 20-year term, on March 2, 1889, the treaty was renewed for another 20-year term.[336] The accretion of funding and general provisions of the second 20-year term also continued. Nearly at the end of this second 20-year term, the Indian Appropriation Act of 1905[337] referred back to the 1877 change and allotted $700,000 to fulfill the need of "for subsistence of the Sioux, and for

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[332] Ibid. (15 Stat. at L. 635).
[333] Ibid. (15 Stat. at L. 635).
[334] Ibid. (16 Stat. at L. 335, 359, chap. 296).
[335] Ibid. (19 Stat. at L. 254, 255, chap. 72).
[336] Ibid. (25 Stat. at L. 894, chap. 405).

purposes of their civilization."[338] The Appropriation Act also referred to the initial 1868 agreement and allotted a sum of $225,000 "for support and maintenance of day and industrial schools, including erection and repairs of school buildings."[339] The distinction between the establishment, intent, and timing of the Sioux Treaty Fund and the Sioux Trust Fund rendered the funding constitutional.

The establishment of education and the Sioux Treaty Fund was followed by the Sioux Trust Fund which entailed land acquisition. The funding as well as intent of the Trust Fund was completely separate from all earlier agreements. In 1889, just as the initial 20-year term ended and the second 20-year term for education was passed, the United States entered into another agreement with the Sioux Indians. The arrangement entailed land acquisition in the sum of $3 million. The Sioux Trust Fund was:

> in consideration of the relinquishment of the Indian title to lands in Dakota…Congress provided 'there shall be set apart, out of any money in the Treasury not otherwise appropriated…which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be appropriated, under the direction of the Secretary of the Interior, to the use of the Indians, etc.'"[340]

The Trust Fund and the Treaty Fund were separate but were both relied upon to provide for the education of the Sioux Indians.

Justice Wright explained that "under the existing legislation the position of the United States with respect to the Indian 'funds' is practically that of a trustee; with respect to the gratuitous appropriations for 'Support of Schools,' that of a voluntary donor; so that it may well be that a limitation can attach to the use of the gift of money without attaching to

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[337] Ibid. (33 Stat. at L. 1048-1055, chap. 1479).
[338] Ibid. (33 Stat. at L. 1048-1055, chap. 1479).
[339] Ibid. (33 Stat. at L. 1048-1055, chap. 1479).
[340] Ibid. (25 Stat. at L. 888-895, chap. 405).

the trust money."[341] Wright's view that the United States was a trustee of the Indian funds with regards to the Treaty Funds and a donor with regards to the Trust Funds was supported by the fact that Congress historically funded for them separately even though they both supported the same goal, education. The problem arose when the aid of public funds was regularly diminished in the 1896 treaty requiring that only 80% of the 1895 funds be allowed and then eliminated in 1899 due to concerns of impingement on First Amendment rights. "It is likely that a restriction attached to the disposition of the gratuity, found only in juxtaposition with the very words creating the gratuity, was intended to apply only to the gratuity."[342]

On May 18, 1908, the Supreme Court of the United States affirmed the decree of the Court of Appeals of the District of Columbia.[343] The Court reaffirmed that the diminution of funds pertained to the public funds and not to the Treaty Funds. The Court determined that the use of those monies was at the total bequest of the Sioux Indians - the money belonged to the Sioux and could be used in any manner they chose. The appropriation of the monies to further the educational needs of their children was a legitimate use regardless of the fact that the money came from a government fund and that the schooling was sectarian. Chief Justice Fuller delivered the opinion of the Court. He stated that "there is no injustice in permitting an Indian to select a school for his children under the auspices of the church to which he is attached, and allowing on that account a portion of the tribal funds or a portion of the annuities or rations to be applied."[344]

Fuller made it clear that withholding the Indian monies was unjust and furthermore, the fact that the funds were used for religious education was determined to be valid. "It

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[341] Ibid.
[342] Ibid.
[343] *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

would be unjust to withhold from an Indian or community of Indians the right…to choose their own school and to choose it frankly because the education therein is under the influence of the religious faith…." He concluded that a differing opinion would "pervert the supposed general spirit of the constitutional provision into a means of prohibiting the free exercise of religion."[345] Fuller's point elucidated the narrow path between the Establishment and Free Exercise Clauses – a path that has ultimately plagued future courts.

Although the Supreme Court had already decided *Bradfield v. Roberts* and *Quick Bear v. Leupp,* both involving the Establishment Clause, most scholars look to the 1947 5-to-4 decision in *Everson v. Board of Education*[346] as the true starting point of modern Establishment Clause jurisprudence. Scholars tend to believe that "First Amendment law is essentially a product of the twentieth century."[347] This historical case is highly regarded for certain precedents it set as well as for its comprehensive analysis regarding the meaning and application of the Establishment Clause.

Everson v. *Board of Education* effectively incorporated the Establishment Clause into the Due Process Clause of the Fourteenth Amendment. As ratified in 1868, the Fourteenth Amendment reads, in part, as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[348]

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[344] Ibid.
[345] Ibid.
[346] *Everson v. Board of Education*, 330 U.S. 1 (1947).
[347] Jerome A. Barron and C. Thomas Dienes, "First Amendment Law", West Group St. Paul, MN 2000, p. 59.
[348] United States Constitution, Amend. 14.

The Amendment was intended to protected citizens from any state encroachment onto their liberties and fundamental rights. It established that each citizen was warranted at least due process of law and equal protection under the law. The citizens were finally afforded protection against any governmental encroachment on their religious rights when the Religion Clauses were incorporated into the Amendment.

The conflict in this case began when Arch R. Everson, a taxpayer and resident of Ewing Township, New Jersey challenged a New Jersey statute that reimbursed parents for the cost of busing their children to schools. He brought suit against the Board of Education on the grounds that it violated the Establishment Clause. Everson claimed that as a taxpayer, his taxes should not be spent to reimburse the transportation costs of parents busing their children to parochial schools.

Ewing Township lacked schools beyond the eighth grade. The Township solved their educational predicament by busing children to nearby jurisdictions, mainly to Trenton and Pennington schools, and reimbursed parents for any out of pocket transportation expenses. As determined by the Board of Education, Ewing Township contracted out their transportation needs, pursuant to *R.S.* 18:14-8 (1903) and as amended in 1941 to read:

> When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.[349]

The township of Ewing did not intend the reimbursement statute to further religion. The fact that Ewing bused children to a parochial school was incidental to the intent of the statute.

The case was initially heard by the Supreme Court of New Jersey on October 5, 1943.[350] Three judges heard the case and two declared that this additional paragraph was not legally valid and thus the New Jersey state legislature did not have the right to authorize reimbursement under the state constitution. Justice Parker explained that the outcome of the statute was to "provide for free transportation of children at the expense of the home municipality and of the state school fund to and from any school, other than a public school, which is not operated for profit."[351]

In reality, the free transportation Parker cites amounted to $859.80. This amount is detailed in the opinion of a later case as delivered by Chancellor Campbell:

> Pursuant to such resolution the appellant on February 15th, 1943, authorized the payment of $8,034.95 for transportation. Of this sum $357.74 was paid to the parents of twenty-one pupils who were transported to parochial schools in Trenton, five to elementary schools and sixteen to high schools. The transportation was by public carrier bus. The payments to parents were in satisfaction of advancements made by them; and the amount was fixed upon the basis of the actual number of days' attendance as indicated upon each pupil's report card.[352]

Justices Parker and Perskie agreed with Everson and declared that the resolution must be set aside due to the 1941 amendment's violation of paragraph 6 of section 7 of article IV of the state constitution that specifically states the support of public free schools.

Justice Heher, however, disagreed that the Ewing Township Board of Education erred in appropriating the transportation funds to and from parochial schools. He believed that the Board's action should not be looked at as unconstitutional, but rather as furthering the Child Benefit Theory. Heher's views become central in the future Appeal where Justice

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[349] *Everson v. Board of Education*, 132 N.J.L. 98 (1944). New Jersey Laws, 1941, c. 191, p. 581; N. J. R. S. Cum. Supp., tit. 18, c. 14, § 8.
[350] Ibid.
[351] Ibid.
[352] *Everson v. Board of Education*, 133 N. J. L. 350 (1945).

Hugo Black agreed and further developed the idea. Heher asserted that giving a gift comprised of public funds to a parochial school would be unconstitutional but believed that the Board's actions do not constitute a gift of public funds. He explained that "such transportation is a service to the children and their parents rather than to the schools, for otherwise the parents would be obliged to provide the conveyance or incur the traffic hazards incident to the journey, for which children are generally so ill-equipped."[353] Heher believed that the act furthered the execution of compulsory education statues and believed that if taken separately and considered an aid to parents, thus removing the institution, that it served an essential public interest and in effect the "constitutional doubts lose their force."[354]

The New Jersey Court of Errors and Appeals reversed two years later on October 15, 1945 in a 6-to-3 verdict holding that neither the resolution nor the statutes are unconstitutional.[355] Chancellor Campbell dissected the intent of the 1941 amendment and explained that the decision to bus children to parochial schools was only incidental since the language of the amendment reads "children attending schools could be furnished transportation by any school district from any point *on an already established school route* to any other point *on such established school route.*"[356] He explained that "payment of such expense out of local taxes is the payment of "incidental expenses" or "transportation of pupils" authorized by *R.S.* 18:7-78."[357]

Finally, on February 10, 1947, in a narrow 5-to-4 decision, the Supreme Court agreed.[358] Justice Hugo L. Black explained in detail the two arguments on the basis of which the reimbursements to the parents of the children are thought to have violated the Federal

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[353] Id., *Everson v. Board of Education* (1944).
[354] Ibid.
[355] Id., *Everson v. Board of Education* (1945).
[356] Id., *Everson v. Board of Education* (1944).
[357] Ibid.

Constitution and then explained why the Court rejected them both. The first argument was that it violated the due process clause of the Fourteenth Amendment by authorizing the State to tax the private property of citizens and then use the money for a specific private purpose. Black rejected this by maintaining that "the fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."[359] He believed that it was incorrect to assume that the reimbursement violated the due process clause and made clear that the fact that something is subsidized by law does not establish that the law has a private instead of a public purpose. As examples, he stated that "subsidies and loans to individuals such as farmers and home-owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history."[360]

The second argument was that it violated the First Amendment's Establishment Clause by forcing the citizens to pay taxes to support religious education at Catholic schools. The Establishment Clause was violated, so the argument went, because the Fourteenth Amendment applied the Religion Clauses to the states. After a lengthy exploration into the history and circumstances surrounding the Constitution and the intent of the Framers, Black equated providing transportation to children to providing fire and police protection. He stated that:

> Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare.[361]

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[358] Id., *Everson v. Board of Education* (1947).
[359] Ibid.
[360] Ibid.
[361] Ibid.

Black's position was that the provision of transportation benefited all involved and thus should not be rejected to some because of their religious affiliations. Black explained that the First Amendment's purpose was to be neutral and thus a law could not be enacted to aid one particular religion. He affirmed that "state power is no more to be used so as to handicap religions than it is to favor them."[362] The fact that the reimbursement might have influenced some parents to send their children to a parochial school was cast aside by the Court and acknowledged as merely incidental. It was deemed a general provision that reimbursed all schools, both public and private, and thus valid.

Black affirmed his position of separation with his famous words: "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[363] His words delineate a separationist attitude but his actions remain far from implementing it. The separationist rhetoric that was employed by Black and supported in his opinion by the writings of Thomas Jefferson and James Madison did little to bolster separationism. In fact, Black bolstered the accommodation of religious groups by interpreting the beneficiaries of the reimbursement as the children and thus substantiated that the aid was secular in nature. Black followed the child benefit theory as did Justice Heher in the earlier New Jersey Supreme Court case of 1943.

Dissents by Justices Jackson and Rutledge are important because they also reinforce Jefferson's wall of separation but however do not look away from where the underlying benefit actually resides. They state that the reimbursement is a form of aid. The children may indeed benefit but the bottom line is that the religious education of children is the backbone of the Church. "Its growth and cohesion, discipline and loyalty, spring from its schools.

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[362] Ibid.

Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself."[364] Jackson and Rutledge felt that the reimbursement of transportation was equated to and indistinguishable from direct aid to the church. They dismissed the child safety argument outright. "This expenditure of tax funds has no possible effect on the child's safety or expedition in transit. As passengers on the public buses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before."[365]

Justices Jackson and Rutledge made a dignified effort to reinforce Jefferson's wall of separation. These next two arguments placed forward, however valiant, fall on deaf ears. The first, states that:

> "The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination." [366]

The second states that:

> "But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them." [367]

These two arguments were rejected by the Supreme Court Justices and the Court thus rejected a broad interpretation of the Establishment Clause. The Court established that

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[363] Ibid.
[364] Ibid.
[365] Ibid.
[366] Ibid.
[367] Ibid.

public money may be spent on general public services for religious organization just as any other secular organization. The Court reiterated however that public money may not be directed to support the religious aspects of a religious organization. It "construed the Establishment Clause to require a complete separation of church and state."[368] Since *Everson* the tension between the separation of church and state and the accommodation of religion has taken center stage. "Establishment decisions subsequent to *Everson* more clearly have turned on whether the Court favored protecting freedom of religion by accommodating free exercise or by maintaining a strict wall of separation."[369]

Twenty-three years after Everson, *Walz v. Tax Commission of the City of New York*[370] explored the meaning of the Establishment Clause and in a vote of 7-to-1 reaffirmed the tax-exempt position of religious organizations. Redlich explains that "many of the Court's attempts to reconcile the values embodied in free exercise and establishment have been in circumstances where the government has provided some form of aid to religious institutions. Often, such cases require the Court to choose, in some measure, between burdening free exercise or promoting establishment."[371] *Walz* is the classic example most scholars cite.

Frederick Walz, a Christian New York state property owner filed suit seeking an injunction against the New York City Tax Commission. Walz challenged the constitutionality of property tax exemptions that were granted to properties owned by religious organizations used solely for religious purposes. He felt that as a citizen of the state of New York and a taxpayer, he indirectly contributed to those religious organizations – effectively violating the Establishment Clause. This case significantly narrowed the poorly demarcated no man's land between the Establishment and Free Exercise Clauses.

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[368] Id., Redlich. *Understanding Constitutional Law* (1999). p. 506.
[369] Ibid., p. 508.
[370] *Walz v. Tax Commission of the City of New York,* 397 U.S. 664 (1970).

On May 4, 1970, in a 7-to-1 decision, the Supreme Court reaffirmed that the tax-exempt status of religious organizations was not in violation of the First Amendment. This decision was based in part on the fact that historically, exemptions had been granted to all religious organizations. The New York Constitution granted the New York City Tax Commission statutory authority to grant property tax exemptions to religious organizations for religious properties. Tax exemptions were implemented by the New York Real Property Tax Law which stated that:

> Real property owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes . . . and used exclusively for carrying out thereupon one or more of such purposes . . . shall be exempt from taxation as provided in this section.[372]

The Court recognized that the intention of the exemption was not designed to support one religion in particular. The Court concluded that in fact, exemptions themselves, if compared to the alternative of taxation, created a smaller interaction between church and state and thus were not considered to be an excessive entanglement.

Chief Justice Warren E. Burger delivered the opinion of the Court. Burger explained the Court's conclusion by first admitting that the decision was problematical due to the vagueness of the First Amendment. The issue of the First Amendment's vagueness bears witness to both its beauty as well as its inherent complicated nature. The First Amendment is not a statute that was intended to delineate proper action on a case by case basis. The First

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[371] Id., Redlich (1999). p. 510.

[372] Ibid., § 420, subd. 1.

Amendment, as Burger explains, is an idea that was intended to be applied when deciding cases.

> The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.[373]

The First Amendment as an objective, rather than a statute, is further complicated by the interaction between the Clauses. Burger explained that this interaction demonstrated the difficulty of operating in this zone. "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[374] The *Walz* decision added to the process of clarifying the indistinct zone between the Clauses and bolstered future Supreme Court cases.

Burger explained an additional conundrum. The absolute neutrality was unattainable since the existence of the Clauses connoted involvement and that absolute neutrality would in effect defeat its basic purpose. It was unambiguous that the "'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."[375] Burger chose instead to advocate a benevolent neutrality which was a realistic, and more importantly, achievable intention. He stated that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist

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[373] Ibid.
[374] Ibid.
[375] Ibid.

without sponsorship and without interference."[376] He believed that this benevolent neutrality, which was derived from the accommodation of both the Establishment and Free Exercise Clauses, was the key to what prevented the inappropriate government involvement and control of churches and religious practices.

Burger tipped his hat to Mr. Jackson's logical analysis in *Everson* but agreed with the Court's ultimate practical decision. He found the decision to be "eminently sensible and realistic [in] application of the language of the Establishment Clause."[377] By rejecting the possible narrow and ultimately harmful interpretation, Burger believed that the Court in *Everson* was able to successfully walk what he called the tight-rope between the clauses. "With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion."[378] Burger asserted that this balance had been the key to the Court's success.

The first issue raised in *Walz* was the customary tax-exempt status of religious organizations. Burger established that religious groups could be included in the general category of eleemosynary organizations and could thus benefit from these general exemptions. He explained that the "State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest."[379] Religious organizations were deemed charitable due to their programs that help society and that would have been done by the government if not otherwise completed by religious organizations.

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[376] Ibid.
[377] Ibid.
[378] Ibid.

Burger made clear that property tax deductions were not created to bolster religious groups. Instead, he asserted that the tax exemption was neither to advance nor to inhibit religion but was a way to prevent possible abuse of power. He explained that:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion. As Mr. Justice Holmes commented in a related context "a page of history is worth a volume of logic."[380]

Exemption from taxation was the lesser of the two evils in that exemption consisted of a comparatively limited involvement. The implementation of taxes would actually increase the nexus of interaction between government and religion. Burger stated that "elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."[381] The characterization of a benefit becomes a crucial recurring theme that become clear in *Lemon.*[382] Burger firmly established that the purpose of exemption was neither the advancement nor the inhibition of religion and next turned to what he felt was crucial in the evaluation – the actual effect, whether intentional or incidental.

Burger remained firm in his beliefs on the necessity of religious tax exemption and asserted that "it is hardly useful to suggest that tax exemption is but the 'foot in the door' or

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[379] Ibid.
[380] Ibid., Justice Burger quotes Mr. Justice Holmes in *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).
[381] Ibid.
[382] Id., Redlich (1999). p. 512.

the 'nose of the camel in the tent' leading to an established church."[383] He did, however, believe that the effect of tax exemptions, even incidental effects, should be calculated. He stated that "we must be sure that the end result -- the effect -- is not an excessive government entanglement with religion. The test is inescapably one of degree."[384] These three words "excessive government entanglement" became significant a year later in *Lemon v. Kurtzman*[385] when it became the third prong of the three-part test that determined whether or not an action violated the Establishment Clause.

Justice Brennan, concurring, made an interesting historical point that became central an upcoming Supreme Court case. James Madison, an advocate for religious tax exemptions had later in life, changed his mind and argued against tax exemptions for churches among other things. Specifically, he argued for the removal of religious vestiges from the government. Madison argued against:

> tax exemptions for churches, the incorporation of ecclesiastical bodies with the power of acquiring and holding property in perpetuity, the right of the Houses of Congress to choose chaplains who are paid out of public funds, the provision of chaplains in the Army and Navy, and presidential proclamations of days of thanksgiving or prayer.[386]

Though the issue of Madison's late-life change of heart was not approached again, it further complicated the issue. The proper course of action was further blurred by yet another interpretation of the original intention. The dissent by Justice Douglas also revealed an interesting personal admission that followed in the footsteps of Madison's change of heart. He stated that "the *Everson* decision was five to four and, though one of the five, I have since

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[383] Ibid.
[384] Ibid.
[385] *Lemon v. Kurtzman* , 403 U.S. 602 (1971).
[386] Id., *Walz v. Tax Commission of the City of New York* (1970).

had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause."[387] This candid statement shed light on his opinion that a tax exemption was a subsidy and placed the accommodation of religion decided in the last four Supreme Court cases on questionable ground. "From that perspective, free exercise concerns were not implicated, and the benefit derived was more clearly in violation of the mandated separation and neutrality."[388]The basic contention between Justices Burger and Douglas was the issue of effect. "The importance of how a benefit is characterized is a recurring theme in religion clause decisions. Its importance would become clear the next year in *Lemon v. Kurtzman*, a case involving government aid to religious schools, where Chief Justice Burger would apply essentially the same standards with opposite results."[389]

In 1971, the 5-to-4 decision in *Tilton v. Richardson*[390] continued the trend of religious accommodation and laid steadier ground for the Supreme Court. *Tilton* reaffirmed the 1899 *Bradfield*[391] decision that determined that not all government aid to organizations owned and operated by religious groups was unconstitutional. *Tilton* established that government construction grants for non-religious academic facilities built on religious university campuses were constitutional.

Eleanor Taft Tilton, representing a group of Connecticut taxpayers, sued Robert H. Finch, the Secretary of the United States Department of Health, Education and Welfare and then Elliot Lee Richardson, the Secretary of Health, Education, and Welfare alleging that the

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387 Ibid.
388 Id., Redlich. *Understanding Constitutional Law* (1999). p. 512.
389 Ibid., p. 512.
390 *Tilton v. Richardson,* 403 U.S. 672 (1971).
391 Ibid., *Bradfield v. Robert* (1899).

Higher Education Facilities Act[392] of 1963 violated the First Amendment. Tilton alleged that the allocation of federal construction grants paid out under Title I to four institutions of higher education in Connecticut amounted to nothing less than the establishment of religion. Five projects were constructed including a library building at Sacred Heart University; a music, drama, and arts building at Annhurst College; science and library buildings at Fairfield University; and a language laboratory at Albertus Magnus College. The four institutions were administered by Catholic religious organizations and had predominantly Catholic student bodies. While the universities did not require students to attend religious services, theology courses were required. The universities maintained that religious indoctrination, however, was not at any time or in any form part of the curriculum.

Title 1 of the Act gave grants and loans for up to 50% of the construction costs to colleges and universities for the building costs of academic facilities. Eligibility for the federal aid was determined if a university proved that it:

> urgently needed [a] substantial expansion of the institution's student enrollment capacity, capacity to provide needed health care to students or personnel of the institution, or capacity to carry out extension and continuing education programs on the campus of such institution.[393]

The Act also expressly excluded facilities intended for religious worship or instruction. Specifically, it excluded "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity."[394] To ensure that the new facility was indeed religion-neutral, the government retained an interest in the property for twenty years and maintained the right to unannounced spot-checks. If these on-

[392] Ibid., 77 Stat. 364, as amended, 20 U. S. C. §§ 711-721 (1964 ed. and Supp. V).
[393] Ibid., 20 U. S. C. § 716 (1964 ed., Supp. V).
[394] Ibid., § 751 (a)(2) (1964 ed., Supp. V).

site inspections revealed a prohibited sectarian association, then the government was to recover a portion of the grant.

In 1970, the District Court of Connecticut heard the case and upheld the constitutionality of the Higher Education Facilities Act.[395] District Judge Timbers explained that the Court found that in intent as well as effect, the Act was constitutional. The Supreme Court however, only partially agreed. In 1971, Chief Justice Burger delivered the opinion of the Court. He began by explaining that over time, the Supreme Court has interpreted the Establishment Clause to protect against sponsorship, financial support, and direct involvement. Burger believed that the analysis and ultimate finding that any of these have been violated are difficult to assess. He stated:

> Every analysis must begin with the candid acknowledgment that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.[396]

Without definitive tests, Burger explained, the Court therefore must rely on guidelines deduced from history mainly: whether the Act reflected a secular legislative purpose, whether the primary effect of the Act was to advance or inhibit religion, whether the administration of the Act created an excessive government entanglement with religion, and whether the Act in effect violated the Free Exercise Clause.

Regarding the first guideline, the Act clearly served the legitimate secular objective of education. Also, the newly constructed buildings were non-religious in appearance. Burger asserted that "these buildings are indistinguishable from a typical state university facility."[397]

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[395] *Tilton v. Richardson*, 312 F. Supp. 1191(1970).
[396] Id., *Tilton v. Richardson* (1971).
[397] Ibid.

The function of the five buildings was also non-religious in nature. Two were libraries, one was a language laboratory, one was a science building and one is a music, drama, and arts building. "There is no evidence that religion seeps into the use of any of these facilities."[398] The Act would have been deemed invalid if religion was taught in any of these buildings.

The Court found problems with respect to the second consideration, whether the Act established an excessive government entanglement. In fact, the Court was unanimous in its opinion regarding the 20-year time limitation and the specified necessary surveillance. The Court deemed the 20-year period allotted for the government interest unacceptable. The dispute was that after the time period elapsed, the religious organization could convert the building to whatever it deemed necessary. This conversion could directly augment its agenda and therefore work to advance religion. Burger illustrated the potential harm this conversion could have. "If, at the end of 20 years, the building is, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion. To this extent the Act therefore trespasses on the Religion Clauses."[399]

Burger clarified that though a part of the Act was in violation of the Religion Clauses that this did not necessitate the invalidation of the remainder of the Act. He rested his opinion on a general principle expressed in *NLRB* v. *Jones & Laughlin Steel Corporation* that "the cardinal principle of statutory construction is to save and not to destroy."" [400] The invalidation of the Act also did not hinge on the retention of the 20-year period. Burger explained that:

> In view of the broad and important goals that Congress intended this legislation to serve, there is no basis for assuming that the Act would have

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[398] Ibid.
[399] Ibid.
[400] Ibid. *NLRB* v. *Jones & Laughlin Steel Corporation,* 301 U.S. 1, 30 (1937).

> failed of passage without this provision; nor will its excision impair either the operation or administration of the Act in any significant respect.[401]

The Court thus allowed the remaining part of the Act to stand as valid.

The third guideline of entanglement was addressed by evaluating the potential for entanglement. The potential was determined to be much less at an institution of higher learning than at an elementary or secondary school. "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[402] The court determined that the entanglement of government with religion was lessened because the substance of the education was not religious, the facilities were religiously neutral, and thirdly that government supervision was minimal. The issue of entanglement was further reduced by the fact that the aid was given one time and in one lump sum only. Burger explained that:

> The Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.[403]

Burger further explained that taken together, these reasons prove that the interaction between government and religion did not constitute excessive government entanglement. He stated that the relationship was found to have "less potential for realizing the substantive evils against which the Religion Clauses were intended to protect."[404]

Mr. Justice Douglas, dissenting in part, had some harsh words. He agreed with the Justices that the 20-year stipulation was unconstitutional but he maintained that the Act

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[401] Ibid.
[402] Ibid.
[403] Ibid.
[404] Ibid.

amounted to an "outright grant."[405] Douglas believed that the payment of the money all at once instead of over several years did not detract from what was essentially a block grant. He stated that "thus it is hardly impressive that rather than giving a smaller amount of money annually over a long period of years, Congress instead gives a large amount all at once. I cannot agree with such sophistry."[406] Douglas also believed that the Court's decision departed drastically from Madison's Memorial and Remonstrance:

> I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost. The million-dollar grants sustained today put Madison's miserable "three pence" to shame. But he even thought, as I do, that even a small amount coming out of the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.[407]

Douglas found support in three other Justices but the hairline 5-to-4 ruling was not in their favor. The decision was different, however, in *Lemon v. Kurtzman*[408] which was ruled on essentially the same subject but held the statute unconstitutional due to the receipt of the federal monies.

In 1971, during the same year as the *Tilton v. Richardson* ruling, the Supreme Court also ruled on *Lemon v. Kurtzman.*[409] The Acts at issue included Pennsylvania's 1968 Nonpublic Elementary and Secondary Education Act and Rhode Island's 1969 Salary Supplement Act. In 1969, the District Court found that neither the Establishment nor the Free Exercise Clauses were violated. The District Court held that "as long as the purpose and primary effect of the statute neither advance[d] nor inhibit[ed] religion, the constitutional standard

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405 Ibid.
406 Ibid.
407 Ibid.
408 Ibid.
409 Id., *Lemon v. Kurtzman* (1971).

[was] satisfied."[410] The United States Supreme Court disagreed with the findings and reversed. *Lemon v. Kurtzman* is significant for establishing three criteria for determining First Amendment cases. The Lemon test deemed that government action was unconstitutional if it established that it did not promote a secular purpose, if its primary effect is deemed to advance or inhibit religion, or if the action fostered an excessive entanglement between church and state. The invalidation of any one of these three prongs invalidated the action and rendered it unconstitutional. The Lemon test was a framework that will be applied consistently and with few modifications throughout the 20th and into the 21st centuries, although several Justices such as Justice Scalia have indicated dissatisfaction with it.

Alton J. Lemon brought suit against David H Kurtzman, Superintendent of Public Instruction of the Commonwealth of Pennsylvania, in charge of administering funds under the Pennsylvania Education Act, Grace Sloan, State Treasurer of the Commonwealth of Pennsylvania, who allocated the approved funds, and seven sectarian elementary and secondary schools who contracted with the Commonwealth for the purchase of secular educational services under the Education Act. Lemon represented a group of citizens that advocated the separation of church and state and were opposed to the "'use of public funds for the support in whole or in part of sectarian schools, or other private schools whose policies and practices, by purpose or effect, exclude or otherwise discriminate against persons by reason of race or religion.'"[411] Lemon, an African American citizen, a Pennsylvania taxpayer, and the father of a public school student alleged that the Act violated the Constitution. He based his claim of standing by alleging that unbeknownst to him, his purchase of a race track ticket supported the Act.

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[410] *Lemon v. Kurtzman,* 310 F. Supp. 35 (1969).
[411] Ibid.

The Legislature passed the Nonpublic Elementary and Secondary Education Act of 1968 to meet the existing crisis in Pennsylvania's nonpublic schools. The Act provided funds to contract out some of the secular services of nonpublic schools. The nature of this arrangement was perceived as non-threatening because nonpublic elementary and secondary education were deemed to have a "public welfare purpose and that nonpublic education, by providing instruction in secular subjects, contributes significantly to the achievement of this public purpose."[412] Kurtzman was empowered to allocate funds for services such as teacher expenses and various instructional materials to nonpublic schools. The State would then reimburse the nonpublic schools for any approved spending. "Under the 'contracts' authorized by the statute, the State directly reimburse[d] nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials."[413] The reimbursement had several stipulations including one that required that secular and non-secular expenses be kept separate and absolutely accounted for subject to audit. Reimbursements were made only for secular public school subjects and were limited to mathematics, foreign languages physical science and physical education and specifically not for "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."[414]

The funding for Pennsylvania's 1968 Nonpublic Elementary and Secondary Education Act was originally subsidized by a tax on horse and harness racing but was replaced by the state cigarette tax. In total, the revenue allowed for a total of $5 million to be reimbursed annually. At the time of the suit, Pennsylvania had entered into contracts with "1,181 nonpublic elementary and secondary schools with a student population of some

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412 Ibid.
413 Id., *Lemon v. Kurtzman*, (1971).
414 Ibid.

535,215 pupils -- more than 20% of the total number of students in the State. More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic Church."[415]

The United States District Court for the Eastern District of Pennsylvania found that the Act did not violate the Religion Clauses.[416] United States District Judge Alfred L. Luongo delivered the opinion of the Court and stated that the Act was constitutional. "Admittedly, the line is not an easy one to draw. However, we believe the Education Act is consistent with neutrality towards religion and comes within the permissible limits and spirit of the non-establishment principle." [417] On June 28, 1971, the Supreme Court of the United States, however, reversed and remanded.

Chief Justice Burger concluded that "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[418] Burger found issue with Pennsylvania's surveillance stipulations. He believed that this produced a relationship of excessive entanglement. "As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state."[419] Burger also noted a difference between the reimbursements in this case and the reimbursement scheme in *Everson* that was deemed constitutional. "The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state

[415] Ibid.
[416] Id., *Lemon v. Kurtzman*, (1969).
[417] Id., *Lemon v. Kurtzman*, (1971).
[418] Ibid.
[419] Ibid.

aid was provided to the student and his parents -- not to the church-related school."[420] Burger equated this relationship to the typical cash subsidy requirement of control. "In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state."[421] It seems that the accommodative tome displayed by Burger in *Walz* was absent.[422]

The second controversy the *Lemon* Court ruled on was Rhode Island's 1969 Salary Supplement Act.[423] The Act was initially contested in the District Court of Rhode Island in the 1970 *DiCenso v. Robinson*[424] case where Joan DiCenso, a Rhode Island resident and taxpayer filed suit against William P. Robinson and John R. Earley alleging that the Act violated the First Amendment. They claimed that the primary beneficiaries of the Act were Catholic schools and the approximately 250 teachers that were paid and thus the Act's purpose and effect was the advancement of the Catholic religion. DiCenso also claimed that she indirectly had to fund the Act through her tax money, thus violating the Free Exercise clause. On June 15, 1970, Circuit Judge Coffin delivered the opinion of the Court which held the Act unconstitutional and enjoined its implementation.

The Salary Supplement Act compensated the teachers of secular subjects in non-public elementary schools. "To accomplish this objective, the legislature appropriated $375,000 to pay up to 15 per cent of the salaries of teachers of secular subjects in non-public elementary schools." [425] The stipulation detailed that in order to be a recipient of the aid, a

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[420] Ibid.
[421] Ibid.
[422] Id., Redlich (1999). p. 514.
[423] *DiCenso v. Robinson,* 316 F. Supp. 112 (1970). R.I. Public Laws c. 246 (1969)
[424] Ibid.
[425] Ibid.

teacher had to teach subject matter and textbooks similar to that approved by public schools, proper certification, and must assure that religious indoctrination did not occur.

The Act was intended to solve the financial crisis of non-public schools. Circuit Judge Coffin explained that the state-wide crisis began when nuns stopped teaching and lay teachers took their place.

> As recently as ten years ago, the Archdiocese of Providence relied almost exclusively on nuns to staff its school system. Lay teachers filled only 4 or 5 per cent of the system's 1200 teaching positions. By 1969, lay teachers constituted one third of the teaching force. Each shift from a teaching sister to a lay teacher represents a threefold increase in salary expense (i.e., a shift from approximately $1800 to $5500 at present levels).[426]

The Court found the Salary Supplement Act unconstitutional based on the deep entanglement it produced between church and state. The necessary surveillance needed to ensure proper use of money was excessive. The Court determined that the Act was in violation "not only [in] substantial support for a religious enterprise, but also the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid."[427]

On June 28, 1971, the Supreme Court of the United States decided the case. Chief Justice Burger delivered the opinion of the Court. Regarding the Rhode Island Act, the Court affirmed the District Court's ruling that the Act was unconstitutional. Burger explained that providing direct aid to teachers was much different from previous accommodations the Court had made in the past.

> Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health

[426] Ibid.
[427] Ibid.

> services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.[428]

But the aid that the Rhode Island Act provided was not in the previously permitted forms but instead was for teachers. The Court did not believe that a sectarian teacher could remain religiously neutral at all times. The energy expended to inspect the teacher and assess the neutrality, though preventive in nature, was deemed an unacceptable entanglement. Burger explained that "these prophylactic contacts will involve excessive and enduring entanglement between state and church."[429] The chance that the relationship would traverse a path not sanctioned by the Constitution was deemed too great. Burger explained that "it is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[430]

Burger advised the Court that it needed to be very cautious in these types of cases. The probable yearly increased funding as well as the underlying political connotations were pitfalls the Court needed to be aware of. He also admitted that the path blazed by this case was a new one necessitated by the uncertain nature of First Amendment case law. "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[431] A new path was indeed blazed. The decision was highly regarded for it outlined what became known as the Lemon test which was intended to guide legislation that raised such concerns. The three prongs included:

1. The government's action must have a legitimate secular purpose;

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[428] Id., Lemon v. Kurtzman, (1971).
[429] Ibid.
[430] Ibid.
[431] Ibid.

2. The government's action must not have the primary effect of either advancing or inhibiting religion; and

3. The government's action must not result in an 'excessive entanglement' of the government and religion.

Together, the prongs established guidelines of appropriate legislation. If any of the three prongs were not satisfied, the statute was deemed unconstitutional.

The 1973 *Committee for Public Education & Religious Liberty v. Nyquist,*[432] case decided the constitutionality of reimbursements to parents of nonpublic school children. Past cases had ruled on the constitutionality of government aided textbooks and busing and passed constitutional muster because of the indirect nature of the funding as well as having been deemed beneficial to the children instead of the parents or the school. This case was distinguished from past cases due to its direct reimbursements which were deemed to benefit the schools. *Nyquist* is known as the decision at the center of the controversy over school vouchers because the case involved grants and tuition tax credits for the benefit of parents whose children attended private schools. The state calculated the amount of these grants on a per pupil basis, established a maximum amount based on comparable expenditures in the public school system, and most significantly did not impose any 'secular use' restriction on the grants.

In 1972, the Committee for Public Education & Religious Liberty (PEARL), an unincorporated association of New York State residents, sued Ewald B. Nyquist, the Commissioner of Education of New York. PEARL claimed that amendment to the State's Education and Tax Laws specifically Chapter 414 of the New York Laws of 1972 violated the Establishment Clause. The U.S. District Court for the Southern District of New York

[432] *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973).

agreed and enjoined §1 and §2 but allowed §§3, 4, and 5.[433] A year later, on June 25, 1973, in a 6-to-3 decision, the Supreme Court affirmed the ruling regarding §§1 and 2 and reversed the ruling on §§3, 4, and 5[434].

The suit contested only three of the five parts of the amendment. The first section provided direct money grants from the State Treasury to nonpublic schools for maintenance and repair. Nonpublic schools were eligible for the grants if they demonstrated that they "serv[ed] a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965."[435] The qualifying schools constructed within the last 25 years received $30 per pupil and, if constructed more than 25 years ago, the grant increased to $40 per pupil. Reimbursements were made for the previous year's maintenance and repairs. Maintenance and repair was defined as:

> 'the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils.' [436]

The 'maintenance and repair' description above was defined under the heading of Health and Safety Grants for Nonpublic School Children. This section of the Law required that the state assume responsibility for the health, welfare, and safety of children. Specifically, the Act delineated these responsibilities to the State due to the fact that the "[financial] resources necessary to properly maintain and repair [deteriorating] buildings are beyond the capabilities of low-income people whose children attend nonpublic schools." [437] The Act specified that in order to assume responsibility for the health, welfare, and safety, "the state ha[d] the right

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[433] *Committee for Public Education v. Nyquist,* 350 F.Supp. 655 (1972).
[434] Id., *Committee for Public Education v. Nyquist* (1973).
[435] Id., *Committee for Public Education v. Nyquist*, (1972).
[436] Ibid., U.S.C.A. § 425.

to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature." In exchange for the funds, the school assumed the responsibility of providing the Commissioner of Education a statement of expenses pertaining to maintenance and repair. The other stipulation was that the payment of grants was limited to 50% of the average maintenance and repair per pupil cost of public school students.

In addition to the funds required for maintenance and repair, the second section of the Act entitled the Elementary and Secondary Education Opportunity Program to provide grants directly from the State Treasury to low-income parents of school children attending nonpublic schools. Families with incomes of less than $5,000 would receive a grant of $50 per year for a child in grade school and $100 per child in high school. The Act detailed that the grants could not exceed 50% of the sum the parents originally paid. Some parents did not qualify for these grants so parents who had paid at least $50 in tuition and had a child in grades 1 through 12 and have an adjusted gross income of $5,000 to $25,000 were given a state income tax deduction. A set maximum value of $1,000 per child was predetermined.

The purpose of the funding was to bolster the competitive nature of nonpublic schools which had been experiencing a systematic decline in New York. The goal was to keep attendance high at nonpublic schools to ensure that public schools were not encumbered by a large influx of nonpublic school students. The New York State Legislature feared that "any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrolment and costs which would seriously jeopardize

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[437] Ibid.

quality education for all children and aggravate an already serious fiscal crisis in public education."[438]

District Court Judge Gurfein delivered the opinion of the Court. He agreed with the legislative findings that it was imperative to allow for a maximum choice in schools. Gurfein stated that the "vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children."[439] He continued that this right to a multitude of choices was diminished for poor families. The "'right' is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated."[440] Gurfein concluded that the state law had a legitimate purpose "to partially relieve the financial burdens of parents who provide a nonpublic education for their children."[441]

As to the first section of the Act, Gurfein stated the Court's "reluctant conclusion."[442] The Court declared that the direct public subsidy for "maintenance and repair" was unconstitutional even though the Court sympathized with what it deemed an essentially secular intention but regrettably, in effect, advanced religion and created an excessive entanglement. The Court ordered the injunction of the §1 maintenance and repair grants. The Court determined that §2, the tuition reimbursement grants, was unconstitutional. The only part that passed constitutional muster was the income tax provisions of §§ 3, 4, and 5.

One year later, on appeal from the U.S. District Court for the Southern District of New York, the Supreme Court ruled on the issue. Justice Powell delivered the opinion of the

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[438] Ibid.
[439] Ibid.
[440] Ibid.
[441] Ibid.
[442] Ibid.

Court by commenting on the difficulty in reaching conclusions regarding permissible and impermissible actions. "For it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no 'bright line' guidance is afforded."[443] These cases were complicated by the numerous interpretations of the First Amendment's original intent. Powell stated that "despite Madison's admonition and the 'sweep of the absolute prohibitions' of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court."[444]

The Court found fault with three of the five sections of the amendment. Powell deemed the maintenance and repair grants were unconstitutional because of the possibility that the reimbursements would not be confined to the actual maintenance and repair expenses. Powell stated that "nothing in the statute…bars a qualifying school from paying out of state funds the salaries of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities."[445] The Act was not restrictive enough and was therefore deemed unconstitutional. Powell reasoned that "in the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid."[446]

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[443] Id., *Committee for Public Education v. Nyquist* (1973).
[444] Ibid.
[445] Ibid.
[446] Ibid.

The Court determined that the maintenance and repair section as well as the tuition reimbursement section failed Lemon's effect test. The maintenance and repair provisions violated the Establishment Clause because their effect was to advance the religious mission of sectarian schools. The Court also concluded that all three sections including the maintenance and repair grants, the tuition grants, and the tax deductions, all had the primary effect of advancing religion. Approximately 20% of New York students or 750,000 students attend New York nonpublic schools. Of these nonpublic school children, 85% were church affiliated. In all, 280 low income schools were deemed to qualify for the aid.

The Supreme Court affirmed the injunction of the first two sections but reversed the decision regarding the third, fourth and fifth sections. The Supreme Court found fault with each section and deemed them unconstitutional. Powell explained "whether the grant is labeled a reimbursement, a reward, or a subsidy, its substantive impact is still the same."[447] *Committee for Public Education v. Nyquist* effectively stopped the New York state law that authorized reimbursement to low income families of parochial school students, prohibited tax deductions for such families, and disallowed direct grants to such families. The Act passed the first prong of the Lemon test - all three were determined to have a secular purpose but all three, however, failed the second prong in that they furthered religion.

The next case that utilized the Lemon test was the 1973 *Hunt v. McNair.*[448] In the same year that the Supreme Court struck down maintenance and repair grants, tuition reimbursements, and tax deductions for parochial students, it upheld issuance of

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[447] Ibid.

[448] *Hunt v. McNair,* 413 U.S. 734 (1973).

government revenue bonds for religious colleges that utilized the bond proceeds to build on-campus facilities.

Richard W. Hunt, a resident and taxpayer of South Carolina, sued Robert E. McNair, the Governor of South Carolina, for declaratory and injunctive relief against the South Carolina Educational Facilities Act.[449] The Education Facilities Act created the Education Facilities Authority to approve proceeds from a South Carolina state bond that was lent to a Baptist College in Charleston, a South Carolina eleemosynary corporation, for the construction of an on-campus building until such time the college repaid the loan.

The issued revenue bonds were intended to assist "higher educational institutions in constructing and financing projects, such as buildings, facilities, and site preparation, but not including any facility for sectarian instruction or religious worship."[450] Specifically, the bond proceeds could not be used to finance "any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."[451] While the loan was repaid, the the Baptist College at Charleston conveyed 400 acres of its land to the state-created Educational Facilities Authority which was leased to the college until debt repayment was completed. A stipulation required that if the repayment was not completed, the government could foreclose on the land. Hunt believed that the South Carolina Educational Facilities Authority Act violated the Establishment Clause in that the proceeds of the state issued bonds would directly benefit a Baptist College.

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[449] Ibid., S. C. Code Ann. §22-41(Supp. 1971).
[450] Ibid.
[451] Ibid.

The college initially requested a loan amount of $3,500,000 from the Authority for the purposes of:

> (a) paying off outstanding indebtedness of the Baptist Foundation incurred for the purpose of acquiring certain equipment and trailers utilized as a part of the College's educational plant in the amount of approximately $275,000; (b) reimbursing in part the College's Current Fund for moneys advanced to the College's Plant Fund used to purchase school equipment and other capital improvements and for the payment of the aforesaid obligation of the Baptist College Foundation; and (c) refunding an outstanding indebtedness of the College in the amount of approximately $2,500,000 represented by the College's first mortgage serial bonds dated July 1, 1966.[452]

After this initial request, the college received a bank loan in the amount of $2,500,000 and altered its requested amount as well as purpose. The college requested $1,250,000 in revenue bonds this time to be used for the purposes of:

> (i) to repay in full the College's Current Fund for the balance (approximately $250,000) advanced to the College's Plant Fund as aforesaid; (ii) to refund outstanding short-term loans in the amount of $800,000 whose proceeds were to pay off indebtedness incurred for *capital improvements*, and (iii) to finance the completion of the dining hall facilities at a cost of approximately $200,000.[453]

The legislative intent of the Act was clearly secular in nature and passed the first prong of the Lemon test. The Act was created for the benefit of the people:

> The purpose of this section [is] to provide a measure of assistance and an alternative method to enable institutions for higher education in the State to provide the facilities and structures which are sorely needed to accomplish the purposes of this act, all to the public benefit and good, to the extent and manner provided herein.[454]

The creators of the Act were well aware of the turmoil that could arise and went to great lengths to ensure that the Act would be devoid of any section that may eventually be deemed

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[452] *Hunt v. McNair*, 255 S.C. 71 (1970).
[453] Ibid.
[454] Hunt v. McNair, 258 S.C. 97 (1972).

in violation of the Religion Clauses. Besides ensuring the secular nature of the Act, the State removed itself from connection with the project and thus any implications its participation may have. "Revenue bonds issued under the provisions of this chapter shall not be deemed to constitute a debt or liability of the State or of any political subdivision thereof or a pledge of the faith and credit of the State or of any such political subdivision, but shall be payable solely from the funds herein provided therefore from revenues."[455] The State made clear that the revenues were not expended from State coffers but from the revenues of the Authority.

The bonds were very attractive due to the exceptional interest rate. "The income-tax-exempt status of the interest enables the Authority, as an instrumentality of the State, to market the bonds at a significantly lower rate of interest than the educational institution would be forced to pay if it borrowed the money by conventional private financing."[456] The College was also pleased with the repayment plan. The plan constituted for a contingency plan. "The Authority and the trustee bank would enter into a Trust Indenture which would create, for the benefit of the bondholders, a foreclosable mortgage lien on the Project property including a mortgage on the right, title and interest of the Authority in and to the Lease Agreement."[457]

The deal was premised on the assurance that the Baptist College at Charleston would not provide any sectarian use of the new building:

> The Deed of reconveyance from the Authority to the Institution shall be made subject to the condition that so long as the Institution, or any voluntary grantee of the Institution, shall own the leased premises, or any part thereof, that no facility thereon, financed in whole or in part with the proceeds of the bonds, shall be used for sectarian instruction or as a place of religious worship, or used in connection with any part of the program of a school or department of divinity of any religious denomination.[458]

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[455] Id., Hunt v. McNair (1973).
[456] Ibid.
[457] Ibid., Jurisdictional Statement, Appendix C, p. 50.
[458] Id., Hunt v. McNair (1972).

The creators of the Act truly covered all possible weaknesses inherent in this type of religion-state nexus. The foresight and thoroughness paid off at the Supreme Court of South Carolina as well as the Supreme Court of the United States.

The Supreme Court of the United States followed the principles previously established in *Lemon* "with full recognition that these are no more than helpful signposts, we consider the present statute and the proposed transaction in terms of the three 'tests': purpose, effect, and entanglement."[459] In a vote of 6-to-3, after applying the Lemon-test, the Supreme Court found the loan constitutional and upheld the issuance of revenue bonds for religious colleges. Justice Powell, writing for the majority, deemed the plan secular in nature as well as clever in that it was available to all colleges and thus potentially beneficial to many institutions. "The benefits of the Act are available to all institutions of higher education in South Carolina, whether or not having a religious affiliation."[460] Since the new building was not used for sectarian purposes the plan was deemed to neither advanced nor inhibited religion.

> The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends. Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[461]

But the Baptist College at Charleston was not deemed to be so pervasive even though it was administered by the College Board of Trustees which was elected by the South Carolina Baptist Convention and that 60% of the College student body was Baptist. The college made

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[459] Id., Hunt v. McNair (1973).
[460] Ibid.
[461] Ibid.

it clear that religious qualifications for faculty and student body were not sanctioned. "On the record in this case there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education."[462] Even if they were sanctioned, *Tilton* established that dealings with an institution even if religious in nature were not inherently unconstitutional. In addition, the Court found than an excessive entanglement did not exist. "Although the record in this case is abbreviated and not free from ambiguity, the burden rests on appellant to show the extent to which the College is church related…and he has failed to show more than a formalistic church relationship."[463]

It is interesting that *Hunt v. McNair* came to the same conclusion before the Lemon test was invoked as well as after. The trial court denied relief and the Supreme Court of South Carolina affirmed even after the United States Supreme Court vacated the judgment and remanded the case for reconsideration in light of the ruling in *Lemon*. The conclusion reached was the same but significantly, it added to the First Amendment case law that invoked the decision in *Lemon.*

Eight years later, the *Widmar v. Vincent*[464] case involved a ruling by the University of Missouri at Kansas City that prohibited the use of its facilities by a student led religious organization. The school believed that its refusal to allow the on-campus meetings was required by the United States Constitution to ensure that the University was not in violation of the Establishment Clause. Eleven members of Cornerstone, the student religious group that had previously been permitted to use the facilities to hold prayers and Bible studies sued the school on October 13, 1977 after being informed of the change in policy. Clark Vincent and Florian Chess representing the students that initiated that action filed suit agianst Gary

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462 Ibid.
463 Ibid.
464 *Widmar v. Vincent*, 454 U.S. 263 (1981).

Widmar, the Dean of Students at UMKC, claiming that their First Amendment rights of religious free exercise and free speech were violated.

The issue in this case was whether the University of Missouri at Kansas City could deny access of one of its facilities to Cornerstone, a group which intended to use the facility for religious worship. Cornerstone consisted of various denominational evangelical Christian students. "Cornerstone held its on-campus meetings in classrooms and in the student center. These meetings were open to the public and attracted up to 125 students. A typical Cornerstone meeting included prayer, hymns, Bible commentary, and discussion of religious views and experiences."[465] The use of the University grounds was deemed easier than traveling off-campus since the nearest University chapel was at the University's Columbia campus, approximately 125 miles east of UMKC.[466]

UMKC openly advocated student organization. "The University officially recognizes over 100 student groups. It routinely provides University facilities for the meetings of registered organizations. Students pay an activity fee of $41 per semester (1978-1979) to help defray the costs to the University."[467] Cornerstone had for four years during 1973 and 1977 been a registered group and paid the activity fee. The purpose of Cornerstone, as stated on the University's request form, was to "promote a knowledge of Jesus Christ among students" and stated that the meetings and events would be open to the public, no University funds would be used, no admission would be charged, and no donations would be solicited.[468]

In 1977, however, the University informed Cornerstone that as per a 1972 Board of Curators regulation, the group could no longer use the facilities. The regulation that had not

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[465] Ibid.
[466] Ibid.
[467] Ibid.

yet been enforced prohibited the use of University buildings and grounds "for purposes of religious worship or religious teaching."[469] The first of a two-part regulation adopted by the Curators in 1972 stated that:

> No University buildings or grounds …may be used for purposes of religious worship or religious teaching by either student or nonstudent groups. Student congregations of local churches…may use the facilities, commonly referred to as the student union or center or commons…. The general prohibition against use of University buildings and grounds for religious worship or religious teaching is a policy required, in the opinion of The Board of Curators, by the Constitution and laws of the State and is not open to any other construction.[470]

The second part of the two-part regulation, stated that "Regular chapels established on University grounds may be used for religious services but not for regular recurring services of any groups. It is specifically directed that no advantage shall be given to any religious group."[471]

On December 11, 1979, the United Stated District Court for the Western District of Missouri heard the case.[472] The Court upheld the University's regulation and agreed that the state could not allow religious use of the building without directly supporting that religion. The Court also ruled that religious speech could be jeopardized to ensure that a prohibitive support to a religion was not created. District Court Justice Collinson explained the decision of the Court. Collinson justified the decision by comparing it to the circumstances and decision in *Tilton v. Richardson.*[473] "This Court finds that a university policy permitting regular religious services in university-owned buildings would have the primary effect of advancing religion. This Court holds, therefore, that the university's present ban on religious services in

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[468] *Widmar v. Vincent,* 635 F.2d 1310 (1980).
[469] Id., *Widmar v. Vincent* (1981).
[470] Id., *Widmar v. Vincent* (1980). 4.0314.0107.
[471] Ibid., 4.0314.0108.
[472] *Widmar v. Vincent*, 480 F. Supp. 907 (1979).

its buildings is required by the establishment clause."[474] The Court also found that religious speech was entitled to less protection than other types of expression even if that meant the subversion of some freedoms in the name of others. Collinson explained that "the State of Missouri's interest in maintaining a strict separation of church and state is a sufficiently compelling interest to overbalance plaintiffs' claims to free exercise of religion."[475]

Unsatisfied with the ruling, the plaintiffs challenged the District's Court's decree on August 4, 1980 in the United States Court of Appeals for the Eight Circuit.[476] The Court of Appeals found UMKC's refusal to allow Cornerstone access to University facilities unconstitutional. The Court found that a religious group could not be excluded based on the content of their meetings. Circuit Judge Heaney explained what he considered to be the compelling argument of content-based discrimination. "According to the Court of Appeals, the 'primary effect' of such a policy would not be to advance religion, but rather to further the neutral purpose of developing students' 'social and cultural awareness as well as [their] intellectual curiosity.'"[477] The primary effect of would not be to advance religion but to advance the University's purpose. Circuit Judge Heaney stated that "neutral accommodation of the many student groups active at UMKC would not constitute an establishment of religion even though some student groups may use the University's facilities for religious worship or religious teaching."[478] The regulation was determined to violate the First and Fourteenth Amendments and the Court of Appeals reversed the District Court's decision.

In 1981, in an 8-to-1 decision, the United States Supreme Court affirmed the ruling of the Court of Appeals. The Court found that the Establishment Clause did not require

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473 Id., *Tilton v. Richardson* (1971).
474 Id., *Widmar v. Vincent* (1979).
475 Ibid.
476 Id., *Widmar v. Vincent,* (1980).
477 Ibid.

state universities to limit access to their facilities by religious organizations. Because the university had generally permitted its facilities to be used by student organizations, it had to demonstrate that its restrictions were constitutionally permitted. It was determined that an equal access policy would not necessarily violate the Establishment Clause. The three-pronged Lemon Test would not be violated by allowing religious groups to meet on campus. The legislative purpose was clearly secular and did not foster excessive government entanglement. The University's claim that the policy's primary effect would be to advance religion was rejected. But as Justice Powell explained, "...this Court has explained that a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion." It was determined that any such benefits at UMKC would be incidental.

The Supreme Court decision ensured religious organization access to public facilities. This access was endorsed with the understanding that the University, in this case, was not in support of the messages that were communicated in their facilities. The Court also concluded that the University policy was found to discriminate against religious groups and that this discrimination was not allowed because the rights to Free Exercise outweighed any Establishment concerns. Clearly, equal access was not incompatible with the Establishment Clause but if, however, the university had not created the public forum it would not have been required to furnish facilities for use by religious groups.[479] The Court expressly prohibited the University from instituting a greater degree of separation. The Clauses worked in tandem to define permissible action. The degree of greater separation intended by the state was not allowed and was limited by the Free Exercise Clause and in this case by the Free Speech Clause as well.

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[478] Ibid.

In hindsight, the decision in *Wallace v. Jaffree*[480] is devoid of any difficult contemplation. At the time, however, the United States District Court for the Southern District of Alabama had difficulty finding an error in a law that in effect established religion. In 1983, Ishmael Jaffree, a resident of Mobile County, filed suit on behalf of his three children to enjoin three statutes regarding school prayer and moment of silence. Chief Judge Hand delivered the opinion if the Court ruling in favor of Wallace, the governor of Alabama. The Court found the Act constitutional because a State had the right to establish a state religion.[481]

Jaffree's three minor children, Jamael Aakki Jaffree, Makeba Green, and Chioke Saleem Jaffree attended public school in Mobile County, Alabama. The defendants were teachers or principals at the public schools. The complaint alleged that at each of the schools attended by the Jaffree children, different prayers were led by the teachers. At E.R. Dickson School, for example the teacher led the class in singing: "God is great, God is good, Let us thank him for our food, bow our heads we all are fed, Give us Lord our daily bread. Amen!"[482] In another classroom, the teacher led the students in the Lord's Prayer: "Our Father, which art in heaven, hallowed be Thy name. Thy kingdom come. Thy will be done on earth as it is in heaven. Give us this day our daily bread and forgive us our debts as we forgive our debtors. And lead us not into temptation but deliver us from evil for thine is the kingdom and the power and the glory forever. Amen."[483]Jaffree, an agnostic, informed the school on several occasions that he did not want his children to participate in any type of

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[479] Id., Nowak and Rotunda. *Principles of Constitutional Law* (2004). p. 772.
[480] *Wallace v. Jaffree*, 472 U.S. 38 (1985).
[481] *Wallace v. Jaffree,* 554 F. Supp. 1104 (1983).
[482] Ibid.
[483] Ibid.

religious activity at school and warned that if the activity continued, he would take legal action.

Jaffree's complaints did not alter the actions of the teacher who claimed that the prayers were conducted voluntarily. The prayers continued even though the school policy adopted by the Board of School Commissioners of Mobile County stated that:

> Schools shall comply with all existing state and federal laws as these laws pertain to religious practices and the teaching of religion. This policy shall not be interpreted to prohibit teaching about the various religions of the world, the influence of the Judeo-Christian faith on our society, and the values and ideals of the American way of life.[484]

The United States District Court for the Southern District of Alabama decision began predictably by stating that in Alabama, prayer in public schools is per se unconstitutional. "Prayer is an address of entreaty, supplication, praise, or thanksgiving directed to some sacred or divine spirit, being, or object. That it may contemplate some wholly secular objective cannot alter the inherently religious character of the exercise."[485] The prayers held in public schools were thus deemed to be in violation of the Establishment Clause. The Court reiterated the importance of the neutrality principle. "Although a given prayer or practice may not favor any one sect, the principle of neutrality in religious matters is violated under these decisions by any program which places tacit government approval upon religious views or practices."[486] The Court thus established the prayers unconstitutional but took an incredible leap and concluded that the U.S. Constitution intended to prohibit only the federal government from establishing a national religion. Quoting Professor Charles Fairman, Hand stated that the "mountain of evidence has become so high, one may have lost sight of the few stones and pebbles that made up the theory that the Fourteenth

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[484] Ibid.
[485] Ibid., Quoting from *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir.1981).

Amendment incorporated Amendments I to VIII."[487] Hand concluded that "suffice it to say that the few stones and pebbles provide precious little historical support for the view that the states were prohibited by the establishment clause of the first amendment from establishing a religion."[488] In effect, the United States District Court for the Southern District of Alabama concluded that based on their independent historical review, the United States Supreme Court had erred in its interpretation of original intent. In a stunning decision based on this analysis, the Court decided that "because the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion, the prayers offered by the teachers in this case are not unconstitutional." The Court went on to denigrate the historical pattern of Religion Clause application:

> Consistency no longer exists. Where you cannot recite the Lord's Prayer, you may sing his praises in God Bless America. Where you cannot post the Ten Commandments on the wall for those to read if they do choose, you can require the Pledge of Allegience. Where you cannot acknowledge the authority of the Almighty in the Regent's prayer, you can acknowledge the existence of the Almighty in singing the verses of America and Battle Hymn of the Republic. It is no wonder that the people perceive that justice is myoptic, obtuse, and janus-like.[489]

This decision concluded the first part of the case. It concerned the part of the statute that authorized teachers to lead students in voluntary prayer.

The court separated the cases into two, one deciding on the prayer in school and the other, in an amended action, the constitutionality of two laws known as the Alabama school prayer statutes.[490] Section 16-1-20.1 allowed for a moment of silence for grades 1-6. It stated that:

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[486] Ibid.
[487] Ibid.
[488] Ibid.
[489] Ibid.
[490] Ibid., Ala.Code §16-1-20.1 (1982) and Ala.Code §16-1-20.2 (former Ala.Act 82-735).

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

Section 16-1-20.2 allowed for a moment of silence and voluntary prayer for all grades. It stated that:

> From henceforth, any teacher or professor in any public educational institution within the State of Alabama… may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

Jaffree v. James,[491] the case that dealt with the statutes ordered a preliminary injunction against the implementation of the statutes but after the trial, the district court dismissed both actions effectively dissolving the preliminary injunction.

On May 12, 1983, The United States Court of Appeals for the Eleventh Circuit affirmed in part and reversed in part.[492] The Act was considered an establishment of a religion and thus unconstitutional. Circuit Judge Hatchett delivered the opinion of the Court. The Court affirmed the previous ruling on Ala.Code §16-1-20.1 and Ala.Code §16-1-20.2. The statutes were held to be clearly in violation of the Establishment Clause. Regarding the payer in schools, the Appeals Court recognized that disregarding approval or disapproval, the Court followed the decisions of the Supreme Court as "the final arbiter of constitutional disputes."[493] The Court of Appelas stated that based on precedent, specifically *Lemon,*

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[491] *Jaffree v. James,* 544 F. Supp. 727 (S.D.Ala.1982).
[492] Jaffree v. Wallace, 705 F.2d 1526 (1983).
[493] Ibid.

Nyquist, Engel, and *Everson*, the prayers conducted in school were unconstitutional. The Appeals Court reversed the District Court's dismissal of the prayer case and remanded the case to the District Court.

On June 4, 1985, on appeal from the United States Court of Appeals, the Supreme Court of the United States decided together with *Smith v. Jaffree*, also on appeal from the same court, affirmed in a 6-to-3 decision.[494] Justice Stevens delivered the opinion of the Court. In acknowledging the District Court's ruling, he sympathized but also admonished the Court in looking away from the Establishment Clause jurisprudence that the Courts had established since 1899. "This uncertainty as to the intent of the Framers of the Bill of Rights does not mean we should ignore history for guidance on the role of religion in public education. When the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis."[495]

Stevens relied on *Lemon* for guidance. The central issue was the actual intent of the law. The Lemon test required that a statute must be invalidated if its intent is established as the advancement of religion. The District Court heard evidence of such an intent. State Senator Donald G. Holmes, the sponsor of the bill that was enacted in 1981 as §16-1-20.1, stated that he endorsed the bill in an "effort to return voluntary prayer to our public schools."[496] In addressing the Court, he stated:

> By passage of this bill by the Alabama Legislature our children in this state will have the opportunity of sharing in the spiritual heritage of this state and this country. The United States as well as the State of Alabama was founded by people who believe in God. I believe this effort to return voluntary prayer to our public schools for its return to us to the original position of the writers of the Constitution, this local philosophies and beliefs hundreds of Alabamians have urged my continuous support for permitting school prayer. Since coming to the Alabama Senate I have worked hard on this legislation

[494] Id., *Wallace v. Jaffree* (1985).
[495] Ibid.
[496] Id., *Wallace v. Jaffree* (1983).

> to accomplish the return of voluntary prayer in our public schools and return to the basic moral fiber.[497]

Stevens commented on the past accommodation of religion by the Courts. He supported the solutions of the Court in that they provided some palpable boundaries to the Religion Clauses. "The solution to the conflict between the Religion Clauses lies not in 'neutrality,' but rather in identifying workable limits to the government's license to promote the free exercise of religion."[498] The intent of the statute as revealed by the key sponsor, however, made the statute unconstitutional. In this case, the hands of the Court were tied and an accommodation could not be reached.

The Supreme Court unanimously held that the moment of silence clause was constitutional but six of the justices held that the voluntary prayer clause unconstitutional. Stevens stated that "Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray, and affirmatively endorsing the particular religious practice of prayer."[499] The accommodation of religion was not permitted here – rendering Wallace one of those rare cases where the Court invalidated legislation because the legislature was motivated solely by a religious purpose.[500] "Even if the Court in the future abandons the '*Lemon* tests' (the formal three part tests: purpose-effect-entanglement), the Court is unlikely to overrule its decisions finding that officially authorized prayers, or readings from religious texts, in government grade schools and high schools violate the establishment clause."[501]

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497 Ibid.
498 Id., *Wallace v. Jaffree* (1985).
499 Ibid.
500 Id., Nowak and Rotunda. *Principles of Constitutional Law* (2004). p. 769.
501 Ibid.

In 1985, the same year during which *Wallace v. Jaffree* was decided, the Court again applied the Lemon test to decide *Aguilar v. Felton.*[502] The dispute began in 1978 when six New York City residents and taxpayers, represented by Betty-Louise Felton, brought suit against Yolanda Aguilar in the United States District Court for the Eastern District of New York alleging that Title I of the Elementary and Secondary Education Act of 1965[503] violated the Establishment Clause. The taxpayers alleged their First Amendment rights were violated and sued to enjoin any further funds from going to parochial schools.

Title I of the New York City Elementary and Secondary Education Act of 1965[504] enabled federal funds to pay the salaries of public school teachers who also taught at parochial schools. The teachers provided special educational services to poor children in parochial schools. To ensure that proper subject matter was being taught, monthly unannounced checks were undertaken. Title I of the Elementary and Secondary Education Act of 1965 empowered the Secretary of Education to grant aid to local institutions that served low-income families.

> Congress hereby declares it to be the policy of the United States to provide financial assistance… to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means …which contribute particularly to meeting the special educational needs of educationally deprived children.[505]

Title I was also made eligible to students attending parochial schools. "To the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special educational services and arrangements . . .

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[502] *Aguilar v. Felton,* 473 U.S. 402 (1985).
[503] Ibid., 20 USCS 6301 et seq.
[504] Ibid., Title I, 92 Stat. 2153, was codified at 20 U. S. C. § 2701.
[505] Ibid., Title I, 92 Stat. 2153, was codified at 20 U. S. C. § 2701.

in which such children can participate."[506] To qualify for such aid, the school had to specifically demonstrate that the students must be educationally deprived[507], the children must reside in areas comprising a high concentration of low-income families,[508] and that the programs must be in addition to not instead of programs that exist.[509]

The Act provided for annual Congressional appropriations contingent on several criteria. Title I funding was eligible only if the two criteria were met including educational deprivation "defined as below age-level performance"[510] and "residence in an area designated by the Local Educational Agency, in accordance with Title I regulations, as having a high concentration of children from low-income families."[511] Title I was replaced on October 1, 1982 with Chapter I of the Education Consolidation and Improvement Act of 1981.[512] This Act also enabled parochial schools to receive aid but required an application that specified a description of what the funds would be used for. Title I was in use since 1966. "Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools."[513]

The Court referred to *Wheeler* v. *Barrera,*[514] another case concurrent with *Aguilar* that also attacked the validity of Title 1. *Wheeler* held that "Title I mandated that private school students receive services comparable to, but not identical to, the Title I services received by public school students. Therefore, the statute would permit, but not require, that on-site

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506 *Aguilar v. Felton*, 739 F.2d 48 (1984).
507 Ibid., §3804.
508 Ibid., §3805.
509 Ibid., §3807.
510 Ibid., 20 U.S.C. §§ 2722, 2732-34.
511 Ibid., 20 U.S.C. §§ 2722, 2732-34.
512 Id., *Aguilar v. Felton* (1985), 20 U. S. C. § 3801.
513 Ibid.
514 *Wheeler* v. *Barrera,* 417 U.S. 402(1974).

services be provided in the parochial schools."[515] *Wheeler* did not speak to the Constitutionality of the Act but did allow parochial schools to receive funds for "programs and projects" that included: "the acquisition of equipment and, where necessary, the construction of school facilities which are designed to meet the special educational needs of educationally deprived children."[516]

Judge Edward R. Neaher and the District Court disagreed with Felton and granted a motion for summary judgment in favor of defendant city, ruling that Title 1 was constitutional. Six years later, on July 9, 1984, the United States Court of Appeals for the Second Circuit heard *Aguilar v. Felton*.[517] Circuit Judge Friendly gave the unanimous opinion of the Court. The Court reversed on the grounds that the funding violated the Establishment Clause. It was determined that the Establishment Clause "as it ha[d] been interpreted by the Supreme Court… constitute[d] an insurmountable barrier to the use of federal funds to send public school teachers and other professionals into religious schools to carry on instruction, remedial or otherwise, or to provide clinical and guidance services of the sort at issue here."[518] The Court followed the ruling in *School District of Grand Rapids v. Ball*[519] and concluded that though the Court in *Grand Rapids* found the Shared Time program unconstitutional, the District Court found Title I unconstitutional on the grounds that *Aguilar* contained a monitoring system. This distinguishing feature obliged the Court to conclude that Title I was unconstitutional. The Court of Appeals reversed the original decision based on their analysis and found that the intended preventative nature of the

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[515] Id., *Aguilar v. Felton* (1985)
[516] Ibid.
[517] Id., *Aguilar v. Felton* (1984).
[518] Ibid.
[519] *Grand Rapids v. Ball*, 739 F.2d 48, 72 (CA2 1984).

monthly inspections created an entanglement that was too deep. It was deemed unconstitutional even if the aid to parochial schools was not found to advance religion.

The next year, in 1985, the Supreme Court of the United States heard *Aguilar v. Felton*[520] and affirmed the Court of Appeals ruling in a 5-to-4 decision. The Court deemed that the necessary inspections created an unacceptable excessive entanglement between government and religion. Justice Brennan delivered the opinion of the Court. The Court determined that an excessive entanglement occurred. "Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid."[521] The Court applied the Lemon test to determine whether the regulation passed constitutional muster and was deemed unconstitutional based on the determination that it produced an excessive entanglement. "In short, the scope and duration of New York City's Title I program would require a permanent and pervasive state presence in the sectarian schools receiving aid."[522]Like *Lemon* v. *Kurtzman,*[523] the unannounced checks were deemed to be an excessive entanglement unlike other cases that did pass muster including *Tilton v Richardson*[524] and *Hunt v. McNair.*[525] The Court concluded that "despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate."[526]

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[520] Id., *Aguilar v. Felton* (1985).
[521] Ibid.
[522] Ibid.
[523] Id., *Lemon v. Kurtzman* (1971).
[524] Id., *Tilton* v. *Richardson* (1971).
[525] Id., *Hunt* v. *McNair* (1973).
[526] Id., *Aguilar v. Felton* (1985).

Two years later, *Edwards v. Aguillard*[527] determined the constitutionality of a Louisiana Act[528] that required that the teaching of evolution be accompanied by the teaching of creationism. The conflict originated on January 10, 1985, when the United States District Court for the Eastern District of Louisiana decided the constitutionality of the statute in *Aguillard v. Treen.*[529] Don Aguillard, a resident and taxpayer of Louisiana, representing numerous Louisiana taxpayers, educators, and parents of school-aged children, sued David C. Treen, Governor of Louisiana, to enjoin the "Balanced Treatment" portion of the Act. The District Court determined that the statute was unconstitutional.

In 1981, the Louisiana Legislature amended the Louisiana's "General School Law" entitled "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction."[530] The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction was an amendment to Part III of Chapter I of Title 17 of the Louisiana Revised Statutes of 1950. The amendment included seven new parts including §§286.1 through 286.7. The amendment was intended to provide a more balanced treatment of creation-science and evolution-science in public schools. The purpose, as established in §286.2 was to "protect academic freedom"[531] but in reality, the Act specified that "when creation or evolution is taught, each shall be taught as a theory, rather than as proven scientific fact."[532]

The plaintiffs allege that the amendment violated the Establishment Clause. District Judge Adrian G. Duplantier gave the opinion of the Court after first deliberating on the utilization of the three pronged Lemon test. He quoted from the 1984 *Lynch v. Donnelly* case

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[527] *Edwards v. Aguillard,* 482 U.S. 578 (1987).
[528] *Aguillard v. Treen,* 34 F. Supp. 426 (1985). La.Rev.Stat.Ann. §§ 17:286.1 to .7.
[529] Ibid.
[530] Ibid., La.Rev.Stat.Ann. §§ 17:286.1 to .7
[531] Ibid.

to demonstrate that the Court has not necessarily in the past adhered to the *Lemon* test nor appreciated being confined to the application of only one constitutional caliper. "We have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[533] He went on to encapsulate the historical trends of the Supreme Court rulings. "The First Amendment does not prohibit governmental activity of a religious nature so long as the activity is neutral to all religions. One conclusion seems clear - the meaning of the First Amendment is not set in constitutional stone. The Constitution guarantees freedom *of* religion, but should not be construed to guarantee freedom *from* religion."[534]

The Court was hesitant to outright apply the Lemon test. The Court did agree, however, that whichever "test" was applied, the outcome of its application would be the same - the Louisiana statute violated the Establishment Clause. Duplantier stated that "because it promote[d] the beliefs of some theistic sects to the detriment of others, the statute violate[d] the fundamental First Amendment principle that a state must be neutral in its treatment of religions. The Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act is a 'law respecting an establishment of religion.'"[535]

Unsatisfied with the ruling, the plaintiffs appealed with the new governor, Edwin W. Edwards, as the named defendant. On July 8, 1985, the United States Court of Appeals for the Fifth Circuit heard *Aguilard v. Edwards.*[536] E. Grady Jolly, the Circuit Judge gave the opinion of the Court. Grady agreed with the District Court's ruling and affirmed its decision. The Court found that the statute's purpose of guarding academic freedom was completely inconsistent with the requirement of teaching creation science in tandem with evolution.

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[532] Ibid.
[533] *Lynch v. Donnelly,* 465 U.S. 668(1984).
[534] Id., *Aguillard v. Treen* (1985).
[535] Ibid.
[536] Id., *Aguilard v. Edwards* (1985).

Circuit Judge E. Grady Jolly began the opinion of the Court by expressing the relative ease in distinguishing the facts of the case. "In truth, notwithstanding the supposed complexities of religion-versus-state issues and the lively debates they generate, this particular case is a simple one, subject to a simple disposal: the Act violates the establishment clause of the first amendment because the purpose of the statute is to promote a religious belief."[537] Grady acknowledged the sensitive nature of this case:

> We cannot divorce ourselves from the historical fact that the controversy between the proponents of evolution and creationism has religious overtones. We do not, indeed cannot, say that the theory of creation is to all people solely and exclusively a religious tenet. We also do not deny that the underpinnings of creationism may be supported by scientific evidence. It is equally true, however, that the theory of creation is a theory embraced by many religions. Nor can we ignore the fact that through the years religious fundamentalists have publicly scorned the theory of evolution and worked to discredit it.[538]

The Court determined that the use of the Supreme Court precedent to determine the constitutionality of the Act was reasonable. In invoking the Lemon test, Grady deduced, as had the District Court, that the secular purpose of the Act was nonexistent.

> Not only does the Act fail to promote academic freedom, it fails to promote creation science as a genuine academic interest. If primarily concerned with the advancement of creation-science, the Act, it certainly appears to us, would have required its teaching irrespective of whether evolution was taught. Thus a primary academic interest in creation-science would seem to be gainsaid because the Act requires the teaching of the creation theory only if the theory of evolution is taught.[539]

The Court determined that the Act violated the Establishment Clause in that its intended effect was to "discredit evolution by counterbalancing its teaching at every turn with the

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[537] Ibid.
[538] Ibid.
[539] Ibid.

teaching of creationism….The statute therefore is a law respecting a particular religious belief."[540]

On June 19, 1987 Supreme Court of the United States ruled on *Edwards v. Aguillard.*[541] In an 8-to-1 decision the Supreme Court invalidated the Act and determined that it was unconstitutional for the third time on the grounds that its intention was to serve and aid religion. Justice Brennan, delivering the opinion of the Court, deemed that Louisiana's "Creationism Act" violated the Establishment Clause on several grounds. The Act was deemed to promote a religious belief and also did not fulfill its stated goal of promoting academic freedom. A clear secular purpose was never determined. It was clear that Senator Bill Keith as the legislative sponsor intended to actually narrow the science curriculum. "The state senator repeatedly stated that scientific evidence supporting his religious views should be included in the public school curriculum to redress the fact that the theory of evolution incidentally coincided with what he characterized as religious beliefs antithetical to his own."[542] Justice Brennan affirmed that "the goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science."[543]

The Supreme Court concluded that the District Court did not err in granting summary judgment. Brennan remarked on how essential the Supreme Court has held the intended meaning of the Establishment Clause when dealing with the education of elementary and secondary school children.

> Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the

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[540] Ibid.
[541] Id., *Edwards v. Aguillard,* (1987).
[542] Ibid.
[543] Ibid.

> private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary.[544]

The assurance of this maintenance was placed in the hands of the states and in upholding this awesome responsibility, the Court found the Act unconstitutional. It was reaffirmed that the "public schools, in other words, may not proselytize, but they may teach about religion when it is appropriate to do so for secular reasons. For example, one cannot understand the history of the middle ages without knowing something about the teachings of the Catholic Church, just as one cannot understand ancient Greek history without knowing something about the ancient Greek gods."[545] The Lemon-test provided the framework and the growing stare decisis to definitely determine the Act unconstitutional.

The Supreme Court has consistently verified that tax exemptions for religious organizations are constitutional. They have been deemed appropriate or several reasons including the fact that they were granted under the auspices of general exemptions to an umbrella group of non-profit groups. On February 21, 1989, *Texas Monthly, Inc. v. Bullock*[546] decided the constitutionality of a Texas state sales tax exemption enacted for specific religious publications. Texas Monthly Incorporated, a nonreligious publisher, sued Bob Bullock, Comptroller of Public Accounts of State of Texas claiming that tax exemptions created specifically for religious publications violated the First Amendment.

In 1982, the Texas Tax Code provided an exemption specifically geared towards religious publications. That section provided:

> Periodicals that are published or distributed by a religious faith and that consist wholly of writings promulgating the teaching of the faith and books

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[544] Ibid.
[545] Id., Nowak and Rotunda. *Principles of Constitutional Law* (2004). p. 771.
[546] *Texas Monthly Inc. v. Bullock,* 489 U.S. 1 (1989).

> that consist wholly of writings sacred to a religion or religious faith are exempted from the taxes imposed by this Chapter.[547]

The state denied any similar tax exemption to other publications. Three years later, in 1984, the exemption was repealed, and then reinstated on October 1, 1987.[548] Throughout 1984 and 1987, periodicals published by religious groups continued to be exempted. Because Texas Monthly was a general interest magazine, it had to pay sales taxes based on subscription sales during the three year period in what amounted to $149,107.74. The District Court of Travis County, Texas agreed with Texas Monthly and found the exemption unconstitutional based on what the Court deemed to be content based exclusion and ordered the taxes of Texas Monthly to be returned. "Such an exemption constitutes an unlawful discrimination based on the content of a publication and thus violates Plaintiff's rights guaranteed by the First and Fourteenth Amendments."[549]

The Court of Appeals of Texas, Third Supreme Judicial District of Texas did not agree and reversed in a 2-to-1 vote.[550] Justice Shannon delivered the opinion of the Court. Following the Lemon test, the Court determined that the exemption served the secular purpose of preserving appropriate separation between church and state. In addition, the exemption was not determined to advance or inhibit religion, and did not produce impermissible government entanglement with religion.

The Supreme Court of the United States found issue with the appellate judgment and reversed and remanded the decision. In a 6-to-3 decision, the Supreme Court found that the exemption violated Establishment Clause. Justice Brennan, delivering the opinion of the Court, determined that a sales tax exemption granted solely to religious literature violated the

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[547] *Texas Monthly Inc. v. Bullock,* 731 S. W. 2d 160 (1987).Tex. Tax Code Ann. §151.312.
[548] Ibid. Tex. Tax Code Ann. § 151.320 (Supp. 1988-1989)
[549] Ibid.

Establishment Clause. The secular objective of the exemption was never determined. The Supreme Court had previously sanctioned exemptions to a wide array of groups. It was determined that any incidental benefit that affected religious groups was allowed and did not invalidate the intended secular purpose. "The nonsectarian aims of government and the interests of religious groups often overlap, and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur."[551] The Court gave examples such as *Widmar* v. *Vincent*[552] in which the Court sanctioned the use of university facilities by all groups, including religious groups. The Court also referred to *Walz* v. *Tax Commission of New York* [553] that affirmed a property tax exemption for religious properties. "In all of these cases, however, we emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well. Indeed, were those benefits confined to religious organizations, they could not have appeared other than as state sponsorship of religion; if that were so, we would not have hesitated to strike them down for lacking a secular purpose and effect."[554] The issue in *Texas Monthly* was that the exemption benefited only a small group – in this case, a sectarian group.

The exemption was not conferred on a multitude of parties and in effect created an environment where the taxpayers endorsed a religious aim. "Every tax exemption constitutes a subsidy that affect[ed] nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'"[555] The exemption in effect advanced religion and also created an entanglement. "It is difficult to view Texas' narrow exemption as anything but state

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[550] Ibid.
[551] Id., *Texas Monthly Inc. v. Bullock* (1989).
[552] Id., *Widmar* v. *Vincent* (1981).
[553] Id., *Walz v. Tax Commission* (1970).
[554] Id., *Texas Monthly Inc. v. Bullock* (1989).

sponsorship of religious belief, regardless of whether one adopts the perspective of beneficiaries or of uncompensated contributors."[556] The exemption was not determined to be necessary as per the Free Exercise Clause and it was also determined that paying a sales tax did not have the effect of impeding religion. Brennan stated that "in this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity."[557]

The Court reaffirmed that tax exemptions for religious organizations were constitutional, as deduced in *Walz,* but prohibited an exemption that was only applicable to such religious groups. The exemption clearly lacked a secular objective since it only applied to religious groups. Additionally, the Court deduced that the application of a tax to these secular groups for publication did not violate either of the clauses.

In the footsteps of *Texas Monthly, Inc. v. Bullock*, *Jimmy Swaggart Ministeries v. Board of Equalization*[558] determined the constitutionality of California's Sales and Use Tax on a religious organization's publications. Jimmy Swaggart Ministries claimed that the California's Sales and Use Tax was unconstitutional both on Free Exercise and Establishment Clause grounds.

The California Sales and Use Tax Law imposed a six percent tax for all in-state sales on personal property as well as six percent for all such property purchased outside the state. It "require[d] retailers to pay a sales tax '[for] the privilege of selling tangible personal

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555 Ibid.
556 Ibid.
557 Ibid.
558 *Jimmy Swaggart Ministries v. Board of Equalization,* 493 U.S. 378 (1990).

property at retail.'"[559] Significantly, the constitution of California did not require religious organizations to be exempt from the Sales and Use Tax.

Jimmy Swaggart Ministries was a religious organization incorporated in 1982 as a Louisiana nonprofit corporation based on its church services administered since 1980 in Baton Rouge, Louisiana. The incorporated Ministries's constitution declared:

> That Jimmy Swaggart Ministries is called for the purpose of establishing and maintaining an evangelistic outreach for the worship of Almighty God…to assume a proper share of responsibility and privilege of propagating the gospel of Jesus Christ. This outreach shall…specifically include evangelistic crusades; missionary endeavors; education…; radio broadcasting…; television broadcasting; and audio production and reproduction of music; audio production and reproduction of preaching; audio production and reproduction of teaching; writing, printing and publishing; and, any and all other individual or mass media methods that presently exist or may be devised in the future to proclaim the good news of Jesus Christ.[560]

In 1980, the California Board of Equalization notified Jimmy Swaggart that it needed to register as a seller to ensure that its profits and subsequent taxes could be calculated. In California, Jimmy Swaggart had to pay taxes for its religious materials because an exemption for religious materials did not exist. Jimmy Swaggart did not respond to the request holding that according to the U.S. Constitution, they were exempt. An audit ensued and concluded that between April 1, 1974 and December 31, 1981 Jimmy Swaggart Ministries sold tangible personal property in California in the amount of $1,702,942.00 for mail order sales from and $240,560.00 for crusade merchandise.[561] "These figures represented the sales and use in California of merchandise with specific religious content -- Bibles, Bible study manuals, printed sermons and collections of sermons, audiocassette tapes of sermons, religious books and pamphlets, and religious music in the form of song-books, tapes, and records."[562] The

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[559] *Jimmy Swaggart Ministries v. Board of Equalization,* 204 Cal. App. 3d 1269 (1988). Rev. & Tax. Code, §6001.
[560] Ibid.
[561] Ibid.
[562] Ibid.

sales and use taxes owed amounted to $118,294.54, plus interest of $36,021.11, and a penalty of $11,829.45, for a total amount due of $166,145.10.[563]

Jimmy Swaggart paid the amount and filed a petition of redetermination. The petition failed, the refund was rejected, and Jimmy Swaggart brought suit in State Court. The State Court found the application of the tax constitutional. In an opinion by Justice P.J. Kremer on August 29, 1988, the Court of Appeals of California Fourth Appellate District affirmed the decision of the Superior Court of San Diego County.[564] Two years later on January 17, 1990, the Supreme Court of the United States affirmed the decision and denied a discretionary review and held the tax constitutional.[565]

Writing for a unanimous Court, Justice O'Connor explained that the Court found the tax constitutional based on the fact that the tax was applied to all and equally burdened all. The tax was not found to specifically burden only Jimmy Swaggart's religious activity. "The sales and use tax [was] not a tax on the right to disseminate religious information, ideas, or beliefs *per se;* rather, it [was] a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California."[566] O'Connor provided a compelling example that "California treats the sale of a Bible by a religious organization just as it would treat the sale of a Bible by a bookstore; as long as both are in-state retail sales of tangible personal property, they are both subject to the tax regardless of the motivation for the sale or the purchase."[567] The Sales and Use tax was determined to be nondiscriminatory in nature. The claim that the tax burdened Jimmy Swaggart because it produced a reduction in income was not enough to prove a

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563 Ibid.
564 Ibid.
565 Id., Jimmy Swaggart Ministries v. Board of Equalization (1990).
566 Ibid.
567 Ibid.

constitutional violation. In addition, the taxation was not deemed to constitute an excessive entanglement. "Collection and payment of the tax will of course require some contact between appellant and the State, but we have held that generally applicable administrative and recordkeeping regulations may be imposed on religious organization without running afoul of the Establishment Clause."[568] As in the previous *Texas Monthly v. Bullock,* neither the Establishment nor the Free Exercise Clauses were violated.

Texas Monthly v. Bullock and *Jimmy Swaggart Ministries v. Board of Equalization* enabled the government to tax religious organizations and not necessarily exclude them based solely on the religious nature of their organization. The next two cases however, reverse the recent trends and accommodate religious groups. The *Alger v. City of Chicago*[569] ruling was detrimental to historic preservationists in that the case decided that a statute allowing religious properties to resist designation was valid. The 1990 *Alger v. City of Chicago*[570] case was disheartening for preservationists. In light of the growing population of aging historic religious properties, preservationists find that the preservation of religious properties imperative. In an opinion by U.S. District Judge Marvin E. Aspen, the United States District Court for the Northern District of Illinois ruled that a Chicago ordinance, Municipal Code §21-69.1(1987), that enabled religious properties to rebuff Landmark status was constitutional.

On September 20, 1990, Rebecca A. Alger, representing the Landmarks Preservation Council of Illinois, and The National Trust for Historic Preservation filed suit to permanently enjoin the Chicago ordinance. Alger's objective was to ensure the designation of Saint Mary of the Angels Church. The plaintiffs claimed that the application of §21-69.1

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568 Ibid.
569 *Alger v. City of Chicago,* 748 F. Supp. 617 (1990).
570 Id., *Alger v. City of Chicago* (1990).

was unconstitutional, arguing that it violated the Establishment and Equal Protection Clauses of the Federal and Illinois Constitutions, and that it unlawfully delegated legislative power to religious organizations in violation of the Illinois Constitution. The court sided with Chicago and granted its motion to dismiss.

Figure 18
Saint Mary of the Angels Church in Chicago.

The case involved a challenge to Chicago's landmark ordinance. The ordinance precluded the designation of religious buildings as landmarks without the consent of the building's owner. "This ordinance, Municipal Code §§21-62 through 21-95, sets forth procedures for designating an 'area, district, place, building, structure, work of art, or other object' as a 'Chicago landmark.'"[571] The designation precluded any alteration without approval by the Landmark Commission. The designation process was initiated by a decision from the Landmark Commission based on seven statutory criteria. After notification, and owner consent, the Commission makes its final decision. The ordinance had a specific section that dealt with religious properties. The section provided that in the event that the owner of a religious property did not consent, special rules applied. "If the property is 'owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies,' the owner's refusal to consent precludes designation. This effectively ends the designation proceedings."[572] If §21-69.1 was applied, the hands of

[571] Ibid.
[572] Ibid. §21-69.1.

Historic Preservation were effectively tied. If however §21-69.1 was not applicable, the Commission could hold public hearings and designate the property anyway.

On November 1, 1989, hearings began to designate Saint Mary's Church as a Chicago landmark. Designation was warranted due to the Church's:

> impressive architectural style emphasized by its monumental scale, its distinctive and firmly established role as a visual and physical centerpiece of the community, and its value as an example of Chicago's historical and architectural heritage in its imitation of the grand religious cathedrals of Europe.[573]

The Church was inspired by Francis Gordon and designed by Worthmann & Steinbach. It epitomized the Polish Renaissance style.[574] Two days later, the Commission sent a letter to Cardinal Joseph Bernardin, the Roman Catholic Archbishop of Chicago and the owner of Saint Mary's. Cardinal Bernadin declined the designation, which effectively halted the designation due to the fact that §21-69.1 was applicable.

The Court dismissed the compliant for lack of standing. The plaintiffs were not able to demonstrate an actual injury. Instead, "they assert that the requirement is met by the threat to their use, enjoyment, and aesthetic appreciation of St. Mary's that is created by the existence and enforcement of §21-69.1."[575] The Court found this to be insufficient. "Yet, the plaintiffs have not alleged any facts which suggest that this is even a vague likelihood. They do not allege that church officials are presently considering, or have ever considered, the possibility of altering St. Mary's. They merely allege that as a result of § 21-69.1 there is nothing to prevent church officials from doing so."[576]

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[573] Ibid.
[574] Found at http://archives.archchicago.org/museum1b.htm.
[575] Ibid.
[576] Ibid.

On December 19, 1990, the plaintiffs amended their case and brought suit again. United States District Judge Marvin E. Aspen again provided the opinion of the United States District Court for the Northern District of Illinois.[577] Again, the plaintiffs claim was dismissed. The plaintiffs provided additional evidence that they felt would be able to prove what the *City of Los Angeles v. Lyons*[578] called "the threat of direct injury must be 'both real and immediate, not conjectural or hypothetical.'" The amended complaint intended to prove that the demolition of Stint Mar's was more than just a possibility. Saint Mary's Church had structural problems that placed the members of the parish in danger and thus closed the Church down in January of 1988.

In light of problem-solving, two yeas later, "the Archdiocese was offered over $1 million in donations from parishioners, neighbors, and other 'restoration supporters' to complete the needed repairs, which it refused to accept stating that it was $150,000 less than the necessary amount. Soon thereafter, it was offered a $150,000 guarantee to make up the difference, which it also refused."[579] Based on this refusal as well as the historic demolition record, the plaintiffs allege that the Church was in great harm. "The Archdiocese has demolished approximately one third (seventeen of forty-two) of the churches that it has closed since the early 1950's."[580]

The Court found that the new evidence provided no "more than mere speculation and conjecture that St. Mary's will be altered or demolished."[581] The Court felt that this did not remedy the problems in the original complaint. The reliance on the historical demolition trends was dismissed as a statistic. Aspen stated that even if the statistic was applied, it would

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577 *Alger v. City of Chicago,* 753 F. Supp. 228 (1990).
578 *City of Los Angeles v. Lyons,* 461 U.S. 95 (1983).
579 Id., *Alger v. City of Chicago,* 753 F. Supp. 228 (1990).
580 Ibid.
581 Ibid.

be construed to the benefit of the preservationists. "According to the complaint, a significant majority (almost two-thirds) of churches that have been closed have not been demolished. Therefore, under the plaintiff's rationale, it seems most likely that St. Mary's will remain intact and the plaintiffs' interests, therefore, are not in any 'real and immediate' danger."[582]

Aspen believed that the alternative of ruling based on the possibility the Church would be harmed was worse than removing the Church's ability to act on its own behalf. Aspen explained that "while we recognize the merits of this argument, the alternative, to base standing on simple guesses and weak hypotheses about an action the Archdiocese might someday take, is far less attractive. Standing in federal court to litigate the constitutionality of legislative action is not a matter of tea leaves and crystal balls."[583] The Court denied the complaint without prejudice which meant that the plaintiffs could take action if at sometime later the Church was indeed in actual harm's way. Incidentally, the Church was not demolished, but instead due to revitalization efforts, updated and preserved. The Church was located in the Wicker Park and Bucktown area of Chicago, which at the time of the case was a blue-collar area. Subsequent to the case, the area has changed due to the revitalization efforts and is currently described as "overrun by under-30 artists, yuppies and grunge types."[584] For now, it seems that the Church is safe from the wrecking ball. But this case exemplifies the difficult time Courts have when walking the tightrope between the clauses and contributes to inconsistent results.

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[582] Ibid.
[583] Ibid.
[584] "Wicker Park/Bucktown." Found at:
www.homestore.com/Cities/Chicago/WickerParkGN.asp?poe=homestore.

The 1997 *Agostini v. Felton*[585] case was part of a trend during the late 1980's and 1990's in which the Court applied the *Lemon* test in slightly different ways when reviewing aid to students at religiously affiliated schools. This trend was unlike that of the 1970's and early 1980's in which "very few government programs that provided aid to religious schools or religious school students survived the three part test."[586] *Agostini* changed long standing precedent by overruling the ruling in *Aguilar v. Felton.*[587] *Agostini* modified the *Lemon* test from its established tree prongs to what was called the *Lemon* test redux which ensured that the focus when determining whether a law violated the Establishment Clause was on the purpose and the effect of a law. The three prongs of purpose, effect, and entanglement, effectively used between 1970 and 1997, were not, however, discarded. The Court also specified that the determination of whether a government action had the primary effect of establishing religion included an evaluation of government indoctrination, defining the recipients based on religious affiliation, and excessive entanglement between government and religion.

In the 5-to-4 decision, *Agostini v. Felton,*[588] decided on June 23, 1997, overturned the 1985 ruling in *Aguilar v. Felton*[589] that held federal funds distributed for the purposes of paying the salaries of public school teachers working in parochial schools was unconstitutional. The petitioners, the parties bound by that injunction, brought suit seeking relief from the injunction twelve years after the ruling. "Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good

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585 *Agostini v. Felton*, 521 US 203 (1997).
586 Id., Nowak and Rotunda, *Principles of Constitutional Law* (2004).
587 Id., *Aguilar v. Felton* (1985).
588Id., *Agostini v. Felton* (1997).

law."[590] Writing the opinion for the majority of the Court, Justice Sandra Day O'Connor, representing Justices Rehnquist, Scalia, Kennedy, and Thomas, revisited the case on several grounds including the fact that since the ruling, certain cases have changed the interpretation of the Establishment Clause.

Rachel Agostini, representing several parents of parochial school students, brought suit against Betty-Louise Felton seeking relief from the permanent injunction entered subsequent to *Aguilar*. Agostini challenged the ruling under Federal Rule of Civil Procedure 60(b). Rule 60(b)(5) states: "on motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application."[591] Agostini felt that the previous judgment was no longer equitable in light of three changes that have effectively altered the factual and legal landscape.

First, Agostini claimed that that the costs associated with complying with the District Court's injunction were overly burdensome. Second, the plaintiff claimed that significant legal developments since *Aguilar* required that the decision be reconsidered in light of some recent opinions rendered by Justices. Finally, since *Aguilar*, *Witters v. Washington Dept. of Services for Blind*[592]and *Zobrest* v. *Catalina Foothills School District*[593] have interpreted the Constitution differently and subsequently work to undermine *Aguilar*.

In response to the ruling in *Aguilar*, Title I was modified to ensure that its goals were being met constitutionally. This change was accomplished by "revert[ing] to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional

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589 Id., *Aguilar v. Felton* (1985).
590 Id., *Agostini v. Felton* (1997).
591 Ibid.
592 *Witters v. Washington Dept. of Services. for Blind,* 474 U.S. 481 (1986).
593 *Zobrest* v. *Catalina Foothills School Dist.,* 509 U.S. 1 (1993).

units (essentially vans converted into classrooms) parked near the sectarian school."[594] The program incurred great costs as a result of implementing these alternative delivery systems to ensure compliance with the requirements. "Since the 1986-1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites."[595] This expenditure greatly encumbered the program and in effect reduced the program's outreach to 20,000 economically disadvantaged children in New York City by 35 percent.

The Court reasoned that the alleged burden incurred by the necessary compliance to the decision in *Aguilar* was an anticipated burden and was not sufficient to mandate a reversal under Rule 60(b)(5). Also under Rule 60(b)(5), the opinions of the Justices in the previous 1994 *Board of Education of Kiryas Joel Village School District v. Grumet* [596]case was also deemed insufficient to mandate a reversal. O'Connor dismissed the first two contentions for a lack of significant change in factual conditions as well as the fact that the additional costs to adjust the programs were known. "That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5)."[597] She additionally dismissed the claim that a majority of Justice's assertions that *Aguilar* be revisited warranted review. "We also agree with respondents that the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed."[598]

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[594] Id., *Agostini* (1997).
[595] Ibid.
[596] *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).
[597] Id., *Agostini* (1997).
[598] Ibid.

O'Connor focused on the cases subsequent to *Aguilar* that changed the Court's interpretation and eroded the logic of *Aguilar* to the point "it is no longer good law."[599] This decision was based on previous Supreme Court rulings such as *Witters*[600] which departed from the assumption that all government aid that assisted the education aspect of religious schools was invalid. The Court declared that a state grant to a blind man to attend a Christian college with the goal of becoming a pastor was constitutional. The other significant ruling was *Zobrest*[601] which rejected the presumption that the presence of public school teachers in parochial schools implied state-sponsored indoctrination. *Zobrest* declared that the Catalina Foothills School District's decision that enabled a deaf parochial student to attend classes with his interpreter was constitutional. O'Conner applied the rulings in these cases to *Agostini* and concluded that the rulings in *Aguilar* would be construed differently. The Court determined that the New York City program that paid public school teachers to provide remedial education in parochial schools was indeed constitutional. O'Connor stated that "*Zobrest* and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid."[602]

Given the precedent set by these cases and the reinterpretation of the facts of *Aguilar,* the Court found that *Aguilar* was not in violation of the *Lemon* test's excessive entanglement prong. This conclusion was reached on the grounds that if it was assumed constitutional for a deaf man, as in *Zobrest,* to participate in school activities via an interpreter and presumably not to participate in religious indoctrination, then the logic could also be

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[599] Ibid.
[600] Id., *Witters* (1968).
[601] Id., *Zobrest* (1993).

applied to a teacher under Title I and likewise does not partake in indoctrination. O'Conner concluded that "both our precedent and our experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be 'uncontrollable and sometimes very unprofessional.'"[603] The court reaffirmed Title I's constitutionality:

> New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion.[604]

O'Connor explained that the general principles such as the purpose as well as effect of advancing or inhibiting religion used to evaluate Establishment cases have not changed. O'Conner relied on the components of the *Lemon* test to resolve this Establishment Clause issue. "*Agostini* not only affirmed the continued vitality of the *Lemon* test, it confirmed once again that the often maligned standard could be used to produce an accommodationist conclusion."[605] O'Connor concluded that "what has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect."[606]

Interestingly, the reversal of the Aguilar was not upheld by either stare decisis or "law of the case" doctrine that states that a Court should refrain from opening issues that have already been decided.

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[602] Id., *Agostini* (1997).
[603] Ibid.
[604] Ibid.
[605] John J. Patrick and Gerald P. Long. *Constitutional Debates on Freedom of Religion.* 1999.

> The doctrine does not apply if the court is 'convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.' In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a 'manifest injustice, such that the law of the case doctrine does not apply.[607]

The "significant change" coupled with the "change in law" as described by O'Conner entitled the petitioners relief under Rule 60(b)(5). O'Conner addressed the statements regarding upholding stare decisis. She stated that "we do no violence to the doctrine of *stare decisis* when we recognize *bona fide* changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine."[608]

The Court that steadily applied the three-pronged *Lemon* test for over two decades applied a modified version to evaluate aid to schools by applying the secular purpose and primary effect prongs while dismissing the third. The *Lemon* Test, however, remained intact. In general, it seems that religious schools that teach at higher levels of education have successfully traversed the Establishment Clause, while religious schools that teach younger pupils have failed. "Financial aid to church-related colleges has fared better in the face of establishment challenges than has aid to elementary and secondary schools. The same three-part test used in the pre-college cases – 'purpose,' primary effect,' and 'excessive entanglements' – has been more easily satisfied in the higher education cases."[609] While *Agostini* took the first step to open the door for religiously affiliated schools to gain access to federal funding, the door was completely blown off three years later in *Mitchell v. Helms.*

On June 28, 2000, the Court adopted a new interpretation that allowed private schools, even though religiously affiliated, to receive aid. In a highly contentious 6-to-3 vote,

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606 Id., *Agostini* (1997).
607 Ibid.
608 Ibid.
609 Id., Redlich (1999). p.524.

Mitchell v. Helms[610] allowed local school districts to be eligible for federal funds for education related equipment intended for distribution to both public and private schools, even those religious private schools. The Court continued to apply its new interpretation of the Establishment Clause as established in *Agostini* and continued to overturn previous rulings. In finding that Chapter 2 of the Education Consolidation and Improvement Act of 1981 was constitutional, the Court overturned *Meek v. Pittenger*[611] and *Wolman v. Walter.*[612]

The United States District Court for the Eastern District of Louisiana originally agreed with Helms and held that Chapter 2 had the primary effect of advancing religion because the equipment loans were construed a direct aid granted to a pervasively sectarian institutions and thus unconstitutional. The District Court originally held that the aid violated the second prong of the Lemon test in that the aid was given directly to pervasively sectarian schools. The residing judge, however, retired and after the new judge heard *Helms v. Cody*[613] on June 10, 1994, he reversed and held the aid constitutional. The Court of Appeals for the Fifth Circuit reversed and held Chapter 2 unconstitutional on August 17, 1998 in *Helms v. Picard.*[614] The United States Supreme Court ultimately reversed the ruling of the United States Court of Appeals for the Fifth Circuit.

Mary Helms, representing a group of Louisiana public school parents, brought suit claiming that Chapter 2 violated the Establishment Clause on the grounds that the federal funds were distributed to state agencies which in turn distributed the funds for educational materials and equipment to public and private religious institutions. The Jefferson Parish entity that was empowered to the handle the funds doled out 30 percent to private Catholic

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610 Mitchell v. Helms, *530 U.S. 793 (2000).*

611 *Meek v. Pittenger,* 421 US 349 (1975).
612 *Wolman v. Walter*, 433 US 229(1977).
613 *Helms v. Cody,* 856 F. Supp. 1102 (1994).
614 *Helms v. Picard,* 151 F.3d 347 (1998).

institutions. "For the 1985-1986 fiscal year, 41 private schools participated in Chapter 2. For the following year, 46 participated….Of these 46, 34 were Roman Catholic; 7 were otherwise religiously affiliated; and 5 were not religiously affiliated."[615]

The Elementary and Secondary Education Act of 1965 (ESEA),[616] created Chapter 2 of the Education Consolidation and Improvement Act of 1981.[617] Chapter 2 was established to distribute federal funds via state educational agencies (SEA's) to local educational agencies (LEA's). The LEA's would in turn loan educational materials to local schools. "Among other things, Chapter 2 provides aid 'for the acquisition and use of instructional and educational materials, including library services and materials (including media materials), assessments, reference materials, computer software and hardware for instructional use, and other curricular materials.'"[618] The establishment of SEA's and their counterpart LEA's followed in the footsteps of the Elementary and Secondary Education Act of 1965 in *Aguilar*. Though initially invalidated, the program was reinterpreted as constitutional in *Agostini*. Chapter 2 did, however, establish some restrictions for private schools. "Most significantly, the 'services, materials, and equipment' provided to private schools must be 'secular, neutral, and nonideological.'"[619] The materials supplied included "library books, computers, and computer software, and also slide and movie projectors, overhead projectors, television sets, tape recorders, VCR's, projection screens, laboratory equipment, maps, globes, filmstrips, slides, and cassette recordings."[620]

Justice Thomas, representing four of the Justices, delivered the opinion of the Court while the concurring opinion written by Justices O'Connor and Breyer agreed that the effect

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615 Id., *Mitchell v. Helms* (2000).
616 Ibid., Pub. L. 89-10, 79 Stat. 27, 55.
617 Ibid., Pub. L. 97-35, 95 Stat. 469, as amended, 20 U.S.C. §§ 7301-7373.
618 Ibid., 20 U.S.C. § 7351(b)(2).
619 Ibid., § 7372(a)(1).

of the law should be determined based on whether government indoctrination could be established, whether the grant recipients were religiously affiliated, and if it could be determined that an excessive entanglement was created. The four person plurality comprised a very broad approach to the Establishment Clause. Thomas candidly admitted that the rulings handed down by the various Courts were incredibly confusing. "The case's tortuous history over the next 15 years indicates well the degree to which our Establishment Clause jurisprudence has shifted in recent times, while nevertheless retaining anomalies with which the lower courts have had to struggle."[621] The shift he referred to was the slightly different interpretations that culminated in the *Agostini* decision. Thomas continued the logic affirmed in *Agostini* and upheld the constitutionality of Chapter 2:

> Considering Chapter 2 in light of our more recent case law, we conclude that it neither results in religious indoctrination by the government nor defines its recipients by reference to religion. We therefore hold that Chapter 2 is not a 'law respecting an establishment of religion.' In so holding, we acknowledge what both the Ninth and Fifth Circuits saw was inescapable -- *Meek* and *Wolman* are anomalies in our case law. We therefore conclude that they are no longer good law.[622]

Thomas relied on the principle of neutrality to establish whether indoctrination had occurred. "If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[623] The concept that parents of school age children made private choices ensured the principle of neutrality. "The private choices helped to ensure neutrality, and neutrality and private choices together eliminated any possible attribution to the government even when the interpreter translated classes on

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[620] Ibid.
[621] Id., *Helms* v. *Cody* (1994).
[622] Id., *Mitchell v. Helms* (2000).
[623] Ibid.

Catholic doctrine."[624] The voucher program, held in check, by neutrality was determined to be constitutional. This concept is the key to current programs that allow federal grants to religiously affiliated organizations including President Bush's faith-based initiatives and Save America's Treasures. As the concept of aid changed over time, from Everson's interpretation that focused on the benefit incurred by the parent not the institution, the concept of aid changed from one focused on the type of aid to one hat focused on the recipient of the aid. The neutrality principle has opened doors for the preservation of historic religious sites with active congregations.

Mitchell v. Helms[625] continued in the footsteps of *Agostini*[626] and further leveled the playing field against the no-direct-aid sentiment. Two years later, the Court built on the recent precedents and concluded that the school vouchers at issue in the February 20, 2002 *Zelman v. Simmons-Harris*[627]case were constitutional. The adjusted focus from the nature of the recipient to the regulation criteria further opened the door for religious organizations to gain access to grants.

In 1995, Ohio created a voucher system that was intended to cure some of the inner-city woes that the faltering Cleveland schools were experiencing. Delivering the opinion of the Supreme Court, Chief Justice William Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas explained the 5-to-4 decision that declared the voucher program constitutional. The religion-neutral vouchers were given to parents of school aged children in participating schools and were used in part to pay for parochial school tuition. Susan Tave Zelman, representing a group of Ohio taxpayers brought suit against Doris Simmons-Harris

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[624] Ibid.
[625] Ibid.
[626] Id., *Agostini v. Felton* (1997).
[627] *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

to enjoin the scholarship vouchers. On appeal from the Court of Appeals from the Sixth Circuit,[628] the Supreme Court reversed the Appellate decision and held that the scholarship vouchers did not violate the Establishment Clause.

In the 1990's, the Cleveland, Ohio school system was languishing. In 1995, Cleveland was described as having a "crisis of magnitude"[629] and in 1996 as having a "crisis that is perhaps unprecedented in the history of American education."[630] The Pilot Project Scholarship Program was enacted to bolster the school system. "The program provides financial assistance to families in any Ohio school district that is or has been under federal court order requiring supervision and operational management of the district by the state superintendent." [631] The program provided two kinds of assistance including tuition aid to be applied towards tuition at participating public or private schools and tutorial aid to be applied for those that chose to stay in the public school system. "The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards." [632] Public schools were eligible for $2,250 tuition grant for each student in addition to the full amount of per-pupil state funding and "families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250." [633] The tutorial aid inclusion ensured that students from low-income families receive a 90% reimbursement of

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628 *Simmons-Harris v. Zelman*, 234 F.3d 945 (2000).
629 Id., *Zelman v. Simmons-Harris* (2002). Quoting from *Reed* v. *Rhodes*, 1 F. Supp. 2d 705, (1995).
630 Ibid. Cleveland City School District Performance Audit 2-1 (Mar. 1996).
631 Ibid. § 3313.975(A).
632 Ibid. § 3313.976(A)(3).
633 Ibid. §§ 3313.978(A) and (C)(1).

the expenditure up to $360 while students from moderate-income families received 75% of the expenditure.[634]

The 1999-2000 school year included 56 participating private schools of which 46 were religiously affiliated. Approximately 96 percent of the 3,700 students participating in the scholarship program were enrolled in religiously affiliated schools. Overlooking these statistics, Justice Rehnquist explained that the issue was the assessment of whether the program had the 'effect' of advancing or inhibiting religion. Though the Court did not question the secular intent of the program, the Court made a distinction between government programs that provide aid directly to religious schools and programs of true private choice. Programs of true private programs were characterized as programs in which government aid could be traced to religious schools via private choices. Justice Rehnquist stated that "while our jurisprudence with respect to the constitutionality of direct aid programs has 'changed significantly' over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges."[635] Rehnquist referred to *Mueller*, *Witters*, and *Zobrest* in which the advancement of a religious mission was found to be incidental because the program was accessible by many recipients and ensured that parents were able to make deliberate choices. Rehnquist stated that:

> As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school

[634] Ibid. § 3313.978(B).
[635] Ibid.

> district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.[636]

The Court determined that when choices were available and parents acted on their ability to privately choose, the Establishment Clause was not implicated. This choice enabled "the circuit between government and religion"[637] to be broken and thus the Establishment Clause was not implicated. In a concurring opinion, Justices O'Conner and Thomas emphasized that the decision in *Zelman* should not be construed to depart from prior Establishment Clause jurisprudence. "Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is 'no,' the program should be struck down under the Establishment Clause."[638] The Supreme Court concluded that the vouchers had neither the primary purpose nor primary effect of advancing religion while simultaneously upholding the validity of the *Lemon* test.

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[636] Ibid.
[637] Ibid.
[638] Ibid.

VIII. Conclusion

The concurrent development of the Religion Clauses has created an interesting tension between the prohibition against the establishment of religion on one hand and the interference with its free exercise on the other. The principal guiding force that has emerged from the Supreme Court jurisprudence to negotiate both Clauses is the principle of governmental neutrality. This neutrality, however, is precarious. There are always situations in which laws traverse boundaries and incidentally encroach on these rights. "Unfortunately, situations arise where government may have no choice but to incidentally help or hinder religious groups or practices. For example, Congress should not pay the salaries of ministers, priests, and rabbis, but if the military ships its soldiers to places with no easy access to churches, synagogues, or mosques, it may hire military chaplains who minister to the soldiers, so that the government will not interfere with their free exercise of religion."[639] These situations arise when the Courts make distinctions between competing interests. The delineation of the boundaries between the two Clauses is becoming more precise and influences a significant aspect of historic preservation, a field which some interpret as involving objectives that conflict with those of religious organizations.

Religious institutions are a significant part of this country's foundation and have historically played an important role in the establishment of communities, cities and states. Many colonial communities gave churches prominent locations in the main square along with other government buildings and almost instantaneously became the area's hub

[639] John E. Nowak and Ronald D. Rotunda. *Principles of Constitutional Law*. 2004. p.740-741.

representative of the community's historical, social and cultural significance. A few states even had established religions. Their spires in and of themselves became landmarks that were easily recognizable from great distances. Historic Preservation's noble goal of preserving these religious structures in order to maintain their significance for future generations is significant and yet has been met with various obstacles. These obstacles include preservation ordinances that on one hand, provide the needed structure to ensure compliance with preservation goals and on the other, represent an infringement on the Religion Clauses of the First Amendment.

The conflicts that arise between the Religion Clauses and their subsequent interpretation by the Supreme Court dictates the place of preservation on the list of competing interests. Recently, the mantra that the government cannot fund that which it cannot not regulate has been dispelled as applied to the preservation of religious structures. On April 30, 2002, the OLC amended its position and released its official opinion regarding the status of the restoration of historic religious properties. The modified policy allowed for federally funded preservation of religious properties. Religious historic sites with active congregations have consequently gained access to federal funding for preservation projects.

The historic preservation of religious sites is a consummate legal balancing act. The successful implementation of preservation ordinances intended to preserve historic religious properties requires the analysis of the Religion Clause jurisprudence even if only a handful of cases deal directly with preservation. The historical trends and the nuances on which cases either distinguish previous precedent or create new precedent are imperative for preservationists to appreciate. Though Save America's Treasures is currently considered constitutional, future Supreme Court interpretations are difficult to predict and

preservationists need to be armed with the knowledge of the First Amendment considerations. For example, significant statutes such as RLUIPA at the federal level provide great obstacles for preservationists. While the Supreme Court has not yet ruled on the constitutionality of RLUIPA, consistent federal court of appeal rulings have emphatically upheld RLUIPA. Many fields, including historic preservation, eagerly anticipate the pending Supreme Court's interpretation of *Cutter v. Wilkinson*. Preservationists need to work with governments to establish strong compelling interests that are implemented by the least restrictive means. If preservation ordinances can prove a compelling governmental interest by the least intrusive means, religious landmarks will survive. Conversely, ignorance of what is appropriate as well as constitutional when confronted with a religious entity's request to alter its historic property can lead to legal and financial heartaches.

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Appendix B: U. S. Constitution – The Bill of Rights

Found at http://www.law.cornell.edu/constitution/constitution.billofrights.html

Bill of Rights

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment II

A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

Amendment III

No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Appendix C: R F R A

Found at http://religiousfreedom.lib.virginia.edu/sacred/RFRA1993.html

Religious Freedom Restoration Act of 1993

Public Law 103-141

November 16, 1993

103rd Congress

H.R.130

An Act

To protect the free exercise of religion.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Sec. 1. Short Title.

This Act may be cited as the 'Religious Freedom Restoration Act of 1993'.

Sec. 2. Congressional Findings and Declaration of Purposes.

(a) Findings: The Congress finds that--

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes: The purposes of this Act are--

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Sec. 3. Free Exercise of Religion Protected.

(a) In General: Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception: Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief: A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

Sec. 4. Attorney's Fees.

(a) Judicial Proceedings: Section 722 of the Revised Statutes (42 U.S.C. 1988) is amended by inserting 'the Religious Freedom Restoration Act of 1993,' before 'or title VI of the Civil Rights Act of 1964'.

(b) Administrative Proceedings: Section 504(b)(1)(C) of title 5, United States Code, is amended--

(1) by striking 'and' at the end of clause (ii);

(2) by striking the semicolon at the end of clause (iii) and inserting ', and'; and

(3) by inserting '(iv) the Religious Freedom Restoration Act of 1993;' after clause (iii).

Sec. 5. Definitions.

As used in this Act --
(1) the term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a State, or a subdivision of a State;

(2) the term 'State' includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term 'demonstrates' means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term 'exercise of religion' means the exercise of religion under the First Amendment to the Constitution.

Sec. 6. Applicability.

(a) In General.--This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act .

(b) Rule of Construction.--Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act .

(c) Religious Belief Unaffected.--Nothing in this Act shall be construed to authorize any government to burden any religious belief.

Sec. 7. Establishment Clause Unaffected.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the 'Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. As used in this section, the term 'granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

Appendix D: R L U I P A

Found at http://www.usdoj.gov/crt/split/documents/rluipa.htm

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS
42 USCA § 2000cc

§ 2000cc. Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

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 governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which--

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-3. Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by

providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether ornot compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

Appendix E: R L U I P A C a s e H i s t o r y

Found at http://law.wustl.edu/landuselaw/COMPILATION_of_all_RLUIPA_Constitutional_Cases.html

The Becket Fund for Religious Liberty

RLUIPA Constitutional Decisions

I. Overview of Constitutionality Decisions

A. Land-Use

1. Findings of Constitutionality

a. *United States* v. *Maui*, __ F. Supp. 2d __, 2003 WL 23148864, (D. Haw. Dec. 29, 2003) (rejecting Enforcement, Commerce, Establishment Clause, and Tenth Amendment challenges)

b. *Guru Nanak Sikh Society* v. *County of Sutter*, No. S-02-1785 (E.D.Cal. Nov. 19, 2003) (rejects Enforcement challenge) **NOTE**: Notice of appeal filed in 9th Circuit.

c. *Primera Iglesia Bautista* v. *Broward County*, No. 01-6530 (S.D. Fla. Jan. 5, 2004) (adopting Nov. 7, 2003 Magistrate Report and Recommendation) (rejecting constitutionality challenge, adopting reasoning of *Freedom Baptist Church*).

d. *Murphy* v. *Town of New Milford,* 289 F. Supp. 2d 87 (D. Conn. 2003) (rejecting Enforcement and Establishment Clause challenges). **NOTE**: on appeal to 2nd Circuit.

e. *Westchester Day Sch.* v. *Village of Mamaroneck,* 280 F. Supp. 2d 230 (S.D.N.Y. 2003) (rejecting Enforcement, Commerce, and Establishment Clause, and Tenth Amendment challenges) **NOTE**: on appeal to 2nd Circuit, oral argument date March 1, 2004.

f. *Life Teen, Inc.* v. *Yavapai County,* No. Civ. 01-1490-PCT-RCB (D. Ariz. Mar. 26, 2003) (rejecting Commerce Clause, Enforcement Clause, Separation-of-Powers, Tenth Amendment, and Establishment Clause challenges).

g. *Christ Universal Mission Church* v. *City of Chicago,* No. 01-C-1429, 2002 U.S. Dist. LEXIS 22917 (N.D. Ill. Sept. 11, 2002) (rejecting constitutionality challenge, adopting reasoning of *Freedom Baptist Church*).

h. *Freedom Baptist Church* v. *Tp. of Middletown,* 204 F. Supp. 2d 857 (E.D. Pa. 2002) (rejecting Enforcement, Commerce, and Establishment Clause challenges).

2. Suggestions of Constitutionality

a. *Shepherd Montessori Center Milan* v. *Ann Arbor Charter Tp.*, Nos. 233484, 234300, ___ N.W.2d ___, 2003 WL 22520439 (Mich. Ct. App. Nov. 6, 2003)

b. *Hale O Kaula* v. *Maui Planning Comm'n,* 223 F. Supp. 2d 1056, 1072 (D. Haw. 2002) (declining to address constitutionality of RLUIPA in detail, but concluding that "jurisdictional element" of § 2(a)(2)(B) precludes Commerce Clause challenge, and that § 2(a)(2)(C) "codifies the 'individualized assessments' doctrine").

c. *Cottonwood Christian Center* v. *City of Cypress,* 218 F. Supp. 2d 1203, 1221 n.7 (C.D. Cal. 2002) (noting that "RLUIPA would appear to have avoided the flaws of its predecessor RFRA, and be within Congress's constitutional authority," citing *Freedom Baptist Church*).

3. Findings of Unconstitutionality

a. *Elsinore Christian Center v. City of Lake Elsinore*, 2003 WL 22724539 (C.D. Cal. Aug. 21, 2003) (striking down Sections 2(a) as applied through 2(a)(2)(B) and 2(a)(2)(C) as exceeding Congress' power under the Commerce Clause and the Enforcement Clause) (per Wilson, J.). **NOTE**: request for certification to 9th Circuit granted by the district court Dec. 17, 2003; unopposed petition for permission to appeal to 9th Circuit pending.

b. *Missionaries of Charity, Brothers* v. *City of Los Angeles,* No. CV-01-8115-SVW (C.D. Cal. July 11, 2003) (incorporating *Elsinore* Enforcement Clause decision by reference, and requesting briefing on Commerce Clause constitutionality) (per Wilson, J.). **NOTE:** Case has been stayed pending Ninth Circuit's resolution of *Elsinore.*

B. Institutionalized Persons

1. Findings of Constitutionality

a. *Midrash Sephardi* v. *Town of Surfside* (11th Cir.) 366 F.3d 1214 (2004).

b. *Open Homes Fellowship* v. *Orange County, No. 6:03-CV-943*-ORL-31 (S.D.Fla.) (*amicus* constitutionality brief filed Jan. 2, 2004) (land use case)

c. *Benning* v. *Georgia*, No. 602CV139 (S.D.Ga. Jan. 9, 2004) (rejecting Establishment Clause challenge and rejecting magistrate report and recommendation) **NOTE**: case certified for appeal to the 11th Circuit under FRCP 54(b).

d. *Castle Hills First Baptist Church* v. *City of Castle Hills,* No. SA-01-CA-1149-HG (W.D. Tex.) (oral argument on Oct. 22, 2003 on cross-motions for partial summary judgment, including constitutionality) (land use case).

e. *Madison v. Riter*, No. 03-6362, __ F.3d __, 2003 WL 22883620 (4th Cir. Dec. 8, 2003) (rejecting Establishment Clause challenge)

f. *Charles* v. *Verhagen,* No. 02-3572, ___ F.3d ___, 2003 WL 22455960 (7th Cir. Oct. 30, 2003) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges, but declining to reach Commerce Clause challenge).

g. *Williams* v. *Bitner,* No. 1:CV-01-2271, 2003 WL 22272302, ___ F. Supp. 2d. ___ (M.D. Pa. Sept. 30, 2003) (rejecting Establishment Clause, Spending Clause, Tenth Amendment, and Eleventh Amendment challenges).

h. *Sanabria* v. *Brown*, No. 99-4699 (D.N.J. June 5, 2003) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation of Powers challenges, but declining to reach Commerce Clause challenge).

i. *Gordon* v. *Pepe,* No. Civ. A-00-10453-RWZ, 2003 WL 1571712 (D. Mass. Mar. 6, 2003) (rejecting constitutionality challenge based on *Mayweathers* district court decision) (still in discovery at district court level).

j. *Mayweathers* v. *Newland,* 314 F.3d 1062 (9th Cir 2002) (rejecting Spending Clause, Establishment Clause, Tenth Amendment, Eleventh Amendment, and Separation-of-Powers challenges), ***cert. denied*** *sub nom. Alameida* v. *Mayweathers,* No. 02-1655, ___ U.S. ___, 2003 WL 21180348, 71 USLW 3725 (U.S. Oct. 6, 2003).

k. *Johnson* v. *Martin*, 223 F. Supp. 2d 820 (W.D. Mich. 2002) (rejecting Commerce, Spending, Establishment Clause, and Tenth Amendment challenges), ***overruled*** *by Cutter* v. *Wilkinson, infra.*

l. *Gerhardt* v. *Lazaroff,* 221 F. Supp. 2d 827 (S.D. Ohio 2002) (rejecting Spending Clause, Establishment Clause, and Tenth Amendment challenges), ***overruled*** *by Cutter* v. *Wilkinson, infra.*

m. *Taylor* v. *Cockrell*, No. H-00-2809 (S.D. Tex. Sept. 25, 2002), ***vacated*** *on mootness grounds, Taylor* v. *Groom,* No. 02-21316 (5th Cir. Aug. 26, 2003).

n. *Love* v. *Evans,* No. 2:00-CV-91 (E.D. Ark. Aug. 8, 2001) (rejecting constitutionality challenge based on *Mayweathers* district court decision).

2. Findings of Unconstitutionality

a. *Cutter* v. *Wilkinson*, Nos. 02-3270, 02-3299, 02-3301 ___ F.3d ___, 2003 WL 22513973 (6th Cir. Nov. 7, 2003) (finding RLUIPA Section 3 violates Establishment Clause). **NOTE**: certiorari granted October 12, 2004 by the United States Supreme Court.

b. *Al Ghashiyah* v. *Wis. Dept. of Corrections,* 250 F. Supp. 2d 1016 (E.D. Wis. Mar. 4, 2003) (same), ***overruled*** *by Charles* v. *Verhagen, supra.*

c. *Madison* v. *Riter,* 240 F. Supp. 2d 566 (W.D. Va. 2003) (same) ***overruled*** *by Madison* v. *Riter*, *supra.*

d. *In re Rowland,* No. HC4172 (Sup. Ct. Cal., Monterey Cy., July 31, 2002) (same) (appellate court affirmed trial court's denial of habeas petition without opinion).

C. Pending

1. *Terrero* v. *Watts*, No. CV202-134 (S.D. Ga.) (appeal to district court from recommendation of magistrate judge that RLUIPA and RFRA violate the Establishment Clause) (prisoner case)

II. Recent Decisions Applying the Act

A. *Shepherd Montessori Center Milan* v. *Ann Arbor Charter Tp.*, Nos. 233484, 234300, ___ N.W.2d ___, 2003 WL 22520439 (Mich. Ct. App. Nov. 6, 2003) (finding genuine issues of material fact on "substantial burden" under RLUIPA Section 2(a), and on "similarly situated" under Equal Protection Clause).

B. *C.L.U.B.* v. *City of Chicago,* 342 F.3d 752 (7th Cir. 2003) (construing "substantial burden" narrowly – zoning law must render worship "effectively impracticable").

C. Pending

1. *San Jose Christian College* v. *City of Morgan Hill,* No. 02-15693 (9th Cir.) (argument before Canby, Kleinfeld, & Rawlinson on May 14, 2003).

2. *Grace United Methodist* v. *Cheyenne* (opening brief due end of January)

3. *Lighthouse Institute* v. *City of Long Branch,* No. 03-2343 (3d Cir.) (briefing complete, argument scheduled for either 2nd or 4th week February).

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