Religious Landmarks, Guidelines for Analysis: Free Exercise, Takings, and Least Restrictive Means

I. INTRODUCTION

From Seattle to New York City, municipalities have ordinances that allow planning organizations to designate certain structures as landmarks.[1] Indeed, all fifty states, the federal government, and more than one thousand cities have passed laws to preserve historic buildings and districts.[2] When a church is selected as a landmark, however, that selection may be more of a handicap than an honor to the congregation. As a result of the designation, the religious organization frequently has fewer alternatives for the use of its facility in addition to increased financial responsibilities. Churches' complaints range from being limited in altering the interior or exterior of the building,[3] to having additional paperwork, negotiating with the city, facing depreciation in the market value of the property,[4] and being prohibited from replacing obsolete structures.[5] In response to the designation, churches have launched a series of

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[1] The Seattle Municipal Code contains a typical landmark preservation ordinance. It allows the Landmark Preservation Board to "designate, preserve, protect, enhance and perpetuate those sites, improvements and objects which reflect significant elements of the City's cultural aesthetic, social, economic, political, architectural, engineering, historic or other heritage." First Covenant Church v. City of Seattle, 787 P.2d 1352, 1354 (Wash. 1990), *vacated and remanded,* 111 S. Ct. 1097 (1991), (citing SEATTLE, WASH., S.M.C. § 25.12.020(B) (1977)).

Another example is NEW YORK CITY, N.Y., N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 *et seq.* (1976), under which Grand Central Terminal was declared a landmark. The ordinance was enacted pursuant to N.Y. GEN. MUN. LAW § a (McKinney 1977), which provides that "it is public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value." Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 109 n.5 (1978).

[2] Elizabeth C. Richardson, Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution,* 63 N.C.L. REV. 404, 406 (1985) (citing *inter alia Penn Central,* 438 U.S. at 107; CHRISTOPHER J. DUERKENSEN, PREFACE TO A HANDBOOK ON HISTORIC PRESERVATION LAW XXI (CHRISTOPHER J. DUERKENSEN ed. 1983); National Historic Preservation Act, 16 U.S.C. § 470 (1982)).

[3] Society of Jesus v. Boston Landmarks, 40, 564 N.E.2d 571, 572 (Mass. 1990) (interior); Opinion of the Justices, 128 N.E.2d 563 (Mass. 1955) (exterior).

[4] *First Covenant,* 787 P.2d at 1355.

[5] *See, e.g.,* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 351 (2nd Cir. 1990), *cert. denied,* 111 S. Ct. 1103 (1991); Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (1968).

lawsuits challenging their landmark status.[6] The principal constitutional arguments raised are that the landmark designations violate the First Amendment right to free exercise of religion and the Fifth Amendment protection against an uncompensated taking.[7] The courts have responded with a variety of holdings. Some are quick to find violations of the Free Exercise and Takings Clauses[8] and others reject both claims.[9]

This Note will not form an all-encompassing religious landmark theory. It will attempt to draw on the existing case law from the United States Supreme Court, state supreme courts, and lower federal courts to create a set of guidelines for analysis of religious landmark cases. This will include analysis under the federal Free Exercise and Takings Clauses, in addition to a proposal for a form of strict scrutiny to apply under state constitutional law in both free exercise and takings cases.

Even though many cases involve free exercise and takings inquiries,[10] some particular burdens on the church are more appropriately examined under one, but not the other, form of analysis. Under federal free exercise analysis, the only possible scenario in which a church may find relief from a landmark designation is when the congregation's actual belief is threatened by the regulation.[11] In takings analysis, there may be discrimination, a physical invasion of the property, or a government enterprise involved in the landmark designation that will invalidate a religious landmark designation.[12] Finally, under state constitutional law, courts may apply least restrictive means to either free exercise or takings analysis. In free exercise, courts may find that a landmark designation is outweighed by a church's right to the free exercise of religion.[13] In takings analysis, courts may find that the landmark designation interferes with the charitable purpose of the congregation.[14] Finally, by employing least restrictive means, alternate solutions to a blanket landmark

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[6] *See generally St. Bartholomew's*, 914 F.2d at 348; Lafayette Park Baptist Church v. Scott, 553 S.W.2d 856 (Mo. Ct. App. 1977); *In re* Westchester Reform Temple v. Brown, 239 N.E.2d 891 (N.Y. 1968); Society for Ethical Culture v. Spatt, 415 N.E.2d 822 (N.Y. 1980); Lutheran Church in Am. v. City of New York, 316 N.E.2d 305 (N.Y. 1974); Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 316 (1968); First Presbyterian Church of York v. City Council of York, 360 A.2d 257, 263 (Pa. 1976) (Kramer, J., concurring); *First Covenant*, 787 P.2d 1352.

[7] *See, e.g., St. Bartholomew's*, 914 F.2d at 353, 356.

[8] *See, e.g., First Covenant*, 787 P.2d 1352.

[9] *See, e.g., St. Bartholomew's*, 914 F.2d at 355, 357.

[10] *See supra* note 6 and accompanying text.

[11] *See infra* notes 56–70 and accompanying text.

[12] *See infra* notes 108–34 and accompanying text.

[13] *See infra* notes 154–76 and accompanying text.

[14] *See infra* notes 205–22 and accompanying text.

designation may allow the government to preserve the historic structure but not unduly burden the congregation.[15]

II. FREE EXERCISE AND TAKINGS: FEDERAL CONSTITUTIONAL ANAYSIS IN RELIGIOUS LANDMARK DESIGNATION

A. *Free Exercise: Generally*

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 . . . ."[16] In *Cantwell v. Connecticut*,[17] the Court applied the Free Exercise Clause to the states, holding that "these liberties [free exercise of religious beliefs] are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[18] The principal policy behind the religion clauses is that the government should set only "secular goals" and achieve them in a "religiously neutral manner."[19]

A conflict with that policy of neutrality emerges, nevertheless, when the legitimate police power of a state has an impact on a religious organization. Even though the United States Supreme Court has swung on a pendulum of analysis in free exercise cases,[20] it has consistently held that the state may exercise no power over the individual's religious "beliefs and opinions."[21] Thus, the state cannot force a government official to profess a belief in God,[22] or expel a student from school for not saluting the flag, if it is contrary to that person's religious convictions.[23]

Even though the state cannot regulate a person's beliefs, action based on one's religious convictions is not free from legislative restrictions. In the 1990 Supreme Court case, *Employment Division, Department of Human Resources v. Smith*,[24] the United States Supreme Court considered a pair of Oregon state

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[15] *See infra* notes 220–21 and accompanying text.

[16] U.S. CONST. amend. I.

[17] 310 U.S. 296 (1940).

[18] *Id.* at 310.

[19] JOHN E. NOWAK ET AL, CONSTITUTIONAL LAW § 17.1 (3d ed. 1986) [hereinafter J. NOWAK].

[20] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1109–11 (1990); Danielle A. Hess, Note, *The Undoing of Mandatory Free Exercise Accommodation*—Employment Division, Department of Human Resources v. Smith, 110 S. Ct. 1595 (1990), 66 WASH. L. REV. 587, 588–95 (1991).

[21] Braunfeld v. Brown, 366 U.S. 599 (1961).

[22] *See generally* Torcaso v. Watkins, 367 U.S. 488 (1961).

[23] *See generally* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[24] 494 U.S. 872 (1990).

laws. One prohibited the use of peyote in Native American religious ceremonies, and the other denied unemployment benefits to persons dismissed from their jobs for violating that law.[25] The Court held that even though there was no requirement that the state prohibit the sacramental use of peyote, under the federal Free Exercise Clause, there was no religious-practice exemption that made such laws unconstitutional.[26]

The reasoning of *Smith* was a dramatic break with the balancing-of-interests test formerly used in free exercise analysis.[27] Previously, the free exercise inquiry was multistep balancing formulation employed by the United States Supreme Court in *Sherbert v. Verner*.[28] For the first level of the test, the person seeking to invalidate the statute would show that it placed a "substantial burden" on a religious belief or practice.[29] If a burden existed, the government would justify the statute by showing that it was necessary to accomplish an "overriding governmental interest."[30] Finally, the state had to prove that the regulation was the "least restrictive means" of achieving the government's goal.[31]

By way of contrast, the Court in *Smith* gave greater deference to legislative acts. It held that a "valid and neutral law of general applicability," which is not passed with the "object" of burdening religion, is not a violation of the Free Exercise Clause even if it prevents or forces conduct contrary to a person's religious beliefs.[32] To hold otherwise, Justice Scalia reasoned, would burden the courts with weighing the social importance of all laws against the impact on religious beliefs and, as a result, "permit every citizen to become a law unto himself."[33]

The analysis of *Smith* initially contained at least three possible limitations to confine the application of the facially neutral analysis. First, the Court

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[25] *Id.* at 874–76.

[26] *Id.* at 890.

[27] *See generally* Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); William P. Marshall, *The Case Against the Constitutionally Compelled Free Exercise Exemption*, 40 CASE W. RES. L. REV. 357 (1990) (free exercise exemptions are better analyzed under the Speech Clause); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) (history and precedent of free exercise cases do not support reasoning of *Smith*).

[28] 374 U.S. 398 (1963).

[29] Hernandez v. C.I.R., 490 U.S. 680, 698 (1989). At least prior to *Smith*, the Court was deferential in determining if a person's beliefs or practice are religious. Former Chief Justice Burger stated that "the courts are not arbiters of scriptural interpretation" and that only a claim that was "bizarre, [or] clearly nonreligious in motivation" would not receive free exercise protection. Thomas v. Review Bd., 450 U.S. 707, 715 (1981).

[30] United States v. Lee, 455 U.S. 252, 257–58 (1982).

[31] Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

[32] *Smith*, 494 U.S. at 879.

[33] *Id.* at 879, 890 (citations omitted).

repeatedly referred to the criminal nature of the Oregon law, as if the rule of *Smith* would only apply in factual contexts in which there were pressing policy issues such as drug abuse.[34] In fact, this notion would have been supported by free exercise thinking that predated the United States Constitution Free Exercise Clause. In original state constitutions drafted before 1789, the year in which the federal Bill of Rights became effective,[35] many states limited free exercise exemptions to those that did not "disturb the 'peace' or 'safety' of the state."[36]

In *Smith*, however, this would-be limitation disappeared within a year when the Court vacated and remanded *First Covenant Church v. City of Seattle*, a Washington State Supreme Court case.[37] The United States Supreme Court reversed the holding of the state court in a religious landmark dispute when the state's interests could hardly have been characterized as protecting the peace or safety of the state. Nevertheless, the Supreme Court directed the state court to reconsider the free exercise claims in *First Covenant* under the *Smith* facially neutral analysis.[38]

An additional possible limitation of *Smith* was that the Court would retain the *Sherbert* balancing test in disputes involving "hybrid" cases. Hybrid cases—those in which free exercise claims are mixed with other claims, such as free speech or free press—were specifically noted by Justice Scalia as the only prior examples of free exercise balancing.[39] Subsequent to *Smith*, this distinction has been employed by lower courts that seek to continue to use *Sherbert* balancing in free exercise claims. For example, in *Cornerstone Bible Church v. Hastings*,[40] the Eighth Circuit Court of Appeals remanded a religious zoning case for the district court to consider in light of the church's free exercise-free speech hybrid claim.[41] Similarly, in another post-*Smith* case, *State v. Hershberger*,[42] the Minnesota Supreme Court noted the possibility, but declined the opportunity, of analyzing an Amish free exercise case as a possible hybrid.[43]

The hybrid distinction, however, is illusory when analyzed in the factual context of *Smith*. As one commentator noted, if flag burning is political speech,

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[34] *Id.* at 874, 882, 884; *see also* Hess, *supra* note 20, at 594–95.

[35] Owings v. Speed, 18 U.S. (5 Wheat) 420 (1820).

[36] McConnell, *supra* note 20, at 1455–61.

[37] *First Covenant*, 787 P.2d 1352 (Wash. 1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

[38] Minnesota v. Hershberger, 110 S. Ct. 1918 (1990).

[39] *Smith*, 494 U.S. at 880.

[40] No. 90-4347, 1991 U.S. App. LEXIS 26060 (8th Cir. Nov. 1, 1991).

[41] *Id.* at *24.

[42] 462 N.W.2d 393 (Minn. 1990).

[43] *Id.* at 396.

sacramental use of peyote is also.[44] As such, *Smith* itself could well have been analyzed as a free speech-free exercise hybrid and the Court could have used *Sherbert* balancing instead of inventing the new facially neutral free exercise doctrine.[45]

Finally, Justice Scalia attempted to cabin the discarded *Sherbert* balancing test to unemployment cases. He noted that the Court had never invalidated a law using *Sherbert* balancing out of the unemployment context.[46] Scalia distinguished these prior unemployment cases from *Smith* by explaining that in *Smith* the Native Americans were seeking an exemption from an "across-the board criminal prohibition."[47] By way of contrast, in the previous unemployment cases, the believers were dismissed from jobs for refusing to work in situations that violated their religious beliefs.[48]

This distinction seems strained because the Court has, in fact, used the *Sherbert* balancing test in innumerable contexts out of the unemployment field.[49] The Court used *Sherbert* balancing—albeit, without finding free exercise exemptions—in cases involving child labor laws,[50] Sunday closing laws,[51] military exemptions,[52] and social security exemptions.[53] As Justice O'Connor noted, it is unusual to judge the validity of a constitutional doctrine by the "win-loss" records of plaintiffs who have used that analysis.[54] Given the chimeric nature of these possible limits on the holding of *Smith*, it seems likely that free exercise balancing in federal constitutional law largely has been relegated to history.[55]

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[44] McConnell, *supra* note 20, at 1121–22 (citing Texas v. Johnson, 491 U.S. 397 (1989) (flag burning is a form of political speech)).

[45] *Id.*

[46] *Smith*, 494 U.S. at 882–84.

[47] *Id.* at 884–85.

[48] *Id.* at 882–83 (citing Sherbert v. Verner, 374 U.S. 398 (1963) (Seventh Day Adventist refused to work on Saturday); Thomas v. Review Bd., 450 U.S. 707 (1981) (Jehovah's Witness refused to work in weapon plant); Hobbie v. Unemployment Appeals Comm'n , 480 U.S. 136 (1987) (Jehovah's Witness refused to work on Sabbath)).

[49] *See infra* notes 50–53 and accompanying text; *see also Smith*, 494 U.S. at 897.

[50] Prince v. Massachusetts, 321 U.S. 158 (1944).

[51] Braunfeld v. Brown, 366 U.S. 599 (1961).

[52] Negre v. Larsen, 401 U.S. 437 (1971).

[53] United States v. Lee, 455 U.S. 252 (1982).

[54] *Smith*, 494 U.S. at 897.

[55] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991); McConnell, *supra* note 20; Hess, *supra* note 20.

B. *Free Exercise Analysis Applied to Landmark Designation*

Even though the United States Supreme Court has not actually decided a religious landmark case, federal religious landmark law can be distilled by observing the fate of two lower court cases. In *St. Bartholomew's Church v. City of New York*,[56] a New York congregation sought to invalidate a landmark designation that prevented it from demolishing a Community House adjacent to the church and building a forty-seven story tower.[57] The Second Circuit Court of Appeals conceded that the landmark designation drastically restricted the church's ability to raise revenues.[58] Nonetheless, because the law was neutral, generally applicable, and the congregation was not coerced in its ability to practice its belief, the court found no free exercise violation.[59] On the church's application for certiorari, the United States Supreme Court refused the petition, thus leaving the landmark designation valid.[60]

The United States Supreme Court's treatment of the *First Covenant* case gives the next step of analytical distillation in federal free exercise religious landmark cases. In that case, the Washington Supreme Court employed the *Sherbert* balancing test in deciding the validity of the landmark designation of a downtown Seattle church.[61] The state court held that when balancing the church's burden with the aesthetic and community interest in landmark designation, "the latter is clearly outweighed by the constitutional protection of free exercise of religion."[62] As a consequence, the state court found the designation void.

The United States Supreme Court disagreed. On the same day that it denied the congregation's petition in *St. Bartholomew's*, the Court remanded *First Covenant* for further consideration in light of the holding in *Smith*.[63] Without holding directly on the issue, the Court determined that in religious landmark cases, there is no per se free exercise exemption in federal constitutional law to prevent state or local governments from designating churches as historic structures.

There remains one additional component of the federal free exercise inquiry. One legal commentator postulated a situation in which a church

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[56] 914 F.2d 348 (2nd Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

[57] 914 F.2d at 351.

[58] *Id.* at 355.

[59] *Id.*

[60] St. Bartholomew's Church v. City of New York, 111 S. Ct. 1103 (1991).

[61] First Covenant Church v. City of Seattle, 787 P.2d 1352, 1357 (Wash. 1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

[62] 787 P.2d at 1361 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 104 (1978)).

[63] St. Bartholomew's Church v. City of New York, 111 S. Ct. 1103 (1991); First Covenant Church v. City of Seattle, 111 S. Ct. 1097 (1991).

building had become inadequate for a growing congregation's worship services.[64] Renovation, however, was infeasible and too costly because the old and badly deteriorated structure was a landmark.[65] As a result, the congregation could not solve the space problem by selling or replacing the structure. This imaginary situation would easily be solved with *Sherbert* free exercise analysis. There would be a burden on the belief or practice of the members of the church, and "the congregation's right to free exercise would probably outweigh the state's interest in aesthetics and historic preservation."[66] As such, the landmark designation would be invalid.

As simple as the analysis would be under *Sherbert*, it is only possible to draw from dicta of *Smith* to find a modern free exercise solution. In *Smith*, Justice Scalia outlined the familiar belief-practice dichotomy when he reasoned that the Free Exercise Clause would invalidate any laws that prohibit or compel any particular view or profession.[67] By way of illustration, he hypothesized that it would be unconstitutional to pass laws that prohibited casting statutes for worship purposes or that made it illegal to bow down before a golden calf.[68] In contrast, he concluded that if a "generally applicable" law only has the incidental effect—not the "object"—of prohibiting the exercise of religion, it would not violate the United States Constitution.[69]

Between these hypothetical belief-practice poles lies the theoretical situation of the congregation that would lose its church because of a landmark designation. Reading *Smith* literally leads to the conclusion that as long as the landmark law was not passed with the "object" of prohibiting the exercise of religion, it would be valid under the federal Free Exercise Clause. This, as Justice Scalia opines, is the "unavoidable consequence of democratic government."[70]

C. *Takings Analysis: Generally*

Federal free exercise analysis resolves cases when a congregation's beliefs are burdened by a landmark designation. Some conflicts involving the use of the structure or land, however, are analyzed more appropriately under the Takings Clause. The Fifth Amendment to the United States Constitution provides, "nor shall private property be taken for public use, without just

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[64] Evelyn B. Newell, Note, *Model Free Exercise Challenges for Religious Landmarks*, 34 CASE W. RES. L. REV. 144 (1983).

[65] *Id.* at 166.

[66] *Id.*

[67] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 876 (1990).

[68] *Id.*

[69] *Id.* at 879.

[70] *Id.* at 890.

compensation."[71] A modern definition of takings is, "any sort of publicly inflicted private injury for which the Constitution requires payment of compensation."[72]

The policy that supports the Takings Clause is that when the government either acquires private property or excessively regulates the use of property, there is a taking and the owner must be reimbursed.[73] The view that regulation, not just acquisition, can be a taking was a break with early federal constitutional law. An example of the early view is the nineteenth-century case, *Muglar v. Kansas*,[74] in which the issue was the validity of a Kansas statute that banned the manufacture of liquor.[75] Beer brewers, who had the value of their distilleries reduced drastically by the law, claimed that the regulation was a taking for which they should be compensated.[76] The Court held, nevertheless, that the proper exercise of police power is not a taking,[77] and because the property was not "devoted to the public use" the owners were not entitled to compensation.[78]

The more modern view was expressed by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*,[79] a case concerned with a statute that prevented certain coal mining procedures.[80] In contrast to the limited view of *Muglar*, the Court in *Mahon* held that "if regulation goes too far it will be recognized as a taking."[81] In *Mahon*, the Court found that because the statute would completely destroy underground mining rights owned by the company,[82] the statute "went too far" and was a taking.[83]

Although federal takings policy may be unchanged since *Mahon*, the mechanics for deciding individual cases remains uncertain. Even the United States Supreme Court admits that it "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic

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[71] U.S. CONST. amend. V.

[72] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

[73] J. NOWAK, *supra* note 19, at § 11.12.

[74] 123 U.S. 623 (1887).

[75] The statute read: "The manufacture and sale of intoxicating liquors shall be forever prohibited in this State, except for medical, scientific, and mechanical purposes." *Id.* at 624 (citing KAN. CONST. art. 15, § 10).

[76] *Muglar*, 123 U.S. at 664.

[77] *Id.* at 668–69.

[78] *Id.* at 668.

[79] 260 U.S. 393 (1922).

[80] The 1921 Kohler Act made it illegal for mining companies to exercise their rights to mine under private houses even though the companies had purchased the subsurface rights from the landowners. *Id.* at 412–13.

[81] *Id.* at 415.

[82] *Mahon*, 260 U.S. at 414.

[83] *Id.* at 416.

injuries caused by public action be compensated by the government."[84] Numerous articles have been written about the takings cases and numerous theories have been propounded;[85] however, "courts continue to reach ad hoc determinations rather than principled resolutions,"[86] thus adding to the continued muddle of takings law.[87]

Penn Central Transportation Co. v. City of New York[88] is the only United States Supreme Court case to deal directly with takings and landmark designation. In *Penn Central*, the Court concluded that there was no taking when the city refused to allow the owners to construct a skyscraper above the existing Penn Central Station. The Court formulated a balancing approach to takings cases that emphasized three significant factors: The economic impact of

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[84] Penn Cent. Transp. Co v. City of New York, 438 U.S. 104, 124 (1978).

[85] *See, e.g.*, John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465 (1983) (a four-step model for "takings" analysis: 1) Presumptive construction of the Takings Clause; 2) due process-takings inquiry; 3) pure takings phase; 4) burden of proof); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) (a fairness principle which proceeds without presumptions and allows courts and legislatures to take into account the impact of free speech, discrimination and invasions of privacy); Carol M. Rose, Mahon *Reconstructed: Why the Takings Issue Is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) (that the competing values of property "acquisitiveness and civic virtue" are so strong that a coherent "takings" policy is unlikely); Thomas Ross, *Modeling and Formalism in Takings Jurisprudence*, 61 NOTRE DAME L. REV. 372 (1986) (models such as Constonis' Decisional Model are too rigid to fit into the complicated fact patterns and philosophical problems of takings cases); Stephen M. Watson, Note, *First Amendment Challenges to Landmark Preservation Statutes*, XI FORDHAM URBAN L. J. 115 (1982) [hereinafter *First Amendment Challenges*] (concludes that the U.S. Supreme Court needs to define what compelling state interests can justify the landmark designation of religious organizations); Lawrence W. Andrea, Comment, *Trespass at High Tide: The Supreme Court Gives Heightened Scrutiny to a State Imposed Easement Requirement*, 54 BROOK. L. REV. 991 (1988) [hereinafter *Trespass at High Tide*] (U.S. Supreme Court is moving towards a level of scrutiny in property issues that is analogous to equal-protection analysis); Evelyn B. Newell, Note, *Model Free Exercise Challenges for Religious Landmarks*, 34 CASE W. RES. L. REV. 144 (1983) [hereinafter *Free Exercise Challenges*] (First Amendment right to free exercise of religion offers protection to churches which are burdened with landmark designation status); Elizabeth C. Richardson, Note, *Applying Historic Preservation Ordinances to Church Property: Protecting the Past and Preserving the Constitution*, 63 N.C.L. REV. 404 (1985) (compares the New York religious landmark cases with *Maher v. New Orleans*, 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976).

[86] Rose, *supra* note 85, at 562 (footnote omitted).

[87] *See generally* Constonis, *supra* note 85; Rose, *supra* note 85.

[88] 438 U.S. 104 (1978). Grand Central Terminal was designated a landmark under the New York City Landmarks Preservation Law. NEW YORK CITY, N.Y., N.Y.C. ADMIN. CODE, ch. 8-A, § 205-1.0 *et seq.* (1976); *Penn Central*, 438 U.S. at 109.

the regulation on the claimant,[89] the extent to which the regulation had interfered with distinct investment-backed expectations,[90] and the character of the governmental action.[91]

A variety of decisions, decided "largely on the particular circumstances of each case,"[92] created the *Penn Central* formulation. The first factor, the economic impact of the regulation, was explored in the pivotal zoning case, *Euclid v. Ambler Realty Co.*,[93] in which the Court held that zoning was not a taking as long as the regulations were not unreasonable.[94] Subsequently, the Court did not find a taking in *Penn Central* even though the owners stood to lose three million dollars annually in rent if the proposed office tower was not built.[95] Similarly, in other takings cases, the Court reached the conclusion that the regulations were not takings even though zoning regulations,[96] height restrictions on buildings,[97] gold mine closings,[98] and a statute requiring owners to cut down infectious cedar trees[99] caused severe economic impact on the landowners.

The second factor, the extent of interference with investment-backed expectations, was first discussed in *Pennsylvania Coal Co. v. Mahon.*[100] The Court invalidated, as a taking, a regulation that completely destroyed subsurface mining rights that the Pennsylvania Coal Company had purchased from landowners. This factor reflects the policy that regulations, not just government acquisitions, may be takings.[101] Regulations that merely diminish the value of property, or deprive owners of the opportunity for unlimited development, however, are less likely to be a taking than ones that eliminate a specifically anticipated use of the property.[102]

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[89] *Penn Central*, 438 U.S. at 124.

[90] *Id.*

[91] *Id.*

[92] United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

[93] 272 U.S. 365 (1926).

[94] *See generally Euclid*, 272 U.S. at 365.

[95] *Penn Central*, 438 U.S. at 116.

[96] *See, e.g.*, Gorieb v. Fox, 274 U.S. 603, 608 (1927).

[97] *See, e.g.*, Welch v. Swasey, 214 U.S. 91 (1909).

[98] *See, e.g.*, United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958).

[99] *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928).

[100] 260 U.S. 393 (1922).

[101] *See supra* notes 65–78 and accompanying text.

[102] The "anticipated use" idea was discussed in *Penn Central*, 438 U.S. 104. The Court held that the terminal's "designation as a landmark contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years; as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as *Penn Central*'s primary expectation concerning the use of the parcel or its ability to obtain a 'reasonable return' on its investment." *Id.* at 136.

The final factor, the character of the government action, can be manifested in several ways. The government action may be discriminatory if it puts an undue burden on one person or a small group of owners.[103] Alternatively, the action may be enterprising, as when the government uses an owner's property for a state project.[104] Finally, as the Court specifically mentioned in *Penn Central*, a physical invasion is more likely to be considered a taking than some "adjustment in the benefits and burdens of economic life to promote the common good."[105] As such, when a cable television line is installed on rooftops of apartment buildings[106] or when an easement is created on private beachfront property,[107] there is a physical invasion, and the Court will find a taking.

D. *Takings Analysis Applied to Religious Landmarks*

Even though religious landmark cases may involve both free exercise and takings issues, takings analysis has the additional advantage to the church of considering burdens on the church's use of its property. Federal takings law, however, will only provide limited assistance for the congregation. The types of designations in which the church will most likely receive relief under federal law are those that fit into the third prong of the *Penn Central* formulation.[108]

The Third Prong of Penn Central

Penn Central's third prong includes designations that are either enterprising, discriminatory, or a physical invasion. The first of these elements, government enterprise, may occur when the state appropriates a building for public use without compensating the owner.[109] The court in *Lutheran Church in America v. City of New York*[110] employed the enterprising element when the

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[103] The "discrimination" factor was also discussed in *Penn Central*. The Court stated that "[i]n contrast to discriminatory zoning, the New York City law embodies a comprehensive plan to preserve structures of historic or aesthetic interest wherever they might be found in the city, and over 400 landmarks and 31 historic districts have been designated pursuant to this plan." *Id.* at 132.

[104] Concerning the "enterprising" factor in *Penn Central*, the Court held that "[t]he Landmarks Law neither exploits appellants' parcel for city purposes nor facilitates nor arises from any entrepreneurial operations of the city." *Id.* at 135.

[105] *Id.* at 124.

[106] *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[107] *See generally* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[108] *See infra* note 109–34 and accompanying text.

[109] *See supra* note 104 and accompanying text.

[110] 316 N.E.2d 305 (N.Y. 1974).

New York City Landmarks Preservation Commission designated the Anglo-Italiante Brownstone structure as a landmark.[111] The congregation countered with a suit claiming that even if it added an additional wing on the church, the building would still be totally inadequate.[112] The court, citing *Penn Central*,[113] held that the city "is attempting to add this property to the public use" by destroying the owner's right to control the land.[114] The concurring judge in *First Presbyterian Church of York v. City Council of York*,[115] echoed this concern, stating that the landmark designation in effect, "provide[s] for the establishment of public museums through restrictions on private property owners' rights."[116] In addition, he reasoned that parks and museums traditionally have been provided for by public funds or private donations, but now they have been dedicated to the public use without compensation for the landowner.[117] The judge agreed with the majority, which denied that a taking had occurred based on the fact that there was no proof that the church could not rent, sell, or find alternate uses for the property.[118] He claimed, however, that "we have reached a constitutional precipice and . . . an advancement of even a fraction of an inch will result in an excessive governmental encroachment upon private property rights."[119]

In light of United States Supreme Court policy, it is unlikely that courts using federal takings law will follow *First Lutheran*. In *Penn Central*, the Court held that "[s]tates and cities may enact land-use restrictions or controls to preserv[e] the character and desirable aesthetic features of a city."[120] Based on that reasoning, the *Penn Central* Court rejected the owner's claim that the landmark designation was an enterprise by the city, saying that "[t]his is no more an appropriation of property by government for its own uses than is a zoning law."[121] With this strong holding by the United States Supreme Court, it is unlikely that the enterprise theory, without more, will disqualify a landmark designation as a taking.

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[111] *Id.* at 307–08.

[112] *Id.* at 307.

[113] *Id.*

[114] *Id.* at 312.

[115] 360 A.2d 257 (Pa. 1976).

[116] *Id.* at 263 (Kramer, J., concurring).

[117] *Id.*

[118] *Id.* at 261.

[119] *Id.* at 263.

[120] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 129 (1978) (citing City of New Orleans v. Dukes, 427 U.S. 297 (1976); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Village of Belle Terre v. Boraas, 416 U.S. 1, 9–10 (1974); Berman v. Parker, 348 U.S. 26, 33 (1954); Welch v. Swasey, 214 U.S. 91, 103 (1909)).

[121] *Penn Central*, 438 U.S. at 135 (citing *Mini Theatres*, 427 U.S. 50).

Another element of the third prong of the *Penn Central* formulation is government discrimination. This argument was raised in *St. Bartholomew's Church v. City of New York* when the church pointed out that over fifteen percent of the six hundred landmarked sites in New York were religious properties and over five percent of the total were Episcopal churches.[122] The court responded that the high proportion of churches involved does not show "an intent to discriminate against, or impinge on, religious belief in the designation of landmark sites."[123] In support, the court cited *Penn Central*, in which the Supreme Court held that "landmark laws are not like discriminatory, or 'reverse spot,' zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones."[124]

The holdings of *St. Bartholomew's* and *Penn Central* indicate that the discriminatory element of the third prong of the *Penn Central* takings formulation will be met not by proving disproportionate impact, but by proving that the regulation "singl[ed] out individual landowners for disparate and unfair treatment."[125] The Court in *Penn Central* also indicated that courts will "indentif[y] arbitrary or discriminatory action in the context of landmark regulation [as] in the context of classic zoning or indeed in any other context."[126] For that reason, if there is a reasonable basis for the regulation, churches seeking to employ the discriminatory element of the takings test will have little success invalidating the statute as facially discriminatory.[127] Rather, if there is evidence that the ordinance has been unfairly applied, the religious organization may be able to prove an individual instance of discrimination and establish an uncompensated taking.

The final element of the third prong of *Penn Central* is a physical invasion. In *Loretto v. Teleprompter Manhattan CATV Corp.*,[128] Teleprompter, acting under a New York state law, installed a one-half inch cable and two four-inch silver boxes across the landowner's building to provide service to the television company's clients.[129] Although the statute provided for a "reasonable

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[122] St. Bartholomew's Church v. City of New York, 914 F.2d 348, 355 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

[123] 914 F.2d at 354.

[124] *Id.* at 355 (quoting *Penn Central*, 438 U.S. at 132).

[125] *Penn Central*, 438 U.S. at 132.

[126] *Id.* at 133 (footnote omitted).

[127] *Id.* n.29.

[128] 458 U.S. 419 (1982).

[129] *Id.* at 422.

payment" of fifty dollars,[130] the Court held that "a physical intrusion by government [is] an unusually serious character," and when it is permanent, a taking has occurred.[131]

The dissent in *Loretto* decried the "per se rule based on 'permanent physical occupation.'"[132] Indeed, there is no balancing of the multifactor formulation when there is a government invasion of private property.[133] As a result, the holdings in religious landmark cases with physical invasions will likely be similar to that in *Loretto*. Any government intrusion on religious property, such as the dedication of church property for public use as a street or sidewalk,[134] would be a taking.

Federal takings analysis applied to religious landmarks yields predictable results in some similar factual situations. When the courts apply the third prong of the *Penn Central* test, at least two of the three elements yield fairly consistent holdings. The court will find a taking if the regulation involves a physical invasion, or if the landowner can prove an individual case of discrimination. If, however, the court finds that the government has appropriated the property for its own use, only some courts will find a taking under the enterprise element of the third prong.

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[130] N.Y. EXEC. LAW § 828 (McKinney Supp. 1981–1982) provides:

> 1. No landlord shall . . .
>
> b. demand or accept payment from any tenant, in any form, in exchange for permitting cable television service on or within his property or premises, or from any cable television company in exchange therefor in excess of any amount which the commission shall, by regulation, determine to be reasonable . . . .

In this case, the landlord previous to the plaintiff received a flat installation fee of $50 for a five year agreement. *Loretto*, 458 U.S. at 443.

[131] *Loretto*, 458 U.S. at 426.

[132] *Id.* at 456 (Blackmun, J., dissenting).

[133] The majority held that "a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 432 (citing *Penn Central*, 438 U.S. 104) (footnote omitted).

[134] *See generally* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668, 674 (Colo. 1981).

III. STATE CONSTITUTIONAL LAW: RELIEF FOR RELIGOUS LANDMARKS

A. *State Constitutional Law*

Given the current condition of federal free exercise[135] and takings[136] constitutional law, congregations that seek to challenge a landmark designation likely will need more in their litigation arsenal to prevail in the courts. State supreme courts, by way of comparison, have created or preserved greater rights for the individual than has the Supreme Court. As a consequence, under state law, churches have been able to maintain greater control of the use of their buildings.

Many state constitutions predate the United States Constitution.[137] In the Judiciary Act of 1789 Congress gave the Supreme Court the power of certiorari over decisions in state supreme courts.[138] That jurisdictional review, however, is not all encompassing. Only cases meeting the statutory criteria will be subject to federal court examination. Those categories of cases are judgments which: First, question the validity of a federal treaty or statute; second, question the validity of a state law as being repugnant to federal law; or third, claim a right or immunity under federal law.[139] The corollary to this provision is that when there is an independent and adequate state ground on which to base the judgment, the Supreme Court will not, at least in theory,[140] review the state court decision.[141]

One such state ground is when the state constitutional or statutory law provides greater rights to an individual than does federal law.[142] For example, in 1972, the Supreme Court of California rejected the idea that the California and United States Constitution offered coextensive rights against cruel and unusual punishment.[143] In *People v. Anderson*, the California court refused to

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[135] *See supra* note 56–70 and accompanying text.

[136] *See supra* notes 122–34 and accompanying text.

[137] Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1455–58 (1990).

[138] Judiciary Act, 28 U.S.C. § 1257 (1988). As originally enacted, the Judiciary Act distinguished between appeals and certiorari. The 1988 amendments to that Act removed the mandatory appeal and made certiorari the only path to Supreme Court review. *Id.* at note (Amendments).

[139] *Id.* at (a).

[140] Colorado v. Nunez, 465 U.S. 324 (1984) (White, J., concurring) (advising the state court how the case would have been decided differently under federal law).

[141] Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635–36 (1874).

[142] Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure; State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 430 (1974).

[143] People v. Anderson, 493 P.2d 880 (Cal. 1972).

consider federal constitutional law and ruled that capital punishment was both cruel and unusual under the California Constitution.[144] Similarly, in *Ravin v. State*,[145] the Supreme Court of Alaska construed the state's constitutional "right to privacy" and declined to be limited by federal law.[146] In that case, the Alaska court noted the distinctively independent character of the Alaskan people and held that in-home use of marijuana was protected under the state's constitutional right to privacy.[147] The current United States Supreme Court seems to endorse this federal concept of states' autonomy. In *Smith*, even though the Court limited the federal right to free exercise of religion, it noted that twenty-three states have statutory or judicial exemptions that allow the sacramental use of peyote.[148]

B. *Least Restrictive Means: Generally*

The least restrictive means test is a level of strict scrutiny that forces the government to consider alternate, less burdensome methods to pursue its purposes in regulation.[149] In land-use cases and those implicating free exercise conflicts, legal commentators and courts specifically have recommended its use.[150] This Note proposes that least restrictive means be used in either free exercise or takings analysis under state constitutional law in religious landmark cases. The test would be: Has the government used the least restrictive means to preserve the historic structure to allow the religious congregation's free

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[144] *Id.* at 883 n.1, 895–99. Interestingly enough, the California electorate overrode its own supreme court when it enacted, by plebiscite, a state constitutional amendment providing for capital punishment. CAL. CONST. art. 1, § 27.

[145] 537 P.2d 494 (Alaska 1975).

[146] ALASKA CONST. art. 1, § 22. The privacy amendment to the Alaska Constitution reads: "[t]he right of the people to privacy is recognized and shall not be infringed. The legislature shall implement this section."

The court reasoned by analogy using the policies of privacy given to home activities in federal cases, but specifically supported its holding on the text of the state constitution and precedent on prior Alaska cases. Ravin v. State, 537 P.2d 494, 503–04 (Alaska 1975).

[147] *Ravin*, 537 P.2d at 504.

[148] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 912 n.5 (1990).

[149] The Court in Dunn v. Blumstein, 405 U.S. 330, 342–43 (1972), included the least restrictive means test in the "formula" for strict scrutiny. It explained that in strict scrutiny analysis a statute which burdens a constitutionally protected activity must be "tailored" to serve its purpose and must use the "less drastic means" of accomplishing that goal. *Id.* at 343 (citation omitted); *see also* Moody v. Cronin, 484 F. Supp. 270, 277 (C.D. Ill. 1979).

[150] City of Sumner v. First Baptist Church, 639 P.2d 1358, 1363 (Wash. 1982) (citing Sherbert v. Verner, 374 U.S 398, 407 (1963)); Scott D. Godshall, Note, *Land Use Regulation and the Free Exercise Clause*, 84 COLUM. L. REV. 1562, 1587 (1984).

exercise of religion or to allow its charitable purpose to continue? If not, the landmark designation is void.

The mechanics of the least restrictive means test were illustrated in a *Sherbert*-balancing case, *Thomas v. Review Board*.[151] The Supreme Court balanced the two competing interests to determine if the law was the least restrictive method of implementing a government policy.[152] The state claimed that granting unemployment benefits to conscientious objectors, who refused to work in a tank factory, would create widespread unemployment in addition to unnecessarily detailed questioning by employers into applicants' religious beliefs.[153] The Court rejected the state's argument and found that the regulation would have little if any impact on those stated goals. The Court held that although the possible unemployment and questioning were important considerations, "the interests advanced by the State do not justify the burden placed on free exercise of religion";[154] thus, the regulation was void.[155]

C. *Least Restrictive Means: Free Exercise*

In free exercise cases specifically, state courts frequently have increased, rather than decreased, individual exceptions to otherwise valid state laws. For example, the Alaska Supreme Court held that the state's free exercise clause excluded native Athabascans from seasonal hunting regulations.[156] Using the *Sherbert* test, the court reasoned that moose meat was essential to religious funeral "potlachs" and that the burdens on the state's hunting regulations and the moose population were small.[157] Consequently, the Athabascans were given a judicially crafted free exercise exemption to hunt moose out of season for potlach services.[158]

Similarly, in one of the first cases to consider a state's free exercise clause, subsequent to *Smith*, the Supreme Court of Minnesota actually rejected federal free exercise analysis. In *State v. Hershberger*, Amish defendants had been fined for refusing to use red, triangular, slow-moving vehicle emblems on their horsedrawn buggies.[159] The Supreme Court of Minnesota held that the traffic regulation violated the defendants' right to free exercise of religion by forcing

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[151] 450 U.S. 707 (1981).

[152] *Id.* at 718–20.

[153] *Id.* at 719.

[154] *Id.*

[155] *Id.* at 720.

[156] Frank v. State, 604 P.2d 1068, 1075 (Alaska 1979).

[157] *Id.* at 1072–75.

[158] *Id.* at 1075.

[159] 444 N.W.2d 282 (Minn. 1989), *rev'd for further consideration*, 110 S. Ct. 1918 (1990) (considering the decision of the Minnesota Supreme Court which held that the statute was an unconstitutional violation of the defendant's free exercise of religion).

them to use "a symbol whose color and meaning are antithetical to their faith."[160] The United States Supreme Court, nonetheless, vacated the decision and ordered the state to reconsider the case under *Smith's* facially neutral analysis.[161] The Supreme Court of Minnesota declined.[162] The court reasoned that the "Minnesota Constitution alone provides an independent and adequate state constitutional basis on which to decide."[163] Using state constitutional free exercise least restrictive means analysis, the Minnesota court held that the Amish defendants were entitled to an exemption from the traffic regulation.[164]

Religious landmark cases, specifically, have been analyzed under state free exercise constitutional law subsequent to *Smith*. In December of 1990, the Massachusetts Supreme Judicial Court considered *Society of Jesus v. Boston Landmarks Commission*,[165] in which the church sought an exemption from a landmark designation that prevented it from remodeling the interior of the church.[166] Although the trial court based its analysis on the federal Free Exercise Clause, the Massachusetts Supreme Court limited its reasoning to state constitutional law.[167] Holding that because the Massachusetts Constitution provided absolute freedom for religious practice "'without any control whatsoever,'" the church should be granted an exemption from the landmark designation.[168]

If state courts continue to employ least restrictive means analysis in free exercise landmark cases, legislative threats to the free exercise of religion will be judicially restrained. One such threat is the potential imbalance of religious exemptions in favor of a majority religion. If religious practices are controlled completely by the democratic process, as suggested by Justice Scalia in *Smith*,[169] the inevitable result is that the majority religion will accommodate its own beliefs without considering those of minority religions.[170] As Justice O'Connor stated in her concurring opinion in *Smith*, "the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority."[171] With least restrictive means applied in state

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[160] State v. Hershberger, 462 N.W.2d 393, 396 (Minn. 1990).

[161] 110 S. Ct. at 1918.

[162] 462 N.W.2d at 396.

[163] *Id.* at 396–97.

[164] *Id.* at 399.

[165] 564 N.E.2d 571 (Mass. 1990).

[166] *Id.* at 572.

[167] *Id.*

[168] *Id.* at 573 (citations omitted).

[169] *See supra* note 70 and accompanying text.

[170] *McConnell, supra* note 20, at 1130–32.

[171] Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

courts, all burdens on free exercise, not just those of the majority, will be accommodated equally.

An additional danger, which will be controlled by least restrictive means analysis, is the unavoidable impact on minority religious beliefs. Despite the familiar distinction between belief and practice, often the line between the two is impossible to determine.[172] For example, under *Smith*, laws may prohibit sacramental use of peyote or, if the minority controlled the legislature, forbid the use of wine in communion.[173] As a result of the practice of religion being destroyed, there is an inevitable burden on the religious belief.[174] At the extreme, when a law prohibits a central practice, such as communion, minority groups will have to forgo the exercise of their beliefs or move to a more accommodating milieu.[175] Least restrictive means analysis reduces the burden on the minority beliefs by seeking alternate solutions to laws that burden the practice of religion.

In religious landmark cases in particular, under state constitutional free exercise balancing, a court will be more likely to find a burden on free exercise as a result of a landmark designation. The most likely difference between state and federal free exercise landmark law would be the hypothetical case in which a congregation would lose its church because of the designation. Just as in *Sherbert* balancing, under state least restrictive means analysis, the burden on the church would outweigh the compelling interest of the state and the designation would be void.[176]

D. *Least Restrictive Means and the Establishment Clause*

The use of alternate solutions for religious landmarks may, however, run afoul of the "natural antagonism"[177] between the two religion clauses of the Constitution. Although the First Amendment provides for the free exercise of religion, it also prohibits the government from "the establishment of religion."[178] The underlying policy of the Establishment Clause is that religion and government will be most effective if "each is left free from the other within its respective sphere."[179]

In *Walz v. Tax Commission of New York*,[180] a case that bears on religious landmark analysis, the Court struggled to "find a neutral course"[181] between

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[172] *Smith*, 494 U.S. at 893–94 (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

[173] McConnell, *supra* note 20 at 1135.

[174] *Smith*, 494 U.S. at 919–20 (Blackmun, J., dissenting).

[175] *Id.*; *see also* Hess *supra* note 20, at 598.

[176] *See supra* notes 64–66 and accompanying text.

[177] J. NOWAK, *supra* note 19, at § 17.2.

[178] U.S. CONST. amend. I.

[179] Lynch v. Donnelly, 465 U.S. 668, 690–94 (1984) (O'Connor, J., concurring).

[180] 397 U.S. 664 (1970).

the Free Exercise and Establishment Clauses. *Walz* addressed the constitutionality of New York state property tax exemptions for religious organizations.[182] The Court held that the government may not establish, or interfere with, religion;[183] however, the Establishment Clause does not require "that in every and all respects there shall be a separation of Church and State."[184] Indeed, there should be some "play in the joints productive of a benevolent neutrality."[185] In *Walz*, because no one particular church or group of churches were given tax-exempt status,[186] the statute did not violate the Establishment Clause.[187]

Just as the Free Exercise Clause underwent a radical analytical revision in *Smith*, there is the equal possibility that the Establishment Clause will be altered by the current Court.[188] Justice Scalia, as the author of *Smith*, has tried—so far unsuccessfully—to incorporate the facially neutral analysis into free speech cases.[189] Additionally, in a recent Establishment Clause case, *Edwards v. Aguillard*,[190] in which the Court struck down the teaching of "creation science" in public schools, he recommended a more restrained judicial role. Greater deference to legislative acts, he contended, would give more predictability and ease the "tension between the Free Exercise and Establishment Clauses."[191]

Under current *Walz* analysis, or even with Scalia's "save not destroy" philosophy,[192] the effect of the Establishment Clause on this Note's proposal should be analogous to the result in *Walz*. Even though there would be some "indirect economic benefit"[193] to churches from deferential legislative treatment, exemptions probably are not unconstitutional because the

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[181] *Id.* at 668.

[182] *Id.* at 666.

[183] *Id.* at 669.

[184] *Id.* at 664 (citing Zorach v. Clauson, 343 U.S. 306 (1952)).

[185] *Id.*

[186] *Id.* at 673.

[187] *Id.* at 675.

[188] Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991), deals with the Establishment Clause problem of whether invocations and benedictions at public school graduations are unconstitutional.

[189] Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (Scalia, J., concurring). Justice Scalia agreed that a local law prohibiting nude dancing did not violate the Free Speech Clause, but urged that the legislation should be upheld because it was "a general law regulating conduct and not specifically directed at expression, it is not subject to First-Amendment scrutiny at all." *Id.* at 2463.

[190] 482 U.S. 578, 626 (1987) (Scalia, J., dissenting).

[191] *Id.* at 640.

[192] *Id.* at 626.

[193] *Id.* at 674.

government does not transfer revenues to the church, but merely refrains from "demanding that the church support the state."[194]

Although the exemptions may not be excessive, landmark exclusions almost certainly will also have to apply to other charitable organizations to be constitutional. In *Walz*, the Court noted that the New York property tax exemption also applied to charitable, historical, or educational institutions and other "nonprofit, quasi-public corporations."[195] Subsequently, in *Texas Monthly, Inc. v. Bullock*, the Court explained that tax exemptions that applied to religious publications, but not other nonsectarian groups, actually did violate the Establishment Clause.[196] As a consequence, least restrictive means analysis probably will have to be applied to all charitable institutions, not just religious organizations, to avoid violating the Establishment Clause. That would, however, only strengthen the policy reasons for the use of the least restrictive means analysis. Indeed, the accommodation of the mutually beneficial charitable efforts of private and government organizations is perhaps the most convincing justification for a deferential approach to landmark designation of religious landmarks.[197]

E. *Least Restrictive Means: Takings*

A hint of how far a state court may be willing to expand takings analysis appeared in the original Washington State Supreme Court *First Covenant* decision. In dicta, the state court hypothesized about the use of strict scrutiny in the Takings Clause.[198] After losing on federal grounds in the United States Supreme Court, the church logically seized on the state constitutional issues when the case was reargued on remand.[199] Although it is uncertain whether the state court will reinstate its religious landmark exemption on remand, it had previously recommended the least restrictive means approach in other church land-use conflicts. It held, in a church zoning case, that a city is required to use the least restrictive means of achieving its compelling interest because in the

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[194] *Id.*

[195] *Id.*; *see also* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

[196] *Texas Monthly*, 489 U.S. at 8, 9 & n.1.

[197] *See infra* notes 222–35 and accompanying text.

[198] The *First Covenant* court suggested that the United States Supreme Court in *Penn Central* would have found a taking "had it analyzed the law under strict scrutiny." First Covenant Church v. City of Seattle, 787 P.2d 1352, 1361 (Wash. 1990), *vacated and remanded*, 111 S. Ct. 1097 (1991).

[199] Respondent's Brief on Remand at 20–35, *First Covenant* (No. 56377-2) (citing Society of Jesus v. Boston Landmark Comm'n, 564 N.E.2d 571 (Mass. 1990); State v. Hershberger, 462 N.W.2d 393 (Minn. 1990)).

final analysis, "accommodation between the competing interests must be the goal."[200]

In an earlier New York Court of Appeals case, *Trustees of Sailors' Snug Harbor v. Platt*,[201] the state court had already advanced, at least partially, toward the least restrictive means dicta in the *First Covenant* decision. In *Snug Harbor*, the New York court formed a charitable institution analog for the second prong of the *Penn Central* formulation.[202] The court held that a test for a charity would be: When a landmark designation either physically or financially "interferes with carrying out the charitable purpose the designation would be void."[203] This test has been cited widely[204] and is based on the policy that charitable organizations are not created to make profits as are private businesses.[205]

The Second Prong of Penn Central *Applied to the "Charitable Purpose Test"*

The broad acceptance of the charitable purpose test, however, masks the difficulty of applying it to particular circumstances. The easiest way to predict the outcome of applying the charitable purpose test to churches is to look at two common scenarios in religious landmark designation; first, when landmark status imperils the church's current charitable programs, and second, when its planned expansion of those programs is prevented by the designation.

1. *The Church's Current Activities Are Imperiled by the Landmark Designation*

In *Lutheran Church v. City of New York*,[206] the New York Court of Appeals employed the charitable purpose test to analyze a landmark designation that would have stopped the church's charitable activities. The court noted that the landmark designation would force the church to discontinue the use to

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[200] City of Sumner v. First Baptist Church, 639 P.2d 1358, 1363–64 (Wash. 1982).

[201] 288 N.Y.S.2d 314, 316 (1968).

[202] *See supra* notes 100–02 and accompanying text.

[203] Society for Ethical Culture v. Spatt, 415 N.E.2d 922, 925 (N.Y. 1980).

[204] *See generally* St. Bartholomew's Church v. City of New York, 914 F.2d 348, 352–53, 356 (1990), *cert. denied*, 111 S. Ct. 1103 (1991); *Ethical Culture*, 415 N.E.2d at 922; Lutheran Church v. City of New York, 316 N.E.2d 305 (N.Y. 1974); First Covenant Church v. City of Seattle, 787 P.2d 1352, 1364–65 (Wash. 1990) (Utter, J., concurring), *vacated and remanded*, 111 S. Ct. 1097 (1991) (citing *Lutheran Church*, for the "charitable purpose" test).

[205] *Ethical Culture*, 415 N.E.2d at 925.

[206] 316 N.E.2d 305 (N.Y. 1974).

which the property had been put for over twenty years.[207] Because the church's status as a landmark would have stopped its current charitable activities, the court found a taking.[208]

Not all courts have accepted this reasoning, most notably the Pennsylvania Supreme Court in *First Presbyterian Church v. City of York*.[209] There, the church sought to demolish the adjoining, landmarked York House.[210] The court rejected the *Snug Harbor* charitable purpose test, holding that the landmark designation would not "preclude the use of York House for any purpose for which it was reasonably adapted."[211] Therefore, if the church could use its property for any purpose, not just the current charitable activities,[212] the landmark designation was not unconstitutional.

The rule found in *York* is even more restrictive than *Penn Central*'s investment-backed expectations test. The Court in *Penn Central* justified not finding a taking when it noted that the landowners "may continue to use the property precisely as it has been used for the past 65 years."[213] A regulation that destroys an investment-backed expectation is one which "totally defeat[s] a distinctly crystallized expectation [that is] demonstrably afoot" at the time of the regulation.[214] Therefore, most courts, even without expanding individual rights, will likely find a taking if, because of a landmark designation, a religious organization cannot use its property for a charitable purpose precisely as it has been used in the past.

2. *The Church's Planned Expansion of Current Charitable Activities Will Be Impossible Because of the Landmark Designation*

A more difficult situation arises when the church is engaged in a charitable purpose, but is unable to expand the scope of those current activities because of the landmark designation. The courts in *St. Bartholomew's Church v. City of New York*[215] and *Society for Ethical Culture v. Spatt*[216] faced this issue in two recent New York cases. In *Ethical Culture*, a religious organization sought to remove a landmark designation and subsequently demolish an auxiliary meeting house in order to develop its property more profitably. Similarly, in *St. Bartholomew's*, the congregation wanted to destroy a building adjacent to the

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[207] *Id.* at 310.

[208] *Id.* at 311 (citing the lower court, Appellate Division).

[209] 360 A.2d 257 (Pa. 1976).

[210] *Id.* at 259-60.

[211] *Id.* at 261.

[212] *Id.*

[213] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 136 (1978).

[214] Michelman, *supra* note 85, at 1233 (citations omitted).

[215] 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

[216] 415 N.E.2d 322 (N.Y. 1980).

church, which was also designated as a landmark, to build a forty-seven story office tower. The church argued that the landmark designation impaired its ability to continue and expand the charitable activates that were central to its ministry.[217] Moreover, the church claimed that the proposed office tower would provide space and income to support those programs.[218]

In both cases, the courts ruled against the religious organizations. In *Ethical Culture*, the court held that "there simply is no constitutional requirement that a landowner always be allowed his property's most beneficial use."[219] Similarly, in *St. Bartholomew's* the court held that a landmark designation "may 'freeze' the Church's property in its existing use and prevent the Church from expanding or altering its activities, *Penn Central* explicitly permits this."[220]

Even under the charitable purpose test, without least restrictive analysis, many religious landmarks will be found not to be takings. An anomalous situation is created, however, when a church is designated a landmark, and the charitable activities of the organization are frozen at their current level. The government prevents a nongovernment institution from furthering charitable activities that are traditional state functions.[221] If, however, the state courts apply a least restrictive reasoning to the charitable purpose test, the church's and state's seemingly competing claims can be reconciled. The municipality will be able to preserve its historical districts without defeating the efforts of religious organizations that are providing charitable services that might otherwise default to the government.[222]

F. *Least Restrictive Alternatives for Free Exercise or Takings*

Given the advantages of strict scrutiny in either takings or free exercise analysis, there remains the problem of identifying the less restrictive alternatives available to the church and the state. One approach is to create a contract between the city and the church in which the property owner would

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[217] *St. Bartholomew's*, 914 F.2d at 351.

[218] *Id.* at 353–54. The court seems to indicate that it would not allow either the expansion of the church's current charitable activities or an increase the number of programs. It held that "[s]o long as the Church can continue to use its property in the way that it has been using it—to house its charitable and religious activity—there is no unconstitutional taking." *Id.* at 357.

[219] *Ethical Culture*, 415 N.E.2d at 326 (citing Goldblatt v. Town of Hempstead, 369 U.S. 590, 592 (1962)).

[220] *St. Bartholomew's*, 914 F.2d at 356.

[221] *See, e.g.*, Trustees of Sailors' Snug Harbor v. Platt, 288 N.Y.S.2d 314, 315–16 (1968) (providing a home for retired seafaring men); *St. Bartholomew's*, 914 F.2d at 351 (community ministry program providing food, clothing and shelter to indigent persons).

[222] *See infra* notes 223–35 and accompanying text.

agree to preserve the building in a mutually satisfactory condition.[223] In 1880, however, the Supreme Court established the rule that local governments cannot "bargain away the police power."[224] Nonetheless, in the case of land use, states and municipalities have successfully employed less sweeping methods for coordinated development.[225] One such technique is the use of "development agreements" created under a state enabling act.[226] These agreements, which allow for procedural and substantive safeguards as well as protection from possible governmental noncompliance,[227] have been used without co-opting the reserved rights of municipalities. The development agreement projects range from the creation of ski hills[228] to preserving farmland in "agricultural preserves."[229] The advantage of applying this alternative to religious landmarks is that the church would be able to bargain for restrictions on the property that would not limit its charitable activities. In addition, the city would receive contractual assurances that certain changes in the building would not be made and that repairs and maintenance will continue.

Another option is for the city to allow modifications to the existing structure that will include waiving certain zoning requirements. Zoning classifications that differ from other properties in the area often are called "spot zoning."[230] This policy was endorsed in *Westchester Reform Temple v. Brown*.[231] In *Westchester*, the church requested zoning waivers from setback and side-yard restrictions in order to expand its building beyond the Planning Commission's limits for the size of lot on which the building was located.[232] The New York Court of Appeals held that "churches and schools occupy a different status from mere commercial enterprises and, when the church enters the picture, different considerations apply."[233] With this approach, congregations could present proposed alterations in their buildings to zoning commissions that would accommodate their anticipated charitable needs without destroying the portions of the building that the city sought to maintain. If those proposals included zoning variances, the flexibility by the city would allow

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[223] Newell, *Free Exercise Challenges*, *supra* note 85, at 168.

[224] Stone v. Mississippi, 101 U.S. 814, 817 (1880).

[225] Judith W. Wenger, *Utopian Visions: Cooperation Without Conflicts in Public/Private Ventures* in CITY DEAL MAKING 57, 71–72 (Lassar ed. 1990).

[226] *Id.* at 72.

[227] Judith W. Wenger, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements and the Theoretical Foundations of Government Land use Deals*, 65 N.C.L. REV. 957, 994–1003, 1008–30 (1987).

[228] E & E Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 677 (7th Cir. 1980).

[229] Delucci v. County of Santa Cruz, 225 Cal. Rptr. 43, 44–45, *cert denied*, 479 U.S. 803 (1986).

[230] BLACK'S LAW DICTIONARY 1258 (5th ed. 1979).

[231] 239 N.E.2d 891 (N.Y. 1968).

[232] *Id.* at 894.

[233] *Id.*

"less restrictive alternatives than strict enforcement of all the technical provisions of the code while still fulfilling the legitimate governmental interests."[234]

A final alternative that would accommodate least restrictive means analysis, would be to coordinate the architectural style of the new or expanded building with the historic landmarks that the government wants to preserve. For example, in New York City, engineers combined turn-of-the-century construction with a modern high rise to restore two landmarks on Fifth Avenue and erect a new skyscraper.[235] There, the new building was constructed as a backdrop to match the style of the Rizzoli and Coty buildings, both of which were rehabilitated landmarks.[236] Architects employed even more imagination in Washington, D.C., where the original facades of historic landmarks were integrated into a new apartment complex.[237] On the sites of an S.S. Kresge store and a brewing company warehouse, the original ornamental terra cotta facades were used as the exterior for a fifty million dollar apartment and theatre structure.[238]

Advantages to the Community from Least Restrictive Means

Not only would churches benefit with strict scrutiny, but there would be benefits to society from the least restrictive means. When cities and churches employ alternative solutions such as city-church contracts, zoning variances, or old and new architecture coordination, the consequence is that the community will share the burden of preserving the historic district. For example, if a city grants a zoning variance, all the surrounding property owners may in some way have the value of their property decreased by the spot zoning allowed for the church.[239] Nevertheless, the Indiana Supreme Court supported the idea of spreading the cost of a church's activities to the rest of the community holding that no landowner of private property adjacent to a church should complain if his property "is depreciated to some extent, since the purpose of the zoning

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[234] City of Sumner v. First Baptist Church, 639 P.2d 1358, 1363–64 (Wash. 1982).

[235] *NYC Landmark/High Rise Meshes Old and New*, 60 CIV. ENGINEERING, May 16, 1990, at 16.

[236] *Id.* (photo).

[237] *Historic Facades Saved for Reuse*, 225 E.N.R., Sept. 6, 1990, at 20.

[238] *Id.* (photo).

[239] *See generally* JAMES E. CURRY, PUBLIC REGULATION OF THE RELIGIOUS USE OF LAND 85–104 (1964). The author notes the various approaches in the courts to surrounding property owner's claims that the value of their land is decreased by spot zoning for churches. The cases show that it is often difficult to determine the effect of spot zoning on neighboring lots. The author claims that "the depreciation issue may involve not only the question (a) whether prices have gone down, but also (b) whether they have gone up less rapidly than they would have risen with the depressing factor of the church." *Id.* at 103.

laws is not to protect private, personal interest, but rather to protect and promote the general public interest."[240] Even though there may be a burden to other landowners in the community, there will be consequential benefits that result from alternative solutions to religious landmark exemptions. In contrast to *St. Bartholomew's*[241] and *Ethical Culture*,[242] in which the religious organizations' charitable activities were not allowed to expand, when alternative solutions are explored through the least restrictive means, charitable activities will continue to grow. Not only would the immediate beneficiaries of the philanthropy receive assistance, but the taxpayers of the community would have their burden of supporting government activities reduced because of the continued increase in private charities.

IV. CONCLUSION

When a church is designated as a landmark, often the congregation suffers restrictions on its use of the building, as well as additional financial burdens. Federal free exercise analysis provides relief to churches only if there is a burden on the congregation's religious convictions. Additionally, the formulation of *Penn Central* likely will only find a taking when the government action is discriminatory, or a physical invasion. Without a more flexible approach churches frequently will be burdened in the exercise of their religion or forced to forgo expanding their charitable activities.

If state courts apply the least restrictive means test in free exercise and takings scenarios, alternative solutions such as city-church contracts, zoning variances, and old-new architecture combinations are possible. Consequently, congregations will be able to practice their religious beliefs, and expand philanthropic projects without destroying the historic buildings that the government wishes to preserve. As a result, those persons in need of churches' charitable aid will continue to receive assistance, the government will be relieved of a portion of its traditional responsibility for social programs, municipalities will be able to preserve their historic landmarks, and the burden of accommodating the alternatives to blanket landmark designation will be spread more evenly to the entire community.

Ted L. Wills

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[240] Board of Zoning Appeals v. Schulte, 172 N.E.2d 39, 241, 243 (Ind. 1961).

[241] *See supra* note 215 and accompanying text.

[242] *See supra* note 216 and accompanying text.