Introduction

One quiet morning in July, 2003, a small group of utility company employees arrived at St. Gelasius Roman Catholic Church on Chicago’s south side. The church, located at 6401 S. Woodlawn Avenue in the city’s Woodlawn neighborhood just south of Hyde Park, had been closed to religious services since June, 2002. Faced with a dwindling congregation and rising maintenance costs, the Archdiocese of Chicago had shuttered the grand Renaissance Revival church building and closed the parish. Unbeknownst to the community, a demolition permit application had been submitted to the city, and demolition was planned for the summer of 2003. The imposing church structure, built in 1923 and once the religious heart of a thriving community, now sat vacant and awaiting destruction. With its rectory uninhabited and the parish school shut down long ago, the only witnesses remaining on site to mark its demise belonged to a small community of nuns residing in church’s convent. When the utility company employees arrived that morning to shut off the power to the building in preparation for demolition, little did they know that one of the remaining nuns would refuse to serve silent witness to the destruction of the historic church. Against the designs of her own church, an industrious nun refused to grant the workers access to the building housing the church’s electrical circuitry, and the workers were turned away. The arrival of the utility company employees, and their subsequent defeat at the hands of a determined nun, served as the first notification to the surrounding community of the planned demolition of St. Gelasius.
The ensuing conflict between the Archdiocese of Chicago, the Woodlawn community, historic preservationists, the Alderman, and the City of Chicago would rage for the following two years. On one side would be the Archdiocese, seeking to demolish the church and backing the right to free exercise of religion, as guaranteed by the First Amendment to the U.S. Constitution.[8] On the other side, the City of Chicago and supporters of government authority to designate significant structures as historic landmarks and protect them from alteration or demolition, as upheld by the United States Supreme Court.[9] This very conflict has played out in communities across the nation, and will occur again wherever a religious organization opposed government efforts to designate its property under a historic preservation ordinance.

The first clause of the First Amendment to the Constitution provides for the protection of religious exercise from government encroachment,[10] underscoring the importance of religious freedom to American society. Similarly, or perhaps consequently, religious structures are often the most important buildings in any American community. Their importance frequently places them at the top of the list for historic preservation, in those communities with historic preservation ordinances. Where these two values collide, several questions of constitutional law arise. The clash between the right to free exercise of religion and the desire to preserve religious structures of importance to the community, and the constitutional issues raised thereby, will be explored in this paper. Recent events surrounding the proposed demolition and landmark designation of St. Gelasius Church will provide a real-world case study of how historic preservation laws interact with the constitutional religion clauses. Analysis of relevant case law, history, and statutes will demonstrate that the designation of religious structures under local historic preservation ordinances and imposition of aesthetic design controls without any exemptions for religious uses should not implicate either religion clause of the First Amendment.
The issues involved with the historic preservation of religious structures will be explored in throughout the four sections of this paper. The first section will provide a brief history of land use controls and historic preservation law in the United States. With *Penn Central* as a foundation[11] (and *Village of Euclid* before it[12]) communities throughout the country embarked on the widespread designation of historic structures, including religious buildings. This section will conclude with a description of the organization and operation of typical historic preservation ordinances, using the historic preservation codes of Baltimore and Chicago as examples. The second section will chronicle the interaction between historic preservation of religious structures and the freedom of religion over the years. Where historic preservation interests have clashed with religious expression, various courts have determined the degree to which landmark protections interfere with the religious exercise. In response to court rulings, legislatures have enacted statutes limiting the power of government agencies to impose historic preservation restrictions on religious structures. These statutory restrictions straddle the fine line between protection of religious freedom and government endorsement of religion, implicating the establishment clause of the very amendment they were devised to protect.[13] Beginning with the *Penn Central* case and continuing through the current debate over the Religious Land Use and Institutionalized Persons Act[14] (“RLUIPA”), all aspects of the legislative and judicial response to the issues raised by the conflict between historic preservation and religious freedom will be explored.

Building on the foundation laid in the first and second sections, the third section of this paper will utilize the events surrounding the potential demolition of St. Gelasius Church as a case study of the current state of constitutional issues surrounding the historic preservation of religious structures, and for exploration of several issues that remain unsettled. An overview of
the growing problem of historic preservation of religious structures will be given, with a brief exploration of the reasons why historic religious structures nationwide are currently facing increased threats of demolition or destruction. The specific circumstances surrounding the St. Gelasius case, and the application of the constitutional issues explored in Section I to those circumstances, will be analyzed. Based on issue exploration and the case study analysis, this paper will conclude with an assessment of the current balance between historic preservation interests and the protection of religious exercise, with suggested guidelines for the designation of religious structures as historic landmarks.

I. ZONING, HISTORIC PRESERVATION, AND PRESERVATION ORDINANCES

Ordinances regarding the preservation of historic religious structures often implicate both religion clauses of the First Amendment. The religion clauses read, in there entirety, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”[15] These two clauses are referred to colloquially as the “establishment clause” and the “free exercise clause,” respectively. The religion clauses, in a mere sixteen words, summarize the delicate balancing act involved whenever governments enact statutes that affect, either directly or indirectly, religious organizations and practices. Such statutes must walk the fine line between interference with and endorsement of religious practice. Straying too far in either direction can result in a constitutional violation. Provisions of historic preservations ordinances that place restrictions upon the alteration of religious structures, where the structure itself may be considered an exercise of religion, may violate the free exercise clause. Conversely, where historic preservation ordinance are crafted in such a way to create exemptions or relief from statutory requirements for religious structures, the exemption or relief provisions may create an
establishment clause problem. The constitutional issues surrounding historic preservation of religious structures have been considered extensively by the courts since the rise of the popular historic preservation movement during the late 1960s, and the debate over the balance between historic preservation interests and the religion clauses of the First Amendment continues to this day. Recent federal legislation affecting the historic preservation of religious buildings, and land use restrictions on religion generally, has only complicated the matter.

**Historic Preservation and Zoning**

Historic preservation ordinances and the restrictions their provisions place upon the use and alteration of designated structures derive directly from municipal zoning ordinances. Historic preservation may be considered a specialized form of zoning, as “the restrictions that accompany the recognition, protection, and preservation of historic districts within them are, essentially, zoning regulations.”[16] The historic preservation of religious structures must be considered within the larger framework of zoning and land use controls.

*The Rise of Zoning and Urban Planning*

Prior to the 20th century, the primary method of restricting the use of land was through common law nuisance. With the industrial revolution and the unprecedented growth of cities, simple nuisance proved inadequate to solve the problems created by the close interaction of people and industry, created by the placement of residential areas adjacent to areas of heavy industry. As the U.S. Supreme Court noted in 1926, “until recent years, urban life was comparatively simple; but, with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in
respect of the use and occupation of private lands in urban communities.”[17] In a large city where incompatible uses often abutted one another, and large noxious uses could have effects beyond immediately adjacent property, some greater tool than nuisance, to bring about order in land use, proved necessary. The answer took the form of the first land use and zoning ordinances.

During the late 19th century, concepts of city design and layout first gained widespread attention in cities throughout the United States. The rebuilding of Paris under Napoleon III and Baron Haussmann in the 1860s, which transformed the cramped medieval city into the modern Paris of wide boulevards, expansive gardens, and uniform apartment blocks, prompted many civic leaders in Europe and America to consider the relationship between the built environment and the social and economic health of a city. The transformation of Paris and increasingly crowded conditions in major cities gave rise to the public parks movement in America. Beginning with New York City in 1858, and soon after in Boston, Chicago, and other major cities, community leaders organized park districts to construct park and boulevard systems to bring some order to city layout and open space to crowded residential areas.[18] The 1893 Columbian Exposition in Chicago, with its wide promenades and uniform buildings based on classical architectural styles, launched the “City Beautiful” movement, which espoused that beautiful and orderly urban environments would lead to peaceful, healthy, and productive urban societies.

Following the rise of the skyscraper during the early 20th century, issues of density and light came to the forefront of urban planning. In response to the crowded conditions caused by taller and taller skyscrapers casting shadows on the surrounding streets and buildings below, New York City passed the first zoning ordinance in the United States in 1916.[19] The Zoning
Resolution established height controls for new structures, mandated building setbacks to allow light to reach surrounding areas, and separated incompatible land uses to reduce conflicts between residential, commercial, and industrial areas.[20] The height and use controls were portrayed as necessary for the general welfare of the public, which would suffer if light-blocking buildings and noxious or offensive uses were allowed to proliferate unabated.[21] Viewed as beneficial to public welfare, the concept of zoning soon attracted the attention and support of the federal government. A Standard State Zoning Enabling Act drafted by a committee appointed by President Hoover and published by the U.S. Commerce Department in 1926 was based on the New York City ordinance.[22] The enabling act served as model legislation for states to grant municipalities and counties the power to enact zoning ordinances. The zoning enabling act was followed the Standard City Planning Enabling Act in 1928, which granted authority to local governments to draft master plans and engage in comprehensive urban planning.[23]

_Village of Euclid v. Ambler Realty Co._

Cities throughout the country quickly embraced zoning as an effective and necessary means of land use control. By the late 1920s, most municipalities in the United States had adopted comprehensive zoning ordinances.[24] In some areas, private landowners challenged the new zoning ordinances, contending that restrictions placed on the use of property diminished the value of that property and resulted in takings that required just compensation under the Fifth Amendment.[25] In 1926, the U.S. Supreme Court reviewed the authority of local governments to enact and enforce zoning restrictions on private property in _Village of Euclid, Ohio v. Ambler Realty Co._[26] In 1922, the Village of Euclid, a Cleveland suburb, adopted a comprehensive zoning plan that divided the village into districts according to height, building area, and use.[27]
The zoning ordinance featured “in great variety and detail, provisions in respect of width of lots, front, side, and rear yards, and other matters, including restrictions and regulations as to the use of billboards, signboards, and advertising signs.”[28] The purpose of the zoning ordinance was to ensure the public health, safety, and general welfare through the imposition of land use controls and restrictions.[29]

The Ambler Realty Co. owned a substantial parcel of land in the village which it desired to sell for development to industrial and commercial users.[30] Following zoning of the land for residential uses, Ambler Realty Co. contended that the value of the property had been diminished in whole or in part and challenged the zoning ordinance as an unconstitutional taking without just compensation under the Fifth Amendment.[31] In a landmark ruling, the Supreme Court held that zoning ordinances, where enabled by state statute, were valid exercises of the police power when enacted to protect public health, safety, and welfare and any effects of their regulations did not constitute uncompensated takings.[32] The Euclid case firmly established the validity of government authority to enact zoning and land use controls. While the law of takings under land use controls has evolved after Euclid, the zoning power of local governments has not been subject to a serious challenge since.

**Historic Preservation**

The concept of historic preservation is a relatively recent phenomenon in the United States. While isolated examples of historic preservation advocacy may be found beginning in the 19th century,[33] the modern historic preservation movement is often traced to the uproar surrounding the demolition of Pennsylvania Station in New York in 1963.[34] When the plans specifying the demolition of the old station and its replacement with a new sports arena[35] were
published in 1961, the public outcry was immediate. Concerned citizens formed the Action Group for Better Architecture in New York (AGBANY), which counted among its members the prominent urban theorist Jane Jacobs. While AGBANY lost the battle to prevent the demolition of Pennsylvania Station, the organization had “galvanized the community into realizing that the preservation of significant historical sites was too important to leave to the whims of commercial developers, or to the goodwill of politicians who were not bound by law to defer to the recommendations of historical protection bodies.” Called “the greatest act of civic vandalism in New York’s history” by former Senator Daniel Moynihan, the demolition of Pennsylvania Station led to the enactment of a landmarks preservation ordinance by the City of New York in 1965 and sparked interest in historic preservation nationwide.

Prompted by the destruction of Pennsylvania Station, in 1966 Congress determined that “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” and passed the National Historic Preservation Act, designed to encourage preservation of sites and structures of historic, architectural, or cultural significance through the Department of the Interior and the National Park Service. Thousands of communities throughout the country, often in response to the destruction of their own “Penn Station”s, enacted historic preservation ordinances to preserve and protect historic places and buildings by imposing restrictions on the physical alteration of the sites or buildings. Similar in organization to local zoning ordinances, historic preservation ordinances may be seen as specialized land use controls that place emphasis on the form of structures rather than their use. Early historic preservation measures often took the form of overlay districts within comprehensive zoning ordinances. While most governments have now chosen to enact separate historic preservation ordinances,
many include historic preservation controls as a section within a comprehensive zoning and land use control ordinance. From the 1960s onward, the notion of historic preservation enjoyed widespread public support, but the legal basis for historic preservation as a valid exercise of zoning power, particularly in regard to the takings issue, remained unsettled.

*Penn Central Transportation Company v. City of New York*

As with the challenge to local zoning authority in Euclid fifty-two years prior, governmental authority to landmark and restrict alterations to structures through historic preservation faced a challenge under the takings clause of the Fifth Amendment.[44] The ordinance chosen to test the validity of historic preservation measures was the New York City Landmarks Preservation law,[45] the very ordinance enacted in response to the destruction of Pennsylvania Station.[46] In *Penn Central Transportation Company v. City of New York*, the owners of Grand Central Terminal, the Penn Central Transportation Company[47], brought suit against the City of New York, alleging a violation of the Fifth Amendment prohibition on takings without just compensation.[48] In 1967, the New York City Landmarks Commission designated Grand Central Terminal a landmark, subject to the protections and restrictions of the landmarks ordinance.[49] Grand Central Terminal, a large railroad station located in midtown Manhattan, is arguably one of the most significant buildings in New York City.[50] The station was opened in 1913, and “it is regarded not only as providing an ingenious engineering solution to the problems presented by urban railroad stations, but also as a magnificent example of the French beaux-arts style.”[51] Although the Penn Central Transportation Co. opposed the landmark designation before the Landmarks Commission, the New York landmarks ordinance allowed the city to designate historic structures against the wishes of the building owner.
In 1968, the Penn Central Transportation Co. applied to the NYC Landmarks Commission for permission to alter the station as necessary to support the construction of a 55-story office building above the terminal.[52] One plan proposed to cantilever the office building over the façade of the station, while a second plan proposed the demolition of the main façade entirely.[53] Both plans specified the placement of massive support columns through the monumental Main Concourse, the grandest interior space in the terminal and, perhaps, in New York City.[54] The Landmarks Commission declined to permit the alterations to the terminal, and summarized its ruling “in the following statement: ‘To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.’”[55] Although additions and alterations to historic landmarks had been allowed elsewhere in the city, the Landmarks Commission found that the proposed alteration would irreparably damage the character of the structure and denied the application.[56]

Rather than challenge the denial of the alteration permit, the Penn Central Transportation Co. brought a claim contending that the NYC landmarks ordinance, and the restrictions placed upon designated structures, operated to effect an unconstitutional taking of private property without just compensation, in violation of the Fifth Amendment as applied to the states through the Fourteenth Amendment.[57] Penn Central Trans. Co. believed that “any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional.”[58] Upon review of the case, the Supreme Court held that the landmarks ordinance, and the designation of Grand Central Terminal as a landmark subject to aesthetic alteration restrictions, did not constitute a taking under the Fifth Amendment.[59] Additionally, the interference with the property brought about by landmark designation was not of such magnitude to constitute an act of eminent domain.[60]
The primary argument put forth by the plaintiff contended that the historic preservation ordinances differed from zoning ordinances in that “the controls imposed by New York City's law apply only to individuals who own selected properties” rather than all properties throughout the city.[61] Regarding this argument, the Court held

“It is true, as appellants emphasize, that both historic-district legislation and zoning laws regulate all properties within given physical communities whereas landmark laws apply only to selected parcels. But, contrary to appellants' suggestions, 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. In contrast to discriminatory zoning, which is the antithesis of land-use control as part of some comprehensive plan, 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 as noted, over 400 landmarks and 31 historic districts have been designated pursuant to this plan.”[62]

The Court recognized that, to find otherwise, “would, of course, invalidate not just New York City's law, but all comparable landmark legislation in the Nation.”[63]

The Penn Central case established the validity of historic preservation and the designation of landmarks as valid exercises of the police power, just as the Euclid case established the validity of zoning fifty-two years previous. The Penn Central case firmly established that preservation ordinances that implement a comprehensive plan to preserve structures for historic or architectural merit are not discriminatory and do not effect a taking, even where such laws affect some property owners to a greater extent than others. Since Penn Central, no historic preservation ordinance has been challenged on takings grounds, and historic preservation laws are considered valid exercises of the police power.

While the validity of historic preservation is now a matter of settled law, many questions regarding the interaction of historic preservation ordinances with the religion clauses of the First Amendment remain unresolved. Landmarks ordinances often straddle the line between
interference with religious exercise and the endorsement or establishment of religion. Restrictions on the alteration of religious structures become problematic where the structure itself may be an integral exercise of religious practice. Exemptions to historic preservation restrictions for religious structures, often intended to avoid interference with religious practice, may stray dangerously close to the opposite extreme and implicate establishment issues. Before exploring the issues raised by the preservation of religious structures, many of the common features and mechanisms of historic preservation ordinances must be noted.

**Historic Preservation Ordinances: Common Elements**

While the localities that enact historic preservation ordinances may differ dramatically - from large cities to small villages, from settlements dating to the colonial era in the east to hundred-year old “new” towns in the west - the ordinances themselves usually feature several common elements that may be found no matter the location. All historic preservation ordinances feature three essential elements: 1) creation of a body for administration of the ordinance, 2) criteria and process for the designation of historic properties and districts, and 3) a process for review of proposed alterations to and demolition of designated structures. Historic preservation ordinances with any real effect must also include enforcement provisions. The historic preservation ordinances of Baltimore and Chicago, each typical of historic preservation ordinances in urban areas, will serve as examples for the exploration of features commonly included in historic preservation ordinances. The Baltimore ordinance is known as the Historical and Architectural Preservation ordinance,[64] while the Chicago code is Chicago Historical and Architectural Landmarks ordinance.[65]

*Review Body Membership and Powers*
All historic preservation ordinances create or designate a body to administer the ordinance. The review body may overlap with an existing municipal body, such as the planning commission or village board, or it may be a body specifically created for the administration of the historic preservation ordinance. Most ordinances create a new body to oversee administration of the historic preservation ordinance, recommend potential landmarks and districts to the city council or village board, and review proposed changes to existing landmarks. The name of the review body may vary from place to place. In Baltimore, the review body is designated the Commission for Historical and Architectural Preservation[66], while the Chicago ordinance created the Commission on Chicago Historical and Architectural Landmarks.[67] In larger municipalities, the review body will be supported by an agency with staff, while in smaller municipalities the commission members may do their own support work. Support work typically includes research of potential landmarks and districts, work with owners of historic properties, and community outreach.

Historic preservation ordinances typically specify criteria for membership and appointment procedures for the review body. In Chicago, the Commission consists of nine members,[68] with eight designated by the Mayor and the ninth being the Commissioner of Planning and Development.[69] The Baltimore Commission consists of thirteen members,[70] eleven members appointed by the Mayor, a City Council member appointed by the City Council President, and the Commissioner of Housing and Community Development.[71] Members of historic preservation review bodies are usually required to possess professional skills or interests related to matters of involved with historic preservation, and ordinances typically specify qualifications for commission members. The Chicago ordinance specifies generally that “Commission members shall be selected from professionals in the disciplines of history,
architecture, historic architecture, planning, archaeology, real estate, historic preservation, or related fields, or shall be persons who have demonstrated special interest, knowledge, or experience in architecture, history, neighborhood preservation, or related disciplines.”[72]

The Baltimore ordinance features greater detail as to the exact qualification of each commission member, requiring four members to be recommended by non-governmental historic preservation and community development organizations in the city,[73] one member who is “an historian knowledgeable in the African-American history and culture of Baltimore City,”[74] a licensed real estate broker, two licensed architects, an owner and resident of a contributing historic residence, an owner and operator of a contributing commercial structure, and a historian knowledgeable of Baltimore City history and culture.[75] These requirements are typical of historic preservation ordinances and demonstrate the specialized knowledge often required to properly administer a historic preservation program, as well as the various interests that must be balanced in the administration of such a program.[76]

Most historic preservation ordinances grant the review body power to recommend historic landmarks and districts to the city council or village board, approve or disapprove requested alterations to designated structures, prepare rules for alterations to designated structures, and impose sanctions for violations of the historic preservation ordinance. The Baltimore Commission is charged with simply carrying out the terms of the historic preservation ordinance,[77] while the Chicago commission has enumerated powers[78] that largely correspond to the powers mentioned previously.[79] In all cases, historic preservation commissions serve an advisory role only, with final approval of historic landmark and district designations subject to review by the municipal legislative body.
Designation Criteria and Process

The criteria for designation of historic landmarks and districts are essential features of any preservation ordinance. Designation criteria may vary from ordinance to ordinance, and often reflect the specific attributes of the locality to which the ordinance applies. Criteria usually follow the standards for listing a property on the National Register of Historic Places. Criteria for designation may be broad or narrow. The Baltimore ordinance requires that designated properties simply be of architectural or historical significance, as determined by the commission after a “full and proper study,” but permits the commission to determine to define what is meant by architectural or historical significance. In contrast, the Chicago ordinance establishes seven criteria for the designation of historic landmarks or districts. Among the properties permitted for designation under the landmarks criteria are those identified with persons significant to the history of Chicago or the U.S., those identified with significant historic events, significant architectural works of prominent architects, those representative of the historical and architectural heritage of Chicago, and those representative of a particular architectural style or movement. Properties that meet the required criteria are reviewed by the historic preservation commission, usually following a thorough investigation by historic preservation staff to determine the degree to which the proposed property satisfies the established criteria for designation.

Properties proposed for designation as landmarks are then reviewed by the historic preservation commission, which then recommends to the municipal legislative body those properties that should be designated. Both the Baltimore and Chicago ordinances require the commission to forward recommendations for designation to the city councils for final
approval. Owner consent to designation may or may not be required, depending on the ordinance. In both Chicago and Baltimore, owner consent for designation is not required, but both ordinances do require a public hearing prior to designation. In Baltimore, the public hearing is held when the proposed historic preservation designation reaches the City Council, and proceeds whether or not owner consent was granted.[87] The City Council may designate historic properties with or without owner consent.

The Chicago historic preservation ordinance provides for an owner consent request to be sent prior to forwarding the designation recommendation to the City Council.[88] If owner consent is granted, the recommendation is forwarded to the City Council without further review by the landmarks commission. If owner consent is withheld, the landmarks commission then convenes a public hearing on the proposed designation. Should the landmarks commission wish to proceed with designation after the public hearing, the recommendation for designation is forwarded to the City Council for final approval. The City Council may then designate the property without owner consent.[89]

Demolition and Alteration Review

The final essential component of any historic preservation ordinance is a process for review of proposed changes to and demolition of designated structures. Most ordinances establish guidelines for the review of proposed alterations to designated structures or, in extreme cases, the demolition of designated structures. These guidelines may be strict, requiring that designated structures not be altered at all and that necessary maintenance be done with exact matching materials,[90] or the guidelines may be flexible, permitting sympathetic alteration and maintenance with similar materials. Establishment of appropriate guidelines for renovation and
alteration is usually delegated to the historic preservation commission or staff.[91] The guidelines typically apply only to the exteriors of structures, but may also apply to interiors where the ordinance permits the designation of interiors or where the interior is critical to the significance of the structure.

Proposed alterations to or demolition of historic structures must be reviewed by the historic preservation commission. The Commission then grants or denies permission for the alterations or demolition to proceed. Many ordinances specify that a “certificate of appropriateness,” indicating commission approval for the alteration of the designated structure, be issued. Where proposed alterations are denied by the historic preservation commission, all ordinances feature an appeal process. Historic Preservation ordinances may also permit the historic preservation commission to issue a finding of economic hardship to qualified owners of historic properties, permitting alteration guidelines to be waived or relaxed. Except in cases where hazards or dangers to the public present, applications for demolition of designated structures are rarely granted. Both the Baltimore and Chicago historic preservation ordinances largely follow the procedures outlined above. As an additional safeguard to the demolition of historic properties, the Chicago ordinance requires that any alteration that would result in the demolition of 40 percent or more of the significant historical or architectural features of the designated structure be reviewed by the City Council.

 Enforcement

In order to have any real effect on the preservation of historic structures, preservation ordinances must include enforcement mechanisms and penalties for violation. Many communities do not include enforcement provisions in their historic preservation ordinances,
relying on civic goodwill to ensure compliance with historic preservation designations.[92] Several historic structures have been lost as a result, victim to unscrupulous owners and the demands of the real estate market. Both the Baltimore and Chicago ordinances provide for enforcement of protections covering designated historic properties.

The Baltimore ordinance permits the historic preservation commission to seek injunctions from the Baltimore Circuit Court halting the alteration or demolition of designated structures. The court may also order the removal of any alterations made without permission and the restoration of features destroyed or removed due to the alteration.[93] Additionally, the ordinance establishes that anyone who alters or demolishes a designated structure without permission is guilty of a misdemeanor and, upon conviction, subject to a fine between $500 and $1,000, imprisonment for not more than 12 months, or both for each offense.[94] Penalties for violation may be substantial, as each day that a violation continues is treated as a separate offense.[95]

The penalties imposed by the Chicago historic preservation ordinance are similarly harsh. Unapproved alterations to or demolitions of landmarked structures may result in a fine of between $500 and $1,000.[96] As in the Baltimore ordinance, “every day on which a violation exists shall constitute a separate violation and a separate offense.”[97] Additionally, the Chicago ordinance provides that in the event of willful or negligent destruction or alteration of landmarked property, no permit for the construction of a new structure will be issued for the property on which the landmarked structure stood for a period of five years, beginning on the date of demolition, and thereafter any new construction will be subject to review by the Landmarks Commission for an additional period of twenty years.[98] These additional
restrictions on new construction ensure that the Chicago historic preservation ordinance serves as a strong protection for landmarked structures.

Demolition by Neglect

In addition to the commonly understood definition of demolition,[99] historic preservation ordinances often address a phenomenon that has come to be termed “demolition by neglect.” Under this concept, a property owner does not take active steps to demolish the historic structure, he simply refrains from performing maintenance on the building.[100] Essentially, the property owner waits for the structure to deteriorate to such an extent that it is no longer safe or salvageable. The property owner neglects necessary repairs or maintenance to the structure until the forces of time, weather, and nature demolish the building without active assistance. This action (or inaction, as the case may be) does not conform to the traditional definition of demolition, but the effect is often the same: destruction of the historic property.

To prevent demolition by neglect, historic preservation ordinances that include enforcement provisions often impose an affirmative duty on affected property owners to maintain the historic structures designated under the ordinance. The duty is realized by extending the applicability of enforcement penalties to include demolition by neglect.

Both the Baltimore and Chicago ordinances recognize the problem of demolition by neglect and extend enforcement penalties to include it. The Baltimore ordinance accomplishes this by including a definition of “demolition” in the ordinance that is sufficiently broad so as to include demolition by neglect.[101] The Chicago ordinance covers demolition by neglect by making the enforcement provisions applicable to destruction to designated properties resulting
from gross negligence.[102] Thus, not only are actions taken to demolish designated structures punishable under many historic preservation ordinances, but actions not taken may be punishable as well.

The affirmative duty to maintain a designated structure imposed by many historic preservation ordinances through the concept of demolition by neglect has led to the resistance of some religious organizations to the designation of their buildings as historic landmarks. For religious organizations that oversee many congregations within a geographic area, such as the Catholic Church, designation of individual churches may result in the diversion of resources that may have been allocated to other church purposes to building maintenance instead. For an institution whose primary mission is evangelism, resources spent on the maintenance of old or vacant buildings may be considered wasted resources. The issues surrounding the historic preservation of religious structures, including demolition by neglect, will be explored fully later in this paper.

II. RELIGIOUS STRUCTURES UNDER HISTORIC PRESERVATION ORDINANCES

There are two general approaches a historic preservation ordinance may take toward the treatment of religious structures. Some historic preservation ordinances, such as the Chicago ordinance, feature exemptions for properties owned by religious organizations or used for religious practices.[103] Other historic preservation ordinances, such as that of Baltimore, feature no such exemption and apply equally to all structures, be they religious or secular.[104] There are potential benefits and problems with each approach. For those ordinances that include an exemption, there is the risk of an establishment clause violation. For those ordinances without an exemption, the free exercise clause may be implicated. While the jurisprudence in this area is
limited, analysis of the existing cases and rulings may indicate the preferred approach to the preservation of religious structures and inform the formulation of an approach free from potential constitutional violations.

**Exemptions and the Establishment Clause**

As mentioned, the jurisprudence related to issues of establishment clause violation by exemptions for religious structures and uses under land use and historic preservation ordinances is limited. There is but one mention of this issue at the Supreme Court level, and that mention came in a concurrence.[105] Despite this lack of material, some indication of the constitutionality of exemptions for religious structures may be discerned from the few cases that exist.

*City of Boerne v. Flores*

The concurrence mentioned above came in the case *City of Boerne v. Flores,*[106] which primarily addressed the constitutionality of the Religious Freedom Restoration Act (“RFRA”).[107] Following the denial of a permit to enlarge a church building by the City of Boerne under a historic preservation ordinance, Archbishop Flores of San Antonio brought suit under the Religious Freedom Restoration Act challenging the constitutionality of the ordinance.[108] While the plaintiff sought declaration of the historic preservation ordinance to be a violation of the constitutional right to free exercise of religion and protection under RFRA, the Court considered the constitutionality of RFRA itself.

RFRA was passed in direct response to the Supreme Court decision in *Employment Div., Dept. of Human Resources v. Smith,*[109] which held that “neutral, generally applicable laws may be
applied to religious practices even when not supported by a compelling government interest.”[110] RFRA restricted government from substantially burdening a person’s exercise of religion even where the burden resulted from a law of general applicability unless the government could satisfy a two part test: 1) the law was in furtherance of a compelling governmental interest and 2) the law is the least restrictive means of furthering that interest.[111] Essentially, RFRA was an attempt by Congress to codify the “least restrictive means” and “compelling governmental interest” test that exists for laws that are not neutral and generally applicable to laws that are. The Supreme Court ruled RFRA unconstitutional, because it was beyond the enforcement power possessed by Congress under the 14th Amendment. While Congress has authority to enact preventive measures through the 14th Amendment to protect constitutional rights, “there must be a congruence between the means used and the ends to be achieved.”[112] In its ruling, the Court held that RFRA “reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.”[113] The sweeping measures of RFRA were beyond the power of Congress to enact under Section 5 of the 14th Amendment, and the statute was declared unconstitutional on these grounds.[114]

In addition to joining in the opinion of the Court that held RFRA unconstitutional as beyond the power of Congress to enact,[115] Justice Stevens addressed an additional ground upon which RFRA may have been unconstitutional. The concurrence is short and pointed, and worth reproducing in its entirety:

“In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a ‘law respecting an establishment of religion’ that violates the First Amendment to the Constitution. 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.”[116]

While the Court did not address establishment clause issue raised by Stevens, the words of his concurrence provide a warning against exemptions for religious structures and uses in land use and historic preservation ordinances. At the very least, any explicit exemption for religious structures will likely be held constitutionally suspect. While Stevens’ concurrence is the only mention of exemptions for religious uses and structures at the federal level, a few state courts have also ruled on the matter.

First Covenant Church of Seattle v. City of Seattle

In a holding similar to the reasoning in Justice Stevens’ concurrence, the Supreme Court of Washington found a provision in the Seattle historic preservation code that created an exemption for alterations to historic structures due to liturgical requirements unconstitutional. In First Covenant,[117] a congregation challenged the constitutionality of Seattle’s landmarks ordinance and the designation of its church as a historic landmark on free exercise grounds.[118] The court ultimately ruled that the Seattle landmarks ordinance, as applied to churches, was an unconstitutional restriction on the free exercise of religion.[119] Curiously, the court held the designation of the church as a historic landmark unconstitutional despite the existence of a provision in the ordinance that exempted necessary alterations to designated structures due to liturgical requirements. Rather than see the exemption as a measure that would counteract any potential free exercise violation, the court found the exemption itself to be unconstitutional on establishment clause grounds.[120] According to the court, the liturgical exemption was “an unnecessary entanglement,” as “the City reserves the right to oversee and challenge First
Covenant’s decisions about what is liturgy and what is a valid religious purpose.”[121] The court went on to characterize the exemption as “exactly the kind of religious entanglement the Constitution seeks to avoid.”[122]

The First Covenant case provides an example of the problems warned of in Justice Stevens’ concurrence. Going further, the Seattle ordinance exemption demonstrates the entanglement problems that may arise when government attempts to define elements necessary or central to religious practice. As the Supreme Court reasoned in Smith, “it is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds.”[123] While blanket exemptions for religious structures and uses may create special privileges for religious institutions, exemptions that rely on definitions of liturgical or religious practice requirements may be unnecessary entanglement in the affairs of religion. Both provisions violate the establishment clause of the First Amendment. A final state case finds otherwise.

*East Bay Asian Local Development Corp. v. State of California*

In *East Bay*, a secular nonprofit landmarks preservation group brought an action for declaratory and injunctive relief challenging the constitutionality of an amendment to the California state historic preservation ordinance that created an exemption for the non-commercial property of religious organizations.[124] The plaintiffs put forth the very argument expressed in Justice Stevens’ concurrence, that the amendment violated “the establishment clause of the First Amendment by conferring a benefit on religious organizations that is not extended to nonreligious entities that own non-commercial property that has been designated a landmark.”[125] The California Supreme Court held that the exemption in question did not
confer a benefit upon religious organizations, stating “there is no measurable or identifiable cost
to others that can be attributed to an exemption from landmark status”[126] and that, even where
benefit is conferred, “not every law that confers an indirect, remote, or incidental benefit upon
religious institutions is, for that reason alone, constitutionally invalid.”[127] The court found the
state exemption from historic landmark ordinances for religious properties to be valid state
action necessary to avert potential free exercise claims, and a “permissible neutral purpose to
alleviate a significant governmental interference with the ability of a religious organization to
carry out its religious mission.”[128]

Interestingly, a dissent by Justice Werdegar comes eerily close to the statements made by
Justice Stevens in his concurrence. Arguing that the exemption does confer a benefit upon
religious organizations, Justice Werdegar states that the exemption allows religious institutions
to “exempt themselves from certain land use regulations, while no comparable relief is provided
to nonprofit secular organizations whose noncommercial activities may be similarly affected by
the same regulations.”[129] The dissent goes on to state “particularly in the area of land use,
where pervasive legal regulation forms the background for private action, a special exemption
from regulation constitutes a benefit to the property owner, both absolutely and relative to others
in the marketplace.”[130] While the Court found the exemption for religious organizations to be
constitutional, the issue of whether such an exemption confers a benefit remains a disputable
issue.

The cases reviewed above cover the various issues that arise concerning exemptions to
historic preservation ordinances for religious uses and structures. While no clear rule may be
discerned regarding potential exemptions, the issues raised by the reviewed cases must be considered when crafting any exemption for religious properties under historic preservation laws.

Exemptions and the Free Exercise Clause

Just as an exemption for religious structures may implicate the Establishment Clause of the First Amendment, a lack of exemption may lead to a Free Exercise Clause violation. Following the Supreme Court’s ruling in City of Boerne v. Flores finding RFRA unconstitutional, Congress passed the Religious Land Use and Institutionalized Persons Act.[131] RLUIPA remains the framework under which free exercise challenges to local land use and historic preservation ordinances should be brought. Congress crafted RLUIPA to avoid the overextension grounds on which RFRA was found to be unconstitutional. Like RFRA, RLUIPA holds that “no government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution A) is in furtherance of a compelling government interest; and B) is the least restrictive means of furthering that compelling government interest.”[132] In contrast to the broad language of RFRA, RLUIPA limits it applicability to specific circumstances, including where the substantial burden is imposed by a land use regulation under which the government makes “individualized assessments of the property involved.”[133] Additionally, RLUIPA features a provision that expands the definition of religious exercise to include “the use, building, or conversion of real property for the purpose of religious exercise.”[134]

This language strikes at the heart of nearly every land use, zoning, and historic preservation ordinance in the United States. As established in the Penn Central case, historic preservation is
by its very nature a practice conducted by individualized assessment of property. While the individualized assessment may be part of a larger program for historic preservation, assessment of historical significance and landmark restrictions apply only to selected parcels.[135] Despite this clear language, the constitutionality of the land use provisions of RLUIPA remains unsettled. An analysis of the cases that have held on the matter follows.

*Freedom Baptist Church of Delaware County v. Tp. of Middletown*

In the first case to raise the constitutionality of the land use provisions of RLUIPA, a church that sought to operate in the ground floor of an office building challenged the denial of a zoning variance by a township, and the zoning provisions upon which the variance and regulation banning religious uses in office buildings, as violations of the right to free exercise of religion.[136] In response, the township argued that RLUIPA was a violation of the establishment clause because it “impermissibly advances religion” and “clearly shows favoritism for those in a religious organization over those who are not part of one.”[137]

The U.S. District Court for the Eastern District of Pennsylvania declined to address the establishment clause element of the case, stating “what we have here is a Free Exercise case, and not an Establishment Clause case,” basing this determination on the fact that the Supreme Court in Boerne declined to find RFRA unconstitutional on Establishment Clause grounds where RFRA featured provisions similar to RLUIPA.[138] Analyzing the free exercise claim, the court finds the land use provisions of RLUIPA “constitutional on their face as applied to states and municipalities.”[139] Reasoning that “land use regulations through zoning codes necessarily involve case by case evaluations of the propriety of proposed activity against extant land use regulations,” they are therefore “of necessity different from laws of general applicability.”[140]
According to the Court, Congress did not exceed its power under the 14\textsuperscript{th} Amendment because the land use provisions of RLUIPA, unlike those found unconstitutional in RFRA, are targeted to land use regulations that conduct individualized assessment of property with “the obvious – and for Congress unacceptable – concomitant risk of idiosyncratic application.”[141]

Under the ruling in the Freedom Baptist case, historic preservation ordinances that do not feature exemptions for religious structures face free exercise challenges under RLUIPA. Despite several cases that have had rulings similar to that in Freedom Baptist,[142] the constitutionality of the land use provisions of RLUIPA remains an open question. A case from the Central District of California has held the land use provisions of RLUIPA unconstitutional.

\textit{Elsinore Christian Center v. City of Lake Elsinore}

In the \textit{Elsinore} case, a congregation brought an action under RLUIPA alleging free exercise violations following the denial of a conditional use permit for allowing it to operate a church on property it had contracted to purchase.[143] As with in the Freedom Baptist case, the city challenged the constitutionality of RLUIPA on establishment clause grounds.[144] While declining to address the establishment clause argument on the basis of superfluousness, the Court likened RLUIPA to RFRA and determined it to be unconstitutional on the same grounds.[145] Like RFRA, the Court held that RLUIPA “exceeds Congress’s power under Section 5 of the Fourteenth Amendment.”[146] Upon reviewing the legislative record for RLUIPA, the court found “a relatively small number of anecdotal instances in which religious assemblies were dissatisfied with zoning decisions or regulations, few of which constitute state or municipal action of a clearly unconstitutional character.”[147] In an earlier ruling, the Court found
RLUIPA to be “a blunderbuss of a remedy” that could not possibly be described as “congruent and proportional to the perceived injury” it was designed to correct.[148]

The court based its ruling on a finding that RLUIPA did not merely codify existing jurisprudential precedent, but rather “mandates a sea change in the relevant standard of review,” as “a church’s status as a religious institution entitles it to strict scrutiny review of any governmental action restricting its religious use of land, regardless of the degree to which that action fails to take account of religious hardship, or relates to or impinges upon the church’s central religious beliefs or mission.”[149] Attacking the expanded definition of “religious use” contained in RLUIPA, the court held that the statute defined protected religious exercise far more broadly than it had ever been interpreted regarding land use.[150] The result of such a broad redefinition of First Amendment rights, warns the court, is likely to be that “many land use decisions risk being invalidated despite being legitimately motivated, simply because the aggrieved landowner is a religious actor.”[151] The land use provisions of RLUIPA run contrary to previous Supreme Court findings that a burden on a religious assembly’s use of land has not generally been held to amount to a substantial burden on central religious practice under the Free Exercise Clause.[152]

As demonstrated by the cases analyzed above, the constitutionality of the land use provisions of RLUIPA remains an open question. Should RLUIPA be upheld, every historic preservation ordinance that does not exempt religious structures may qualify as a violation of the Free Exercise Clause. Should RLUIPA be found unconstitutional, historic preservation ordinances may still be found to violate the Free Exercise Clause if they place a substantial burden on the exercise of religion or involve unnecessary government entanglement with religion. These
significant issues were addressed by two prominent cases prior to the passage of RLUIPA. While the holdings in these cases may be rendered moot under RLUIPA, they offer insight into the interaction of historic preservation and the free exercise of religion.

Significant Rulings Prior to RLUIPA

Prior to RLUIPA, the rulings in two cases informed the interaction between historic preservation restrictions on religious structures and the Free Exercise Clause of the First Amendment. In the first of these cases, *Rector, Wardens, and Members of Vestry of St. Bartholomew’s Church v. City of New York,* members of St. Bartholomew’s Church in Manhattan challenged the New York City landmarks ordinance on the grounds that it violated both the Free Exercise clause and the Establishment clause of the First Amendment. The landmarks designation involved a community house that the church wished to demolish for real estate development. The community house was adjacent to the church building and used for religious activities and non-religious activities. In 1984, the church applied for a certificate of appropriateness to permit the demolition of the community house and replacement with an office tower. When the application was denied twice, the church sought a hardship exception to the requirements of the landmark designation, based on the argument that the community house was inadequate for the charitable activities of the church and income from the proposed office tower was necessary to fund church activities. Upon denial of the hardship exception, the church filed suit against the City of New York.

In finding for the City, the U.S. Court of Appeals for the Second Circuit held that the landmarks designation did not implicate the free exercise clause. According to the court, past Supreme Court decisions “indicate that neutral regulations that diminish the income of a religious
organization for not implicate the free exercise clause.”[160] The historic preservation ordinance also did not violate the establishment clause, as the only scrutiny imposed by the regulation “occurred in the proceedings for a certificate of appropriateness, and the matters scrutinized were exclusively financial and architectural”[161] The court added “this degree of interaction does not rise to the level of unconstitutional entanglement.”[162] The church also filed a takings claim in the case, which the court briefly addressed and dismissed as without merit on the basis of the Penn Central precedent.[163]

The second significant case to involve historic preservation and the free exercise clause prior to RLUIPA was First Covenant.[164] covered supra. In its Free Exercise claim against the Seattle landmarks ordinance, the church argued that the “church building itself is an expression of Christian belief and message and that conveying religious beliefs is part of the building’s function.”[165] The Court agreed with the church, stating that “the relationship between theological doctrine and architectural design is well recognized” and that the “exterior and the interior of a structure are inextricably linked.”[166] Continuing, the Court held that when both exterior and interior “are freighted with religious meaning that would be understood by those who view it, then the regulation of the church’s exterior impermissibly infringes on the religious organization’s right to free exercise and free speech.”[167] Balancing the city’s interest in preserving historic structures with the church’s right to free exercise of religion, the Court held that “the possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom” and that “the City’s interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant’s right to freely express religion.”[168]
Both *St. Bartholomew’s* and *First Covenant* address issues that are likely to arise concerning the designation of religious structures in the absence of an exemption for religious structures in a historic preservation ordinance. As was seen in *First Covenant*, however, the presence of a liturgical exemption was insufficient to prevent the Court from finding a free exercise violation, and may have violated the establishment clause.\textsuperscript{[169]} With the current controversy over the land use provisions of RLUIPA, these cases provide insight into the complex interaction between the free exercise clause and historic preservation of religious structures.

**III. ST. GELASIUS CASE STUDY**

As mentioned in the introductory paragraphs of this paper, recent events surrounding the proposed demolition of St. Gelasius Roman Catholic Church in Chicago provide an excellent case study of the issues involved whenever historic preservation and religious freedom interests collide. Prior to exploring the St. Gelasius example further, however, it is necessary to address why St. Gelasius, and so many other religious structures throughout the country, faced the wrecking ball in the first place.

**The Problem of Historic Religious Structures**

The proposed demolition of St. Gelasius church is indicative of a problem faced by communities and churches in cities and villages throughout the nation. Communities throughout the nation are faced with difficulties involving the historic preservation of aging and abandoned religious structures. Faced with declining attendance, centralized churches (such as the Catholic church) must make a difficult choice between closing parishes or continuing to expend precious resources on the upkeep of buildings, often old and elaborate, that remain empty on
The maintenance of empty old buildings is not the primary mission of any church.
Church resources are intended to fund ministry activities, not roof repairs for vacant structures.
In the eyes if many churches, the structures are merely vessels for transmission of the word of God, no matter how elaborate, beautiful, historic, or architecturally significant the vessel may be.
In a time of declining congregation membership, changing demographics, and scandals, church resources are often stretched thin.

Religious structures located in urban area are often the most at risk of demolition or destruction.
Due to suburbanization and changing demographics, buildings that once overflowed with parishioners now serve much smaller congregations, if any at all. The problem is acute in older urban areas, where each ethnic group may have built its own church. In cities like Chicago, this was the established practice encouraged by the Archdiocese.[170] As an example, there were once twelve separate Catholic parishes within a single square mile of the Bridgeport neighborhood on Chicago’s near south side, with some churches not more than a single block away from another.[171] As population densities decreased and ethnic divisions diminished over generations, the separate churches became redundant but costly infrastructure. Competition between nearby parishes meant promoted the construction of ever more elaborate and large structures, structures that are now largely empty and expensive to maintain.

Faced with declining revenues, smaller congregations, and increasing costs, many churches are reluctant to permit the designation of their structures as historic landmarks. In addition to the restrictions on demolition and alteration, the concept of “demolition by neglect” and the attendant enforcement mechanisms of many historic preservation ordinances may require expenditure of funds that could otherwise go toward ministry. When unwillingness to designate
the buildings under a historic preservation ordinance is paired with reluctance to reuse or sell the religious structure for non-religious purposes and increasing maintenance costs, demolition of the building often becomes the only viable option. As a result, many significant religious structures have been lost in recent years.

The problem of historic preservation of religious structures has become so widespread that the National Trust for Historic Preservation, a national preservation advocacy organization included “urban houses of worship nationwide” on its list of the eleven most endangered places for 2003. Locally, the Landmarks Preservation Council of Illinois has included several religious structures on its statewide and Chicagoland “ten most endangered” lists over the years. Aging buildings, combined with declining congregations, mean that the trend is likely to get worse before it improves.

The Demolition of St. Gelasius

Like many urban church structures in cities throughout the country, St. Gelasius Roman Catholic Church appeared destined for oblivion. A declining congregation and mounting maintenance costs had led to its closure by the Archdiocese. Unlike many of its brethren, however, St. Gelasius Church was ultimately saved from demolition. The peculiar events surrounding the proposed demolition of St. Gelasius Church in Chicago may serve as a case study of the conflict between historic preservation and the religion clauses of the First Amendment.

Following the incident between the nun (ironically, on the side of the city against her own church) and the utility company employees in July 2003, community response to preserve St. Gelasius church was immediate and urgent. Faced with the potential demolition of a
Woodlawn landmark, nearby residents and concerned citizens throughout the Chicago area contacted the city to determine how it was that the archdiocese could be allowed to demolish a structure of potential historical significance without notice. The previous year, the Chicago Municipal Code section regarding demolitions had been amended to provide for a mandatory 90-day demolition hold period for demolition permit applications received for potential historic structures.[175] Over the previous two decades, every structure in the City of Chicago constructed prior to 1940 had been surveyed and evaluated for potential historical or architectural significance, then ranked on a color-coded scale.[176] The Chicago Historic Resources Survey ranked structures possessing the most potential significance either red or orange. Approximately 300 structures were ranked “red,” indicating that they possessed some architectural feature or historical association that made them potentially significant in the broader context of the City of Chicago, the State of Illinois, or the United States of America.[177] Buildings classified “red” by the survey include the Monadnock Building and the Tribune Tower. Approximately 9,600 additional properties were ranked “orange,” indicating they possessed some architectural feature or historical association that made them potentially significant in the context of the surrounding community.[178] Buildings classified “orange” include the former Montgomery Ward warehouse along the Chicago River and the Three Arts Club building on North Dearborn Parkway.

The demolition hold provision of the Chicago Municipal Code specified, in part, “if a building or structure is color coded orange or red in the Chicago Historic Resources Survey published in 1996, no demolition permit shall be issued for a period not to exceed 90 days in order to enable the department of planning and development to explore options to preserve the building or structure, including, but not limited to, possible designation of the building or structure as a
Chicago landmark.”[179] St. Gelasius Church had received an “orange” rating, yet no hold had been placed on the demolition permit application and no public notice of the pending demolition had been given. Faced with community opposition to the demolition plans, the city halted the demolition permitting process, citing “irregularities in the permit application.”[180]

In late August, 2003, a large rally of community residents and preservation advocates is held on the steps of St. Gelasius to raise awareness of the structure, protest the Archdiocese’s plans to demolish the church, and support designation of the structure as a historic landmark.[181] At the rally, the local alderman pledges to “lay down in front of the bulldozer” to save St. Gelasius from demolition.[182] In September, the movement to preserve St. Gelasius gains momentum when the City of Chicago Landmarks Commission takes the first steps toward preliminary designation of the church as a Chicago landmark, subject to the protections of the Chicago landmarks ordinance.[183]

Initially, it was thought that designation could not proceed without the consent of the Archdiocese, because the landmarks ordinance contains an exemption for religious structures.[184] According to the ordinance, “no building that is owned by a religious organization and is used primarily as a place for the conduct of religious ceremonies shall be designated as a historical landmark without the consent of its owner.”[185] The provision had been added to the landmarks ordinance during the late 1980s, following several contentious attempts to designate religious structures in Chicago.[186] A closer reading of the provision, revealed a potential loophole that would allow the designation of St. Gelasius against the wishes of the Archdiocese. Focusing on the clause “and is used primarily as a place for the conduct of religious ceremonies,”[187] the City of Chicago Law Department argued that the exemption did
not apply to St. Gelasius because the building had been vacant for over a year and was not used for anything, much less the conduct of religious ceremonies.[188] With support from the Mayor, Alderman, and community, the Landmarks Commission proceeded to designate St. Gelasius as a preliminary landmark.[189]

In response, the Archdiocese put forth two arguments. First, the clause “and is used primarily as a place for the conduct of religious ceremonies”[190] did not refer to active use but was merely a descriptive phrase, describing buildings that, when used, are used for primarily for religious ceremonies.[191] Mere vacancy did not change the primary use of the structure; a church is still a church even when empty. Under this interpretation, the St. Gelasius church building would still fall under the exemption. Second, the restrictions placed on the alteration of structures by designation as historic landmarks violate the free exercise clause of the First Amendment, because the structure itself is an expression of religious ceremony and worship.[192] Any restrictions placed on the appearance of the structure would infringe upon religious practice. This is particularly true of Catholic churches, which must conform to liturgical standards. The very shape of a typical Catholic church, with its long nave, short apse, and intersecting transept in the shape of a cross, is an expression of religious practice.

Despite threats of a legal challenge from the Archdiocese, the City of Chicago proceeded with the historic landmark designation process. Acting on a recommendation from the Landmarks Commission, the Chicago City Council voted to designate St. Gelasius a Chicago landmark in January, 2004.[193] The Archdiocese has not challenged the designation, and St. Gelasius remains a landmark. Landmark status has not prevented the return of religious activities to the structure. In an attempt to prevent designation prior to the City Council vote, the
Archdiocese announced intentions to transfer the building to the Institute of Christ the King Sovereign Priest, an apostolic order within the Catholic Church.[194] The order plans to renovate the building for its national headquarters, and rehabilitation work is currently proceeding.[195]

Designation of St. Gelasius as a landmark proceeded despite the announcement of the Archdiocese of the return to religious use. At the time of designation, the structure remained vacant and, according to the Chicago Law Department, not subject to the exemption in the landmarks ordinance. Should the current occupants of St. Gelasius wish to pursue de-listing of the building as a landmark, the move would require approval of the Landmarks Commission and the City Council. With the landmarks ordinance restrictions now in place and active use of the structure for religious ceremonies, perhaps a legal challenge to the designation of St. Gelasius on free exercise grounds may yet transpire.

Lessons of St. Gelasius

The designation of St. Gelasius as a historic landmark raised several aspects of the interaction between historic preservation of religious structures and the religion clauses of the First Amendment. Through analysis of the events and statutes involved in the St. Gelasius controversy, insight into the careful balance between free exercise and establishment violations required by the historic preservation of religious structures.

Like many other historic preservation ordinances, the Chicago landmarks ordinance features an exemption for religious structures.[196] As demonstrated by the differing interpretations of the same clause offered by the Chicago Law Department and the Archdiocese,
the precise terms of the exemption remain unclear.[197] The ambiguity resembles the entanglement between government and religion warned against by the Court in *First Covenant*. Like the Seattle ordinance, the Chicago ordinance features undefined terms that necessitate the government determination of what is and what is not a religious practice. While the Seattle ordinance referred to liturgical requirements, the Chicago ordinance requires the city to interpret what practices qualify as religious ceremonies and which organizations qualify as religious organizations. With no established definitions, this vague provision may stray too close to unnecessary entanglement and beyond the scrutiny of non-religious matters the Court found of the New York City ordinance in *St. Bartholomew’s*. [199]

Additionally, the mere existence of the exemption may implicate the establishment clause as described by Justice Stevens in his concurrence to the *Boerne* opinion.[200] Like RFRA, the religious structures exemption in the Chicago ordinance creates an avenue of relief from the requirements of the historic landmarks ordinance that is not available to non-religious structures. While the *East Bay* court found there to be no benefit conferred by an exemption to historic preservation ordinance requirements, [201] the savings to the Archdiocese in maintenance costs alone would likely qualify as a benefit. Had the exemption applied, the designation of St. Gelasius not been approved, and the demolition proceeded as planned, the Archdiocese would have enjoyed thousands of dollars in savings on maintenance that would have otherwise been performed. As mentioned in the Werdegar dissent to *East Bay*, freedom from the requirements of an ordinance can be a benefit unto itself. [202] While the constitutionality of RLUIPA remains unsettled, the *Elsinore* case again raises the specter of establishment clause violation due to an exemption for religious organizations based solely on their status as religious organizations.[203]
Under the *Elsinore* (and Justice Stevens) reasoning, the exemption for religious structures in the Chicago landmarks ordinance would not pass establishment clause review.

Had the Archdiocese pursued a challenge to the Chicago landmarks ordinance on free exercise grounds, the result would be unclear. The argument against designation offered by the Archdiocese closely resembles that raised by the church in First Covenant.[204] Where the structure is inextricably intertwined with religious practice, being an expression of religious exercise itself, then any restrictions placed upon the appearance of that structure interfere with free expression. The provisions of the Chicago landmark ordinance require strict compliance with established renovation and alteration guidelines.[205] These guidelines may prohibit the alteration of a religious structure despite the requirements of the religion practiced therein.

Additionally, relief may be available under RLUIPA. The provisions of RLUIPA clearly state that land use ordinances (of which historic preservation ordinance are but one form) may not substantially burden the free exercise of religion when the ordinance is administered through individual assessments of property. Since all historic preservation ordinances involve the individual assessment of property, as established by *Penn Central*, the Chicago landmarks ordinance likely would not apply to St. Gelasius under RLUIPA.

The law surrounding the historic preservation of religious structures remains unclear. While the events surrounding the St. Gelasius landmark designation demonstrate the complexity of the issues involved when historic preservation interests intersect with the religion clauses of the First Amendment, few definite answers exist in this evolving area of law.

**IV. CONCLUSION**
If the St. Gelasius case study establishes anything, it is that the Chicago Landmarks Ordinance may not offer the ideal process for the designation of religious structures. Under current case and statutory law, the religious structures exemption may be too vague and undefined to avoid establishment clause violation, yet too under-inclusive to avoid free exercise violation. The question remains, what, if anything, is the answer?

The answer may be simple. Historic preservation ordinances should provide for the designation of religious structures as landmarks without need for religious use exemptions. While the constitutionality of the land use provisions of RLUIPA has not been determined, the existing Supreme Court and Circuit Court decisions tend to support the imposition of historic preservation restrictions on religious properties without implication of the free exercise clause. The *Penn Central* case established historic preservation as a legitimate use of the police power, and the *St. Bartholomew’s* case established that historic preservation provisions may apply to structures used for religious purposes without being an undue burden on the exercise of religion. When given the chance to strike down a historic preservation ordinance that applied directly to a church in *Boerne*, the Supreme Court declined to do so, choosing to strike down the federal statute that created an exemption for religious uses instead.

While the Washington Supreme Court in *First Covenant* found religious practice to be inextricably tied to religious structures, this view has not gained widespread acceptance in other cases. The connection between religious structures and religious expression may be too tenuous a link. Additionally, numerous historic preservation ordinances around the country, such as that of Baltimore, permit the designation of religious structures without owner consent, and the dearth
of cases in this area may serve witness to the frequency with which these designations see challenge.

The alternative to not providing an exemption for religious uses is to include an exemption. This route appears more problematic than designation without exemption. Any exemption would necessarily involve determination of what is and what is not a religious practice or use, and such questions skirt dangerously close to an establishment clause violation through unnecessary entanglement. As stated by Justice Stevens in his concurrence to Boerne, any exemptions would also border on establishment clause violation by their very existence.

While no clear prescribed method for the designation of religious structures as historic landmarks has emerged, the available case law appears to indicate that simple designation without exemptions may be the best option. As demonstrated by the analysis in this paper, the interaction of historic preservation and First Amendment religion clause issues caused by the designation of religious structure is a complex and emerging area of law. Within the past fifteen years, two federal statutes have been passed in attempts to clarify the issues, yet the rules remain unclear.

[3] Id.
[4] Id.
[5] Id.
By 2006, nearly all cities, towns, villages, and counties in the United States had adopted some kind of zoning regulation. The most notable exception to this has been the City of Houston (4th largest city in the U.S. as of the 2000 census), which remains the largest U.S. city without zoning controls. Interestingly, and somewhat consequentially, Houston is also the home of the world’s tallest building located outside a central business district. At 64 stories and 909 feet, the Williams Tower dominates the surrounding residential and commercial areas of the Uptown District.

[27] Id. at 379-380.

[28] Id. at 382.

[29] Id. at 383.

[30] Id.

[31] Id. at 385.

[32] Id. at 397.

[33] Most notably at Mount Vernon in Virginia, protected by the Mount Vernon Ladies’ Association since 1889.

[34] http://home.cc.umanitoba.ca/~mcgonig/CityPlanning/penn.htm


[37] Id.

[38] Id.


[41] Penn Central, 438 U.S. at 108.

[42] 16 U.S.C. § 470(b)

[43] An overlay district is a special zoning classification, usually designed to achieve a specific purpose, that may affect (or overlay) several zoning districts. The overlay district typically does not include regulations for all matters of zoning, only for the matter it is designed to affect. An example would be a downtown sign district, designed to limit the size and placement of signs in a downtown area, which may apply to commercial, residential, and industrial zones. The individual commercial, residential, or industrial zoning classifications regulate the buildings and uses in each zone, but the overlay district regulates the signs in the area it affects.

[44] As made applicable to the states under the 14th Amendment.

Penn Central Transportation was a company that resulted from the merger of the New York Central Railroad and the Pennsylvania Railroad. Somewhat ironically, the Pennsylvania Railroad was the party responsible for the destruction of Pennsylvania Station, the impetus for the very historic preservation ordinance challenged in *Penn Central*.

The Landmarks Commission report recommending designation of the building as a landmark read, in part, “Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts.” as quoted in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 116 (1978).

Regarding the plans for the office building, Jacqueline Kennedy Onassis, an ardent supporter of the terminal, famously stated "Is it not cruel to let our city die by degrees, stripped of all her proud monuments, until there will be nothing left of all her history and beauty to inspire our children? If they are not inspired by the past of our city, where will they find the strength to fight for her future? Americans care about their past, but for short term gain they ignore it and tear down everything that matters. Maybe... this is the time to take a stand, to reverse the tide, so that we won't all end up in a uniform world of steel and glass boxes." As quoted at http://en.wikipedia.org/wiki/Grand_Central_Terminal.

Elaborating upon this finding, the Landmarks Commission stated “[We have] no fixed rule against making additions to designated buildings-it all depends on how they are done · · · . But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The ‘addition’ would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

“Landmarks cannot be divorced from their settings-particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way-with alterations and additions of
such character, scale, materials and mass as will protect, enhance and perpetuate the original
design rather than overwhelm it.” Quoted in Penn Cent. Transp. Co. v. City of New York 438

[57] Penn Central, 438 U.S. at 122.

[58] Id. at 129.

[59] Id. at 133.

[60] Id. at 136.

[61] Id. at 131.

[62] Id. at 132.

[63] Id. at 131.


[68] Id.

[69] The Commissioner of Planning and Development is the Director of the Department of
Planning and Development for the City of Chicago, a position also appointed by the Mayor.


[71] The Commissioner of Housing and Community Development is the Director of the
Department of Housing and Community Development for the City of Baltimore, a position also
appointed by the Mayor.


[73] One member each from the Greater Baltimore Committee (a community revitalization civic
organization), Baltimore Heritage (a nonprofit historic preservation organization), Preservation
Maryland (a statewide historic preservation advocacy group), and the Baltimore City Historical
Society.

As a demonstration of the balance of competing interests, it is common practice to require representation on the historic preservation commission of the local real estate profession and private landowners. Real estate professionals and private landowners frequently clash with historic preservation interests and often raise issues that may be overlooked by preservation professionals. The strict member qualification requirements specified by the Baltimore ordinance are an excellent example of how real estate/landowner interests may be balanced with historic preservation interests through diversity in commission membership.

Additional duties of the Chicago Landmarks Commission include an ongoing survey of properties in Chicago for identification of potential landmarks and districts, the manufacture and installation of plaques identifying the significance of designated landmarks, publication of descriptive materials about the designated landmarks, providing assistance to property owners about potential landmark designation and benefits available to landmarked properties, oversight of nominations to the National Register of Historic Places, and cooperation with historic preservation advocacy groups. There is also a catch-all provision that grants the commission “any other power or authority necessary or appropriate to carry out the purpose of these provisions.”

Properties listed on the National Register of Historic Places must meet at least one of four criteria: association with a person of significance to American history, association with an event of significance to American history, be representative of an architectural style or movement, or be archeological ruins or significant to ancient history.

The National Register of Historic Places is a designation program overseen by the United States Department of the interior. The National Register is merely a recognition program and does not carry any protections. Properties on the National Register may still be demolished or altered without penalty. Local historic preservation ordinances are the only means of protecting historic properties from demolition or alteration. Listing on the National Register does carry with it eligibility for federal property restoration tax credits, however.

The full seven criteria to be considered for each proposed property follow: 1. Its value as an example of the architectural, cultural, economic, historic, social, or other aspect of the heritage of the City of Chicago, State of Illinois, or the United States; 2. Its location as a site of a significant historic event which may or may not have taken place within or involved the use of any existing improvements; 3. Its identification with a person or persons who significantly contributed to architectural, cultural, economic, historic, social, or other aspect of the
development of the City of Chicago, State of Illinois, or the United States; 4. Its exemplification of an architectural type or style distinguished by innovation, rarity, uniqueness, or overall quality of design, detail, materials or craftsmanship; 5. Its identification as the work of an architect, designer, engineer, or builder whose individual work is significant in the history or development of the City of Chicago, the State of Illinois, or the United States; 6. Its representation of an architectural, cultural, economic, historic, social, or other theme expressed through distinctive areas, districts, places, buildings, structures, works of art, or other objects that may or may not be contiguous; 7. Its unique location or distinctive physical appearance or presence representing an established and familiar visual feature of a neighborhood, community, or the City of Chicago.


[89] Id. at § 2-120-690.

[90] A common complaint against stricter guidelines is the requirement that deteriorated wooden window frames be replaced with wooden window frames. This strict (and expensive) requirement earned many historic preservation commissions the derogatory nickname “hysterical preservationists.” Wood windows are notoriously expensive and susceptible to the elements, and suitable aluminum windows that mimic historical designs and the appearance of wood are now available. Many ordinances now allow the replacement of deteriorated historic materials with sympathetic materials, with exact matching materials required only for properties of extreme significance. The tyranny of “wood windows” is now mostly at an end.

[91] Local guidelines for the alteration, renovation, or restoration of historic structures typically follow the Standards for Rehabilitation of Historic Structures published by the United States Secretary of the Interior, 36 C.F.R. 67.

[92] For example, the Village of Plainfield, Illinois, permits designation only with owner permission. While designated properties are subject to design, alteration, and demolition review by the historic preservation commission, owners of designated properties may remove their properties from designation at any time. The historic preservation ordinance operates as a local National Register in effect, conferring recognition without any protection.


[94] Id. at § 5-3.

[95] Id.


For example, the Connecticut Trust for Historic Preservation defines demolition by neglect as “the destruction of a building through abandonment or lack of maintenance.”

http://www.cttrust.org/index.cgi/1050.

Balt. City Code Ordin. (Md.) Art. 6, § 1-1 (2006). Under this provision, “the term ‘demolition’ for the purposes of and as used in this article includes “demolition by neglect”, which term means willful neglect in the maintenance or repair of a building or structure, resulting in any of the following conditions: (1) the deterioration of any exterior architectural feature so as to create or permit the creation of a hazardous or unsafe condition; (2) the deterioration of exterior walls or other vertical supports; (3) the deterioration of roofs or other horizontal members; (4) the deterioration of exterior chimneys; (5) the deterioration or crumbling of exterior plaster or mortar; or (6) the ineffective waterproofing of exterior walls, roofs and foundations, including broken windows and doors.”


Balt. City Code Ordin. (Md.) Art. 6, § 3-1 et seq. (2006).


Boerne, 521 U.S. at 511 (1997).


Boerne, 521 U.S. at 514 (1997).


Boerne, 521 U.S. at 529-530 (1997).

Id. at 533.

Id. at 507.
Interestingly, although City of Boerne held that RFRA could not constitutionally apply to the states under the 14th Amendment, the Court did not address applicability of the statute to the federal government. Since Boerne, several courts have held that RFRA remains effective as to the federal government. See Kikamura v. Hurley, 242 F.3d 950, 959-60 (10th Cir. 2001).


First Covenant Church of Seattle v. City of Seattle, 120 Wash.2d 203 (Wash. 1992).

Id. at 214.

Id. at 223.

Id. at 222.

Id. at 221.

Id. at 221-222.


East Bay Asian Local Development Corp. v. State of California, 24 Cal.4th 693 (Cal. 2000).

Id. at 704-705.

Id. at 714.

Id. at 705.

Id. at 713.


Id. at 729.


Id. at § 2000cc(a)(1).

Id. at § 2000cc(a)(2)(c).

Id. at § 2000cc(b)(7)(b).

Penn Central, 438 U.S. at 132.

[137] *Id.* at 862.

[138] *Id.* at 865.

[139] *Id.* at 874.

[140] *Id.* at 868.

[141] *Id.* at 874.


[144] *Id.* at 1087.

[145] *Id.* at 1102.

[146] *Id.*

[147] *Id.*


[150] *Id.* at 1100.

[151] *Id.* at 1102.

[152] *Id.* at 1100.


[154] *Id.* at 352.

[155] *Id.* at 350.
[156] Id. at 351.

[157] Id.

[158] Id. at 352.

[159] Id. at 355.

[160] Id.

[161] St. Bartholomew’s, 914 F.2d 348, footnote 4.

[162] Id.

[163] St. Bartholomew’s, 914 F.2d at 356.

[164] First Covenant, 120 Wash.2d 203.

[165] Id. at 217.

[166] Id.

[167] Id.

[168] Id. at 222-223.

[169] Id. at 221-222.


[177] Id.

[178] Id.


[181] Id.

[182] Id.


[189] Id.


[192] Id.

[193] Id.


[195] Id.


[198] First Covenant, 120 Wash.2d 203.

[199] St. Bartholomew's, 914 F.2d 348.


[201] East Bay., 24 Cal.4th 693.


[204] *First Covenant*, 120 Wash.2d 203.