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2004

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FEDERAL FUNDING FOR THE PRESERVATION OF RELIGIOUS HISTORIC PLACES: OLD NORTH CHURCH AND THE NEW ESTABLISHMENT CLAUSE

Christen Sproule

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."
-- The First Amendment of the United States Constitution[1]

"What would many neighborhoods be like if there were only rubble-strewn empty lots or another batch of fluorescent-lighted fried chicken outlets where these weathered Romanesque and Gothic Revival structures now stand?"
-- Peter Steinfels, The New York Times, November 1, 1997[2]

INTRODUCTION

On May 27, 2003, the National Parks Service of the Department of the Interior announced a $317,000 grant under the "Save America's Treasure's" program for the historic preservation of Boston's Old North Church.[3] The church is the famous site in whose steeple lanterns were hung to signal to Paul Revere in 1775 that the British were coming.[4] Regular worship services are still conducted every Sunday in the 280 year old structure.[5]

This grant marks a major shift in the views of the federal government about the constitutionality of the federal government's role in providing funding for the restoration of historic buildings currently being used for religious purposes.[6] Until this shift in policy, the federal

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[1] U.S. CONST. amend. I.
[2] Peter Steinfels, *Beliefs*, N.Y. TIMES, Nov. 1, 1997, at B7.
[3] News Release, National Park Service, Old North Foundation Awarded $317,000 Grant Under Save America's Treasures Program, (May 27, 2003), *available at* http://www.nps.gov/pub_aff/pressrm.htm.
[4] *The Old North Church Guidebook*, *at* http://www.oldnorth.com/guid.htm (last visited Mar. 13, 2004).
[5] *Id.*
[6] *Compare Constitutionality of Awarding Historic Preservation Grants to Religious Properties*, Memorandumfrom Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to John Leshy, Solicitor, U.S. Department of the Interior (Oct. 31, 1995), *available at* http://www.usdoj.gov/olc/doi.24.htm, *available at* www.usdoj.gov/olc/doi.24.htm *with Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as the Old North Church*, Memorandum from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice, to John Leshy, Solicitor, U.S. Department of the Interior (Apr. 30, 2003), *available at* http://www.usdoj.gov/olc/OldNorthChurch.htm. Note a similar shift in policy regarding FEMA under the Faith Based Initiative. This program is now authorized to provide grants to religious institutions in other policy contexts. *See Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy*, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, For the General Counsel, Federal Emergency Management Agency (Sept. 25, 2002), *available at* http://www.usdoj.gov/olc/FEMAAssistance.htm.

government concluded that the Establishment Clause of the Constitution forbid the use of federal funds for the restoration of historically significant religious buildings that were also used for religious purposes, such as worship or religious instruction.[7] Specifically, the Park Service removed the provision in its application for a grant from this program that previously excluded "[h]istoric properties and collections associated with an active religious organization (for example, restoration of an historic church that is still actively used as a church)."[8] This new policy, in contrast, makes such religious buildings eligible to receive funding from the federal Save America's Treasures program.[9]

On May 28, 2003, the Office of Legal Counsel released an opinion concerning historic preservation grants to religious places.[10] It was upon the authority of this Office of Legal Counsel opinion that the National Park Service made the grant to restore the Old North Church.[11] The opinion reversed the longstanding federal view that governing Supreme Court precedent prohibits such grants as embodied in the previously controlling opinion of the Office of Legal Counsel dated October 31, 1995.[12] Because there is no Supreme Court precedent directly on point, all analysis is based upon analogy to cases in the education and other fields, and conjecture about the future direction of the Establishment Clause doctrine. The opinion concludes that the Constitution permits grants to houses of worship when they are among many beneficiaries, not defined by reference to religion, in a program with broad, secular goals.[13] Secretary of the Interior Gale A. Norton explained the new policy of the administration as such: "This new policy will bring balance to our historic preservation program and end a discriminatory double-standard that has been applied against religious properties. All nationally

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[7] *See* Memorandum from Walter Dellinger, *supra* note 6.
[8] Save America's Treasures: FY 2002 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions* at 1, *available at* http://www.pcah.gov/sat/SAT2002.html (last visited Mar. 13, 2004).
[9] 2003 Memorandum; *see* News Release, *supra* note 3.
[10] Memorandum from M. Edward Whelan III, *supra* note 6.
[11] News Release, *supra* note 3 (quoting Secretary of the Interior Gale A. Norton).
[12] Memorandum from Walter Dellinger, *supra* note 8.
[13] Memorandum from M. Edward Whelan III, *supra* note 8, at 17.

significant historic structures - including those used for religious purposes - will now be eligible to receive funding from Save America's Treasures program."[14]

This change in policy strikes at the heart of the sharp debate on the Supreme Court about the correct meaning of the Establishment Clause between two competing interpretations, separationism and neutralism.[15] Separationism, sometimes described as the creation of a "wall of separation" between church and state, has been the dominant theme of Establishment Clause jurisprudence for fifty years.[16] According to strict separationist theory, the government may not support, assist, or otherwise promote religion or religious institutions. Over the past twenty years, however, Supreme Court jurisprudence has shifted towards the neutralism theory.[17] Neutralism is premised on the idea that because the government may not confer a disfavored status upon religion, government may provide aid to religion and religious institutions if done in a neutral and non-discriminatory manner.

The Save America's Treasures program helps to preserve links with our past that help us understand who we are as a nation. Historic religious buildings are among those places that represent our country's cultural heritage. This Note argues that if such a grant to preserve the Old North Church, or another religious building, is challenged, the Supreme Court would uphold these grants as valid under the recent Establishment Clause jurisprudence in Justice O'Connor's concurrence in *Mitchell v. Helms.*[18] The regulations controlling the use of grant funds by religious institutions prohibit those funds from being to promote religion, and may only be used to preserve historically significant features. As such, the grant program has a secular purpose, and does not have the effect of advancing religion. In addition, the grant program may be sustained under the principle that religious institutions

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[14] News Release, *supra* note 3 (quoting Secretary of the Interior Gale A. Norton).
[15] This structure is borrowed from Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002); *see also* Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C. L. REV. 1139 (2002).
[16] *See infra* text accompanying notes 123-143.
[17] *See infra* text accompanying notes 145-162.
[18] 530 U.S. 793 (2000) (O'Connor, J. concurring in judgment).

may not be discriminated against in the distribution of general governmental services provided on the basis of neutral criteria.[19]

Part I of this Note considers the state of historic religious properties, the contributions they make to their community, and the threats they face. Part II considers the federal laws that apply to historic preservation, detailing the National Historic Preservation Act and the Save America's Treasures grants program. In Part III, the Note next considers Establishment Clause jurisprudence, its current shift toward neutralism, and its applicability to grants to religious buildings. The two opinions of the Office of Legal Counsel about the constitutionality of providing historic preservation grants to religious buildings are considered in Part IV. Finally, in Part V, this Note attempts to ground in Supreme Court jurisprudence the arguments made by the most recent Office of Legal Counsel opinion. The Note determines that the Save America's Treasures program may constitutionally provide grants to religious institutions, and also provides suggestions to ensure such grants remain within the limits of the Establishment Clause.

I. HISTORIC PRESERVATION AND AMERICA'S ENDANGERED HISTORIC HOUSES OF WORSHIP

In May of 2003, the National Trust for Historic Places placed America's Historic Urban Houses of Worship at the top of its list of "America's 11 Most Endangered Historic Places,"[20] a yearly list of important historical and cultural sites that are threatened by demolition, slow and steady deterioration, and neglect.[21] The Trust cautioned that these houses of worship are endangered by declining membership, increasing maintenance costs, and in some instances "soaring real estate values that make selling the property an attractive proposition for shrinking congregations."[22] Moreover, if these buildings are allowed to deteriorate or be demolished, not only is their architectural and historical

[19] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).
[20] National Trust for Historic Preservation, *America's Eleven Most Endangered Historic Places 2003*, *at* http://www.nationaltrust.org/11most/2003/index.html (last visited Mar. 13, 2004).
[21] *See generally* National Trust for Historic Preservation, *2004 Nomination Form – The Guidelines*, (2004) *available at* http://www.nationaltrust.org/11Most/11Most_2004_nomguidelines.pdf.
[22] National Trust for Historic Preservation, *America's Endangered Historic Urban Houses of Worship*, (2003) *available at* http://www.nationaltrust.org/11Most/2003/Endangered_Urban_Worship.pdf.

value lost, but also their ability to continue to provide critical community services to people in the nation's most impoverished neighborhoods.[23]

1. Historic Value of Houses of Worship

"We can't tell American history without talking about the history of our sacred places . . . We can't have a strong future for our community without safeguarding the buildings (that are used for worship)," Senator Joseph Lieberman told an event organized by the Partners for Sacred Places, a non-sectarian, non-profit organization dedicated to the care and active use of America's older and historic sacred places.[24] Indeed, much of American history has evolved in an around our houses of worship, providing "eloquent testimony" to the American experience and the quest for religious freedom that helped shape our nation.[25] The National Trust suggests that "[c]hurches, synagogues, temples and mosques are often the most ambitious, beloved, and architecturally significant buildings in any given urban neighborhood. Their domes, towers, and spires provide identifying elements in the local skyline, and they attest to the diverse traditions that have created cities and towns across the country."[26]

There are many examples of houses of worship that contribute to our nation's historical and cultural legacy. Old North Church, for example, has held its place in American history from when Robert Newman climbed the steeple and briefly hung the two lanterns that touched off the Revolutionary War.[27] The lanterns, arranged for by Paul Revere, signaled the movement of British troops up the Charles River to Cambridge to begin a march to Lexington.[28] The shot heard round the world was fired on Lexington Green the following day.[29] Currently, the 280 year old church has a

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[23] *Id.* at 3.
[24] Partners for Sacred Places, *Lieberman Announces National List of Sacred Places to Save* (2002), *at* http://www.sacredplaces.org/ten_places.html#2. Lieberman was the Democratic sponsor of crafting a compromise version of earlier legislation passed in the House of Representatives that would allow religious groups to accept public funds in order to operate faith-based social services. Elizabeth Becker, *Lieberman Joins Bush Bid To Push Aid-to-Charity Bill*, N.Y. TIMES, July 21, 2001, A11.
[25] National Trust for Historic Preservation, *America's Endangered Historic Urban Houses of Worship*, *supra* note 22, at 2.
[26] *Id.*
[27] *"Paul Revere,"* ENCYCLOPEDIA BRITANNICA (2003), *see* generally, Henry Wadsworth Longfellow, *Paul Revere's Ride*, in *The Home Book of Verse* 2,422 (selected & arranged by Burton E. Stevenson, 9th ed. 1950).
[28] *"Paul Revere,"* ENCYCLOPEDIA BRITANNICA (2003).
[29] *Id.*

congregation of 150 members, yet because of its historical status, the church has more costs to repair its forty-three clear windows and to stay open for sightseers than its congregation and visitors donate.[30] The Old North Church was the first religious institution to be awarded a grant under the Save America's Treasures program.[31]

The Mount Bethel Baptist Church in Washington, D.C. is another example of a church with an important place in our history.[32] Former slaves established the congregation in 1875.[33] The church and its congregation were deeply involved in the Civil Rights movement, particularly Martin Luther King's 1963 March on Washington, when busloads of protestors camped out and made placards at the church.[34] The National Trust for Historic Preservation has put the Baptist church, built in 1902, on their annual list of national landmarks in need of preservation, as the small congregation cannot afford both to provide much-needed services to the community and to upkeep its historic building.[35]

The historic Baltimore Cathedral, built from 1806 to 1821, is one further example of the integral role houses of worship can play in the development of our country. The Basilica of the National Shrine of the Assumption of the Blessed Virgin Mary stands as a symbol of the burgeoning country's religious freedom, as it is not only the first major religious building constructed in America after the adoption of the Constitution, but also America's first cathedral.[36] Three prominent Americans guided the Cathedral's design and architecture: John Carroll, the country's first bishop, later Archbishop of Baltimore, and cousin of Charles Carroll, who was the only Catholic to sign the Declaration of Independence; Benjamin Henry Latrobe, the first Architect of the U.S. Capitol; and

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[30] *The Old North Church Guidebook*, *at* http://www.oldnorth.com/guid.htm (last visited Mar. 13, 2004).
[31] *See* News Release, *supra* note 3.
[32] Although this Church has been listed as endangered by the National Trust for Historic Preservation, *see infra* note 33, no grant from the Save America's Treasures program has been publicly requested.
[33] National Trust for Historic Preservation, *National Trust Calls D.C.'s Mount Bethel Baptist Church "Poster Child" of National Epidemic*, *at* http://www.nationaltrust.org/news/docs/20030529_11most_urbanmountbethel.html (last visited Mar. 19, 2004).
[34] U.S. Department of State, *March on Washington*, *at* http://usinfo.state.gov/usa/civilrights/anniversary/mow04.htm (last visited Mar. 19, 2004).
[35] National Trust for Historic Preservation, *National Trust Calls D.C.'s Mount Bethel Baptist Church "Poster Child" of National Epidemic*, *at* http://www.nationaltrust.org/news/docs/20030529_11most_urbanmountbethel.html, *supra* note 33.
[36] Baltimore Basilica, Basilica of the National Shrine of the Assumption of the Blessed Virgin Mary, *The History of Americas First Cathedral*, *at* http://www.baltimorebasilica.org/index2.html (last visited Mar. 13, 2004).

President Thomas Jefferson, whose advice and counsel guided Latrobe.[37] For more than 100 years, until the success of the American Revolution, the Catholic Church in England's colonies was a persecuted minority.[38] After the Revolution, leaders wanted to build a cathedral to celebrate their newfound religious freedom in America.[39] Today, the Basilica's historic trust has applied for a grant under the Save America's Treasures program as it hopes to raise funds to restore the national landmark to the original concept of its principle architect, Benjamin Latrobe.[40]

A final example of a religious institution important to our nation's history was recently awarded $375,000 from Save America's Treasures, which would have been prohibited before the recent change in federal policy.[41] Touro Synagogue, dedicated in 1762 in Newport, Rhode Island, is the oldest synagogue in the United States and the only one that survives from the colonial era.[42] The synagogue was designed by Peter Harrison, America's first professional architect.[43]

Touro Synagogue stands as a testament to the importance of religious tolerance in our nation's beginning. In 1790, President George Washington's visited the Synagogue and in his letter "To the Hebrew Congregation in Newport Rhode Island," the President proclaimed that the United States "gives bigotry no sanction, to persecution no assistance."[44] John F. Kennedy reaffirmed the importance of the Synagogue saying that it "is not only the oldest Synagogue in America, but also one of the oldest symbols of Liberty."[45] According to the Touro Synagogue Foundation, this historic

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[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*; Frank Langfitt, *Basilica Finds Itself at Center of a Constitutional Quandary; Public Grants Raise Issue of Church-State Separation*, BALTIMORE SUN, Aug. 24, 2003, at 1A.
[41] Margaret Foster, *Save America's Treasures Grant Recipients Announced*, PRESERVATION ONLINE, *available at http://www.nationaltrust.org/magazine/archives/arc_news/112003.htm* (November 20, 2003).
[42] Rabbi Theodore Lewis, HISTORY OF TOURO SYNAGOGUE, *available at http://www.tourosynagogue.org* (last visited Mar. 19, 2004).
[43] *Id.*
[44] George Washington, *Letter from George Washington in response to Moses Seixas*, *available at http://www.tourosynagogue.org/GWLetter1.php* (last visited Mar. 19, 2004).
[45] The Touro Synagogue Foundation, *Save Touro Synagogue*, http://www.tourosynagogue.org/capital_campaign.php?str=Save%20Touro%20Synagogue (last visited Mar. 19, 2004).

structure is in "dire need of critical repairs and costly improvements," including efforts to address "long-standing structural problems."[46]

2. Community Contributions

"In our nation's time of need . . . it should be clearer than ever what our churches, synagogues, mosques and temples mean to our communities. They are much more than houses of worship. They are anchoring centers of community service," Joseph Lieberman has said.[47] Beyond their physical ties to the community, these institutions provide significant and necessary services to their communities.[48] A survey conducted in over 100 congregations in six cities found that more than 90% of inner-city houses of worship serve as community centers that provide services to people in need, on average more than one in five of whom is not a congregation member.[49] Indeed, "[t]he average congregation provides over 5,300 hours of volunteer support."[50] This translates into a value of an average of $140,000 per year from these institutions, sixteen times what they receive from the people who use these spaces.[51]

This research also shows that a congregation's ability to serve the community is based upon its facilities.[52] Indeed, over 76% of all congregation-based community services take place in an historic property.[53] During his tenure as Director of the White House Office of Faith-Based and Community

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[46]The Touro Synagogue Foundation, *Restoration of Touro*, *at* http://www.tourosynagogue.org/conservation.php?str=Restoration%20of%20Touro (last visited Mar. 19, 2004).
[47] Partners for Sacred Places, *Lieberman Announces National List of Sacred Places to Save* (2002), *at* http://www.sacredplaces.org/ten_places.html#2.
[48] *See* National Trust for Historic Preservation, *America's Endangered Historic Urban Houses of Worship*, *supra* note 22, at 3; Daniel P. Hart, *God's Work, Caesar's Wallet: Solving the Constitutional Conundrum of Government Aid to Faith-Based Charities*, 37 Ga. L. Rev. 1089, 1091-92 n.10 (citing Ram A. Cnaan et al., THE NEWER DEAL: SOCIAL WORK AND RELIGION IN PARTNERSHIP (1999) (discussing increasingly important role of religious congregations and sectarian agencies in providing social services and calling for "limited partnership" between social work and religion in helping those in need); Marvin Olasky, THE TRAGEDY OF AMERICAN COMPASSION (1992) (calling for return to social services system operated by religious charities instead of government bureaucracies); Joseph P. Shapiro & Andrea R. Wright, *Can Churches Save America?*, U.S. NEWS & WORLD REPORT , Sept. 9, 1996, at 46-53 (discussing increasing call by politicians for allowing religious charities to provide more of social safety net)).
[49] Diane Cohen & A. Robert Jaeger, SACRED PLACES AT RISK 5 (Partners for Sacred Places ED., 1998); National Trust for Historic Preservation, *America's Endangered Historic Urban Houses of Worship*, *supra* note 22, at 3.
[50] Cohen & Jaeger, *supra* note 49, at 5.
[51] *Id.*
[52] National Trust for Historic Preservation, *America's Endangered Historic Urban Houses of Worship*, *supra* note 22, at 3.
[53] *Id.*

Initiatives, John DiIulio has said that "[l]etting sacred places crumble or close – failing to give them the corporate, philanthropic and other support they need to keep the walls from falling and the pipes from bursting is tantamount to losing millions and millions of dollars a year in vitally needed anti-poverty and community-building efforts." [54]

3. The Threat

Many inner-city congregations have been forced to make difficult choices between providing necessary community services or preserving their historic properties as they struggle to make ends meet.[55] Demographic changes in the last half-century have lead to severe declines in membership, and thus, financial resources.[56] As a result, crucial repairs have frequently been postponed and the deferred maintenance has lead to roof leaks, plumbing and electrical problems, and other severe structural concerns.[57] In a representative group of ten historic urban houses of worship in one of the poorest census tracks in North Philadelphia, for example, the average inner-city facility faces repairs in the range of $1 million to $2 million.[58] The Partners for Sacred Places estimate that 20% of all historic houses of worship are expected to suffer partial collapse or worse in the next five years.[59]

II. THE FEDERAL SCHEME: NATIONAL HISTORIC PRESERVATION ACT AND THE SAVE AMERICA'S TREASURES PROGRAM

A. National Historic Preservation Act

In 1966, Congress, motivated by at least two concerns, enacted the National Historic Preservation Act ("NHPA").[60] The first concern was the recognition that large numbers of historic structures, landmarks, and areas have been destroyed with little or no consideration of their value as

[54] *Id.* at 4.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] Cohen & Jaeger, *supra* note 49.
[59] *Id.*
[60] National Historic Preservation Act, 16 U.S.C. § 470, *et seq.* (2000).

historic properties or the possibility of preserving the properties in economically productive ways.[61] The second consideration was a belief that structures with historic, cultural, or architectural significance enhance the quality of life for the community.[62] As such, Congress declared the purposes of the NHPA to include in part that:

> (1) the spirit and direction of the nation are founded upon and reflected in its historic heritage;
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people; . . .
> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;
> (7) although the major burdens of historic preservation have been borne and major effects initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to support by private means, and to assist State and local governments and the Nation Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities.[63]

In keeping with these purposes, the NHPA authorizes the Department of the Interior to provide grants to owners of historic properties and to the states for preserving historic properties. These programs require that any property receiving such grants must be listed on the National Register of Historic Places, ("National Register") a list maintained by the Secretary of the Interior of "district, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering, and culture."[64] The criteria for evaluating a property for listing on the National Register are set out in the applicable regulations and include consideration of:

> "[t]he quality of significance in American history, architecture, archeology, engineering, and culture as present in districts, sites, buildings, structures, and objects

[61] Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 107-08 (1978) (explaining the purposes underlying the national, state and local level historic preservation legislation).
[62] *Id.*
[63] 16 U.S.C. § 470-1.
[64] 16 U.S.C. § 470a(a)(1)(A).

that possess integrity of location, design, setting, materials, workmanship, feeling, and association and:

(a) that are associated with events that have made a significant contribution to the broad patterns of out history; or
(b) that are associated with the lives of persons significant in our past; or
(c) that embody the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
(d) that have yielded, or may be likely to yield, information important in prehistory or history.[65]

A property need only satisfy one of the four criteria for listing on the National Register.[66]

It is important to note that under current Department of Interior regulations governing inclusion in the National Register, historical religious properties must meet a higher standard than historic secular properties. The guidelines provide that properties "owned by religious institutions or used for religious purposes" are "[o]rdinarily" deemed ineligible for the National Register.[67] Only under an exception contained in the regulations for "religious property deriving primary significance from architectural or artistic distinction or historical importance," could a religious property be listed on the National Register.[68] If a religious property meets these heightened standards, however, a 1992 amendment to the NHPA specifically provides that "grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant."[69] Even after this amendment was passed, however, and until the 2003 Opinion from the Office of Legal Counsel, the executive branch declined to provide grants to religious properties.[70]

[65] 36 C.F.R. § 60.4 (2004).
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] 16 U.S.C. § 470a(e)(4).
[70] *See, e.g.* Memorandum from M. Edward Whelan III, *supra* note 6, at 1 (noting that Save America's Treasures grant was awarded to Old North Church, but the Park Service reversed its position shortly thereafter relying upon Memorandum from Walter Dellinger, *supra* note 6).

Designation as a historic property may impose certain burdens and responsibilities on the property owner. The NHPA imposes certain restrictions on the federal government when a federal "undertaking" or "licensed" activity may affect a National Register property.[71] The federal agency involved must consult with the federal Advisory Council on Historic Preservation and must consider and take into account the effect on the historic property.[72] Although listing on the National Register does not itself affect what a private property owner may do with his property, designation as a historic property can have significant ramifications under relevant state and local laws.[73]

B. Save America's Treasures Program

The Save America's Treasures program is a national effort to protect "America's threatened cultural treasures, including historic structures, collections, works of art, maps and journals that document and illuminate the history and culture of the United States."[74] Established by Executive Order in February 1998 by President Clinton, Save America's Treasures was originally founded as the centerpiece of the White House National Millennium Commemoration and as a public-private partnership that included the White House, the National Park Service, and the National Trust for Historic Preservation.[75] The Program provides matching grants for preservation of "the enduring symbols of American tradition that define us as a nation."[76] Matching Save America's Treasures

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[71] 16 U.S.C. § 470a(f).
[72] *Id.*
[73] *See, e.g.*, Historic Landmark and Historic District Protection Act, D.C. Code Ann. § 6-1101 (1981), *et seq.*; Landmark's Preservation Law, N.Y. City Admin. Code, ch. 8-A, § 205-1.0 *et seq.*

Another controversy closely related to the one at issue in this Note is whether placing requirements upon a house of worship once it is deemed a historic landmark is an infringement upon the free exercise of religion in violation of the Free Exercise Clause. *See, e.g.*, Catherine Maxson, *"Their Preservation is Our Sacred Trust" -- Judicially Mandated Free Exercise Exemptions to Historic Preservation Ordinances under Employment Division v. Smith*, 45 B.C. L. REV. 205 (2003); Laura S. Nelson, *Remove Not the Ancient Landmark: Legal Protection for Historic Religious Properties in an Age of Religious Freedom Legislation*, 21 CARDOZO L. REV. 721, 730 (1999); Alan C. Weinstein, *The Myth of Ministry v. Mortar: A Legal and Policy Analysis of Landmark Designation of Religious Institutions*, 65 TEMP. L. REV. 91, 93 (1992); Angela C. Carmella, *Houses of Worship and Religious Liberty: Constitutional Limits to Landmark Preservation and Architectural Review*, 36 VILL. L. REV. 401, 402 (1991). This issue is beyond the scope of this Note.

[74] Exec. Order No. 13072, 63 FR 6041 (Feb. 2, 1998).
[75] *Id.* The Program was established in 1998 pursuant to the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470 to 470x-6 (2000). Funding for the Program is provided by the Historic Preservation Fund, which was created by the NHPA. *See* 16 U.S.C. § 470h.
[76] Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, 115 Stat. 414, 425 (2001).

grants are available for work on "nationally significant intellectual and cultural artifacts and nationally significant historic structures and sites."[77] Past grantees include Montpelier, the home of James Madison in Montpelier Station, Virginia; the Star Spangled Banner at the Smithsonian Institute; Harriet Tubman Residence and Home for the Aged in Auburn, New York; and Ellis Island in New Jersey.[78]

Grants require a dollar-for-dollar non-federal match, which can be in the form of cash or donated services.[79] The minimum grant request for collections projects is $50,000; the minimum grant request for historic property projects is $250,000 and the maximum grant request for all projects is $1 million.[80] In 2003, the average federal grant award to collections was $172,000 and the average award to historic properties was $268,000.[81]

Six categories of entities, including both public and private institutions, are eligible to apply for Save America's Treasures grants: federal agencies funded by the Department of the Interior and Related Agencies Appropriations Act; other federal agencies collaborating with a nonprofit partner to preserve the historic properties or collections owned by the federal agency; non-profit, tax-exempt 501(c)(3), U.S organizations; units of state or local government; federally recognized Indian Tribes; and historic properties and collections associated with active religious organizations.[82] Applications are reviewed and ranked on the basis of extensive criteria, primarily related to historical significance.[83] Most importantly, the applicant must demonstrate the property's "national significance," as that term is

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[77] Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions* at 1, *available at* http://www.pcah.gov/GuidelinesSAT2003.html (last visited Mar. 13, 2004).

Guidelines and application materials for the 2004 grant program will be available in early 2004. *See* National Parks Service, Save America's Treasures Federal Grants, *at* http://www2.cr.nps.gov/treasures (last visited Mar. 14, 2004).

[78] Save America's Treasures, Official Project Profiles, *at* http://www.saveamericastreasures.org/profiles.htm (last visited Mar. 14, 2004).

[79] Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 1; National Parks Service, Save America's Treasures Federal Grants, *at* http://www2.cr.nps.gov/treasures, *supra* note 77.

[80] National Parks Service, Save America's Treasures Federal Grants, *at* http://www2.cr.nps.gov/treasures, *supra* note 77.

[81] *Id.*

[82] Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 1.

[83] *Id.* at 4.

defined by the Guidelines.[84] The criteria set out by the Guidelines for "national significance," although similar to those for listing on the National Register, focus more acutely on the property's value to the nation as a whole, and not simply its value in a particular community.[85] Applications not meeting this criterion will not receive further consideration.[86] This requires a showing that the property possesses "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," that it possesses "a high degree of integrity," and that it is associated with events, persons, ideas, or ideals that are especially significant in American history.[87] In addition, to qualify as nationally significant, the historic property must have been either designated as a National Historic Landmark or listed as a place of "national significance" in the National Register, or be deemed eligible for such designation or listing.[88] In addition to "national significance," Save America's Treasures grant applicants must also demonstrate that the historic property is "threatened" or "endangered," or that it has an "urgent preservation and/or conservation need."[89] Additionally, the proposed project "must address the threat and must have

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[84] *Id.* at 4. Guidelines quality of national significance is ascribed to collections and historic properties that possess exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States, that possess a high degree of integrity and:

- That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent the broad patterns of United States history and culture and from which an understanding and appreciation of those patterns may be gained; or,
- That are associated importantly with the lives of persons nationally significant in the United States history or culture; or,
- That represent great historic, cultural, artistic or scholarly ideas or ideals of the American people; or,
- That embody the distinguishing characteristics of a resource type
  - that is exceptionally valuable for the study of a period or theme of United States history or culture; or
  - that represents a significant, distinctive and exceptional entity whose components may lack individual distinction but that collectively form an entity of exceptional historical, artistic or cultural significance (e.g., an historic district with national significance), or
  - that outstandingly commemorate or illustrate a way of life or culture; or,
- That have yielded or may be likely to yield information of major importance by revealing or by shedding light upon periods or themes of United States history or culture.

[85] *Compare* 36 C.F.R. § 60.4 (National Register "Criteria considerations" *with* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 4.

[86] Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 4.

[87] *Id.*; *see* source cited *supra* note 77.

[88] *Id.* at 5.

[89] *Id.*

educational, interpretive, or training value and a clear public benefit (for example, historic places open for visitation or collections available for public viewing or scholarly research)."[90] Finally, the project must be "feasible (i.e., able to be accomplished within the proposed activities, schedule and budget described in the application), and the applicant must demonstrate ability to complete the project and match the federal funds."[91]

After the Park Service completes its ranking of the applicants,[92] a panel of experts with professional expertise in fields such as history, preservation, conservation, archeology rank applications and make funding recommendations to the Secretary of the Interior.[93] In order to insulate the panel members from external influence, the Department of the Interior does not disclose their identity to the public.[94] The Secretary of the Interior, in consultation with the President's Committee on the Arts and the Humanities, will select applicants and forward those selections to the House and Senate Committees on Appropriations for concurrence.[95]

Applicants that qualify for a grant under the substantive criteria discussed above must also satisfy a number of administrative requirements before a grant will be awarded. Because projects funded by the Program are "undertakings" within the meaning of the Historic Preservation Act,[96] the Park Service requires that grant recipients consult with their State Historic Preservation Officer and the

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[90] *Id.*
[91] *Id.*
[92] *Id.* Applications are evaluated and selected based on the following criteria: the relative national significance of properties are evaluated and accounts for 30% of its total evaluation score; the nature, the extent, and the level of severity of the threat, danger or damage to the collection or historic property accounts for 25% of its total score; how the proposed preservation or conservation work will significantly diminish or eliminate the threat, danger or damage, and the clear public benefit of the project accounts for 25% of the score; and the project budget and ability to secure the required non-federal match that must be used during the grant period will account for 20% of the total score.
[93] *Id.* at 4.
[94] Memorandum from M. Edward Whelan III, *supra* note 6, at 2 (citing Letter for Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, from William G. Myers III, Solicitor, Department of the Interior at 3 (Jan. 24, 2003).
[95] Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 4.
This provision, however, is unenforceable. *See* INS v. Chadha, 462 U.S. 919 (1983).
[96] 16 U.S.C. § 470f (2000).

Advisory Council on Historic Preservation prior to the receipt of funds.[97] In addition, grant recipients must agree to encumber the title to their property with a fifty year covenant that runs with the land that provides that the owners "shall repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places."[98] Finally, because grants for the repair and development of historic properties are provided "only for the benefit of the public," "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least 12 days a year during the 50-year term of the preservation easement or covenant."[99] There is no requirement of notice to the public of the property's historical significance.[100]

Save America's Treasures grantees must also keep detailed records of their expenditures and are subject to audit by the government to ensure that the Save America's Treasures grants are spent only for designated purposes.[101] The Act expressly requires grantees to maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit."[102] These requirements ensure that federal funds are not used for unauthorized purposes.[103]

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[97] *See* 36 C.F.R. 800.3 (2004); Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 3.
[98] *Id.* at 3-4.
[99] *Id.*
[100] *See generally id.*
[101] 16 U.S.C. § 470e (2000).
[102] *Id.*
[103] Memorandum from M. Edward Whelan III, *supra* note 6, at 3.

III. ESTABLISHMENT CLAUSE DOCTRINE IN THE SUPREME COURT: SHIFT TO NEUTRALISM

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[104] Religious liberty and separation of church and state are the cornerstones of the American way of life. The Framers of the Constitution designed the First Amendment's religion clauses to embrace two key concepts: the government will not endorse or oppose any particular religious viewpoint (or religion generally), and will not interfere with the right of citizens to practice their faith. James Madison, the father of the United States Constitution, once observed, "The [religious] devotion of the people has been manifestly increased by the total separation of the church from the state."[105] Supreme Court Justice Hugo Black also expressed the purpose and function of the Establishment Clause when he said that it rests "on the belief that a union of government and religion tends to destroy government and degrade religion."[106]

The issue at the core of this Note is whether facially neutral laws that provide funding to religious institutions, and are not shown to have been applied for the purpose of helping, hurting, or discriminating among religions, are an establishment of religion prohibited by the Establishment Clause. Namely, may government support for the preservation of historically important buildings include religious buildings?

Two schools of thought have developed regarding this kind of support for religious institutions. Separationism, described as the creation of a "wall of separation" between church and state, has been the dominant theme of Establishment Clause jurisprudence for fifty years.[107] According to strict

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[104] U.S. CONST. amend. I.
[105] Letter from James Madison to Robert Walsh (Mar. 2, 1819), in 8 THE WRITINGS OF JAMES MADISON 1808-1819, at 432 (Gaillard Hunt ed., 1908); *see generally* Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) ("In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"); Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's belief that religion is "a matter which lies solely between man and his God" and that the Establishment Clause essentially builds a "wall of separation between church and state.")
[106] *See* Engel v. Vitale, 370 U.S. 421, 431 (1962) (viewing the purpose of the Establishment Clause as resting on the belief that "a union of government and religion tends to destroy government and to degrade religion").
[107] *See infra* text accompanying notes 123-143.

separationist theory, the government may not support, assist, or otherwise promote religion or religious institutions because of the inseparability of the secular and sectarian characters of such organizations.[108] Over the past twenty years, however, Supreme Court jurisprudence has shifted towards the neutralism theory.[109] Neutralism espouses that the "Constitution requires, at a minimum, neutrality not hostility toward religion,"[110] that the government may not confer a disfavored status upon religion, but may provide aid to religion and religious institutions if done in a neutral and non-discriminatory manner. As such, neutralists argue that the government must include religious institutions in social programs on the same terms as other institutions, and that the religious identity of those institutions should not be of concern to government as long as private parties create that religious content and no one is coerced into religious participation.[111]

The administration's change in policy regarding historic preservation grants to religious buildings feeds into this debate about the correct meaning of the Establishment Clause between these two competing interpretations.[112] Although the Supreme Court has recently redefined its own conception of the Establishment Clause,[113] Justice Thomas believes that this apparent, yet incomplete doctrinal shift has caused "growing confusion among the lower courts."[114] As such, he suggests that the Court "cannot long avoid addressing the important issues"[115] illustrated, for example, by the question of whether the government may provide grants to religious historic properties.

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[108] Lupu & Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note 15; *see also* Lupu & Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, *supra* note 15.
[109] *See infra* text accompanying notes 145-162.
[110] Columbia Union College v. Clark, 527 U.S. 1013, 1014 (1999) (Thomas, J. dissenting from denial of writ of certiorari).
[111] Lupu & Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, *supra* note 15; *see also* Lupu & Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, *supra* note 15.
[112] Ira C. Lupu & Robert Tuttle, *New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction*, Roundtable Publications, *at* http://www.religionandsocialpolict.org/legal/legal_update.cfm?id=16 (last visited Apr. 5, 2004).
[113] *See infra* text accompanying notes 131-48; Columbia Union Coll. v. Oliver, 254 F.3d 496 (4th Cir. 2001). In *Columbia College*, the Fourth Circuit recently ruled that *Mitchell* had "buried" the presumption that government aid to "pervasively sectarian" schools is unconstitutional. *Id.* at 504. The court alternatively went on to affirm the district court's finding that the funding program was constitutional because the College is not, in fact, pervasively sectarian. *Id.* at 508-09.
[114] *Clark*, 527 U.S. at 1014 (1999) (Thomas, J. dissenting from denial of writ of certiorari).
[115] *Id.* Note that the Court has decided Mitchell v. Helms, 530 U.S. 793 (2000), since Justice Thomas made this statement. Because of the lack of a majority opinion, however, the muddled jurisprudence in this area is still causing confusion. *See*

A. The Lemon Test

The Supreme Court has interpreted the Establishment Clause to give protection from the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[116] In 1971, the Supreme Court in *Lemon v. Kurzman* set out a three-part test to assess a statute's constitutionality under the Establishment Clause.[117] For a statute to be consistent with the Establishment Clause, the law: (1) must have a secular purpose; (2) must have a primary effect that neither materially inhibits nor advances religion; and (3) must not excessively entangle religion and governmental institutions.[118] The *Lemon* test, however, has been applied in an inconsistent manner, thus rendering the test less than dispositive.[119] Although the test has been ignored by some Justices, and sharply criticized by others,[120] it has been recently applied in a modified form more in accord with the neutralist theory.[121] In fact, the same year as the *Lemon* test was adopted, the Supreme Court cautioned about applying the test too inflexibly: "[t]he standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clause have been impaired. And as we have noted in *Lemon*, candor compels the acknowledgement that we can only dimly

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generally Anthony Kovalchick, *Educational Aid Programs under the Establishment Clause: The Need for the U.S. Supreme Court to Adopt the Rule Proposed by the Mitchell Plurality*, 30 S.U. L. REV. 117, 185-86 (2003).

[116] Walz v. Tax Com. of New York, 397 U.S. 664, 668 (1970)

[117] 403 U.S. 203 (1997).

[118] *Id.* at 612-13.

[119] *See, e.g.* Aguilar v. Felton, 473 U.S. 402 (1985) (striking down state remedial education programs administered in part in parochial schools); Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains).

[120] Justices Scalia, Rehnquist, Kennedy, O'Connor, and Souter have all criticized the Lemon test. Justice White, who dissented from the decision in Lemon, also has strongly criticized the test. *See* Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (O'Connor, J., concurring); *Id.* at 110-11 (Rehnquist, J., dissenting); in County of Allegheny v. ACLU, 492 U.S. 573, 655-79 (1989) (Kennedy, J., concurring in part and dissenting in part) (stating that "persuasive criticism of Lemon has emerged"); Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 156 (1990) (statement of nominee); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (Justice Scalia lamented that the test is "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried." Justice Scalia accused the Lemon test of "stalking" Establishment Clause jurisprudence and pointed out to the Court that "when we wish to strike down a practice [*Lemon*] forbids, we invoke it ...; when we wish to uphold a practice it forbids, we ignore it entirely.")

[121] Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000) (plurality).

perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."[122]

B. Separationist Doctrine

During its separationist period, the Supreme Court limited direct money grants that went to religious institutions. The cases below are the main cases in which the Court has considered the constitutionality of such grants. They demonstrate that the Court held that the Establishment Clause required that aid from governments to religious institutions had to be used to support only secular activities, and then only if the religious character of the institution was not pervasive.

The Supreme Court first confronted the issue of governmental support for buildings associated with religious institutions in 1899,[123] more than a century after the First Amendment was ratified.[124] In *Bradfield v. Roberts*, the Supreme Court upheld a federal statute that provided direct funds to a hospital run by the Roman Catholic Church but devoted exclusively to caring for those with contagious diseases.[125] The Court focused on the building's purposes, and not the identity of the owner, to find that because those purposes were secular, there was no establishment of religion.[126]

At the height of the separationist era in the Supreme Court, the Court in *Tilton v. Richardson* sustained a federal statute that provided construction grants to religious colleges and universities for libraries and other buildings devoted to science, music, and art.[127] The program explicitly excluded aid to facilities "used for sectarian instruction or as a place for religious worship."[128] The Court concluded that because the schools that had received the grants had not been shown to be pervasively sectarian,

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[122] Titlon v. Richardson, 403 U.S. 672, 678 (1971); *see also* Mueller v. Allen, 463 U.S. 368, 394 (1983) ("Our cases have also emphasized that [*Lemon*] provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges.").
[123] Bradfield v. Roberts, 175 U.S. 291 (1899).
[124] On September 25, 1789, the First Congress of the United States proposed to the state legislatures twelve amendments to the Constitution that attempted to meet those arguments most frequently advanced against it. These amendments were ratified December 15, 1791. *"Constitution of the United States of America,"* ENCYCLOPEDIA BRITANNICA (2003).
[125] 175 U.S. 291, 293 (1899).
[126] *Id.*
[127] Tilton v. Richardson, 403 U.S. 672 (1971). The Court decided *Tilton* on the same day in 1971 as Lemon v. Kurtzman, 403 U.S. 602 (1971).
[128] *Id.* at 675.

and had maintained the federally supported buildings in a secular fashion, no constitutional violation had occurred.[129] Although the Court upheld most of this program, it unanimously struck down a provision that would have returned the new building to the exclusive control of its owner after twenty years without restriction on religious use.[130] Because this reversion meant that after twenty years the government might be effectively subsidizing worship or instruction, the Court held that the restriction on religious use must extend for the life of the building.[131] The Court also noted that in such cases, the "crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."[132]

Two years later, the Court further solidified its separationist doctrine by extending the "secular use" principle of *Bradfield* and *Tilton*. The Court in *Hunt v. McNair* upheld state issuance of revenue bonds for use at a religiously affiliated college, but only on the condition that the financed structures never be used for religious worship or instruction.[133] The Court found that the purpose of the law was secular, and there was no evidence that religion was so pervasive in the college that a substantial portion of its functions was religious.[134] Thus, the Court held, the primary effect of the law as applied to the college would not be to advance religion.[135] "The Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."[136] In addition, there was no evidence of potential excessive entanglement because the state would not become involved unless the college failed to make its rent payments.[137]

On the same day, in *Committee for Public Education and Religious Liberty v. Nyquist*, the Court reaffirmed the principle that the Establishment Clause prohibits government construction or

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[129] *Id.* at 686-69.
[130] *Id.* at 683.
[131] *Id.* 683-84.
[132] *Id.* at 679.
[133] Hunt v. McNair, 413 U.S. 734, 749 (1973).
[134] *Id.* at 741-42.
[135] *Id.* at 743-45.
[136] *Id.* at 743.
[137] *Id.* at 745-46.

repair of buildings used for religious worship or instruction.[138] This case most directly addresses the issue of direct government funding for existing buildings used for religious purposes. In *Nyquist*, the Court held unconstitutional New York State's program of "maintenance and repair" grants for the upkeep of religious schools and equipment.[139] The grants were allocated per student, but were only available to private, nonpublic schools in low-income areas, "all or practically all of which were Catholic."[140] The court held that the maintenance and repair provision violated the Establishment Clause because its effect, inevitably, was to subsidize and advance the religious mission of these schools.[141] Although noting that "an indirect and incidental benefit to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law,"[142] the Court reasoned that "if the state may not erect buildings in which religious activities take place, it may not maintain such buildings or renovate them when they fall into disrepair."[143] The Court has never repudiated *Nyquist*,[144] and thus, it likely stands as the relevant precedent for government support for structures used primarily for religious purposes.

C. Current State of Establishment Clause Doctrine and Doctrinal Shift Toward Neutralism

The Supreme Court has notably shifted towards neutralism in its recent cases involving government assistance to religious schools. In these cases, the Court has effectively renounced the notion that all assistance to secular institutions is forbidden. None of these cases, however, relate directly to governmental support for religious *buildings.* Therefore, the following cases are only suggestive of the direction of Supreme Court Establishment Clause jurisprudence.

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[138] Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Note that the Court's decision of the Court's decision in Zelman v. Simmons-Harris, 536 U.S. 639 (2002), turned on the *Nyquist* decision. The holding of *Zelman*, however, does not extend to the portion of *Nyquist* dealing with "maintenance and repair" grants. *Nyquist*, 413 U.S. at 768.
[139] *Id.* at 794.
[140] *Id.* at 768.
[141] *Id.* at 794.
[142] *Id.* at 775.
[143] *Id.* at 777.
[144] *See supra* note 138.

In *Agostini v. Felton*, the question was whether public employees could provide on site-remedial instruction to students attending sectarian school in educationally deprived areas.[145] The purpose of the program was to provide the same opportunities for remedial instruction as were available to public school students.[146] The Court upheld the program and in doing so reaffirmed but modified the *Lemon* test.[147] Under the modified *Lemon* test, courts look to: (1) whether the government had a secular purpose; and (2) whether the aid has the effect of advancing or inhibiting religion.[148] Three "primary criteria" are used in the "effects test" inquiry: (1) whether the aid results in governmental indoctrination; (2) whether the aid program defines its recipients by reference to religion; and (3) whether the aid creates an excessive entanglement between government and religion.[149] The Court made clear that government aid to religious institutions is less likely to subsidize religion (and thus result in governmental indoctrination) where "the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[150] The Court emphasized that the program in this case was neutral from the perspective of religion, was directed at supporting students and not institutions, and was carefully designed to avoid promoting the sectarian goals of the schools at which the program operated.[151]

In *Mitchell v. Helms*, the Court addressed whether a federal program that provides government aid in materials and equipment to public and private schools, was a law respecting an establishment of religion.[152] The law required that all items purchased under the program had to be secular in nature and no item purchased under the program could be used for sectarian purposes.[153] The Court upheld

[145] Agostini v. Felton, 521 U.S. 203, 223 (1997).
[146] *Id.* at 210.
[147] *Id.* at 237.
[148] *Id.* at 231.
[149] *Id.* at 234.
[150] *Id.* at 231.
[151] *Id.* at 234-35.
[152] Mitchell v. Helms, 530 U.S. 793 (2000) (plurality).
[153] *Id.* at 802-03.

the program, but without a majority opinion.[154] The four-person plurality adopted a neutralist perspective, applying the two-part test adopted in *Agostini*.[155] First, did the government program seek to indoctrinate religion?[156] In answer to this question, the Court held that because the equipment and materials were themselves secular and that sectarian uses were forbidden, the program did not seek to indoctrinate religion.[157] Second, the Court asked if the recipients of the aid were selected by reference to religion, and found that the law determined eligibility neutrally and based on private choices, and as such, recipients were not selected on the basis of religious criteria.[158]

Justice O'Connor, joined by Justice Breyer, concurred in the opinion.[159] O'Connor agreed that the aid program was constitutional, but disagreed with the "singular importance" that the plurality had placed on neutrality.[160] O'Connor believed the constitutionality of the program resulted from the confluence of several factors: the neutral, secular criteria under which the aid was awarded; the fact that the aid supplemented and did not supplant the existing curriculum; the fact that no religious schools received government funds; the fact that the items purchased and loaned were secular; the fact that evidence of actual diversion was de minimis; and the inclusion in the program of adequate safeguards against diversion.[161] As such, O'Connor concluded that the program neither advanced nor inhibited religion.[162] By combining the plurality and the concurrence, it seems that the government may under some circumstances provide religious institutions with aid, even if it is potentially divertible to religious purposes.

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[154] *Id.*
[155] *Id.* at 808 (quoting *Agostini,* 521 U.S. at 234).
[156] *Id.*
[157] *Id.* at 809-13.
[158] *Id.* at 813-14.
[159] 530 U.S. 793 (2000) (O'Connor, J. concurring).
[160] *Id.* at 837.
[161] *Id.* at 849.
[162] *Id.* at 867.

IV. GOVERNMENT POLICY

A. Prior Policy

The former federal policy, which seems to date back to the Carter administration and was explicitly adopted by the Reagan, Bush, and Clinton administrations, prohibited federal grants for repair or preservation of properties dedicated to worship or religious instruction.[163] This policy was memorialized in the 1995 opinion of the Office of Legal Counsel by Assistance Attorney General Walter Dellinger.[164] The opinion concludes that the "question of government aid to religious institutions is a very difficult one. . . . We think, however, that a court applying current precedent is most likely to conclude that the direct award of historic preservation grants to churches and other pervasively sectarian institutions violates the Establishment Clause."[165]

The opinion makes three major points in support of its finding. First, Supreme Court precedent suggests that federal grants may not be provided to "pervasively sectarian" institutions.[166] The reason for this prohibition is the risk that where secular and religious activities are "inextricably intertwined," any government aid, even if limited to a secular purpose, will inevitably advance the religious purpose as well.[167] The assumption is that secular elements cannot be separated from the overall religious mission of the institution.[168] Secondly, any effort to distinguish the sectarian from the religious elements of active houses of worship is not feasible and may require "monitoring for the subtle or overt presence of religious matter" prohibited by the Establishment Clause.[169] Such an effort would necessitate an inquiry into the religious doctrine or beliefs that may impermissibly entangle the

[163] Louis R. Cohen, *Religious Freedoms: Historic Preservation Grants and the Establishment Clause*, ALI-ABA Course of Study Materials: Historic Preservation Law, at 4 (Oct. 2001).
[164] Memorandum from Walter Dellinger, *supra* note 8.
[165] *Id.* at 5.
[166] *Id.* at 2 (citing *Hunt*, 413 U.S. at 743).
[167] *Id.* at 3 (quoting Meek v. Pittenger, 421 U.S. 349, 365-66 (1975) (invalidating provision to pervasively sectarian schools of instructional material "earmarked for secular purposes") (citing Kendrick, 487 U.S. at 610).
[168] *Id.* (citing *Meek*, 421 U.S. at 363).
[169] *Id.* (citing Hernandez v. Comm'r, 490 U.S. 680, 694 (1989)).

government with religion.[170] Finally, this opinion argues that historic preservation grants are not generally available, but rather are awarded on the basis of subjective criteria requiring an evaluation of historical importance and architectural and artistic distinction.[171] The application of subjective criteria in the context of a competitive grant program may require or reflect governmental judgments about the relative value of religious enterprises.[172] The opinion concludes that although recent Supreme Court precedent has "emphasized the importance of neutrality in upholding governmental programs against Establishment Clause challenge," there is no authority to depart from the policy that funds should not be provided directly to religious institutions.[173]

B. 2003 Opinion

On May 28, 2003, the Office of Legal Counsel released its opinion concerning historic preservation grants to places of religious worship and instruction.[174] The new opinion reversed the long-standing policy that Supreme Court precedent prohibited such grants. This opinion concludes that the Establishment Clause does not forbid grants to houses of worship when they are among a broad range of beneficiaries, not defined by reference to religion, in a program with neutral application and broad, secular goals.[175] It seems that, given the indecision and doctrinal confusion in the Supreme Court, the opinion attempted to answer any potential constitutional question that may be asked.[176]

First, the opinion argues that the federal government has a substantial interest in preserving all sites of historic significance to the nation, whether those sites are secular or sectarian.[177] This interest makes these grants distinguishable from those given to educational institutions, where the concerns

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[170] *Id.* (citing *Hernandez*, 490 U.S. at 696-97 ("[R]equiring the Government to distinguish between 'secular' and 'religious' benefits or services [provided by Church of Scientology auditing sessions] may be fraught with the sort of entanglement that the Constitution forbids.'")).
[171] *Id.* (citing *Rosenberger*, 515 U.S. at 840-45 (subsidization of printing costs generally available to all student publications); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 757-59, 763 (1995) (access to public square generally available for all displays); Westside Cmty. Bd. of Educ. v. Mergens, 496 U.S. 226, 252 (1990) (O'Connor, J.) (access to school facilities available to all student clubs, with students free to organize additional clubs)).
[172] *Id.* at 4 (citing *Pinette*, 515 U.S. at 757-59, 763-6; *Mergens*, 496 U.S. at 252).
[173] *Id.* at 5.
[174] Memorandum from M. Edward Whelan III, *supra* note 6.
[175] *Id.* at 17.
[176] *See infra* text accompanying notes 202- 302.
[177] *Id.* at 7-8.

about religious indoctrination are particularly strong.[178] As such, the historic preservation grants should not be subjected to as rigorous a scrutiny as that given to religious educational institutions.[179]

Second, Save America's Treasures grants are analogous to aid that qualifies as "general governmental services," such as police protection and fire fighting because they preserve landmarks of nationwide significance.[180] These governmental services may be provided to religious institutions if they are made available on the basis of neutral criteria.[181] If these services were denied to religious institutions, religion would be handicapped.[182] In this case, the class of beneficiaries is so broad as to encompass any and all kinds of historic structure whether owned by public or private sources, secular or sectarian.[183] Thus, the breadth of eligibility suggests that these historic preservation grants are simply a permissible general government service.[184]

The opinion next emphasized the neutrality of the criteria for selecting Save America's Treasures grantees.[185] The opinion suggests that although a number of the criteria allow for discretion, they are amenable to neutral application.[186] The opinion argues that the neutrality of the criteria, with the limited allowance for subjective decision-making, and the diverse makeup of structures that have been preserved under the Program, indicate that the Program is not skewed toward religion.[187]

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[178] *Id.* (citing Edwards v. Aguillard, 482 U.S. 578, 585 (1987) (noting "particular [establishment] concerns that arise in the context of public elementary and secondary schools"); *Mitchell*, 530 U.S. at 885 (Souter, J., dissenting) (noting that "two types of aid recipients heighten Establishment Clause concern: pervasively religious schools and primary and secondary religious schools"); *Nyquist*, 413 U.S. at 772.)
[179] *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 613-18 (1988)).
[180] *Id.* at 9 (citing Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947)).
[181] *Id.* at 9 (citing Widmar v. Vincent, 454 U.S. 263, 274 (1981), ("[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, *512* U.S. 687, 704 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges")).
[182] *Id.* at 8 (citing *Everson*, 330 U.S. at 17-18.)
[183] *Id.* at 9.
[184] *Id.* at
[185] *Id.* at 10.
[186] *Id.* at 12.
[187] *Id.* at 12-13 (citing Witters v. Washington Dep't of Serv. for the Blind, 474 U.S. 481, 488 (1986)).

The opinion felt that for the above reasons, no reasonable observer would feel that this Program was an endorsement of religion.[188] Rather, an informed observer would understand that a government grant from this Program is not a payment for the endorsement of religion, but rather a payment for the preservation of a structure that is important to the country's history.[189]

The opinion emphasizes that the Save America's Treasures grants are not to be used to promote religion as set out by statute and regulation.[190] Audit rules and other aspects of the Program work to ensure that Save America's Treasures grants are used for their stated purpose and not used to promote religion.[191]

The opinion next analogizes this Establishment Clause issue here with the Supreme Court jurisprudence in two separate but related doctrines, free speech and the free exercise of religion.[192] The opinion notes the move towards neutralism in these analogous areas.[193] The opinion first describes a line of cases that hold that the Free Speech Clause does not permit the government to deny religious groups equal access to the government's own property even where those groups will use that property for religious worship or instruction.[194] The opinion then suggests that the denial of grants to religious institutions because of their religious identity is to single out religious activity for special and burdensome treatment, a violation of the Free Exercise Clause.[195] The opinion here argues that parallel

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188 *Id.* at 13.
189 *Id.* (citing *Mitchell*, 530 U.S. at 842-44 (O'Connor, J., concurring in judgment)).
190 *Id.* at 13-14. ("To begin with, under the NHPA, properties that are owned by religious institutions or used for religious purposes are eligible for Save America's Treasures grants only if they "deriv[e] primary significance from architectural or artistic distinction or historical importance," 36 C.F.R. § 60.4(a), and "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, *provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant*," 16 U.S.C. § 470a(e)(4) (emphasis added).")
191 *Id.*
192 *Id.* at 15, 15-16.
193 *Id.*
194 *Id.* at 15 (citing Widmar v. Vincent, 454 U.S. 263, 265 (1981). *See* Lamb's Chapel v. Center Moriches Sch. Dist., 508 U.S. 384, 394 (1993); Capital Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); *see also* Westside Community Bd. of Educ. v. Mergens, 496 U.S. 226 (1990)).
195 *Id*. at 15-16 (citing Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (government may not "impose special disabilities on the basis of religious views or religious status"); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993) ("[a]t a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs"); Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 390 (1990) (to "single out" religious activity "for special and burdensome treatment" would violate the Free Exercise Clause)).

Supreme Court doctrine prohibits the discrimination against religion under the Free Exercise Clause.[196] To deny houses of worship otherwise available grants directly implicates that anti-discrimination jurisprudence.[197] The opinion suggests that the Supreme Court's doctrinal shift towards non-discrimination against religion in these two analogous areas suggests that the Court would carry that same principle over into its Establishment Clause jurisprudence.

The opinion concludes by suggesting that even though the relevant Supreme Court precedent, *Tilton* and *Nyquist* have not been explicitly overruled, the Establishment Clause jurisprudence has evolved since those decisions were rendered, and as such, they may no longer be good law.[198] Agostini and Mitchell overturned many principles that underlie the decisions in Tilton and Nyquist.[199] Specifically, the "pervasively sectarian" doctrine, that held that there are certain religious institutions in which religion is so pervasive that no governmental aid may be provided to them, because their performance of even secular acts will be infused with religious purposes, no longer enjoys support from a majority of the court.[200]

V. HISTORIC PRESERVATION GRANTS IN CONSTITUTIONAL CONTEXT

The opinion identifies policy considerations and considers factors that may be relevant in a constitutional challenge to the Save America's Treasures grant program. This Note, while agreeing with the conclusion of the opinion, attempts to more concretely ground the many arguments made by the opinion in Supreme Court jurisprudence. This analysis may more accurately reflect an actual judicial response to such a challenge. It is important to note, and has been demonstrated above, that

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[196] *Id.*
[197] *Id.*
[198] *Id.* at14-16.
[199] *Id.*
[200] *Id.* at 16 (stating that "[f]our Justices expressly abandoned it in *Mitchell*, *see* 530 U.S. at 825-29 (plurality opinion), and Justice O'Connor's opinion in that case set forth reasoning that is inconsistent with its underlying premises, *see id.* at 857-58 (O'Connor, J., concurring in judgment, joined by Breyer, J.) (requiring proof of *actual* diversion of public support to religious uses to invalidate direct aid to schools and explaining that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause"); *see also* Columbia Union Coll. v. Oliver, 254 F.3d 496, 502-04 (4th Cir. 2001) (explaining that the pervasively sectarian test is no longer valid in light of the holdings of six Justices in *Mitchell*).").

the Establishment Clause jurisprudence is in flux, with a shift toward neutralism.[201] Thus, this Note suggests two different approaches the Court may take in approaching a grant to a historic religious institution under the Save America's Treasures grant program.[202] First, this Note will consider whether the grant program is constitutional under the doctrine of direct aid of funding to religious institutions. Secondly, this Note will consider whether the grant program can be upheld as a general governmental service.

A. Direct Aid Approach

The law of the Establishment Clause has been moving away from a regime of strict separationism and toward a regime of neutrality.[203] The principles of *Tilton* and *Nyquist* have guided federal policy for the past twenty years or more. There are reasons to believe, however, that the Supreme Court may no longer adhere to the full sweep of this exclusion of structures devoted to worship or religious instruction from government assistance. Thus, the opinion is correct that although *Tilton* and *Nyquist* have not been overturned, they may no longer stand as good law.[204] The opinion, however, should have gone further to apply the now relevant *Mitchell* test to the historic preservation grants to determine their constitutionality.[205]

Because the plurality opinion in *Mitchell* garnered only four votes, the controlling opinion is the concurrence with the narrowest holding, here Justice O'Connor's.[206] Taking these two opinions together, it is clear that the "pervasively sectarian" doctrine has been overruled, no longer requiring

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[201] *See infra* Part IV.
[202] Note that this note does not analyze the free speech and free exercise arguments raised by the opinion. The opinion raises these issues to demonstrate a broader doctrinal shift in Supreme Court treatment of religion across constitutional clauses. As such, it is not directly relevant to a challenge under the Establishment Clause to historic preservation grants to religious institutions, and thus, is beyond the
[203] *See, e.g.*, *Mitchell*, 530 U.S. at 808, 835-36 (plurality opinion); *id*. at 837, 851 (O'Connor, J., concurring in judgment); *Agostini*, 521 U.S. at 223.
[204] *See* Memorandum from M. Edward Whelan III, *supra* note 6, at 16.
[205] *Mitchell*, 530 U.S. at 808, 835-36 (plurality opinion); *id*. at 837, 851 (O'Connor, J., concurring in judgment).
[206] *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

religious institutions to segregate their religious activities to receive aid,[207] and has been replaced with a question of "neutrality plus" from O'Connor's concurring opinion.[208] O'Connor's opinion suggests that neutrality is a necessary and important consideration in judging Establishment Clause cases, but that factor may not be sufficient in and of itself.[209] Instead, courts must examine whether actual diversion of aid occurs and whether the "particular facts of each case" reveal that the Establishment Clause has been violated.[210] As such, just as Justice O'Connor did in her concurrence in *Mitchell*,[211] the Court in this case would apply the modified *Lemon* test from *Agostini v. Felton* considering and balancing each factor: (1) whether the government had a secular purpose; and (2) whether the aid has the effect of advancing or inhibiting religion.[212] Three "primary criteria" are used in the "effects test" inquiry: (1) whether the aid results in governmental indoctrination; (2) whether the aid program defines its recipients by reference to religion; and (3) whether the aid creates an excessive entanglement between government and religion.[213]

A. Secular Purpose Test

First, it is undisputed that the Save America's Treasures Program has a secular purpose.[214] The program is designed to preserve America's historic resources without regard to their secular or sectarian characters.[215] The grants are available, and have been available, to recipients of all sorts.[216] As such, the Program is in no way a vehicle for the advancement of religious purposes.

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[207] *See, e.g. Agostini*, 521 U.S. at 223 (students attending religious schools eligible for federal remedial assistance); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995) (Christian student organization eligible for student activity funds); Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1 (1993) (publicly funded sign language interpreter could assist student in a Catholic school); Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481 (1986) (blind student free to use public vocational assistance to attend bible college).
[208] *Mitchell*, 530 U.S. at 837, 851 (O'Connor, J., concurring in judgment).
[209] *Id*. at 837.
[210] *Id.* at 839.
[211] *Mitchell*, 530 U.S. at 808, 844-45 (O'Connor, J., concurring in judgment).
[212] *Id.* at 231.
[213] *Id.* at 234.
[214] *Mitchell,* 530 U.S. at 845 (O' Connor, J., concurring in the judgment) (stating that it is important to "ask whether the government acted with the purpose of advancing or inhibiting religion") (internal quotations omitted).
[215] *See generally* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.

B. Effects Test

Secondly, the grants do not have the effect of advancing religion. In order to determine effect, the neutrality of the criteria used to assign the aid must first be evaluated.[217] It seems clear that the criteria for determining grant eligibility are neutral on their face as none take religion into account in any way.[218] The first criteria requires a showing of national significance, that the property has an "exceptional value or quality in illustrating or interpreting the intellectual and cultural heritage and the built environment of the United States," that it possesses "a high degree of integrity," that it is associated with events, persons, ideas, or ideals that are especially significant in American history, and that it is listed on the National Register or is eligible to be.[219] Here, in fact, it is more difficult for a religious building to obtain this status, as they are "ordinarily" deemed ineligible for listing on the Register unless that religious property derives "primary significance from architectural or artistic distinction or historical importance."[220]

Grant applicants must also demonstrate that the historic property is "threatened" or "endangered," or that it has an "urgent preservation and/or conservation need."[221] Additionally, the proposed project "must address the threat and must have educational, interpretive, or training value and a clear public benefit."[222] Finally, the project must be financially feasible.[223] These criteria clearly do not consider religion.

Notably, the analysis in the opinion goes beyond the dictates of *Mitchell* to apply a novel reasoning by evaluating the neutrality of the criteria as they may be *applied*.[224] The opinion asks to

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216 Save America's Treasures, Official Project Profiles, *at* http://www.saveamericastreasures.org/profiles.htm, *supra* note 78.

217 *Mitchell,* 530 U.S. at 838-39 (O'Connor, J., concurring in the judgment).

218 *See generally* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.

219 *Id.*

220 36 C.F.R. § 60.4 (2004).

221 *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.

222 *Id.*

223 *Id.*

224 Memorandum from M. Edward Whelan III, *supra* note 6, at 10-13.

what extent the criteria leave room for an administrator with discretion to favor religion when considering grant applications.[225] "We believe that the degree to which officials administering public aid have discretion to favor (or disfavor) religious institutions – and, far more important, the manner in which they exercise that discretion – are relevant to the aid's constitutionality."[226] The opinion's analysis is logical in that even though criteria appear to be neutral, this appearance is insufficient where a biased administrator could exercise his discretion to favor religion in practice. In the case of this program, the opinion is correct to conclude that the limited discretion allowed within the criteria does not leave room for favoritism.[227] In addition, although not recognized by the opinion, the administrative oversight involved in the program would not allow a single administrator's bias to be acted upon.[228]

Under the *Mitchell* plurality opinion, the Program's secular purpose and its neutral criteria would practically dispose of this case.[229] Under the analysis of Justice O'Connor and Justice Breyer, however, the neutrality of the Program remains a critical factor in considering its constitutionality, but additional considerations must also weigh in favor of constitutionality.[230] Justice O'Connor noted that the Court has "never held that a government-aid program passes constitutional muster solely because

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[225] *Id.*
[226] *Id.* at 13.
[227] *Id.* at 12-13; *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.
[228] After the Park Service completes its ranking of the applicants, a panel of experts with professional expertise in fields such as history, preservation, conservation, archeology rank applications and make funding recommendations to the Secretary of the Interior. In order to insulate the panel members from external influence, the Department of the Interior does not disclose their identity to the public. The Secretary of the Interior, in consultation with the President's Committee on the Arts and the Humanities, will select applicants and forward those selections to the House and Senate Committees on Appropriations for concurrence. *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions, supra* note 77.
[229] *Mitchell*, 530 U.S. at 829-32.
[230] Although she recognized that "neutrality is an important reason for upholding government-aid programs against Establishment Clause challenges," she would not make neutrality, and neutrality alone, the one factor of "singular importance in the future adjudication of Establishment Clause challenges to government school-aid programs." *Id.* at 837, 838; *see id.* at 838-39 (O'Connor, J., concurring in the judgment) ("We have emphasized a program's neutrality repeatedly in our decisions approving various forms of school aid.") (citing cases).

of the neutral criteria it employs as a basis for distributing aid."[231] Instead, Justices O'Connor and Breyer would hold that "neutrality is important, but it is by no means the only 'axiom in the history and precedent of the Establishment Clause.'"[232] Instead, courts must examine whether actual diversion of aid occurs and whether the particular facts of each case reveal that the Establishment Clause has been violated.[233] As such, the next considerations are of the "primary criteria" used to determine whether the grants program has the "effect of advancing or inhibiting religion."[234]

1. Indoctrination

Compelling arguments exist on both sides of the question of whether the aid appears to result in governmental indoctrination. *Agostini* requires that the grant to a religious institution be based on secular, neutral criteria to avoid the appearance that government is endorsing religion or funding indoctrination.[235] Neutral criteria must also be considered with regard to the extent that the funding will have a constitutionally impermissible effect by *actually* supporting religious indoctrination.[236] Justice O'Connor has specifically criticized past Supreme Court cases for "applying an irrebuttable presumption that secular instructional materials and equipment would be diverted to use for religious indoctrination."[237] Instead of focusing on this irrebuttable presumption that even the secular courses in a religious school are "inescapably" religious,[238] Justice O'Connor would require those challenging a statute to "prove that the aid in question actually is, or has been, used for religious purposes."[239] Thus, O'Connor requires a consideration of both whether there is the appearance that the government is

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[231] *Id.* at 839.
[232] *Id.* (quoting *Rosenberger, 515 U.S. at 846* (O' Connor, J., concurring)); *see also* Good News Club v. Milford Cent. Sch., 533 U.S. 98, (2001) ("We have held that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion.") (internal quotations omitted).
[233] *Id.*
[234] *Mitchell*, 530 U.S. at 234.
[235] Agostini v. Felton, 521 U.S. 203, 33-35 (1997).
[236] *Id.; Mitchell*, 530 U.S. at 845.
[237] (O'Connor, J., concurring in the judgment) (citing and joining the plurality opinion in expressly overruling Meek v. Pittenger, 421 U.S. 349 (1975) (invalidating a program sending public employees into parochial schools to provide auxiliary services to students); and Wolman v. Walter, 433 U.S. 229 (1977) (invalidating state program allowing for field trips for private schools).
[238] *Wolman*, 433 U.S. at 250.
[239] *Mitchell*, 530 U.S. at 857 (O'Connor, J., concurring in the judgment).

endorsing religion, and also whether government funds are being diverted to actually support religious indoctrination.

a. Appearance of Endorsement

The *Mitchell* plurality suggested that neutral criteria are sufficient to establish that the government is not appearing to endorse religion: "If the religious, irreligious, and a-religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[240] Because the concurring opinion did not disagree with this point, it appears that neutral criteria to disburse aid is sufficient to assure that such aid does not appear to be an endorsement of religion.[241] In this case, as has been established, the criteria used to evaluate applications are neutral and serve a secular purpose.[242]

The opinion also suggests, although less than clearly, that there is less of a concern of the appearance of endorsement where historic preservation grants are distributed to a wide range of institutions to use strictly as opposed to those grants strictly limited to educational recipients.[243] This distinction seems unnecessary because, in *Mitchell*, the plurality and the concurrence upheld aid that was directed to only educational institutions, and specifically to religious primary and secondary schools.[244] Thus, the Supreme Court has not required that grant programs have a range of recipients that spans across many fields.

b. Actual Diversion of Funds

The opinion delineates the statutory and regulatory requirements that prevent Save America's Treasures grants from being used to promote religion.[245] The opinion, however, does not indicate how this factor relates to the constitutionality of the grant program. In fact, these limits on the stricter requirements for religious places to qualify for the National Register and thus be eligible for grants,

[240] *Id.* at 809.
[241] *Id.* at 851 (O'Connor, J., concurring in the judgment).
[242] *See infra* text accompanying notes 217-228.
[243] Memorandum from M. Edward Whelan III, *supra* note 6, at 8-10.
[244] *Mitchell*, 530 U.S. at 810.
[245] Memorandum from M. Edward Whelan III, *supra* note 6, at 13-14.

and the auditing and covenant requirements after the grant has been awarded, are relevant to the second prong of the *Agostini* test, whether the government aid is actually being used to support religion.[246]

Justice O'Connor criticized the plurality in *Mitchell* for approving the "actual diversion of government aid to religious indoctrination."[247] She wrote that the Court has "long been concerned that secular government aid not be diverted to the advancement of religion."[248] Actual diversion concerned Justice O'Connor because if "religious indoctrination is supported by government assistance, the reasonable observer would naturally perceive the aid program as government support for the advancement of religion."[249] Justice O'Connor's concerns with governmental aid to houses of worship, therefore, would be lessened if these places did not actually use the aid for religious purposes.[250]

In this case, properties that are owned by religious institutions or used for religious purposes are eligible for Save America's Treasures grants only if they "deriv[e] primary significance from architectural or artistic distinction or historical importance,"[251] and "[g]rants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, *provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant*,"[252] Thus, the Department of the Interior may provide grants for the preservation of religious structures only insofar as such preservation protects those structures' *historically significant* components, and as such, grants are limited to secular uses and solely to protect those non-religious historical elements of otherwise religious buildings.

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[246] Agostini v. Felton, 521 U.S. 203, 233-35 (1997).
[247] *Mitchell*, *530* U.S. at 837 (O'Connor, J., concurring in the judgment).
[248] *Id.* at 840.
[249] *Id.* at 843.
[250] *See id.* at 843.
[251] 36 C.F.R. § 60.4(a).
[252] 16 U.S.C. § 470a(e)(4) (emphasis added).

Yet, the *Tilton* case involved higher education,[253] and in *Nyquist*, the program for secondary schools was struck down.[254] By extension, could the Court find that religious indoctrination is even more likely to occur in a house of worship – that when the government finances the preservation of a house of worship in which religious indoctrination explicitly occurs, the government is effectively financing "religious activities" forbidden by Justice O'Connor's controlling opinion in *Mitchell*?[255] To answer this question, it seems that given the Court's recent jurisprudence, these holdings in *Tilton* and *Nyquist* would not withstand further review. Rather, it seems that the Court is willing to uphold government aid to an institution that engages in religious behavior and education, as long as the aid itself is not actually used for that purpose.[256]

Finally, other aspects of the Program ensure that Save America's Treasures grants are provided "only for the benefit of the public" and not used for religious purposes.[257] Grantees must agree to encumber their property with a fifty year covenant to keep open to the public all portions of rehabilitated structures that are not visible from the public way for twelve days a year,[258] and to "repair, maintain, and administer the premises so as to preserve the historical integrity of the features, materials, appearance, workmanship, and setting that made the property eligible for the National Register of Historic Places."[259] To ensure compliance with these requirements, those receiving grants must keep detailed records and are subject to audit by the government to ensure that the grants are used only for designated purposes.[260] Thus, as *Mitchell* held that the government need not "have a failsafe

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[253] Tilton v. Richardson, 403 U.S. 672 (1971).
[254] Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
[255] *Mitchell*, 530 U.S. at 840 (O'Connor, J., concurring in the judgment).
[256] *Id.* at 845.
[257] *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 3.
[258] *Id.* at 2 (mandating that "interior work (other than mechanical systems such as plumbing or wiring), or work not visible from the public way, must be open to the public at least twelve days a year during the fifty year term of the preservation easement or covenant").
[259] *Id.* at 2.
[260] 16 U.S.C. § 470e (grantees must maintain "records which fully disclose the disposition by the beneficiary of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or

mechanism capable of detecting any instance of diversion,"[261] in this case, the safeguards against sectarian diversion are more than constitutionally sufficient.

2. Recipients Defined on Basis of Religion

Agostini's second criterion under the effects test, whether an aid program defines its recipients by reference to religion,[262] is largely left unanswered by the opinion.[263] The plurality in *Mitchell* explained that the second criterion is related to the first, as it considers the same facts as the neutrality inquiry,[264] but asks whether the criteria for allocating the aid creates a financial incentive to undertake religious indoctrination.[265] The plurality in *Mitchell*, and left unquestioned by the concurrence, holds that "[s]uch an incentive is not present where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis."[266]

The historic preservation context has a unique answer to the question of whether direct grants provide incentive to undertake religious indoctrination. First, no incentive exists for a property to undertake religious activities because the grants are available on an equal basis to religious and secular properties.[267] Secondly, in this case, no property is eligible for the grant unless it is at least fifty years old *and* meets the other criteria for national significance.[268] As such, individual property owners have little to no actual control over whether their property is eligible for a grant from this Program. Therefore, because the grant criteria are neutral as to the activities in or uses of the historic properties, the program creates no incentive to undertake religious indoctrination.

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used, and the amount and nature of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate an effective audit").

[261] *Mitchell*, 530 U.S. at 861 (O'Connor, J., concurring in the judgment).

[262] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[263] *See* Memorandum from M. Edward Whelan III, *supra* note 6.

[264] *Mitchell,* 530 U.S. at 813 (citing *Agostini*, 521 U.S. at 225-26).

[265] *Id.* (citing *Agostini*, 521 U.S. at 231).

[266] *Id.*

[267] *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.

[268] *Id.*

3. Excessive Entanglement

The Court has explained that "[n]ot all entanglements, of course, have the effect of advancing or inhibiting religion.[269] Interaction between church and state is inevitable, and we have always tolerated some level of involvement between the two. Entanglement must be 'excessive' before it runs afoul of the Establishment Clause."[270] As such, there is no basis to conclude that allowing active religious structures to receive aid would "excessively entangle" church and state, because there is no more governmental monitoring of grant recipients here than in other cases in which the Court has not questioned the provision of aid under the entanglement prong. These programs have included the review of the materials used by an adolescent counseling program set up by the religious institutions, and monitoring of that program by periodic visits,[271] annual audits conducted by the state,[272] and unannounced monthly visits by public supervisors.[273] Here, where the grants are limited to use on the secular and historically significant portion of the religious properties, require maintenance for fifty years, and only potential auditing are certainly less onerous burdens on religious institutions than those that have already been deemed constitutionally acceptable.[274]

4. Outcome

Under the modified *Lemon* test applied by the *Agostini* and *Mitchell* Courts, the historic preservation grants to religious buildings would be upheld under the Establishment Clause. Yet, although these federal grants may be provided to religious buildings, it seems clear that those funds

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[269] Agostini v. Felton, 521 U.S. 203, 233 (1997).
[270] *Id.* (citing Bowen v. Kendrick, 487 U.S. at 615-617; Roemer v. Bd. of Pub. Works, 426 U.S. 736, 764-65 (1976)).
[271] *Bowen*, 487 U.S. at 615-617 (no excessive entanglement where government reviews the adolescent counseling program set up by the religious institutions that are grantees, reviews the materials used by such grantees, and monitors the program by periodic visits).
[272] *Roemer*, 426 U.S. at 764-65 (no excessive entanglement where state conducts annual audits to ensure that categorical state grants to religious colleges are not used to teach religion); c*f., e.g., Agostini*, 521 U.S. at 232-35; Mitchell v. Helms, 530 U.S. 793 (2000).
[273] *Agostini*, 521 U.S. at 234.
[274] *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77.

cannot be used to rehabilitate *any* element of those buildings. Rather, both the relevant regulations[275] and the Establishment Clause[276] require that these grants be limited to the support of only secular elements of the historic religious buildings. If the federal government funded the restoration of some plainly religious element of a building that serves no purpose other than for religious conduct or religious ornamentation, such as a crucifix or perhaps an altar, this would violate the *Mitchell* test as having the effect of advancing religion[277] as the grants appear to endorse religion because they actually support religious indoctrination.[278] In addition, under Justice O'Connor's concurrence in *Mitchell*, the grants are impermissible because the funds are actually diverted to support religious indoctrination.[279]

A closer question, in contrast, is whether the use of government funds to restore something less obviously religious, such as stained glass windows, would have the effect of advancing religion.[280] Such windows often depict religious imagery, yet, they are also visible from the outside of the building and may lend to the building's historic character. An argument can be made that the funding is acceptable if the windows are historically significant, are not used in a religious service beyond simply allowing light into the building, and the funding is provided to a broad range of recipients not defined by religion. In contrast, an argument can be made that the stained glass windows that depict religious imagery cannot be divorced from that character, and therefore, it is impermissible for the federal government to subsidize this religious message. Because the issue of providing federal funding for this type of religious imagery is such a close question and may be interpreted differently by different courts, it may be prudent to avoid this issue by declining to fund such projects.

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[275] "Grants may be made . . . for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, *provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant*." 16 U.S.C. § 470a(e)(4) (emphasis added).
[276] *Mitchell*, *530* U.S. at 843 (O'Connor, J., concurring in the judgment).
[277] *Mitchell*, 530 U.S. at 809.
[278] *Id.*
[279] *Mitchell*, 530 U.S. at 837 (O'Connor, J., concurring in the judgment).
[280] *See* Lupu & Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, *supra* note 15, at 1174. The authors here discuss the distinction between the funding of the interior and the exterior of religious buildings and determine that because the state could not require a religious institution to retain stained glass windows, (not a foregone conclusion), the government cannot fund the restoration of those windows either.

Another suggestion may be made that the beneficiaries of federal grants from the Save America's Treasures program should be required to provide notice to the public of the nature of the building's national, historic significance. This notice would further the principle that Save America's Treasures grants are provided "only for the benefit of the public"[281] by ensuring that the public, in fact, is aware of the import of the building to appreciate it as such. In addition, this notice would further ensure that the funding does not have the effect of advancing religion, because it would more clearly demonstrate to Justice O'Connor's "reasonable observer" that "religious indoctrination is [not being] supported by government assistance."[282] Rather, the government assistance is solely directed to preserving the secular elements of an important, historic, and only coincidentally religious building. This notice could be in the form of signage, tours, or other media, and should be readily available to those who visit during the days the building must be open to the public.

It is important to note, finally, that in *Agostini v. Felton*, the Supreme Court, in no uncertain terms, instructed that "we do not hold that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent."[283] The Court went on to "reaffirm that if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[284] Despite the apparent movement in the doctrine of the Establishment Clause, the rule of *Tilton*, *Hunt* and *Nyquist*, that prohibits government aid to construct, maintain or repair pervasively sectarian institutions, has never been repudiated or directly questioned by a majority of the Supreme Court. If the principles underlying these cases have been explicitly overruled, however, it is fair to assume that the Supreme Court may take the opportunity to

[281] *See* Save America's Treasures: FY 2003 Historic Preservation Fund, Grants to Preserve Nationally Significant Intellectual and Cultural Artifacts and Historic Structures and Sites, *Guidelines and Application Instructions*, *supra* note 77, at 3.
[282] *Mitchell*, 530 U.S. at 843 (O'Connor, J., concurring in the judgment).
[283] *Agostini*, 521 U.S. at 237, *cited in* Columbia Union Coll. v. Oliver, 254 F.3d 496, 511 (4th Cir. 2001) (Motz, J., concurring).
[284] *Id.*

dispense with this case law that is in tension with its more recent decisions in *Agostini* and *Mitchell*. Yet, the votes of the Justices were nearly unanimous in the *Tilton-Hunt-Nyquist* jurisprudence.[285] In fact, Justice O'Connor cites *Tilton* with apparent approval in her concurrence in *Mitchell.*[286] As such, the Establishment Clause jurisprudence is in flux and perhaps it is not fair or wise to attempt to discern its future.

B. Principle of Non-Discrimination in General Governmental Services

Since its first modern Establishment Clause decision in *Everson v. Board of Education*, the Supreme Court has indicated that religious institutions are entitled to receive "general government services" made available on the basis of neutral criteria.[287] *Everson* held that the Establishment Clause does not prevent the government from providing generally available busing services to students attending religious schools.[288] The Court explained that even if the neutral provision of busing services increased the likelihood that some parents would send their children to religious schools, the same could be said with respect to other general government benefits such as "ordinary police and fire protection, connections for sewage disposal, public highways, and sidewalks."[289] The Court concluded that "the First Amendment . . . requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them."[290]

This principle has been reaffirmed many times and most recently by the dissent in *Mitchell*: "We do not regard the postal system as aiding religion, even though parochial schools get mail."[291] In

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[285] Hunt v. McNair, 413 U.S. 734 (1973); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).
[286] *Mitchell,* 530 U.S. at 857 (O'Connor, J., concurring in the judgment) (citing *Tilton*, 403 U.S. at 674-75).
[287] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).
[288] *Id.*
[289] *Id*. at 17-18.
[290] *Id.* at 17-18 (1947); s*ee also id*. at 16 ("[The state] cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. . . . [W]e must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.").
[291] *Mitchell*, 530 U.S. at 883 (Souter, J., dissenting).

Board of Education v. Allen, the Court also permitted the government to provide secular textbooks loaned by the State on equal terms to students attending both public and church-related elementary schools.[292] Because it had not been shown in this case that the secular textbooks would be used for anything but secular purposes, the Court concluded that, as in *Everson*, the State was merely "extending the benefits of state laws to all citizens."[293] Thus, *Everson* and *Allen* hold that sometimes the State may act in a way that has the incidental effect of facilitating religious activity:

> The Court has not been blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair. The Court never has held that religious activities must be discriminated against in this way.[294]

The Court has "consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge."[295] As Justice Brennan expressed the point in *Texas Monthly*: "Insofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause."[296] For example, in *Walz v. Tax Commission*,[297] the Court rejected an Establishment Clause challenge to a property tax exemption made available not only to churches, but to other nonprofit institutions, such as "hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups."[298] In upholding the tax exemption, the Court relied in part upon its breadth: the exemption

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[292] Bd. of Educ. v. Allen, 392 U.S. 236 (1968).
[293] *Id*. at 242.
[294] Roemer v. Bd. of Pub. Works, 426 U.S. 736 (1976).
[295] Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993); Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 704 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges").
[296] 489 U.S. at 14-15 (plurality opinion) (footnote omitted). As the Court explained in Widmar v. Vincent, 454 U.S. 263, 274 (1981), "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."
[297] 397 U.S. 664 (1970).
[298] *Id*. at 673; *see also id*. at 667 n.1.

did "not single[] out one particular church or religious group or even churches as such," but rather was available to "a broad class of property owned by nonprofit, quasi-public corporations."[299]

The opinion is correct to argue that the Save America's Treasures program is analogous to aid that qualifies as "general government services" approved by the Court in *Everson*. Although the historic preservation grants program is not as universal as fire fighting, for example, the broad range of beneficiaries is extensive enough to satisfy existing Supreme Court precedent. The Save America's Treasures program includes a broad range of beneficiary institutions, "including not only private non-profit groups, but state and local governmental units, Indian tribes, and numerous federal agencies, each of which may seek funding to preserve *any and all kinds* of historic structures."[300] As such, just as the wide-ranging group of beneficiaries was sufficient to sustain the inclusion of religious institutions for the tax benefit in *Walz*, the breadth of eligibility for the Save America's Treasures Program weighs heavily in favor of its constitutionality as well.[301] In contrast to the education-specific aid in *Nyquist*, *Hunt*, and *Tilton*, the grants under this program are awarded to beneficiaries in a vast number of fields. Thus, although the grants are not as widely distributed as mail or fire fighting service, they are provided to many beneficiaries for one common goal, the preservation of buildings that played an important role in our nation's history.[302]

CONCLUSION

The Save America's Treasures program has helped protect more than 700 of the country's defining buildings, sites, and documents.[303] Historic religious buildings are among those places that represent our country's cultural heritage and stand as important links to our past as a nation. Under the recent Establishment Clause jurisprudence in Justice O'Connor's concurrence in *Mitchell v. Helms*, the

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[299] *Id*. at 673.
[300] Memorandum from M. Edward Whelan III, *supra* note 6, at 10.
[301] Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).
[302] Hunt v. McNair, 413 U.S. 734 (1973); Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Tilton v. Richardson (403 U.S. 672 (1971).
[303] National Trust for Historic Preservation, *Who Benefits from Historic Preservation?*, *at http://www.nationaltrust.org/primer/advantages.html* (last visited Mar. 22, 2004).

Supreme Court would likely uphold the grant to the Old North Church, or another religious building.[304] The regulations controlling the use of grant funds by religious institutions prohibit those funds from being used to promote religion, and may only be used to preserve historically significant features. As such, the grant program has a secular purpose, and does not have the effect of advancing religion. In addition, the grant program may be sustained under the principle that religious institutions may not be discriminated against in the distribution of general governmental services provided on the basis of neutral criteria.[305] Thus, if challenged, the Supreme Court should find that historic preservation grants to religious institutions distributed on the basis of neutral criteria do not endorse religion. Rather, such grants demonstrate that the government is not hostile to religion, and will not discriminate against it. This should especially be true in the context of the preservation of buildings that played an important role in our nation's history and that, given their charitable status, are most in need of assistance.

[304] 530 U.S. 793 (2000) (O'Connor, J. concurring in judgment).
[305] Everson v. Bd. of Educ., 330 U.S. 1, 17 (1947).