

THE CALIFORNIA MISSIONS PRESERVATION ACT: SAFEGUARDING OUR HISTORY OR SUBSIDIZING RELIGION?

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INTRODUCTION

On November 30, 2004, President Bush signed the California Missions Preservation Act¹ (“Missions Act”) into law,² providing an authorization of federal grants for historic California missions.³ However, this enactment did not end the controversy surrounding the campaign to preserve California missions. Two days later, Americans United for Separation of Church and State (“Americans United”) filed a federal lawsuit challenging the constitutionality of the Missions Act.⁴ Although the suit has been dropped until funding is appropriated pursuant to the new law,⁵ the legal question remains unanswered.

At the heart of this dispute is whether the Establishment Clause⁶ prohibits the federal government from funding the preservation of California missions, which have both religious⁷ and historical significance.⁸ The outcome of a future challenge to this law could

1. Pub. L. No. 108-420, 118 Stat. 2372 (2004).

2. Acts Approved by the President, 40 WEEKLY COMP. PRES. DOC. 2906 (Nov. 30, 2004).

3. *See Mission Aid Bill Signed*, PRESS-ENTERPRISE, Dec. 1, 2004, at B7 (reporting enactment of the legislation authorizing \$10 million in grants to preserve California’s missions); *see also* Erica Werner, *House Approves Funds for Missions*, VENTURA COUNTY STAR, Nov. 18, 2004, Local News and Opinion, at 1 (noting that several members of the California congressional delegation promoted this legislation to respond to immediate needs of the historic missions structures).

4. *Doe v. Norton*, No. 04CV02089 (D.D.C. filed Dec. 2, 2004). *See generally* Alan Cooperman, *Federal Aid For Churches Is Criticized*, WASH. POST, Dec. 3, 2004, at A25 (outlining Americans United for Separation of Church and State’s arguments against the Missions Act and providing responses from lawmakers and the defendant, the Secretary of Interior).

5. *See* Press Release, Americans United for Separation of Church and State, Americans United Wins Showdown with Congress over Public Funding of California Missions (Jan. 18, 2006), <http://www.au.org> (select “Press Center” tab; then select “2006: January” hyperlink under “Press Archive”) (announcing decision to withdraw lawsuit on the grounds that Congress has not yet appropriated funding under the challenged law and noting ability to refile should appropriation of funds occur).

6. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;”).

7. *See California Missions Preservation Act; Baranov Museum Study Act; Manhattan Project National Historical Park Study Act; and Johnstown Flood National Memorial Boundary Adjustment Act: Hearing Before the Subcomm. on National Parks of the Sen. Comm. on Energy and Natural Resources*, 108th Cong. 485, 38 (2004) [hereinafter *Hearing*] (statement of Reverend Barry Lynn) (arguing that even though the missions are of historic significance, they are also of religious significance, with nineteen being owned by the Catholic Church and operated as parishes with regular worship services).

8. *See id.* at 13 (statement of Congressman Sam Farr) (emphasizing the historic value of the California missions as proven through the landmark status of the structures, including twenty-one missions designated California Registered Historic

impact all federal historic preservation of religious properties as there is currently no case law addressing federal funding for this purpose.⁹

This Comment argues that federal funding for the California missions does not violate the Establishment Clause because the Missions Act excludes any activity that would support the religious uses of the structures, as opposed to the strictly cultural and historical uses.¹⁰ Part I of this Comment provides background on the Missions Act, Americans United's facial challenge to the constitutionality of the law, and the state of Establishment Clause jurisprudence generally. Part II demonstrates the valid secular purpose of the Missions Act and refutes allegations that the Missions Act illegally (1) subsidizes religion, (2) defines recipients on the basis of religion, or (3) causes excessive government entanglement with religion. Part III contends that to deny funding to California missions because of their association with religion, when other historic resources are granted such funding, would be adversarial toward religion. Finally, Part IV of this Comment provides recommendations for a cooperative agreement between the Department of the Interior and the California Missions Foundation that would carry out the purpose of the Missions Act without violating the Establishment Clause.

I. BACKGROUND

A. *California Missions Preservation Act*

The Missions Act authorizes the appropriation of up to \$10 million in federal grants¹¹ over five years to restore and repair California missions and associated artwork and artifacts.¹² It further permits the Secretary of the Interior to carry out this program by entering into a cooperative agreement with the California Missions Foundation, a non-sectarian charitable organization.¹³ The Secretary would govern

Landmarks and seven designated National Historic Landmarks).

9. See 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, 1140 (2002) (maintaining that the authors know of no judicial decisions on the constitutionality of federal historic preservation grants to religious sites). *But cf. id.* at 1140 n.5 (referencing a California decision from 1923 declaring that state funding of the San Diego mission violated the California Constitution).

10. See *infra* notes 100-103 and accompanying text (describing the provisions within the Missions Act that prohibit religious activities and that require Justice Department approval of the activities to ensure that they are secular in nature).

11. California Missions Preservation Act, Pub L. No. 108-420, § 4, 118 Stat. 2372, 2373 (2004).

12. *Id.* § 3.

13. *Id.*

the technical assistance and funding provided to the California Missions Foundation by the federal government. The Missions Act requires a determination by the U.S. Attorney General that the activities outlined in the cooperative agreement do not violate the Establishment Clause and are consistent with provisions in the National Historic Preservation Act governing federal historic preservation funding for religious properties.¹⁴

The California congressional delegation lent broad support to the Missions Act.¹⁵ Accordingly, the Missions Act sailed through the House of Representatives without difficulty.¹⁶ The Senate held a hearing on March 9, 2004, and Senators Barbara Boxer and Dianne Feinstein, Congressman Sam Farr, and Stephen Hearst of the California Missions Foundation testified in support of the Missions Act.¹⁷ Reverend Barry Lynn of Americans United provided testimony on his organization's opposition to the bill.¹⁸ Later in the congressional session, the Senate Energy and Natural Resources Committee added the Attorney General's provision to the bill,¹⁹ but there were no obstacles to passage in the Senate.²⁰

California's twenty-one missions were built during a period in U.S. history when the Spanish were colonizing the western territory.²¹

14. *Id.*; see National Historic Preservation Act of 1966, 16 U.S.C. § 470a(e)(4) (2000) (establishing guidelines for federal grants to *fund* historic preservation of religious properties listed on the National Register of Historic Places and excluding grants for the *acquisition* of religious historic properties).

15. See *Hearing, supra* note 7, at 11 (statement of Congressman Sam Farr) (describing the atypical support among the California delegation for the Missions Act with forty-eight California representatives and the state's two senators co-sponsoring the legislation).

16. See S. REP. NO. 108-375, at 3 (2004), as reprinted in 2004 U.S.C.C.A.N. 2358, 2359 (stating that the Missions Act initially passed the House by a voice vote on October 10, 2003, only seven months after its introduction).

17. See generally *Hearing, supra* note 7, at 1-2, 6-14, 43-46 (recording testimony of Senators Boxer and Feinstein, Representative Farr, and Stephen Hearst as all voiced strong support for the Missions Act).

18. See *Hearing, supra* note 7, at 37-39 (statement of Reverend Barry Lynn) (arguing that, despite the bill's language providing for only secular activity, any government grant that helps maintain or restore religious properties results in impermissible endorsement of religion).

19. See S. REP. NO. 108-375, at 3, as reprinted in 2004 U.S.C.C.A.N. 2358, 2359 (describing the Senate Energy and Natural Resources Committee's additional requirement that the Attorney General determine the cooperative agreement's compliance with the Establishment Clause).

20. See *id.* (noting that the Missions Act was favorably reported out of the Senate Energy and Natural Resources Committee on September 15, 2004, with the additional requirement); see also Claire Vitucci, *Senate Passes Bill Giving \$10 Million to Historic Missions*, PRESS-ENTERPRISE, Oct. 12, 2004, at B1 (reporting that the full Senate passed the Missions Act after the bill was reported out of committee).

21. See S. REP. NO. 108-375, at 2-3, as reprinted in 2004 U.S.C.C.A.N. 2358, 2358-59 (finding that the missions' history is tied to Spanish colonization, with the first mission built in San Diego by Father Junipero Serra in 1769).

After Americans occupied the California territory, the missions suffered a period of decline until groups who recognized their cultural and historical significance began efforts to repair them.²² Despite this public support, the restoration efforts have been piecemeal and fragmented, and the missions are threatened by severe deterioration.²³

Nineteen of the twenty-one California missions are owned by the Catholic Church and hold worship services on a regular basis.²⁴ In addition to their religious uses, these missions are open to the public six to eight hours per day for cultural, educational, and recreational purposes.²⁵ The missions are the most visited sites in the State of California, with 5.5 million visitors each year.²⁶ Additionally, because learning the history of California missions is a mandated part of the fourth grade history curriculum in California, thousands of these visitors are school children on field trips.²⁷

The art and artifacts associated with the missions contribute to the

22. See Steven J. Schloeder, *From Mission to Mishmash: How Modernism has Failed Sacred Architecture*, 6 NEXUS 67, 68-69 (2001) (outlining the decline of the California missions coinciding with the decline of the Spanish Empire and then the growing interest in the missions in the 1870s and 1880s as tourism to the West grew and the California missions were romanticized by travel guides and magazines); see also S. REP. NO. 108-375, at 3, as reprinted in 2004 U.S.C.C.A.N. 2358, 2359 (describing the growing interest in the California missions beginning in the late 1800s that led to the establishment of the Hearst Mission Restoration Fund in 1948).

23. See *Hearing*, supra note 7, at 1 (statement of Senator Dianne Feinstein) (describing the missions' state of disrepair, including termite infestation, structural deterioration and water damage); S. REP. NO. 108-375, at 3, as reprinted in 2004 U.S.C.C.A.N. 2358, 2359 (stating that there is no single entity managing the restoration of the California missions).

24. See *Hearing*, supra note 7, at 38 (statement of Reverend Barry Lynn) (arguing that because nineteen of the missions are owned by the Catholic Church and serve as places of worship for thousands of parishioners, they should not receive funding).

25. See Press Release, California Missions Foundation, Response to the Lawsuit Filed by Americans United for Separation of Church and State to block the California Missions Preservation Act, (Dec. 6, 2004), http://www.missionsofcalifornia.org/feature/auscs_response.html [hereinafter California Missions Foundation] (comparing the two or three hours that missions are used for religious purposes each week with the approximately fifty hours they are used for heritage tourism, educational purposes, or other secular activities); see also Declaration of Dr. Knox Mellon ¶¶ 19-59, *Doe v. Norton*, No. 04CV02089 (D.D.C. filed March 23, 2005) (on file with the American University Law Review) (citing the public visitation hours for fourteen California missions that are currently listed on the National Register and founded before 1798) (on file with the American University Law Review).

26. See *Hearing*, supra note 7, at 14 (statement of Congressman Sam Farr) (stating that tourism is the third largest industry in the state and that the missions contribute considerable revenue to the state economy from the millions of visitors including international tourists).

27. See California Missions Foundation, supra note 25 (describing the State of California's decades long policy of sending fourth-grade school children to visit missions).

cultural and historical experience for visitors at the missions.²⁸ The collections, which include religious art, Native American pieces, and historic documents illustrating mission life,²⁹ are threatened by degradation.³⁰

B. Federal Historic Preservation Grants To Religious Properties And Prior Aid For California Missions

The National Historic Preservation Act³¹ expressly authorizes governmental historic preservation grants to religious properties listed on 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.”³² Congress did not include this provision in its original enactment of the National Historic Preservation Act, but approved the modification in a package of amendments passed in 1992.³³

Despite the authorization provided in the National Historic Preservation Act, previous Administration policy³⁴ prevented federal historic preservation grants to historic religious properties.³⁵ In 2003, the Department of Justice (“DOJ”) reversed the earlier policy

28. See Declaration of Dr. Knox Mellon, *supra* note 25, ¶ 13 (noting that most of the art and artifacts are kept in museums on the grounds of the missions). *But see Hearing, supra* note 7, at 40 (statement of Reverend Barry Lynn) (arguing that mission art and artifacts are associated with devotional and worship activities at the missions).

29. See California Missions Foundation, *supra* note 25 (listing the missions’ secular artifacts such as historic archives, Native American murals, and genealogical records).

30. See *Hearing, supra* note 7, at 8 (statement of Senator Barbara Boxer) (lamenting the loss of Native American artifacts including the erosion and weathering of a gargoyle carved by the Chumash Indians at Mission Santa Barbara).

31. 16 U.S.C. § 470a (2000).

32. § 470a(e)(4).

33. See Elizabeth S. Merritt, *Fowler Bill Enacted: Federal Preservation Law Strengthened*, 11 PRESERVATION L. REP. 1155, 1159 (1992) (explaining that this enactment reversed previous federal administrative policy completely prohibiting federal historic preservation grants to religious sites).

34. See Christen Sproule, *Federal Funding for the Preservation of Religious Historic Places: Old North Church and the New Establishment Clause*, 3 GEO. J.L. & PUB. POL’Y 151, 171 (2005) (tracing the Administration policy prohibiting federal funds for historic preservation of religious properties back to the Carter Administration and noting that the policy was adopted by every subsequent administration until it was reversed in 2003).

35. See Constitutionality of Awarding Historic Preservation Grants to Religious Properties, 19 Op. Off. Legal Counsel 267, 267-68 (1995), *available at* <http://www.usdoj.gov/olc/doi.24.htm> (advising against historic preservation grants to religious properties based on the prediction that a court is likely to deem such funding a violation of the Establishment Clause). See generally Sproule, *supra* note 34, at 151 (arguing that Save America’s Treasures funding for historic religious properties, as authorized in the 2003 Department of Justice (“DOJ”) Office of Legal Counsel opinion, does not violate the Establishment Clause).

prohibiting the use of Historic Preservation Fund grants for religious properties, and advised the Department of the Interior that religious properties were eligible for historic preservation grants under the federal Save America's Treasures grant program.³⁶ Since the policy reversal, at least four Save America's Treasures grants have been awarded to historic religious properties.³⁷

Prior to the 2003 DOJ policy reversal on federal historic preservation grants to religious properties, the federal government had already authorized Federal Emergency Management Agency ("FEMA") funding for certain religious properties.³⁸ Furthermore, both FEMA and the Federal Highway Administration had also granted funds to the California missions.³⁹ In fact, the FEMA grants "were given directly to the Archdiocese of Los Angeles."⁴⁰

The Department of the Interior currently has experience in handling the unique challenge of separating secular historic preservation from religious uses in dealing with historic missions because it manages the San Antonio Missions National Historical Park. This National Park Service unit includes four Spanish frontier missions that are still in use by the Catholic Church for worship services.⁴¹

36. See Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 2003 Op. Off. Legal Counsel (Apr. 30, 2003), available at <http://www.usdoj.gov/olc/OldNorthChurch.htm> (reversing the previous Justice Department policy banning historic preservation grants to religious sites and arguing that the federal government has a strong interest in historic preservation, historic preservation grants are available to all manner of historic properties without reference to religion, and historic preservation criteria can be neutrally applied to religious or secular properties); see also 16 U.S.C. § 470a(e)(4) (2000) (requiring that historic preservation grants to religious properties be for purely secular purposes and not fund costs associated with acquisition of the property).

37. See *Hearing, supra* note 7, at 31 (providing National Park Service data that lists Save America's Treasures grants in 2003 to the Old North Church in Boston, Massachusetts, Touro Synagogue in Newport, Rhode Island, Mission Concepcion in San Antonio, Texas, and the Eldridge Street Synagogue in New York City).

38. See Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, 2002 Op. Off. Legal Counsel (Sept. 25, 2002), <http://www.usdoj.gov/olc/FEMAAssistance.htm> (finding that the statutes governing FEMA funds do not preclude grants to religious schools and predicting that such aid would not be deemed unconstitutional).

39. See *Hearing, supra* note 7, at 52 (noting that FEMA provided a \$1.4 million grant to Mission San Gabriel and a \$1 million grant to Mission San Fernando in 1994 after an earthquake and that the Federal Highway Administration granted funds to Mission San Juan Capistrano to restore historic ruins).

40. *Id.*

41. See Lars A. Hanslin, *San Antonio Missions National Historical Park*, 3 PRESERVATION L. REP. 2016, 2017 (1984) (citing the historical and secular aspects of the Spanish missions as well as their religious function, and noting that each mission serves a parish of between 500 and 900 families); see also NAT'L PARK SERV., SAN ANTONIO MISSIONS NATIONAL HISTORICAL PARK FACT SHEET (2003),

In establishing the San Antonio Missions National Historical Park, Congress authorized the Park Service to preserve and interpret⁴² the secular dimension of the missions by entering into a cooperative agreement with the Archdiocese of San Antonio.⁴³ The DOJ rejected the argument that funds would confer a benefit on the Archdiocese because no direct funds were being granted to the Catholic Church, and the Park Service activities would be purely secular.⁴⁴ However, the DOJ and the National Park Service acknowledged the potential constitutional conflicts, and thus restricted the cooperative agreement⁴⁵ by not including all of the activities authorized by Congress.⁴⁶ The cooperative agreement, instead, limited National Park Service funding to secular buildings within the San Antonio Missions National Historical Park.⁴⁷

C. Facial Challenge To The California Missions Preservation Act

On December 2, 2004, Americans United filed a lawsuit in the United States District Court for the District of Columbia challenging the constitutionality of the California Missions Preservation Act on its face.⁴⁸ Americans United represented four United States citizens and

<http://www.nps.gov/saan/index.htm> (go to "Management Docs" and click on "San Antonio Missions NHP Fact Sheet") (reporting almost 1.4 million visitors to the San Antonio National Historical Park in 2001).

42. The word interpret is used in the context of cultural and historic resource management. The National Association for Interpretation defines interpretation as "a communication process that forges emotional and intellectual connections between the interests of the audience and the meanings inherent in the resource." Nat'l Assoc. for Interpretation, <http://www.interpnet.com> (last visited May 3, 2006).

43. See Hanslin, *supra* note 41, at 2017 (noting that the cooperative agreement between the National Park Service and the Archdiocese of San Antonio only allows the Park Service to interpret and maintain secular buildings and grounds).

44. See 6 Op. Off. Legal Counsel 717, 719-22 (1982) (holding that San Antonio Missions cooperative agreement does not violate the Establishment Clause because the agreement limits the federal government to secular structures and secular activities, such as management and interpretation, leaves maintenance, repair and security of religious structures with the Catholic Church, and confers no federal funds to the Catholic Church itself).

45. See *id.* at 719 (limiting the Secretary of the Interior's access, maintenance, and security at San Antonio Missions to the grounds and secular buildings).

46. See Hanslin, *supra* note 41, at 2019 (arguing that Congress did not limit the National Park Service's activities to the secular buildings and grounds because the statutory authorization did not contain this restriction).

47. See *id.* at 2017-18 (delineating the parameters of the cooperative agreement, which include an exclusion of religious properties from Park Service funding, prohibition of Park Service restrictions over the religious structures, and a ban on Park Service participation in any religious activities).

48. See Press Release, Americans United for Separation of Church and State, Americans United Files Lawsuit To Block Federal Taxpayer Funding For California Missions (Dec. 2, 2004), <http://www.au.org> (select "Press Center" tab; then select "2004," then select "December" hyperlink under "Press Archive") [hereinafter Americans United for Separation of Church and State] (challenging the proposed

taxpayers of various faiths, residing in California.⁴⁹ Gale Norton, Secretary of the Interior, was the named defendant.⁵⁰

The complaint alleged that the Missions Act violates the Establishment Clause because: (1) the primary purpose of the Missions Act is to subsidize and advance religion;⁵¹ (2) the Missions Act, in effect, advances religious activities;⁵² (3) the Missions Act gives preference to religion over non-religion and to the Catholic faith among faiths;⁵³ and (4) the Department of the Interior's responsibilities under the Missions Act would create excessive government entanglement with religion.⁵⁴ Americans United further claimed that the Missions Act forces taxpayers to support churches, violating the principles of separation of church and state.⁵⁵ The organization expressed concern that upholding the Missions Act would encourage religious institutions around the country to pursue federal funding.⁵⁶

Americans United has since withdrawn the lawsuit on the grounds

historic preservation funding for California missions as government subsidized maintenance for houses of worship). *See generally* Dani Dodge, *State's Dual Missions*, VENTURA COUNTY STAR, June 6, 2005, at 1 (describing the tension between the religious significance and historical and cultural significance of the missions that led to the filing of the lawsuit).

49. *See* Complaint ¶¶ 4-7, *Doe v. Norton*, No. 04CV02089 (D.D.C. filed Dec. 2, 2004) (listing four unnamed plaintiffs: a Unitarian-Universalist residing in San Diego, a Jew residing in Elk Grove, a freethinker residing in Newbury Park, and a Buddhist minister residing in Fremont).

50. *See id.* ¶ 8 (noting that Secretary Norton was being sued in her official capacity as the government official responsible for carrying out and overseeing the Missions Act); *see also* Americans United for Separation of Church and State, *supra* note 48 (listing Secretary Norton as the sole defendant).

51. *See* Complaint, *supra* note 49, ¶¶ 26-27 (observing that the bill authorizes federal tax dollars to restore houses of worship and related artifacts); *see also* Americans United for Separation of Church and State, *supra* note 48 (arguing that the public should not be made to subsidize the maintenance of churches).

52. *See* Complaint, *supra* note 49, ¶ 28, *Doe*, No. 04CV02089 (concluding that because several of the structures are active houses of worship, the funding will advance the activities and the religious mission of the Church).

53. *See id.* ¶ 29 (maintaining that by singling out the California missions for preservation funding, the bill "defines eligibility for federal benefits with reference to religion" and is "non-neutral" in regards to religious versus secular sites and Catholic sites versus those of other faiths); *see also infra* note 151 and accompanying text (emphasizing Americans United's argument that this funding is directly given to specific religious sites).

54. Complaint, *supra* note 49, ¶ 30.

55. *See* Americans United for Separation of Church and State, *supra* note 48 (arguing that the bill is a "backdoor church tax," which is what Thomas Jefferson and James Madison were attempting to block in advocating for separation of church and state).

56. *See* Edward Epstein, *Suit Asks Bar on Taxpayer Rescue of Missions*, S.F. CHRON. (Bay Area), Dec. 3, 2004, at B3 ("If this type of assistance is upheld, every house of worship in America that is deemed historic could demand upkeep and repair courtesy of the taxpayer." (quoting Reverend Barry Lynn of Americans United)).

that Congress has not yet appropriated funds under the new law.⁵⁷ Proponents of the Missions Act view the withdrawal of the suit as a “greenlight” to move ahead with appropriations,⁵⁸ yet opponents vow to challenge the Missions Act once funding is received.⁵⁹

*D. Establishment Clause Jurisprudence On Government Aid
To Religious Properties*

The First Amendment provides that “Congress shall make no law respecting an establishment of religion”⁶⁰ However, the Framers of the Constitution did not provide precise guidance as to how to apply this prohibition.⁶¹ Although the Bill of Rights was ratified in 1791,⁶² the Supreme Court is still struggling to determine the meaning of the Establishment Clause and to define the parameters for government aid to religious institutions.⁶³ Furthermore, the Court continues to seek a balance between the Establishment Clause and the Free Exercise Clause.⁶⁴

In *Everson v. Board of Education*,⁶⁵ the Court began to define Establishment Clause jurisprudence.⁶⁶ The Court upheld a New

57. See *supra* note 5 (noting that Americans United originally filed the motion because it believed that Congress would be appropriating funds soon after passing the authorization).

58. See David Whitney, *Lawsuit Challenging Mission Restoration Dropped*, SCRIPPS HOWARD NEWS SERV., Jan. 18, 2006, at Washington Dateline (quoting Congressman Farr’s intention to move forward with congressional appropriations as authorized by law with the withdrawal of the lawsuit); see also Douglas Quan & Betty Wells Miller, *Suit Targeting Missions Funding Dropped*, PRESS-ENTERPRISE, Jan. 18, 2006, at B5 (reporting that the California Missions Foundation looks forward to the appropriations process).

59. See Whitney, *supra* note 58 (noting that when asked whether they would refile should funds be appropriated under the Mission Act, the Americans United spokesperson replied, “In a heartbeat.”).

60. U.S. CONST. amend. I.

61. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* xxi (1994) (arguing that the constitutional text does not answer modern questions about what the Establishment Clause means and that “[t]hose who wrote our glorious Bill of Rights were vague if not careless draftsmen”).

62. U.S.C.A. Const. amend. I, References and Annotations 35 (West 2004).

63. See *Mitchell v. Helms*, 530 U.S. 793, 807 (2000) (acknowledging that the Court has been struggling to define the Establishment Clause in relation to aid for parochial schools for over fifty years); see also LEVY, *supra* note 61, at xv-xvi (noting close to twenty questions that the Court has had to or will need to grapple with in order to resolve the ambiguities in the First Amendment).

64. See *Locke v. Davey*, 540 U.S. 712, 718-19 (2004) (acknowledging that there is frequently tension between the Establishment Clause, which prohibits government endorsement of religion, and the Free Exercise Clause, which prohibits government interference in religion, caused by the fact that there is room for the Court to “play in the joints” of what is permitted by the Establishment Clause, but also not required by the Free Exercise Clause).

65. 330 U.S. 1 (1947).

66. See JULIA K. STRONKS, *LAW, RELIGION, AND PUBLIC POLICY: A COMMENTARY ON FIRST AMENDMENT JURISPRUDENCE* 33 (2002) (noting that analysis of the

Jersey program that reimbursed parents for transportation expenses for students to attend public, private or parochial schools.⁶⁷ The Court recognized that the Founding Fathers adopted the Establishment Clause in response to the prevalence in the colonies of religious persecution and favoritism that early Americans fled the “old world” to escape.⁶⁸ Accordingly, the Court held that the Establishment Clause not only prohibits the establishment of a church by the government, but also government aid to any or all faiths and government participation in religion generally.⁶⁹ However, the Court favored an application and interpretation of the Establishment Clause that permitted indirect government funding related to religious institutions.⁷⁰ The Court decided that reimbursing parents for the cost of transporting children to school, regardless of whether the schools are secular or parochial, is a general government service that does not aid religion.⁷¹ In addition to the Court’s establishment of the separation of Church and State principle, it also stated that the government should remain neutral in relation to religious institutions rather than being “their adversary.”⁷²

Twenty-two years later, in *Walz v. Tax Commission*,⁷³ the Court affirmed the interpretation of the Establishment Clause established in *Everson*,⁷⁴ and upheld tax exemption for religious properties.⁷⁵ The

Establishment Clause should begin with *Everson*); see also LEVY, *supra* note 61, at 150 (maintaining that the principles first stated in *Everson* are still an accepted part of Establishment Clause jurisprudence).

67. See *Everson*, 330 U.S. at 17-18 (recognizing the program as a means of helping parents get their children to school safely rather than as an aid to religion); see also STRONKS, *supra* note 66, at 33 (summarizing the Court’s holding that education is a “neutral public purpose” even though some of the children aided were going to religious schools).

68. See *Everson*, 330 U.S. at 8-12 (suggesting that certain practices in the colonies, such as persecution of Catholics and Quakers, and taxation of colonists to pay for ministers’ salaries and the building of churches, were just as abhorrent to the Founding Fathers as those practices in the “old world” that they hoped to escape in America).

69. See *id.* at 15-16 (establishing the framework for a “wall of separation” that the Court will use to divide Church from State).

70. See *id.* at 14-15 (arguing that because the Free Exercise Clause had been interpreted in a broad context by the Court to allow greater freedom for religious exercise, the Establishment Clause should be interpreted in a broad context as well).

71. See *id.* at 17-18 (defining a class of government services such as “police and fire protection, connections for sewage disposal, public highways and sidewalks,” which should not be withheld from religious institutions).

72. See *id.* at 18 (“State power is no more to be used so as to handicap religions than it is to favor them.”). But see STRONKS, *supra* note 66, at 33-34 (noting later disagreement with the *Everson* neutrality concept among the justices and a subsequent shift toward “strict neutrality,” that the government should not aid or hinder religion in any way).

73. 397 U.S. 664 (1969).

74. See *id.* at 671 (maintaining that a literal interpretation of the Religion Clauses

Court endorsed “benevolent neutrality” where the government would neither support nor interfere with religious exercise.⁷⁶ The challenged tax exemption was offered to a “broad class” of non-profit entities beyond religious institutions,⁷⁷ and because a tax exemption is not a direct subsidy and does not entangle the government in religious matters, it did not violate the Establishment Clause.⁷⁸

In contrast to this early interpretation of the Establishment Clause that permitted certain indirect government support for or interaction with religious institutions, the Court’s interpretation of the Establishment Clause in *Lemon v. Kurtzman*⁷⁹ embraced a more prohibitive understanding,⁸⁰ leading to the adoption of a three part test to evaluate Establishment Clause challenges.⁸¹ In striking down state aid to parochial school teachers, the Court looked for: (1) a secular legislative purpose in the law; (2) a primary effect that neither advanced nor inhibited religion; and (3) a result that did not create excessive government entanglement in religious matters.⁸²

would “undermine the ultimate constitutional objective as illuminated by history” because it is reasonable to expect that government services and tax exemption would not be denied to religious institutions when provided to nonprofit hospitals, libraries and museums).

75. See *id.* at 671-72 (comparing tax exemption of religious institutions to bus transportation for parochial schools upheld in *Everson* as a general government service); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 709 n.19 (2002) (Souter, J., dissenting) (acknowledging that tax exemption for religious institutions does not violate the Establishment Clause despite rejecting direct government aid to such institutions).

76. See *Walz*, 397 U.S. at 669-70 (arguing that neutrality is not a “straight line” and that complete separation is not possible, thus government should avoid any activity that would “tip the balance” in favor of government sponsorship of churches or regulation of religious practices).

77. See *id.* at 673 (observing that the tax exemption extends to “hospitals, libraries, playgrounds, scientific, professional, historical, and patriotic groups”). But see *Tilton v. Richardson*, 403 U.S. 672, 695-96 (1971) (Douglas, J., dissenting) (arguing that tax exemption contributes to the growing wealth and power of the churches and could lead to the churches controlling the economy).

78. See *Walz*, 397 U.S. at 675-677 (contrasting tax exemption with a direct subsidy to religious institutions that would require direct involvement in religious matters and finding that a tax exemption creates remote involvement between the government and the institution).

79. 403 U.S. 602 (1971).

80. See *id.* at 612 (emphasizing the prohibition on government making a law respecting the establishment of religion, a broader definition than a prohibition on establishing a religion); see also *Mitchell v. Helms*, 530 U.S. 793, 880 (2000) (Souter, J., dissenting) (characterizing a shift by the Court in *Lemon* from using the word “neutral” to describe the government’s position to religion to describing instead a benefit that was not religious).

81. See *Lemon*, 403 U.S. at 612-13 (creating criteria that guard against government sponsorship and involvement in religious activity (quoting *Walz*, 397 U.S. at 668)); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002) (noting that the type of analysis underlying the *Lemon* criteria is still used although the criteria have been modified).

82. See *Lemon*, 403 U.S. at 612-13 (combining criteria from several of the Court’s

Although there was dissension among the Justices regarding the *Lemon* test,⁸³ it was at least referenced by the Court in most cases until the early 1990s.⁸⁴ However, in 1997 the Court revised the *Lemon* criteria for Establishment Clause analysis in *Agostini v. Felton*.⁸⁵ The Court rejected earlier criteria used to analyze aid to religious institutions.⁸⁶ It modified the three prong test in favor of a two part test determining whether government action had the: (1) purpose or (2) effect of advancing or inhibiting religion.⁸⁷ The Court further clarified the test by establishing three criteria to determine if the aid had the effect of advancing religion.⁸⁸ It stated that aid does not advance religion if: “[i]t does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.”⁸⁹

In subsequent parochial school funding cases, the Court adopted the *Agostini* criteria for determining whether government aid for secular education at religious schools advances religion.⁹⁰ In *Mitchell*

Religion Clauses jurisprudence for guidelines to be used in such cases).

83. See, e.g., *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting) (asserting that the court declined to use the *Lemon* test in *Lee v. Weisman*, 505 U.S. 577, 644 (1992), but “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, *Lemon* stalks our Establishment Clause jurisprudence once again”); *Lee*, 505 U.S. at 644 (Scalia, J., dissenting) (“Our Religion Clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions that are not derived from, but positively conflict with, our long-accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test.”); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (“The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize.”); *Hunt v. McNair*, 413 U.S. 734, 741 (1973) (characterizing the *Lemon* elements as no more than “helpful signposts”); see also STRONKS, *supra* note 66, at 118 (identifying Justice O’Connor’s criticism of the *Lemon* test as early as 1984).

84. See STRONKS, *supra* note 66, at 119 (observing that by 1992 the Court no longer referenced the *Lemon* test in Establishment Clause opinions (quoting NANCY MAVEETY, JUSTICE SANDRA DAY O’CONNOR: STRATEGIST ON THE SUPREME COURT 82-83 (1996))).

85. 521 U.S. 203, 224 (1997).

86. See *id.* at 222 (contending that the Court’s recent cases “have undermined the assumptions” upon which previous cases were based—particularly the criteria the Court used to determine if aid to religious institutions has the effect of advancing religion).

87. See *id.* at 222, 234 (establishing that the court still determines if government aid has the “purpose” or the “effect” of advancing or inhibiting religion, but the court analyzes “excessive entanglement” as part of its effect inquiry); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-70 (2002) (describing the Court’s modifications of the *Lemon* criteria in looking at government aid).

88. See *Agostini*, 521 U.S. at 234 (finding that the program being evaluated by the Court met the three criteria that the Court primarily used to determine that government aid did not advance religion).

89. *Id.*

90. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 806-08 (2000) (accepting *Agostini*’s rejection of two precedents against government aid, *Aguilar v. Felton*, 473 U.S. 402

v. Helms,⁹¹ the Court upheld government funding for educational materials and equipment for parochial schools.⁹² Later, in *Zelman v. Simmons-Harris*,⁹³ the Court upheld a pilot voucher program providing aid for students to attend the school of their choice, be it religious or secular.⁹⁴ This trend affirms the rejection by *Agostini* of *Lemon* era interpretations of the Establishment Clause that prohibited any government interaction or indirect benefit to religious institutions⁹⁵ and embraces precedent allowing certain indirect government aid to religious institutions based on a more permissive interpretation of the Establishment Clause.⁹⁶

II. THE MISSIONS ACT HAS NEITHER THE PURPOSE NOR THE EFFECT OF ADVANCING RELIGION

A. *Secular Purpose of the Missions Act*

In their complaint before the U.S. District Court, Americans United alleged that, in authorizing grants to active houses of worship, Congress's primary purpose is to advance religion.⁹⁷ If a law's primary purpose is to advance religion, the Supreme Court is likely to strike down that law regardless of which Establishment Clause jurisprudence is applied.⁹⁸

One key weakness in Americans United's argument is that

(1997) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1978), and affirming the *Agostini* criteria).

91. *Mitchell*, 530 U.S. at 793.

92. *See id.* at 830 (holding that Chapter 2 funding, which includes federal funds distributed by local agencies to public and private schools for educational materials and equipment, does not result in government indoctrination because it allows private choices for families and it does not define eligible recipients based on religion).

93. 536 U.S. at 639.

94. *See id.* at 652 (arguing that the voucher program is not subject to challenge under the Establishment Clause because it is neutral regarding religion and provides aid directly to a "broad class of citizens").

95. *See Mitchell*, 530 U.S. at 807 (acknowledging that in bringing clarity to Establishment Clause criteria, *Agostini* overruled two previous cases).

96. *See Zelman*, 536 U.S. at 649-53 (distinguishing between programs that gave aid directly to religious institutions and those that allowed private choice but resulted in significant aid to religious institutions).

97. *See* Complaint, *supra* note 49, ¶ 27 ("In authorizing the expenditure of federal tax dollars to support houses of worship and to restore their religious artwork and artifacts, the Act has the primary purpose of subsidizing and advancing religion, in violation of the Establishment Clause.").

98. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (establishing that a statute must have valid secular purpose in order to survive an Establishment Clause challenge); *see also Zelman*, 536 U.S. at 648-49 (affirming that the purpose inquiry remains a part of the Establishment Clause analysis); *Agostini v. Felton*, 521 U.S. 203, 222-23 (1997) (noting that the purpose inquiry has remained unchanged).

Congress's intent was to authorize a historic preservation program, an activity that has been recognized as a secular aim.⁹⁹ To ensure that only this secular purpose is achieved, Congress provided that funding is solely available to a secular charitable historic preservation organization,¹⁰⁰ and that the authorized activities must not promote religion.¹⁰¹ In requiring the Attorney General's approval before the cooperative agreement is complete¹⁰² and a yearly report on progress and activities,¹⁰³ Congress enacted a safeguard to ensure that the Establishment Clause is not violated.

Furthermore, the testimony offered by the Missions Act's congressional sponsors underscores the secular purpose of Congress's intent in enacting this law. Senators Barbara Boxer (D-CA) and Dianne Feinstein (D-CA), as well as Congressman Sam Farr (D-CA), all emphasized the importance of the missions to California and national history.¹⁰⁴ Both Senator Feinstein and Congressman Farr discussed the importance of the missions to California tourism.¹⁰⁵

99. See *Modrovich v. Allegheny County*, 385 F.3d 397, 410 (3d Cir. 2004) (recognizing historic preservation as a secular goal even when the property or artifact has religious significance).

100. See California Missions Preservation Act, Pub. L. No. 108-420, § 3(b), 118 Stat. 2372, 2372-73 (2004) (selecting the California Missions Foundation as the recipient of the authorized funding).

101. See *id.* § 3(b)(4) (requiring the Secretary of the Interior to ensure that the activities undertaken under the cooperative agreement abide by the National Historic Preservation Act in that they are purely secular). *But see* Americans United for Separation of Church and State, *supra* note 48 (questioning whether it is possible to distinguish between the funding of historic preservation work and the funding of the religious aspects of the missions).

102. See California Missions Preservation Act § 3(c) (prohibiting the cooperative agreement from taking effect until the Attorney General determines that the activities within the agreement do not violate the Establishment Clause).

103. See *id.* (ordering the California Missions Foundation to supply an annual report on activities to the Secretary of the Interior and to the committees of jurisdiction in Congress).

104. See *Hearing, supra* note 7, at 1 (statement of Senator Feinstein) (describing the role of the missions in the history of Spanish settlers and Native Americans); *id.* at 7 (statement of Senator Boxer) (noting that missions are central to the history of the "Hispanic colonial experience," Native Americans, and the State of California); *id.* at 12 (statement of Congressman Farr) (emphasizing the central role of the missions in the history of the West); see also Schloeder, *supra* note 22, at 69-70 (noting that in the late nineteenth century there was a growing interest in the American literary world in the California missions and the condition of Mexicans and Native Americans in the Southwest that led to a number of well read publications on the topic as well as political interest and legislation); Scott Duke Harris, Op-Ed, *Rebuilding: A Righteous Mission for Your Tax Dollars*, L.A. TIMES, Sept. 25, 2005, at M1 (quoting an elder of the Salinan Indians discussing the importance of the missions to the Salinans, who built Mission San Miguel, because of their ties to the structures and the birth and baptismal records kept at the missions).

105. See *Hearing, supra* note 7, at 2 (statement of Senator Feinstein) (reporting that the missions are California's most visited sites); *id.* at 12 (statement of Congressman Farr) (citing tourism as California's third largest industry with the missions contributing approximately 5.5 million visitors annually); see also Press

All three sponsors highlighted the important role the missions play in education.¹⁰⁶ Finally, Senator Boxer specifically addressed the secular purpose of the legislation, stating that Congress chose not to fund a religious entity directly in order to preserve separation of church and state.¹⁰⁷

Despite the evidence of Congress's secular intent in both the law and the legislative history, Americans United argued that by authorizing funding to restore "religious artwork and artifacts," the congressional purpose was to advance religion.¹⁰⁸ However, Congressional testimony did not focus on religious icons but on the history and artifacts of Spanish settlers and Native Americans and the architecture of the structures.¹⁰⁹ Additionally, the safeguards enacted by Congress, such as the Attorney General's prior approval of the cooperative agreement, will ensure that funding goes strictly to secular purposes.¹¹⁰

B. *Effect of the Missions Act*

Americans United argued that the effect of the Missions Act will be to advance and subsidize religion because federal tax dollars are

Release, Congressman Sam Farr, Big Victory for California Missions Preservation Act (Nov. 17, 2004), <http://www.farr.house.gov/> (follow "News" hyperlink; then follow "Press Releases" hyperlink for reverse chronological listing) (noting the important contribution of the missions to the California economy as a tourist draw).

106. See *Hearing, supra* note 7, at 2 (statement of Senator Feinstein) (observing that the missions serve an educational role to children and adults alike); *id.* at 10 (statement of Senator Boxer) (recognizing that mission history is a part of the mandated fourth grade history curriculum in California); *id.* at 12 (statement of Congressman Farr) (emphasizing the role of the missions in the fourth grade curriculum).

107. See *id.* at 9 (statement of Senator Boxer) ("I am a believer in separation of church and state. That is why when this legislation was put together, it was put together in a very careful way, that the funding goes to a foundation, not to a religious entity.").

108. See Complaint, *supra* note 49, ¶ 27 (alleging that the Missions Act violates the Establishment Clause because in authorizing federal tax expenditures to restore religious artwork and artifacts, its primary purpose is to advance religion); see also *Hearing, supra* note 7, at 40 (statement of Reverend Barry Lynn) (drawing the connection between the artwork and artifacts and the devotional activities carried out at the missions).

109. See *Hearing, supra* note 7, at 7-8 (statement of Senator Feinstein) (highlighting the importance of the missions' architecture to California and the rest of the country as well as the important Spanish colonial artifacts including tools, textiles, and Native American art).

110. See *supra* notes 101-103 and accompanying text (describing the safeguards enacted within the Missions Act, such as the Attorney General's obligation to review and approve the cooperative agreement between the Department of the Interior and the California Missions Foundation and the reporting requirements of the California Mission Foundation to Congress to ensure that the funding is used only for secular purposes).

going to restore structures that serve as active houses of worship.¹¹¹ They base several of their arguments on the criteria set forth by the Court in *Agostini*.¹¹²

1. *Missions Act does not subsidize religion*

Americans United argued that in authorizing federal tax dollars for the preservation of historic sites used as active houses of worship, the Missions Act subsidizes religion in violation of the Establishment Clause.¹¹³ The Court has differentiated between direct and indirect aid to determine whether the aid results in the subsidizing of religion.¹¹⁴

The Missions Act does not provide aid directly to a religious institution,¹¹⁵ thus a court will need to determine whether this indirect aid results in a government subsidy to a religious entity. In *Walz*, the Court upheld tax exemptions for churches, despite the indirect economic benefit, because the tax exemption provided a “minimal and remote involvement between church and state.”¹¹⁶

The Missions Act, like the tax exemption in *Walz*, will provide a minimal and remote involvement between the government and the Catholic Church.¹¹⁷ Although the funded activities will take place on

111. See Americans United for Separation of Church and State, *supra* note 48 (“The Constitution simply does not allow the government to force a taxpayer to subsidize the maintenance of houses of worship. That’s a core principle of separation of church and state.”).

112. See *supra* note 89 and accompanying text (listing the criteria established in *Agostini* to determine if a law has the effect of advancing religion).

113. See *supra* note 97 (characterizing the funding of historic preservation within active houses of worship as supporting the religious institution in highlighting religious art and artifacts); see also Press Release, Americans United for Separation of Church and State, Americans United Deplores House Vote Funding California Missions (Nov. 17, 2004), <http://www.au.org> (select “Press Center” tab; then select “2004,” then select “November” hyperlink under “Press Archive”) (arguing that the Missions Act would force taxpayers to fund repairs to facilities that serve as active houses of worship, and that the First Amendment protects taxpayers from having to financially support religion).

114. See *supra* notes 70 and 78 and accompanying text (illustrating how the Court in *Everson* and *Waltz* permitted indirect government aid to religious institutions and distinguished it from direct government aid); see also *supra* note 96 (distinguishing between aid that goes directly to religious institutions and aid that goes to individuals who make a private choice on how to use it).

115. See California Missions Preservation Act, Pub. L. No. 108-420, § 3, 118 Stat. 2372, 2372 (2004) (authorizing funding to the non-sectarian California Missions Foundation); cf. Louis R. Cohen, *Historic Preservation Grants and the Establishment Clause*, SG040 A.L.I.-A.B.A. 721, 732-40 (2001) (arguing that, in theory, even historic preservation grants provided *directly* to religious institutions under the National Historic Preservation Act would be constitutional under the framework of *Agostini* and *Mitchell*).

116. *Walz v. Tax Comm’n*, 397 U.S. 664, 675-76 (1969).

117. Compare *id.* at 676 (explaining that tax exemption involves “minimal and remote” association between religious institutions and the government because it

properties that serve as houses of worship, they will be secular in nature and carried out by a secular foundation.¹¹⁸ The Secretary of the Interior is only allowed to approve activities that preserve the historical significance of the property, not the religious significance.¹¹⁹

The Department of the Interior has experience with providing funding and support for only the secular aspects of historic sites that have religious significance and are used as houses of worship. For example, the National Park Service has long made this distinction in managing secular and historic aspects of the San Antonio Missions National Historic Park apart from the religious use of the mission churches.¹²⁰ Additionally, because the Department of the Interior awarded at least four historic preservation grants to historic religious sites through the Save America's Treasures program,¹²¹ the agency has experience in ensuring that even direct aid to religious institutions is used only for secular historic preservation purposes.¹²²

restricts the fiscal relationship between the two and insulates one from another), *with* California Missions Preservation Act § 3(a) (conveying the historic preservation responsibilities to a third party, the non-sectarian California Missions Foundation, which insulates the government and the Catholic Church by allowing a private, secular party to carry out the secular activities).

118. See California Missions Preservation Act § 3(b)(4) (allowing only secular activities that do not promote religion). *But see* Ams. United for Separation of Church and State, *Calif. Missions Should Not Tap Taxpayers For Funds, Lynn Tells Senate Panel* (Apr. 2004), available at <http://www.au.org> (select "Press Center" tab; then select "2004," then select "April" hyperlink under "Church & State Archive") (arguing that the missions are not just museums, they are also houses of worship and it is inappropriate for the government to provide funds to "fix the ceilings and windows and to revitalize the religious icons on the walls").

119. See California Missions Preservation Act § 3(b)(4) (requiring the Secretary of the Interior to only authorize grants that will specifically address historically significant qualities of the missions); *see also infra* note 135 (describing the neutral, objective historic preservation standards that the Secretary of the Interior must apply to all historic preservation projects regardless of how the structure is used).

120. See *supra* notes 41-47 and accompanying text (describing National Park Service management of secular buildings and activities at the San Antonio Missions National Historical Park since 1978).

121. See *supra* note 37 and accompanying text (chronicling the expenditure of federal funds through the Save America's Treasures to four historic sites that also serve as houses of worship); *cf.* David Whitney, *Congress to Provide Repair Grant for California Mission*, SACRAMENTO BEE, July 28, 2005, at A3 (reporting that \$300,000 in funding was recently appropriated for one of the California missions, Mission San Miguel Archangel, in the Fiscal Year 2006 Department of the Interior Appropriations measure under the Save America's Treasures earmarks).

122. See SAVE AMERICA'S TREASURES., 2003 FEDERAL SAVE AMERICA'S TREASURES GRANT RECIPIENTS, <http://www.saveamericastreasures.org/funding.htm> (select "2003 Federal Save America's Treasures Grant Recipients" in the middle of the page) (last visited May 6, 2006) (describing the activities funded by the Save America's Treasures program, which for the Eldridge Street Synagogue included restoration of brick, terra cotta and bluestone elements of the façade and for the Touro Synagogue included reinforcement of roof trusses and restoration of exterior architectural features). *But see* Claire Vitucci, *Groups Spar over Mission Restoration*, PRESS-ENTERPRISE,

However, opponents of the Missions Act cite several cases that they argue establish that the government cannot “allow federal grants for the repair or preservation of structures devoted to worship or religious instruction.”¹²³ Specifically, opponents argue that *Tilton v. Richardson*¹²⁴ stands for the principle that no federally funded building can be used for religious purposes.¹²⁵ Opponents also argue that *Committee for Public Education & Religious Liberty v. Nyquist*¹²⁶ extended this principle to include a prohibition on government funding for activities involving the basic maintenance or repair of structures used for religious purposes as this would constitute government subsidy of religion.¹²⁷

In *Tilton*, a case that challenged federal officials’ grant of federal funds to religiously-affiliated colleges and universities, the Court struck down a provision that only required the federally funded buildings to be in secular use for twenty years because the program constituted an impermissible grant of some value that the government conveyed upon the religious institutions.¹²⁸ Unlike the provision struck down in *Tilton*, the Missions Act does not provide property to the church.¹²⁹ Furthermore, the Missions Act does not provide value to the Catholic Church. Rather, in enhancing the historic character and features of the missions, the funded activities provide value to the tourists and school children who visit the missions for historical and educational purposes.¹³⁰ Historic

May 7, 2005, at A2 (quoting a Americans United spokesperson as acknowledging that the Save America’s Treasures program is funding historic preservation at religious properties, but distinguishing this program from the Missions Act because it goes to “a range of religious and cultural institutions”).

123. *Hearing, supra* note 7, at 40 (statement of Reverend Barry Lynn).

124. 403 U.S. 672 (1971).

125. *See Hearing, supra* note 7, at 40 (statement of Reverend Barry Lynn) (testifying that *Tilton*’s “clear holding” is that “no building that was built with federal funds can ever be used for worship” because the Court unanimously struck down a provision that allowed federally-funded educational buildings to be converted to religious uses after twenty years).

126. 413 U.S. 756 (1973).

127. *See Hearing, supra* note 7, at 41 (statement of Reverend Barry Lynn) (interpreting the Court’s holding as prohibiting any funding for repair or maintenance of “physical structures . . . unless there is no possibility that the structures will be used for sectarian worship”).

128. *See* 403 U.S. at 683 (holding that since the structures would still be valuable after twenty years and could then be used for religious purposes, to provide a gift of this value to religious institutions would impermissibly advance religion).

129. *See* Complaint, *supra* note 49, ¶ 19 (noting that based on the criteria of the Missions Act, ten missions owned by the Catholic Church are already eligible for the funding and seven additional Church-owned missions may be potentially eligible); *see also* National Historic Preservation Act of 1966, 16 U.S.C. § 470a(e)(4) (2000) (establishing that federal historic preservation grants for the *acquisition* of historic properties used as places of worship are expressly prohibited by law).

130. *See* Declaration of Dr. Knox Mellon, *supra* note 25, ¶ 14 (stating that the

preservation may not be a priority for the Catholic Church in the face of other religious needs.¹³¹

Unlike the prohibited activities struck down in *Nyquist*,¹³² such as snow removal, janitorial services, and repair of heating and water systems,¹³³ the Missions Act does not provide for the basic maintenance and repair of the missions. If the Missions Act did provide for basic maintenance, cleaning and upkeep, it would be unconstitutional because that would provide services and assistance to the church in keeping the structures operational for worship services. However, there is a difference between basic maintenance and historic preservation.¹³⁴ Unlike basic maintenance and repair work, historic preservation involves mainly architectural and restoration work, governed by neutral and objective standards, and requiring specialized tools and training to preserve the design, details and materials that contribute to the historic significance of a property.¹³⁵

development and role of the missions is very important to the understanding of California history to the more than five million annual visitors and to the fourth grade students in California who study the missions as part of the mandated social studies curriculum).

131. See *infra* notes 139-140 (addressing the Catholic Church's inability to preserve other historic properties that it owns). But see Press Release, Americans United for Separation of Church and State, Senate Panel Looks At California Church Funding Bill (Jan. 29, 2004), <http://www.au.org> (select "Press Center" tab; then select "2004," then select "January" hyperlink under "Press Archive") [hereinafter Senate Panel] (suggesting that the Catholic Church is able to raise money for properties when it wishes, since it raised over \$189 million to build a new cathedral in Los Angeles in 2002).

132. 413 U.S. 756 (1973) (challenging a New York statute that provided for maintenance, repair, and tuition reimbursement grants for parochial schools as an Establishment Clause violation).

133. See *id.* at 763 (enumerating the activities defined as maintenance and repair including, "the provision of heat, light, water, ventilation and sanitary facilities; cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection").

134. See *Hearing, supra* note 7, at 21 (statement of Daniel Smith, National Park Service, Department of the Interior) (emphasizing that the Missions Act requires professional condition assessments to ensure that the most critical preservation and conservation needs are undertaken under the highest professional standards).

135. See Secretary of the Interior's Standards for the Treatment of Historic Properties, 36 C.F.R. § 68 (2004) (setting neutral, objective professional standards for historic preservation, rehabilitation and restoration work); NAT'L TRUST FOR HISTORIC PRES., CAREERS IN HISTORIC PRESERVATION, <http://www.nationaltrust.org/help/downloads/careersandeducation.html> (last visited Apr. 27, 2006) (observing that since the first degree program for historic preservation was formed in 1973, nearly sixty institutions of higher learning have established historic preservation degree programs including specialties in historic preservation architecture, planning, restoration design, administration, documentation techniques, and historic preservation law); AM. INST. OF ARCHITECTS, ABOUT THE HISTORIC RESOURCES COMMITTEE, http://www.aia.org/hrc_about (last visited Apr. 27, 2006) (describing the American Institute of Architects' resources group to promote the role of the historic architect and share "knowledge delivery in preservation practice, technology,

Although it is likely that structural issues will be included in the conservation and preservation work depending on the deterioration of the mission buildings,¹³⁶ the California Missions Foundation is only authorized to carry out projects that address the historic features of the missions.¹³⁷ Therefore, the law does not allow the California Missions Foundation to make repairs or maintenance that would make the worship service more comfortable. Providing assistance for an activity, such as historic preservation, which does not advance the church's religious mission, does not result in subsidy of religion.¹³⁸

The Missions Act subsidizes historic preservation, rather than religion. Without the Missions Act, the type of historic preservation intended by Congress is not likely to occur at the California missions. Since the Church's objective is not historic preservation, it is possible that the Church is unable or unwilling to expend the funds and effort necessary to restore the missions so the American public can enjoy their historical significance.¹³⁹ The Church has been unable to preserve certain historic resources in other parts of the country.¹⁴⁰

Courts have recognized that historic preservation laws may impose substantial burdens on the free exercise of religion because of the special limitations on demolition and alteration of a property.¹⁴¹

and education").

136. See *Hearing, supra* note 7, at 8 (statement of Senator Barbara Boxer) (declaring that collapse of several of the missions structures is imminent).

137. See *supra* note 99-100 and accompanying text (citing the Missions Act's prohibition on funding for any activities that are not purely secular in nature).

138. See NAT'L PARK SERV., *supra* note 122 (describing government funded restoration of architectural features of the façades of religious properties preserving specific materials and designs); see also 36 C.F.R. § 60.4 (2004) (determining that in order to be eligible for listing on the National Register of Historic Places, a property must be nationally significant in that it is associated with an historic event, is associated with a person important to national history, embodies distinct architectural merit, and may yield important information about history). Religious properties must further satisfy the requirement that they derive their primary significance from architectural or artistic distinction or historical importance. *Id.* But see Senate Panel, *supra* note 131 (arguing that funding to fix windows and religious icons is a government subsidy of church maintenance).

139. See Dodge, *supra* note 48 (quoting Knox Mellon, executive director of the California Missions Foundation as arguing that the Church's priority is its religious function—the house of worship and schools—and that the Church cannot be relied upon to save the missions). But see Whitney, *supra* note 121 (noting a recent federal Save America's Treasures grant awarded to California Mission San Miguel by congressional earmark for restoration work).

140. See Michael Paulson, *Historic Trust Lists Catholic Churches*, BOSTON GLOBE, June 3, 2005, at B1 (reporting that the National Trust for Historic Preservation listed historic Catholic churches of the greater Boston area as endangered because the Church's plan to close approximately eighty churches put them at risk of partial or total demolition).

141. See *E. Bay Asian Local Dev. Corp. v. California*, 13 P.3d 1122, 1135 (Cal. 2000) (holding that in enacting an exemption for religious properties from historic preservation laws, the California legislature could have reasonably believed that the

Since religious institutions may sometimes receive exemptions from local land use or historic preservation laws that would prove a substantial burden to the institution,¹⁴² providing funding for historic preservation may be the only way to ensure that these resources are preserved.¹⁴³

2. *Missions Act does not define recipients based on religion*

Americans United argued that by setting aside funding for Catholic missions and not for non-Catholic or non-sectarian sites, the Missions Act defines its recipients on the basis of religion in violation of the Establishment Clause.¹⁴⁴ In this regard, the court will analyze whether a law defines its recipients in reference to religion in order to determine whether the law provides aid to indoctrinate religion directly or creates a financial incentive to undertake religious

local historic preservation ordinances imposed a substantial burden on religious institutions' free exercise of their religious beliefs based on the legislature's understanding of the limitations imposed by the law and anecdotal evidence of actual burdens), *cert. denied*, 532 U.S. 1008 (2001); *see also* First United Methodist Church of Seattle v. Hearing Examiner for the Seattle Landmarks Pres. Bd., 916 P.2d 374, 379-80 (Wash. 1996) (recognizing the burden of a local landmark ordinance on a church due to both the administrative burdens placed on the church prior to receiving approval from the local government for alterations and the financial burdens because landmark designation could have lowered the property value of the church).

142. *See* Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2000) (prohibiting government from imposing a land use law on religious institutions if that law creates a substantial burden on religious exercise); *see also* Autumn L. Rierson, *RLUIPA: Four Years Later*, 21 PRESERVATION L. REP. 1169, 1171-72 (2002-03) (stating that RLUIPA establishes a "strict scrutiny" standard for land use and historic preservation regulations that burden religious exercise, but that there are various methods of determining a substantial burden in different circuits of the U.S. Court of Appeals).

143. *See* Rierson, *supra* note 142, at 1177 (recognizing the impact of the "flurry of [RLUIPA] litigation" on historic preservation commissions and municipalities that develop and enforce historic preservation ordinances, but arguing that these groups should resist the urge to stop enforcing historic preservation laws on religious institutions). *But see* Julia H. Miller, *Preservation Regulations and Constitutional Challenges*, 22 PRESERVATION L. REP. 1003, 1005 (2004) (citing the first RLUIPA case involving an historic preservation ordinance, *Episcopal Student Foundation v. City of Ann Arbor*, 341 F. Supp. 2d 691 (E.D. Mich. 2004), where the court ruled that the historic district commission's denial of a demolition permit for a worship facility was not a substantial burden because the institution had other ways to meet its worship needs beyond demolishing the property); *cf.* 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, 1172-76 (2002) (arguing that the government should only be allowed to fund what it can regulate—Religion Clause Symmetry—and suggesting that it should be allowed to regulate and fund exterior restoration of historic religious properties).

144. *See* Complaint, *supra* note 49, ¶ 29 ("By providing federal funds only for the restoration and repair of Catholic missions and not secular or other non-Catholic sites, artwork, or artifacts, the Act defines eligibility for federal benefits with reference to religion . . .").

indoctrination.¹⁴⁵ Specifically, a court examines whether “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.”¹⁴⁶ Therefore, if the aid is awarded on a neutral basis, it does not create an incentive to engage in religious practices in order to gain the aid.¹⁴⁷

The Missions Act, however, does not define recipients of the aid on the basis of religion, because the missions eligible for funding are defined based on their location, the date of construction, and landmark status.¹⁴⁸ Although all of the missions were, at some time, owned by the Catholic Church, two of the missions are now owned by the State of California Department of Parks and Recreation.¹⁴⁹ The Missions Act, therefore, makes no distinction on the basis of ownership between the state-owned and church-owned missions.¹⁵⁰ Because the eligible missions are defined by religiously neutral criteria, no financial incentive exists for the state owned missions to undertake religious practices or for the Catholic Church owned missions to abandon their religious practices.

Although the Missions Act provides aid for one particular resource that is associated with religion, California missions,¹⁵¹ directing historic preservation funding to a specific resource or type of resource is necessary and common in the field of historic preservation where activities are categorized in reference to

145. See *Agostini v. Felton*, 521 U.S. 203, 230-31 (1997) (expanding the Court’s previous view that defining recipients of aid based on religion would result in funding of religious indoctrination to also include an assessment of whether the aid would indirectly create a financial incentive to undertake indoctrination in order to receive the aid).

146. *Id.* at 231.

147. See *id.* at 232 (holding that educational funding that is available to all children regardless of whether they go to a secular or sectarian school does not define the recipients in regard to religion, so it does not create an incentive for recipients to adopt religious practices to receive the aid).

148. See California Missions Preservation Act, Pub. L. No. 108-420, §§ 2(1), 3(2), 118 Stat. 2372, 2372-73 (2004) (requiring that the missions be located in the State of California, built between 1769 and 1798, be designated California Registered Historic Landmarks, and be listed on the National Register of Historic Places).

149. See Dodge, *supra* note 48, at 1 (reporting that two missions are owned by California State Parks, one by a Jesuit university, and the rest by the Catholic Church); see also *Hearing*, *supra* note 7, at 53 (noting that the lands and churches that comprise the missions were deeded back to the Catholic Church by Congress in the mid-nineteenth century and that two of the missions were deeded to the state).

150. Cf. California Missions Preservation Act § 2 (establishing the parameters of eligible missions by geography, age, and landmark status).

151. See Vitucci, *supra* note 122, at A2 (quoting an Americans United spokesperson as arguing that the Missions Act directly grants money to “a certain string of churches”).

architectural periods, historical periods, and type of structures.¹⁵² In this sense, Congress has earmarked historic preservation funding for specific sites, such as Lincoln Cottage.¹⁵³ Congress has also provided funding for historic sites that are owned or managed by a specific entity, such as the National Trust for Historic Preservation.¹⁵⁴ Finally, like the Missions Act, Congress has set up funding programs for specific types of resources such as historic barns¹⁵⁵ or historic covered bridges.¹⁵⁶

3. *Missions Act does not cause excessive government entanglement with religion*

Americans United argued that the restrictions that Congress placed on the use of the funds and the resulting burden on the Secretary of the Interior for monitoring this funding would result in excessive entanglement of church and state.¹⁵⁷ Excessive entanglement of church and state has been a concern of the Court in cases from *Walz*¹⁵⁸ to *Lemon*,¹⁵⁹ as well as more recent Establishment Clause cases.¹⁶⁰

The Court has acknowledged that absolute separation between the affairs of the state and religious institutions is not possible.¹⁶¹ Rather,

152. See Motion to Dismiss Plaintiff's Second Amended Complaint at 1, *Doe v. Norton*, No. 04CV02089 (D.D.C. filed Apr. 14, 2005) (characterizing the passage of the Missions Act as keeping with a congressional "tradition" because Congress appropriates funds on an annual basis for a diverse range of historic resources regardless of religious affiliation).

153. See Press Release, National Trust for Historic Preservation, President Lincoln and Soldiers' Home National Monument Receives \$2.35 Million for Restoration (Feb. 13, 2003), http://www.nationaltrust.org/news/docs/20030214_lincolncottage_restoration.html (announcing \$2.35 million in historic preservation funding for the Lincoln Cottage in the omnibus appropriations measure passed by Congress).

154. See Department of the Interior and Related Agencies Appropriations Act of 2002, Pub. L. No. 107-63, 1, 11, 115 Stat. 414 (2001) (appropriating \$2.5 million dollars for the "perpetual care and maintenance of National Trust Historic Sites").

155. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (2002) (establishing the Historic Barn Preservation Act and authorizing funds to operate the program and provide grants to eligible projects).

156. See Safe, Accountable, Flexible and Efficient Transportation Equity Act: A Legacy for Users, Pub. L. No. 109-59, 119 Stat. 1144 (2005) (authorizing up to \$10 million in grants for historic covered bridge preservation).

157. See Complaint, *supra* note 49, ¶ 30.

158. See 397 U.S. 664, 674 (1970) ("We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.").

159. See 403 U.S. 602, 613 (1972) (listing excessive government entanglement with religion as an element of the Court's Establishment Clause inquiry).

160. See, e.g., *Mitchell v. Helms*, 530 U.S. 793, 807-08 (2000) (affirming the Court's decision in *Agostini* to include excessive entanglement analysis in the Court's inquiry into primary effect of the challenged law).

161. See *Walz*, 397 U.S. at 670 (arguing that absolute separation is not possible as the existence of the Religion Clauses is, in itself, involvement between church and state).

the aim of the Establishment Clause is to avoid government control of religious institutions, and to avoid either government sponsorship or interference with religion.¹⁶² Under the analysis established in *Lemon* to identify excessive government entanglement in religion, a court must “examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.”¹⁶³

While the direct benefit of the Missions Act goes to the California Missions Foundation, a non-sectarian charitable organization dedicated to preserving the California missions,¹⁶⁴ the indirect benefit goes to residents of California,¹⁶⁵ visitors of the missions, and school children.¹⁶⁶ Therefore, the character of the benefiting institution is secular. Additionally, the aid that is authorized in the Missions Act is strictly for secular historic preservation purposes,¹⁶⁷ not for improving the structures to improve the worship experience. Because the criteria that govern historic preservation were created without regard to the purpose of the structure being preserved,¹⁶⁸ the application of these neutral criteria focuses on the historic rather than religious nature of the resources. Moreover, the Missions Act will not result in a relationship between the government and the church because funding goes to a nonprofit historic preservation organization to carry out the authorized activities.¹⁶⁹ Therefore, the government will

162. See *id.* (suggesting that “there is room for play in the joints productive of a benevolent neutrality” as long as the government does not sponsor or interfere with religion or control churches or religious practices).

163. 403 U.S. at 615. See *Agostini v. Felton*, 521 U.S. 203, 232 (1997) (acknowledging that even though the Court now examines excessive entanglement within the context of the effect of a government program, it is the same analysis that the Court used under the *Lemon* test when excessive entanglement was a distinct prong of the test).

164. California Missions Preservation Act, Pub. L. No. 108-420, § 2, 118 Stat. 2372, 2372 (2004). (identifying the California Missions Foundation as the entity entitled to accept grant money and carry out the activities authorized under the Missions Act).

165. See *Hearing, supra* note 7, at 14 (statement of Congressman Sam Farr) (describing the economic benefit to the state through tourist revenue generated by visitors to the missions).

166. See S. REP. NO. 108-375, at 3 (2004), as reprinted in 2004 U.S.C.C.A.N. 2358, 2359 (citing the importance of the missions to 5.5 million visitors annually and the fourth grade mandatory curriculum).

167. California Missions Preservation Act § 3(b)(4); see *supra* note 101 and accompanying text (describing the provisions of the California Missions Preservation Act that preclude any activities that are not secular in nature).

168. See *supra* note 135 and accompanying text (describing the neutral historic preservation professional standards used by the Secretary of the Interior in all historic preservation matters).

169. See *Hearing, supra* note 7, at 9 (statement of Senator Barbara Boxer) (reasoning that the congressional sponsors of the Missions Act purposely directed

not be involved in church affairs and the government will not have any fiscal interaction with the church.

Finally, the Missions Act is not likely to cause excessive entanglement with religion because the Department of the Interior has more than two decades of experience preserving historic aspects of missions that serve as active houses of worship.¹⁷⁰ For example, the National Park Service has managed the San Antonio Missions National Historic Park under a cooperative agreement with the Archdiocese of San Antonio since 1982.¹⁷¹ The National Park Service avoided any excessive entanglement in carrying out its relationship with the Catholic Church by preserving only secular aspects of the San Antonio missions.¹⁷² Excessive entanglement, therefore, will be even less likely to occur when the National Park Service works with a non-sectarian organization at the California missions to preserve their secular aspects.¹⁷³

III. DENYING HISTORIC PRESERVATION FUNDING TO THE CALIFORNIA MISSIONS WOULD BE ADVERSARIAL TOWARD RELIGION

A. *General Government Services*

In *Everson v. Board of Education of Ewing Township*,¹⁷⁴ the Court acknowledged that while the government is not permitted to aid religious institutions under the Constitution, it is also not permitted to be adversarial toward religious groups.¹⁷⁵ The Court recognized a

the funding to the California Missions Foundation rather than a religious entity because they believed it was the "proper way" to preserve the missions without violating the separation of church and state). *But see Hearing, supra* note 7, at 30 (statement of Reverend Barry Lynn) (arguing that even if the funding goes to the California Missions Foundation, it will still be seen as government using taxpayers' money to promote religion).

170. *See supra* notes 41-47 and accompanying text (examining the successful management of the San Antonio Missions Historical Park by the National Park Service for several decades).

171. *See* 6 Op. Off. Legal Counsel 717, 718 (1982) (stating that the cooperative agreement with the San Antonio Archdiocese is not in conflict with the Establishment Clause).

172. *See supra* note 43 (noting that the National Park Service has been interpreting and managing the secular buildings and the grounds of the San Antonio Missions National Historical Park since the early 1980s).

173. *Compare* 6 Op. Off. Legal Counsel 717, 717 (governing a cooperative agreement between the Secretary of the Interior and the Archdiocese of San Antonio), *with* California Missions Preservation Act, Pub. L. No. 108-420, § 3, 118 Stat. 2372, 2372-73 (2004) (authorizing the Secretary of the Interior to enter into a cooperative agreement with the non-sectarian, California Missions Foundation).

174. 330 U.S. 1 (1947).

175. *See id.* at 18 (holding that the Constitution requires the government to remain neutral in relations with religious groups).

category of general government services such as “police and fire protection, connections for sewage disposal, public highways and sidewalks” that are “marked off from the religious function.”¹⁷⁶ The Court held that denying these general government services to religious institutions would “handicap” the institutions.¹⁷⁷

Historic preservation has long been a service of the federal and state government, and the National Historic Preservation Act mandates the federal government’s role in preserving the nation’s historic resources.¹⁷⁸ In fact, a federal independent agency was created to oversee federal stewardship responsibilities¹⁷⁹ and Congress has provided funding for a wide variety of historic resources in response to this national policy.¹⁸⁰ Additionally, the federal government funds historic preservation work at both the state and local level through the Historic Preservation Fund.¹⁸¹ Because the federal government has an extensive infrastructure and funding mechanism that carries out historic preservation at the federal, state, and local level, historic preservation is a general government service.¹⁸² To deny historic sites affiliated with religious institutions

176. *See id.* at 17-18 (establishing that these services are separate from religious functions, yet they are necessary for religious institutions to operate).

177. *See id.* at 18 (concluding that the Establishment Clause prohibits government from handicapping religious institutions as well as fostering them).

178. 16 U.S.C. § 470(1) (2003) (“It shall be the policy of the federal government . . . to . . . contribute to the preservation of nonfederally owned prehistoric and historic resources and give maximum encouragement to organizations and individuals undertaking preservation by private means . . . [and] encourage the public and private preservation and utilization of all usable elements of the Nation’s historic built environment . . .”).

179. *See* § 470i(a) (establishing an independent advisory agency for historic preservation and prescribing the required appointments to the twenty-person body); *see also* § 470j(a) (charging the Advisory Council with the responsibilities of advising the President and Congress on historic preservation matters and working with federal, state, and local agencies to educate and inform their historic preservation undertakings).

180. *See supra* notes 153-156 and accompanying text (providing a sampling of recent Congressional appropriations for historic preservation projects that illustrates the broad range of resources for which the government provides historic preservation funding).

181. *See* Department of Interior, Environment, and Related Agencies Appropriations Act, Pub. L. No. 109-55, 119 Stat. 565 (2005) (appropriating over \$75 million to the Historic Preservation Fund for fiscal year 2006); *see also* NAT’L PARK SERV., THE HISTORIC PRESERVATION FUND: ANNUAL REPORT FY2002 3 (2003) (finding that since its inception in 1970, the Historic Preservation Fund has been providing grants-in-aid to states, Native American tribes and local governments on an annual basis for activities such as historic preservation survey work, educational programs, National Register nominations and bricks and mortar grants).

182. *See* Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church, 2003 Op. Off. Legal Counsel (Apr. 30, 2003), *available at* <http://www.usdoj.gov/olc/OldNorthChurch.htm> (arguing that federal Save America’s Treasures grants are a government service under *Everson* because they are available to all types of non-

this service when so many other historic sites are provided it would be adversarial toward religion.¹⁸³

Denying this general government service would make it far more difficult for the missions to operate because of the burdens associated with allowing public access to historic resources.¹⁸⁴ This is especially so, given the high volume of visitation that the California missions receive.¹⁸⁵ Because the federal government extends funding and technical services to secular institutions that provide public access to historic properties,¹⁸⁶ it should not deny funding and services to historic properties associated with religious institutions.

The type of restoration work authorized under the California Missions Preservation Act is “marked off from the religious function” similar to the government services described in *Everson*.¹⁸⁷ The restoration and interpretation will focus on the secular aspects of the missions,¹⁸⁸ and the funding is not going to a religious institution, but to a secular group.¹⁸⁹ Furthermore, guidelines are in place under the National Historic Preservation Act that would ensure that restoration work is only for secular purposes and would meet professional historic preservation and archaeological standards set forth by the Secretary of the Interior.¹⁹⁰

profit institutions and the government at the federal, state, tribal and local level, and the purpose of the grants is to rehabilitate any historic structure that meets the requirements of the program).

183. See Motion to Dismiss Plaintiff’s Second Amended Complaint, *supra* note 152, at 34-35 n.7 (listing more than a dozen congressional appropriation measures providing funding to historic properties generally or to specific resources).

184. See California Missions Foundation, *supra* note 25 (estimating that the missions are, on average, open at least fifty hours per week for tourism or educational activities).

185. See *Hearing*, *supra* note 7, at 14 (statement of Congressman Farr) (noting that approximately 5.5 million people visit the California Missions each year).

186. See *supra* notes 153-156 (listing types of properties for which the government has funded historic preservation efforts including properties associated with presidential history, barns, historic house museums, and historic bridges).

187. See *supra* note 176 and accompanying text (establishing that police and fire protection, sewer service and sidewalk maintenance are general government services unrelated to religious function).

188. See Declaration of Dr. Knox Mellon, *supra* note 25, ¶¶ 9-12 (noting the historic significance of the California missions for architecture, agriculture and trades, and foundations of California’s cities and transportation system); see also 6 Op. Off. Legal Counsel 717, 722 (1982) (finding that the interpretive program at the San Antonio Missions, which focused on history and architecture, is likely to have “only a remote and incidental effect advantageous to [the Catholic Church]” (quoting *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 784 n.39 (1973))).

189. See California Missions Preservation Act, Pub. L. No. 108-420, § 3, 118 Stat. 2372, 2372-73 (2004) (authorizing funding to the California Missions Foundation).

190. 16 U.S.C. § 470a(e)(4) (2004) (“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

B. Content/Viewpoint Discrimination

The Supreme Court has acknowledged in Free Exercise cases that the Establishment Clause is not necessarily an excuse for engaging in viewpoint discrimination.¹⁹¹ As such, denying the missions funding due to the religious association with the structures, despite their important secular value to the nation, would take separation of church and state to an illogical extreme.¹⁹²

The opponents of the bill have emphasized the religious themes of some of the art and artifacts in arguing that the government should not be spending money to preserve them.¹⁹³ However, religious art is displayed at the federally funded National Gallery of Art.¹⁹⁴ Given that religious symbols, such as depictions of biblical characters or events, exist in many government sponsored buildings,¹⁹⁵ it would be impractical to embrace this type of content discrimination.

IV. RECOMMENDATIONS

The Department of the Interior should incorporate additional safeguards into the cooperative agreement with the California Missions Foundation to prevent Establishment Clause violations. Although the Attorney General is directed to review the cooperative agreement for compliance with the Establishment Clause,¹⁹⁶ the

purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant. Nothing in this paragraph shall be construed to authorize the use of any funds made available under this section for the acquisition of any property referred to in the preceding sentence.”).

191. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112-13 (2001) (rejecting school’s argument that it needed to exclude religious groups from using the school facilities in order to abide by the Establishment Clause).

192. See *Van Orden v. Perry*, 125 S. Ct. 2854, 2876 (2005) (Stevens, J., dissenting) (acknowledging that the Establishment Clause does not require the government to hide art or artifacts from the public because they have religious significance); see also *Everson v. Bd. of Educ. of Ewing Township*, 330 U.S. 1, 18 (1947) (arguing that although the government should not aid religion, government power should not be used to “handicap” religion either).

193. See *Hearing*, *supra* note 7, at 38 (statement of Reverend Barry Lynn) (“Can a person in a pew observing a government-funded restored painting of the Virgin Mary be expected to ignore the religious impulse it was meant to convey and just think of it as some historically significant cultural manifestation? I do not think so.”).

194. See NAT’L GALLERY OF ART, ITALIAN PAINTING OF THE 13TH-14TH CENTURIES, <http://www.nga.gov/collection/gallery/ita13.shtm> (last visited Apr. 27, 2006) (showing several of the gallery’s paintings including “The Crucifixion” by Paolo Veneziano, “The Calling of the Apostles Peter and Andrew” by Duccio di Buoninsegna, “Madonna and Child” by Giotto, and “The Nativity of the Virgin” by Andrea di Bartolo).

195. See *Van Orden*, 125 S. Ct. at 2862-63 (noting the presence of religious symbols in federal government properties including representations of Moses and/or the Ten Commandments at the Supreme Court, the Library of Congress, the National Archives, the DOJ, the Ronald Reagan Building, and the House of Representatives).

196. See *supra* note 14 and accompanying text (stating that the text of the

following recommendations would further ensure that the purpose and intent of the Missions Act are met and would prevent the use of funds for any activities beyond the secular activities authorized by the Missions Act.

The Department of the Interior should incorporate the guidelines and eligible activities of the Save America's Treasures program.¹⁹⁷ The Save America's Treasures guidelines are applicable to historic resources and collections, so they would be appropriate for the missions and the related art and artifacts therein.¹⁹⁸ By using this criteria, which include measures of national significance and a determination of an urgent preservation threat, the Department of the Interior would be further ensuring that projects undertaken under the cooperative agreement would be historic preservation priorities.

Additionally, any funded historic preservation activities should be carried out solely in areas of the missions that are currently open to the general public. The Save America's Treasures program requires the placement of a covenant on a grantee property to ensure that any parts of the property preserved or restored with Save America's Treasures funding are open to the public for at least twelve days per year.¹⁹⁹ Limiting historic preservation work to areas already open to the general public will prevent funding preservation of the worship areas that may only be viewed by parishioners.

The cooperative agreement should also require that funded historic preservation activities adhere to the restoration specifications in the Secretary of the Interior's Standards for Treatment of Historic

California Missions Preservation Act includes a provision requiring the Attorney General's finding that the cooperative agreement between the Department of the Interior and the California Missions Foundation does not include any activities that would violate the Establishment Clause).

197. Fiscal Year 2006 Application Guidelines for Save America's Treasures, National Park Service 3-4 <http://www.cr.nps.gov/hps/treasures/download/2006SATinstructions.pdf> (last visited May 6, 2006) (requiring that projects demonstrate national significance through landmark status or listing on the National Register of Historic Places and that projects must demonstrate an "urgent preservation and/or conservation need" and an appropriate plan to mitigate that threat).

198. *See id.* at 1 (restricting Save America's Treasure grants to nationally significant cultural artifacts and nationally significant historic properties); *supra* note 37 and accompanying text (describing the Save America's funding that has been granted to historic sites owned by religious entities); *cf.* NAT'L PARK SERV., *supra* note 122 (describing the historic preservation activities that the Save America's Treasures program funded at the Eldridge Street Synagogue and Touro Synagogue—two historic sites that are also religious properties).

199. *See* Sproule, *supra* note 34, at 164 (noting Save America's Treasures' requirement that restoration done to a property's interior be accessible to the general public for at least twelve days per year for fifty years).

Properties.²⁰⁰ The restoration standards are preferable to preservation or rehabilitation standards because they require the removal of materials, features, and finishes from time periods other than the properties period of significance, they require the repair rather than replacement of distinctive features, and they ensure that the replacement of any missing features must first be substantiated by documentary or physical evidence.²⁰¹ Because the restoration standards are the strictest professional standards for historic preservation, they leave the least room for interpretation.²⁰² These strict guidelines are preferable where the California Missions Foundation and Department of the Interior are working to ensure that the activities are strictly secular because it leaves little room for subjective determinations and will ensure that the activities are all conservation based rather than simple repair or maintenance work that could be seen as a benefit to the religious institution. For instance, since the restoration standards would require the removal of materials or features that were added after the period of significance, one potential activity could be the removal of any inappropriate siding materials or building additions to the missions. This would not benefit the religious use of the properties, but would ensure that visitors and residents wishing to enjoy the history and architecture of the missions would be experiencing the authentic mission structure rather than a false feature or finish. This is a secular conservation goal that historic preservation organizations commonly seek to accomplish in restoration work.

Finally, the cooperative agreement should require a dual review of the proposed grant activities before the funds are disbursed with the written concurrence of the State Historic Preservation Officer and the Department of the Interior.²⁰³ The dual review will ensure that

200. The Secretary of the Interior's Restoration Standards for the Treatment of Historic Properties, 36 C.F.R. § 68.3(c) (2004).

201. *Id.*

202. Compare 36 C.F.R. § 68.3(c) (requiring that the property be used as it was historically or interpreted according to the restoration period; prohibiting removal of features or treatments from the restoration period; mandating the documentation and removal of features or spaces added after the restoration period; and forbidding any new construction that is not a reconstruction of designs executed during the restoration period), with The Secretary of the Interior's Rehabilitation Standards for the Treatment of Historic Properties, 36 C.F.R. § 68.3(b) (2004) (allowing a new use for the property as long as it minimizes changes to historic features; discouraging, but not prohibiting, the removal of historic features or treatments; requiring the preservation of changes to the property after the period of significance if they have become significant in their own right; and allowing new construction as long as it does not destroy historic features and is differentiated from the historic space).

203. See generally NAT'L PARK SERV., PRESERVATION TAX INCENTIVES FOR HISTORIC BUILDINGS 7 (2001) (describing the dual review for the Federal Historic

the activities are strictly secular and are carried out to the highest professional standard for historic preservation. The State Historic Preservation Officer will be most familiar with the resources within his or her state, and the Department of the Interior can make the final determination on behalf of the federal government.

CONCLUSION

California's historic missions have provided insight into Spanish colonial and Native American history for generations of Americans.²⁰⁴ The Missions Act seeks to preserve these cultural and historic treasures for future generations by allowing federal aid to protect the most significant historic features of these resources.²⁰⁵ Historic preservation of nationally significant religious properties is not unprecedented, as the federal government has already undertaken similar activities under the Save America's Treasures grant program.²⁰⁶

Congressional intent proves that the purpose of the Missions Act is secular, and analysis of the authorized activities illustrates that its effect does not advance religion. Furthermore, funding is awarded to a secular organization rather than to a religious institution, and it goes solely to secular activities, so the Missions Act in no way subsidizes religion.²⁰⁷ Because the law provides religiously neutral criteria that determine the recipients of the aid²⁰⁸ and the Department of the Interior has two decades of experience with similar preservation responsibilities,²⁰⁹ the law will not result in excessive government entanglement.

Rehabilitation Tax Credit where the State Historic Preservation Office gives the first level of review on the ground and the National Park Service makes all of the final determinations).

204. *See supra* note 104 and accompanying text (establishing Congress's intent in advancing Native American history and the history of settlement and exploration in the West by preserving the California missions).

205. *See supra* notes 101-103 and accompanying text (requiring that the restoration work abide by the National Historic Preservation Act's provision regarding grants to religious properties and that the California Missions Act provide annual reports to Congress on the historic preservation activities).

206. *See supra* note 37 and accompanying text (describing the type of religious properties funded by Save America's Treasures grants).

207. *See supra* notes 111-143 and accompanying text (arguing that the Missions Act does not subsidize religion because the funds go to a secular organization and the funds do not indirectly benefit the church in an impermissible manner).

208. *See supra* notes 148-150 and accompanying text (establishing that eligible missions are not chosen based on religion, but on geography, date of construction, and landmark status).

209. *See supra* notes 170-173 and accompanying text (describing the National Park Service's experience in managing the San Antonio Missions National Historical Park, which includes an active house of worship).

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Given that the Missions Act is neutral on its face and a variety of existing preservation tools and regulations will serve as useful safeguards in ensuring that the line between secular historic preservation and sectarian aid is not crossed, the Missions Act does not violate the Establishment Clause.