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## First Amendment Challenges to Landmark Preservation Statutes

Stephen M. Watson

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# FIRST AMENDMENT CHALLENGES TO LANDMARK PRESERVATION STATUTES

## I. Introduction

A significant constitutional conflict has developed between the free exercise of religion<sup>1</sup> and the application of landmark preservation statutes to religious properties.<sup>2</sup> An example of this debate is the recent controversy generated by St. Bartholomew's Episcopal Church's<sup>3</sup> plan<sup>4</sup> to develop a fifty-nine story skyscraper adjacent to the landmarked church and above the parish community house.<sup>5</sup> It is estimated that this project could produce annual revenues of \$9.5 million for the church in the first ten years.<sup>6</sup> These proceeds would be designated by the church to further its urban ministries and attempt to satisfy certain overwhelming religious and social needs of New York City.<sup>7</sup> The project, however, would be impermissible according to the

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1. U.S. CONST. amend. I. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." This federally guaranteed freedom has been applied to the States and local governments through the fourteenth amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

2. See generally COMMITTEE OF RELIGIOUS LEADERS OF THE CITY OF NEW YORK, FINAL REPORT OF THE INTERFAITH COMMISSION TO STUDY THE LANDMARKING OF RELIGIOUS PROPERTY 7-8 (1982) [hereinafter cited as INTERFAITH REPORT]. The Interfaith Commission was established in 1980 by the Committee of Religious Leaders of the City of New York (comprised of Protestants, Roman Catholics and Jews) in response to a specific request by the Episcopal Diocese of New York to study the issues raised regarding the landmark designation of the Church of St. Paul and St. Andrew (United Methodist), *id.* at 39, despite the objections of the congregation. *Id.* at 18.

3. St. Bartholomew's Episcopal Church, 109 E. 50th Street, New York, New York.

4. "[T]he proposal appears certain to set off a major political, theological and legal battle that both opponents and supporters of development have vowed to carry to the United States Supreme Court if necessary." N.Y. Times, Oct. 29, 1981, at A1, col. 2. "Not since the Penn Central railroad tried to put a skyscraper atop Grand Central Terminal has a land-use issue in midtown Manhattan ignited such passions as the proposal to sell off some of St. Bartholomew's Episcopal Church on Park Avenue for the construction of an office tower." *Id.*, Oct. 30, 1981, at A1, col. 3.

5. St. Bartholomew's is located on Park Avenue on a plot described as "the last piece of land on the city's premier commercial boulevard not now occupied by commercial real estate." *Id.* The church was designated a New York City Landmark in 1967. NEW YORK CITY LANDMARKS PRESERVATION COMMISSION, DESIGNATION REPORT LP-0275, No. 1 (1967). See also N.Y. Times, Oct. 29, 1981, at D27, col. 2.

6. N.Y. Times, Oct. 29, 1981, at A1, col. 4. The yearly earnings were projected to increase after the initial ten year period. *Id.*, at D27, col. 1.

7. Brenner, *Holy War on Park Avenue: The Great St. Bartholomew's Landmark Battle*, NEW YORK MAG., Dec. 14, 1981, at 34, 36. Some activities in which St. Bartholomew's currently engages are "daily noontime services, a celebrated music series, theology classes, a kindergarten, [and] meetings of Alcoholics Anonymous . . . ." *Id.* St. Bartholomew's also provides food and clothing for anyone in

existing New York City landmarks law which states that "it shall be unlawful for any person in charge of a landmark site . . . to alter, reconstruct or demolish [any such site] unless the [New York City Landmarks Preservation] Commission has previously issued . . . a certificate of appropriateness or a notice to proceed authorizing such work . . . ." <sup>8</sup> The resulting controversy presents a dramatic setting for an analysis of how the application of the landmarks law can thwart valid religious goals. <sup>9</sup>

The religious leaders of New York City, deeply concerned with the problems associated with the landmarking of religious properties, commissioned an Interfaith Study <sup>10</sup> to review the effect of landmark status on local churches and synagogues. <sup>11</sup> The Interfaith Commission

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need. *Id.* Reverend Thomas Dix Bowers (the current rector of St. Bartholomew's) envisions "an Urban Training Center for the needy people of the Grand Central area, the bag people, the homeless, and the desperate" as well as money for charities, disaster victims, and for the use of the diocese. *Id.*

8. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-4.0 (1976).

9. Many other religious organizations may be burdened similarly by the application of New York City landmark statutes. See note 11 *infra*. Approximately 125 religious properties have been listed as landmark sites by the New York City Landmarks Preservation Commission. Landmarks Preservation Commission of the City of New York, A Guide to New York City Landmarks (1979 & Supp. March 23, 1982).

10. Bishop Stuart J. Wetmore of the Episcopal Diocese of New York commented that the Interfaith Commission had initiated its study prior to the St. Bartholomew's controversy. N.Y. Times, March 4, 1982, at B3, col. 7.

11. See INTERFAITH REPORT, *supra* note 2, at 15-21. The Interfaith Commission cited eight specific examples in which the landmarks law has burdened religious communities:

(1) Conservative Synagogue of Fifth Avenue, E. 11th St., Manhattan. (After a proposal by the congregation to extend the existing building was endorsed by the local community board, and thousands of dollars in fees paid to architects, the Landmarks Commission arbitrarily criticized the plan. The plan must now be re-drawn at additional expense and delay.)

(2) Spencer Memorial Presbyterian Church, Montague St., Brooklyn. (After the congregation was dissolved, the church property was offered for sale. A prospective purchaser submitted several plans to redevelop the interior of the church. All proposals were rejected by the Landmarks Commission, and the property was subsequently sold to a private developer at a greatly reduced price.)

(3) Church of St. Paul and St. Andrew, W. 86th St., Manhattan. (A congregation burdened with excessive building repair costs had the opportunity to lease its land for the construction of a high-rise apartment. The ground floor of the new building was to be reserved for the congregation's use. Although properly zoned for such a development, the plan was thwarted when the Landmarks Commission designated the building as a landmark in 1981.)

(4) The Village Church, Presbyterian, 13th St., Manhattan. (Upon the dissolution of the congregation, the vacant building located in the Greenwich Village Historic District was offered for sale and restored to the tax rolls in 1978. Three years later, after having incurred heavy tax and management expenses, the Presbytery of New York finally found a suitable buyer for the vacant building.)

found that the prohibition against demolition or alteration effectively destroys the value of the landmarked religious property.<sup>12</sup> In addition, the Interfaith Commission stated that religious organizations are required to expend thousands of dollars of religious contributions to maintain<sup>13</sup> these landmarks for the public benefit in accordance with the regulations of the Landmarks Commission.<sup>14</sup> Furthermore, certain amelioratory provisions of the landmarks law which offset this burden for commercial properties<sup>15</sup> do not aid non-profit organizations.<sup>16</sup> The study concludes that the New York City landmarks law is

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(5) St. Bartholomew's Church, Park Ave., Manhattan. See notes 3-7 *supra* and accompanying text.

(6) Yeshiva Chofetz Chaim, W. 87th St., Manhattan. (As a result of owning a landmarked building, this school bears a considerable expense for maintenance. Unable to modernize, the religious and educational purposes of this school are being threatened.)

(7) St. Paul's Roman Catholic Church, Warren St., Brooklyn. (Dwindling enrollment forced the parish to close its elementary school and consequently pay real estate taxes on and maintain a vacant building. A contract to sell the building was signed in 1979 pending the approval of the Landmarks Commission. By the time the approval was granted 18 months later, the plan had fallen through.)

(8) Grace Church School, Episcopal, 4th Ave., Manhattan. (A plan to replace an old clergy house had been rejected by the Landmarks Commission. An alternative plan eventually adopted has proven inadequate for the needs of the school.)

12. See INTERFAITH REPORT, *supra* note 2, at 10. The Commission argues that, if buildings are to be saved for the public benefit because of architectural merit, the government should condemn the building and pay full value to the owner. The landmarks law, however, forces the landmark owner to bear the cost of preservation for the public benefit. *Id.*

13. *Id.* at 8. Such costs include repair, maintenance, heating an "energy inefficient facility," and fees for architects and attorneys to represent the organization before the Commission. *Id.* at 15. "The [landmarks] law destroys the hope of a congregation that it can free itself from the crushing burden of maintenance and heating of a structure which has outlived its useful life and can no longer serve the purposes for which it was originally built." *Id.* at 22.

14. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 207-10.0 to -11.0 (1976) provides that all landmark owners must maintain and repair the building and prevent deterioration. A question can arise as to what is minor work and what is alteration, *id.* § 207-1.0(q), and procedures including a hearing are often required before any work can be done. *Id.* §§ 207-5.0 to -9.0.

15. *Id.* § 207-8.0. Owners of commercial landmarked property may request permission to demolish, alter or reconstruct by proving that they cannot earn a sufficient return on their property. § 207-1.0(v) defines a sufficient return as six percent. When an insufficient return is shown, the Landmarks Commission may allow a real property tax exemption or remission. *Id.* § 207-8.0(b), (c). The Landmarks Commission may also recommend the purchase by the city of a "specified appropriate protective interest" in the property. *Id.* § 207-8.0(g)(1). If neither of these plans is adopted, the owner may then demolish, alter or reconstruct. *Id.* § 207-8.0(i)(5).

16. The tax exemption or remission provided by § 207-8.0(b), (c) is of no benefit to religious organizations as they already receive a tax exemption. N.Y. REAL PROP. TAX LAW § 421 (McKinney 1972). Thus the mitigating effect of § 207-8.0(b), (c) benefits only commercial owners. See also INTERFAITH REPORT, *supra* note 2, at 3.

“unworkable and unacceptable”<sup>17</sup> as applied to religious organizations. Furthermore, the Interfaith Commission declared that the statute “violates directly the constitutional prohibition against governmental interference with the free exercise of religion . . . .”<sup>18</sup>

The New York State Court of Appeals recently permitted the landmark designation of religious or charitable property<sup>19</sup> so long as it did not “seriously interfere with the carrying out of the charitable purpose.”<sup>20</sup> The constitutional standard for the regulation of religious organizations, however, requires a compelling state interest to justify any infringement on the free exercise of religion. Such a burden will be permitted only where the state cannot achieve its goals by another means.<sup>21</sup>

This Comment focuses on the constitutionality of landmark preservation statutes as applied to religious properties. Using New York City as a model, this Comment will examine the problems presented by the landmarking of religious properties. This Comment concludes that a re-examination of the New York standard under the constitutional test requires the resolution of whether the preservation of landmarks is a compelling state interest sufficient to justify the burden of maintaining landmarks which has been placed on religious organizations.

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17. INTERFAITH REPORT, *supra* note 2, at 23.

18. *Id.*

19. *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). Landmark designation which prevented the demolition of the Society's meeting house was upheld because it did not seriously interfere with the charitable purpose, even though the congregation had planned to construct an apartment building for investment purposes whose revenue would be used for charitable purposes.

20. *Id.* at 455, 415 N.E.2d at 925, 434 N.Y.S.2d at 935.

21. The United States Supreme Court in *Braunfeld v. Brown*, 366 U.S. 599 (1961), upheld a “Sunday Closing” law despite the adverse economic impact it had on certain Orthodox Jewish merchants whose religion prohibited their working on Saturdays. The Court stated the test for determining whether a regulation violates the free exercise clause as:

[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.

*Id.* at 607. This test was further refined by the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), to require a “compelling state interest . . . [to] justif[y] the substantial infringement of appellant's First Amendment right.” *Id.* at 406. *See also Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Amish exempt from compulsory education requirements due to religious objections).

## II. The New York City Landmarks Preservation Law As Applied to the Religious Community

### A. The Landmark Designation Process

The New York City Landmarks Preservation Commission (Landmarks Commission) was created in 1965<sup>22</sup> to "effect and accomplish the protection, enhancement and perpetuation of such improvements and landscape features and of districts which represent or reflect elements of the city's cultural, social, economic, political and architectural history . . . ."<sup>23</sup> While the Landmarks Commission does not have zoning authority,<sup>24</sup> it may regulate and restrict minor work, alteration, construction and demolition of a landmark.<sup>25</sup>

The landmark designation process involves an administrative determination of whether a proposed building or area merits protection from alteration or demolition.<sup>26</sup> After a written proposal for designation has been made, a public hearing is conducted<sup>27</sup> at which the owner of the subject property and others may present testimony regarding the proposed designation.<sup>28</sup> Following the hearing, the Landmarks Commission may designate the property as a landmark, effective immediately.<sup>29</sup> A copy of the designation is then filed with the New York City Board of Estimate, which may approve or disapprove within ninety days.<sup>30</sup> If no disapproval or modification is forthcom-

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22. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-1982).

23. *Id.* § 205-1.0(b)(a).

24. *Id.* § 207-3.0(a).

25. *Id.* § 207-3.0(b).

26. *Id.* § 207-2.0.

27. *Id.* Although notice is required, failure to give notice will not invalidate the designation hearing. *Id.* § 207-12.0(a). The hearing need not be held before the full Landmarks Commission, but rather, the Commission may delegate the power to conduct a hearing to any member or members. *Id.* § 207-12.0(c). For a discussion of the lack of procedural safeguards in the New York City designation procedure, see Comment, *Beyond the Taking Issue: Emerging Procedural Due Process Issues In Local Landmark Preservation Programs*, 10 FORDHAM URB. L.J. 441 (1982). See also *Historic Greensprings, Inc. v. Bergland*, 497 F. Supp. 839 (E.D. Va. 1980) (Federal landmarking of Green Springs, Virginia Historical District was void for lack of adequate notice); K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 5:10, 7:26 & 8:4 (Supp. 1982).

28. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-12.0(b) (1976). However, the Landmarks Commission, in its discretion, need not be confined to such testimony. *Id.* That the Landmarks Commission is free to disregard the objections of the property owner calls into question the effectiveness of the public hearing.

29. *Id.* § 207-2.0(b), (e).

30. *Id.* § 207-2.0(g)(1), (2). A copy of the designation is also filed with the New York City Department of Buildings, the City Planning Commission, the Board of Standards and Appeals, the Fire Department and the Health Services Administration. *Id.* § 207-2.0(f). The statute does not require that the Board of Estimate review

ing, the designation becomes final.<sup>31</sup> Once the property is granted landmark status, its owner must comply with the maintenance and repair provisions set forth by the Landmarks Commission,<sup>32</sup> or face criminal penalties.<sup>33</sup> Similarly, the landmark owner is subject to criminal reprisals if alteration, reconstruction or demolition is attempted without the consent of the Landmarks Commission.<sup>34</sup>

To remove the effect of a landmark designation (de-landmarking), two different standards may apply. The owner of commercial property must request a Certificate of Appropriateness authorizing demolition, alteration or reconstruction based on the grounds of insufficient economic return.<sup>35</sup> The de-landmarking of non-commercial charitable or religious property, however, requires a showing by the owner that there is a contract to sell or to lease the property for at least twenty years.<sup>36</sup> In addition the property must be shown to be unable to earn a reasonable return, comparable to that of commercial properties.<sup>37</sup> Finally, the building must no longer be suitable for the owner's purpose or for the purpose for which it was originally used.<sup>38</sup> If these conditions are met, the Commission shall endeavor to obtain a purchaser or tenant who will occupy the premises as a landmark, and not seek to alter or demolish the structure.<sup>39</sup> If such a purchaser or tenant cannot be found, the Landmarks Commission may recommend that

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or approve the designation, but only that it may modify or disapprove. *Id.* § 207-2.0(g)(2). For a criticism of the Board of Estimate review of landmark designations see Richland, *The Case for Tightening the Reins on Landmarking*, N.Y. Times, Feb. 21, 1982, § 8, at 1, col. 3; INTERFAITH REPORT, *supra* note 2, at 29.

31. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-2.0 (1976 & Supp. 1981-1982).

32. *Id.* §§ 207-10.0 to -11.0.

33. *Id.* § 207-16.0.

34. *Id.* The landowner may seek a Certificate of No Effect where the alteration would not affect the protected architectural features of the structure. *Id.* § 207-5.0. Alternatively, the landowner may apply for a Certificate of Appropriateness where the proposed work would be consistent with and appropriate for the goals of the preservation of the landmark. *Id.* § 207-6.0. Also, the landowner may seek a permit authorizing minor work for such repairs that are so insignificant that no construction permit would ordinarily be required. *Id.* § 207-9.0. For all three applications the Landmarks Commission has complete discretion to grant or deny the request. Although each application is required to be acted on within a specified number of days, the landowner may not begin such work until a determination has been made.

35. *Id.* § 207-8.0; see note 15 *supra*.

36. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-8.0(a)(2)(a) (1976). The owner may not develop the property and retain ownership of it. INTERFAITH REPORT, *supra* note 2, at 32.

37. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-8.0(a)(2)(b) (1976).

38. *Id.* § 207-8.0(a)(2)(c).

39. *Id.* § 207-8.0(i)(1).

the city acquire a "specified appropriate protective interest"<sup>40</sup> in the property.

## B. The Effect of Landmark Designation on Religious Organizations

While owners may welcome the landmark designation of their property as an honor,<sup>41</sup> the designation of religious properties creates serious problems for many religious organizations. The vague standards used by the Landmarks Commission in determining landmark significance<sup>42</sup> the high economic cost of maintaining a landmark<sup>43</sup> and the previously mentioned lack of compensation for tax exempt non-commercial landmark owners<sup>44</sup> are substantial burdens imposed on the religious community.

### 1. Standards

The landmarks law defines a landmark as: "Any improvement, any part of which is thirty years old or older, which has a special character or special historical or aesthetic interest or value as part of the development, heritage or cultural characteristics of the city, state or nation . . . ."<sup>45</sup> Religious properties easily satisfy this standard because churches and synagogues by their nature are designed to be architecturally distinctive.<sup>46</sup> The Landmarks Commission is free to apply this vague standard liberally over any objections made by the landowner.<sup>47</sup> Another problem generated by the broad definition of a

40. *Id.* § 207-8.0(i)(4)(a). Note that rather than condemning the entire structure and paying full value to the owner, the city can accomplish the same result by purchasing the restrictive protective interest. INTERFAITH REPORT, *supra* note 2, at 32.

41. INTERFAITH REPORT, *supra* note 2, at 8. There may also be an economic benefit to owners of property located in an historical district through increased business and tourism. The real estate tax exemption also provides compensation to these landmark owners. See note 15 *supra*.

42. See notes 45-52 *infra* and accompanying text.

43. See notes 53-56 *infra* and accompanying text.

44. See note 15 *supra* and accompanying text.

45. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-1.0(n) (1976).

46. INTERFAITH REPORT, *supra* note 2, at 3, 8-9.

One might consider the situation if the landmarks law had been in effect at the turn of the century: the City would now be studded with useless religious buildings from Wall Street through midtown and to the upper reaches of Manhattan. Not only would these buildings be occupying land needed for other uses, but they would be draining religious resources in ways that would undermine ministry and service to the people of our community.

*Id.* at 21.

47. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-12.0(b) (1976).

landmark is that the statute, as presently applied to churches and synagogues, is often used for zoning purposes despite the specific prohibition in the landmark statute against such use.<sup>48</sup> Religious properties frequently occupy under-developed parcels in relatively congested areas.<sup>49</sup> Applying the general language of the landmarks standard to religious properties effectively blocks any further development in the area.<sup>50</sup> Many who oppose the development of St. Bartholomew's, for example, have admitted their primary concern is the effect the proposed tower will have on the local environment.<sup>51</sup> These are zoning concerns and are not within the province of the Landmarks Commission.<sup>52</sup>

## 2. Maintenance

Another problem which arises when churches and synagogues become landmarks is that they are forced to expend religious contributions to comply with the maintenance and repair regulations of the Landmarks Commission.<sup>53</sup> The Interfaith Commission has found that "[i]n forcing religious organizations to expend their charitable funds for the maintenance of outmoded and inadequate buildings, the City government is, in fact, directing the Church and Synagogue on how it is to use its resources which have been contributed for its religious ministry, not for architectural preservation."<sup>54</sup>

Although religious organizations may apply for federal grants from the Historic Preservation Fund,<sup>55</sup> it is doubtful that these grants would

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48. *Id.* § 207-3.0(a). The Landmarks Commission may not "limit the height and bulk of buildings . . . regulate and determine the area of yards, courts and other open spaces [or] . . . regulate density of population . . ." *Id.* See also *Gumley v. Nantucket Bd. of Selectmen*, 371 Mass. 718, 724-25, 358 N.E.2d 1011, 1015 (1977). (The Nantucket Historic District Commission lacked the authority to reject a residential development plan on the grounds of interference with the "'open space' aspect of Nantucket.")

49. See notes 5 & 9 *supra*.

50. INTERFAITH REPORT, *supra* note 2, at 11.

51. N.Y. Times, Oct. 30, 1981, at A26, col. 1. This article discusses the effect of the proposed development on light, open space and congestion on Park Avenue. *Id.*

52. See note 48 *supra*.

53. See notes 13-14 *supra* and accompanying text.

54. INTERFAITH REPORT, *supra* note 2, at 4.

55. 16 U.S.C. § 470(a) (1976 & Supp. IV 1980). See Memorandum from James D. Webb, Associate Solicitor, Conservation and Wildlife, to the Director, Heritage Conservation and Recreation Service, on Historic Preservation Grants for Renovation of Church Properties (March 6, 1979), reprinted in PRACTISING LAW INSTITUTE, HISTORIC PRESERVATION LAW 287-302 (N.A. Robinson ed. 1980). See also Robinson, *Historic Preservation Law: The Metes and Bounds of a New Field*, 1 PACE L. REV. 511, 558-59 (1981).

meet the constitutional test regarding the first amendment's prohibition against the establishment of religion.<sup>56</sup> Also, the tentative nature of federal grants and the increasing costs of heating and maintenance make it unlikely that the Historic Preservation Fund could alleviate any of the economic burdens presently imposed on religious organizations.

The indefinite standards of the landmarks law and the distinctiveness of religious structures result in the landmarking of many religious properties, often for zoning purposes. Additionally, the mandatory diversion of religious funds to landmark maintenance and the removal of a congregation's discretion to determine the fate of its house of worship constitute an interference with the free exercise of religion. As a result, when religious organizations challenge the landmarks law, first amendment issues arise which must be addressed and resolved by the courts. In applying the landmarks law to religious properties, however, the New York courts have not considered these first amendment problems.

### III. Judicial Application of Landmarks Preservation Statutes to Religious Properties

#### A. Application to Commercial Property

If a commercial property owner can demonstrate that landmark status destroys the reasonable use of the property, the designation will be removed.<sup>57</sup> In *Penn Central Transportation Co. v. New York*

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56. See note 1 *supra*. The constitutional test as stated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1976) is: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an 'excessive government entanglement with religion' " (citations omitted). See generally *Robinson*, *supra* note 55, at 558-59.

57. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). This case has been the subject of considerable commentary. See Conrad & Merriam, *Compensation in TDR Programs: Grand Central Terminal and the Search for the Holy Grail*, 56 U. DET. J. URB. L. 1 (1978); Marcus, *The Grand Slam Grand Central Terminal Decision: A "Euclid" for Landmarks, Favorable Notice for TDR and A Resolution of the Regulatory/Taking Impasse*, 7 *ECOLOGY L.Q.* 731 (1978); Samuels, *After Penn Central: A Look Down the Track at Constitutional Taking*, 8 *REAL. EST. L.J.* 230 (1980); Comment, *Alas in Wonderland: The Impact of Penn Central v. New York Upon Historic Preservation Law and Policy*, 7 *B.C. ENVTL. AFF. L. REV.* 317 (1978); Comment, *Grand Central Terminal and the New York Court of Appeals: "Pure" Due Process, Reasonable Return, and Betterment Recovery*, 78 *COLUM. L. REV.* 134 (1978); Comment, *Penn Central Transportation Company v. City of New York: Landmark Preservation Eludes the "Taking" Clause*, 14 *NEW ENG. L. REV.* 317 (1978); Comment, *Historic Preservation by Means of Landmark Designation*. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), 30 *S.C.L. REV.* 825 (1979); Note, *Penn Central v. City of New York: A Landmark Landmark Case*, 6

*City*,<sup>58</sup> the United States Supreme Court upheld the constitutional validity of the New York City landmarks law. The Court held that the landmarks law could prohibit the development of air space above Grand Central Terminal.<sup>59</sup> Such a restriction, the Court ruled, was not a taking without compensation in violation of the fifth amendment,<sup>60</sup> because the property owner (Penn Central Transportation Co.) was not denied the reasonable use of the building as a railroad terminal.<sup>61</sup> It was also found that Penn Central could transfer its right to develop above the terminal to surrounding properties which Penn Central owned.<sup>62</sup> If the reasonable use of the commercial property has not been entirely destroyed by the designation, the New York City landmarks law also provides that commercial owners may alter or demolish a landmarked structure upon a showing that the property is unable to earn a reasonable return.<sup>63</sup>

FORDHAM URB. L.J. 667 (1978); Note, *Penn Central Transportation Co. v. City of New York: Landmark Designation, Legitimate Preservation or Unconstitutional Taking?*, 25 LOY. L. REV. 205 (1979); Note, *The Taking Issue—Landmarks Preservation Law That Severely Restricts the Use of Individual Historic Structures Does Not Effect a Taking When There Remains a Reasonable Beneficial Use of a Property—Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), 56 U. DET. J. URB. L. 141 (1978).

58. 438 U.S. 104 (1978).

59. *Id.* at 136-37.

60. The fifth amendment forbids that "private property be taken for public use, without just compensation." U.S. CONST. amend. V; N.Y. CONST. art. I, § 6 provides "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. CONST. art. I § 7(a) provides "[p]rivate property shall not be taken for public use without just compensation."

61. *Penn Central*, 438 U.S. at 136-37. The Court in *Penn Central* applied the balancing test of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal Co.*, the United States Supreme Court stated "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. In *Penn Central*, the regulation did not constitute a taking because Penn Central could take advantage of its Transfer Development Rights ("TDR's"). 438 U.S. at 137. TDR's are the development rights possessed by a landmark owner which may be transferred to another property, allowing the transferee to increase the size of his building. See J. COSTONIS, *SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKET PLACE* (1974); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574 (1972); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973). But see Berger, *The Accommodation Power in Land Use Controversies: A Reply to Professor Costonis*, 76 COLUM. L. REV. 799 (1976).

62. See note 61 *supra*.

63. Although the New York City landmarks law forbids reconstruction, alteration or demolition without the prior consent of the Landmarks Commission, NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-4.0(a)(1) (1976), if the owner can prove that the property can not earn a reasonable return, *id.* § 207-8.0(a)(1)(a), then the alteration may be permitted. *Id.* § 207-8.0.

## B. Application to Non-Commercial Property

The Appellate Division of The New York State Supreme Court has recognized that the standards for commercial property owners cannot be applied to non-commercial landmark owners. In *Trustees of Sailors' Snug Harbor v. Platt*,<sup>64</sup> the court announced the test for charities: "[w]here maintenance of the landmark either physically or financially prevents or seriously interferes with carrying out the charitable purpose,"<sup>65</sup> the regulation will be considered invalid.<sup>66</sup> While the *Sailors' Snug Harbor* test may be valid for charitable organizations, judicial application of this test to religious organizations overlooks the strictures of the first amendment. The first amendment affords religious organizations greater protection from governmental interference than it provides the charitable property owner. The *Sailors' Snug Harbor* test was developed in the absence of any first amendment issues. In subsequent landmark preservation cases, the New York courts equated charitable and religious organizations using the *Sailors' Snug Harbor* test, and placed an inordinate emphasis on the taking analysis to determine the validity of the landmarks law.<sup>67</sup> The underlying first amendment issues have been neither adequately addressed nor resolved by the New York courts.<sup>68</sup> The United States Supreme Court test for determining whether governmental regulation violates the free exercise of religion<sup>69</sup> has not been employed.

### 1. Charitable Organizations

The constitutionality of the New York City landmarks law was first tested in *Sailors' Snug Harbor*,<sup>70</sup> which concerned the preservation of

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64. 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. N.Y. County 1967), *rev'd*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968). See notes 65-77 *infra* and accompanying text.

65. *Sailors' Snug Harbor*, 29 A.D.2d at 378, 288 N.Y.S.2d at 316.

66. *Id.*

67. *Lutheran Church in America v. City of New York*, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974); see notes 78-105 *infra* and accompanying text; *Society for Ethical Culture v. Spatt*, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1st Dep't 1979), *aff'd*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); see notes 106-33 *infra* and accompanying text.

68. Although the first amendment issue was stated in *Lutheran Church*, 35 N.Y.2d at 125 n.1, 316 N.E.2d at 308 n.1, 359 N.Y.S.2d at 11 n.1, it was not discussed in the opinion. In *Society for Ethical Culture*, the New York Court of Appeals said merely that the first amendment "does not entitle it [a religious organization] to immunity from reasonable government regulation when it acts in purely secular matters." 51 N.Y.2d at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

69. *Braunfeld v. Brown*, 366 U.S. 599 (1961). See note 21 *supra* and notes 137-47 *infra* and accompanying text.

70. 53 Misc. 2d 933, 280 N.Y.S.2d 75 (Sup. Ct. N.Y. County 1967), *rev'd*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968).

a charitable organization's 19th century Greek Revival buildings used to house retired seamen.<sup>71</sup> The Appellate Division of the New York State Supreme Court conceded the validity of using the police power to regulate landmark structures.<sup>72</sup> The court focused primarily on whether in this instance the regulation went so far as to be considered a taking.<sup>73</sup> In its discussion of the taking issue, the court recognized that the landmarks law sets guidelines for commercial property owners with regard to any "undue burden"<sup>74</sup> and allows for a reasonable return.<sup>75</sup> The court found that corresponding provisions for non-commercial, charitable owners provide relief only if the owner chooses to sell or lease the property.<sup>76</sup> Upon finding that the landmarks law provided inadequate guidance regarding charitable properties, the court established the *Sailors' Snug Harbor* test—if maintenance of the landmark physically, financially or seriously interferes with the charitable purpose, the landmark designation will be overturned.<sup>77</sup>

## 2. Religious Organizations

In *Lutheran Church in America v. City of New York*,<sup>78</sup> the New York Court of Appeals applied the *Sailors' Snug Harbor* test to a religious organization.<sup>79</sup> The court, by equating charitable and religious organizations, concentrated on the taking issue, thereby neglecting important first amendment considerations.

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71. 29 A.D.2d at 377-78, 288 N.Y.S.2d at 315-16. Petitioner contended that these old buildings were no longer suitable for the purposes of housing elderly men, and therefore petitioner sought to replace them with modern structures. *Id.*

72. *Id.* at 378, 288 N.Y.S.2d at 316.

73. *Id.* For taking discussion *see* notes 57-62 *supra*.

74. *Sailors' Snug Harbor*, 29 A.D.2d at 378, 288 N.Y.S.2d at 316.

75. *Id.* Commercial owners who would earn less than a reasonable return on the property may apply for a Certificate of Appropriateness authorizing alteration or demolition. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-8.0 (1976). A reasonable return is defined as six percent. *Id.* § 207-1.0(v).

76. *Sailors' Snug Harbor*, 29 A.D.2d at 378, 288 N.Y.S.2d at 316. *See* notes 36-38 *supra* and accompanying text.

77. *Sailors' Snug Harbor*, 29 A.D.2d at 378, 288 N.Y.S.2d at 316. The case was remanded to answer the factual questions presented by the new test. *Id.* The City subsequently purchased the property and it became the Sailors' Snug Harbor, Staten Island Institute of Arts and Sciences. Landmarks Preservation Commission of the City of New York, *A Guide to New York City Landmarks* 80-81 (1979).

78. 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). *See* Note, *Landmark Preservation: The Problem of the Single Landmark*—*Lutheran Church in America v. City of New York*, 25 DE PAUL L. REV. 160 (1975).

79. *Lutheran Church*, 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16.

*Lutheran Church* concerned the designation of a midtown Manhattan mansion which was the former home of J.P. Morgan, Jr.<sup>80</sup> The structure was built in 1853 and had been a residence until The United Lutheran Church in America purchased it in 1942.<sup>81</sup> Subsequently, the Lutheran Church converted it to offices for the administrative purposes of the church.<sup>82</sup> Prior to the enactment of the landmarks law in 1965, the Lutheran Church considered demolishing the building in favor of a new office building to better serve their needs.<sup>83</sup> The designation of the building as a landmark precluded the planned alteration.<sup>84</sup> The court conceded that the Landmarks Commission would not approve a demolition.<sup>85</sup> The court also noted that the church as a religious organization could not benefit from the ameliorative provisions of the landmarks law.<sup>86</sup>

The court then addressed the taking issue, despite the fact that the lower courts had ruled solely on the issue of whether the structure was of landmark quality.<sup>87</sup> In discussing governmental interference with an owner's use of private property,<sup>88</sup> the court noted that there is either compensable taking or noncompensable regulation.<sup>89</sup> The court further stated that while similar land use restrictions such as zoning regulations may be noncompensable,<sup>90</sup> they cannot be applied retro-

80. *Id.* at 125, 316 N.E.2d at 308, 359 N.Y.S.2d at 11. The structure was designated a landmark in 1965 because it was significant as "the residence of J.P. Morgan Jr. during the first half of the twentieth century, . . . an early example of Anglo-Italiane architecture, . . . one of the few free standing Brownstones remaining in the City . . . [and] is a handsome building of great dignity." *Id.* (quoting the New York City Landmarks Preservation Commission).

81. *Id.* at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

82. *Id.*

83. *Id.* at 124-25, 316 N.E.2d at 307, 359 N.Y.S.2d at 10-11.

84. NEW YORK, N.Y., ADMIN. CODE ch. 8-A, § 207-4.0(a)(1) (1976). See notes 32-34 *supra* and accompanying text.

85. *Lutheran Church*, 35 N.Y.2d at 124, 316 N.E.2d at 307, 359 N.Y.S.2d at 10.

86. *Id.* See also notes 15-16 *supra* and accompanying text for a discussion of the ameliorative provisions.

87. *Lutheran Church*, 35 N.Y.2d at 127-28, 316 N.E.2d at 309-10, 359 N.Y.S.2d at 13.

88. *Id.* at 128, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

89. [E]ither the government is acting in its enterprise capacity, where it takes unto itself private resources in use for the common good, or in its arbitral capacity, where it intervenes to straighten out situations in which the citizenry is in conflict over land use or where one person's use of his land is injurious to others. . . . Where government acts in its enterprise capacity, as where it takes land to widen a road, there is a compensable taking. Where government acts in its arbitral capacity, as where it legislates zoning . . . there is simply noncompensable regulation.

*Id.* at 128-29, 316 N.E.2d at 310, 359 N.Y.S.2d at 14 (citing Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63-64 (1964)).

90. *Lutheran Church*, 35 N.Y.2d at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

actively to prohibit an existing use of property<sup>91</sup> and are void if confiscatory.<sup>92</sup> In so ruling, the court relied on a number of zoning cases including *Vernon Park Realty v. City of Mount Vernon*,<sup>93</sup> in which it held: “[h]owever compelling and acute the community- . . . problem may be, its solution does not lie in placing an undue and uncompensated burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose.”<sup>94</sup> The New York Court of Appeals in *Lutheran Church* also relied on *Forster v. Scott*<sup>95</sup> and *Keystone Assocs. v. Moerdler*,<sup>96</sup> wherein it held:

[i]t is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment or the power of disposition at the will of the owner.<sup>97</sup>

The court applied these standards to the landmarks law because, as in *Forster* and *Keystone Associates*, the record owner retained title and use but the “free use was so severely restricted as to be confiscatory.”<sup>98</sup> The court then stated that the landmarks law may be unconstitutional in certain situations, as in the present case where it deprives the landowner of the reasonable use of the property.<sup>99</sup> However, the court refused to invalidate the law itself as unconstitutional because it held that not all landmark designations are confiscatory.<sup>100</sup>

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91. *Id.* See also 1 R. ANDERSON, NEW YORK ZONING LAW AND PRACTICE § 6.03 (2d ed. 1973) (“[z]oning ordinances which sought to affect such vested rights were described as ‘retroactive’ and therefore invalid”). *Id.* § 6.03, at 169.

92. *Lutheran Church*, 35 N.Y.2d at 129, 316 N.E.2d at 310, 359 N.Y.S.2d at 14.

93. *Id.* at 129-30, 316 N.E.2d at 310-11, 359 N.Y.S.2d at 15, (citing *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E.2d 517 (1954)). The court in *Lutheran Church* also relied on *Morris County Land Improvement Co. v. Township of Parsippany—Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963), where under the guise of regulation, the subject property was added to the municipality’s resources.

94. *Vernon Park Realty*, 307 N.Y. at 498, 121 N.E.2d at 519.

95. *Lutheran Church*, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15, citing *Forster v. Scott*, 136 N.Y. 577, 32 N.E. 976 (1893).

96. *Lutheran Church*, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15, citing *Keystone Assocs. v. Moerdler*, 19 N.Y.2d 78, 224 N.E.2d 700, 278 N.Y.S.2d 185 (1966).

97. *Lutheran Church*, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15, (quoting *Forster v. Scott*, 136 N.Y. at 584, 32 N.E. at 977, citing *Keystone Assocs. v. Moerdler*, 19 N.Y.2d at 88, 224 N.E.2d at 703, 278 N.Y.S.2d at 189).

98. *Lutheran Church*, 35 N.Y.2d at 130, 316 N.E.2d at 311, 359 N.Y.S.2d at 15.

99. *Id.*

100. *Id.* The landmarks law was held not to be confiscatory in *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980). See notes 106-33 *infra* and accompanying text for a discussion of *Society for Ethical Culture*.

The court in *Lutheran Church* discussed *Sailors' Snug Harbor* and stated that if "the owner can make a case for alteration or demolition [based on the *Sailors' Snug Harbor* test], the municipality would have to relinquish the designation, provide agreeable alternatives or condemn the premises."<sup>101</sup> It was concluded that "to force plaintiff to retain its property as is, without any sort of relief or adequate compensation, is nothing short of a naked taking."<sup>102</sup> In *Lutheran Church*, the court found that the church met the *Sailors' Snug Harbor* test because the structure was totally inadequate for the church's administrative needs.<sup>103</sup> The landmarks law was found to be a serious interference with the charitable use of the premises.<sup>104</sup> Thus, the court in *Lutheran Church* relied on the taking analysis and never addressed the first amendment issues presented.<sup>105</sup>

In a recent New York decision, *Society for Ethical Culture v. Spatt*,<sup>106</sup> the *Sailors' Snug Harbor* test was again applied to a religious organization.<sup>107</sup> In *Society for Ethical Culture*, the designated property was not an office building as in *Lutheran Church*, but rather a congregation's meeting house.<sup>108</sup> Moreover, in *Society for Ethical Culture*, the New York Court of Appeals, in a broad reference to the first amendment issue regarding the free exercise of religion, concluded that the first amendment does not grant "immunity from reasonable government regulation".<sup>109</sup> The Society for Ethical Culture<sup>110</sup> claimed that the designation of their meeting house as a landmark was both a violation of the free exercise of religion and a taking.<sup>111</sup> The structure was built in the early 1900's and was designed in the art nouveau style of architecture.<sup>112</sup> The Society opposed the landmark designation at the initial public hearing and later sought to annul the designation.<sup>113</sup>

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101. *Lutheran Church*, 35 N.Y.2d at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17.

102. *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 16.

103. *Id.* at 132, 316 N.E.2d at 312, 359 N.Y.S.2d at 17.

104. *Id.* at 131-32, 316 N.E.2d at 311-12, 359 N.Y.S.2d at 16-17.

105. *Id.* at 125 n.1, 316 N.E.2d at 308 n.1, 359 N.Y.S.2d at 11 n.1.

106. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

107. *Id.* at 455, 415 N.E.2d at 925, 434 N.Y.S.2d at 935. In *Society for Ethical Culture*, unlike *Lutheran Church*, the landmark designation did not interfere with a charitable purpose. *Id.* at 455-56, 415 N.E.2d at 925-26, 434 N.Y.S.2d at 935-36.

108. *Id.* at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 932.

109. *Id.* at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936.

110. "The Society is a religious, educational and charitable organization founded in 1877 for the purpose of uniting interested persons to further the goal of nonsectarian moral improvement." *Id.* at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 933.

111. *Id.*

112. *Id.* at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 934.

113. *Id.*

The Society contended that the designation was unreasonable, in that there was insufficient evidence supporting the house's alleged historical and architectural significance.<sup>114</sup> The appellate division noted that the trial court had found the designation "confiscatory, unconstitutional, arbitrary and unreasonable."<sup>115</sup> The appellate division reversed the trial term and found there was a rational basis for the designation.<sup>116</sup>

The Society further contended that economic obsolescence justified the building's demolition; it proposed replacement with a new center, above which would be revenue generating apartments.<sup>117</sup> The income from this development would then be used by the Society for charitable purposes.<sup>118</sup> The appellate division questioned whether the landmarks law seriously interfered with the property's use<sup>119</sup> and concluded no such interference existed.<sup>120</sup>

In discussing the first amendment claim of the Society, the appellate division expressly refused to apply the language of *Westchester Reform Temple v. Brown*.<sup>121</sup> In *Westchester Reform Temple*, the

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114. *Id.* at 453, 415 N.E.2d at 924, 434 N.Y.S.2d at 934.

115. *Society for Ethical Culture*, 68 A.D.2d at 115, 416 N.Y.S.2d at 249.

116. *Id.* at 117, 416 N.Y.S.2d at 250. The appellate division in *Society for Ethical Culture* followed the New York Court of Appeals decision in *Pell v. Board of Educ.*, 34 N.Y.2d 222, 313 N.E.2d 321, 356 N.Y.S.2d 833 (1974), in determining that the trial term's review of an administrative tribunal where there has been a hearing is limited to whether there is substantial evidence to support the finding. The administrative finding must stand unless it is without a rational basis and is arbitrary and capricious. In *Society for Ethical Culture*, the Landmark Commission's designation was not arbitrary and capricious, but relied on the history of the Society (founded in 1876), the art nouveau style of architecture and professional opinions. 68 A.D.2d at 117, 416 N.Y.S.2d at 249-50.

117. *Id.* at 119-20, 416 N.Y.S.2d at 252.

118. *Id.* at 120, 416 N.Y.S.2d at 252.

119. *Id.* at 119, 416 N.Y.S.2d at 251. The Court in *Society for Ethical Culture* relied upon *Sailors' Snug Harbor* and *Lutheran Church* in applying the serious interference test. *Id.*

120. *Id.* at 120, 416 N.Y.S.2d at 252. The appellate division also relied on *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592 (1962), which held that an ordinance can deprive a property owner of the most beneficial use of the property and not be unconstitutional. 68 A.D.2d at 121, 416 N.Y.S.2d at 252. Perhaps this reliance is misplaced in that *Society for Ethical Culture* concerns a religious organization's right to the best use of its property as a means to further the religious purposes of the congregation. In *Goldblatt*, an ordinance which prohibited any excavation below the water table was upheld despite appellant's objections that such excavation was the most beneficial use of his property. 369 U.S. at 592-96.

121. *Society for Ethical Culture*, 68 A.D.2d at 122, 416 N.Y.S.2d at 253 (citing *Westchester Reform Temple v. Brown*, 22 N.Y.2d 488, 239 N.E.2d 891, 293 N.Y.S.2d 297 (1968)). In *Westchester Reform Temple* the New York Court of Appeals held unconstitutional a zoning regulation which effectively prohibited the construction of a synagogue with added parking space.

New York Court of Appeals noted that “[r]eligious structures enjoy a constitutionally protected status which severely curtails the permissible extent of governmental regulation in the name of the police powers . . . .”<sup>122</sup> In distinguishing *Westchester Reform Temple*, the appellate division stated that the Society sought not just a new facility, but rather the right to develop its property as it desired.<sup>123</sup> Neither a religious organization nor a commercial property owner, the court stated, is entitled to the most beneficial use of the property.<sup>124</sup> The appellate division thus concluded that the application of the landmarks law to the Society for Ethical Culture was not a violation of the free exercise of religion.<sup>125</sup>

The New York Court of Appeals affirmed the appellate division’s ruling in *Society for Ethical Culture*.<sup>126</sup> The court, citing *Sailors’ Snug Harbor* and *Lutheran Church*, enforced the landmark designation as it found no serious interference with the charitable purpose.<sup>127</sup> The court similarly equated charitable with religious organizations and applied the taking analysis of *Sailors’ Snug Harbor*.<sup>128</sup> The first amendment issue was almost disregarded.<sup>129</sup> Citing *Wisconsin v. Yoder*,<sup>130</sup> the court stated that “[a]lthough the Society is concededly entitled to First Amendment protection as a religious organization, this does not entitle it to immunity from reasonable government regulation when it acts in purely secular matters.”<sup>131</sup> Despite citing *Yoder*, the New York Court of Appeals failed to apply the United States Supreme Court test for determining the validity of governmental regulation of religion.<sup>132</sup> Correct application of *Yoder* in the landmarks context would require that courts determine whether the excessive regulation of religious organizations and the diversion of funds

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122. 22 N.Y.2d at 496, 239 N.E.2d at 896, 293 N.Y.S.2d at 303.

123. *Society for Ethical Culture*, 68 A.D.2d at 122, 416 N.Y.S.2d at 253.

124. *Id.* at 121, 416 N.Y.S.2d at 252.

125. *Id.* at 122, 416 N.Y.S.2d at 253.

126. 51 N.Y.2d 449, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980).

127. *Id.* at 455, 415 N.E.2d at 925, 434 N.Y.S.2d at 935.

128. *Id.*

129. *Id.* at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936. The Court devoted only one paragraph to the first amendment issue.

130. 406 U.S. 205 (1972).

131. *Society for Ethical Culture*, 51 N.Y.2d at 456, 415 N.E.2d at 926, 434 N.Y.S.2d at 936, citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972). For a discussion of *Yoder*, see notes 156-62 *infra* and accompanying text.

132. This Supreme Court test requires a careful scrutiny of any regulation which infringes on the free exercise of religion. See notes 137-66 *infra* and accompanying text.

away from the religious ministry can be justified by furthering the "cultural and aesthetic benefit of the community."<sup>133</sup>

#### IV. The Constitutionality of Landmarking Religious Properties

The first amendment issue regarding the landmarking of religious property was presented in both *Lutheran Church in America v. City of New York*,<sup>134</sup> and *Society for Ethical Culture v. Spatt*.<sup>135</sup> The courts, however, relied primarily on the taking analysis (using the *Sailors' Snug Harbor* standard)<sup>136</sup> and failed to consider adequately the first amendment problems. The United States Supreme Court, in a series of cases beginning with *Braunfeld v. Brown*,<sup>137</sup> has adopted a balancing test to be applied when the government is allegedly violating the free exercise of religion. The test as stated by the Court in *Braunfeld* is:

[I]f the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goal, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.<sup>138</sup>

133. *Society for Ethical Culture*, 51 N.Y.2d at 454, 415 N.E.2d at 925, 434 N.Y.S.2d at 935. The New York Court of Appeals in *Society for Ethical Culture* stated that "a government may reasonably restrict an owner in the use of his property for the cultural and aesthetic benefit of the community," *id.*, citing *Cromwell v. Ferrier*, 19 N.Y.2d 263, 225 N.E.2d 749, 279 N.Y.S.2d 22 (1967), and *Sailors' Snug Harbor*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (1st Dep't 1968). However, the court neglected to weigh the benefits for the community against the infringement on the free exercise of religion: a test required by the United States Supreme Court. See notes 137-66 *infra* and accompanying text.

134. 35 N.Y.2d at 125 n.1, 316 N.E.2d at 308 n.1, 359 N.Y.S.2d at 11 n.1.

135. 51 N.Y.2d at 452, 415 N.E.2d at 924, 434 N.Y.S.2d at 933.

136. *Lutheran Church*, 35 N.Y.2d at 131, 316 N.E.2d at 311, 359 N.Y.S.2d at 16; *Society for Ethical Culture*, 51 N.Y.2d at 454-55, 415 N.E.2d at 925, 434 N.Y.S.2d at 935.

137. 366 U.S. 599 (1961); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963); see generally Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327 (1969); Dodge, *The Free Exercise of Religion: A Sociological Approach*, 67 MICH. L. REV. 679 (1969); Pepper, *Reynolds, Yoder, and Beyond: Alternatives for the Free Exercise Clause*, 1981 UTAH L. REV. 309; Riga, *Yoder and Free Exercise*, 6 J. LAW & EDUC. 449 (1977); Comment, *A Braunfeld v. Brown Test for Indirect Burdens on the Free Exercise of Religion*, 48 MINN. L. REV. 1165 (1964); Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 YALE L.J. 350 (1980).

138. *Braunfeld*, 366 U.S. at 607 (citing *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940)). The Court in *Braunfeld* also noted *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follet v. McCormick*, 321 U.S. 573 (1944), where the Court held that Jehovah's Witnesses "colporteurs" (itinerant ministers selling religious liter-

In *Braunfeld*, the Court was faced with the question of whether Pennsylvania's Sunday closing law<sup>139</sup> interfered with the appellants' free exercise of religion. The appellants were Orthodox Jewish merchants whose religion required their abstention from work on Saturdays.<sup>140</sup> Prior to the enactment of the law, these merchants were allowed to remain open for business on Sundays in order to compensate for their closing on Saturdays.<sup>141</sup> The mandatory Sunday closing, they claimed, would restrict their ability to earn a living. Moreover, it would interfere with the free exercise of religion because the statute forced them to either disobey their religious teachings or suffer great economic loss.<sup>142</sup> The Court in *Braunfeld* upheld the Sunday closing law because it was enacted to advance a valid secular goal of providing one day of "rest, repose, recreation and tranquillity . . . ."<sup>143</sup> The Court was not satisfied that any other means existed which could be adopted to further the state's purpose.<sup>144</sup>

The *Braunfeld* test is applicable to historic preservation statutes because they are general laws which advance the state's purpose but also impose a burden on religion. The application of the *Braunfeld* test to the landmarks law<sup>145</sup> gives rise to three fundamental issues: (1) whether the preservation of landmarks is a valid secular purpose, (2) whether the burden placed on religious organizations is direct or indirect and (3) whether the state may accomplish its purpose by means which do not impose such a burden.

The purpose of the landmarks law is to preserve for future generations examples of significant architectural and historical buildings.<sup>146</sup> While historic preservation is a valid secular purpose,<sup>147</sup> it may not

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ature) could not be compelled to pay a local peddler's tax. The Court held this license tax unconstitutional as a direct tax on the free exercise of religion. *Braunfeld*, 366 U.S. at 607 n.4.

139. 18 PA. CONS. STAT. ANN § 4699.10 (Purdon 1960), presently codified at 18 PA. CONS. STAT. ANN. § 7363 (Purdon 1973).

140. *Braunfeld*, 366 U.S. at 601.

141. *Id.*

142. *Id.* at 602.

143. *Id.* at 607.

144. *Id.* at 608-09. The Court stated that if it created an exception for appellants and permitted their working on Sunday, those who remained closed on Sunday could complain that their religions had been discriminated against. Also, others might feign religious beliefs in order to close on a less profitable day, thereby being able to remain open on Sunday.

145. NEW YORK, N.Y. ADMIN. CODE ch. 8-A, §§ 205-1.0 to 207-21.0 (1976 & Supp. 1981-1982).

146. *Id.* § 205-1.0(b).

147. Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978); see notes 57-63 *supra* and accompanying text.

meet the *Braunfeld* test as it was further refined by the United States Supreme Court in *Sherbert v. Verner*.<sup>148</sup>

Justice Brennan, who concurred and dissented in *Braunfeld*,<sup>149</sup> wrote for the majority in *Sherbert* and stated that there must be "some compelling state interest . . . [to] justif[y] the substantial infringement of appellant's First Amendment right."<sup>150</sup> The Court in *Sherbert* considered the question of whether South Carolina's Unemployment Compensation Act<sup>151</sup> violated the free exercise clause. The appellant was a Seventh-Day Adventist who was denied unemployment benefits because she was unable to work on Saturday due to her religious beliefs.<sup>152</sup> The Court in *Sherbert* distinguished *Braunfeld* based on the fact that in *Sherbert* there was no compelling state interest which necessitated the substantial infringement on appellants' freedom of religion.<sup>153</sup> Unlike *Braunfeld*, the Court in *Sherbert* found the appellant could be exempted from the eligibility requirement of the regulation. Thus, an alternative was available which did not burden the free exercise of religion.<sup>154</sup>

Application of the *Sherbert* compelling state interest test to the landmarking of religious properties requires that a substantially higher standard be met to justify the burden imposed on religious organizations. It has not yet been determined whether the protection of New York City's "cultural, social, economic, political, and architectural history"<sup>155</sup> is a compelling state interest, or whether that interest would be defeated by exempting religious buildings.

The United States Supreme Court in *Wisconsin v. Yoder*<sup>156</sup> discussed what state purposes would or would not justify an infringement on the free exercise clause of the first amendment. In *Yoder*, members of the Old Order Amish contended that Wisconsin's compulsory school attendance law<sup>157</sup> was "contrary to the Amish religion and way of life."<sup>158</sup> The Court conceded the valid state purpose in the

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148. 374 U.S. 398 (1963).

149. 366 U.S. at 610. (Brennan, J., concurring and dissenting). In *Braunfeld*, Justice Brennan stated that there was not such an overbalancing need for the Sunday closing law so as to justify the substantial limit on the appellants' free exercise of religion. *Id.* at 613-14.

150. 374 U.S. at 406.

151. S.C. CODE ANN. §§ 68-1 to -404 (Law. Co-op. 1962), presently codified at S.C. CODE ANN. §§ 41-27-10 to -41-50 (Law. Co-op. 1976 & Supp. 1981).

152. *Sherbert*, 374 U.S. at 399-401.

153. *Id.* at 408-09.

154. *Id.* at 409.

155. NEW YORK, N.Y., ADMIN. CODE ch.8-A, § 205-1.0(b) (1976).

156. 406 U.S. 205 (1972).

157. WIS. STAT. § 118.15 (1973 & Supp. 1981-1982).

158. *Yoder*, 406 U.S. at 209.

education of its citizens,<sup>159</sup> but ruled in favor of the Amish. The Court noted that despite the need for formal education, the values underlying the religion clauses of the first amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."<sup>160</sup> The Court further stated that although religious activities may be regulated to "promote the health, safety, and general welfare"<sup>161</sup> of the community, "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."<sup>162</sup>

The United States Supreme Court has continued to apply the *Braunfeld*, *Sherbert* and *Yoder* tests requiring a compelling governmental interest to justify an infringement on the free exercise of religion. In the recent case of *United States v. Lee*,<sup>163</sup> the Court upheld the substantial governmental interest in maintaining the Social Security system despite the objections of the Amish that their religion also requires them to contribute to the support of fellow members.<sup>164</sup> The Court stated that the Social Security system could not function if each religion were to seek an exemption from compliance.<sup>165</sup> Thus, the infringement on the free exercise of religion was upheld because of the high governmental interest in the program and the lack of any alternative means to further the government's purpose.<sup>166</sup>

## V. Conclusion

Application of the United States Supreme Court first amendment standards to the New York City landmarks law requires a determination of whether the preservation of landmarks is or should be considered a state interest so compelling as to justify the substantial burden such preservation places on religious organizations. In determining whether the state interest is compelling, courts must ascertain whether other means are available to further the state interest in preserving landmarks without infringing on the free exercise of religion. If such

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159. *Id.* at 213.

160. *Id.* at 214.

161. *Id.* at 220, citing *Gillette v. United States*, 401 U.S. 437 (1971), *Braunfeld v. Brown*, 366 U.S. 599 (1961), *Prince v. Massachusetts*, 321 U.S. 158 (1944), *Reynolds v. United States*, 98 U.S. 145 (1879).

162. *Yoder*, 406 U.S. at 220, citing *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Walz v. Tax Comm'n*, 397 U.S. 664 (1979).

163. 102 S.Ct. 1051 (1982).

164. *Id.* at 1055.

165. *Id.* at 1056.

166. *Id.*

means exist, the infringement on the free exercise of religion is invalid. While the United States Supreme Court has approved the validity of the New York City landmarks law as applied to commercial properties,<sup>167</sup> the court has yet to determine whether landmarks preservation is a sufficient compelling state interest when applied to religious properties.

The New York courts, without fully addressing the first amendment standard set by the United States Supreme Court, have approved the validity of landmark regulations as applied to religious organizations.<sup>168</sup> In so doing, the New York courts have applied a lesser standard than the first amendment, determining solely if there has been a taking without compensation, despite the fact that the New York City landmarks law imposes substantial burdens on religious landmark owners.<sup>169</sup> These burdens include the lack of standards which make churches and synagogues easy targets for landmark designation, the prohibition against alteration and development and the heavy economic costs of heating, maintaining and repairing these structures, all of which amounts to a significant interference with the free exercise of religion.<sup>170</sup> As a result, religious organizations are burdened for the public benefit despite the contrary desires of the religious community. Although these burdens may be unintentional and therefore indirect, the regulations still must be carefully scrutinized applying the Supreme Court standards.

Furthermore, and also within first amendment analysis, a number of alternatives are available to further the state's goal of preserving landmarks. Among the options available are exemption of religious buildings from landmark designation or proposed legislation providing for designation of religious properties only with the congregation's consent.<sup>171</sup> The government could also contribute financially to either maintain or to purchase these landmarks outright. Considering these alternatives, it is doubtful that a court would conclude that other means are not available to further the state interest and thereby render it compelling.

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167. *Penn Central*, 438 U.S. at 128-29. See notes 57-63 *supra* and accompanying text.

168. See notes 78-133 *supra* and accompanying text for a discussion of *Lutheran Church and Society for Ethical Culture*.

169. See notes 41-56 *supra* and accompanying text.

170. See notes 41-54 *supra* and accompanying text.

171. 10341 N.Y.S., 13043 N.Y.A., 205th Leg., Reg. Sess., 1982. This proposed amendment to N.Y. GEN. MUN. LAW § 96-a (McKinney 1977) has been supported by the New York State Council of Churches and the Religious Leaders of New York State and would not permit the landmarking of religious or charitable properties without the consent of the religious or charitable organization.

The New York Court of Appeals in *Penn Central*<sup>172</sup> acknowledged the great financial burden which would be imposed on the public treasury were the government to pay the price of maintaining landmarks. The New York courts have ignored the fact that churches and synagogues, with their limited resources, are also ill-suited to bear the economic burden imposed on them for the public benefit.

While landmark preservation is important, it must be recognized that the values underlying the religion clauses of the first amendment "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance."<sup>173</sup> To force congregations to bear the burdens of landmark designation, without either the consent of the congregation or financial compensation from the government constitutes a violation of the free exercise clause of the first amendment.

*Stephen M. Watson*

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172. 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S.2d 914 (1977), *aff'd*, 438 U.S. 104 (1978).

173. *Wisconsin v. Yoder*, 406 U.S. at 214.

