

# William & Mary Environmental Law and Policy Review

---

Volume 15 (1990)  
Issue 2 *William and Mary Journal of  
Environmental Law*

Article 2

---

April 1991

## The Strict Neutrality Principle: Workable Solution for First Amendment Challenges to Preservation Designation of Religious Landmarks?

S. Kathleen Pepper

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Land Use Law Commons](#)

---

### Repository Citation

S. Kathleen Pepper, *The Strict Neutrality Principle: Workable Solution for First Amendment Challenges to Preservation Designation of Religious Landmarks?*, 15 Wm. & Mary Envtl. L. & Pol'y Rev. 1 (1991), <https://scholarship.law.wm.edu/wmelpr/vol15/iss2/2>

Copyright c 1991 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmelpr>

# THE STRICT NEUTRALITY PRINCIPLE: WORKABLE SOLUTION FOR FIRST AMENDMENT CHALLENGES TO PRESERVATION DESIGNATION OF RELIGIOUS LANDMARKS?

*S. Kathleen Pepper*

The first amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>1</sup> Infringements of these clauses have been litigated on a wide variety of issues.<sup>2</sup> Over the past decade, some of the most controversial first amendment litigation has involved alleged infringements on religious freedom caused by state historic reservation regulations.<sup>3</sup> The principal issue is whether historic landmark<sup>4</sup> designation of church-owned<sup>5</sup> properties impermissibly restricts a religious organization's free exercise of

---

1. U.S. CONST. amend. I.

2. See *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990) (sales and use taxes on the distribution of religious materials); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 108 S. Ct. 1319 (1988) (timber harvesting in national forests areas traditionally used for religious purposes by Native Americans); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (mandatory education for minors up to age 16); *Sherbert v. Verner*, 374 U.S. 398 (1963) (unemployment compensation); *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closings as a uniform day of rest); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (child labor laws); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (medical vaccinations); *Reynolds v. United States*, 98 U.S. 145 (1878) (monogamous marriage).

3. See, e.g., *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990) (landmark designation not an infringement upon the Church's free exercise of religion), *cert. denied*, 111 S. Ct. 1103 (1991); *Society of Jesus v. Boston Landmarks Comm'n*, (Nos. 87-3168, 87-4751, and 87-6586, Suffolk County Sup. Ct.) (Nov. 2, 1989) (landmark designation not an infringement upon the Church's free exercise of religion); *First Covenant Church v. City of Seattle*, 114 Wash. 2d 392, 787 P.2d 1352 (1990) (landmark designation impermissibly infringed upon the Church's free exercise of religion). See also *Historic Preservation News*, July 1990, at 1, col. 2.

4. The term "historic landmark" or "religious landmark" is used in this article to refer to properties designated either as being included within an historic district or as an individual historic landmark.

5. The word "church" is used generically to refer to bodies, organizations, buildings, or properties of any and all faiths and beliefs.

religion by imposing affirmative duties upon the property owner and subjecting property owners to criminal penalties where property is not in compliance with statutory obligations. A less frequently litigated issue is whether historic landmark designation of church-owned property constitutes an impermissible establishment of religion.

Historic landmark designations are granted on the national level by the National Park Service<sup>6</sup> and on the state level by state historic preservation offices.<sup>7</sup> All nominations must meet specific criteria in order to receive an historic register designation.<sup>8</sup> Listing

6. The National Register of Historic Places, which lists all properties of cultural significance worthy of preservation, serves as the model for the Register of Historic Places administered by each state. 16 NAT'L REG. BULL. 3 (1986).

7. *Id.*

8. For example, the criteria required for a National Register designation are:

The quality of *significance* in American history, architecture, archeology, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association, and:

- A. that are associated with events that have made a significant contribution to the broad patterns of our history; or
- B. that are associated with the lives of persons significant in our past; or
- C. that embody the distinctive characteristics of a type, period, or method of construction or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
- D. that have yielded, or may be likely to yield, information in prehistory or history.

Criteria Considerations (Exceptions): Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings, properties primarily commemorative in nature, and properties that have achieved significance within the past 50 years *shall not be considered eligible* for the National Register. However, such properties *will qualify* if they are integral parts of districts that do meet the criteria or if they fall within the

on the National or on a state Register indicates that the building or property so designated represents an important aspect of American history, architecture, archaeology, or culture.<sup>9</sup> Although a specific exception is granted for properties used for religious purposes or owned by religious organizations, such properties may still be listed if they are part of an historic district or meet additional criteria.<sup>10</sup> Once official designation is received,<sup>11</sup> listed properties are subject to a variety of restrictions.<sup>12</sup> These restrictions form the basis for free exercise or establishment clause challenges to landmark status and to preservation ordinances.

One way to interpret the conflict between the freedoms of first amendment's two religion clauses and historic preservation guidelines is through the strict neutrality principle. This principle holds that the free exercise and the establishment clauses "should be

---

following categories:

- A. a religious property deriving primary significance from architectural or artistic distinction or historical importance; or . . . (Exceptions B - G omitted).

16 NAT'L REG. BULL. 1 (1986).

9. *Id.*

10. *Id.*

11. Many states require the property owner's consent to designate property as an historic landmark. Virginia does not require consent prior to designation of state landmarks. In 1989, the state of Washington decided that church-owned property could not be nominated or designated as an historic landmark because such actions constituted an infringement upon the religious institution's free exercise of religion. To date, Washington is the first state to specifically exempt church-owned property from the historic landmarks process. It remains to be seen whether this decision constitutes the beginning of a trend or whether it represents a minority view. T. BOASBERG, T. COUGHLIN & J. MILLER, *PRESERVATION LAW AND TAXATION* §§ 7.03[7][b][iv], 7.03[8] (1986); M. DAVIS, *PRESERVATION POLICY RESEARCH: STATE SYSTEMS FOR DESIGNATING HISTORIC PROPERTIES AND THE RESULTS OF DESIGNATION* 12 (1987).

12. Common restrictions include, but are not limited to paint color, aluminum siding, roofing materials, building additions, and building demolitions. In addition, owners are required to maintain the condition of their listed properties.

read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.<sup>13</sup>

The purpose of this article is to determine whether the strict neutrality approach to interpretation of the two religion clauses provides a viable framework for analyzing alleged infringements of the free exercise clause resulting from the affirmative duties imposed by designation of property as a religious landmark<sup>14</sup> under state historic preservation regulations.<sup>15</sup> The article begins by exploring the development of the strict neutrality principle in the early 1960s and its recent modifications. Next the article discusses the holding and rationale of the most recent, and most controversial, religious landmark case -- *St. Bartholomew's Church v. City of New York*.<sup>16</sup> The strict neutrality principle is then applied to the facts of the case, and compared to the approach actually used by the courts. Finally, the article discusses whether the strict neutrality principle offers a workable solution to conflicts between religious landmarks and the free exercise and establishment clauses of the first amendment.

#### THE STRICT NEUTRALITY PRINCIPLE

##### *Origins of the Strict Neutrality Principle*

Strict neutrality was first seriously advocated as a doctrinal

---

13. P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 112 (1962) [hereinafter KURLAND].

14. While church-owned property most commonly refers to a principal religious structure (often with related dependent religious buildings), it may also refer to a formerly secular building constructed for residential or commercial use which has been subsequently purchased by a religious organization.

15. This article does not address the issue of whether the criminal sanctions provisions of state historic preservation regulations constitute an infringement of a religious institution's free exercise of religion under the First Amendment.

16. 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

approach to interpreting the two religion clauses of the first amendment in the early 1960s.<sup>17</sup> Under this theory, the free exercise and the establishment clauses are read together as flip sides of the same coin rather than as tension filled opposing commands.<sup>18</sup> Utilizing a foundation of equal protection theory rather than due process theory, the strict neutrality principle states that the free exercise and the establishment clauses "must be read to mean that religion may not be used as a basis for classification for purposes of governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations."<sup>19</sup>

Although Kurland's principle arguably offered a fair, even-handed approach capable of resolving the inherent tensions between the two religion clauses and between the treatment of religious and secular actions and beliefs, it has not been wholeheartedly adopted or consistently applied by the Supreme Court.<sup>20</sup> Over the past few years, however, the strict neutrality principle has been revisited, providing the first serious scholarly analysis of the principle since its origin.<sup>21</sup> Consequently, the strict neutrality principle has been modified in response to the criticisms it has engendered.

---

17. KURLAND, *supra* note 13, at 116. For other early commentary on the neutrality principle, see Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). *Contra* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960).

18. This point has been emphasized by modern scholars as well. See Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 313 (1986) [hereinafter Paulsen].

19. KURLAND, *supra* note 13, at 18. At the same time Kurland noted that this approach should be used as a "starting point for solutions to problems brought before the Court, not a mechanical answer to them." *Id.*

20. See Kelley, "Strict Neutrality" and the Free Exercise of Religion, in EQUAL SEPARATION 18 (P. Weber ed. 1990) [hereinafter Kelley]; Tushnet, *The Emerging Principle of Accommodation of Religion (Dubitante)*, 76 GEO. L.J. 1691 (1988).

21. EQUAL SEPARATION (P. Weber ed. 1990), at xi.

*Modifications of Kurland's Strict Neutrality Principle*

James Madison advocated that since all religions are equal before the law, they should be subject to the same treatment.<sup>22</sup> Following this approach makes a unified interpretation of the two religion clauses easier and provides for more coherent analysis than does Thomas Jefferson's admonition that there should be "a wall of separation between church and state."<sup>23</sup> The separationist view advocated by Jefferson, and frequently cited by the courts, exacerbates the tension that exists between the two clauses and prevents development of a single test that would allow the two clauses to be read together harmoniously.<sup>24</sup>

Neutrality, therefore, expresses a "principle of relationship, not of content."<sup>25</sup> The thrust of the strict neutrality principle is to treat religious interests, whether on an individual or on an organizational level, the same as other similarly situated<sup>26</sup> persons and groups.<sup>27</sup> In

22. See generally JAMES MADISON ON RELIGIOUS LIBERTY (R. Alley ed. 1985).

23. R. Healey, *Thomas Jefferson's "Wall": Absolute or Serpentine?* in EQUAL SEPARATION 123 (P. Weber, ed. 1990).

24. Madison's "neutral" approach is distinct from Jefferson's "separationist" approach which advocated "a wall of separation between church and state." *Id.*

25. Paulsen, *supra* note 18, at 333.

26. "[S]trict neutrality is committed to the proposition that there is seldom a *legally significant* characteristic of religion so unique that it is not shared by similar nonreligious individuals or groups (emphasis in the original)." Weber, *Neutrality and First Amendment Interpretation*, in EQUAL SEPARATION 9 (P. Weber ed. 1990) [hereinafter Weber].

27. Monsma considers this interpretation to be essential because it encourages religious organizations to continue to play an active, constructive (yet limited) role in modern American society. To accomplish this, he believes that:

the free exercise clause must be broadly interpreted to allow religious organizations to act freely, also when receiving governmental funds in support of secular programs, as long as there are checks to assure that their actions do no endanger the social order or the health and safety of the community or themselves, and do not misspend public funds, thereby violating the secular goals or purposes for which they received them . . . [and] . . . the establishment clause must be interpreted to allow

such circumstances, the level of judicial review or scrutiny is the same for the religious interests as for the similarly situated secular interests. Thus, for example, if the government distributes surplus foodstuffs, such as cheese and milk, through local organizations, it could neither exclude religious organizations from participating in the program nor grant them exclusive rights to participate over other interested groups. Because the religious organizations are similarly situated to other local charitable groups, they should be treated the same. If these interests are involved in litigation, the judicial scrutiny should be the same for the religious institution as for the secular organization.

When, however, religious interests are uniquely situated, i.e. there is no similarly situated secular counterpart, or when the purpose of governmental classifications is to produce varying effects upon the free exercise of religion, the strict neutrality principle mandates that a strict scrutiny standard be used by the courts.<sup>28</sup> Such scrutiny would be triggered when a claim is based upon a uniquely religious belief.<sup>29</sup> Strict scrutiny would also be triggered when a significant burden has been placed upon religious activity as a result of a seemingly neutral

---

governmental recognition and accommodation of secularly and religiously based organizations alike, as long as they are given without discrimination, and to allow governmental aid in support of activities or religious groups which have a secular goal or purpose (even though religious beliefs and goals are intertwined with the secular goals and purposes).

Monsma, *The Neutrality Principle and a Pluralist Concept of Accommodation*, in EQUAL SEPARATION 73 (P. Weber ed. 1990).

28. See Weber, *supra* note 27, at 9-10.

29. *Id.* Examples of uniquely religious beliefs include, but are not limited to: a Seventh-Day Adventist who cannot work on Saturdays, her Sabbath day; a Mennonite who refuses to have her picture placed on her driver's licence; a Baptist church that requires all of its employees to be members of the church; an Amish family that refuses to send their children to public school after completion of the eighth grade. *But see* Kelley, *supra* note 20, at 18-40.



law.<sup>30</sup> In these cases, religion would be treated as a suspect classification where "any statute utilizing religion or specifically impacting on religion is automatically suspect, will demand a very heavy burden of justification, and will be subject to the most rigorous scrutiny."<sup>31</sup> A compelling state interest will overcome a burden on a fundamental right under strict scrutiny. When an impermissible burden is found to have been placed upon religious freedom, the religious belief or activity will be considered exempt from the regulation involved.

In addition, strict scrutiny ensures that religious activities<sup>32</sup> and organizations are not categorically excluded by operation of the establishment clause from statutes having legitimate secular purposes which otherwise warrant their inclusion. For example, a categorical exemption from all tax laws for religious organizations would violate the establishment clause by impermissibly preferring religious over secular interests and would greatly reduce the amount of revenue

30. For example, compulsory education of minors until age 16, while a seemingly neutral governmental regulation, may impose significant burdens upon the exercise of religion where the life of the family is permeated by religious values. In such cases, the strict neutrality principle does allow for an exemption. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The rationale for the strict scrutiny requirement is similar to the rationale mandating heightened scrutiny for racial and gender discrimination. Paulsen states that classification due to a religious "purpose" is not always improper; it simply requires "a more probing examination" than when no such purpose is involved. Paulsen, *supra* note 18, at 340. He justifies strict scrutiny under the neutrality principle by stating that a policy that on its face intends to have specific effects on religion calls attention to itself as a policy affecting a fundamental right and employing a classification that is, in terms of first amendment freedoms of religious exercise and nonexercise, highly suspicious. Presumptively, at least, classifications along religious lines have effects upon the exercise of religious liberty. *Id.* at 341.

31. Weber, *supra* note 26, at 10.

32. Analysis of the two religion clauses typically revolves around religious beliefs and activities. In keeping to this distinction, the word "activities" is defined broadly in this article to include not only the traditional activities, but also decisions such as whether to act. For example, a religious institution's decision on how to utilize its property is considered an "activity."

that the government could collect. Such an exemption would encourage proliferation of businesses claiming religious exemptions in order to avoid paying taxes. This would then entangle the government and the courts in determining the validity of such claims.

Strict scrutiny would also require the government to demonstrate that its legitimate secular regulations that do have an impact on religious liberty employ the "least-entangling-means" to achieve their objectives.<sup>33</sup> For example, a statute which requires religious organizations to withhold taxes from employees' salaries should require as proof only those financial records necessary to demonstrate compliance with the statutory requirements rather than a detailed inquiry into church finances.

McConnell has identified three specific areas where strict scrutiny should be applied in order to preserve religious freedom:

- (1) When religious practice is suppressed or inhibited as an incidental consequence of facially neutral governmental action;<sup>34</sup>
- (2) when enforcement of a neutral regulatory scheme would interfere with a religious organization's internal structure and doctrine,<sup>35</sup>
- and (3) when the governmental presence is so pervasive that religious exercise would be impossible in the

---

33. Paulsen, *supra* note 18, at 331. Paulsen also suggests that unnecessary entanglement by the government in any of its regulations triggers intermediate scrutiny by the courts. *Id.* This seems redundant given that governmental policies affecting religious freedom are subject to strict scrutiny. The means that the government chooses to implement its policies would likely be examined by the court at the same level at the same time. For the court to examine the effects under a higher standard of review than the examination of the means which created the effects would be illogical.

34. For example, a national prohibition against alcohol consumption is a neutral government regulation. If applied without a religious exception, however, it would impermissibly burden religious freedom by compelling Roman Catholics to either violate the law or to give up celebration of the eucharist, a ceremony requiring consumption of wine.

35. This typically would involve government regulations concerning ownership of church property when a congregation splits into separate factions, mandatory hiring practices for all levels of church employees, or church membership criteria.

absence of affirmative accommodation.<sup>36</sup>

Depending upon the facts of the cases falling within each of the three areas, this level of review may result in a religious exemption from the regulation at issue.

Thus, the strict neutrality approach to interpretation of first amendment religious freedom, reflects a "willingness [by] American society to spread the costs . . . of religious toleration and accommodation."<sup>37</sup> Only when these costs actually impair one's freedom of exercise or non-exercise or result in discrimination from the exercise or non-exercise of one's beliefs does the believer or non-believer have an objection to a regulation.<sup>38</sup> Consequently, when a regulation's religious classification produces a disproportionate impact upon religious beliefs or activities, the costs of free exercise should be weighed, not against the regulation itself, but against the effect caused by granting an exemption to the regulation.<sup>39</sup>

This balancing formulation is important for two reasons. First, it explicitly recognizes that, where a compelling governmental interest is involved, the attainment of the objectives behind the regulation might be more significantly impeded by granting an exemption to the rule than would be caused by requiring compliance with the rule.<sup>40</sup>

---

36. McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U. L. REV. 151 (1986) [hereinafter McConnell]. For example, in prisons and military installations.

37. Paulsen, *supra* note 18, at 337.

38. For example, working on Saturdays would burden the religious freedom of a Seventh Day Adventist or a Jew but would not curtail the religious freedom of a Catholic or an atheist. Under the strict neutrality principle, only those persons whose religious freedom is actually burdened by a regulation can object to its effects and seek an exemption. Those not burdened do not need the exemption. *Id.*

39. *Id.* at 338.

40. For example, generating revenues, in part through imposition of sales and retail taxes, is a compelling governmental interest. Imposing the tax upon religious materials sold by religious institutions would broaden the tax base and increase the amount of revenue received by the state government. Payment of such taxes would decrease the amount of money available to the religious organization to support its religious and charitable mission, however, thus imposing a burden upon the

Second, it also evaluates implicitly whether a regulation's religious classifications closely relate to the burden upon religious freedom which is to be removed. This must be done in order to minimize the appearance and practice of religious favoritism.

### *The Modified Strict Neutrality Test*<sup>41</sup>

The modified strict neutrality principle proposed in this article has three prongs. The first prong is whether the activity is uniquely religious or affected in differing ways as a result of governmental classifications, or whether the activity is one performed by secular organizations similarly situated to the religious institution. If the activity is uniquely religious or affected as a result of governmental classifications, then strict scrutiny should be applied. If the activity is one performed by similarly situated secular organizations, then rational basis scrutiny should be applied.

The second prong is whether one of three potential categories of exemption from the governmental regulation apply to the religious activity at issue. The three categories are: 1) suppression or inhibition of religious practice resulting from the incidental effects of neutral governmental regulations; 2) interference with the internal structure or doctrine of religious organizations through a regulation's

---

exercise of religion. Granting an exemption from such taxes for religious institutions would significantly impair the government's ability to operate by decreasing state revenues. Because the effect of granting an exemption to a regulation involving a compelling governmental interest would significantly impede attainment of the governmental objectives behind the regulation, the exemption should not be granted. See *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990).

41. Kurland's strict neutrality principle was aimed primarily at resolving the tensions between interpretations and application of the free exercise of religion clause and the establishment clause by proposing a single, coherent interpretation which utilized both clauses. The recent modifications have attempted to formulate a test that embodies the concepts underlying Kurland's strict neutrality principle. Because the proposed tests are similar, this article combines these various similar approaches into a single test.

enforcement mechanism; and 3) pervasive governmental presence making religious practice impossible absent affirmative accommodation. If any one of the three categories is applicable to the issue being analyzed, the third prong of the test is triggered.

The third prong of the test is whether the costs of free exercise outweigh the effects of granting an exemption from the governmental regulation. This analysis utilizes the strict scrutiny standard. If the costs of free exercise outweigh the effects of granting the exemption, then the exemption should be granted. If the costs of free exercise do not outweigh the effects of granting the exemption, then the exemption should not be granted. This balancing portion of the test ensures that important governmental interests will not be affected adversely by granting exemptions.

The modified strict neutrality principle provides a workable approach to the current confusion surrounding interpretation of the religion clauses. It protects fundamental religious freedom by applying the strict scrutiny standard. It does not grant religious beliefs and activities an absolute preference, however, by placing them outside of the authority and control of governmental regulations. Nor does the modified strict neutrality principle subject all activity motivated by religious purposes to the same standard. Such an approach would grant preferential treatment to religious organizations that perform functions also performed by similarly situated secular organizations. Instead, all similarly situated groups, both religious and secular, are treated alike under the rational basis standard.

Furthermore, the modified strict neutrality principle recognizes that no approach provides all solutions and, consequently, permits exceptions from governmental regulation where unique religious beliefs or activities are involved. Religious interests will yield only if the effect of granting an exemption does not outweigh the compelling governmental interests underlying the regulation. Likewise, governmental regulations are not presumed valid to the point of

subordinating religious beliefs and activities to secular concerns. Thus, the modified strict neutrality principle provides a workable test which balances religious, governmental and secular interests. Religious interests are not segregated by creation of an artificial wall between church and state. Rather, religious interests are recognized as an integral part of modern American society because they perform many of the same functions provided by secular organizations and by an active, administrative government.

APPLICATION OF THE STRICT NEUTRALITY PRINCIPLE TO  
RELIGIOUS LANDMARK CASES

The most recent and controversial religious landmark case -- *St. Bartholomew's Church v. City of New York*<sup>42</sup> -- is the focus of the remainder of this article. *St. Bartholomew's Church* is the first religious landmarks case to be adjudicated by the federal courts.<sup>43</sup> The Supreme Court's recent denial of certiorari<sup>44</sup> suggests that the Second Circuit's opinion will be a leading authority for the near future.

*The District Court's Decision*

St. Bartholomew's Church (Church), located on Park Avenue in New York City, was designated as a historic landmark in 1967. Between December 1983 and October 1986, the Church repeatedly

42. 728 F. Supp. 958 (S.D.N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

43. All other cases have been heard in state courts. See *Second Baptist Church v. Little Rock Dist. Comm'n*, 293 Ark. 155, 732 S.W.2d 483 (1987); *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510, 496 N.E.2d 183, 505 N.Y.S.2d 24 (1986); *Society for Ethical Culture v. Spatt*, 51 N.Y.2d 499, 415 N.E.2d 922, 434 N.Y.S.2d 932 (1980); *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); *First Covenant Church v. Seattle*, 114 Wash.2d 392, 787 P.2d 1352 (1990).

44. The Supreme Court denied certiorari on March 4, 1991. 111 S. Ct. 1103 (1991).

applied for a certificate of appropriateness from the New York City Landmarks Preservation Commission to proceed with demolition plans. After repeated denials of its applications and a denial of its claim of financial hardship, the Church brought suit in federal district court alleging numerous violations of its guaranteed first amendment religious freedoms.<sup>45</sup>

First, the Church claimed that the landmarks ordinance was facially unconstitutional because the regulation's impact upon church property violated the free exercise of religion.<sup>46</sup> Second, the Church claimed that the ordinance was unconstitutional as applied because the denial of the certificates of appropriateness interfered with the free exercise of religion.<sup>47</sup> Finally, the Church claimed that the ordinance was unconstitutional, both facially and as applied, because the economic hardship application process constituted an impermissible intrusion into the internal affairs of the Church in violation of the establishment clause.<sup>48</sup>

The district court first examined the applicable free exercise and establishment clause tests to determine whether the landmarks ordinance violated either clause.<sup>49</sup> The focus of the court's review centered upon the denial of the Church's application for an economic hardship exception, as this was the heart of the Church's free exercise claim.<sup>50</sup> The district court stated that a statute violates the free exercise clause when it either coerces an affected individual into violating his or her religious beliefs or denies an affected individual an equal share of the rights, benefits, and privileges accorded to

---

45. *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958 (S.D.N.Y. 1989).

46. *Id.* at 962.

47. *Id.*

48. *Id.*

49. *Id.* at 962-3.

50. *Id.* at 967-74.

other individuals, thus penalizing religious activity.<sup>51</sup> The court found that the New York landmarks ordinance did not penalize religious activity when it imposed obligations upon owners of landmarked property which were not imposed upon owners of nonlandmarked property.<sup>52</sup> Because the ordinance specifically provided that all owners of landmarked property have the same right to request a certificate of appropriateness in order to alter their property, there was no violation of the free exercise clause.<sup>53</sup> In addition, the court noted that religious institutions are free to seek a certificate of appropriateness where the landmarked property can no longer be used to carry out the church's religious and charitable missions.<sup>54</sup>

The Church's claim that a statute which produces any impact upon a religious organization must be justified by a compelling governmental interest was also rejected.<sup>55</sup> The court stated that a compelling state interest is required only when a statute impermissibly burdens the free exercise of religion.<sup>56</sup> As the landmarks ordinance had already been found by the court to not burden the free exercise of religion, there was no reason to require the government to demonstrate a compelling state interest.<sup>57</sup>

Focusing upon the "entanglement" prong of the *Lemon v. Kurtzman* establishment clause test,<sup>58</sup> the district court found that the

51. *Id.* at 963. This test was set forth in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988).

52. *Id.* at 964.

53. *Id.*

54. *Id.* at 963.

55. *Id.* at 963 n.9.

56. *Id.*

57. *Id.*

58. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The three-part *Lemon* test requires that 1) a statute must have a secular legislative purpose, 2) a statute's primary effect must neither advance nor inhibit religion, and 3) a statute must not foster excessive government entanglement with religion. *Id.* at 612-13.

In determining whether a statute involves excessive government



landmarks ordinance did not excessively entangle the state in church operations.<sup>59</sup> Specifically, no excessive entanglement was found because the governmental inquiry into the Church's finances was done for the limited purpose of determining the validity of the economic hardship claim.<sup>60</sup>

The district court also rejected the Church's claim that the economic hardship provision of the landmarks ordinance violated the equal protection clause because a different test was applied to commercial organizational owners of landmarked property than was applied to charitable (including religious) institutional owners of landmarked property.<sup>61</sup> The court noted that commercial organizations are not similarly situated to charitable institutions and thus "it would make little sense, and might in fact be irrational, to apply the charitable test<sup>62</sup> to a commercial property or the

---

entanglement, the factors to be considered by a court include the character and purposes of the organizations that are benefited, the nature of the governmental aid provided, and the resulting relationship between the government and the religious institution. *Id.*

59. *St. Bartholomew's Church*, 728 F. Supp. at 963.

60. *Id.* at 963. The court further noted that the establishment clause is usually triggered in cases involving governmental aid to religious institutions where church finances must be extensively and continuously monitored to ensure that the government funds were only used for secular purposes. *Id.*

61. *Id.* at 964.

62. The economic hardship test for charitable organizations allows the landmark designation to remain only if the designation restrictions do not prevent or seriously interfere with the carrying out of the charitable purpose. This test was first announced in *Sailor's Snug Harbor v. Platt*, 29 A.D.2d 376, 288 N.Y.S.2d 314 (App. Div. 1968).

The judicially created charitable organizations test was established by the courts as a counterpart to the statutorily created commercial enterprises test. The statutory test not only granted an economic hardship waiver from the obligations of the landmarks ordinance but also listed a variety of alternative measures to demolition should the landmarked property not provide the statutorily set rate of return on investment. The scheme effectively prevented charitable organizations from receiving an economic hardship waiver and from taking advantage of the demolition alternative provisions because their non-profit properties, by definition, were not utilized to provide a rate of return on investment. This test was first

commercial test<sup>63</sup> to a charitable property.<sup>64</sup>

The court then addressed the Church's claim that the economic hardship provisions, as applied, were unconstitutional as a violation of their right to the free exercise of religion.<sup>65</sup> The district court held that in order to trigger the economic hardship provisions the Church had to demonstrate that the community house, which it wanted to demolish, was inadequate to fulfill its charitable functions.<sup>66</sup> The district court found as a matter of fact that the Church failed to meet its burden of proof on this issue.<sup>67</sup>

### *The Second Circuit Analysis*

On appeal, St. Bartholomew's claimed that the decision of the district court was clearly erroneous as to its finding that there was no violation of the right to free exercise of religion.<sup>68</sup> The Second Circuit affirmed the district court decision, however, and stated that the right of free exercise still requires individuals to comply with

---

applied to religious landmarks in *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) and has been consistently applied to religious landmarks since 1974.

63. The economic hardship test for commercial organizations is based upon the ability of an organization to earn a reasonable return from its property. This test is set by statute as part of the landmarks ordinance under N.Y. CITY ADMIN. CODE § 207-8.0(a)(1)(a).

64. *St. Bartholomew's Church*, 728 F. Supp. at 964.

65. *Id.* at 965-74.

66. The parties had previously agreed to hold a bench trial on the evidence that had been submitted to the Commission. The court reviewed this evidence *de novo*. Its findings of fact and conclusions of law were based upon this evidence. For a detailed examination of the facts of the case, see Trial Brief, *Amici curiae*, in Support of Defendants' Trial Brief, *St. Bartholomew's Church v. City of New York* (86 Civ. 2848 (JES)) (1988).

67. The court stated that the Church must prove by a preponderance of the evidence that it could no longer carry out its religious mission within the community house. *St. Bartholomew's Church*, 728 F. Supp. at 974-75.

68. *St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 353 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

valid, neutral laws of general applicability.<sup>69</sup> The court found that the "critical distinction is thus between a neutral, generally applicable law that happens to bear on religiously motivated action, and a regulation that restricts certain conduct because it is religiously oriented."<sup>70</sup>

The court recognized that the designation of the property as an historic landmark diminished the market value of the property<sup>71</sup> but stated that recent Supreme Court decisions<sup>72</sup> indicate that the free exercise clause is not implicated where neutral governmental regulations reduce the value of income to religious institutions.<sup>73</sup> Moreover, governmental regulations that produce incidental effects upon the free exercise of religion do not require the government to justify its actions by showing a compelling interest even where those effects may make it more difficult to practice certain religions.<sup>74</sup> Rather, the free exercise clause is implicated where those effects may tend, either directly or indirectly, to coerce or penalize individuals into acting contrary to their religious beliefs.<sup>75</sup>

The Second Circuit stated that the burden is on the plaintiff to prove violations of the free exercise clause stemming from the

---

69. *Id.* at 354.

70. *Id.* The Second Circuit then went on to state that the neutral criteria set forth in the ordinance for designating property an historic landmark "is not evidence of an intent to discriminate against, or impinge on, religious belief" even though the landmarks ordinance affects many religious structures. *Id.*

71. *St. Bartholomew's Church* and associated buildings and gardens would be extremely valuable for commercial purposes without the landmark designation. The Second Circuit noted that this diminution in value had "drastically restricted" the Church's ability to raise revenues with which to fund its charitable and religious activities. *Id.* at 355.

72. *Jimmy Swaggart Ministries v. Board of Equalization*, 110 S. Ct. 688 (1990); *Hernandez v. Commissioner*, 490 U.S. 680 (1989).

73. *St. Bartholomew's Church*, 914 F.2d at 355.

74. *Id.* at 355, relying on *Lyng v. Northwest Cemetery Protective Ass'n*, 485 U.S. 439 (1988).

75. *Id.*

effects of landmark designation of church property.<sup>76</sup> The court will find violations if the church can show discriminatory motive and either coercion in religious practice or an inability to carry out its religious activities in existing buildings.<sup>77</sup>

The Second Circuit held that the findings and conclusions of the district court regarding the Church's claim of financial hardship<sup>78</sup> were not clearly erroneous.<sup>79</sup> Thus, since the Church failed to meet its burden of proof, the Second Circuit upheld the district court decision regarding the Church's free exercise claim.<sup>80</sup>

76. *Id.* at 355-6.

77. *Id.* The Second Circuit specifically stated the burden of proof only in terms of religious mission. Presumably this would also include charitable activities conducted as part of its religious ministries.

78. On appeal, St. Bartholomew's Church did not "seriously defend" their \$11 million estimate of the cost of repairs to the community house and, instead, accepted the \$3 million estimate found by the district court to be a reasonable costs of repairs. *Id.* at 358.

79. *Id.* at 360. The court noted that the Church presented no evidence to refute the contention that a phased renovation under a reasonable financing procedure would not severely damage their financial situation. Nor did the Church present evidence to refute the contention that options other than a withdrawal of funds from the endowment principal sufficient to cover all repairs up front, such as loans or gradual withdrawal of funds from the endowment principal, were not financially feasible. Such proof would have bolstered the Church's claim that they were unable to fulfill their religious and charitable missions if demolition and subsequent construction plans were not approved. The circuit court noted that without such information, the district court decision could not be found clearly erroneous. *Id.* at 358-60.

80. *Id.* at 360. In footnote 4, the court also discussed the establishment clause claim that had been dismissed by the district court as inapplicable to the case at bar. The Second Circuit noted that, in light of the recent *Jimmy Swaggart* decision, excessive entanglement between church and state will not be found where the administrative and recordkeeping obligations are routine, do not require continuous surveillance of the religious institution, and do not require inquiries into either the motives of the religious organization or the doctrine of the religious institution. The landmarks ordinance meets this test (inquiry is limited to financial and architectural matters required to meet application requirements). Therefore, this "degree of interaction does not rise to the level of unconstitutional entanglement." *Id.* at 356.

ANALYSIS OF *ST. BARTHOLOMEW'S CHURCH*  
UNDER THE STRICT NEUTRALITY PRINCIPLE*The First Prong of the Strict Neutrality Test*

If the free exercise of religion claim in *St. Bartholomew's Church* had been analyzed using the strict neutrality principle, the final decision would have been the same. The reasoning, however, would have emphasized a balancing of both governmental and religious interests rather than a mechanical application of existing free exercise tests. The first prong of the test requires a determination of whether the Church's decision on how best to utilize its landmarked property is an activity either uniquely religious or one that is affected in differing ways as a result of governmental classifications or is performed by secular organizations similarly situated to the religious institution.<sup>81</sup>

Although a religious institution's decision on the use of its property is a religious activity, it cannot be considered a uniquely religious activity.<sup>82</sup> All property owners must decide what to do with their property. Each property owner's decision reflects his or her view of what best furthers his or her interests, just as a religious organization's decision seeks to further its religious mission. Therefore, the decision on how to utilize church property is not a

---

81. A church's decision on where to build its house of worship is arguably a uniquely religious decision on how best to utilize church property. In *Congregation of Jehovah's Witnesses v. City of Lakewood*, 699 F.2d 303 (7th Cir.), cert. denied, 464 U.S. 815 (1983), the Seventh Circuit held zoning regulations limiting construction of churches to 10% of the city constitutional. The court stated that construction of a house of worship was not a fundamental tenet of the religion involved and that there was no constitutional right for religious organizations to build where they choose.

If construction of a house of worship is not considered a uniquely religious activity, then it seems very unlikely that a court will find a church's decision to make alterations to church property to be a uniquely religious activity. This seems particularly true where the alterations are to accessory buildings and not to the house of worship itself.

82. See *supra* note 32.

uniquely religious activity.<sup>83</sup> Likewise, because all owners of landmarked property are subject to the same restrictions and requirements under the ordinance, a decision on how to utilize landmarked church property also cannot be considered a uniquely religious activity.

The landmarks ordinance arguably creates a governmental classification (owners of landmarked property v. owners of non-landmarked property) that produces different effects upon religious organizations. The strict neutrality principle refers to governmental classifications contained in a statute, however, and not to classifications resulting from operation of the statute. Because the landmarks ordinance does not include classification categories,<sup>84</sup> this portion of the first prong of the test is inapplicable to the case at hand.

Unless the landmark ordinance clearly distinguishes between types of property owners, all owners of landmarked property must adhere to the same restrictions and incur the same obligations whether they are individual or institutional owners. Imposition of these duties alone, however, does not make all owners of landmarked property similarly situated to each other. What is significant is whether the owners are similarly situated as to the type of ownership,

---

83. If clearly religious activity alone qualified as a uniquely religious activity, then all actions conducted by a religious organization would require strict scrutiny and a compelling governmental interest to overcome. Obviously more is required to qualify as a *uniquely* religious activity.

84. Classification should not be confused with criteria. Classification for the purpose of applying the strict neutrality principle means that the government has included within a statute various categories or classifications. The statute then has varying effects upon religious organizations depending upon the category into which an organization is placed. Varying effects will also be produced if one of the classifications is religiously based.

Criteria, on the other hand, are those factors used to determine whether or not the statute is applicable to the organization or property. Criteria are also those factors used to determine which statutory classification is applicable to an organization or property.

i.e. residential, commercial, nonprofit. The type of ownership remains the dominant factor influencing the decision making process for each owner. Residential and commercial owners have investment-backed expectations regarding their properties; that is, each expects to receive a reasonable rate of return on their investments.

On the other hand, nonprofit owners have different expectations because of their nonprofit status.<sup>85</sup> Charitable institutions expect their property investments to primarily carry out their charitable purposes. Religious institutions are nonprofit organizations. Therefore, only other nonprofit institutions owning landmarked property are similarly situated to religious institutions owning landmarked property.

Thus, under the first prong of the strict neutrality principle a decision by a religious organization on how best to utilize its landmarked property is considered an act that is also performed by other, similarly situated (i.e., nonprofit) organizations. Consequently, analysis of the constitutionality of the statute will utilize the rational basis standard and the statute will be upheld if it bears a reasonable relationship to a legitimate governmental purpose. Because the Supreme Court has already stated that the New York landmarks ordinance is rationally related to a legitimate governmental purpose<sup>86</sup> -- the preservation of state and national historic landmarks -- this point is not at issue.

### *The Second Prong of the Strict Neutrality Test*

In contrast to the approach taken by the district court and the Second Circuit in the present case, religious institutions that fail the first prong of the strict neutrality test are not without further

---

85. These differing expectations resulting from the differing types or purposes of property ownership is what led the New York courts to adopt an independent charitable purpose test for nonprofit organizations. *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 964, 966 (S.D.N.Y. 1989).

86. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

recourse. The second prong of the strict neutrality principle requires determining whether one of the three potential categories of exemption from the landmarks ordinance is applicable to the religious activity at issue. The third prong of the test is triggered if any one of the three categories of exemptions is applicable.

*The First Exemption*

The first ground for exemption requires the plaintiff to demonstrate that the statute's<sup>87</sup> incidental effects result in the suppression or inhibition of religious practice. In the present case, the Church could claim that the ordinance's use restrictions inhibit its religious practice by requiring the Church to expend its financial resources on property maintenance and upkeep which the Church would rather spend on other charitable purposes. Preservation of landmarks through mandatory repair and upkeep obligations appears to be a primary purpose of the statute, however, rather than an incidental effect. Assuming that these obligations are an incidental effect, the question becomes whether the Church's religious practice is actually inhibited.<sup>88</sup> Inhibition would be a question of fact to be determined by the trial court using the strict scrutiny standard.

If the court found that religious practice had been inhibited, the statute would be upheld only if it represented the least restrictive means to accomplish a compelling state interest. The state applied the least restrictive means given that the statute provides a mechanism for relief from the obligations imposed. The key issue is whether preservation of historic landmarks constitutes a compelling state interest. No court has squarely addressed this point. In *Penn*

---

87. The statute in question must be a neutral governmental regulation. The New York landmarks ordinance is a neutral governmental regulation that does not include religious classifications and is not aimed at religious activity.

88. Note that under this formulation, any inhibited religious practice does not necessarily mean that the Church will be in a position to claim economic hardship. There may be inhibitions of religious practice which nevertheless do not meet the criteria for economic hardship.



*Central Transportation Co. v. City of New York*,<sup>89</sup> the Supreme Court identified historic preservation as "substantially related" to promotion of the general welfare but did not specifically identify it as a compelling state interest.<sup>90</sup> Assuming that a court would find historic preservation to be a compelling state interest,<sup>91</sup> the Church would then move to the third prong of the strict neutrality test in order to see if the Church may qualify for an exemption.

### *The Second Exemption*

The second ground for exemption requires the plaintiff to show that the enforcement mechanism of the statute interferes with the internal structure or doctrine of its religious organization.<sup>92</sup> The Church alleged that the statute's requirement that the Commission review the Church's financial records in order to determine the validity of the hardship claim was an impermissible intrusion into the internal operation of the Church.<sup>93</sup> The district court dismissed this

---

89. 438 U.S. 104 (1978).

90. *Id.* at 129, 131.

91. If historic preservation is not found to be a compelling state interest then the Church's claim will be upheld and the landmarks ordinance will be held inapplicable to religious institutions.

92. *See supra* notes 35-36 and accompanying text.

93. Secular approval for church decisions is not unique to the landmarks ordinance, however. Compliance with zoning ordinances and building codes and vehicle safety inspections prior to registration are two of many instances where secular approval is required before permits or other forms of approval may be obtained in the furtherance of church purposes involving church resources. Burdens of this nature have been justified as a permissible extension of the state's police power where important or compelling governmental interests, such as the health, safety, and general welfare of the citizenry, are involved. Likewise, use restrictions have also been held to be a permissible extension of the police power where a property owner has not been deprived of all reasonable use of the property. Thus, these claims in and of themselves are not enough to find a violation of the free exercise clause. Assuming that the burdens on the free exercise of religion are heavy enough to warrant qualifying for an exemption, then the third prong of the strict neutrality test must be met using the strict scrutiny standard.

claim, stating that the examination was permissible because it was for the limited purpose of ascertaining the validity of a financial hardship claim.<sup>94</sup> Under the strict neutrality principle, this provision would be analyzed under the strict scrutiny standard discussed above.

### *The Third Exemption*

The third ground for exemption requires the plaintiff to prove that its religious practice is impossible, absent affirmative accommodation, due to pervasive governmental presence caused by the regulation.<sup>95</sup> This exemption is perhaps the weakest ground for avoiding New York's landmarks ordinance. It would be difficult to argue that the regulation and its obligations make religious practice impossible or that the governmental presence is pervasive. Assuming that a claim could be made, however, the court would use the strict scrutiny standard discussed above.

### *The Third Prong of the Strict Neutrality Test*

Finally, under the third prong of the strict neutrality principle, the plaintiff must demonstrate that the benefits of honoring free exercise of religion outweigh the negative effects of granting an exemption from the landmarks ordinance.<sup>96</sup> In the present case, granting an exemption from the landmarks ordinance independent of the statutory exemption would effectively exclude church-owned property from the landmarks preservation program. A total church exemption would significantly reduce the ability of states to preserve important historic resources and could disable preservation programs in states with a large proportion of church-owned property. This seems a high price to pay in order to avoid free exercise of religion

---

94. *St. Bartholomew's Church v. City of New York*, 728 F. Supp. 958, 963 (S.D. N.Y. 1989), *aff'd*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

95. *See supra* note 36 and accompanying text.

96. This exemption is separate from, and independent of, the economic hardship exemption already available under the landmarks ordinance.

conflicts.

On the other hand, granting the exemption would allow religious organizations greater freedom in determining how to spend their money and best utilize their properties for the benefit of church members and the community. Under this cost/benefit analysis, the benefits of free exercise do not outweigh the negative effects of granting an exemption from the landmarks ordinance. Consequently, the exemption should not be granted. Limiting religious organizations to the statutory exemptions provides a fair opportunity for such institutions to remove themselves from the obligations of the landmarks ordinance.<sup>97</sup>

The analysis of *St. Bartholomew's Church* under the strict neutrality principle is similar to the analysis of the district court, which was affirmed by the Second Circuit. The district court, applying equal protection principles, officially recognized that religious institutions that own landmarked property are similarly situated to secular charitable organizations that own landmarked property.<sup>98</sup> This similarity is the central premise of the strict neutrality principle. The court also emphasized similarly situated organizations when it discussed the validity of the Commission's denial of the Church's application for a certificate of appropriateness.<sup>99</sup> Moreover, the district court noted that the free exercise test was applicable for *affected* individuals.<sup>100</sup> This limitation is similar to the strict neutrality principle, which emphasizes that what affects one religion does not necessarily affect all religions. Therefore, only those persons or organizations actually burdened by the governmental regulation may

---

97. An exemption was granted from the New York landmarks ordinance in *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).

98. *St. Bartholomew's Church*, 728 F. Supp. at 963.

99. *Id.* at 963-4.

100. *Id.* at 963.

challenge the regulation.

#### CONCLUSION

The strict neutrality principle offers a workable solution to the problem of historic landmark designation and the infringement of religious freedoms raised in *St. Bartholomew's Church v. City of New York*.<sup>101</sup> First, the strict neutrality principle provides a single, coherent framework from which to analyze issues involving free exercise and establishment clause claims. The greater depth of analysis under this principle ensures that both the governmental and religious interests are adequately, if not thoroughly, addressed. At the same time, this greater analysis also ensures that both parties believe that their interests have been considered and not merely given cursory treatment. The district court's approach, by contrast, utilizes a variety of tests with comparatively little analysis compared to that employed under the strict neutrality principle.

Second, the strict neutrality principle provides a single test that can be used by the courts whether the religious activity is one performed by similarly situated secular organizations (requiring the rational basis test) or whether the activity is uniquely religious or affected by differing results from application of a neutral governmental regulation (requiring the strict scrutiny standard). This minimizes the problems that the courts have had in distinguishing between similar religious claims.

Third, application of the strict neutrality principle to religious landmarks cases produces a neutral middle ground for problem resolution which favors neither religious interests nor governmental concerns. Within the context of governmental regulations of historic landmarks, the strict neutrality principle provides a viable structure for evaluating and analyzing claims without an inherent bias towards

---

101. 728 F. Supp. 958 (S.D. N.Y. 1989), *aff'd*, 914 F. 2d 348 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1103 (1991).

either the religious interests or the government. Courts have typically avoided the first amendment issues in cases involving religious landmarks because an objective analysis of each party's claim is so difficult.

Finally, the strict neutrality principle provides a single framework for finding a neutral alternative or for determining when exemptions from landmarks ordinances are warranted. Again, this provides an equitable solution which avoids the problem of favoritism. The first amendment does not place religious exercise outside of governmental regulation, nor does it place it in a subordinate position. Under the strict neutrality principle, this status is maintained.

The preceding analysis, although applied to a New York case, is fully applicable to cases arising in Virginia and other states with a significant number of landmarked church properties.<sup>102</sup> Landmark designation imposes affirmative obligations upon property owners to maintain and repair their properties in compliance with guidelines and decisions made by local landmark preservation committees. Exemptions from these obligations are possible where property owners can demonstrate financial hardship caused by compliance with the landmarks ordinance. Where the property owner is a religious organization, these obligations may impair the right to free exercise of religion and cause excessive entanglement between church and state in violation of the establishment clause. The strict neutrality principle provides a viable solution to this conflict surrounding church-owned historic landmarks.

---

102. Over 150 church owned landmarks in Virginia are listed in the Virginia State Landmarks Registry and in the National Register of Historic Places. This represents over 10% of all landmarks designated in Virginia. VIRGINIA LANDMARKS REG. (C. Loth ed. 1986).