COMMENTS

ESTABLISHING A BUFFER ZONE: THE PROPER BALANCE BETWEEN THE FIRST AMENDMENT RELIGION CLAUSES IN THE CONTEXT OF NEUTRAL ZONING REGULATIONS

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INTRODUCTION

The genius of the United States Constitution lies not only in what it contains, but also, ironically, in what it omits. Because it is merely a skeletal framework, the Constitution permits the specific nature of its own application to vary with the social, cultural, and political changes that inevitably accompany the progression of time.¹ While this has

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¹ This concept was articulated adeptly by Judge Thomas M. Cooley in the case of *People v. Hurlbut*:

If this charter of . . . government we call a Constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, . . . and mutual responsibility in neighborhood interests, the precepts which have come from the revolutions which overturned tyrannies, the sentiments of manly independence and self-control which impelled our ancestors to summon the local community to redress local evils, instead of relying upon king or legislature at a distance to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down within the last hundred years, many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in support and vitality which

allowed the document to transcend the changing circumstances brought by the centuries, such longevity has been realized through the imposition of a burden upon each generation to redefine and reinterpret the many balances and compromises it strikes.

Among these balances is one that constitutes the focus of this Comment. The First Amendment guarantees individuals the right to exercise freely their religious convictions,² yet it is also clear in its pronouncement that "Congress shall make no law respecting an establishment of religion."³ Despite being intended as means to the common end of securing "religious liberty,"⁴ the Free Exercise and Establishment Clauses often find themselves at odds with one another, especially as state efforts to promote and secure free exercise creep closer to the line demarcating the institutionalized preference of religion over "irreligion."⁵ When this threshold is crossed, the Establishment Clause mandates the invalidation of such governmental action.⁶ Indeed, the principles underlying these clauses have clashed

these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.

24 Mich. 44, 107 (1871).

² See U.S. CONST. amend. I ("Congress shall make no law . . . prohibiting the free exercise [of religion].").

³ *Id.*

⁴ *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) (citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962)); see also Michael W. McConnell & Richard A. Posner, *An Economic Approach to Issues of Religious Freedom*, 56 U. CHI. L. REV. 1, 33 (1989) ("The two provisions are complementary, together protecting religious choice from government interference whether in favor of a religion (or religion in general) or against it.").

⁵ *Zorach v. Clauson*, 343 U.S. 306, 325 (1952) (Jackson, J., dissenting).

⁶ See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("[G]overnmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment."); *Zorach*, 343 U.S. at 325 (Jackson, J., dissenting) ("The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power."); see also *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989) (Brennan, J., plurality opinion) (holding that a sales tax exemption that is confined to religious publications violates the Establishment Clause when other publications are denied such an exemption); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 476-77 ("This principle [that government may not aid religion] has been consistently articulated, and applied to invalidate [even] religion over nonreligion." (citing *Lee v. Weisman*, 505 U.S. 577, 611-12 (1992))).

Some have disputed this proposition, especially in the context of the Framers' intent. Stephen V. Monsma, quoting Michael J. Malbin, has effectively presented this view:

on the federal level, in the context of congressional enactments aimed at securing religious liberty,⁷ and on the state level regarding, for instance, school prayer.⁸ The potential for significant conflict between them also exists in areas governed primarily by local regulation," and zoning is foremost among these likely arenas of antagonism.

There may be no power at the disposal of local government more

The Court [in adopting the view embodied in Justice Stevens's *Boerne* concurrence] has simply misread history. One scholar who has made one of the most thorough studies of the debates of the First Congress [the body which enacted the Bill of Rights] on the adoption of the religion language of the First Amendment concluded:

All of the speakers, except [Roger] Sherman [of Connecticut], agreed that the Bill of Rights should prohibit the new government from establishing a national religion. In addition, they did not want the government to have the power deliberately to favor one religion over another. But every one of them seemed to agree that the Bill of Rights should not prevent the federal government from giving nondiscriminatory assistance to religion. . . . Madison, even though he privately questioned the efficacy of governmental assistance to religion, accepted the . . . [nondiscriminatory assistance] view throughout the First Congress debates.

STEPHEN V. MONSMA, POSITIVE NEUTRALITY: LETTING RELIGIOUS FREEDOM RING 37 (1993) (quoting MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 9 (1978)); see also *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring) (disagreeing with those who contend that the Establishment Clause prevents a preference for religion over irreligion). This Comment, however, takes the view that such a reading of the Framers' intent is actually a misconstruction of the true meaning of the Establishment Clause, as argued below. See *infra* Part II.

⁷ See *City of Boerne*, 521 U.S. at 537 (Stevens, J., concurring) (suggesting that the Religious Freedom Restoration Act, designed to secure the free exercise right, runs afoul of the Establishment Clause).

⁸ See, e.g., *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (analyzing a Rhode Island practice regarding school prayer); *Jaffrey*, 472 U.S. at 61 (striking down an Alabama law providing for a period of silence at the beginning of the school day "for meditation or voluntary prayer").

Naturally, because the Bill of Rights is applicable only to the federal government, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), the relevance of such a conflict, from a constitutional standpoint, is wholly contingent upon the incorporation of these clauses into the Fourteenth Amendment. While some have argued against the propriety of such incorporation, "[s]uch arguments are unpersuasive While they are technically correct from a rigid perspective of original intent, they are irrelevant." MONSMA, *supra* note 6, at 35. Indeed, subsequent developments in constitutional law have unambiguously held state and local governments responsible for adherence to the mandates of the Establishment and Free Exercise Clauses. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.").

capable of affecting the rights and abilities of individuals and groups to engage in given activities than zoning.¹⁰ A municipality's zoning regulations may restrict the geographical areas of the municipality in which activities may be conducted; the size of properties on which those activities may transpire; the types of facilities that may be required on those properties if they are to be validly undertaken; and the conditions, such as hours of operation, under which they may be conducted.

Of course, zoning regulations have the potential to restrict secular and nonsecular activities alike. However, many jurisdictions have, to varying degrees, facilitated the implementation and expansion of religious uses to an extent not demonstrated when only secular uses have been involved. Indeed, such favoritism has been mandated by federal statutory law, most notably by the Religious Land Use and Institutionalized Persons Act of 2000.¹¹ Upon introducing this bill, Senator Orrin Hatch indicated that "[a]t the core of religious freedom is the ability for assemblies to gather and worship together. . . . Finding a location to do so, however, can be quite difficult when faced with pervasive land use regulations."¹² Accordingly, this statute sharply curtails the ability of localities and municipalities to enforce zoning ordinances "that impose[] a substantial burden on the religious exercise of a person."¹³

More frequently, this sort of favoritism has been the product of

¹⁰ See Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 784 n.48 (1992) ("Local control is a major factor . . . in land use control, which is the most important local regulatory power. Local control over zoning is . . . testimony to the powerful hold of the principle of local autonomy in practice in the American legal system." (citation omitted)); Katia Brener, Note, *Belle Terre and Single Family Home Ordinances: Judicial Perceptions of Local Government and the Presumption of Validity*, 74 N.Y.U. L. REV. 447, 482 (1999) (stating that zoning ordinances may serve to isolate suburban residents and to exclude nonaffluent individuals and low- and moderate-income families from membership within a community).

¹¹ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.A. § 2000cc (West Supp. 2000).

¹² David W. Dunlap, *God, Caesar and Zoning*, N.Y. TIMES, Aug. 27, 2000, § 11, at 4.

¹³ 42 U.S.C.A. § 2000cc(a) (1). The statute reads in full:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

both federal¹⁴ and, especially, state common law.¹⁵ Specifically, common law maxims requiring the waiver or abnormally flexible application of dimensional and use regulations of all sorts—including minimum building set-back and lot area requirements; maximum floor-area ratio and lot coverage requirements; height and parking limitations; and occupancy ceilings, to name only a few—entail the potential to affect results of this preferential variety. More fundamentally, several jurisdictions feature jurisprudential regimes that are notable for having institutionalized a positive general predisposition toward religious land uses. Often assuming the form of a maxim that nonsecular uses will be considered presumptively valid, this pro-religious stance constitutes preferential treatment in and of itself. Moreover, it may underlie determinations that any particular zoning requirement is to be relaxed where a religious land use is involved. This Comment is concerned with the applicability of zoning regulations generally to religious land uses, and as such will not focus upon any specific type of regulation.

¹⁴ See, e.g., *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.* 224 F.3d 283, 292 (4th Cir. 2000) (holding that the Establishment Clause was not violated by a county zoning ordinance exempting parochial schools located on church-owned or -leased land from a special exception requirement); *Islamic Ctr. of Miss., Inc. v. City of Starkville, Miss.*, 840 F.2d 293, 294 (5th Cir. 1988) (holding that the Free Exercise Clause prevented the defendant municipality from excluding a mosque from its borders, even where it was possible, at least in the *de jure* sense, for a permit allowing the construction of a religious structure to be granted by the city aldermen).

¹⁵ See, e.g., *Bethlehem Evangelical Lutheran Church v. City of Lakewood*, 626 P.2d 668, 674 (Colo. 1981) (recognizing that "the law provides preferential treatment for churches"); *Grace Cmty. Church v. Planning & Zoning Comm'n*, 615 A.2d 1092, 1103 (Conn. Super. Ct. 1992) (describing the state constitution's preferential treatment of churches); *Rogers v. Mayor & Aldermen*, 137 S.E.2d 668, 671 (Ga. Ct. App. 1964) (favoring religious purposes in zoning); *City of Chicago Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. Ct. 1998) (requiring that the city have a "compelling interest" to impose zoning regulations on a church), *aff'd in part, rev'd in part*, No. 87101, 2001 WL 290835 (Ill. Mar. 22, 2001) (unofficial disposition); *Church of Christ v. Marion County Metro. Bd. of Zoning Appeals*, 371 N.E.2d 1331 (Ind. Ct. App. 1978) (favoring religious purposes in zoning); *Mooney v. Vill. of Orchard Lake*, 53 N.W.2d 308, 309 (Mich. 1952); *Chaminade Coll. Preparatory, Inc. v. City of Creve Coeur*, 956 S.W.2d 440, 441-42 (Mo. Ct. App. 1997); *Kali Bari Temple v. Readington Bd. of Adjustment*, 638 A.2d 839, 844 (N.J. Super. Ct. App. Div. 1994); *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509, 515 (N.Y. 1986); *State ex rel. Synod of Ohio of United Lutheran Church v. Joseph*, 39 N.E.2d 515, 524 (Ohio 1942); *Northeast Neighborhood Ass'n v. City of Salem*, 651 P.2d 193, 194 (Or. Ct. App. 1982); *Marsden v. Bd. of Zoning Appeals*, No. 01-A-01-9012-CH00455, 1991 WL 66473, at *5 (Tenn. Ct. App. May 1, 1991); *City of Sherman v. Simms*, 183 S.W.2d 415, 416 (Tex. 1944); *State ex rel. Wenatchee Congregation of Jehovah's Witnesses v. City of Wenatchee*, 312 P.2d 195, 197 (Wash. 1957); *State ex rel. Lake Drive Baptist Church v. Vill. of Bayside Bd. of Trs.*, 108 N.W.2d 288, 295-96 (Wis. 1961).

In some states, including New York, a strong presumptive validity attaches to religious uses.¹⁶ In others, like California, such uses enjoy no preferential treatment whatsoever.¹⁷ In many other jurisdictions, various intermediary positions have been espoused, all entailing the reservation of some special status or preference for religious land uses.¹⁸ This Comment argues, however, that this judicially sanctioned favoritism is, as a matter of historical interpretation, modern jurisprudence, and religious liberty-focused policy considerations, a violation of the Establishment Clause of the First Amendment. Instead of sanctioning such institutionalized preference for religion over irreligion, a more appropriate balance between the First Amendment Religion Clauses in the zoning context could be struck by ensuring that religious uses are subject to neutral laws of general applicability. This is an indispensable means of effectuating the end of religious liberty that is so vital to our shared constitutional tradition.

In demarcating this as an appropriate resolution to the conflict between the First Amendment Religion Clauses, the lessons of this Comment hopefully will be generalizable and will suggest a more appropriate balance between disestablishment and free exercise in other contexts within our legal order.

The Comment is structured as follows: Part I outlines the First Amendment problems posed by the exemption of religious land uses from neutral zoning laws of general applicability. Part II deals with several aspects of the historical background and intellectual traditions which should inform modern interpretations of the First Amendment Religion Clauses. Here the Comment focuses especially on the impact of (1) the ideas of John Locke and European enlightenment philosophers, (2) the early American colonial experience, (3) the ideas and experiences of Roger Williams as representative of the early

¹⁶ See Kenneth Pearlman, *Zoning and the Location of Religious Establishments*, 31 CATH. LAW. 314, 317-21 (1988) (describing the "New York approach" to zoning and its relationship to the Free Exercise Clause). Indeed, New York's pro-religious leaning is so strong that a municipality may not validly exclude religious uses from residential districts. See *infra* text accompanying note 19.

¹⁷ [I]n California a church is to be treated just like any nonsectarian enterprise when determining the extent of its compliance with zoning legislation. . . . "[A] church, like any other property owner, is to be considered on its merits as fitting into the general scheme of a comprehensive zoning, entitled to no preference and subject to no adverse discrimination."

Lucas Valley Homeowners Ass'n v. County of Marin, 233 Cal. App. 3d 130, 143 (1991) (quoting Minney v. City of Azusa, 330 P.2d 255, 261 (Cal. Dist. Ct. App. 1958)).

¹⁸ See *supra* note 15 (listing cases).

nonsecular reformist spirit, and (4) the ideas and experiences of James Madison. Part III analyzes constitutional and policy-based justifications for the exemption of religious land uses from neutral zoning laws. The conclusion reached is that neither the Free Exercise Clause nor any extralegal notion that religious uses are somehow desirable or inherently beneficial to a community justify the exemption of places of worship from such regulations. Finally, Part IV suggests that rendering all land uses, regardless of their ecclesiastical character, subject to truly neutral zoning laws is actually an indispensable means of protecting religious liberty. This suggestion is presented in the context of some of the more prevalent strains of the contemporary discourse on the proper balance between the First Amendment Religion Clauses.

I. THE PROBLEM OF EXEMPTING RELIGIOUS LAND USES FROM NEUTRAL ZONING LAWS OF GENERAL APPLICABILITY

Conceptually, the troublesome preference for religious land uses is quite simple, and is effectively summarized by Terry Rice within the context of New York common law:

It has been clear, since the 1956 decision in *Diocese of Rochester v. Planning Board*, that a zoning law may not exclude educational and religious uses from a community's residential districts. . . . [T]he conclusion [of the New York Court of Appeals in *Trustees of Union College v. Schenectady City Council*] is consistent with the forty-year-old determination of *Diocese of Rochester*, [as] the decision reinforces the obligation of New York municipalities to explicitly permit religious and educational uses in all of its residential zoning districts by right or special permit. "The New York courts have consistently taken an expansive view of what constitutes a religious use and have held that a religious use is more than just prayer and worship. . . . The activities constituting religious or accessory uses *which are entitled to preferential treatment* have also been broadly construed."¹⁹

Decisions like those discussed by Rice, both in New York and the many other states wherein such preferences are part of the governing

¹⁹ Terry Rice, *Zoning and Land Use*, 48 SYRACUSE L. REV. 1075, 1114-15 (1998) (emphasis added) (quoting Terry Rice, *Re-Evaluating the Balance Between Zoning and Religious and Educational Uses*, 8 PACE L. REV. 1, 20 (1998), and citing *Diocese of Rochester v. Planning Bd.*, 136 N.E.2d 827, 834 (N.Y. 1956) (implying that religious uses are entitled to strong presumptive validity and preferential judicial treatment)); see *Trs. of Union Coll. v. Members of the Schenectady City Council*, 656 N.Y.S.2d 425, 427-28 (N.Y. App. Div. 1997) (reaffirming the holding in *Diocese of Rochester*), *aff'd*, 91 N.Y.2d 161 (1997)).

common law,²⁰ are the product of the notions that "religious institutions . . . [make] unique contribution[s] to the public welfare and because of the First Amendment's Free Exercise Clause."²¹ The states are virtually uniform in holding that religious land uses may be required to conform to neutral zoning regulations, fire and building codes, and the like.²² Yet the contradictory judicial practices of deeming such uses presumptively valid or declaring the impermissibility of their complete exclusion from residential zones have been predicated upon "the concept that such zoning restrictions must yield to the right of freedom of religion protected by the [F]irst and [F]ourteenth [A]mendments to the United States [C]onstitution and comparable provisions in state constitutions where the zoning regulations unreasonably hinder or restrict religious activities."²³

As this Comment cautions, however, the fact that a facially neutral zoning ordinance serves to exclude a church from a residential zoning district does not indicate that the law is per se an unconstitutional hindrance of religious activities. After all, municipalities are free to impose neutral rules of general applicability upon places of worship within their perimeters. Upon what basis, then, could rest a rule that declares neutral zoning laws to be legally invalid where those

²⁰ See *supra* note 15 (listing cases); see also *Grace Cmty. Church v. Planning & Zoning Comm'n*, 615 A.2d 1092, 1102-03 (Conn. Super. Ct. 1992) (listing cases from various jurisdictions).

²¹ Shelley Ross Saxer, *When Religion Becomes a Nuisance: Balancing Land Use and Religious Freedom When Activities of Religious Institutions Bring Outsiders into the Neighborhood*, 84 Ky. L.J. 507, 508-09 (1996). Constitutional objections to the placement of limits on religious freedom may also be based in the constitutions of the several states, which are free to "provide greater protection of rights than the federal constitution gives." *Grace Cmty. Church*, 615 A.2d at 1103 (citing *Husti v. Zuckerman Prop. Enters., Ltd.*, 508 A.2d 735, 742 (Conn. 1986)); see also *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992) ("Although we might distinguish this case from *Smith II* . . . we decline to do so . . . and [we] rest our decision also on independent grounds under the Washington constitution.").

To the extent that a state constitution grants religious land uses the right to be free from neutral zoning laws of general applicability, however, that particular provision is inconsistent with the Establishment Clause of the federal Constitution. A prime example is *Grace Community Church*, in which the court stated that "under the facts of the present case and considering . . . article seventh of the constitution of Connecticut, . . . the zoning regulations would be unconstitutional as applied to the plaintiff's property." 615 A.2d at 1104. That article states that "[e]ach [religious association] . . . may build and repair houses for public worship." CONN. CONST. art. 7.

²² See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972) (holding that neutral regulation of religious uses among all other land uses is unproblematic under the First Amendment); *Lemon v. Kurtzman*, 403 U.S. 602, 612-14 (1971) (same).

²³ *Grace Cmty. Church*, 615 A.2d at 1103.

regulations, when applied in a genuinely nondiscriminatory fashion, serve to exclude places of worship?²⁴ If it is otherwise permissible under the Free Exercise Clause to engage in neutral regulation of a religious use, these regulations do not become Free Exercise violations if the use cannot comply with those rules. Yet to the extent that the decisions and practices detailed above rely on the First Amendment, by prohibiting the exclusion of places of worship from residential districts, they serve as the functional equivalent to that rule.

A more logical justification for the common law maxim is that, as many courts have stated,²⁵ religious uses are somehow inherently beneficial to the communities in which they are situated. Indeed, the fact that preferential treatment often is afforded to both religious and educational land uses²⁶ indicates a belief that such uses share characteristics that render their presence within a community particularly desirable. Permitting the use despite its nonconformance with neutral zoning laws, according to this rationale, would be legitimized on policy grounds. The New York Court of Appeals states: "a zoning ordinance may not *wholly exclude* a church or synagogue from any residential district . . . [since such a restriction] bears no substantial relation to the public health, safety, morals, peace or general welfare of the community."²⁷ Yet this justification looks suspiciously similar to an explicit preference for religion over irreligion, in violation of modern Supreme Court Establishment Clause jurisprudence and contrary to the visions of James Madison and of those thinkers upon whose ideas he predicated his own.²⁸

²⁴ This would, of course, be the result if a religious use is unable to comply with the zoning regulation.

²⁵ See *Kali Bari Temple v. Bd. of Adjustment*, 638 A.2d 839, 843 (N.J. Super. Ct. App. Div. 1994) ("It has been held that a church use is inherently beneficial." (citing *Holy Spirit Ass'n for Unification v. Rosenfeld*, 458 N.Y.S.2d 920, 925-26 (N.Y. App. Div. 1984))).

²⁶ See, e.g., MASS. GEN. LAWS ch. 40A, § 3 (1993) ("No zoning ordinance . . . shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes . . ."); Rice, *supra* note 19, at 1114 ("[A] zoning law may not exclude educational and religious uses from a community's residential districts.").

²⁷ *Diocese of Rochester v. Planning Bd.*, 136 N.E.2d 827, 834 (N.Y. 1956); see also *Cornell Univ. v. Bagnardi*, 503 N.E.2d 509, 514 (N.Y. 1986) ("Because of the inherently beneficial nature of churches . . . to the public, we held that the total exclusion of such institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community.").

²⁸ See *infra* Part II (delineating the historical bases for a modern interpretation of the First Amendment Religion Clauses).

II. HISTORICAL BACKGROUND

To completely appreciate the offense done to the Establishment Clause by a judicially legitimized preference for places of worship as opposed to other land uses, it is necessary to understand the ideals that drove Madison, as he framed the First Amendment,²⁹ and the individuals upon whose ideas he relied.³⁰ Of course, a truly comprehensive survey of the entire body of thought reflected in the words and spirit of the Religion Clauses would require a multivolume work, and in truth, it is doubtful that even such an extensive undertaking could truly contemplate all of the relevant intellectual strains.³¹ Here the aim is far more modest—this Comment merely seeks to provide a sampling of the notions of the most salient thinkers and of the sorts of philosophical approaches embodied in their works, as gauged by their impact upon Madison.

Once this theoretical background is established, the inconsistency between these underpinnings and a common law preference for religious land uses becomes clear. It also becomes possible to offer a resolution to this conflict in the specific context of "religious zoning," and further, to suggest the best way in which the Religion Clauses can

²⁹ But see Mark M. Arkin, *Regionalism and the Religion Clauses: The Contribution of Fisher Ames*, 47 BUFF. L. REV. 763, 763-71 (1999) (highlighting the historically understated role of Fisher Ames as the source of the language now embodied in the First Amendment).

³⁰ See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 501 (1982) (Brennan, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting))); see also Daniel L. Dreisbach, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 242 (2000) ("It is a tortured logic that credits any one individual, party, or movement with the establishment of religious liberty in America. The story of this lively and fair experiment would be incomplete . . . without acknowledging the vital roles played by the Puritans and the Evangelical dissenters . . . It is hard to imagine, for example, the achievement of religious disestablishment and liberty in Virginia without the imagination of John Locke; the eloquence and legislative leadership of George Mason, James Madison, and Thomas Jefferson; the encouragement of George Washington and Patrick Henry; and the convictions and agitation of Evangelical congregations.").

³¹ Several works focus solely upon the historical background of the First Amendment Religion Clauses, or some subsegment thereof, and are far more complete than any account included here ever could be. See, e.g., THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986) (surveying conflicting critical interpretations of the Religion Clauses); Comment, *First Amendment Religion Clause: Historical Metamorphosis*, 61 NW. U. L. REV. 760 (1966) (exploring the development of church-state relations).

be reconciled with each other, regardless of the specific circumstances.

The important point, worth keeping in mind when considering this issue, is that the Establishment and Free Exercise Clauses were intended as means to a common end; in enacting both, the Framers intended to create a barrier against the usurpation of religious freedom.³² Indeed, this protection was an essential element of the natural rights tradition that animated Jefferson, Madison, and the rest of the Framers.³³ Upon consideration, the logic undergirding the need for both First Amendment Religion Clauses appears clear; an individual's liberty to practice her chosen religion can be usurped just as easily by the institutionalization of a state-sponsored preference for a set of beliefs which differs from her own as through direct inhibition of her favored creed. Therefore, both forms of interference must be prohibited in order to ensure the maintenance of religious freedom.

³² See *Wallace v. Jaffrey*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("[The] common purpose [of the First Amendment Religion Clauses] is to secure religious liberty. . . . On these principles the Court has been and remains unanimous." (citation omitted)); see also Comment, *supra* note 31, at 769 (stating that the intent of the First Amendment was, at least in part, to protect the free exercise of religion by placing all religious matters beyond the purview of state authority). Specifically, the Court has been clear in its repeated assertions that through these provisions, "[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority." *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (quoting *Harmon v. Dreher*, 17 S.C. Eq. (Speers Eq.) 87, 120 (1843)). At least one commentator, however, while not taking issue with this notion in a normative sense, has disputed the Court's self-proclaimed pattern of ascribing a commonality of purpose to these clauses. See MONSMA, *supra* note 6, at 18 ("I contend that . . . the Supreme Court has [mistakenly assumed] . . . that the religion provisions of the First Amendment should be read as two distinct clauses with two distinct objectives, rather than one provision with one objective. . . .").

³³ See David A.J. Richards, *Civil Religion and Constitutional Legitimacy*, 29 WM. & MARY L. REV. 177 (1987) (engaging in a comprehensive discussion of the intellectual tradition upon which the Framers' work was based); Note, *Zobrest v. Catalina Foothills School District: Equal Protection, Neutrality, and the Establishment Clause*, 43 CATH. U. L. REV. 1209, 1216 (1994) (describing Jefferson's condemnation of the establishment of religion). Richards argues that although Madison

probably rejected Hume's religious skepticism and certainly rejected his attacks on Lockean contractarianism and inalienable natural rights[, Madison] notoriously followed Hume and Harrington in regarding religion itself as yet another locus of faction, . . . and argued for corresponding constitutional constraints on its force[, including] the substantive constraints of the Religion Clauses of the first amendment.

Richards, *supra*, at 178-79 (citations omitted).

A. *The Impact of John Locke and Continental European Enlightenment Philosophers on the Framers of the First Amendment*

Although sentiments such as those discussed immediately above were not manifested in constitutional mandates until 1791,³⁴ the intellectual origins of the Framers' reasoning are traceable at least to philosophers of the European Enlightenment.³⁵ As Anson Phelps Stokes and Leo Pfeffer state,

[among these individuals were] Charles Louis Montesquieu, a believer in a written constitution, whose *L'esprit des lois* appeared in 1748 with its comparative study of the ideas of a republic, a monarchy, and a despotism; Jean Jacques Rousseau, whose *Contrat social*, with its theory of popular sovereignty and the need of full citizenship for the complete development of manhood, appeared in 1762; and Francois Marie de Voltaire, who strongly opposed any State Church with exclusive rights and privileges and pleaded for full religious freedom.³⁶

Yet it was John Locke, in whose earlier writings we find the origins of the social libertarian notion of state-citizen relations, who most swayed Jefferson, Madison, and, indeed, eighteenth-century American political thought as a whole.³⁷ In fact, "[a]ll the important figures of the founding generation, including John Otis, John and Samuel Adams, James Madison, Thomas Jefferson, Patrick Henry, and Benjamin Franklin, were disciples of Locke."³⁸ Locke's teachings powerfully and directly affected the substance of the First Amendment Religion Clauses. Indeed, the core of his natural-rights-centered notions lay in his contention that "the state's origin was not shrouded in the impenetrable mystery of divine gift or dispensation."³⁹ Instead, it was the people "who voluntarily contracted to set up governments in order to protect their natural rights to life, liberty, and property"⁴⁰

³⁴ See U.S. CONST. amend. I.

³⁵ See ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 4 (1964) (describing the influence of several such individuals upon the thinking of some of the founders of the American republic); cf. Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33, 44 (1997) (suggesting that the natural law tradition is rooted in "the classical and Christian traditions of Cicero, Aquinas, and Richard Hooker").

³⁶ STOKES & PFEFFER, *supra* note 35, at 4.

³⁷ *Id.*; see also ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 72-73 (1996) (describing Locke's influence in America).

³⁸ KRAMNICK & MOORE, *supra* note 37, at 72.

³⁹ *Id.* at 73.

⁴⁰ *Id.*

who were the source of the power and legitimacy of the state.

Lockean sociopolitical theory thus featured a respect for the right of individuals to pursue life's rudimentary fulfillments and freedoms, a liberty endowed unto them by nothing more than the humanity inherent in their beings. Consequently, the system of governance established by Locke's disciples would take no part in the "defen[se] and propagat[ion] of moral and religious truths."¹¹ To them, the realms of governance, where state power exists solely to facilitate and protect individual freedoms, and religion, where God reigns supreme, were to be kept absolutely separate.¹² Indeed, the rationale behind the "Christian state,"¹³ which characterized Locke's time, was undermined by his liberal theory of political relations, which "assigns [the state] the very mundane and practical role of protecting private rights."¹⁴ Hence, given their own liberal intellectual inclinations, the Framers' placement of barriers between the government and religion is fairly unsurprising.¹⁵

Yet while Locke wrote with unmatched influence upon the American mindset, his theories drew on English experiences. While conceptually momentous and easily applicable within the American context, they were also the product of another time, over a century before the Framers of the First Amendment set about their drafting. It was only natural, then, for the Framers to draw not only upon European theory, but also upon American experience. Therefore, it

¹¹ *Id.*

¹² *See id.* at 74 ("Locke sought... 'to distinguish exactly the business of civil government from that of religion, and to settle the just bounds that lie between the one and the other.'" (quoting John Locke, *Letter Concerning Toleration*, in 35 GREAT BOOKS OF THE WESTERN WORLD 1 (Charles L. Sherman ed., 1937) (1689))).

¹³ *Id.* at 73.

¹⁴ *Id.*

¹⁵ Some argue that the First Amendment was not in fact intended to prohibit governmental promotion of religion generally, but instead reaches only state favoritism of one particular religion over any or all other(s). *See, e.g.,* *Wallace v. Jaffrey*, 472 U.S. 38, 98 (1985) (Rehnquist, J., dissenting) ("[Madison's views,] as reflected by actions on the floor of the House in 1789, [indicate] that he saw the [First] Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and 'irreligion.'"); MALBIN, *supra* note 6, at 9 (contending similarly). However, this contention, as mentioned above, *see supra* note 6, has been consistently rejected by the United States Supreme Court. *See* *Ed. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) (stating that a state preference for religion over irreligion is prohibited by the Establishment Clause); *Sch. Dist. v. Schempp*, 374 U.S. 203, 216 (1963) ("[T]his Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another.").

would be ill-advised to consider this liberal theoretical background in isolation.

Long before the Enlightenment Europeans published their influential works, the American continent was settled by many individuals whose primary purpose was to escape religious persecution.⁴⁶ Indeed, it is their struggle, and its significant influence upon the substance of the Constitution,⁴⁷ that renders the dictates of the First Amendment uniquely American. To contend otherwise would be to understate the extent to which the United States Constitution is more than a mere replica of its temporal predecessors,⁴⁸ and thus to foster empirical inaccuracy.

B. *The Impact of the Early American Colonists' Experience on the Framers of the First Amendment*

The earliest American settlers were wholly religious people and yet they were religiously diverse.⁴⁹ From such a history, one might

⁴⁶ See Marc L. Rubinstein, Note, *Gay Rights and Religion: A Doctrinal Approach to the Argument that Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1585, 1593 n.36 (1995) ("To summarize briefly, many early American colonists came to the 'New World' to escape religious persecution.").

⁴⁷ See generally John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41, 62-64 (1990) (explaining the beliefs and teachings of seventeenth-century Puritans and their impact on the substance of the Constitution).

⁴⁸ See STOKES & PFEFFER, *supra* note 35, at 3 (referring to several great European works such as the Magna Carta, the English Bill of Rights of 1689, and the Acts of Toleration of 1689 and 1693). See generally Christopher James Sears, Note, *Clinton v. Jones: The King Has No Clothes (Nor Absolute Immunity to Boot)*, 100 W. VA. L. REV. 493, 495 (1997) (discussing the Magna Carta and the English Bill of Rights of 1689 and highlighting divergences between the substance of those documents and the United States Constitution).

⁴⁹ Stokes and Pfeffer comment on the religious bent of the early American colonists:

The founders of the American colonies were, relatively speaking, largely political liberals and religious non-conformists . . . This was true not only of the early English immigration but even more so of the West European migration which followed in 1660 and included so many German sectaries with Anabaptist backgrounds—Mennonites, Moravians, Quakers, and so on. Different colonies also had their distinctive religious and ecclesiastical flavor due to the dominant point of view, such as that of the Puritans in Massachusetts or of the Anglicans in Virginia; but there were probably more different religious backgrounds than have been generally recognized.

STOKES & PFEFFER, *supra* note 35, at 22.

Stokes and Pfeffer go on to explain how this diversity later would be perceived by Jefferson and Madison as conducive to liberty:

The perpetual conflict among the sects was in the long run conducive to

understandably assume that the Constitution that drew upon their experiences would be geared toward the promotion⁵⁰ of religion. In truth, some of the early colonists may not have found neutral governmental support of religion to be problematic, as the Supreme Court has declared it to be⁵¹ and as liberty-minded policy considerations must find it to be.⁵²

Despite this possible divergence between the early colonists' views and the Constitution that was influenced thereby, the ideal of religious tolerance espoused by these dissenters comprises a significant portion of the conceptual backbone for modern thought and jurisprudence construing the First Amendment. To properly comprehend their views, the hardship that produced them, and the ways in which those ideas were incorporated into the Religion Clauses, it is necessary to take another, closer look at the lives and beliefs of some of the early colonists.

The persecutions that provided the impetus for many of the early settlers' migration to the New World are well documented.⁵³ Yet, importantly, following the Atlantic crossing, the persecutions continued, as

[t]he very charters granted by the English Crown to the individuals and companies designated to make the laws which would control the destinies of the colonials authorized these individuals and companies to

liberty. . . . Jefferson and Madison[] realized this. Indeed, the idea goes back at least to Voltaire [and] his *Lettres sur les Anglais*: "If there were one religion in England, its despotism would be terrible; if there were only two, they would destroy each other; but there are thirty, and therefore they live in peace and happiness."

Id. at 23 (quoting letter VII from Francois Marie de Voltaire to Mr. Thiriot, reprinted in VOLTAIRE, LETTERS CONCERNING THE ENGLISH NATION 29, 30 (Nicholas Cronk ed., Oxford Univ. Press 1994) (1733)).

⁵⁰ Promotion, here, must be distinguished carefully from protection, as the aim of governmental nonpromotion of religion was to protect the individual's freedom to worship according to the dictates of her conscience. See *infra* text accompanying notes 100-03.

⁵¹ See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879 (1990) ("[T]he right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability . . .'" (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment))).

⁵² See generally *infra* text accompanying notes 173-76.

⁵³ See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1, 8-9 (1947) (describing the European practices of religious intolerance which ultimately sparked the voyage of the *Mayflower*). But cf. STOKES & PFEFFER, *supra* note 35, at 21 (describing the efforts of several modern historians to attribute the migration to various nonreligious factors). Stokes and Pfeffer, however, do conclude that most likely the largest single influence guiding the colonists was the desire to escape "ecclesiastical tyranny." *Id.*

erect religious establishments which all, whether believers or non-believers, would be required to support and attend. An exercise of this authority was accompanied by a repetition of many of the old-world practices and persecutions. Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects⁵⁴

Indeed, the earliest Europeans to arrive in America had no intention of creating a condition of religious liberty as we conceive of that notion today. The freedom they sought was the individual's ability to adhere to her own religious doctrines without interference from the English crown. In other words, they embraced the ideal of the "Christian commonwealth."⁵⁵ They merely wished to experience it on their own terms, not on those dictated by Charles I.⁵⁶

As alluded to above, this predilection was not limited to theory, and the civil magistrates of Massachusetts Bay and Connecticut did more than merely present those who held views divergent from their own with an intolerant ideological disposition. Indeed, consistent with their own leanings and their colonial charters, the churches in those colonies were established, or funded by the entirety of the colonial populace, regardless of any particular individual's membership status.⁵⁷ In sum, as Isaac Kramnick and R. Laurence

⁵⁴ *Everson*, 330 U.S. at 9-10 (citation omitted).

⁵⁵ Kathleen A. Brady, *Fostering Harmony Among the Justices: How Contemporary Debates in Theology Can Help To Reconcile the Divisions on the Court Regarding Religious Expression by the State*, 75 NOTRE DAME L. REV. 433, 467 n.195 (1999) (quoting JOHN LELAND, *THE VIRGINIA CHRONICLE* (1790), reprinted in *THE WRITINGS OF THE LATE ELDER JOHN LELAND* 107 (L.F. Greene ed., G.W. Wood 1845)).

⁵⁶ See KRAMNICK & MOORE, *supra* note 37, at 46-47 (discussing the views of the civil authorities of the Massachusetts Bay Colony).

⁵⁷ See *id.* at 49 (likening these colonies to "theocrac[ies]"). Moreover, contrary to a particular strain of popular opinion, conditions were similar in the southern colonies as well, as described by Laura Underkuffler-Freund:

It has been said that in the southern colonies, religious rules were observed more in the breach than in the practice. Most Revolutionary-Era laws, however, reflected the intolerance that existed elsewhere. The South Carolina Constitution of 1778 granted toleration to "[a]ll persons and religious societies, who acknowledge that there is one God, and a future state of reward and punishment, and that God is publicly to be worshipped"—a formulation that seemed to include the protection of Jews and Catholics. However, it further provided that "[t]he Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State," with "[a]ll denominations of Protestants . . . enjoy[ing] equal religious and civil privileges." North Carolina denied public office to any person, "who shall deny the being of God or the truth of the Protestant religion, or the divine authority of either the Old or New Testaments, or who

Moore state:

The men and women who boarded the *Arabella* in 1630 with John Winthrop, leaving England for Massachusetts Bay, believed that they were repeating the biblical drama of Exodus. . . . Winthrop gave the American Puritans their duty to construct a city on a hill. While this duty was both civil and religious, its ultimate success depended upon the power of the civil authorities to enforce religious correctness.⁵⁸

Though dominant during the seventeenth century, this view was not universal. Many colonists perceived the establishment of a state-mandated religion by a group of individuals who had risked their lives to cross a dangerous ocean in the name of freedom from religious persecution as largely hypocritical. Dissenters challenged various aspects of the civil-religious state, from the substance of the Puritans' religious teachings⁵⁹ to their insistence upon inextricably weaving institutionalized religiousness into the civil order.

A particularly compelling example of such an individual—Roger Williams—illustrates this latter reaction to the transplantation of the Christian civil order and its characteristic intolerance from England to America. Again, this is not to say that Williams's experience was typical of seventeenth-century colonists, but it is exemplary in its representation of the reformist *Zeitgeist*. Moreover, he was the most influential of the early religious dissenters, and as such, a focus upon him is natural.

shall hold religious principles incompatible with the freedom and safety of the State” Georgia, in its Constitution of 1777, declared that all members of the legislature “[shall] be of the Protestant religion.”

Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 886-87 (1995) (quoting, respectively, S.C. CONST. OF 1778, art. XXXVIII, *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES, NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3248, 3255-56 (Francis Newton Thorpe ed., 1909) [hereinafter CONSTITUTIONS]; N.C. CONST. OF 1776, art. XXXII, *reprinted in* 5 CONSTITUTIONS, *supra*, at 2787, 2793; GA. CONST. OF 1777, art. VI, *reprinted in* 2 CONSTITUTIONS, *supra*, at 777, 779).

⁵⁸ KRAMNICK & MOORE, *supra* note 37, at 50.

⁵⁹ This is illustrated by the banishment of Anne Hutchinson for expressing a belief in Antinomianism—the idea that the individual conscience is able to communicate directly with God, and is supreme when doing so. “Antinomianism threatened the Puritan colony because its advocates placed the spirit of God above the civil state and above Biblical law itself.” Paul Finkelman, *Cultural Speech and Political Speech in Historical Perspective*, 79 B.U. L. REV. 717, 725 (1999) (reviewing DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1997)).

C. *The Impact of Roger Williams on the Framers of the First Amendment*

Williams's influence upon the First Amendment is important not only in that it is the product of an early-American perspective. It is also significant because Williams's ideas were those of a devoutly religious individual and therefore may not be dismissed as the critique of one at odds with Christianity generally. Indeed, his views were firmly rooted in his own religious convictions, which dictated that "his Christian God had fixed a narrow path of religious duty for his chosen saints, a duty that required them to protect correct Christian practice from worldly corruption, and . . . the number of true Christians would always be a small proportion of the population in any society . . ."⁶⁰ Consequently, he rejected the concept of a nation under God as "arrogant blasphemy."⁶¹

Yet, for all of their controversial character, these ideas would have remained mere abstract notions had no opportunity existed for their application. But almost immediately upon arriving in Massachusetts in 1630, Williams was presented with the occasion to assert these ideas in a significant and divisive way.

Notably, his transatlantic voyage was itself largely impelled by the overbearing close rule of his "ecclesiastical superiors in the person[s] of bishops."⁶² Yet upon arriving in Massachusetts, Williams soon realized that the civil-religious order was an impediment to genuine religious freedom of the same genus as that with which he had been confronted in England. One pair of commentators has described the matter thus: "[Williams] had found in Massachusetts freedom from the rule of ecclesiastical superiors . . . but not what was to him the other most important part of 'soul liberty,' freedom from interference by the civil authority."⁶³

Williams had sought a place that had broken completely with the "inadequately reformed Church of England" and that featured religious tolerance in the form of civil nonpreferentialism among religious orders.⁶⁴ Yet Massachusetts Bay, as then constituted, was not a place in which his ideals would be realized, as the colony was

⁶⁰ KRAMNICK & MOORE, *supra* note 37, at 48.

⁶¹ *Id.* In full, Kramnick and Moore state that "[f]or England or for Massachusetts Bay to make a claim that it was a Christian polity, a civil government party to a divine contract, was arrogant blasphemy." *Id.*

⁶² STOKES & PFEFFER, *supra* note 35, at 13.

⁶³ *Id.*

⁶⁴ KRAMNICK & MOORE, *supra* note 37, at 46.

steadfastly and officially Anglican.⁶⁵ As his disappointment festered, Williams began to criticize vocally the civil establishment, and ultimately was expelled from the colony by its magistrates. He fled to Rhode Island in 1636, where he was able to implement his vision of "seculariz[ing] the institutions of government and politics," and to provide for pure religious liberty.⁶⁶

Many scholars evaluate Williams's influence upon the substance of the First Amendment Religion Clauses as significant,⁶⁷ and view his embrace of religious tolerance as entailing potentially similarly great impact within the modern First Amendment discourse.⁶⁸ Yet others,

⁶⁵ See Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1563 (1989) ("The nonseparatist Puritans who founded the Massachusetts Bay Colony still recognized the Anglican establishment and were less tolerant than their Pilgrim brethren, setting up a theocentric commonwealth premised on Old Testament law.").

⁶⁶ See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1867 (1833) (stating that Rhode Island was an exception to the prevalent trend of Christianization of the civil authority); see also CURRY, *supra* note 31, at 19 ("[The Rhode Island] settlements did live up to Williams's hopes for Providence itself—that it would be a refuge for those who were distressed in conscience." (citing SYDNEY V. JAMES, COLONIAL RHODE ISLAND 1, 48-74 (1975))).

⁶⁷ See, e.g., KRAMNICK & MOORE, *supra* note 37, at 48 ("To praise Williams is not to denigrate John Winthrop and other admirable seventeenth-century Puritan leaders of the Massachusetts Bay Colony. But it is to remember why in 1787 Americans chose to model their views more on the church-state ideas of Williams than on those of the people who banished him to Rhode Island."); STOKES & PFEFFER, *supra* note 35, at 15-16 ("[Williams's principles upon which a religious pluralistic society can best survive and flourish] were later to become the First Amendment declaration against laws respecting any establishment of religion or prohibiting the free exercise thereof . . ."); Randy Lee, *When a King Speaks of God; When God Speaks to a King: Faith, Politics, Tax Exempt Status, and the Constitution in the Clinton Administration*, 63 LAW & CONTEMP. PROBS. 391, 421 (2000) ("[William] Penn and Williams established the foundation for the proper relationship between faith and government in America and, therefore, still merit our attention today.").

⁶⁸ See, e.g., Jesse H. Choper, *A Century of Religious Freedom*, 88 CAL. L. REV. 1709, 1712 (2000) ("[O]ur nation's courts . . . shoulder the task of implementing the vision[] of . . . Roger Williams through interpreting the text of the First Amendment."); Marcus Mumford, *The Believer's First Amendment*, 1999 BYU L. REV. 957, 974 (1999) (reviewing TIMOTHY L. HALL, SEPARATING CHURCH AND STATE: ROGER WILLIAMS AND RELIGIOUS LIBERTY (1998)) ("Hall concludes *Separating Church and State* by providing an indication of how he expects a return to the thought of evangelical passion and dissent, as expressed by Williams, will affect our modern interpretation of both the Establishment and the Free Exercise Clauses."); cf. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1453 (1990) ("Consistent with [his] more affirmative stance toward religion [than that displayed by Thomas Jefferson], Madison advocated a jurisdictional division between religion and government based on the demands of religion rather than solely on the interests of society."). In this sense, then, Madison may have been more like Williams in his church-state leanings than is popularly conceived to be the case.

such as Edward J. Eberle, contest the directness of Williams's influence upon the Framers.⁶⁹

To the extent that such skeptical arguments are empirically grounded, however, any lack of direct reliance should not be mistaken for an overall lack of influence by Roger Williams. Even Eberle continues: "Williams thus originated the evangelical strand of separation that influenced the framing of the First Amendment religious protections, complementing the more secular theories of separation of Thomas Jefferson and James Madison."⁷⁰ Indeed, the problem for those who contest Roger Williams's influence is that his ideas concerning religious toleration and the experiences that produced them, because widely shared, were by the late eighteenth century indelibly stamped upon American political and religious consciousness.⁷¹ Thus, it is logical to assert that his influence is visible in the direct products of that mindset: the Free Exercise and Establishment Clauses of the First Amendment.

D. *The Impact of the Ideas and Experiences of the Framers on the Substance of the First Amendment*

Although he drew heavily on the work of his intellectual predecessors, James Madison was also influenced by his own ideas and those of his American contemporaries. Perhaps Madison's views on the proper relationship between church and state are best expressed in his 1785 *Memorial and Remonstrance Against Religious Assessments*,⁷² a work that has been referred to as "Madison's complete, though not his only, interpretation of religious liberty."⁷³ In this essay, he argued

⁶⁹ It is possible that Williams's views, rooted in his own religious leanings, carried a limited amount of *direct*, persuasive currency with the Framers. For instance, Eberle states: "there is no direct evidence that Williams influenced overtly . . . Jefferson, or Madison." Eberle, *supra* note 6, at 466; *see also* Mumford, *supra* note 68, at 967 (stating that "efforts to demonstrate any sort of 'tutelage' from Williams to Madison . . . are far from persuasive." (internal quotation omitted)).

⁷⁰ Eberle, *supra* note 6, at 453.

⁷¹ *See generally* Thomas C. Berg, *Church-State Relations and the Social Ethics of Reinhold Niebuhr*, 73 N.C. L. REV. 1567, 1580 n.55 (1995) (providing that Williams's views on disestablishment exemplified those incorporated by the Framers into the First Amendment).

⁷² *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, in *THE FORGING OF AMERICAN FEDERALISM: SELECTED WRITINGS OF JAMES MADISON* 299 (Saul K. Padovar ed., 1953) (offering a prime example of Madison's perspective on disestablishment).

⁷³ *Everson v. Bd. of Educ.*, 330 U.S. 1, 37 (1947) (Rutledge, J., dissenting). Justice Rutledge adds that "the Remonstrance is at once the most concise and the most

that:

religion must be left to each man's conscience and that civil government should remain aloof from religion so that religion and government could flourish. Madison argued that collaboration between civil government and religion degraded both and that attempts by civil governments to impose religious conformity only led to strife and bloodshed.⁷¹

Moreover, the *Remonstrance* "is a broadside attack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective."⁷⁵ Perhaps the simplest, most profound indication of the extent to which Madison favored separation is his statement that the religious realm is necessarily "exempt from [the] cognizance"⁷⁶ of the civil sphere.⁷⁷

Importantly, the *Remonstrance* was spurred by the intensification of the "disestablishment" movement in Madison's native Virginia roughly a decade after the signing of the Declaration of Independence.⁷⁸ Indeed, for all of the efforts of religious dissenters such as Roger Williams and prominent Quaker leaders such as William Penn,⁷⁹ who ensured disestablishment for the colony of Pennsylvania,⁸⁰ established churches were common in late-eighteenth-century America.

Yet Virginia, which had established Anglicanism as its state religion, was not a religiously homogeneous place. This period was

accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" *Id.*

⁷¹ Ronald D. Wenkart, *Prayer in School: Can a Solution Be Found?*, 138 Educ. L. Rep. 597, 599 (1999).

⁷² *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting) (emphasis added). Importantly, recent scholarship has questioned the completeness of the separation preferred by Madison. See McConnell, *supra* note 68, at 1453 (stating that Madison may have disfavored only established religion, while believing that neutral aid is unproblematic). Indeed, Jefferson often is credited with being stricter in his separation ideas. See *id.* at 1452 ("Madison possessed a far more sympathetic attitude toward religion than did Jefferson."). Nonetheless, the Court has been reticent to attribute to Madison the espousal of anything other than an absolute separation of church and state. See *Everson*, 330 U.S. at 37-40 (Rutledge, J., dissenting) (tracking Madison's opposition to the establishment of religion).

⁷³ Madison, *supra* note 72, at 300.

⁷⁴ See Erika King, *Tax Exemptions and the Establishment Clause*, 49 SYRACUSE L. REV. 971, 989 (1999) (delineating Madison's views on the separation of church and state).

⁷⁵ See *Everson*, 330 U.S. at 36 (Rutledge, J., dissenting) (noting that the struggle over Virginia's Assessment Bill reached its zenith in 1784-1785).

⁷⁶ See John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372, 394 (1996) (describing Penn's views and their place in Madisonian separation doctrine).

⁸⁰ See *id.*

marked by the proliferation of religious sects, and many, particularly the sizable Presbyterian contingent,⁸¹ expressed their displeasure to the Virginia legislature about the use of their tax dollars to support a religious order not their own.⁸² Madison and Jefferson were both key figures in the ultimately successful effort to render the "church tax" voluntary, and Madison's *Remonstrance* was the primary weapon in this fight against religious imposition.⁸³

Yet this seminal essay was not the first instance in which James Madison had considered the issue of how best to effectuate religious liberty. In 1776, he had co-authored with George Mason the Virginia Declaration of Rights, and he "is credited with changing it from a mere statement of the principle of tolerance to the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual."⁸⁴

In 1779, as a member of the Virginia General Assembly, Madison lent his unabashed support to Thomas Jefferson's Bill for Establishing Religious Freedom, which embodied the arguments against the "church tax" delineated above. Madison in fact penned the *Remonstrance* both in support of this Bill and in opposition to the tax.⁸⁵ Thus, Madison's opposition to "every form and degree of official relation between religion and civil authority"⁸⁶ had been well conceived before the 1791 drafting of the First Amendment.

During the debate surrounding the ratification of that Amendment, Madison argued for a separation of precisely the sort he had advocated in his home state in years past. Nonetheless, there was one notable difference between this debate and that which had transpired in Virginia. Unlike the latter, the new constitutional amendment entailed an important aspect of federalism, around which revolves a wealth of recent debate concerning the meaning of the First

⁸¹ Madison himself was an Episcopalian. John T. Noonan, Jr., *Commentary: The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642, 651 (1995).

⁸² See CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT 31-32 (1964) (relating dissenting sects' opposition to the collection of large taxes to support establishment).

⁸³ See generally Wenkart, *supra* note 74, at 599 (noting the role played by Madison and Jefferson in this conflict and describing the *Remonstrance* as an implement aimed at securing liberty from the "church' tax").

⁸⁴ *Everson*, 330 U.S. at 34 (Rutledge, J., dissenting).

⁸⁵ See *id.* at 38 (Rutledge, J., dissenting) ("The Remonstrance, stirring up a storm of popular protest, killed the Assessment Bill . . . With this, the way was cleared at last for enactment of Jefferson's Bill for Establishing Religious Freedom.").

⁸⁶ *Id.* at 39 (Rutledge, J., dissenting).

Amendment Religion Clauses.⁸⁷ Despite his insistence upon protecting the essential liberty of conscience through the separation of the civil and religious realms, Madison was also a strong proponent of the rights of the sovereign states vis-à-vis the federal government. Thus, some have interpreted statements such as his declaration that “[t]here is not a shadow of right in the general government to intermeddle with religion”⁸⁸ as evidence that he intended “the Religion Clauses solely to assign jurisdiction over religious liberty issues to the states,”⁸⁹ and not as placing substantive federal limits on civil-religious conjunction in the states.

Although this view has garnered significant support,⁹⁰ its reception has not been uniformly hospitable.⁹¹ Indeed, many constitutional law scholars adhere to the view that the First Amendment places substantive limits on governmental entanglement with religion.⁹²

⁸⁷ See, e.g., Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Syntaxis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2282 (1999) (reviewing AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998)) (“[O]ur First Amendment . . . was not originally about libertarian individualism but . . . was instead a federalism provision.”); David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987 (1999) (reviewing STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995)) (discussing interpretation theories as they relate to the Religion Clauses).

⁸⁸ Debate by James Madison at the Convention of Virginia (June 12, 1788), in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 330 (Jonathan Elliot ed., 2d ed. 1896).

⁸⁹ Steinberg, *supra* note 87, at 1002; see also Comment, *supra* note 31, at 767 (“Madison . . . left it to the states to adopt such measures regarding religion as they saw fit, provided only that they did not thereby infringe the rights of conscience.”).

⁹⁰ See Calabresi, *supra* note 87, at 2282 (putting forth the theory that Madison viewed the clauses as a federalism provision). Moreover, the idea that the Bill of Rights applied only to the federal government was a mainstay of American jurisprudence until the passage of the Reconstruction Amendments from 1865 to 1870. See generally *Barron v. Baltimore*, 32 U.S. (7 Pet.) 242 (1833) (holding the Bill of Rights inapplicable to the states).

⁹¹ See Steinberg, *supra* note 87, at 1002-03 n.76 (“Madison’s terse statement that the federal government could not ‘intermeddle with religion’ is susceptible to interpretations other than the jurisdictional interpretation advocated by Professor Smith.”). Steinberg goes on to declare that “[t]he statements cited by Professor Smith are ambiguous, and subject to more than one plausible interpretation. At best, such statements provide limited support for Professor Smith’s thesis that the Framers did not enact some substantive principle when they adopted the Religion Clauses.” *Id.* at 1003.

⁹² See *id.* at 1002 (describing the substantive significance attributed by many to the First Amendment). It is also possible that such a stance was the product of a political strategy aimed at securing the votes of the large Baptist contingent of the Virginia electorate, whose support at the polls proved crucial in Madison’s defeat of James

Moreover, even if the First Amendment Religion Clauses were intended to be jurisdictional only, this does not mean that Madison favored a Christian state, or even a derivative thereof, as some purport.⁹³ Here it is worth emphasizing that Jefferson's ideas also played a large part in framing the First Amendment, and Jefferson's advocacy of strict separation is unquestioned.⁹⁴ But even if we are to scrutinize Madison in particular, we find that the view of individual religious liberty expressed in the *Remonstrance* is reconcilable with his strong notion of federalism. While he arguably might have intended to indicate in the First Amendment that the states should be left "free to deal with the citizen in religious matters in whatever manner they chose,"⁹⁵ as long as such measures did not "infringe the rights of conscience,"⁹⁶ his conception of complete separation as the appropriate nature of that choice appears clear.⁹⁷ Indeed, this was the

Monroe for a seat in the first House of Representatives. See McConnell, *supra* note 68, at 1477 (describing the campaign strategy employed by Madison).

⁹³ See, e.g., M.G. "Pat" Robertson, *Squeezing Religion Out of the Public Square—The Supreme Court, Lemon, and the Myth of the Secular Society*, 4 WM. & MARY BILL OF RTS. J. 223, 270-71 (1995) (noting that the clauses' text does not support the view that they summed up Madison's views on church-state relationships).

⁹⁴ See McConnell, *supra* note 68, at 1452 (crediting Jefferson with a more rigid stance on the issue).

⁹⁵ See William F. Cox, Jr., *The Original Meaning of the Establishment Clause and Its Application to Education*, 13 REGENT U. L. REV. 111, 140 (2000-2001) ("The fact that Madison's initial First Amendment proposition was to be inserted into Section 9 of Article I, which deals with limits on Congress, rather than into Section 10, which deals with restrictions on the States, further substantiates the contention that Amendment was not intended to apply against the States.")

⁹⁶ Comment, *supra* note 31, at 767-69.

The nonpreferentialist school is mistaken. . . .

. . . . Rather, the [Establishment] Clause was intended to prevent the establishment of a class of religion or even of religion generically. Thus, it does not mean only that a single church cannot be joined to the state, but it also means that no *set* of religions can be joined to the state.

Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 822-23 (1999).

The Framers of the Religion Clauses certainly did not consciously intend to permit nonpreferential aid, and those of them who thought about the question probably intended to forbid it. In fact, substantial evidence suggests that the Framers expressly considered the question and that they believed that nonpreferential aid would establish religion.

Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 878 (1986).

⁹⁷ See William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1203 (1990) ("Madison's Memorial and Remonstrance indeed suggests a push toward more complete separation in Virginia.").

very point of his *Remonstrance*, targeted directly at the Virginia legislature.

The argument that Madison in fact sought something short of an absolute separation as a means of benefiting religion generally, that is, without impeding any individual's "freedom of conscience,"⁹⁸ mistakes such a scheme for his actual goal of defending religious liberty via complete separation.⁹⁹ As Professor Monsma states: "[i]n defending religious liberty, and church-state separation as the means to attain it, Madison consistently argued that such separation would be good for religion as well as for government."¹⁰⁰ Indeed, as will be argued below, Madison recognized that an absolute separation is essential if religious freedom is to be ensured. This conception of the Religion Clauses as substantive guarantees of governmental noninvolvement with religion was secured by the incorporation of the clauses into the Due Process Clause of the Fourteenth Amendment in the mid-twentieth century, thereby rendering them applicable to the states.¹⁰¹

In sum, the First Amendment was the product of ideas drawn from the natural-rights intellectual tradition. Synthesized by the "common unifying force of Madison's life, thought and sponsorship,"¹⁰² these notions find a unitary voice in the opening to the Bill of Rights. Whether intended as a means of protecting religion from civil authority, individual rights from ecclesiastical power, or, as is more likely, both, the First Amendment prohibits any governmental entity from declaring one denomination as its official religion. More

⁹⁸ Mark G. Valencia, Comment, *Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty*, 49 SMU L. REV. 1579, 1581 (1996).

⁹⁹ For one of many possible examples, consider:

[N]either the text of the Establishment Clause nor its historical background support the view that the Clause merely summed up Madison's and Jefferson's views regarding church-state relationships, much less the view that the Clause requires a complete separation between religion and government prohibiting all government aid to or encouragement of religion. Certainly the first several generations of American legislators (including those who actually drafted the Amendment) did not think that government aid to or encouragement of religion was inconsistent with the Religion Clauses.

Robertson, *supra* note 93, at 270-71. In fact, the Framers likely believed that the Religion Clauses themselves encouraged religion, but that they did so by preventing the government from impacting negatively upon it in any direct way.

¹⁰⁰ MONSMA, *supra* note 6, at 96.

¹⁰¹ See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact . . . laws [that violate the First Amendment Religion Clauses].").

¹⁰² *Everson v. Bd. of Educ.*, 330 U.S. 1, 39 (1947) (Rutledge, J., dissenting).

generally, the Amendment mandates the complete separation of church and state,¹⁰³ thereby rendering a state preference for religion generally equally problematic. It is these principles that necessarily underpin any wise and jurisprudentially defensible approach to the Religion Clauses, and that must guide our appraisal of the questions presented within the context of preferential zoning.

III. AN ANALYSIS OF CONSTITUTIONAL AND POLICY-BASED JUSTIFICATIONS FOR THE EXEMPTION OF RELIGIOUS LAND USES FROM NEUTRAL, GENERALLY APPLICABLE ZONING REGULATIONS

I will focus primarily on the policy-based justification for the maxim that neutral zoning laws may not exclude religious uses from residential districts, namely that such uses are inherently beneficial to the community. The force of any line of reasoning that takes issue with this justification would be virtually nil, however, if there existed a second, legitimate basis for curtailing the power of zoning laws, namely the Free Exercise Clause. I will therefore argue briefly that the Clause imposes no such limitation.

A. *The Free Exercise Clause as a Potential Justification for the Exemption of Religious Land Uses from Neutral, Generally Applicable Zoning Regulations*

We may start from the baseline proposition that, as a matter of Free Exercise jurisprudence, mosques, temples, churches, and the like may be subjected to neutral, generally applicable laws.¹⁰⁴ Given this, those who contend that the Free Exercise Clause¹⁰⁵ mandates the

¹⁰³ See *Sch. Dist. v. Schempp*, 374 U.S. 203, 217 (1963) (“[T]he object [of the Religion Clauses] was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.” (quoting *Everson*, 330 U.S. at 31-32)).

¹⁰⁴ *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 878-82 (1990); see *infra* text accompanying notes 106-07 (discussing free exercise jurisprudence prior to 1990).

¹⁰⁵ I am referring here to the Free Exercise Clause of the Federal Constitution. This, of course, is not technically the only other possible source of such a doctrine. Such preference could be predicated upon a provision of a state constitution that is more expansive in its free exercise protections than the federal version. That a state’s constitution may be more protective of individual rights in this sense is undisputed. See *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992) (declaring that such expansiveness is unproblematic). To the extent that this protection rises to the level of a state-backed, institutionalized preference for religion generally, however,

exemption of religious uses from neutral, generally applicable zoning regulations must necessarily defend the following proposition: the Free Exercise Clause draws a line between zoning regulations with which a religious use is able to comply and those that make demands that the use is unable to meet. Because compliance with pertinent zoning regulations is a necessary precursor to the development or use of a structure (in the absence of a variance sanctioning noncompliance therewith), a group that is unable to conform its place of worship to the mandates of a zoning law will be prohibited from using the subject property for its desired religious purpose. This law, they would conclude, may therefore be said to impede the members' exercise of their religious beliefs, in violation of the Free Exercise Clause.

This sort of argument, although interesting, simply finds no support in current Free Exercise jurisprudence. Until 1990, proponents of such a view would have had some legal foundation for the position; the governing authority was the ruling of the Supreme Court in *Sherbert v. Verner*, which expounded a strict-scrutiny test for governmental actions that substantially burdened religion.¹⁰⁶ Thus, unless such actions were narrowly tailored to serve a compelling governmental purpose, *Sherbert* deemed them violative of the Free Exercise Clause. But in 1990, the Court drastically shifted direction, careening down what may be considered a substantially pro-regulatory avenue. In *Employment Division, Department of Human Resources v. Smith*, *Sherbert's* compelling interest test was functionally abandoned, as the Court reaffirmed that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"¹⁰⁷ Thus, "a claimant whose religious practice is burdened by a facially 'generally applicable' and 'neutral' law can obtain relief only by carrying the heavy burden of proving that there is an unconstitutional motivation behind the law and, thus, that it is not truly neutral or

it violates the federal Establishment Clause. Thus, such preferences in the context of zoning are not legitimized as based on a highly expansive state analog to the federal Free Exercise Clause. See *supra* note 21 (discussing this line of reasoning).

¹⁰⁶ 374 U.S. 398, 403 (1963); see also *City of Boerne v. Flores*, 521 U.S. 507, 513 (1997) (describing the *Sherbert* approach to the Free Exercise Clause as asking whether a law substantially burdens a religious practice and whether there is a compelling interest justifying the burden).

¹⁰⁷ 494 U.S. 872, 879 (1990) (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)).

generally applicable."¹⁰⁸ *Smith* arose within the context of a criminal statute, and the *Smith* Court was unambiguous in holding that because the public health, safety, and welfare were at issue and because the Free Exercise Clause was the sole constitutional basis for *Smith*'s claim, the state's regulatory interest simply outweighed that of the respondent.¹⁰⁹ Subsequently, the applicability of the holding in *Smith* and the expansive notion of regulatory propriety it implicitly entails have been routinely confirmed within the civil context of zoning.¹¹⁰ Thus, although "the Court left open the viability of free exercise attacks on government actions . . . that violate the first amendment in conjunction with other constitutional protections,"¹¹¹ zoning has not been interpreted as such a vulnerable area.¹¹²

The notion that the Free Exercise Clause precludes the de facto exclusion of religious land uses from residential or other districts by neutral, generally applicable zoning laws is thus impossible to reconcile with the unambiguous standard governing modern interpretations of the First Amendment.¹¹³ Indeed, to argue to the

¹⁰⁸ Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. DAVIS L. REV. 725, 727 (1999).

¹⁰⁹ See generally *Ala. & Coushatta Tribes v. Trs. of Big Sandy Indep. Sch. Dist.*, 817 F. Supp. 1319, 1331 (E.D. Tex. 1993) (addressing the holding of *Smith*, stating that "the state's interest in regulating criminal conduct, thereby protecting the public health, safety, and welfare, was so overwhelming that a free exercise challenge, standing alone, could not be maintained").

¹¹⁰ See *Mount Elliott Cemetary Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir. 1999) (adjudicating the Free Exercise challenge to a zoning regulation under the *Smith* standard); *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464, 472 (8th Cir. 1991) (same); *Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348, 354 (2d Cir. 1990) (same).

¹¹¹ *Cornerstone Bible Church*, 948 F.2d at 472.

¹¹² Indeed, the shift manifested in *Smith* was so extreme that Congress responded with the Religious Freedom Restoration Act of 1993 ("RFRA"). Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488. In passing the RFRA, Congress reinstated the compelling governmental interest test eschewed by *Smith* by requiring that a generally applicable law placing a "substantial burden" on the free exercise of religion must be justified by a "compelling governmental interest" and must employ the "least restrictive means" of furthering that interest. Religious Freedom Restoration Act §§ 2-3; see *City of Boerne v. Flores*, 521 U.S. 507, 515-16 (1997) (describing the purpose of the RFRA). Importantly from a current jurisprudential vantage, however, the Court declared the RFRA to be an excessive, unconstitutional assertion of the remedial power possessed by Congress pursuant to section 5 of the Fourteenth Amendment, concluding that the Act could not "be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532. Thus, no statutory provision currently casts a shadow of doubt upon the subservience of free exercise to truly neutral, generally applicable regulations, as articulated in *Smith*.

¹¹³ The opinion of the Fourth Circuit in *Christ College, Inc. v. Board of Supervisors*,

contrary—that is, that neutral zoning regulations may not serve to prevent a group from employing a piece of property for any religious purpose it pleases—is actually to take issue with the notion that such uses should be subject to generally applicable regulations at all, as a regulation that entails no incentive for compliance is a functional nonentity. While this might have been a viable reading during the *Sherbert* era, the strict-scrutiny approach has been obviated by *Smith*.¹¹⁴

B. *Policy-Based Reasoning as a Potential Justification for the
Exclusion of Religious Land Uses from Neutral,
Generally Applicable Zoning Regulations*

Given the shortcomings of the free exercise argument delineated above, if zoning regulations are to be found impermissible when they functionally exclude religious uses, the holding may not be viably predicated upon that Clause. Instead, policy-based reasoning rooted in a preference for religion would necessarily inform such a doctrine, and this is where the First Amendment is a doctrinal impediment.

One explicit articulation of this pro-religious, policy-based reasoning was laid down in *Diocese of Rochester v. Planning Board*, in which the New York Court of Appeals declared that “[a] church . . .

No. 90-2406, 1991 WL 179102, at *4 (4th Cir. 1991), is particularly instructive here. In that case, the court held that zoning laws could theoretically violate the Free Exercise Clause by absolutely (i.e., explicitly) prohibiting religious uses on any property or by pointedly curtailing “particular uses having special religious significance.” *Id.* at *4. However, zoning regulations of that sort would not be truly neutral, as alluded to above. See Keetch & Richards, *supra* note 108, at 727 (noting that a claimant must prove that a zoning law which purportedly violates the Free Exercise Clause “is not truly neutral or generally applicable”); see also *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-32 (1993) (holding that a regulation that is not generally applicable must advance compelling interests and be narrowly tailored in pursuit of these interests in order to curtail religious practice). The *Christ College* court concluded that “[t]he fact that local regulations limit the geographical options of a religious [use] . . . does not prove that any party’s right to free exercise is thereby burdened.” *Christ College*, 1991 WL 179102, at *4.

Interestingly, the court did state that “[t]here must at least be some nexus between the government regulation—here, a zoning law—and impairment of ability to carry out a religious mission [for the law to violate the Free Exercise Clause],” *id.* at *4, thereby implying that laws with which a congregation is unable or possibly unwilling to comply may be unconstitutional. To the extent that this is an accurate reading of the *Christ College* holding, however, it is at odds with *Smith*. Indeed, as indicated by the above argument concerning the functional nullification of the zoning laws as applied to religious uses that would stem from such a doctrine, such a holding would eviscerate the core holding of *Smith* and must therefore be incorrect as a matter of law.

¹¹¹ See *Smith*, 494 U.S. at 879 (holding that neutral laws of general applicability may apply to religious land uses without violating the Free Exercise Clause).

[is, in itself,] clearly in furtherance of the public morals and general welfare. The church is the teacher and guardian of morals,"¹¹⁵ and "is considered an aid to the general welfare."¹¹⁶ While the courts of only a few states have explicitly articulated this line of reasoning,¹¹⁷ it is implicit in the decisions of numerous other jurisdictions that are often couched in free exercise terms.¹¹⁸ Yet their use of free exercise language demonstrates that even these tribunals have recognized the inadequacy of such policy-based lines of reasoning.

As evidence of the inclusion of an implicit, pro-religious bias in the court-fashioned (and statutory) limits on zoning vis-à-vis religious land uses, consider, for example, the following statement: "where private schools [as opposed to parochial schools] are involved . . . exclusion may well be unrelated to the public health, safety, morals, or the general welfare, and therefore not be reasonably related to the police power."¹¹⁹ Parochial schools, by contrast, have often been treated as excludable only where such action is reasonably related to the police power.¹²⁰ Indeed, this notion that churches, temples, synagogues, and the like are entitled to disparately favorable treatment as compared to secular land uses is widespread.¹²¹

¹¹⁵ 136 N.E.2d 827, 836-37 (N.Y. 1956) (citing *State ex rel. Synod of Ohio v. Joseph*, 39 N.E.2d 515 (1942)).

¹¹⁶ *Id.* at 837 (quoting *Roman Catholic Archbishop of Diocese of Oregon v. Baker*, 15 P.2d 391, 395 (1932)).

¹¹⁷ See *Kali Bari Temple v. Bd. of Adjustment*, 638 A.2d 839, 843 (N.J. Super. Ct. App. Div. 1994) (noting that "a church use is inherently beneficial"); *Trs. of Union Coll. v. Members of the Schenectady City Council*, 656 N.Y.S.2d 425, 427 (N.Y. App. Div. 1997) (describing the preferred status with respect to the enforceability of zoning laws afforded to religious and educational institutions, as they "are, by their very nature, 'clearly in furtherance of the public morals and general welfare.'" (quoting *Diocese of Rochester v. Planning Bd.*, 136 N.E.2d 827, 836 (N.Y. 1956))).

¹¹⁸ See, e.g., *Grace Cmty. Church v. Planning & Zoning Comm'n*, 615 A.2d 1092, 1103 (Conn. Super. Ct. 1992) (holding that the right of freedom of religion may trump certain zoning restrictions).

¹¹⁹ 83 AM. JUR. 2D *Zoning* § 427 (1992).

¹²⁰ See *id.* (noting that public and parochial schools are treated differently on occasion with respect to zoning controls).

¹²¹ See, e.g., *Grace Cmty. Church*, 615 A.2d at 1104 (holding that the local zoning commission was required to grant the plaintiff a special permit based upon its religious nature); *City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 707 N.E.2d 53, 59 (Ill. App. Ct. 1998) ("Zoning ordinances . . . are presumptively valid. . . . But different presumptions arise when zoning ordinances implicate constitutional guarantees of freedom of religion. Under these circumstances, the ordinance does not enjoy presumptive validity and the burden of [proving that the regulation is related to the public health, safety and morals] shifts to the city." (citations omitted)); *Chaminade Coll. Preparatory, Inc. v. City of Creve Coeur*, 956 S.W.2d 440, 441-42 (Mo. Ct. App. 1997) ("Any regulatory power a

How could that be? Certainly these courts' purported reliance on the Free Exercise Clause must be pretextual. The import of *Smith*, which has been unambiguously rendered applicable within the zoning context,¹²² is that the standard for determining whether a particular governmental regulation violates the Free Exercise Clause is *not* whether the law furthers the public health, safety, morals, or welfare. That sort of compelling interest analysis is precisely the interpretive mode expounded in *Sherbert*, which was rejected by *Smith*.¹²³ In a telling passage, the *Smith* Court stated:

[I]f "compelling interest" really means what it says . . . many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," and precisely because we value and protect that religious divergence, we

municipality may have over churches is purely for safety regulation." (quoting *Vill. Lutheran Church v. City of Ladue*, 935 S.W.2d 720, 722 (Mo. Ct. App. 1997)); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 185 (Wash. 1992) ("We hold that the City's interest in preservation of esthetic and historic structures is not compelling and it does not justify the infringement of First Covenant's right to freely exercise religion. The possible loss of significant architectural elements is a price we must accept to guarantee the paramount right of religious freedom.").

¹²² See *supra* note 110 (listing cases employing the *Smith* standard within the context of zoning); cf. *First Assembly of God of Naples, Fla., Inc. v. Collier County*, 775 F. Supp. 383, 386 (M.D. Fla. 1991) ("[Z]oning ordinances of general application are not aimed at impeding religion and, 'given zoning's historical function in protecting public health and welfare, and the incidental nature of the asserted burden on religion, the essential effect of zoning laws is clearly secular.'" (quoting *Grosz v. Miami Beach*, 721 F.2d 729, 738 (11th Cir. 1983))).

¹²³ See Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 SUP. CT. REV. 79, 80 ("The Court . . . formally renounce[d] the *Sherbert* test as the general rule in religious exemption cases."). While the Court did not state that *Sherbert* was explicitly overruled, the standard articulated in *Smith* serves as the functional equivalent to such a declaration. The *Smith* court was forthcoming in stating that if what it deemed a "hybrid situation" were present, where the freedom of religion was infringed along with another substantive constitutional right like freedom of speech or the press, then the First Amendment might bar the application of a neutral law of general applicability. See *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 881 (1990) (delineating examples of constitutional rights). For purposes of this Comment, I have assumed that no such hybrid situation is at issue; in other words, that the problem is simply the conflict between a religious use and neutral zoning laws. To the extent that such a situation did arise, for example, that zoning laws functionally precluded the publishing of a religious newspaper, I suspect—though it exceeds the scope of this Comment to argue this point thoroughly—that this would *not* serve to reinvigorate the *Sherbert* standard, as the Court seems fairly interested in effectuating the notion that religious uses are neither more nor less desirable than others.

cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind¹²⁴

Smith thus precludes insistence upon such a relationship between the regulation in question and the public welfare, or any sort of exclusion for religious uses from neutral laws of general applicability.¹²⁵

Because *Smith* so clearly holds that the Free Exercise Clause does not require such preferential treatment, the insistence upon bestowing uniquely preferential treatment upon religious uses must be the product of a belief that such uses are simply different from others, in a positive sense. This conflict, however, highlights precisely the sense in which the First Amendment does speak to such doctrinal developments. Put in the simplest possible terms, the Establishment Clause absolutely precludes the institutionalized preference for religion over irreligion.¹²⁶ Explicit and implicit preferences for religious land uses, therefore, violate the Establishment Clause.

When courts fashion such pro-religious doctrines, claiming that the First Amendment (specifically the Free Exercise Clause) supports their endeavors, they stretch the provision beyond its legitimate bounds. Contrarily, courts ignore the very aspect of that Amendment, the Establishment Clause, that does possess teeth in this particular context.

C. *The Cultural and Historical Bases for, and the Current Status of, Pro-Religious Bias in Zoning Jurisprudence*

This Part delineates the origins of this favorable view of religion generally, the ways in which this notion has undergone a genuinely profound transformation over the course of American history, and the nature and scope of its modern jurisprudential manifestations. This discussion is particularly important because the problem of "religious zoning" is but one episode in an extended clash between the ecclesiastical and secular realms in American society. Thus, to understand the contours of this broader conflict is to be able to view

¹²⁴ *Smith*, 494 U.S. at 888 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 606 (1961)).

¹²⁵ *But see supra* note 123 (discussing "hybrid situations").

¹²⁶ *See sources cited supra* note 6 (listing authorities that support the proposition that the government cannot prefer religion to secularism).

the subject matter of this Comment in light of its broad socio-cultural import, as well as to understand its more finite constitutional implications. Indeed, both of these considerations render "religious zoning" an especially seminal issue in modern America.

As discussed above, the United States was founded by individuals who were devout in their respective faiths, and who, no doubt, viewed religious devotion as the mark of a morally righteous individual and a healthy society. While I have argued that James Madison intended to create a complete barrier between church and state, it is worth reiterating here the suggestion that he did so as a means of protecting religious liberty. It would be implausible to contend that this pro-religious stance was not largely incorporated into the American mindset for decades and, it would appear, centuries to come.

However, by the late nineteenth century, the United States began to experience a trend which continues to be reflected today in both its culture and laws: a significant, yet uneasy and incomplete secularization.¹²⁷ The origins of this shift may be conceived of as part of

a manifestation of the influence of romanticism in American culture. The term "romanticism" is used here to refer to a spiritual transformation in nineteenth-century America—a reconfiguration of the relationship between the sacred and the secular in a society buffeted by political revolution, religious awakenings, and industrial growth. In this unsettling environment, American romantics struggled to "save traditional concepts, schemes, and values which had been based on the relation of the Creator to his creature and creation, but to reformulate them within the prevailing two-term system of subject and object, ego and non-ego, the human mind or consciousness and its transactions with nature."¹²⁸

¹²⁷ See Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L.J. 1431, 1434 (1994) ("The development of Western liberal secularism has relegated religious discourse to a subordinate status among the otherwise legitimate views of what the common good entails."); Hamilton, *supra* note 96, at 838 ("Religion may have chosen to go behind the scenes in this republican democracy throughout the course of over two hundred years . . ."); James D. Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in ARTICLES OF FAITH, ARTICLES OF PEACE 54 (James D. Hunter & Os Guinness eds., 1990) (noting the increasing prevalence of secular humanism in American society); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1257 (2000) ("American liberalism under[went a] transformation, from a set of ideas rooted in Christian theology and congenial to religious institutions to an ideology hostile to or suspicious of religion, at least in its more common traditional forms."); Michael R. O'Neill, Comment, *Government's Denigration of Religion: Is God the Victim of Discrimination in Our Public Schools?*, 21 PEPP. L. REV. 477, 486 (1994) ("[T]here can be no doubt that America has undergone a rapid secularization process . . .").

¹²⁸ Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI-KENT L. REV. 151,

This is not to say that America was or is not a religious place; rather, the point is merely to highlight the development of a cultural order featuring distinct spheres of thought and activity, with religion no longer the lens through which *all* aspects of sociopolitical life are perceived.

This general trend toward secularization was particularly pronounced during the 1960s, a time marked by prevalent popular distrust of authority of all sorts: governmental, parental, and religious. It was such that "[b]eginning in the 1970s . . . several scholars, including Andrew Greeley and David Martin, looking at evidence from the United States, began to question the 'death of God' and the 'rise of the secular city.'"¹²⁹

Paradoxically, however, the source of these thinkers' interest in the subject was

growing evidence that American society was becoming less, rather than more, secular. Church membership was increasing not declining. In 1976, a born-again Baptist, Jimmy Carter, was elected President and Operation Rescue and other religious organizations were responding publicly to abortion and creationism. Millions of Americans were tuning in to televangelical religious programs such as Jim and Tammy Bakker's *Praise the Lord* cable network, as well as the programs of Jerry Falwell of the Moral Majority, Oral Roberts, Pat Robertson, Jimmy Swaggert, and others.¹³⁰

At first glance, this may appear contradictory—a trend of secularization coupled with heightened religious participation—and to a substantial degree, it is. American society had come to a point where secular pursuits had begun to dominate public life, yet the American people were becoming increasingly involved in religion. The resultant confusion, hesitancy, and intrapersonal and social

156-58 (1998) (quoting M.H. ABRAMS, *NATURAL SUPERNATURALISM: TRADITION AND REVOLUTION IN ROMANTIC LITERATURE* 13 (1971)).

¹²⁹ Rebecca R. French, *Lamas, Oracles, Channels, and the Law: Reconsidering Religion and Social Theory*, 10 YALE J.L. & HUMAN. 505, 512 (1998). It is also probably worth noting here that in 1971, the Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), handed down a markedly antiecclesiastical Establishment Clause test:

Lemon is castigated by its critics as an excessively separationist decision that overemphasizes the impregnability of the "wall of separation" between church and state. Critics who take this view also complain that the test (at least as applied) is often too rigid and inflexible in its prohibition of government accommodation of religion, so that it becomes ultimately hostile to the role of religion in American life.

Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 HAMLINE L. REV. 1, 74 (1998).

¹³⁰ French, *supra* note 129, at 512-13.

conflict, where the state and religion brushed against one another, were virtually inevitable.

This phenomenon has been replicated in the legal arena. If the law lagged temporally behind in its own secularization, as possibly indicated by the fact that the Supreme Court's first major proclamation concerning the Establishment Clause, *Everson v. Board of Education*, was not handed down until 1947,¹³¹ it stayed a parallel course. Given that law is by its nature the product of social necessity and circumstance,¹³² we should not find its reflection of the phenomenon of secularization surprising. In fact, *Smith* itself may well be perceived, from a socio-legal perspective, as a significant step in this secularization process.

Yet just as America was incomplete in its move away from a wholly religiously infused social order, by the 1970s the law of church and state was marked by uncertainty and hesitance. Thus, both the general culture within the United States and the law it spawned exhibited signs of being immersed in a spiritual-ideological quagmire. Indeed, just as the interest in the "death of God"¹³³ was provoked by what outwardly signaled an ecclesiastical resurgence, jurisprudential manifestations of the process of secularization were juxtaposed against clear doctrinal embodiments of a perception of religion as being tied to the public welfare.

A particularly stark, noteworthy example of this sort of uncertain shift in the direction of secularization may be found within the context of late twentieth-century Michigan zoning jurisprudence. In *Congregation Dovid Ben Nuchim v. City of Oak Park*, decided in 1972, the Michigan Court of Appeals stated:

[T]he [Michigan] Supreme Court made clear that religion is accorded a favored status in our society. In so doing, the Court held that a zoning

¹³¹ See Brady, *supra* note 55, at 440 ("In 1947 in *Everson v. Board of Education*, the Court squarely addressed the meaning of the Establishment Clause for the first time.").

¹³² I mean here simply that when communities are sufficiently small and close-knit, the maintenance of social order may be achieved through the enforcement of informal, community-based behavioral norms. It is only when society and the interpersonal relationships between members thereof become complex and weaken that those norms lose their potency, and it is only then that formal law is a necessary instrumentality in the structuring of social relations. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (arguing that people often resolve disputes cooperatively without regard to the laws that govern those disputes); Cook, *supra* note 127, at 1437 ("[T]he pluralism that has always characterized social life in America has become more and more difficult to deny in intellectual life.").

¹³³ French, *supra* note 129, at 512.

ordinance which operated to exclude churches from an entire village was in direct contradiction to the Constitutional provision setting forth the necessity to good government of religion, morality and knowledge. As such, the ordinance was not presumed valid and was found void.

In view of the aforesaid, we hold that the use of land for a church is recognized as bearing a real, substantial, and beneficial relationship to the public health, safety, and general welfare so as to be accorded a preferred status.¹³⁴

Just two years later, however, the Michigan Supreme Court announced a doctrinal shift in *Kropf v. City of Sterling Heights*,¹³⁵ as it declared: "[i]nsofar as decisions of the Court of Appeals are based solely on the concept of 'favored or preferred use' and the attendant shifting of burden of proof, they are hereby overruled. Plaintiffs must bear the burden of proof in attacking the constitutionality of [zoning] ordinance[s]."¹³⁶

The interesting aspect of *Kropf*, however, is that despite its explicit rejection of the proposition that religious uses are preferred in relation to secular ones, the court went on to hold that the total exclusion of places of worship would necessarily be justified through the fulfillment of a "heavy burden" by the governmental entity responsible for the exclusion.¹³⁷ Apparently satisfied that its approach (drawing a line between the complete exclusion of religious uses and their reasonable regulation) was logical, the court actually contradicted itself. How can a place of worship be denied a preferred status, yet be subject upon its total exclusion to a level of review not afforded to other uses not considered to be such an integral part of the "spirit and genius of our free institutions and system of government and the traditions of the American people?"¹³⁸ I submit that it cannot.

As demonstrated by the Michigan experience, while there has been fairly marked movement toward secularization in the de jure

¹³⁴ 199 N.W.2d 557, 559 (Mich. Ct. App. 1972) (citing *Mooney v. Vill. of Orchard Lake*, 53 N.W.2d 308, 310 (Mich. 1952)). Interestingly, however, the provision of the Michigan Constitution upon which the *Congregation* court relied remains unchanged. See MICH. CONST. art. 8, § 1 ("[R]eligion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."). This, at least upon a prima facie evaluation, appears in and of itself to constitute a clearly worded, institutionalized preference for religion over irreligion in violation of the federal Establishment Clause.

¹³⁵ 215 N.W.2d 179 (Mich. 1974).

¹³⁶ *Id.* at 186.

¹³⁷ *Id.* at 185.

¹³⁸ *Id.* (quoting *Mooney*, 53 N.W.2d at 310).

sense, the courts have been unwilling to effectuate such a shift in fact. American culture, both civil and legal, has grappled with conflicting historical and contemporary norms for religion, and this tension is reflected in the evolving status of the traditional preference for religious land uses.

Importantly, both this conflict and the preference that aided in its creation were present in 1990 when the Supreme Court handed down *Smith*. In overturning *Sherbert's* compelling interest test, *Smith*, as applied in the zoning context,¹³⁹ signaled a dramatic shift in favor of regulatory control in an already unsteady balance that had existed between the doctrinal preference for places of worship and the zoning laws that regulated them. But many courts have balked at simply doing away with the institutionalized favoritism for religion that had for so long occupied an important, if doctrinally illegitimate,¹⁴⁰ role in the law of their respective jurisdictions. After all, consistent with the theme of law reflecting social circumstance, America was a religious place in 1990.¹⁴¹ Thus, the modern preference for religious uses is a remnant of its historical antecedent, the notion that an elevated status for religion is rightfully manifested in zoning doctrine.

As stated above, however, the problem with this reasoning is that the Establishment Clause simply does not permit a state-sponsored preference for religion over irreligion at all, much less does it allow such favoritism to guide the development of judicial doctrine.¹⁴² This

¹³⁹ See *supra* notes 110, 122 (listing the cases that employ the *Smith* standard in the context of zoning).

¹⁴⁰ See *Krepps*, 215 N.W.2d at 185 (implicitly displaying such favoritism immediately after repudiating its doctrinal legitimacy).

¹⁴¹ See William P. Marshall, *The Culture of Belief and the Politics of Religion*, LAW & CONTEMP. PROBS., Winter/Spring 2000, at 453, 459 (citing church membership within the United States at sixty-five percent for 1990).

¹⁴² See *City of Boerne v. Flores*, 521 U.S. 507, 537 (1997) (Stevens, J., concurring) ("[A] governmental preference for religion, as opposed to irreligion is forbidden by the First Amendment." (citing *Wallace v. Jaffrey*, 472 U.S. 38, 52-55 (1985))); see also *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 703 (1994) ("[A] principle at the heart of the Establishment Clause . . . [is] that government should not prefer one religion to another, or religion to irreligion."); *Lee v. Weisman*, 505 U.S. 577, 612 (1992) (Souter, J., concurring) ("The challengers argue that, as originally understood by the Framers, '[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.' While a case has been made for this position, it is not so convincing as to warrant reconsideration of our settled law" (quoting *Jaffrey*, 472 U.S. at 106 (Rehnquist, J., dissenting))); Christopher A. Hoffman, Note, *The Future of School Vouchers for Religious Academies After Jackson v. Benson*, 43 ST. LOUIS U. L.J. 1083, 1099 n.158 (1999).

is so not only in the abstract and in light of the history delineated above, but moreover, it is also impermissible in view of the interpretive stances taken on the Establishment Clause by the current members of the United States Supreme Court. When we examine the current Court and the views held by each Justice concerning the Clause, it is clear that the preference for religion over irreligion as manifested in an explicit or implicit partiality toward ecclesiastical land uses should be held by a majority to constitute a First Amendment violation.¹⁴³ In a comprehensive survey of the Justices' varying approaches to the Establishment Clause, Lisa Langendorfer, after noting the de facto demise of the *Lemon* test,¹⁴⁴ ultimately concludes that Justice O'Connor is left "in the middle, a place that has become quite familiar to her."¹⁴⁵

Justice O'Connor favors an "endorsement" test whereby governmental action that has the effect of creating a "symbolic union"¹⁴⁶ between state authority and "religion,"¹⁴⁷ as perceived by the

¹⁴³ See generally Lisa Langendorfer, Comment, *Establishing a Pattern: An Analysis of the Supreme Court's Establishment Clause Jurisprudence*, 33 U. RICH. L. REV. 705, 707-23 (1999) (giving historical and current overviews of the Court's jurisprudential approaches in the context of the Establishment Clause).

¹⁴⁴ See *id.* at 708 (stating that although the *Lemon* test has yet to be formally overruled, it has been functionally abandoned by most of the justices, as it has been considered overly "hostil[e] toward religion"); see also *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (implementing a test consisting of the following three parts: (1) does the measure in question have a secular purpose?; (2) does it have a primary effect that neither advances nor inhibits religion?; and (3) does it involve an excessive entanglement with religion?).

¹⁴⁵ Langendorfer, *supra* note 143, at 725. Her analysis, in fuller form, is as follows: At one end of the spectrum, the Chief Justice, Justice Scalia, and Justice Thomas are unlikely to find a violation of the Establishment Clause in any case absent direct government coercion. Justice Kennedy is one step closer to the middle in that he would find a violation where there is indirect coercion, if the coercion is obvious and perhaps directed at school-aged children. At the other end of the spectrum is Justice Souter, who would find a violation in any case showing favoritism to a particular religion or to religion generally. In his opinion, anything short of complete neutrality is unacceptable. Justice Stevens is also likely to find Establishment Clause violations due to the presumption he would apply against the government in the cases of religious displays on public property. Justice Ginsburg and Justice Breyer seem to fit somewhere toward this side of the spectrum, although it is unclear exactly where they stand.

This leaves Justice O'Connor in the middle, a place that has become quite familiar to her.

Id. at 724-25.

¹⁴⁶ *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985) (discussing a "symbolic union" in the context of the "effects" test), *overruled on other grounds by* *Agostini v. Felton*, 521 U.S. 203 (1985).

populace as a whole, is deemed violative of the Clause. Justice O'Connor does not focus upon the endorsement of one particular religion over any and all others, but is concerned with the sanctioning of religion generally. If the government sends the message that the presence of religion within our society is somehow "better" than its absence, she holds this to be an unconstitutional endorsement of religion.¹¹⁸

As applied to explicit and implicit preferences for religious land uses, the facilitation of the construction and maintenance of places of worship and other related uses, such as parochial schools, which would fall within the ambit of the term "religious use," conveys an impermissible pro-religious message.

Little needs to be said in order to substantiate this contention in the context of the explicit preference for religious uses; by their plain meanings, statements such as "[a] religious use is 'clearly in furtherance of the public morals and general welfare'"¹¹⁹ convey the message that religion is better than irreligion.

As for the implicit preference for religious uses, although the conveyance is effectuated more subtly, the message is the same. By excusing places of worship from requirements necessarily met by other land uses, courts indicate that these uses are different from others. Unless the selection of religious uses is simply arbitrary, which is patently untenable, or a product of a broad reading of *Smith*, which is jurisprudentially indefensible, they must be singled out on the basis of some inherent characteristic(s) that render(s) them more desirable. Put another way, courts imply that the presence of religion (as manifested in institutions that feature the explicit goal of furthering faith of one sort or another) is better than its absence. Thus, under Justice O'Connor's test, which, due to the intellectual and doctrinal middle ground occupied by its creator, may be perceived as roughly defining the approach of the Court, such

¹¹⁷ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (stating, in full, that "[a] more direct infringement [of the principles embodied in the Establishment Clause] is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." (emphasis added)).

¹¹⁸ *Id.*

¹¹⁹ *Kali Bari Temple v. Bd. of Adjudication*, 638 A.2d 839, 843 (N.J. Super. Ct. App. Div. 1994) (quoting 2 ARDEN H. RATHKOPF & DAREN A. RATHKOPF, RATHKOPF'S THE LAW OF ZONING & PLANNING § 20.01[3][a], at 20-9 (4th ed. 2000)).

favoritism for religious uses must fall.¹⁵⁰

IV. A SUGGESTION

So where does all of this leave us? The principles embodied in the Free Exercise and Establishment Clauses and their shared goal of securing religious liberty¹⁵¹ are of paramount importance in contemporary society. Given the competing trends of secularization and a renaissance of faith,¹⁵² the need for a coherent doctrine of how this common goal may be realized without transgressing the dictates of either Clause is great.

To solve the problem of the exemption of religious land uses from neutral zoning laws of general applicability, an absolute separation between the realms of the ecclesiastical and the state must be effectuated and maintained. In the zoning context, this means that religious uses must be granted no preferential or deprecatory treatment under the law. As I will argue, such is an absolutely vital means to the preservation of religious liberty, an end the Framers unquestionably sought to realize, the worth of which remains uncontroversial. Any view on this subject will be best presented in the context of the modern discourse on the relationship between the First Amendment Religion Clauses, and therefore it is to this ongoing discussion that I now turn.

The number of scholars, jurists, and other commentators who have taken the opportunity to contribute their ideas on the proper balance between these two provisions is overwhelming, and a comprehensive survey of that body of work would also require a multivolume undertaking. Here, I aim merely to provide a small, representative sampling of some of the most interesting and prevalent

¹⁵⁰ The Court had the opportunity in *City of Boerne* to find exactly this, but instead of addressing the validity of the RFRA on Establishment Clause grounds, Justice Stevens's concurrence aside, it kept with one of the themes dominating the current Court—a heightened emphasis on principles of federalism—and used *City of Boerne* to continue a line of cases narrowly construing the remedial enforcement power afforded Congress by section 5 of the Fourteenth Amendment. See generally *City of Boerne*, 521 U.S. at 507 (invalidating congressional action as exceeding the power possessed pursuant to U.S. CONST. amend. XIV, § 5); *Coll. Sav. Bank v. Fla. Prepaid Post-Secondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (same); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (same).

¹⁵¹ See *Wallace v. Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) (discussing the clauses' common goal of facilitating religious liberty).

¹⁵² See generally *supra* text accompanying note 128 (discussing these conflicting phenomena).

intellectual strains and ultimately to elaborate upon my own suggestion.

It is important to realize at the outset that a perfect reconciliation of the Religion Clauses may well be unattainable. As one scholar has stated, "[t]he very natures of church and state have made their separation frustratingly difficult. Each is authoritative, each is capable of exercising power in the public sphere with great alacrity, and each is more than willing to use the other to accomplish its own ends."¹⁵³ Indeed, even Justice O'Connor, despite her advocacy of the endorsement test, has acknowledged the elusiveness of a "Grand Unified Theory."¹⁵⁴ Yet while any possible balance between the clauses may be flawed, this should not preclude efforts to minimize the friction when the clauses do collide.

Significantly, a person's views on this particular subject are necessarily a product of her notion of the proper role of government vis-à-vis religion in American political and civil society.¹⁵⁵ For example, Professor Monsma believes that the purpose of the Supreme Court's Religion Clause jurisprudence is to "assure government's neutrality toward religion. By not supporting or favoring one religious doctrine or group over another, and by favoring neither religion nor nonreligion, neutrality or evenhandedness is presumably maintained."¹⁵⁶ He claims that in practice, however, this has translated into a system that "[i]mplicitly . . . supports secularism."¹⁵⁷ This is so, he argues, because:

[i]f one removes all positive, supportive references to religion from all the wide-ranging programs of the comprehensive administrative state . . . morality, values, and human goals are being considered and taught,

¹⁵³ Hamilton, *supra* note 96, at 808.

¹⁵⁴ Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 712 (1994) (O'Connor, J., concurring).

¹⁵⁵ This is not, however, to suggest that the matter is as simple as: those who favor an expansive role for religion in American society desire a less pronounced separation and vice versa. Indeed, it is precisely because religious liberty (a foundational element of any role for religion in American social life) must be preserved that a complete separation is essential.

¹⁵⁶ MONSMA, *supra* note 6, at 40; see also Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149, 191 (1999) ("The Establishment Clause adopts a principle of neutrality among religions, and between religion and secularism.").

¹⁵⁷ MONSMA, *supra* note 6, at 40; see also Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 505 (1998) ("Neutrality has replaced the separation of church and state as the guiding metaphor for American secularism.").

either explicitly or implicitly, only in terms of the "well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God." Government is not being neutral between religion and an irreligious secularism; secularism is being favored and advanced over theistic religion.¹⁵⁸

As a proposed solution, Monsma advocates a theory of "positive neutrality." Under this approach, religious liberty is not perceived as a negative freedom, i.e., one which will flourish in the absence of governmental inhibition. It is instead something that requires cultivation, and thus, under this normative prescription, government must "take certain positive steps if it is to be truly neutral in the sense of assuring equal freedoms and . . . opportunities for religious persons and groups and for religious and irreligious persons and groups alike."¹⁵⁹

Monsma uses the example of a military cemetery and asks whether tombstones featuring the cross or the Star of David should be excluded. In arguing in the negative, Monsma contends that only by "the active, positive use of religious symbols corresponding to the . . . faiths of the fallen men and women"¹⁶⁰ is religion "recognized and given its due."¹⁶¹ In order to be truly neutral among all religions and between religion and irreligion, he continues, appropriate Islamic and secular humanist symbols should also be developed so that adherents to those beliefs may be represented as well. Only this sort of approach, he concludes, would be truly neutral.¹⁶²

As an alternative to theories focusing on neutrality,¹⁶³ Professors Eisgruber and Sager espouse an "equality theory." According to this conception, "government's fundamental obligation is to treat all deep

¹⁵⁸ MONSMA, *supra* note 6, at 40-41 (citation omitted).

¹⁵⁹ *Id.* at 174.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) (discussing "benevolent neutrality" (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970))); Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1, 23-27 (1997) (contending that the exemption of religiously motivated conduct, but not secular acts from neutral, generally applicable laws is justified by neutrality theory); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 331 (1996) (contending that it is "essential to the pursuit of religious neutrality [that] the law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers"); McConnell & Posner, *supra* note 4, at 37-38 (discussing "incentive neutrality").

personal commitments equally, regardless of whether those commitments are secular or religious, mainstream or unusual."¹⁶⁴ Underpinning this proposal is the notion that

the exemption of religiously motivated conduct from general laws proposed by neutrality theory, standing alone, "radically favors religious motivation, by giving it and it alone a presumptive immunity from state regulation. It is precisely this favoritism which is normatively indefensible, and precisely this favoritism which makes exemption seem so much like subsidy. Redescribing it as neutrality does not solve the problem on either score."¹⁶⁵

This theory is notable for its insistence that "there is nothing sufficiently unique about religion that justifies assigning it a fundamentally distinct status in constitutional law."¹⁶⁶ Moreover, Sager and Eisgruber assert that "[t]here is no coherent normative basis for insisting that religious commitments receive better treatment than other, comparably serious commitments—and, as a result, it will be impossible to identify any principled stopping point for the Free Exercise claims [that would not inevitably run afoul of the equality principles within the Constitution]."¹⁶⁷ These scholars suggest that the *Smith* Court was correct in upholding neutral, generally applicable laws against a Free Exercise challenge.

Taking issue with this contention is Professor Alan Brownstein, who describes his own "liberty, equality and speech theory"¹⁶⁸ as a "form of quid pro quo approach."¹⁶⁹ Specifically, it might be characterized as advocating the return by the Free Exercise Clause of some of the privileged status that the Establishment Clause removes from religion.¹⁷⁰ This view does treat religion as being special for purposes of ascertaining its proper constitutional status, and would exempt religiously motivated conduct from neutral laws of general applicability and treat religious institutions differently than secular

¹⁶⁴ Eisgruber & Sager, *supra* note 123, at 123.

¹⁶⁵ Alan E. Brownstein, *Interpreting the Religion Clauses in Terms of Liberty, Equality, and Free Speech Values—A Critical Analysis of "Neutrality Theory" and Charitable Choice*, 13 NOTRE DAME J.L. ETHICS & PUB. POL'Y 243, 248 n.15 (1999) (quoting Eisgruber & Sager, *supra* note 123, at 118).

¹⁶⁶ *Id.*

¹⁶⁷ Eisgruber & Sager, *supra* note 123, at 104-05.

¹⁶⁸ Brownstein, *supra* note 165, at 248 n.15.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* (summarizing Eisgruber and Sager's possible understanding of Brownstein's view).

ones.¹⁷¹ Brownstein states:

To apply [the] standard of neutrality more expansively to review all governmental distinctions between the secular and the sacred cannot help but jeopardize Free Exercise exemptions and institutional autonomy as well as important Establishment Clause requirements.

A more nuanced, alternative approach recognizes that religious and secular beliefs and practices need not always be treated in the exact same way by government. Sometimes religious liberty concerns justify treating religious beliefs, practices, and institutions more favorably than their secular counterparts. Sometimes religious equality (and liberty) concerns justify treating religious activities and organizations in a facially less favorably way than secular ones. Moreover, under this analysis, there is no fair and logical way to adopt only one side of the equation.¹⁷²

Brownstein's suggestion is something of a dynamic ledger approach, in which the implementation of regulatory exemptions for religion and associated activities (in other words, pro-religious incentives) justify the provision of countervailing incentives mandated by the Establishment Clause, thus moving the system closer, in the broad view, to an equilibrium position.¹⁷³

These perspectives yield differing results when applied to religious land uses and neutral zoning laws. The approach advocated by Monsma, it seems, would demand that religious uses be afforded preferential treatment, as the very existence of places of worship is necessary if religion is to be afforded the opportunity to gain a foothold in American society equal to that enjoyed by secular employments.

Given that the absence of a common law preference for religious land uses (and the resultant applicability of neutral zoning laws) could serve to exclude synagogues, temples, mosques, and the like, a doctrine that renders religious uses subject to neutral regulations¹⁷⁴ would be viewed as supporting secularism instead of genuine neutrality, and would therefore be undesirable. Monsma would likely disagree with my argument concerning the lack of tension between the Free Exercise Clause and the applicability of neutral regulations to religious uses, if not as a matter of actual jurisprudence then in terms

¹⁷¹ See *id.*

¹⁷² *Id.* at 276.

¹⁷³ See *id.* at 249 (advocating a more holistic approach in using "constitutional standards to further the goal of incentive neutrality").

¹⁷⁴ See, e.g., *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 879-80 (1990) (maintaining that the Free Exercise Clause permits application of neutral, generally applicable laws to religiously motivated actions).

of normative doctrine. He would certainly take issue with the idea that the Establishment Clause precludes such institutionalized favoritism as is embodied in exemptions for places of worship.

The equality-based notion advocated by Eisgruber and Sager would completely diverge from Monsma's view. Given that they fail to perceive any legitimate basis for distinguishing between ecclesiastical and secular entities insofar as neutral, generally applicable laws are concerned, they would likely agree with the contentions made thus far in this Comment.

Finally, Professor Brownstein would agree with Monsma, and for similar reasons. Instead of viewing favoritism for religious uses as necessary to avoid a pro-secular doctrinal regime, he would likely view such preferential treatment for the very physical structures in which religious practice usually transpires as a necessary means of ensuring the continued liberty to worship as contemplated by the Free Exercise Clause.¹⁷⁵

My own notion of the proper balance between the clauses lies closest to that espoused by Eisgruber and Sager, although there is a significant divergence between their preferred view and my own. On a more rudimentary level, I disagree in principle with the theoretical underpinnings of the views advocated by Monsma and Brownstein. I do not believe that, as Monsma contends, the neutrality doctrine is actually a thinly veiled, tacit espousal of secularism. In fact, the view that religion must be affirmatively promoted in order to achieve genuine neutrality between religion and irreligion mistakes a system that advocates neither of these positions for one that affirmatively endorses the absence of faith-centered belief. Simply stated, to refuse to endorse religion is not to advocate nonecclesiasticism any more than a refusal to endorse a system of affirmative action is to espouse racism. Certainly some who oppose affirmative action do so as a means of facilitating the realization of a racist end, but equally certainly, some individuals who are deeply committed to racial equality are not proponents of affirmative action.¹⁷⁶ Similarly, it is

¹⁷⁵ Brownstein has explicitly aired his disagreement with the result in *Smith*. See Brownstein, *supra* note 165, at 276 (arguing that the expansive application of neutral review of "governmental distinctions between the secular and the sacred cannot help but jeopardize Free Exercise exemptions").

¹⁷⁶ As three of many potential examples, one might consider the views of Justice Clarence Thomas and those of Professors Stephen Carter and Shelby Steele. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 232-35 (1991); SHELBY STEELE, A DREAM DEFERRED: THE SECOND BETRAYAL OF BLACK FREEDOM IN AMERICA 19-23 (1998); Note, *Lasting Stigma: Affirmative Action and Clarence Thomas's Prisoners'*

possible to be highly committed to the tenets of a particular faith and still believe that the government should take no part in advocating that view. When governmental authorities actively refuse to endorse religion, they are not endorsing secularism—instead they are merely relegating such issues of faith to their appropriate sphere: the individual conscience.

Moreover, I do not believe, as Brownstein does, in the desirability of a First Amendment jurisprudence that balances the dictates of the Religion Clauses on a case-by-case basis, with favoritism sometimes, but not always, being justified. Not only is this inconsistent with *Smith* and with the historical meaning of the Religion Clauses, but such an approach would also place a particularly sensitive area of constitutional doctrine in an inherently standardless, exploitable adjudicatory mode, subject to manipulation at the whim of a swing Justice's fancy. It would also result in the absence of effective signposts to governmental entities indicating which types of actions vis-à-vis religious land uses, and indeed religion in general, would constitute acceptable accommodation and which would cross the line drawn by the Establishment Clause.

Most fundamentally, I disagree with these scholars in their contention that the state may in any way, explicitly or implicitly, endorse or promote religion without running afoul of the Establishment Clause. For religious land uses to be afforded preferential treatment by the state, no matter how subtle that favoritism might be, inherently conveys the message that the government officially endorses religion generally. This is unacceptable not only because it is facially inconsistent with the ideas held by Madison and Jefferson and manifested in that Clause, but further because the ability of the state to take a pro-religious stance threatens to undermine the religious liberty sought by many who advocate such a broad construction of governmental power. Indeed, the complete separation of the religious and political realms is crucial because it prevents government from intermingling in *any* way with religion. If this prohibition is removed in the manner suggested by Monsma and Brownstein, the security enjoyed by the American citizenry to worship, and indeed to believe as they wish, would become instantly jeopardized. If government is free to aid religion, there is no principled basis for holding that it is not free to denigrate it as well. This result would be directly contrary to the end that Monsma and

Brownstein advocate and for which the Framers so diligently strove.

Eisgruber and Sager, on the other hand, come closer to articulating a viable means of balancing the Clauses. By contending that neutral regulation of religion is constitutionally unproblematic, they demonstrate a historically and pragmatically more defensible reading of the Establishment Clause, and avoid the hyper-expansive reading of the Free Exercise Clause that marks the analyses of Monsma and Brownstein. Their insistence upon equal governmental treatment of all sorts of personal commitments is well placed. However, they are incorrect in asserting that:

The Constitution singles out religious liberty for special attention, but that attention centers on the ideal of equal regard, pursuant to which the deep concerns of religious believers are protected against hostility, indifference, or a failure of comprehension, and assured equal stature with the deep concerns of other citizens. The Constitution emphatically does not privilege religious concerns.¹⁷⁷

Quite the contrary, not only is religion singled out by the Constitution for special attention, but that emphasis does take the form of privilege. By insisting upon absolute neutrality among religions and between religion and irreligion, the Constitution emphatically *does* privilege religion in a broad sense: it is uniquely afforded a guarantee of survival while other modes of activity are not so protected. Unlike camping, jetskiing, or minor league baseball,¹⁷⁸ religion may not be dismantled or singularly targeted for unfavorable treatment by the state. It is important to realize that inherent in the "singling out" of religious activity, in the manner effectuated by the Constitution, is the bestowal of a specially protected status upon it.

Thus, religious land uses must be subject to neutral laws of general applicability. In more general terms, few argue that religion may be uniquely denigrated, as such actions would clearly constitute a Free Exercise violation of the primary order. Crucially, however, equally fatal shortcomings exist in arguments to the effect that religion and its attendant activities and facilities should be elevated over any other sort of land use or activity. To thus breach the wall between church and state would subject religious liberty to the will of a popularly accountable legislature, and thus to faction and the transient passions of the electorate. Madison valued the freedom of

¹⁷⁷ Eisgruber & Sager, *supra* note 123, at 106.

¹⁷⁸ See FunNJ.com, *Fun & Adventure in NJ*, at <http://www.funnj.com> (last visited Apr. 2, 2001) (describing these and other fun yet affordable New Jersey activities).

conscience far too much to leave it so vulnerable.

It is the legacy of the Framers' convictions that we Americans have inherited, and it is their fundamental goals that we must strive to implement. We must therefore effectuate a complete separation, keeping foremost in mind the ideas that religion *is* special, and that we are zealously guarding religious liberty. The Constitution was drafted by individuals who so prized their faith that they took great care to secure it from governmental usurpation. To understand its Religion Clauses is to appreciate that exemptions for religious uses from neutral, generally applicable zoning laws destroy that security.