RESIDENTIAL RELIGIOUS NUISANCE, RLUIPA AND *SIC UTERE TUO UT ALIENUM NON LAEDAS:* "LIKE A PIG IN THE PARLOR."[1]

By: Matthew T. Sutter*

I. INTRODUCTION

[1] The commandments "are summed up in this word, 'Love your neighbor as yourself.' Love does no wrong to a neighbor; therefore, love is the fulfilling of the law."[2] Nearly as aspirational is the ancient[3] property law maxim[4] "*sic utere tuo ut alienum non laedas,*" which

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[1] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-88 (1926).

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[2] *Romans* 13:9 (Harper Collins).

[3] *See generally* Aldred's Case, 77 Eng. Rep. 816 (K.B. 1611) (upholding the right of a homeowner to recover damages from his neighbor who maintained a stinking pigsty).

[4] *See* Kenneth J. Brown, Comment, *Establishing a Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations*, 149 U. PA. L. REV. 1507, 1507 n.1 (2001) (quoting People v. Hurlbut, 24 Mich. 44, 107 (1871)) (Judge Thomas M. Cooley adeptly articulates the role common law maxims play in constitutional questions and modern law:

> 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).

Id.

commands each one to use his own property so as not to injure his neighbor.[5] Despite obvious similarities, at some point, formalistic and non-offensive goals of religion and law have split. As a result, religious laws, constitutions, judges, legislators and private litigants have entered into the fray. The Religious Land Use and Institutionalized Persons Act (RLUIPA)[6] is a recent legislative creation designed to protect religious exercise. This Comment attempts to locate the point where the legal commandment of *sic utere tuo ut alienum non laedas* retains vitality in spite of RLUIPA.

[2] Congress enacted RLUIPA to provide federal protection for churches and other religious land uses that complained of disproportionate negative treatment before local zoning and planning boards. This Comment explains how the passage of RLUIPA, when viewed in conjunction with traditional common law preferences for religious uses, may unnecessarily favor religious land uses at the residential level. Part I details the purpose for the passage of the Land Use portion of RLUIPA. Part II traces the philosophical underpinning of the principle of *sic utere tuo ut alienum non laedas* in common law nuisance and, more modernly, in constitutionally sanctioned comprehensive zoning plans under cases following *Euclid v. Ambler Realty Co*.[7] Part III examines how RLUIPA, when viewed in combination with courts' traditional deference afforded to residential religious uses, creates a heavy burden for a neighbor seeking to enjoin another neighbor's offensive activity when such activity is labeled religious. Part III also offers

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[5] *See* Mugler v. Kansas, 123 U.S. 623, 660 (1887) (quoting Munn v. Illinois, 94 U.S. 113, 124 (1876)) ("[W]hile power does not exist with the whole people to control rights that are purely and exclusively private, government may require 'each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another.'").

[6] Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000).

[7] 272 U.S. 365 (1926).

an alternative solution to religious land use conflicts by advocating a return to *sic utere tuo ut alienum non laedas*. A retrogression to the spirit behind *sic utere tuo ut alienum non laedas,* the ancient measurement for nuisance and zoning law, would allow courts to apply a malleable but principled test to determine whether religious uses can be enjoined on a private residential level.

II. BACKGROUND AND THE PASSAGE OF RLUIPA AND RELIGIOUS LAND-USE ADJUDICATION

[3] In 2000, Congress, by bi-partisan agreement, resoundingly approved the Religious Land Use and Institutionalized Persons Act (RLUIPA).[8] The principal sponsors of the bill were Senator Orrin G. Hatch and Senator Edward M. Kennedy.[9] During legislative hearings, various groups, ranging in ideology from the ACLU to the Family Research Council, came forward to voice support of the Act.[10] RLUIPA, as a piece of legislation, aimed to champion individual liberties, and was embraced as a work of a marriage between the left and the right.[11]

[4] RLUIPA emerged in response to the Supreme Court's decision in *Employment Division*

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[8] 146 CONG. REC. S7774 (daily ed. July 27, 2000); 146 CONG. REC. H7190 (daily ed. July 27, 2000); David E. Rosenbaum, *House Approves Measure on Religious Rights*, N.Y. TIMES, July 16, 1999, at A16.

[9] *See* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response To Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929, 943 (2001).

[10] *Id*. at 944. The RLUIPA was supported by "[a] group comprised of over fifty diverse organizations including the American Civil Liberties Union, People For the American Way, Christian Legal Society and Family Research Council." *Id*.

[11] *See* Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After* Boerne, 68 GEO. WASH. L. REV. 861, 863 (2000) ("RLUIPA's concentration on land use and institutionalized persons reflects a compromise among the broad coalition . . . . ").

v. Smith.[12] Through Congress' commerce and taxing powers, advocates of RLUIPA[13] sought to codify a broader strict scrutiny test of judicial review,[14] one reminiscent of Supreme Court cases governing religious expression prior to the controversial Establishment Clause retuning in *Smith.*[15]

[5] To many, *Smith* removed the primacy of religious expression because it held that, without a compelling reason, a judicially neutral law when neutrally applied could not be subject to a challenge unless that law unfairly burdened the expression of religious practices.[16] This is a

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[12] 494 U.S. 872 (1990); *see also* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 2-3 (2000) (stating that under *Smith*, a religious practice exemption is no longer necessarily constitutionally protected because "there are special constitutional rules applicable to religion," and an exemption invariably leaves similarly situated individuals or institutions with secular objection to the law without a remedy. This lack of remedy amounts to an unconstitutional "privileging of religion" in violation of the Establishment Clause.).

[13] *See* Davison M. Douglas, *Institute of Bill of Rights Law Symposium: Religion in the Public Square*, 42 WM. & MARY L. REV. 647, 659 (2001) ("Since *Smith*, both politicians and scholars have engaged in spirited debates of the merits of the Court's holding that the government need not show a compelling, narrowly tailored interest to justify its neutral regulations that impose a burden on the free exercise of religion.").

[14] *See* Douglas Laycock, Article, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25, 26-27 (2000) ("The requirement that *Smith* actually lays down is general applicability. If a law burdens the exercise of religion, it requires compelling justification unless it is neutral and generally applicable.").

[15] *See* Carol M. Kaplan, Note, *The Devil is in the Details: Neutral, Generally Applicable Law and Exceptions from Smith*, 75 N.Y.U. L. REV. 1045, 1057-58 (2000) (arguing that *Smith* "paved the way for a more fundamental questioning of our presuppositions about the power and role of religion in contemporary society," thereby "exposing the need for a jurisprudence that equalizes the liberty interests between majority and minority religious groups, and between religious and secular groups and individuals") (footnotes omitted).

[16] *See Employment Division v. Smith*, 494 U.S. 872, 894 (1990) (O'Connor, J., concurring) ("few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such").

marked shift from the previous precedent, *Sherbert v. Verner.*[17] Under the *Sherbert* standard, religiously-motivated conduct presumptively inspired strict scrutiny protection; only by a showing of a compelling state interest could a state employ a regulation that infringed upon religious beliefs.[18] *Smith* abandoned the compelling interest prong for a "pro-regulatory avenue."[19] In an effort to re-establish the protection once afforded religious land uses, Congress attempted to reinstate the compelling interest prong by legislative means because there appeared to be "no obvious and attractive strategy for doing so" by judicial means.[20]

[6] Congress' first attempt to reinstate a *Sherbert*-type strict scrutiny standard, the Religious Freedom Restoration Act (RFRA), met judicial resistance. Shortly after is passage, RFRA was struck down by the Supreme Court in *City of Boerne v. Flores,*[21] which cited Congress' lack of legislative power to implement such a broad test for religion.[22] In the following session of Congress, RLUIPA emerged as a "less ambitious successor law"[23] to the RFRA. Although

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[17] 374 U.S. 398 (1963).

[18] *Id.* at 406-07.

[19] *See* Brown, *supra* note 4, at 1533.

[20] *See* Laycock, *supra* note 14, at 25.

[21] City of Boerne v. Flores, 521 U.S. 507, 511 (1997); *cf.* Thomas v. Review Bd. of the Indiana Emp. Sec. Div., 450 U.S. 707, 727 (1981) (Rehnquist, J., dissenting) (Religious expression may be exempted from neutral and generally applicable laws if, but only if, the accommodation is designed to alleviate government intrusion that might significantly deter adherents a particular faith from conduct protected from the free exercise clause and would not have the effect of inducing religious belief.).

[22] *Flores*, 521 U.S. 507; *see also* Douglas, *supra* note 13, at 659.

[23] Frederick Mark Gedicks, *Governing Two Cities: Civil Law and Religious Institutions, A Symposium Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 925-26 (2000).

RLUIPA too faces an uncertain constitutional future,[24] Congress, when drafting RLUIPA, focused on land use regulation where it presumed federal authority could not be as easily challenged.[25]

A. WHAT RLUIPA SPELLS OUT:

[7] A zoning system "invariably involve[s] individualized subjective judgments by zoning officials . . . ."[26] Advocates of RLUIPA felt the subjective assessments by zoning officials and other politicians invariably lead to non-neutral law making.[27] The procedure of zoning ordinances and appeals is intensely situation-specific and habitually precludes neutral laws of general applicability. Indeed, no other "power at the disposal of local government [is] more capable of affecting the rights and abilities of individuals and groups to engage in given activities than zoning."[28] Although the United States Constitution forbids local zoning boards from actual takings of property under the Fifth Amendment,[29] RLUIPA heightens the scrutiny a court must

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[24] *Id*. at 926; *see generally,* Evan M. Shapiro, *The Religious Land Use and Institutionalized Persons Act: An Analysis under the Commerce Clause*, 76 WASH. L. REV. 1255 (2001) (arguing that Congress exceeded its Commerce Clause authority in enacting RLUIPA because land use does not constitute an economic activity).

[25] *See* 42 U.S.C. § 2000cc (2000).

[26] Storzer & Picarello, *supra* note 9, at 949 (footnote omitted).

[27] *See* Sarah J. Gralen Rous, Comment, *Why Free Exercise Jurisprudence in Relation to Zoning Restrictions Remains Unsettled After Boerne v. Flores*, 52 SMU L. REV. 305, 328-29 (1999) (arguing that zoning ordinances are non-neutral).

[28] *See* Brown, *supra* note 4, at 1509-10.

[29] U.S. CONST. amend. V ("No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

apply in determining whether the action of a local zoning authority interferes with religion by issuing blanket provisions of non-interference with religious exercise on real property.

[8] RLUIPA achieves its intensity chiefly through three means.[30] First, RLUIPA terms "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[31] Second, "[t]he use, building, or conversion of real property for the purpose of religious exercise should be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose."[32] Third, Section 2(b)(1) of RLUIPA prohibits discrimination and "mandates that religious uses [are to] be treated under zoning laws on equal terms with secular uses, [and are to] be free of discrimination or exclusionary regulations, and not . . . subject to unreasonable limitations."[33]

[9] Under RLUIPAssue is "not who owns the building, but whether the building is used for the exercise of religion."[34] As noted succinctly by Roman P. Storzer and Anthony R. Picarello, Jr. in their analysis on the constitutionality of the Act, "[t]he fundamental importance of RLUIPA is the recognition that the placement, building, and use of churches is more than simply a secular issue of height restrictions and traffic patterns."[35] In short, RLUIPA puts local zoning

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[30] 42 U.S.C. § 2000cc-3(d) (allowing the local government to avoid the law by modifying its practices or by exempting the religious land use); 42 U.S.C. § 1988(b) (permitting plaintiffs to seek attorneys fees).

[31] 42 U.S.C. § 2000 cc-5(7)(A).

[32] *Id*. § 2000 cc-5(7)(B).

[33] Robert I. McMurry, *Using Federal Laws and Regulations to Control Local Land Use,* SG021 A.L.I.-A.B.A. 357, 364 (Aug. 2001).

[34] *See* McConnell, *supra* note 12, at 7.

[35] *See* Storzer & Picarello, *supra,* note 9, at 945.

authorities on notice that if a religious use is discriminated against, there will be constitutionally-inspired problems.[36] Notably, although RLUIPA advocates equal treatment for religious land uses, it is silent on the issue of religious accommodation and does nothing to afford non-religious land uses a protection against the capriciousness of zoning officials.

B. WHAT CONGRESS INTENDED TO ACCOMPLISH BY TYING RELIGIOUS FREEDOM TO LAND USE

[10] As indicated by the testimonial evidence[37] before Congress, RLUIPA sought to level the playing field for religious organizations that have been "zoned out" of commercial and residential zones.[38] In terms of commercial zones, RLUIPA apologists believe religious uses take a back seat to historic preservation concerns and efforts at economic revitalization.[39] Advocates of RLUIPA also believe that, in residential zones, the political and organizational clout of neighborhood homeowner associations exclude religious uses unfairly by reasoning from a small scale approach, typically using "not-in-my-backyard"-type arguments.[40] Correctly,

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[36] *Id.* ("RLUIPA explicitly lays out the appropriate free exercise standards and puts municipalities on notice that they apply. Such notice is especially needed in the land use context.") (footnote omitted).

[37] 146 CONG. REC. S7714 (daily ed. July 26, 2000); 146 CONG. REC. S6687-88 (daily ed. July 13, 2000).

[38] *See* Storzer & Picarello, *supra* note 9, at 929 ("According to zoning boards, mayors and city planners across the nation, churches may belong neither on Main Street nor in residential neighborhoods.") (footnotes omitted).

[39] *Id.* at 930; *see also* Lucinda Harper, *Storefront Churches: The Neighbor's Upscale Stores Don't Love*, WALL ST. J., Mar. 15, 2000, at B1. (explaining that in the rural south storefront churches are often evicted by landlords and subject to "no rent" laws).

[40] *See* Tuttle, *supra* note 11, at 861-62 ("Schools, hospitals, playing fields and religious institutions fall beneath the equal opportunity sword of NIMBY" [not-in-my-backyard]) (footnote omitted).

Storzer and Picarello point out that the arguments used at the residential level are essentially the same as those made to exclude religious uses in districts zoned for commercial uses, "[w]hile churches are being eliminated from downtown and commercial areas because municipalities believe that such uses do not attract enough traffic to generate retail and tax revenues for surrounding areas, they are simultaneously being eradicated from residential districts for creating too much traffic and noise."[41] From the record, it appeared that proposed religious uses were being squeezed out of residential and commercial zones with no alternatives in place.

[11] Since being enacted, RLUIPA has surfaced in a variety of residential contexts and has succeeded in changing the practices and policies of many local zoning boards.[42] The successes of religious "home use" cases, zealously advocated by religious freedom groups under RLUIPA,[43] have resulted in the abandonment or frustration of zoning variance and conditional use permit procedures by many local jurisdictions.[44] Although an assessment on the effectiveness of RLUIPA would be premature at this point,[45] it appears that the statute is on

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[41] Storzer & Picarello, *supra* note 9, at 930.

[42] *See, e.g.,* http://www.rluipa.org.

[43] *See, e.g.*, Falwell v. City of Lynchburg, 198 F. Supp.2d 765 (W.D. Va. 2001) (The ACLU filed an amicus brief in support of Jerry Falwell's Thomas Road Baptist Church's planned expansion. Since the case was filed, the ordinance that prohibited the expansion was repealed.); *see also*, Elizabeth Amon, *Strange Bedfellows: Falwell and the ACLU*, NAT'L. L. J., Dec. 17, 2001, at A4.

[44] David O'Reilly, *A Law with Religious Sway: A New Federal Law Reduces the Clout of Zoning Boards When They Deal with Houses of Worship*, PHILADELPHIA INQUIRER, Oct. 27, 2000, at A1.

[45] *See* Tran v. Gwinn, 262 Va. 572, 554 S.E.2d 63 (2001) (Kinser, J. ,dissenting).

track: it will succeed in removing many zoning-based encumbrances on religious land uses at the residential level.

III. EUCLIDEAN ZONING AUTHORITY STEMS FROM THE IDEAL *SIC UTERE TUO UT ALIENUM NON LAEDAS*, THE NATURAL RIGHTS PRINCIPLE BEHIND NUISANCE LAW[46]

[12] Prior to the adoption of zoning and central planning schemes, conflicts "between churches and neighbors generally would have been handled under the law of nuisance, which forbids uses of property that unreasonably interfere with others' right to use and enjoy their property."[47] Modern zoning regulations serve as "proxies for nuisance law."[48] A century ago, police powers "extend[ed] to . . . the preservation of good order and the public morals."[49] Today, zoning ordinances are included among these powers. Zoning regulations "sustained, under the complex conditions of our day . . . find their justification in some aspect of the police power,

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[46] *See* Tuttle, *supra* note 11, at 869-71.

[47] *Id.* at 868 (footnote omitted).

[48] *Id*.; *See* Hadachek v. Sebastian, 239 U.S. 394, 410 (1915) (holding that even though operation of brickyard was not a nuisance per se it was still within police power to regulate the brickyard's operation); Reinman v. City of Little Rock, 237 U.S. 171, 176 (1915) (holding that ordinance regulating stable operation was not unreasonable or arbitrary).

[49] *See* Sheryl E. Michaelson, *Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis*, 59 N.Y.U. L. REV. 301, (1984) ("As the Supreme Court observed in 1878, 'Whatever differences of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to . . . the preservation of good order and the public morals." (quoting Beer Co. v. Massachusetts, 97 U.S. 25, 33 (1878))); *see generally,* Lochner v. New York, 198 U.S. 45, 53 (1905) (holding that police powers relate to "safety, health, morals and general welfare of the public"); *See* Berman v. Parker, 348 U.S. 26, 32 (1954) "The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Id*.

asserted for the public welfare"[50] and are openly based on the principle of *sic utere tuo ut alienum non laedas.*[51]

[13] Euclidean zoning is the practice of separating different types of land uses based on the assumption that they are incompatible.[52] According to *Euclid,* the constitutionality of a zoning provision relies on reasonableness and utility found within the crucible of nuisance law.[53] The standard of compromise enunciated in *Euclid* originates in the equitable balancing framed by the principle of *sic utere tuo ut alienum non laedas.*[54] In fact, "[t]he Supreme Court's landmark decision in *Euclid*, which upheld the constitutionality of a comprehensive zoning plan, relied heavily on the nuisance underpinnings of land use regulation."[55] In *Euclid*, Justice Sutherland explained:

> In solving doubts, the maxim '*sic utere tuo ut alienum non laedas*,' which lies at the foundation of so much of the common law of nuisances, ordinarily will furnish a fairly helpful clew. And the law of nuisances, likewise, may be consulted, not for the purpose of controlling, but for the helpful aid of its analogies in the process of ascertaining the scope of, the power. Thus the question whether the power exists to forbid the erection of a building of a particular kind

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[50] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926).

[51] *Id.* at 387.

[52] *See* Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege? The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas*, 56 U. PITT. L. REV. 367 (1994); *see also* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS, CASES AND MATERIALS*,* 95-100 (2d ed., Aspen Law and Business 2000) (discussing the exclusion of multi-family dwellings from land zoned for single-family dwellings based on a presumed conflict of use).

[53] *Euclid*, 272 U.S. at 395.

[54] *See* ELLICKSON & BEEN, *supra* note 51, at 95-100.

[55] *See* Tuttle, *supra* note 11, at 868-69.

> or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard.[56]

As Professor George P. Smith in his analysis of nuisance law's philosophical, historical and economic-efficiency underpinnings aptly put it, "the most well-established or inherent principle of the law of nuisance as well as its most contentious is to be found in the principle of *sic utere tuo ut alienum non laedas*."[57] Thus, since *Euclid*, zoning disputes remain within the framework of the "contentious"[58] maxim *sic utere tuo ut alienum non laedas.*

IV. JUDICIAL DEFERENCE TOWARD RELIGIOUS LAND USES IN THE ZONING CONTEXT AND A PREDICTED REEMERGENCE OF PRIVATE NUISANCE ACTIONS

A. RELIGIOUS LAND USE CONFLICTS: HISTORIC PRESERVATION EXAMPLES

[14] Over time, like other large uses, religious uses began to conflict with non-religious uses,

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[56] *Euclid*, 272 U.S. at 387-88.

[57] George P. Smith, II, *Nuisance Law: The Morphogenesis of an Historical Revisionist Theory of Contemporary Economic Jurisprudence*, 74 NEB L. REV. 658, 680 (1995). The factors used to achieve this social compromise among competing land uses may be found in the law of torts. See RESTATEMENT (SECOND) OF TORTS § 827(a)-(e) (1979). The reasonableness in nuisance, though sounding in tort, is actually an assessment of the offender's conduct and the character of the conduct in a certain area. The factors to be weighed or balanced in assessing the gravity of the offending harm to the plaintiff versus the utility of the offender's conduct consist of: the extent of the harm involved and its character; the social value attached by law to the type or use of the enjoyment invaded; and the suitability of either the use or the enjoyment to the character of the locality together with the burden on the injured person of avoiding the harm; *See also* RESTATEMENT (SECOND) OF TORTS § 828(a)-(c) (1979). In assessing the social value attached by law to the primary purpose of the conduct, not only will the suitability of the conduct to the character of the locality be considered but the impracticability of either preventing or avoiding the invasion should be considered as well. *Id*.

[58] Smith, *supra* note 56, at 680.

just as commercial uses tend to conflict with residential uses.[59] Examples of conflict are common in cases involving historic preservation. Few courts have upheld a rationalization for excluding religious land uses in the interest of historic preservation. Typically, when religion is involved, courts are reluctant to uphold historic preservation laws of religious land uses without making a constitutional inquiry.

[15] *St. Bartholomew's Church v. City of New York*[60] is a case in which a church brought an action against New York City's Landmarks Preservation Commission. *St. Bartholomew's Church* applied the recently handed down *Smith* decision and served as a window into the type of zoning regulations that concerned the drafters of RLUIPA. As the *St. Bartholomew's Church* court explained, "Supreme Court decisions indicate that while the government may not coerce an individual to adopt a certain belief or punish him for his religious views, it may restrict certain activities associated with the practice of religion pursuant to its general regulatory powers."[61] The court concluded that the regulation did not restrict certain conduct "because it is religiously oriented,"[62] it was therefore neutral in application: "the Landmarks Law is a valid, neutral regulation of general applicability, and . . . the Church has failed to prove that it cannot continue its religious practice in its existing facilities."[63]

[16] Another example of the intrusiveness of the historical preservation community on

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[59] *See Euclid*, 272 U.S. at 387-88.

[60] 914 F.2d 348 (2d Cir. 1990).

[61] *Id.* at 354.

[62] *Id*.

[63] *Id.* at 355-56.

religious exercise is evident in the facts surrounding *Soc'y of Jesus v. Boston Landmarks Comm'n*.[64] In *Soc'y of Jesus*, historical preservation authorities maintained that the Jesuits operating a landmark church had no religiously-based right to re-orient the altar within the church because doing so would affect the historical integrity of the building itself. However, the ruling in *Soc'y of Jesus* is more characteristic of historical preservation regulation challenges. At the final stage of this case, the court held that a historical landmark designation of church interior unconstitutionally restrained religious worship under state provisions similar to the constitution guarding free expression.[65]

[17] In *Keeler v. Mayor & City Council of Cumberland***,** another landmark case involving an old building owned by the Catholic Church,[66] the church sought "permission to demolish a monastery and a chapel which [it] deem[ed] to be 'a draining financial liability.'"[67] The church contended that the refusal to permit demolition of the monastery "impermissibly infringes upon its parishioners' right to the free exercise of the Catholic religion."[68] The Court recognized the church's argument and declared that the historic preservation goals were not tantamount to a compelling state interest, and accordingly, the historical preservation restriction on the church was shot down.[69] The *Soc'y of Jesus* and *Keeler* courts, and eventually even *St. Bartholomew's*

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[64] 564 N.E.2d 571 (Mass. 1990).

[65] *Id.*

[66] 940 F. Supp. 879 (D. Md. 1996).

[67] *Id.* at 880.

[68] *Id*. at 883.

[69] *Id*. at 886; *see also* Thomas Pak, Note, *Free Exercise, Free Expression and Landmarks Preservation*, 91 COLUM. L. REV. 1813, 1845 (1991). "Although the goals of landmarks preservation are valid state interests that are within the legitimate police powers of the state, they

Church, applied the compelling interest test found in *Sherbert*.[70] Predictably, under the *Sherbert* standard religious uses prevailed.

[18] *First Covenant Church of Seattle v. City of Seattle*[71] designated the arrival of *Smith* in historic preservation challenges and was specifically vacated and remanded by the Supreme Court for reconsideration[72] under *Smith.* Moreover, *First Covenant Church of Seattle* reveals how courts protect religiously motivated land uses despite *Smith*. On the first appeal, the majority had applied a strict scrutiny analysis found under *Sherbert*[73] to assess the church's free exercise claim. Under the *Sherbert* standard, the court concluded, "landmark preservation was not a 'compelling interest' that justified the burden on First Covenant's right to free exercise."[74]

[19] On remand, the *First Covenant Church* court agreed with the church's claims that the historic preservation laws were not "neutral or generally applicable because the sites, improvements, and objects they govern are arbitrarily selected, and the selection process requires individual evaluation of each building, site, or improvement."[75] The court, however, did not continue to decide the case under a *Smith* analysis of neutral laws of general application. Because the court found "the exterior and the interior of the structure are inextricably related" as

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do not rise to the level of more traditional justifications for compelling state interests, such as the maintenance of health and safety." *Id*. (footnote omitted).

[70] Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[71] 840 P.2d 174 (Wash. 1992).

[72] First Covenant Church of Seattle v. City of Seattle, 787 P.2d 1352 (Wash. 1990), *cert. granted, vacated and remanded by*, 499 U.S. 901 (1991).

[73] *Sherbert*, 374 U.S. 398.

[74] *First Covenant Church*, 840 P.2d at 178.

[75] *Id.* at 180.

a matter of free speech, it determined the church had presented a "hybrid situation."[76] "The *Sherbert* Court's 'compelling interest' test, therefore, applies to the . . . controversy . . . ."[77] In sum, "historic preservation deals with the sacred in the experience of our cultural environment."[78] But when "historic preservation laws, as well as some zoning laws, serve only aesthetic interests rather than interests in peace or safety of a neighborhood, "[79] they appear to not withstand judicial scrutiny, regardless of an application of the Supreme Court's ruling in *Smith*.

[20] The cases above are shocking examples of the overreaching power that local historic preservation staffers seek over privately-owned, religious land. But as evidenced in *First Covenant Church of Seattle* and *St. Bartholomew's Church,* when municipalities push historic preservation too far (and at the expense of religious freedom), courts will refuse to blindly sanction their decisions. Though not a cohesive doctrine, the previous cases show that the addition of religious expression removes the judicial deference announced in *Euclid.*[80] Thus, contrary to the opinions of RLUIPA campaigners, courts are not inspired by a phenomenon of

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[76] *Id.* at 182.

[77] *Id.*

[78] Felipe M. Nunez & Eric Sidman, *California's Statutory Exemption For Religious Properties From Landmark Ordinances: A Constitutional and Policy Analysis*, 12 J.L. & RELIG. 271, 313 n.31 (1996).

[79] Thomas C. Berg & Frank Myers, *The Alabama Religious Freedom Amendment: An Interpretive Guide*, 31 CUMB. L. REV. 47, 74 (2001).

[80] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926). "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id*.

secularism.[81] What, then, does RLUIPA seek to achieve? RLUIPA's drafters assert evidence of disparate treatment is in cases where churches are excluded from residential zones. But, contrary to the advocates of RLUIPA, judicial favoring of religious land uses are even more evident in cases that uphold the right of religious assembly in private homes. The religious preference by the judiciary in the residential situation is tempered only by the context of the particular use proposed for the residential situation. Prior to RLUIPA, residential cases could securely exhibit an application of *sic utere tuo ut alienum non laedas;* now, reasonableness and judicial balancing mark the result of this type of traditional analysis are threatened by RLUIPA's federal mandate.

B. Religious Land Use Conflicts and the Traditional Deference to Religious Uses in Residential Zones

[21] The record of court cases preventing religious land use for historical preservation concerns is shadowed by a consistent accommodation of religious uses in residential settings. According to advocates of RLUIPA, "the raison d'etre of a church *is* religious exercise" because "all activity that a church undertakes is in furtherance of its religious belief."[82] As Orrin Hatch explained, RLUIPA, "at 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

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[81] Perhaps the fall of religious uses from prominence in recent judicial balancing tests is a result of the secularization of modern society. According to Storzer and Picarello, this reflects a trend in which "some courts and commentators have become less receptive to the claims of churches whose religious exercise has been burdened by land use laws." Storzer & Picarello, *supra* note 9, at 935-36. (footnote omitted).

[82] *Id.* at 947.

pervasive land use regulations."[83] Throughout RLUIPA's land use portion, a "suspicion of underinclusion . . . animate[s]" the statute and its choice of language.[84] As a result, RLUIPA is a sweeping form of legislation, and includes broad definitions and terms in favor of *all* religious land uses, including residential uses. What is striking is that RLUIPA's "suspicion of under inclusion" is contemporary with a host of cases that have upheld religious accommodation in residential zoning challenges.

[22] *Christian Gospel Church, Inc. v. City of San Francisco*[85] demonstrated how local civic groups may employ the judiciary to restrict the use of a single-family home as a church in a residential district.[86] In *Christian Gospel Church*, the church applied for conditional use to establish a church for up to fifty people in a single-family residence.[87] A local neighborhood organization opposed the granting of a conditional use and circulated a petition citing a general lack of housing in San Francisco and the availability of sites nearby in commercially zoned districts.[88] The Christian Gospel Church cited the significance of "home worship" to their mission to demonstrate an undue burden by the denial of the conditional use.[89] But the church had previously congregated in a banquet hall, so the court determined that by seeking a new

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[83] Michael Nielsen, *Congress OKs End to Religious Zoning Bias*, MORMON NEWS, Aug. 4, 2000, *available at* http://www.mormonstoday.com/000730/N1ReligiousZoning01.shtml (summarizing Lee Davidson, *Congress OKs End to Religious Zoning Bias*, DESERET NEWS, Jul. 28, 2001).

[84] *See* Gedicks, *supra* note 23, at 945.

[85] 896 F.2d 1221 (9th Cir. 1990).

[86] *Id*.

[87] *Id.* at 1222-23.

[88] *Id.* at 1223 n.1.

[89] *Id.* at 1224.

location in a residential district, "the burden on religious practice in this case did not warrant an exemption from the zoning scheme" and does not violate the Free Expression Clause of the Constitution. [90]

[23] In *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio*[91] a "175-member Congregation of Jehovah's Witnesses" challenged the city's comprehensive zoning plan which designates portions of the city for exclusive residential use. [92] The congregation sought to construct a new "Kingdom Hall" and move from its previous storefront location.[93] Before purchasing its new lot, the zoning authorities had denied the permit citing traffic and noise.[94] At issue before the court in *Lakewood Congregation of Jehovah's Witnesses* was how to characterize the charge. Under the traditional *Euclid* approach,[95] a Due Process Clause charge would invoke the standards of reasonableness, so long as the statute is substantially related to governmental public welfare concerns.[96] But, if the ordinance "in fact infringes [on] the Congregation's right to free exercise of religion," [97] then the municipality

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[90] *Id.* at 1225.

[91] 699 F.2d 303 (6th Cir. 1983).

[92] *Id.* at 304.

[93] *Id.*

[94] *Id.* at 305.

[95] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (citing Radice v. N. Y., 264 U.S. 292, 294 (1924)) (stating that even when a zoning ordinance is "fairly debatable," it remains within the province of police powers).

[96] *Lakewood Congregation of Jehovah's Witnesses*, 699 F.2d at 305 (citation omitted).

[97] *Id.*

would have to demonstrate a compelling interest for the zoning regulation. The court resolved that *Euclid* and its progeny applied.[98] It concluded that since the case did not hinge upon whether the congregation "must choose between exercising its religious beliefs and forfeiting government benefits or incurring criminal penalties" and because "[n]o pressure is placed on the [c]ongregation to abandon its beliefs and observances," a denial of a conditional use permit in a residential zone was permissible under a Euclidean substantially related test.[99]

[24] *Christian Gospel Church* and *Lakewood Congregation of Jehovah's Witnesses* are similar in one foremost respect: in both fact patterns, large congregations sought to enter into tight-knit residential communities against the neighborhood's wishes.[100] When religious land uses are less obtrusive, the judiciary appears to be more accommodating, so long as the religious use could not be seen to severely injure the neighbors already in the residential district. The *real politick* of local judiciaries in the following cases demonstrate the practicality of the principle of *sic utere tuo ut alienum non laedas.*

[25] *Cohen v. City of Des Plaines*[101] exemplifies a balanced, and yet still religiously

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[98] *Id.* at 308 (quoting Vill. of Belle Terre v. Boraas*,* 416 U.S. 1, 9 (1974)) ("The Supreme Court acknowledged a village's police power as 'ample to layout zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'").

[99] *Id.* at 307-08.

[100] The reasoning here is familiar to the concept of "coming to the nuisance" in which the burden on the person harmed of avoiding the harm is a mitigating factor. *See* RESTATEMENT (SECOND) OF TORTS § 828 (1979); *cf*. Spur Industries v. Del. E. Webb Dev. Co., 494 P.2d 700, 708 (Ariz. 1972) ("Coming to the nuisance" permitted Webb, the developer who came to the nuisance of Spur's feed-lot, an injunction but required appropriate compensation not because of any wrongdoing, but because of a proper and legitimate regard of the courts for the rights and interests of the public.).

[101] 8 F.3d 484 (7th Cir. 1993).

accommodating result. In *Cohen,* an applicant for a special use permit brought an action against the city, claiming she should have been allowed to continue to operate a day care center in a residential district.[102] The local zoning ordinance did not forbid day care land uses in a residential district, but it did require a filing of a special use permit unless associated with a religious organization.[103] The applicant owned and operated other day care centers in residential districts of Des Plaines, but "by virtue of their affiliation with a church, [none] were required to obtain a special use permit from the city."[104] On this issue the district court concluded, "the sole effect of City's Ordinance is to lift from religious organizations, without any rational justification, a regulatory burden that is uniformly applicable to day care operators generally."[105] The Seventh Circuit Court of Appeals applied the *Lemon* Test,[106] which focuses on whether the zoning ordinance "has the purpose or effect of 'indorsing' religion."[107] The Seventh Circuit found that the ordinance had a "secular purpose of minimizing governmental meddling in religious affairs" to be sufficient "notwithstanding that the ordinance does not explicitly state that nursery schools (or day care centers) operated in churches in residential areas must give care or instruction defined as 'religious.'"[108] The municipality filed appeals. The denial of certiorari

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[102] *Id.* at 486-87.

[103] *Id.*

[104] *Id.* at 487 (citation omitted).

[105] *Id.* at 488.

[106] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[107] *Cohen*, 8 F.3d at 489.

[108] *Id*. at 491 (quoting Cohen v. City of Des Plaines, 742 F. Supp. 458, 470-71 (N.D. Ill. (1990)).

by the Supreme Court[109] in *Cohen* "[i]ndicated a greater willingness to tolerate legislative accommodations of religion in the form of exemptions from otherwise neutral, generally applicable land-use regulations."[110] In the end the day care remained in a residential zone.[111]

[26] Similarly, in *Church of Christ v. Metro Bd. of Zoning Appeals*,[112] an Indiana Appellate Court reversed the lower court's ruling and therefore the City of Indianapolis's denial of a special use permit for a church parking lot expansion in a residentially zoned area.[113] According to *Church of Christ,* "[t]he exclusion of a Church from a residential area by a zoning ordinance is a violation of the fundamental right of freedom of worship protected by the first and fourteenth amendments . . . ."[114] In accordance with Indiana precedent "[t]he way legally to effectuate this desire [to exclude churches from residential zones] is by private mutual covenants between property owners imposing appropriate servitudes on land . . . [and] the new device of zoning [may not be employed] to make exclusive districts much more exclusive."[115] The court held that it was not a "proper function of government to interfere in the name of the public to exclude churches from residential districts . . . ."[116]

[27] However, even when a state precedent upholds the police power of a zoning authority to

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[109] *Cohen*, 8 F.3d 484, 487 (7th Cir. 1993), *cert. denied,* 512 U.S. 1236 (1994).

[110] Nunez & Sidman, *supra* note 77, at 306-07.

[111] *Id*.

[112] Church of Christ v. Metro Bd. of Zoning Appeals, 371 N.E.2d 1331 (Ind. Ct. App. 1978).

[113] *Id.* at 1332-33.

[114] *Id*. at 1333.

[115] *Id*. at 1334 (citing Bd. of Zoning Appeals v. Schulte, 172 N.E.2d 39, 43 (Ind. 1961)).

[116] *Id.*

regulate religious land uses in a residential zone, a challenge based on an ordinance's application may permit a non-conforming religious use. In *State v. Cameron*[117] a minister sought to hold services out of his home in a residential district.[118] At the time, the minister maintained he could not afford to rent a location for his services, and the services in his home would be temporary.[119] The minister did not attempt to move through any administrative channels to seek a variance or special use permit and the action stemmed out of a municipal administration seeking to enjoin the minister's use of his home as a church.[120] The zoning ordinance in question was successfully challenged on grounds of unconstitutional vagueness.[121] The "minister claim[ed] that the ordinance [did] not, with sufficient clarity, forbid [his] religious activity, and, as applied against him, it [was] unconstitutionally vague.[122] The majority agreed because it found that "the zoning ordinance's exclusion of 'churches or similar places of worship' from the particular residential zone [was] not sufficiently directed against the tangible detrimental effects of particular conduct."[123] In an effort to protect the minister from state harassment, the court characterized the local ordinance as overbroad.[124]

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[117] 498 A.2d 1217 (N.J. 1985).

[118] *Id.* at 1218.

[119] *Id*.

[120] *Id*. at 1219.

[121] *Id*. at 1234.

[122] *Id*. at 1218.

[123] State v. Cameron, 498 A.2d 1217, 1225 (N.J. 1985).

[124] *Id*.

[28] In *Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc.*,[125] the court found, an "authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice."[126]

[29] The Connelly School of the Holy Child, Inc. is a private "college-preparatory school for young women" located in a residential neighborhood in Maryland.[127] The Renzis, homeowners who lived across the street from the Holy Child school, brought an action to stop the prep school's ongoing plans, which included constructing improvements and additions to the school.[128] The school did not seek a special exception for its construction plans because a local zoning ordinance contained a "special exception requirement [for] parochial schools located on land owned or leased by a church or religious organization."[129] The District Court for the District of Maryland, found the ordinance violated the Establishment Clause and enjoined the school from starting any construction.[130] The Fourth Circuit concluded the exemption "remov[ed] the State from forums in which religious conflict might otherwise require improper State action,"[131] and therefore the exception was a permissible accommodation of religion.[132]

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[125] 224 F.3d 283 (4th Cir. 2000).

[126] *Ehlers-Renzi*, 224 F.3d at 287.

[127] *Id*. at 285.

[128] *Id.* at 284.

[129] *Id.* at 285.

[130] *Id.*

[131] *Id.* at 292.

[132] Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 292 (4th Cir. 2000).

According to the final decision in *Ehlers-Renzi*, the secular purpose of the exception was to step out of the way of religion and prevent "anti-religious animus underlying opposition to a special exception."[133] To many, *Ehlers-Renzi* is like a "government message" case – a judicial watermark illustrating a policy that allows religious uses to receive explicit municipal support with the blessing of the court.[134]

[30] The preceding cases demonstrate a judicial balancing between accommodation and upholding zoning restrictions. Where upholding a religious expression challenge would violate the principle of *sic utere tuo ut alienum non laedas*, such as in *Christian Gospel Church*'s attempt to hold religious services of fifty people in a single family home or *Lakewood Congregation of Jehovah's Witnesses* attempt to relocate a 175 member congregation into a exclusively zoned neighborhood, the enforcement of the zoning ordinance is valid. But, in cases where the religious uses would have only a minor impact, such as in *Cohen*, a temporary impact, such as in *Cameron*, or where the people have spoken by legislatively approving an accommodation for religious uses, such as in *Ehlers-Renzi*, balancing the competing principles of property ownership, the legislative process that forms the base of zoning ordinances, and the Constitutional protection of religious expression tilts toward the interests of religion.

C. RLUIPA, BY APPLYING A SYSTEM OF NON-JUSTICIABLILITY TO RELIGIOUS LAND USES IS INCONSISTENT WITH *SIC UTERE TUO UT ALIENUM NON LAEDAS* AND TRADITIONAL NUISANCE LAW BECAUSE IT AFFORDS NO POSSIBILITY OF BALANCING COMPETING INTERESTS AT THE RESIDENTIAL LEVEL

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[133] *Id.* at 289.

[134] *See* Ira C. Lupu, *Institute of Bill of Rights Law Symposium: Religion in the Public Square Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and The Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 801 (2001).

[31] A review of case law demonstrates that courts are willing to balance fundamental rights afforded individuals under the Constitution against important property rights. For instance, under *Euclid,* a Fifth Amendment property taking may be found if there is no legitimate connection between a zoning regulation and the health and safety of the community at large.[135] Similarly, under *Smith*, for a regulation that infringes upon an individual's religious expression to withstand constitutional scrutiny, it must be one that is religiously "neutral" in its application and on its face.[136] Lastly, *Ehlers-Renzi* demonstrates that courts are willing to apply a "benevolent neutrality"[137] marked by an accommodation of religious land uses in residential contexts.

[32] RLUIPA is aimed at protecting religious expression. However, its effect does not "protect[] church autonomy by right of religious association [, but] rather . . . by a rule of religious nonjusticiability."[138] Had RLUIPA's approach been in terms of religious association, it would "not extend to religious groups any greater protection than the freedom of association extends to advocacy groups founded on secular morality."[139] In other words, a free exercise test based on the First Amendment right to Free Association could potentially co-exist more naturally with a *sic utere tuo ut alienum non laedas* balancing of Lockean principles of individual

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[135] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 378 (1926).

[136] Employment Division v. Smith, 494 U.S. 872, 896 (1990).

[137] Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283, 287 (4th Cir. 2000). *See* e.g. Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 669 (1970).

[138] Gedicks, *supra* note 23, at 944.

[139] *Id.*

autonomy and property, which form the base of our constitutional system.[140] But RLUIPA does not work to protect free expression within a system of compromising interests. Instead, RLUIPA creates an absolutist declaration of non-justiciability for religious land uses though its sweeping language: terming "religious exercise" to including "any exercise of religion,"[141] declaring religious exercise as any "use, building or conversion of real property for the purpose of religious exercise"[142] and mandating religious uses only free from "unreasonable limitations" of zoning laws.[143] RLUIPA's mandates are a marked departure from the traditional common law development of *sic utere tuo ut alienum non laedas* and extinguish the inherent balancing of interests found under *Euclid*, by declaring the deliberation on the utility and reasonableness of a zoning board inapplicable if tied to *any* religious use.

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[140] *See* Brown, *supra* note 4, at 1518 (quoting ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS, 73 (1996)

> 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." Instead, it was the people "who voluntarily contracted to set up governments in order to protect their natural rights to life liberty, and property." Locke's disciples would take no part in "the defense and propagation of moral and religious truths.").

[141] 42 U.S.C. § 2000 cc-5(7)(A) (2000) ("The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief."); 42 U.S.C. § 2000cc-5(7)(B) (2000) (defining religious use as "any" use tied to the land).

[142] *See id.* at § 2000 cc-5(7)(B).

[143] McMurry, *supra* note 33.

D. PRIVATE REMEDIES SOUNDING IN TRADITIONAL NUISANCE LAW SHOULD BE AWARDED TO PROTECT PROPERTY INTERESTS FROM RELIGIOUSLY-MOTIVATED NUISANCES.

[33] Since RLUIPA prevents prophylactic Euclidean zoning, the practice of separating dissimilar uses to preemptively avoid conflicts, a private remedy sounding in traditional nuisance will likely re-emerge as the last resort for secular homeowners who seek to protect their property interests from religiously-motivated nuisances. Since a municipality would likely be hamstrung from preemptively enjoining an annoying "religious" use in a residential area, a private, "neighbor v. neighbor" action will become the last resort for an injured party. Prior to RLUIPA's passage, courts hearing zoning board challenges held a strong deference for religious uses in the community (as discussed in Part III, A and B). This presumption in favor of religious land uses needs to be reexamined in light of the loss of administrative power of zoning authorities to regulate religious land uses (as discussed in Part III, C). Without a retooling of the law's deference for religious uses at the residential level, the end result will be a two-tiered system of religious preference at the expense of individual property rights. If, therefore, as a homeowner, you seek to enjoin your neighbor from holding constant religious services in his home, under RLUIPA, you are no longer afforded legislative and zoning protections directed at separating religious uses from residential uses.[144] Likewise, once these religious practices have begun in your neighborhood, there is little likelihood that an individual homeowner could win an equitable injunction under current judicial standards of accommodation of religious uses at the residential level.[145]

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[144] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[145] *See e.g.*, Ehlers-Renzi v. Connelly Sch. of the Holy Child, Inc., 224 F.3d 283 (4th Cir. 2000); State v. Cameron, 498 A.2d 1217, 1225 (N.J. 1985); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, Ohio, 699 F.2d 303 (6th Cir. 1983).

V. CONCLUSION

[34] The success of RLUIPA in changing zoning policies and exclusionary tactics will soon become clear. Because of the statute's expansive definitions it likely that homeowners will now be able to invoke its language to thwart local zoning boards from granting or denying religiously neutral conditional use and variance permits. Additionally, courts have historically been deferential toward religiously motivated land uses. In the end, recourse in a local court will likely replace the zoning process as the sole means to enjoin religiously-motivated nuisances. If this is the case, unless courts temper their favoring treatment of religion at the private level, the effect of RLUIPA could amount, in its aggregate, to a subsidy of religious land uses. This aggregate effect may violate the Establishment Clause by creating a transfer of individual property rights from the secular to the non-religious, insulating religion from other social activities. Now, in the pale of RLUIPA, secular convictions, no matter how beneficial to the health, safety, welfare and morals of a community, must stand alone without the exemptions afforded religious uses under RLUIPA.