

# THOU SHALT LOVE THY NEIGHBOR: RLUIPA AND THE MEDIATION OF RELIGIOUS LAND USE DISPUTES

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## Abstract

*Religious land use disputes are characterized by high levels of conflict and the potential to seriously undermine social capital in affected communities. Contemporary land use procedures reflect an antiquated heritage and reliance upon adversarial means that are inadequate to successfully resolve these socially complex local conflicts. While there are practical obstacles, mediation holds advantages over these existing procedures in terms of dispute resolution, and has greater potential to preserve and build social capital at the local level. This article examines the theoretical justification for mediation in this context, and argues for moving beyond the status quo.*

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## INTRODUCTION

In the name of religious freedom, the federal government has reversed the traditional deference accorded to local government land use decisions. By enacting the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”),<sup>2</sup> Congress has shifted the balance of power between individuals and groups who claim religious reasons for the use of their real property and the communities in which they are embedded, setting the course for an unprecedented clash of religious values and community interests. Whatever one may think of the wisdom of this new course, it raises the question of how well the traditional system of local land use regulation is designed to resolve disputes involving religious values.

While rare in the past, religious land use disputes have become widespread since the adoption of RLUIPA. That statute provides an exemption from state and local government zoning or landmarking laws where they “substantially burden” the religious exercise of individuals, groups, or institutions, unless the law or imposition of the law is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest.<sup>3</sup> In addition to imposing a regime of strict judicial scrutiny of local land use decisions, RLUIPA also awards attorneys fees to successful litigants,<sup>4</sup> putting religious land use claims on a par with traditional civil rights litigation. Because religious persons—if not religious congregations—are present everywhere people reside, and because relatively few parcels of land used or potentially used for religious purposes remain free of zoning restrictions, the likelihood of such disputes arising is high.

The prospect of gaining an exemption from zoning regulations,

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<sup>2</sup> 42 U.S.C. §§ 2000cc et seq. The land use provisions of the statute apply to both zoning and historic landmarking laws, and while I mostly refer to the former in my analysis, the impact of RLUIPA on historic landmarking disputes is the same and my analysis is intended to apply to those as well. As the name of the statute suggests, however, a portion of the statute pertains to the rights of institutionalized persons, such as prisoners. These latter provisions were recently upheld by the U.S. Supreme Court against an Establishment Clause challenge. *Cutter v. Wilkinson*, 125 S.Ct. 2113 (2005). That decision, however, specifically reserved judgment on the constitutionality of the land use provisions that are the focus of this article. 125 S.Ct. at 2118, fn.3.

<sup>3</sup> 42 U.S.C. § 2000cc(a)(1). In addition, RLUIPA contains three “categorical” prohibitions, preempting zoning and landmarking laws which: 1) treat religious assemblies or institutions on “less than equal terms” compared to nonreligious assemblies or institutions; 2) discriminate on the basis of religion or religious denomination; or 3) totally exclude or unreasonably limit religious assemblies, institutions, or structures within a jurisdiction. See 42 U.S.C. § 2000cc(b).

<sup>4</sup> 42 U.S.C. § 1988(b).

along with the tempting prospect of attorneys fees if litigation follows, provides religious land owners an almost irresistible incentive to assert claims of religious discrimination if they face opposition to their use or proposal, if only to gain strategic leverage in the land use approval process.<sup>5</sup> Not surprisingly, a large variety and number of claims have been filed under RLUIPA in the short time since its passage.<sup>6</sup> And it is likely that where such disputes arise, they will consume an inordinate amount of time, energy, money, and social capital<sup>7</sup> in these communities.

Land use disputes that involve claims of religious freedom touch on some of the most contentious and difficult challenges of civic life. They raise the complex issue of how best to reconcile the concerns and imperatives of religiously motivated individuals or institutions with the interests of their neighbors, and the interests of the communities in which they exist.<sup>8</sup> These conflicts contain a significant potential to create social

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<sup>5</sup> In this article I mostly refer to the land use approval or permitting process, in which property owners seek the right to commence a new use on their property. However, many religious land use disputes involve enforcement actions, where the local zoning authority is seeking to halt or modify an existing use of the property that it alleges to be out of conformance with applicable zoning requirements. *See, e.g.,* *Murphy v. Zoning Com'n of Town of New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003), *vacated as unripe*, 42 F.3d 342 (2nd Cir. 2005) (challenging Town's cease and desist order issued to halt Sunday prayer meetings held in home in single family residential neighborhood). My analysis extends equally to both contexts, but for convenience I will mostly refer to the former.

<sup>6</sup> Advocates as well as scholars have attempted to track litigation filed under RLUIPA since its enactment. One public interest law firm involved in bringing RLUIPA keeps a running list of such cases on its web site. Becket Fund for Religious Liberty, at [http://www.rluipa.com/cases/court\\_cases.html](http://www.rluipa.com/cases/court_cases.html) (last checked March 27, 2006). While the courts could eventually strike down or all or parts of RLUIPA, the analysis set forth here will remain pertinent to the smaller universe of constitutional—as opposed to statutory—claims of religious discrimination in land use disputes.

<sup>7</sup> Professor Ackerman defines social capital as “the connections between individuals that build social networks.” *See* Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 Ohio St. J. on Disp. Resol. 27, 28 (2002) (citing ROBERT PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 19 (2000)).

<sup>8</sup> Richard Schragger has captured well the opposing views:

To Congress and the law's supporters, RLUIPA is necessary to prevent local governments from discriminating against particular religions (or religion in general) by limiting religious congregations' ability to build or expand places of worship. The charge is that localities enforce religious bigotry through the strategic use of often vague and standardless land-use ordinances and development processes. To its critics, RLUIPA is a dramatic interference with local power to enforce generally applicable zoning rules and an unnecessarily broad exemption that allows religious organizations (and no others) to flout a community's reasonable land-use concerns.

Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of*

divisions lasting long after a particular dispute has settled.<sup>9</sup>

The question addressed in this article is whether existing systems for processing religious land use claims are well suited to the task. The conclusion is that they are not, and that local officials and others involved in religious land use disputes ought to consider employing mediation at an early stage. The main virtue of mediation in this context is the opportunity it provides for disputants to meet face-to-face in an effort to understand—even if they do not agree with—the views of others. A facilitated meeting of persons with differing perspectives is precisely what is missing from the traditional systems of land use decision making, which, like the litigation process, is adversarial in nature and designed to keep separate rather than bring together those who disagree. Significant by-products of using mediation are the potential for increasing social capital in the community, and developing additional capacity within the community for problem-solving and healthy dispute resolution practices. These outcomes are likely to produce stronger and more vibrant communities.

Part I of this article examines the existing system for resolving land use disputes, why it is generally ill suited to the task of effectively resolving religious land use disputes. Part II describes the contentious cultural climate around issues of religion in our country, and how, as a product of that larger debate, RLUIPA has the potential to bring divisive religious disputes to every community in America. Part III looks more closely at the debate in the scholarly literature about the place of religion in public discourse, speculates concerning the challenges these issues present to local efforts to resolve religious land use disputes, and argues that mediation provides a good model to promote useful public dialogue in the midst of such disputes. Finally, part IV discusses concerns about and challenges to using mediation in these situations.

## I. THE ADVERSARIAL CHARACTER OF LOCAL LAND USE PROCEDURES

Parcels of real property are unique and highly local by definition, and local zoning regulations tend to reflect this and exhibit a tremendous variability from one jurisdiction to the next.<sup>10</sup> The idiosyncratic nature of

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*Religious Liberty*, 117 Harv. L. Rev. 1810, 1839 (2004) (footnotes omitted).

<sup>9</sup> Cf. Ackerman, *supra* note 7, at 59 (“communities that have been the focus of ... adjudicated zoning battles often require years to mend their wounds.”).

<sup>10</sup> This lack of uniformity is troubling for many, especially in the developer community, and there have been periodic calls for the development and adoption of more uniform laws and regulations. See, e.g., Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 Urb. Law. 449 (2002) (recommending reform of “the current Balkanized systems of planning”); Daniel R. Mandelker, *Model Legislation for Land Use Decisions*, 35 Urb. Law. 635 (2003)

local regulations creates tension with any jurisprudential or regulatory effort to exert a centralizing or unifying influence on, or supervision over, land use decision making. In the effort to assure accountability for local land use decisions while at the same time respecting democratic principles, judicial decisions and state-wide planning legislation have created a system of land use disputing that draws its inspiration from the adversarial and adjudicatory model of the courtroom.

As the size and complexity of the nation grew during the twentieth century, local officials increasingly saw the need for systematic community land planning and regulation.<sup>11</sup> There also arose a recognition—at least in urban areas and among urban planners—that communities face uniquely local challenges and opportunities relating to growth, and therefore some measure of discretion ought to be left to local officials to negotiate, in the context of specific land use proposals or issues, for the optimal distribution of benefits and burdens from development.<sup>12</sup> That discretion, however, creates a fundamental concern from the perspective of law and democratic governance, concern both as to the proper amount of discretion and the need to police concerns about civil rights, property rights, accountability, fairness and due process.

In response, both the courts and state legislatures have imposed upon local zoning officials a “quasi-judicial” model of decision-making aimed at: 1) curbing abuses of discretion when local authorities adjudge development proposals; and 2) facilitating subsequent judicial review.<sup>13</sup>

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(reviewing the American Planning Association’s model code for zoning procedures).

<sup>11</sup> Sullivan & Richter, *supra* note 10, at 451-54. See also, Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 Harv. Negot. L. Rev. 337, 340-44 (2002) (reviewing history of land use planning in the United States).

<sup>12</sup> See Ryan, *supra* note 11, at 349 (arguing that land use decision-making has grown increasingly discretionary and “has shifted from the planned to the particularized, affording a more ad hoc response to individual development proposals.”).

<sup>13</sup> See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problems of Local Legitimacy*, 71 Cal. L. Rev. 837, 850, 867 (1983). In this article, Professor Rose describes how the adjudicative model and the concomitant prescription of courtroom-like procedures arose from parallel developments in the field of administrative law. *Id.* at 844-53. From this premise, she argues that fundamental differences distinguishing large governmental bureaucracies from local governments—such as the idea that an administrative agency would possess a certain focus and expertise—were overlooked, and the resulting jurisprudence of local land use decisions tends to misconstrue the nature and benefits of local decision-making. She concludes that local land use decisions are best understood as efforts to mediate between private and public interests in the use of real property. Even in the administrative law context, however, many see the need for more collaborative forms of decision-making. See, e.g. Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982) (explaining arguments for the explicit recognition of private interests and the incorporation of direct negotiations with

Thus, formal public hearings may involve published and mailed notices, issuance of subpoenas, the administration of oaths, the right to present testimony and cross-examine witnesses, submission of written evidence and arguments, a record of the hearing, issuance of a formal written decision, and the right to an administrative appeal.<sup>14</sup> Typically, not all of these elements are present, and often they are not evident to the public. On the whole, public hearings in land use matters retain a structured formality calculated to keep opponents separated, talking only to the decision makers and not to each other.

To capture a sense of how this process embodies explicit and implicit adversarial values and assumptions, it is useful to describe in detail what transpires in a typical public hearing.<sup>15</sup> Just as in a courtroom, the participants and members of the public attending a zoning hearing sit facing forward towards the individual or panel that is charged with deciding the matter. They are expected to remain largely silent unless making a formal presentation up at the podium designated for speakers. The podium is usually situated at the head of the public seating area, and the speaker has his or her back to the audience while addressing the decision makers. After the agency's planning staff provides a staff report, the proponent of the application is invited to give a presentation concerning the details of the proposal. Aside from word of mouth, this is often the first glimpse of the project for those in the audience, and for many it may be their first experience with the formal zoning process.<sup>16</sup>

After these initial presentations and any follow up questions from the decision makers, people in the audience are invited to address issues concerning the project under consideration. If it appears that more than a few persons intend to speak, a strict time limit of 3-5 minutes is usually employed to keep things moving.<sup>17</sup> Occasionally there will be a follow up

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interested parties into the administrative agency rulemaking process in the case of difficult and contested proposals).

<sup>14</sup> See Sullivan & Richter, *supra* note 10, at 474.

<sup>15</sup> There is, of course, much variety in public hearings with respect to the physical layout of the hearing room as well as the form and formality of the proceedings. The following sketch is intended to be illustrative, rather than comprehensive, in its description.

<sup>16</sup> Persons more familiar with the zoning process may know that plans and other application materials can be viewed at the planning department at certain times of the day, and that they can ask for the assistance of a planning department employee to answer questions about the project. But even for these persons, work or other obligations may prevent them from doing so. For the very few people who are savvy, concerned, and have the time to do so, a written letter sent well in advance of the hearing is often the most effective way to voice their concerns, as is direct contact with agency staff involved with the processing of the application, when that option is available.

<sup>17</sup> Public hearings of local zoning boards or city councils are typically held on weekday evenings, and the agenda will often include many other items of business including other

question from a member of the decision making body, but for the most part they will, at best, sit listening impassively.<sup>18</sup> Thereafter ensues a period of discussion solely among the decision makers, which is often just a series of statements for public consumption intended to justify the vote the member expects to cast when all the speeches are over. The last formality will be the vote, after which the decision making body quickly moves on to the next matter on its agenda or goes home.

This more or less tightly choreographed bit of public theater is frequently the only time that proponents and opponents of the project are together in the same room. There are no opportunities, much less invitations, to engage in a dialogue to explore the mutual interests and concerns of those in attendance. Everything said and done is in the nature of performance and advocacy, calculated to cajole and persuade. And if the stakes are high, it is likely to devolve into little more than a lengthy shouting match, complete with cheers and jeers from the audience.

In the end, responsibility for the decision is left to the elected or appointed decision makers. In general, these decision makers are not planning or technical experts able to easily sift through the competing arguments and seize upon the logically and legally relevant morsels. Rather, this is a group of mostly well-intended community volunteers who, with the help of their underpaid and overworked staff, have the difficult job of weighing arguments and discerning the correct legal standards for application to the issues for decision.<sup>19</sup>

In sum, there is very little about the public hearing process that is designed, intended, or well suited to promote the sort of thoughtful dialogue and deliberation that commentators have argued is necessary to successfully

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public hearings. These meetings can run late into the evening, and the participants often feel pressed for time.

<sup>18</sup> For anybody expecting that decision makers will be held rapt by a speaker's eloquence, the recent case of *Lacy Street Hospitality Service, Inc. v. City of Los Angeles*, 125 Cal.App.4th 526, 22 Cal.Rptr.3d 805 (2004), offers an admittedly extreme, but nonetheless cautionary, tale. In that case, the court held that an applicant seeking modification of zoning restrictions applicable to its adult cabaret business was denied the right to due process when the City Council failed to pay attention during the applicant's presentation. 125 Cal.App.4th 530-31. The offending behavior of the City Council members, captured on videotape, included talking on their cell phones, eating, talking with aides, reading, and one "especially peripatetic" member who walked back and forth from one side of the council chambers to the other consulting with various colleagues. *Id.* at 529-30. The court noted that the council members also failed to pay attention during the testimony of opponents to the application. *Id.*

<sup>19</sup> Professor Rose argues that the only type of expertise these local officials are likely to have is political expertise, which creates tensions with the assumptions about impartiality that are central to the adjudicative model of decision making. Rose, *supra* note 13, at 869.

navigate the difficult terrain of religion in public discourse.<sup>20</sup> Particularly for members of the public, the press of time and lack of access to both information and to decision makers leaves them frustrated and with little choice but to fire away using their strongest claims and objections.<sup>21</sup>

The process of land use decision-making reaches its denouement, then, in a public hearing resembling a dramatic courtroom battle, with advocates making impassioned pleas to a third party decision maker.<sup>22</sup> But for some commentators—admittedly a step removed from the battlefield—what feels like a trial to its participants can be more usefully understood as the final session of a protracted bargaining process. In fact, taken as a whole, the land use decision-making process resembles to them nothing so much as mediation.<sup>23</sup> That theoretical lens lends support to the prescriptive thesis of the present argument, which is that actually using mediation offers a promising alternative for the resolution of religious land use disputes.

More than twenty years ago, at the dawn of the modern alternative dispute resolution era, Carol Rose argued that courts would do well to view the land use process as a form of mediation between the private and public

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<sup>20</sup> See *infra* text accompanying notes 26-31.

<sup>21</sup> Cf. Jayne E. Daly, *What's Really Needed to Effectuate Resource Protection in Communities*, 20 Pace Envtl. L. Rev. 189, 205 (2002) (“At a public hearing, residents are invited to comment on pending decisions, however, their ‘input’ is often too late to be meaningfully incorporated. Additionally, the public’s reaction to the proposal is often presented in an exaggerated fashion because of fear that local officials will not take their concerns seriously.”) The commentator, a practitioner on the front lines of community disputes, argues that citizens’ experiences with the public hearing process may explain survey data finding a relative distrust of city and county government zoning decisions. *Id.*

<sup>22</sup> A recent press report, while not involving RLUIPA, well illustrates the dynamics at play in public hearings involving religious issues. According to the San Diego Union-Tribune, 350 people—“most of them Christians”—showed up at a San Diego City Council hearing on whether to remove a large cross from the top of Mt. Soledad. The 29-foot tall cross has stood on a 5-foot base on city-owned property at the top of the mountain overlooking the city since 1954. It has been the target of legal actions by (persons identified in the article as) “atheists” since 1989. After 16 years of litigation, including a decision by the 9th Circuit in 2002, the city had no recourse left against an injunction requiring it to take down the cross. At what was described as an “emotional hearing,” one person opposed to removal was quoted as telling the council: “We will either prevail before this City Council to maintain the cross in its current location, or we will prevail in the 2006 and 2008 elections. It is not the jurisdiction of this City Council to negotiate away our religious freedoms. The Mount Soledad cross is non-negotiable.” See Matthew T. Hall, *No Clemency for Cross*, S.D. Union-Trib., March 9, 2005, at A1, available at 2005 WL 3785333.

<sup>23</sup> See Rose, *supra* note 13, at 889 (arguing that “piecemeal” zoning decisions—the small, ad hoc determinations concerning individual parcels or properties, a category that encompasses the bulk of religious land use disputes—“are far more realistically perceived as mediative than quasi-judicial.”). See also Ryan, *supra* note 11, at 357 (stating that a “mediation model is more realistic and less distorting”).

interests in land, rather than as an adjudication of property rights.<sup>24</sup> Her aim was primarily theoretical and jurisprudential, but Professor Rose acknowledged the possibility of employing mediation in this context. “Anthropological literature, and, increasingly, modern legal literature,” she wrote, “suggest negotiation and particularly mediation as an alternative dispute-resolving model especially appropriate at the local or sub-local level.”<sup>25</sup>

Rose points to the mixed public and private interests which co-habitate in any given parcel of land, and argues that local government—through its land use regulations and procedures—mostly acts in a mediative role, looking to find the best accommodation of these oft-competing interests.<sup>26</sup> Individuals serving on local elected and appointed zoning bodies, she argues, are not trained to dispassionately apply abstract rules of decision to competing property rights-based claims in a predictably disciplined process, and these bodies thus are not otherwise particularly competent to act as neutral judicial-like councils.<sup>27</sup>

Yet courts insist that local governments act more judicially when making decisions about individual land uses proposals, and this creates unintended consequences along with predictable efforts to evade these restraints. Local officials have shown an “irrepressible inventiveness” in finding ways to preserve or increase their discretion in land use decision-making.<sup>28</sup> In this way, local governments have retained a significant ability to bargain ad hoc when presented with a land use proposal. Often that negotiation happens behind the scenes and is not readily apparent to local residents. It takes place in the form of various one-on-one contacts and other meetings between applicants and the local government’s professional and technical staff, local officials, motivated citizens, and perhaps staff from other government agencies. Most such negotiating is a response to differing views about the requirements of applicable local, state, and federal

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<sup>24</sup> Rose, *supra* note 13.

<sup>25</sup> *Id.* at 888-89. While Professor Rose’s analysis has not yet found a home in modern land use jurisprudence, one recent commentator has argued that subsequent advances in scholarship and theorizing of dispute resolution have only strengthened the appeal of her arguments. See Ryan, *supra* note 11, at 357-59 (calling Rose’s work “the most convincing theoretical analysis of the necessary role of bargaining in local land use decision-making”).

<sup>26</sup> Rose, *supra* note 13, at 887-88 (stating that development proposals “pit the proponent of change against the interests of neighborhood property owners or some larger segment of the community”).

<sup>27</sup> See *supra* note 19, and accompanying text. Rose argues that the insistence on judicializing land use “at once asks too much and too little” of local governments: too much in supposing that they can plan their futures well enough to develop fair and useful guidelines for adjudicating future land use proposals; and too little in accepting that they will apply these speculative and vague guides in a fair and impartial manner. *Id.* at 881.

<sup>28</sup> *Id.* at 879-80.

regulations, or in connection with the environmental review process, if any. By the time the proposal reaches its last act in the public hearing, most if not all such negotiations are complete or abandoned, and a more or less final package is presented to the decision making body for a yes or no vote.

This opaque quality of the land use process poses a difficult challenge for efforts to promote a healthy civic discourse around religious land use disputes. Many citizens directly impacted by and most passionate about a dispute will feel shut out of the decision making, and may conclude—not without some justification—that the result was pre-ordained. Their only opportunity to express support, opposition, or any other concerns or feelings may be a two or three minute presentation, during an emotional hearing and before a packed audience, where some will be too intimidated to make any public statement.<sup>29</sup>

Similar to a formal judicial proceeding, participants in such a public hearing must address their arguments to a purportedly disinterested and neutral third party, and are not encouraged to speak to one another. The proceedings have a formal quality, and speakers are told to raise and discuss only a narrow range of legally and factually relevant arguments. After the vote on the matter, some will walk away feeling vindicated while others will feel they have lost or been victimized.

Contrast this public hearing scenario with that of a mediation involving the same religious land use dispute. The key discussions and negotiations would directly involve all interested parties, though representative spokespersons would likely be selected to organize and make more efficient the actual bargaining aspects of the mediation. With the assistance of a skilled mediator or facilitator, participants would be invited to express their concerns in a structured but collegial and more informal environment. The local zoning authority would be represented and participate as an interested party, but also with the understanding that it retains formal responsibility to review and approve any proposal that is reached as a result of the mediation. Much time and effort would be spent to ensure that participants understand—even if they do not agree with—the views and concerns of others. Also, the scope of issues and concerns addressed in the mediation would not be strictly limited to those considered relevant by the state legislature or the courts. Rather, the idiosyncratic issues of the dispute and the needs of the individuals and community

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<sup>29</sup> In addition to the pressures of time and emotions, many people also suffer from a fear of public speaking that will discourage them from voicing their thoughts and concerns. Choosing not to speak may deprive them of the cathartic benefit which often accompanies self-expression, and may deprive others of the benefit of that person's viewpoint, including information that might influence the decision making process.

involved could be addressed, in addition to the more abstract and technical concerns found in local zoning regulations.

This type of mediation allows the community to work out a difficult issue in a neighborly fashion. Passionate feelings can be expressed, but there is ample opportunity—and, with the assistance of the mediator, the skills and techniques necessary—to foster the sort of discussion and understanding necessary to bridge the divide among participants. Consensus solutions can be explored absent the imminent threat of a decision being imposed by a third party. If consensus is reached, the participants walk away with the knowledge that they arrived at their own decision in a principled and fair fashion. The resulting consensus sends a strong message to the ultimate decision-making body about what the community feels is an appropriate resolution and an appropriate distribution of benefits and burdens resulting from the decision.<sup>30</sup>

In contrast to the adjudicatory approach to resolving religious land use disputes, mediation is more likely to foster a climate of fully-engaged and respectful deliberation among the parties most affected by the use in question, and to create or increase tolerance and understanding among members of the community with differing religious concerns and commitments. Additionally, effective citizen participation in dispute resolution mechanisms at the community level may enhance a community's capacity for disputing productively and spur increased levels of social capital, both of which encourage a more robust civic life and well-functioning democracy.<sup>31</sup>

The divisive nature of religious conflict is both the impetus for the argument that religious land use disputes are ideal candidates for mediation, and the primary challenge facing those who undertake such an effort. For this reason, it is worth looking more closely at the larger social and cultural forces that led to the enactment of RLUIPA, and how they manifest at the local level in the form of religious land use disputes. This issue is examined next.

## II. CULTURE WARS AND THE NEW WAVE OF RELIGIOUS LAND USE DISPUTES

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<sup>30</sup> See, e.g., Gus Bauman, *Land Use Mediation: Negotiation with Municipalities to Get Project Approval without Litigation*, SF08 ALI-ABA 519, 525 (2000) (“a mediated plan is not likely to be rejected by the locality or taken to court by neighbors). Mediation should not wholly supplant the public hearing and formal decision making processes of the local zoning authority. See *infra* note 119 and accompanying text. But local governments, while retaining formal authority to approve or deny a project, will have a strong incentive to adopt the consensus solution reached in a mediation in which it participated, if only because the other parties will hold that expectation.

<sup>31</sup> See *infra* Part III.C.

The interplay of religion and public policy is the subject of a vigorous debate in contemporary American society.<sup>32</sup> There is the litany of causes—prayer in public schools, abortion, display of religious symbols on government property, gay marriage, and others—that seem to continually test our capacity for reasoned deliberation and tolerance for diversity.<sup>33</sup>

After the last presidential election, the airwaves, newspapers, and the Internet were saturated with stories about religion and its influence on electoral (and judicial) politics.<sup>34</sup> In the year-end holiday season that followed, the usual battles over placement of religious symbols on public property were subsumed in a broader debate about putting “more Christ into Christmas.”<sup>35</sup> It seems these days that every public issue with religious

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<sup>32</sup> See, e.g., Robert Justin Lipkin, *Reconstructing the Public Square*, 24 *Cardozo L. Rev.* 2025, 2026 n.6 (2003) (“controversies over the appropriate limits of Church and State have gained a ferocious intensity over the past quarter of a century”); Alberto B. Lopez, *Equal Access and the Public Forum: Pinette’s Imbalance of Free Speech and Establishment*, 55 *Baylor L. Rev.* 167, 169, 169 n.5 (2003) (collecting recent newspaper articles and asserting that concern about separation of church and state “permeates public discourse”). Issues of church and state are also contested abroad, though perhaps with less acrimony. See, e.g., Ian Fisher, *Letter from Europe; Italy’s Church and State: A Mostly Happy Union*, *N.Y. Times*, December 1, 2004, at A4, available at 2004 WLNR 12606835 (describing the effects of the established church on the social and political life of Italy, and exploring similar themes in other western European nations).

<sup>33</sup> See, e.g., Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 *Minn. L. Rev.* 1047, 1070-73 (1996) (arguing that political changes in the 1960’s lead to political organizing and activism among evangelical Christian groups, resulting in “bitter national debates” with liberal and Jewish interest groups).

<sup>34</sup> See, e.g., Frank Rich, *2004: The Year of ‘The Passion,’* *N.Y. Times*, December 19, 2004, Section 2, at 1, available at 2004 WLNR 14330194 (reporting that immediately after the election NBC’s “Meet the Press” and ABC’s “This Week” Sunday talk shows featured religious leaders discussing religious values and electoral outcomes).

<sup>35</sup> The Associated Press recently reported on a nationwide effort to highlight the Christian meaning of Christmas, providing notable examples of activism including an effort to boycott major department stores that have replaced “Merry Christmas” with “Happy Holidays” signs in their windows, and reporting that one organization, the Alliance Defense Fund, has a list of 800 lawyers “waiting in the wings” to litigate these matters. Allen G. Breed (Associated Press), *Christian Conservatives Say it’s ‘Christmas’ time; Their Election-induced Push Against “Holiday” and “Season” Greetings Draws Support, Concern*, *Philadelphia Inquirer*, December 15, 2004, at A3, available at 2004 WL 103345658 (“Emboldened by their Election Day successes, some Christian conservatives around the country are trying to put more Christ into Christmas”). *Id.* There were the usual assortment of disputes over religious symbols, as well. See, e.g., Alan Cooperman, *Evangelicals Use Courts to Fight Restrictions on Christmas Tidings*, *Washington Post*, December 20, 2004, at A1, available at 2004 WL 101231741 (reporting several disputes over Christmas trees on public property, the singing of carols in schools, inclusion of mangers in public school plays, and the like); Julie E. Bisbee (Associated Press), *Pulled Nativity Irks Voters in Oklahoma*, *Orlando Sentinel*, December 19, 2004, at A3 (reporting

implications is hotly contested.<sup>36</sup>

While the political rhetoric heated up in Washington, D.C.,<sup>37</sup> most actual disputes involving religion are and continue to be played out at the local level, in communities and schools.<sup>38</sup> Not surprisingly, religious land use disputes are highly localized.<sup>39</sup> Thus, when Congress enacted RLUIPA

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that voters in Mustang, Oklahoma, defeated two school bond measures in retaliation for the decision of the school administration to remove a nativity scene from a school Christmas Program).

<sup>36</sup> Former Reagan appointee Clint Eastwood, interviewed about accusations aired on political talk shows that his Oscar-winning film, *Million Dollar Baby*, was intended to promote euthanasia, expressed frustration at the current cultural and political climate:

‘I never thought about the political side of this when making the film,’ Mr. Eastwood says. He is both bemused and concerned that a movie with no political agenda should be construed by some as a polemic and arouse such partisan rage. ‘Maybe I’m getting to the age when I’m starting to be senile or nostalgic or both, but people are so angry now,’ he adds. ‘You used to be able to disagree with people and still be friends. Now you hear these talk shows, and everyone who believes differently from you is a moron and an idiot - both on the right and the left.’

Frank Rich, *How Dirty Harry Turned Commie*, N.Y. Times, Feb. 13, 2005, Section 2, at 1, available at 2005 WLNR 2040605.

<sup>37</sup> See, e.g., Will Lester (Associated Press), *Right Wing Set to Press Agenda; Supreme Court Vacancies Would Get Top Priority*, The Columbian, January 2, 2005, at A10, available at 2005 WLNR 94687 (reporting that in the aftermath of President Bush’s reelection, “[s]ocial conservatives want to push for a federal ban on gay marriage, new restrictions on abortion and rollbacks of laws limiting a church’s participation in politics”); David D. Kirkpatrick, *Evangelical Leader Threatens to Use His Political Muscle Against Some Democrats*, N.Y. Times, January 1, 2005, at A10, available at 2005 WLNR 22492 (reporting that “James C. Dobson, the nation’s most influential evangelical leader, is threatening to put six potentially vulnerable Democratic senators ‘in the bull’s-eye’ if they block conservative appointments to the Supreme Court.”).

<sup>38</sup> See, e.g., Sara B. Miller, *In Schools and Cities, Battles over ‘Christ’ in Christmas*, Christian Science Monitor, December 15, 2004, at 1, available at 2004 WL 58698416 (noting that “years of lawsuits [have] caused schools and local governments to pull back from” traditional forms of celebration of Christmas); cf., Schragger, *supra* note 8, at 1811 (“Much of the Supreme Court’s modern Religion Clause doctrine has been forged in conflicts that directly implicate the traditional powers of local governments: primary and secondary education, land use, police powers”).

<sup>39</sup> The courts have long recognized that land use regulation is a “quintessentially” local matter. See *Murphy v. New Milford Zoning Com’n*, 402 F.3d 342, 348-49 (2nd Cir. 2005) (stating that “land use disputes are uniquely matters of local concern more aptly suited for local resolution,” and citing similar decisions from other circuit courts of appeal); see also, Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 Ind. L. J. 311, 353 (2002) (hereinafter, Hamilton, *Federalism*). As Professor Hamilton, a prominent critic of RLUIPA, explains:

Land use law has always been a creature of state and local law. The reason for this is three-fold. First, the permanent nature of land—its immovability—makes its uses far more relevant to those who are nearby than those who are far away. Second, how land is used is an essential

it took an unprecedented step into local waters,<sup>40</sup> and the result has been a wave of religious land use disputes in communities nationwide.<sup>41</sup> To better understand the consequences of what Congress has done, it is helpful to briefly review the emergence of RLUIPA from the broader battles involving the Free Exercise Clause in the courts and in Congress.<sup>42</sup>

The events leading to the enactment of RLUIPA demonstrate that this national debate over religion has now filtered down to local communities in the form of religious land use disputes. Between 1960 and 1990, beginning with the decisions in *Sherbert v. Verner*,<sup>43</sup> and then *Wisconsin v. Yoder*,<sup>44</sup> the Supreme Court began to back away from a bright line distinction between religiously motivated actions and religious beliefs, and on occasion invoked a balancing test requiring the government to justify a substantial burden imposed on a person's religious practice.<sup>45</sup> Then, in 1990, a divided court in *Employment Division v. Smith* declared "an individual's religious beliefs [do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate," igniting a debate concerning the history and meaning of the Free Exercise

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ingredient for communities to develop their character and to pursue shared purposes. Land use law is one of the key ways that communities come together to set priorities, to establish their character, and to meet fiscal, aesthetic, and lifestyle needs. Third, by keeping land use law local, citizens have more direct access to their representative (than if those representatives were national) and a proportionally larger voice in the land use process that directly affects them. Land use law is enacted by the state and local governing bodies and implemented by locally elected or appointed boards, with publicized public hearings an integral component in altering the law and in applying it.

*Id.* at 335 (footnotes omitted).

<sup>40</sup> See Schragger, *supra* note 8, at 1839 ("RLUIPA is, in essence, the first national land-use ordinance.").

<sup>41</sup> *Id.* at 1839 n.121 (compiling RLUIPA decisions). See, also, Allison B. Cohen, *Neighbors Divided; A Religious Land-use Law Designed to Protect Institutions Fuels Some Zoning Disputes*, L.A. Times, April 25, 2004, at K1, available at 2004 WL 55908541 (estimating there were 50 active RLUIPA cases nationwide).

<sup>42</sup> For a comprehensive look at this history, see Hamilton, *Federalism*, *supra* note 39.

<sup>43</sup> 374 U.S. 393, 403 (1963).

<sup>44</sup> 406 U.S. 205, 220 (1971).

<sup>45</sup> The distinction between actions and beliefs was set out in the Supreme Court's first Free Exercise case, *Reynolds v. United States*, 98 U.S. 145 (1879), affirming the bigamy conviction of a Mormon. See, generally, ROTUNDA & NOWAK, TREATISE ON CONSTITUTIONAL LAW, §§ 21.7-21.8 (3d. ed. 1999); Alan C. Weinstein, *Land Use Regulation of Religious Institutions: Balancing Planning Concerns with Constitutional and Statutory Safeguards for Religious Freedom*, in PROTECTING FREE SPEECH AND EXPRESSION: THE FIRST AMENDMENT AND LAND USE LAW 150-51 (Daniel R. Mandelker & Rebecca L. Rubin, Eds., 2001).

Clause.<sup>46</sup>

Fearing that important constitutional guarantees had been undermined, religious groups intensively lobbied Congress to step in and restore what they felt had been lost.<sup>47</sup> Their efforts bore fruit initially with the passage of the Religious Freedom Restoration Act of 1993 (“RFRA”), which was explicitly aimed at overturning the result in *Smith* by incorporating the strict scrutiny standard from *Sherbert*.<sup>48</sup> However, RFRA was quickly invalidated in *City of Boerne v. Flores*, when the Court held that Congress had exceeded its enforcement powers under Section 5 of the Fourteenth Amendment.<sup>49</sup>

After the *Boerne* decision, the Religious Liberty Protection Act of 1998, followed by the Religious Liberty Protection Act of 1999, were introduced into Congress. Both bills were substantially similar to RFRA, in that they applied broadly to state and federal regulations and actions of every kind, although this time Congress was mindful to claim authority under its Spending and Commerce powers, in addition to the enforcement power under Section 5. In the latter of these two bills, Congress for the first time inserted language specifically relating to land use regulation. It justified these new provisions by declaring that land use regulation “lacks objective, generally applicable standards, and instead relies on discretionary, individualized determinations,” and stated that Congress was responding to “the established evidence of discriminatory land use regulations based on Congress’ remedial power under Section 5 of the Fourteenth Amendment, pursuant to the Court’s directive in *Boerne*.”<sup>50</sup>

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<sup>46</sup> 494 U.S. 872, 879 (1990). In *Smith*, the Court held that a criminal law banning the use of peyote was valid even though it was applied to deny unemployment benefits to members of the Native American Church who used peyote for sacramental purposes and were dismissed from their jobs in a private drug counseling program for using an illegal drug. Justice Scalia, writing for the majority, reasoned that the right of free exercise of religion does not relieve individuals of the obligation to comply with valid, religiously neutral laws of general application. Much criticism has focused on the Supreme Court itself. See, e.g., Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. Jefferson L. Rev. 333, 333-338 (2004) (arguing that the Court’s Free Exercise jurisprudence is plagued by “inconsistencies [which] have prompted serious concerns about the Court’s competency in resolving church-state problems”).

<sup>47</sup> See Schragger, *supra* note 8, at 1835-36.

<sup>48</sup> *Id.* RFRA is found at 42 U.S.C. 2000bb-1(b) (1993), and provides as follows: “Government may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of further that compelling governmental interest.”

<sup>49</sup> 521 U.S. 507 (1997) (holding unconstitutional the application of RFRA to a local historic landmark dispute involving property owned by the Catholic Church).

<sup>50</sup> H.R. NO. 106-219, at 17 (1999). Critics have disagreed with these conclusions,

Significant opposition arose to these bills, however, and neither passed.<sup>51</sup> After these legislative efforts failed, a few members of the sponsoring coalition persevered, introducing a compromise bill retaining only the land use elements plus a provision regarding “institutionalized persons.” That bill, RLUIPA, passed Congress and was signed into law by President Clinton, effective September 22, 2000.<sup>52</sup>

RLUIPA places the religious discrimination claims of owners or users of real property on par with traditional civil rights litigation. It creates an exemption for religious land users to all state and local government zoning or landmarking laws when such laws substantially burden religious exercise, unless the law furthers a compelling governmental interest and is the least restrictive means of doing so.<sup>53</sup> RLUIPA reverses the long-established presumption of validity and respect traditionally accorded the decisions of local planning and zoning officials, and, together with the threat of large attorneys fees awards, has created an atmosphere where many counties, cities, and towns accede to the demands of potential plaintiffs who can assert religious reasons for the use or proposed use of their property. In addition, the U.S. Department of Justice (“DOJ”) has pursued RLUIPA enforcement actions against local jurisdictions in conjunction with suits by religious congregations, putting additional pressure on these communities to settle rather than pursue legal claims.<sup>54</sup>

Because RLUIPA potentially applies to any person or organization that uses real property for a religious purpose, the statute creates a large spectrum of possible objections to zoning regulations. Each dispute will be unique, involving a different parcel of property, different religious acts and purposes, different sets of zoning regulations, different communities, not to mention different personalities. Nonetheless, it is possible to identify some typical, recurring themes thus far in religious land use disputes:

- *Locating in commercial and industrial areas.* Churches<sup>55</sup> will

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arguing that Congress made no effort to investigate and understand the nature of land use regulation, and that it failed to establish (as required by the *Boerne* decision) a pattern of widespread religious discrimination in land use regulations or activities. *See, e.g.*, Hamilton, *Federalism*, *supra* note 39, at 335-52.

<sup>51</sup> Hamilton, *Federalism*, *supra* note 39, at 335-52.

<sup>52</sup> *Id.* at 334.

<sup>53</sup> 42 U.S.C. sec. 2000cc(a)(1). RLUIPA also imposes certain related categorical prohibitions in the regulation of religious exercise. *See supra* note 3.

<sup>54</sup> *See, e.g.*, Adam Liptak, *Justice Dept. Takes Up a Little Church’s Zoning Fight*, N.Y. Times, July 4, 2003, at A14, *available at* 2003 WLNR 5170419 (reporting that DOJ had initiated enforcement proceedings in conjunction with a RLUIPA action brought by a religious congregation against the County of Maui, Hawaii).

<sup>55</sup> The use, in this article, of the term “church” may refer either to the community of religious practitioners or the physical structures associated with their use of a site, or both,

often attempt to locate in depressed commercial areas or even shopping centers where land values and rents are low. Local governments and local merchants, who argue that having major noncommercial uses in commercial areas will thwart efforts to reinvigorate and grow the commercial district and the local economy, sometimes oppose these efforts.<sup>56</sup>

- *Expansion in residential zones.* Existing churches in residential zones are often small, but may wish to expand the scope and intensity of their activities, or expand their physical facilities to accommodate growth in membership.<sup>57</sup> The historic model of small community-oriented churches has become outdated in recent years; many churches are quite entrepreneurial (for example, renting facilities for receptions and other social gatherings), and have a full calendar of events throughout the week. Many have active and varied ministries involving religious education and daycare, feeding and housing the homeless, substance abuse rehabilitation, counseling, or shelters for abused persons. Yet many communities have not updated their planning regulations in response to these societal changes, and others find themselves constrained because they are older, “built-out” communities, limited in their ability to change historic development patterns.
- *Use of Single Family Residences.* A recurring dispute under RLUIPA involves religious groups or individuals seeking to use single-family homes in single-family neighborhoods for their religious activities. Neighbors of such uses often are concerned about the loss of residential character that can accompany the conversion from residential to religious use.<sup>58</sup>
- *Religious Schools.* Another common situation has been the siting or expansion of schools associated with religious

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and should be understood to include similar institutions such as temples and mosques.

<sup>56</sup> See, e.g., *Elsinore Christian Center v. City of Lake Elsinore*, 291 F.Supp.2d 1083 (C.D. Cal. 2003) (congregation sought to locate to a commercial district).

<sup>57</sup> See, e.g., *Grace United Methodist Church v. City of Cheyenne*, 235 F.Supp.2d 1186 (D. Wyo. 2002) (church in a low-density residential area sought permit to operate an on-site day-care facility).

<sup>58</sup> See, e.g., *Murphy v. Zoning Com’n of Town of New Milford*, 289 F.Supp.2d 87 (D. Conn. 2003) *vacated as unripe*, 402 F.3d 342 (2nd Cir. 2005). In *Murphy*, a couple living at the end of a cul-de-sac hosted regular prayer meetings involving as many as 50-60 guests. The town issued an order limiting the number of attendees to 25, the homeowner sued, and the court granted an injunction against the town, finding that the town’s actions violated RLUIPA. The injunction was subsequently vacated on appeal to the Second Circuit, on ripeness grounds.

organizations.<sup>59</sup> Whether small or quite large, as some are, religious schools feature all the same impacts as other schools, including traffic, large events, noise, morning and evening hours, and they frequently draw objections from neighboring residential uses.

As the above examples suggest, religious land use disputes usually involve individuals or groups who are part of a larger community, but are at cross-purposes with some in that community. To give a better sense of how mediation might work in such situations, consider a hypothetical example of the first type of dispute described above, where a long-established congregation in a residential neighborhood seeks to remodel, modernize, and expand its facilities. The congregation submits an application to remodel its sanctuary and expand the seating area for religious services, to build a new multi-purpose room for meetings and receptions or other events involving up to five hundred people, to construct two additional classrooms for the existing preschool, and to provide fifty additional parking spaces. The plan also calls for new lighting and additional landscaping. In addition, the operational plan proposes to expand the hours of operation until 10 p.m. on weekdays and midnight on Fridays and Saturdays, an increase in the frequency of the congregation's religious services, as well as an increase in the use of facilities by outside organizations. The proposal also includes a plan to increase preschool enrollment by one-third.

The application comes before the city's planning commission for an initial public hearing to consider the potential environmental impacts of the project. Project opponents include a group of nearby residents who have just created an informal neighborhood association to represent their views and concerns to city officials. The hearing draws a standing room only crowd, roughly split between opponents and supporters, the latter including many congregation members. From the testimony, it is clear that the project has been carefully conceived and is very important to its supporters. They believe it is urgently needed to ensure the future well being of the congregation and their ability to pursue their religious mission. It is likewise clear that the nearby residents have legitimate concerns about the impact the project will have on their lives.

The congregation believes that without improvements to its decades-old facilities, strained as well by the gradual growth in the size and activities of its membership, they will be unable to meet the needs and expectations of their members for a vital and relevant ministry. The

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<sup>59</sup> See, e.g., *Westchester Day School v. Village of Mamaroneck*, 386 F. 3d 183 (2nd Cir. 2004) (Orthodox Jewish day school with enrollment of 470 sought to construct 25 additional classrooms and a multi-purpose room on existing site).

neighbors, on the other hand, already have concerns about the amount of traffic and the number of activities occurring in what they see as an otherwise quiet residential enclave, and they view the expansion plans with even greater concern. They anticipate increased levels of traffic and noise to be generated throughout the day and into the night each day of the week, adversely affecting the character of their neighborhood and lowering property values.

At the hearing, the planning commissioners allow for two hours of emotional presentations before concluding the public testimony. In the discussions that follow, several commissioners are clearly uncertain about how to proceed, and express concern both for the needs of the congregation and for the interests of the residents. Two commissioners state that they would like to see more analysis on nighttime noise impacts, weekend traffic volumes, along with additional details on the landscaping plans and an alternative daily schedule for the preschool. Ultimately, the commission votes to delay any decision until its next meeting, and asks its staff to provide additional information at that time.

At this particular moment in our hypothetical dispute, there is a good opportunity to intervene using a mediated process. A concrete land use proposal is on the table, the opposition to that proposal has surfaced, and the important interests and issues have been identified. Yet it is still early enough in the process that positions have only just been aired, remaining tentative and subject to discussion and subject to the development of further information. Importantly, no public allegations of religious animus or discrimination have been made—at least not yet. The city, being the regulatory authority charged with making the decision on the application, may be in the best position to persuade the parties to try mediation. A planning department staff member who is familiar with the process might informally discuss the possibility with persons on each side of the dispute, including the representatives of the congregation and the lawyer for the newly formed neighborhood association. Alternatively, an independent public policy mediator might be asked to conduct an assessment of the dispute to determine the prospects for a successful mediation, what the key issues are likely to be, and who the critical stakeholders are that should be invited to participate in the mediation.

If a mediation process is thereafter convened, a face-to-face dialogue among the various interested parties—at a minimum, representatives of the applicant, the residents, and the city—can begin. In this dialogue the parties will have a full opportunity to present their concerns in a setting conducive to respectful listening and reasoned discussion. The benefits of the mediation setting are due in part to the presence of a skilled neutral who has gained the trust of the parties along with a commitment to try and

understand each others' views, but also due to the absence of a packed hearing room and the imminent threat of an adverse decision hanging over the proceedings. Under such circumstances, the parties are better able to explore areas of mutual interest and agreement, to clarify areas of disagreement or matters that require the development of further information, to seek compromise on some matters and win-win solutions on others, and, at a minimum, gain a better understanding of each other's needs, concerns, and viewpoints.

It seems likely in our hypothetical that, after having the opportunity to sit down and discuss the issues with the aid of the mediator, the congregation's representatives will quickly see that the opposition of surrounding residents stems from their fear of the impacts of the proposed development, and is not the result of religious animus. Likewise, neighborhood representatives will better understand the needs and motivations driving the proposal, and this mutual understanding can provide the basis not only for a creative resolution but also for productive future relations. In contrast to this scenario, if mediation is not considered and the congregation's application is either denied or approved with unacceptable conditions, the scene is set for a RLUIPA claim. Where an administrative appeal is available or required, the congregation may begin to lay the groundwork for a legal challenge by asserting that the city's regulations—either on their face or as applied by the planning commission—violate RLUIPA. And once this rights-based dynamic asserting religious discrimination firmly takes hold, the stakes become higher and the dispute will become much more difficult to entangle—even for the most skilled mediator. With each allegation, insinuation, or even suspicion of religious animus, community ties will be strained or broken, and the community's social fabric further distressed.

In summary, despite the potential for an acceptable resolution and even mutual benefit in such disputes, if they devolve into claims of religious discrimination there is a significant risk of harm to the affected neighborhoods and communities. The next part examines this contention more closely, focusing on the difficulties we, as Americans, experience when attempting reasoned discussion and deliberations over public issues involving religion, and why it is important that we find a way to do so.

### III. RELIGION IN THE PUBLIC SQUARE

#### *A. The Risk of Polarization in Arguments over Religion*

In general, people who live in the same community will share many concerns about environmental planning issues. These common interests

both contribute to and provide an impetus for harmonious relations. Disputes over traffic, noise, and aesthetics may generate a few impassioned speeches, but are not frequently bitter and divisive in the long term. It is much less likely, however, that a community will share common views about religion to the same extent. Even people who share the same faith may give religious considerations a very different priority when it comes to land use issues that affect them personally.

With the passage of RLUIPA, disputes that once focused on mundane planning issues such as traffic, noise, and aesthetics, become contests over religious freedom and the place of religion in a liberal democracy. Not only are there likely to be divergent views as to the religious claims involved, but also there will be a tendency to engage in a zero-sum contest of wills over these issues. Land use applicants who assert religious reasons for the use of property gain the possibility of an exemption from the zoning laws that apply to everybody else, and at the very least obtain tremendous leverage from the highly credible threat of imposing litigation costs and an award of attorney's fees.<sup>60</sup> Few, if any, such applicants can be expected to forego the strategic advantage of a religious discrimination claim.

The transformation of a land use dispute into a civil rights claim of religious discrimination is problematic because it carries a significant risk of polarization between the parties and in the community.<sup>61</sup> Of course, heated accusations and divisive partisanship are not limited to religious issues, as anybody who has witnessed a public hearing over a controversial land use matter can attest. But religion implicates core identity issues, reliably causing disputants to act and react in defensive and sometimes

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<sup>60</sup> For example, according to a recent press report from the city of Ontario, California, a congregation that had sought to build a new church settled their dispute with the city on favorable terms once they had amended an existing complaint to include a RLUIPA claim. Brenda Gazzar, *Church Lawsuit Settled*, Inland Valley Daily Bulletin, February 10, 2005. City planners and neighbors had opposed the new church, citing concerns about traffic, parking and disruption of economic plans for that area. *Id.* "I think the RLUIPA claim changed the complexion of the case," noted an attorney with a national organization who had assisted the congregations with its RLUIPA claim, "That's when the city wanted to talk settlement." *Id.* The City Manager of Ontario opined that the \$150,000 the city agreed to pay "was a good settlement because our attorneys certainly believed it was likely that the city could lose the case, and that we could have to spend far more than what we settled for." *Id.* A member of the city council agreed, pointing out that, as he understood RLUIPA, "there is no way the city can legally keep them from locating wherever they please." *Id.*

<sup>61</sup> Professor Lipkin argues that religious arguments create a "Tower of Babel" of political debate, that it "paradoxically personalizes and objectifies political debate, and...is altogether too powerful for democratic purposes." Lipkin, *supra* note 32, at 2027 n.9 and accompanying text.

extreme ways.<sup>62</sup> Like disputes involving race and ethnicity, disputes that divide along religious lines are particularly volatile and prone to expressions of bigotry and hatred, leading in some instances to the use of intimidation and violence.<sup>63</sup> As Professor Nagel has stated about religious argumentation in the context of the abortion debate:

It is so urgent and one-sided as to leave no room for broader perspective or compromise. It makes opponents into enemies and thus induces both hatred and a sense of futility. Worse, these defects are progressive, for extreme moral claims of this kind can be answered only by ratcheting up the intensity of argumentation. As charges fly back and forth, even the very basic inhibition against using falsehoods begins to drop away.<sup>64</sup>

In summary, RLUIPA is likely to bring religious discrimination claims front and center in many land use disputes. Having previously asserted that mediation is better suited to dealing with this difficult issue than the current system of land use dispute resolution, the next section looks more closely at the highly contested debate over religion in the public square, and how that debate both makes clear the depth of the problem identified, but also contains the seeds of a responsive approach to resolving these disputes.

### *B. Religious Arguments in Public Discourse*

A vigorous theoretical debate has accompanied the public shouting over politically charged issues touching on religion, such as abortion, school prayer, and the display of religious symbols on public property. The debate concerns the propriety of religious arguments in deliberations and decisions about legislation and public policy.<sup>65</sup> Some legal commentators

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<sup>62</sup> See, e.g., Kenneth Karst, *Local Discourse and the Social Issues*, 12 *Cardozo Stud. L. & Literature* 1, 12 (2000) (“Issues concerning gender, race, and religion are laden with emotion because they touch the sense of self.”).

<sup>63</sup> The volatility of ethnic and religious conflict is perhaps more tragically evident elsewhere in the world. See, e.g., VAMIK VOLKAN, *BLOODLINES: FROM ETHNIC PRIDE TO ETHNIC TERRORISM* (1997) (examining the role of ethnicity and religion in violent conflicts around the world from the perspective of group identity formation and psychoanalytics).

<sup>64</sup> ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* 159 (2001) (quoted in Lipkin, *supra* note 32, at 2027 n.9). Of course, the concern about extreme argumentation is not limited to religious or even moral arguments, and may occur in almost any context where a proponent aggressively pursues a position despite the lack of acceptance by opponents of the argument’s premises. Conflicts touching on religion seem particularly prone to this form of adversarialness, however.

<sup>65</sup> See, e.g., Lipkin, *supra* note 32, at 2026 n.1 (compiling scholarly books and articles on this issue). Lipkin divides the “warring factions” in this debate into the “inclusionists,”

advocate for explicit recognition of religious moral values as the basis for at least some government legislative and policy actions, pointing to “the founders’ anchoring of American humans right upon sovereign presupposition of a Creator.”<sup>66</sup> Others tread more carefully around Establishment Clause objections to the use of religious justifications for law and policy, arguing that a “law that coincides with moral teachings of some religion does not establish that religion.”<sup>67</sup>

For those who assume that such public discourse is or ought to be a brawling, wide-open affair, it will come as something of a surprise that there is any controversy at all.<sup>68</sup> In any case, it is clear that many believe that religious voices have been stifled or excluded from the debates over legislation and policy.<sup>69</sup>

Assuming religious arguments are being excluded, why would reasonable citizens seek to bar any sincerely held views from public debates, even if founded in religious beliefs? A frequent target of *inclusionists* is political theorist and philosopher John Rawls,<sup>70</sup> who sought

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who welcome religious arguments, and the “exclusionists,” who seek to limit debate to secular arguments only. *Id.* at 2025.

<sup>66</sup> Douglas W. Kmiec, *Oh God! Can I Say That in Public?*, 17 Notre Dame J. L. Ethics & Pub. Pol’y 307, 312 (2003). Professor Kmiec further explains his view that such explicit recognition was intended to protect individual liberty from the power of the state: “Anchoring basic rights upon a metaphysical source is very much part of that structural separation, for without God, the law is invited to become god.” *Id.* at 313.

<sup>67</sup> Laycock, *supra* note 33, at 1082 (discussing *Harris v. McRae*, 448 U.S. 297, 318-20 (1980)).

<sup>68</sup> *See, e.g.*, Lipkin, *supra* note 32, at 2033 (“According to the conventional view in American politics, the public square should be unrestricted and include robust, vigorous debate.”).

<sup>69</sup> *See, e.g.*, Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 Notre Dame J. L. Ethics & Pub. Pol’y 541, 546 (2003) (“That religious believers should be speaking at all is, as it turns out, hardly less contested than the substance of what we are called to say.”). Others dispute this claim, however. Professor Blumoff, for example, argues that “‘God-talk’ enjoys a robust and seeming omnipresence in our public life.” Theodore Y. Blumoff, *The New Religionists’ Newest Social Gospel: On the Rhetoric and Reality of Religions’ ‘Marginalization’ in Public Life*, 51 U. Miami L. Rev. 1, 6 (1996). “As an empirical matter,” Blumoff notes, “there is indisputable evidence of both the prevalence and the influence of religious organizations on public policy.” *Id.* at 14. In contrast, he asserts, “not a shred of empirical evidence supports the claim that religion has in fact been marginalized.” *Id.* at 10

<sup>70</sup> *See, e.g.*, Jay D. Wexler, *Framing the Public Square God’s Name in Vain: The Wrongs and Rights of Religion in Politics*, 91 Geo. L. J. 183, 185 (2002) (book review) (calling the work of Rawls the “leading source” for such arguments); Garnett, *supra* note 69, at 546 (identifying Rawls with this position); Steven D. Smith, *Recovering (From) Enlightenment?*, 41 San Diego L. Rev. 1263, 1279 (2004) (calling Rawls “the most influential contemporary American theorist” associated with the effort to distinguish the religious from the secular in political and democratic discourse). According to Professor

to describe a theory of democracy in a pluralistic society that was just and stable.

Rawls held that just and acceptable laws and public policy will be possible in areas of “overlapping consensus” where citizens agree on certain essential features of their democracy, and therefore citizens should only rely on political arguments that might reasonably appeal to all citizens.<sup>71</sup> The chief enemy of such a democracy is, in this view, fundamentalism—whether religious or philosophical—or what Rawls referred to as “comprehensive doctrines.”<sup>72</sup> Rawls’ formulation sprang from the recognition and acceptance of a politically and religiously plural society.<sup>73</sup> From that premise, he argued that it is not reasonable for some citizens to impose any one comprehensive doctrine on others.<sup>74</sup> Thus, arguments that rely on religious texts for their authority are, in this view, politically unreasonable because they would not appeal to all citizens in a democracy where religious freedom and pluralism are taken seriously.<sup>75</sup> Such arguments, accordingly, result in incommensurate discourse and a

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Lipkin, “Rawls’s notion of ‘public reason’ is an exclusionist view and relies on a notion of ‘reasonableness.’” Lipkin, *supra* note 32, at 2045 n.74.

<sup>71</sup> See, e.g., Leslie C. Griffin, *Fundamentalism From the Perspective of Liberal Tolerance*, 24 *Cardozo L. Rev.* 1631, 1632 (2003) (summarizing and defending Rawls’ support for excluding “politically unreasonable” arguments from public discourse).

<sup>72</sup> *Id.* at 1632-34. According to Professor Griffin, Rawls stated his objection to religious arguments as follows: “How is it possible for those holding religious doctrines, some based on religious authority, for example, the Church or the Bible, to hold at the same time a reasonable political conception that supports a reasonable constitutional democratic regime?” *Id.* at 1632, (quoting JOHN RAWLS, *The Idea of Public Reason Revisited*, in *COLLECTED PAPERS* 573, 588 (Samuel Freeman ed., 1999)).

<sup>73</sup> *Id.* at 1632.

<sup>74</sup> *Id.*

<sup>75</sup> Professor Greenawalt also makes this point, highlighting what he sees as the danger of allowing such arguments:

If freedom of religion exists, diverse religious views are bound to emerge and continue; religion engenders such strong passions that it will inevitably be a source of tension; and that tension will be aggravated by reliance on religious grounds in political decisions and arguments. Relatedly, social unity in liberal democracies will always be fragile enough so that argument in terms of nonaccessible grounds will be harmful.

KENT GREENAWALT, *PRIVATE CONSCIENCES AND PUBLIC REASONS* 130 (1995), quoted in Annette Bulger Mathis, Comment, *Judges, Thou Shalt Not Use Thine Own Religion In Thy Opinions*, 23 *Miss. C. L. Rev.* 131, 132 (2004). Cf., Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 180 *U. Pa. L. Rev.* 661, 672 (2001) (noting “the incendiary effects of governments and political actors mobilizing people around political differences in places such as Bosnia, Israel, and Northern Ireland.”).

breakdown of the deliberative aspects of civic debate.<sup>76</sup>

Suffice it to say that the debate over the role of religion in public discourse has been long and passionate, and the competing inclusionist and exclusionist viewpoints will not be easily reconciled.<sup>77</sup> Undaunted by this challenge, Robert Lipkin offers what he calls his “reconstruction thesis.” Professor Lipkin argues that all sides in a reasonable democratic debate must, after initially stating their views on the issues, “reconstruct” their respective arguments; this step, he says, is an effort “to formulate, in a common framework or discourse, different and sometimes incommensurable perspectives.”<sup>78</sup>

Stated more plainly, Lipkin’s idea is that all participants must be allowed to present their views in whatever terms they see fit, but after doing so they must next be prepared to “reconstruct” their arguments in a manner and in a language which is accessible to others—if not, “the conversation abruptly comes to an end.”<sup>79</sup> This obligation does not apply just to those holding religious viewpoints and concerns, of course. Those who do not share, or give a different priority to, particular religious concerns may also need to reconstruct their own arguments so that those with religious

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<sup>76</sup> See Lipkin, *supra* note 32, at 2027 (arguing that religious arguments can “create a divisive ‘Tower of Babel’ of political debate, and tend to stop meaningful political debate dead in its track.”). Cf. Robert C. Post, *Community and the First Amendment*, 29 *Ariz. St. L. J.* 473, 480 (1997) (summarizing John Dewey’s views, and stating that Dewey believed “there can be no search for the truth when persons merely shout at each other.”).

<sup>77</sup> Nor is it not my purpose here to take sides in or reconcile the various arguments. Rather, I am concerned here with how, in the context of religious land use disputes, people with different views might best attempt to resolve their conflict. I suspect that many political actors on both sides in this debate, along with at least some legal commentators, pay little attention to the question of reconciliation. There are, after all, potential advantages to be obtained by encouraging division, including the hope of gaining a more complete victory. With this same concern in mind, Professor Lopez warns that “the division of citizens into religious factions that ‘vex and oppress’ one another for political ends exacts a substantial toll on society because the clash inevitably creates winners and losers based upon the number of adherents, information, wealth, or the like.” Lopez, *supra* note 32, at 174 (quoting *The Federalist No. 10*, at 79 (James Madison) (Clinton Rossiter ed., 1961)).

<sup>78</sup> See Lipkin, *supra* note 32, at 2029.

<sup>79</sup> *Id.* at 2073. Lipkin adds: “This impasse prompted Richard Rorty to characterize religious arguments as ‘conversation-stoppers.’ The reason religious discourse can be a conversation-stopper is not because the non-religious citizen arbitrarily refuses to continue, but because the parameters for continuing are totally obscure.” *Id.* at 2073 n.174 (citing Richard Rorty, *Religion as Conversation-Stopper*, 3 *Common Knowledge* 1, 2 (1994)). And if no attempt is made to bridge such divides, Professor Minow warns us, “the prospects for communication across different groups grow very dim, and the occasions for using religious authority as a club—of both the weapon and social variety—jeopardizes equality, participation, and mutual exchange.” Minow, *supra* note 75, at 686.

viewpoints and concerns can understand them.<sup>80</sup>

Lipkin provides several examples of reconstructed rhetoric from the oratory of Reverend Martin Luther King, Jr.. Dr. King's messages, he argues, were aimed at other Christians, but also at other religious-minded individuals and secular audiences as well.<sup>81</sup> Though filled with religious language and references, King's was "a universal ethical discourse," which spoke of the reciprocal duties of each citizen towards the mutual benefit of all.<sup>82</sup> Even statements utterly shorn of religious references, such as King's "I can never be what I ought to be until you are what you ought to be. And you can never be what you ought to be until I am what I ought to be," reverberate powerfully with common ethical and moral concerns.<sup>83</sup>

What is of primary interest here is that Lipkin's notion of reconstruction—his response to the quandary of religious argumentation—has a direct parallel in mediation. Parties in mediation enter into a dialogue whereby they attempt to reach an understanding of their differences, and then seek to resolve them. This effort requires that the parties, with the aid of the mediator, attempt to describe their point of view in a way that can be understood, if not accepted as true, by the other disputants. This concerted attempt to restate and to explain—to reframe, in the mediator's parlance—is similar to Lipkin's notion of reconstruction, and is likewise aimed at establishing common ground or a common language upon which the parties can then seek an acceptable resolution.

The analogy to mediation is especially clear in the way Lipkin describes the stages of political justification in a democracy. According to Lipkin, these are: 1) the *presentment* stage, a "[n]o holds barred" exchange of views among all-comers; 2) the *reconstruction* stage, the attempt to state these views in "a common language with shared principles of reasoning"; 3) the *argument* stage, where options for resolving the issues identified during the first two stages are considered and contested; and 4) the *judgment* stage, where the decision is made on a course of action, stated in terms understandable to all.<sup>84</sup>

Lipkin's stages closely parallel the structural elements of mediation as commonly described by theorists and practitioners.<sup>85</sup> Following

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<sup>80</sup> See Lipkin, *supra* note 32, at 2073.

<sup>81</sup> *Id.* at 2043.

<sup>82</sup> *Id.* at 2043-44.

<sup>83</sup> *Id.* at 2043 (quoting from Martin Luther King, Jr., *Remaining Awake Through a Great Revolution*, in *A KNOCK AT MIDNIGHT: INSPIRATION FROM THE GREAT SERMONS OF REVEREND MARTIN LUTHER KING, JR.* 205, 208 (Clayborne Carson & Peter Holloran eds., 1998)).

<sup>84</sup> *Id.*, at 2051-52.

<sup>85</sup> See, e.g., MARK D. BENNETT & MICHELLE S.G. HERMANN, *THE ART OF MEDIATION* 25-27 (1996) (describing the stages of mediation to include "information gathering and

introductions and other preliminaries, the mediator often invites the parties to offer an opening presentation or narrative description of the origins and nature of the dispute. This feature tracks Lipkin's *presentment* stage of political justification. The initial foray into the background dispute is often followed by an effort by the mediator to foster a common understanding among the parties about the nature of the dispute and the issues that need to be addressed, which parallels Lipkin's *reconstruction* stage. Next, in mediation, it is common to engage the parties in generating and analyzing available options and strategies for resolving the dispute, a task roughly analogous to the *argument* stage—though in mediation this frequently involves a problem-solving or cooperative effort, as opposed to an adversarial contest. Then, finally, as with Lipkin's *judgment* stage, their comes a time in mediation to decide on a course of action.

Lipkin believes that the task of reconstruction is critical to creating a public discourse where people with differing (and even incommensurate) views about religion can nonetheless act deliberately to decide important matters of law and policy. Likewise, mediation, with its focus on creating understandings among parties holding differing views and concerns, offers perhaps the best means for resolving many religious land use disputes.<sup>86</sup> As explained in Part I, the existing quasi-judicial system for resolving religious land use disputes lacks precisely this sort of opportunity for opponents to directly exchange views and engage in the hard work of dialogue. In contrast, mediation allows the parties to talk directly with each other with the aid of a skilled neutral, and holds out the possibility of working through potentially divisive issues around religion. Furthermore, if the issues are

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issue identification,” followed by “agenda setting,” then “resolving each issue,” and “reaching agreement”). Cf. Richard M. Cartier, *Mediating Local Intergovernmental Disputes—Reflections on the Process*, 13 San Joaquin Agricultural L. Rev. 1, 3-8 (2003) (describing the “classical” model of mediation as including: a statement of the problem by the parties; information gathering; problem identification; problem solving; and writing of an agreement). This basic structure is found as well in the final draft of the Model Standards of Conduct for Mediators being developed jointly by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution, available at <http://www.acrnet.org/pdfs/modelstandards12-29-2004.pdf> (“Mediation serves various purposes, including opportunities for the parties to define and clarify issues, understand different perspectives, identify interests, explore and assess possible solutions, and reach mutually satisfactory agreements, when desired.”).

<sup>86</sup> There are mediators for whom, and forms of mediation in which, facilitating a dialogue between the disputants is not always encouraged and not thought to be crucial to the process. See, e.g., Nancy A. Welsh, *Making Deals in Court-connected Mediation: What's Justice Got to do with It?*, 79 Wash. U. L. Q. 787, 809-13 (2001) (describing the reduced role of disputants in court-connected mediation). When I refer to mediation in this paper, however, I mean to suggest a process that includes an effort to create such a dialogue.

developed enough so that mediation can profitably occur prior to public hearings, they can be addressed before positions harden and the dispute becomes front-page fodder.

Central to this argument is the understanding that mediation does not seek to exclude the idiosyncratic views of the participants about the history and nature of the dispute.<sup>87</sup> The parties need not avoid talking about their respective religious beliefs, motivations, or aspirations. Indeed, disputants will likely respond positively when they feel they have been genuinely heard and understood.<sup>88</sup> A negotiation or mediation will often see little or no significant headway until one or more parties' point of view has been at least acknowledged.<sup>89</sup>

The point is crucial, as people with religious viewpoints may enter the mediation concerned that their views will not be listened to or understood. They may believe, in the words of Stephen Carter, that their voices are not "welcome[d]...taken seriously, respected, and honored" in the debates over important public issues.<sup>90</sup> Whether this is true or not seems largely beside the point if the sentiment is widely shared.<sup>91</sup> Because the national debates over

<sup>87</sup> Cf. R. Lisle Baker, *Using Insights About Perception and Judgment from the Myers-Briggs Type Indicator Instrument as an Aid to Mediation*, 9 Harv. Negot. L. Rev. 115, 129-30 (2004) ("The chance for parties to tell their stories as they prefer is a part of mediation's value because disputants may not have the same chance in court.")

<sup>88</sup> Cf. DOUGLAS STONE ET AL., *DIFFICULT CONVERSATIONS: HOW TO DISCUSS WHAT MATTERS MOST* 163 (Penguin Books 2000) (1999) ("[W]e [all] have a deep desire to feel heard, and to know that others care enough to listen."). See also BENNETT & HERMANN, *supra* note 85, at 41 ("mediators must create an environment where feelings can be verbalized safely and the parties feel that they are heard and understood").

<sup>89</sup> See Baker, *supra* note 87, at 130 (observing that "until these stories are told, it will be challenging for a party to move beyond them towards resolution."). After this point is reached, however, I agree with Professor Lipkin that people on both (or all) sides of the dispute have a duty, as a matter of "civic virtue," to argue or explain themselves in terms—in a language, even—that is accessible to the comprehension and analysis of those who do not share the speaker's specific religious, moral, or philosophical commitments. See Lipkin, *supra* note 32, at 2048.

<sup>90</sup> Wexler, *supra* note 70, at 189 (quoting STEPHEN L. CARTER, *GOD'S NAME IN VAIN: THE WRONGS AND RIGHTS OF RELIGION IN POLITICS* 42). But see Blumoff, *supra* note 69, at 10, 14 (denying any empirical basis for such claims).

<sup>91</sup> Sometimes perception *is* reality, in other words. However, I have found no studies regarding the prevalence of the belief among Americans that religious-based views are not welcomed in the so-called public square. This might be a useful question to pursue. For my purposes here, I assume with others that the widespread and frequent expression of this belief among religious elites and opinion makers has the intended impact of influencing grass level beliefs and attitudes, and that, in turn, it is likely to be reflected in religious land use disputes at the local level. Cf. Schragger, *supra* note 8, at 1820 (observing that as national political debates involving religion have become more polarized, "local negotiations over religion's place in public discourse have become increasingly difficult."). See also, *infra* at note 93.

religion naturally find their way into the local discourse of communities and religious congregations,<sup>92</sup> when land use disputes turn into claims of religious discrimination—as they will under RLUIPA—these same contentious dynamics will be likely in play.

Should we care if differences over religion result in more acrimony down at city hall, or in the courthouse? Isn't that how democracy works? The next section argues that how we dispute matters, and that efforts to resolve religious land use conflicts through mediation can avoid or repair damaged relationships, leading to more robust communities.

### C. Conflict and Community

Religious land use disputes are primarily local conflicts over “the normative content of public life,” rather than simple reflections of larger social issues being played out on the national scene.<sup>93</sup> And the choice of disputing process is important: the manner and skillfulness with which it is employed, along with the substantive outcome, become feedback in the loop that continually shapes the evolving nature and quality of community life.<sup>94</sup>

*Community* exists alongside *liberty* and *equality* as a fundamental— if at times under appreciated—value in American democracy.<sup>95</sup>

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<sup>92</sup> See, e.g., Karst, *supra* note 62, at 9 (“To the extent that the social issues concern religion directly—say, school prayers or religious exemptions from civil rights laws—our local religious congregations are natural loci for explicit discussion.”). See also, *infra* note 93.

<sup>93</sup> Schragger, *supra* note 8, at 1874. Nonetheless, as *infra*, these national debates appear to influence the attitudes and beliefs of citizens at the local level.

<sup>94</sup> Ackerman, *supra* note 7, at 53-82 (comparing the impact on communities of litigation, arbitration, and mediation). Cf. Karst, *supra* note 62, at 24 (“Behavior is not just something in brute nature to be talked about and named; it has its own role in creating, reinforcing, or undermining meanings.”). Professor Ackerman is careful to point out the instrumental nature of dispute resolution techniques: “All dispute resolution processes have elements conducive to communitarianism, yet all such choices can be employed in a manner detrimental to building community.” Ackerman, *supra* note 7, at 53. He does not dismiss nor even denigrate the importance of litigation as a tool for resolving conflicts and providing other benefits for communities. Nor is his hope—or mine, for that matter—to simply reduce conflict by avoiding it; rather, encouraging mediation is meant to counter the lack of community engagement which itself may evidence a tendency towards conflict avoidance. *Id.* at 40.

<sup>95</sup> Post, *supra* note 76, at 482 (“democracy presupposes community”); Lipkin, *supra* note 32, at 2029 n.17 (“[A]spirings towards ‘communitarian democracy’ is precisely, in my view, what prompted the Founding.”). Lipkin elaborates on his notion as follows:

[W]e might usefully regard the United States as aspiring towards an “American communitarian republic,” consisting of a community of democrats committed to creating the conditions for the mutual

Relationships between individuals are the basic currency of communities of all types, providing the building blocks for the social networks that constitute a community's lifeblood and identity. Therefore, many social observers view with concern the decline in participation in community institutions and civic activities that, historically, have provided a major source of "social capital" in communities.<sup>96</sup> The fear is that declining stores of social capital will undermine the healthy functioning of local communities, both adversely affecting the quality of life for individuals in the community as well as constituting a drag on the greater polity.<sup>97</sup>

Retaining the right to adjudicate such disputes is fundamental, of course. Moreover, the existence of legal rights and the availability of formal adjudicatory processes to enforce them provide an important context

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recognition of each other's good. Essentially, the American communitarian republic consists of diverse individuals adhering to conflicting conceptions of the good life who recognize that individuality and diversity in part defines their political identities. The American communitarian republic examines the possibility that such individuals can form a community which protects their individuality and diversity and which fosters self-government and the commitment to the equal freedom of its members. The idea of the American communitarian republic explains community in terms of a reciprocal commitment to certain types of procedures for resolving social conflict and measuring change. One way of understanding these procedures is in terms of truth. On this view, truth is the result, often provisionally acknowledged, of interacting, especially through, but not limited to, deliberating with other members of the political community. We not only find truth through these interactions, but more important, the appropriate kinds of interactions with others constitute the nature of at least one important kind of truth, namely, political truth.

*Id.* Lipken, then, also finds inherent meaning in the nature and quality of our social relationships, and not simply their products.

<sup>96</sup> Ackerman, *supra* note 7, at 28-29 (discussing the work of political scientist Robert Putnam, and defining social capital as "the connections between individuals that build social networks [and which are] seen as critical to the norms of reciprocity and trustworthiness that allow us to function in civil society.").

<sup>97</sup> The position that, generally, the needs of community have lately been subjugated to the concerns of individual liberty is frequently identified with the communitarian movement or philosophy. *Id.* In his insightful article, *Disputing Together: Conflict Resolution and the Search for Community*, Professor Ackerman draws upon the communitarian perspective to examine the impact of how we choose to dispute. I draw on his work to argue that, in the case of religious land use disputes, communities will experience significant "centrifugal" (i.e., divisive) forces due to the likelihood, under the RLUIPA regime, that land owners with plausible religious motivations will choose (or at least threaten) to litigate rather than negotiate their conflicts with their neighbors and their community. *Id.* at 55. Thus, I share, to this extent, the communitarian concern about tending to the health of our civic communities. For a broader and more detailed exploration of communitarian theory, however, I highly recommend Ackerman's article.

for religious land use disputes and, more generally, for the broader range of community disputes. For example, adjudication provides guidance or norms that reflect the broader sense of the community about the expected substantive outcome of disputes.<sup>98</sup> Resort to adjudication is an affirmation of community values in so far as the parties place their dispute (and their faith) in the hands of community representatives, in the interest of resolving the matter peacefully.<sup>99</sup> The handing down of decisions from an authority figure or figures, after a fair hearing, may also fit more easily currently popular conceptions of justice, so that traditional disputing methods may be imbued with a greater sense of legitimacy. Lastly, authoritative interpretations of law are sometimes needed and may have a “cathartic” effect, even for losing parties.<sup>100</sup>

Despite these virtues, adjudication in the American vein relies on adversarial assumptions that, on the whole, tend to separate people rather than build cooperative relationships and social capital. The design of the formal litigation process—indeed, the very design of the courtroom—is intended to separate and “minimize engagement between the parties.”<sup>101</sup> As discussed in Part I, the land use process, which is a form of local administrative adjudication, has inherited these assumptions and attributes of the adjudicatory model. Thus, the land use process typically places stakeholders on an adversarial footing from the moment a project is proposed.

Reliance on adversarial disputing can lead to a “self-absorbed preoccupation with individual rights to the derogation of community interests and needs.”<sup>102</sup> The resulting “rights talk,” according to Mary Ann Glendon, “in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground.”<sup>103</sup> Rights talk is precisely what predominates when disputes over the impacts of

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<sup>98</sup> Post, *supra* note 76, at 477 (stating that an important function of law “is the articulation and enforcement of community norms.”). In this sense, as the holder and vehicle for enforcement of such legal rights, communities serve as a “container for conflict.” Ackerman, *supra* note 7, at 47. Cf., Owen M. Fiss, *Against Settlement*, 93 Yale L. J. 1073, 1089 (1984) (arguing that civil litigation is “an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals.”). Indeed, its supporters may hope that RLUIPA, rather than resulting in a wave of litigation, instead brings about more favorable administrative zoning decisions for religious property owners that, in turn, reflect new community attitudes of religious tolerance.

<sup>99</sup> Ackerman, *supra* note 7, at 55-56.

<sup>100</sup> *Id.* at 58.

<sup>101</sup> *Id.* at 57.

<sup>102</sup> *Id.* at 56.

<sup>103</sup> MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 14 (1991), *quoted in* Ackerman, *supra* note 7, at 56.

development are transformed into debates about religious values and beliefs. A statute such as RLUIPA, designed to encourage this divisive dynamic, raises serious concerns both because of the public nature of the disputes and the potential they hold to broadly affect disputing behavior within the communities.<sup>104</sup> As Kenneth Karst argues, the resulting discord “tends to perpetuate itself,”<sup>105</sup> depleting community’s store of social capital. These are disputes that, literally, hit close to home. Like disputes involving family, those between neighbors become overheated and personal very quickly. Adding religion into that mix only makes things more volatile.

The need to resolve religious land use disputes is in tension but not incompatible with the goal of strengthening community.<sup>106</sup> Conflict is inevitable, but the disintegration of community bonds is not. Indeed, how effectively residents respond to conflict is a measure of a community’s health. Generally, an early intervention that allows neighbors to sit down together, to talk and listen to one another, and to deliberate about how to move forward, offers the hope of slowing the seemingly inevitable march to the (federal) courthouse. Collaborative dispute resolution processes such as mediation offer that opportunity, and have greater potential not just to avoid depletion of social capital but to *add* to it, while also enhancing the problem-solving capacity of communities.<sup>107</sup>

And so mediating religious land use disputes offers an opportunity to communities, but also a challenge. For this suggestion to work, communities must accept the burden and responsibility of resolving their conflicts together, instead of resorting to the default of adversarial adjudication.<sup>108</sup> Residents and local government officials will need to depart from established patterns and procedures, and commit their time, energy, and resources to perhaps unfamiliar collaborative processes.

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<sup>104</sup> Ackerman, *supra* note 7, at 33-34 (arguing that land use disputes have “public implications” and “may have a broad substantive impact on the community”).

<sup>105</sup> Karst, *supra* note 62, at 16.

<sup>106</sup> See, e.g., Ackerman, *supra* note 7, at 37 (“The effort of individuals to resolve their disputes and the desire to reinforce the societal fabric are, more often than not, compatible goals.”).

<sup>107</sup> See *id.* at 71-72 (“The process can be inherently fulfilling, and can provide the parties with the tools to resolve future problems, develop relationships and build social capital.”). Professor Ackerman insists “we delude ourselves if we think that adjudicative dispute resolution processes can serve as a surrogate for the types of community bonds that can be forged only in the absence of coercion.” *Id.* at 32. He rightly cautions, however, that even mediation “requires conscious use of process in a manner conducive to personal interaction, mutual recognition, and a sense that the parties and their dispute are part of a larger tapestry,” lest it fall into a “self-indulgent” and “empty ritual.” *Id.* at 30-31.

<sup>108</sup> As Professor Ackerman states succinctly, “collaboration can be hard work.” *Id.* at 72.

Effective mediation demands patience, maturity, flexibility, and openness to opportunities for mutual accommodation.

This may be a tall order for many communities. Adversarial strategies are a powerful habit for individuals, institutions, and for communities as well. Adjudication to many seems like the “natural” way to resolve disputes. For some, it will be easier to ask a judge to decide who is right and who is wrong. Indeed, one attraction of both litigation and administrative land use proceedings is that they shift responsibility for resolving the conflict away from the disputants. For local government officials, mindful of the political costs of making hard choices, the temptation to “punt” a problem to the courts may be irresistible.

In contrast, mediation requires that disputants—including the local zoning officials—take responsibility for finding a solution themselves. And this autonomy is precisely the foremost advantage of mediation. After all, those closest to the dispute are often in a better position to resolve it, simply because they are the driving force and they know best what their own needs and interests require.<sup>109</sup> When disputants “own” the process, it stands to reason that they will embrace the fruits of their efforts, thus enhancing legitimacy and compliance.

To summarize, mediation can empower community members to participate in productive civic engagements, which should yield benefits in the form of increased social capital and a better overall quality of individual and communal life.<sup>110</sup> Changing in this way how individuals and

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<sup>109</sup> *Id.* at 75 (“People usually are better equipped to order their lives and resolve their problems on their own accord.”).

<sup>110</sup> *Id.* at 80 (“the true promise of mediation... involves a process of empowerment and recognition that shifts disputants from weakness and dependency to strength, from self-absorption to responsiveness.”). Professor Schragger likewise cites the importance for communal life of constructive public disputing at the local level:

The strength of the civic community is that it generates crosscutting communal norms through a public and democratic process, and that it does so on behalf of citizens, not just private parties. There is powerful value to fostering the negotiation of public values in this type of association. Indeed, commentators express alarm that the legal and philosophical favoring of private associational life over public associational life is corrosive of civic engagement. Those who believe that participation in the process of governing is essential to a well-functioning democracy view the decrease in local civic role as particularly dangerous to the republic, a sign of the decay of democratic virtue. This ideal places civic engagement at the center of individual virtue, and views the norms of citizenship as central to achievement of the good life. Bypassing those public institutions that are well-scaled for participatory activity narrows the space for the public negotiation of communal values and shifts those debates into the private sphere.

Schragger, *supra* note 8, at 1887-88 (footnotes omitted).

communities view and attempt to resolve their conflicts can change the very culture of that community. It is in local settings and through local institutions that individual identity and character are most powerfully influenced.<sup>111</sup> Indeed, it is precisely in the content and form of communications within families, congregations, and communities—what Professor Karst refers to as “local discourse”—that we learn and embody disputing behaviors, and other aspects of culture:

If a culture is a community of meaning, local discourse is the port of entry into that community. The conversations and other communicative interactions of ordinary life are, from childhood on, the stuff of world-making. Language is part of this discourse, but we also communicate meanings—our understandings of the world, our intentions, our convictions, our capacities—by our actions. We learn to assign meanings to our own behavior and to others’ behavior, and all these assignments of meaning add up to the culture in which we live.<sup>112</sup>

In other words, if we are to build communities that dispute well, we must do so from the ground up. Similar notions undergird other community-centric forms of dispute resolution such as victim-offender mediation and community boards.<sup>113</sup> Like those initiatives, however, use of mediation in land use disputes generally, much less religious land use disputes, has yet to gain widespread acceptance. What, then, are the obstacles to realizing the potential benefits of mediation? Part IV explores this question, and offers recommendations for overcoming these barriers.

#### IV. POTENTIAL OBSTACLES AND OBJECTIONS TO MEDIATION

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<sup>111</sup> Karst, *supra* note 62, at 2-5.

<sup>112</sup> Karst, *supra* note 62, at 3. Corporate America is discovering the power of local discourse, and some companies have developed “word of mouth” marketing campaigns, involving the targeted recruitment of volunteer consumers who are provided free samples of products and asked to (surreptitiously) let friends and acquaintances know about their experiences with them. See Rob Walker, *The Hidden (In Plain Sight) Persuaders*, N.Y. Times, December 5, 2004, Section 6, at 69, available at 2004 WLNR 13102193.

<sup>113</sup> See, e.g., Christine B. Harrington & Sally Engle Merry, *Ideological Production: The Making of Community Mediation*, 22 Law & Soc’y Rev. 709, 714-723 (1988) (reviewing the history of community dispute resolution centers and identifying their primary purposes as being the delivery of dispute resolution services, transformation of society, and personal growth). See also PAUL WAHRHAFTIG, COMMUNITY DISPUTE RESOLUTION, EMPOWERMENT AND SOCIAL JUSTICE: THE ORIGINS, HISTORY AND FUTURE OF A MOVEMENT 19 (2004) (analogizing the benefits of a community dispute resolution program to an iceberg, in that only 10% is visible in the delivery of services, but that 90% of the benefit, in the form of community empowerment, is obscured from view).

Resolving religious land use disputes presents a difficult challenge for local communities, due both to the religious content and to the shortcomings of existing land use procedures. Mediation is not an easy alternative, however, nor does it represent an unalloyed good. To borrow Archbishop Tutu's metaphor for religion, any dispute resolution technique is like a knife: equally useful to create a feast, or to disembowel an adversary.<sup>114</sup> Disputants should give careful consideration to advantages and disadvantages before choosing an available dispute resolution option.<sup>115</sup> With this in mind, this part examines the likely concerns and obstacles to using mediation in the context of a religious land use dispute.

First, the existing culture of local government may pose a significant obstacle to implementing mediation. It is not easy to change the habits and beliefs of an organization, and bureaucracies—including those at the local government level—can be especially resistant to change. In two decades of advising parties on all sides of local land use disputes, the author has not seen a significant shift towards more collaborative models of decision-making.<sup>116</sup> While commentators have often endorsed the use of mediation in land use disputes,<sup>117</sup> local officials may be reluctant to consider it, fearing a loss of influence over the decision making process.<sup>118</sup>

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<sup>114</sup> Arlene Getz, 'Religion is Morally Neutral': Desmond Tutu Discusses the Tsunami Tragedy, God, Iraq and the Ee-election of George W. Bush, *Newsweek*, December 30, 2004 (web edition, available at <http://www.msnbc.msn.com/id/6769686/site/newsweek/>) (last checked April 5, 2006). Here is the full quote:

I keep having to remind people that religion in and of itself is morally neutral. Religion is like a knife. When you use a knife for cutting up bread to prepare sandwiches, a knife is good. If you use the same knife to stick into somebody's guts, a knife is bad. Religion in and of itself is not good or bad—it is what it makes you do.

<sup>115</sup> Commentators, of course, should likewise take care in prescribing any particular approach, and that is the underlying purpose of present article.

<sup>116</sup> An exception to this general observation may be in the area of long-range community planning, where local governments have begun to convene facilitated community-wide processes that bring together stakeholder groups in an effort to develop and achieve consensus about future goals and aspirations. I have not seen a similar shift in local government thinking in the area of resolving disputes. There is some movement in the developer community, however, which increasingly includes collaborative techniques among its best practices for development proposals. See, e.g., Bauman, *supra* note 30, at 525 (recommending that developers use mediation for difficult or controversial land use proposals).

<sup>117</sup> See, e.g., John R. Nolon, *Golden and its Emanations: The Surprising Origins of Smart Growth*, 35 *Urb. Law.* 15, 72-3 (2003) (calling for continued encouragement of mediation in connection with other "smart growth" urban planning strategies).

<sup>118</sup> See, e.g., LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES* 241-42 (1987) (pointing out that public officials usually retain decision making authority, and that consensual processes will likely enhance their power because the public favors the better outcomes that these

Nonetheless, the highly contested nature of religious land use disputes may eventually encourage local officials to try mediation. For one thing, local officials' natural aversion to making unpopular decisions could lead them to loosen their control over the decision-making process. Indeed, fear of blame might lead a zoning official to make a decision he or she thinks is popular with large numbers of voters, even where the decision is questionable as a legal matter and there is exposure to costly litigation.<sup>119</sup> Mediation effects a sharing of responsibility for the process—and, therefore, the result—among those most directly interested in the dispute. If local officials believe that mediation can result in a solution acceptable to all parties involved, they may be very happy indeed to adopt it in their own formal decision on the matter.

Another likely obstacle to choosing mediation is the lack of resources for new programs at the local government and community level. With so many competing demands for services, and a political climate that makes finding new revenue sources exceedingly difficult, local governments have been suffering from financial difficulty and uncertainty for many years now. While, in a sense, it is a matter of reconsidering priorities, local governments can be shy about launching new initiatives in an era where securing adequate funding for even basic services has become difficult. It may be possible to convince public officials that there are community-building benefits to collaborative dispute resolution methods, or even that it could save them money on legal costs if they avoid litigation, but there will be for many a natural inclination to stay the course.

The issue of cost savings is a challenging one because the existing system of processing land use disputes can and often appears to be very efficient. It is difficult to imagine, for example, a controversial religious land use dispute being resolved through mediation in just one evening session. Yet, many public hearings on land use matters are concluded in that time. Moreover, because employing mediation does not avoid the need to process land use applications in accord with basic administrative procedures, nor replace the public hearing, mediation might appear to be an expensive “add on.”

Also, the traditional administrative procedures serve important purposes and are legally required in most instances. They operate structurally to retain the ultimate locus for decision making in a democratically constituted and accountable local government, and provide a context of public values that must be the background for such disputes.<sup>120</sup>

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processes provide).

<sup>119</sup> This, of course, is a concern for minority faith communities, who fear exclusion by mainline religious and secular interests through zoning decisions.

<sup>120</sup> Thus mediation is best viewed, in the words of Professor Susskind, as “an important

Religious land use disputes involve public as well as private interests, and the overlay of a public process, along with the involvement of public officials, is necessary for the success of the mediation and to provide an important element of legitimacy.<sup>121</sup>

Mediation, then, may be resisted because of its potential to increase costs in terms of the time and resources devoted to the process by local government and other interested parties, and in terms of the costs and associated overhead for the mediator and the mediation process itself. For the property owner, the holding costs of the land could add up quickly, or financial options may lapse, if a decision is much prolonged by negotiation and mediation efforts. Yet there appear to be real cost savings possible from cooperative decision making, not the least of which is avoiding consultant and legal fees prior to and during litigation, which may quickly render insignificant the costs of the mediation process. There is also the social capital and community good will to be gained when citizens work collaboratively to solve problems that implicate mutual concerns.

Aside from costs, there must also be concern that mediation of this sort not be used to avoid public scrutiny. Almost all jurisdictions have open meeting laws, public records requirements, and conflict of interest regulations; it is no less important to comport with the public values represented by these types of statutes when resolving a public dispute using mediation than with other public processes. These forms of official transparency and accountability, too, will increase the legitimacy of any agreement reached through mediation.

A final significant concern about recommending mediation in the case of religious land use disputes is that it might be used to disadvantage non-mainstream groups and individuals who do not hold to more conventional religious views or practices. To repeat: the instrumental nature of mediation will not prevent its use for less than admirable purposes.<sup>122</sup> Any recommendation of mediation must respond to the concern that the process does not become a vehicle for oppression of minority interests or views, or for the denial of fundamental rights.

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supplement to the traditional administrative, political and legal tools typically used to resolve land use disputes.” See LAWRENCE SUSSKIND ET AL., CONSENSUS BUILDING INSTITUTE, USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDE FOR PUBLIC OFFICIALS 1 (1999). The main thrust of the present article, then, is that mediation appears to be particularly appropriate in the case of religious land use disputes.

<sup>121</sup> Cf., DAVID LAMPE & MARSHALL KAPLAN, RESOLVING LAND-USE CONFLICTS THROUGH MEDIATION: CHALLENGES AND OPPORTUNITIES, LINCOLN INSTITUTE OF LAND POLICY WORKING PAPER 2 (1999) (analyzing eight case studies of land use mediation and concluding that the failure to involve elected and appointed officials could “prolong a dispute-resolution process substantially and unnecessarily.”).

<sup>122</sup> See *supra* note 94, note 114 and accompanying text.

## CONCLUSIONS AND RECOMMENDATIONS

Mediation holds particular promise for communities facing religious land use disputes, though care must be taken to ensure it is used appropriately. Thus, it is important that a party's decision to enter into and participate in mediation is well informed, as well as voluntary and not even subtly coerced. Public officials or employees representing the decision making body should avoid any suggestion that the refusal of a party or person to participate in mediation will be held against them in subsequent proceedings. Also, mediation must not be a substitute for, nor a prerequisite (and thus an additional barrier) to, an official decision by the decision making body, or for obtaining judicial review. While such requirements may encourage people to try mediation, they may also discourage or deny legitimate expectations of access to governmental process and decisions. Nor should any persons or organizations be excluded from mediation or deprived of any information gathered in that process because they lack the ability to pay a share of the costs. In summary, mediation should not be an impediment to achieving a fair and just resolution.

There will be instances in which the need to vindicate rights through litigation outweighs the benefits obtainable through mediation. In rare cases, the parties will need to protect fundamental interests that cannot be compromised. At other times, the parties will simply not be able or willing to accommodate each other. For these reasons and others, access to administrative and judicial forums must be preserved. Similarly, there will likely be disputes in the near term in which important questions about the scope and effect of RLUIPA remain unresolved by the courts, leaving the parties unable to make good decisions about settlement. Relatively more cases will require litigation at this early stage in the statute's history, as some number of cases must go through the appeal process in order to shape the legal landscape and set the parameters of parties' reasonable expectations, thus conducting settlement of later claims.<sup>123</sup>

Despite its promise, there are likely to be political and practical obstacles to employing mediation at the local level. Perhaps ironically, the best strategy for overcoming these obstacles—at least in any programmatic fashion—may be to focus at the state level.<sup>124</sup> State government authority

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<sup>123</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (arguing that parties' expectations about possible litigated outcomes influence bargaining behavior).

<sup>124</sup> While land use is largely controlled at the local level, often the statutory authority for local regulation will be grounded in state law. In general, cities, counties, and other local government subdivisions are creatures of the state, thus states can and do legislate in

over the local zoning function provides the opportunity to encourage or direct parties to consider mediation in these cases. This can easily overcome the resistance of local officials who are unfamiliar with or wary of employing a new dispute resolution strategy. And, in general, state governments are in a much better position to secure the resources necessary to support a mediation effort, either directly or by providing grants to local government or non-profit community mediation centers for this purpose.

Another reason for state-level coordination is the relative lack of trained mediators. Multi-party disputes are a specialty in the dispute resolution field, and relatively few mediators have the appropriate training and experience to serve as neutrals in such disputes. Experience with land use, and a demonstrated familiarity with or sensitivity to the concerns of religious groups or individuals, may also be desirable qualities, and further limit the pool of available mediators. Some communities do have active community mediation programs, and it is possible that candidates will be found close to home. As the use of mediation and other dispute resolution increases over time, it may be possible for local government agencies to develop in-house expertise, and to create along with other local agencies a shared pool of mediators, allowing one agency to “lend” the services of an in-house mediator to another agency when disputes arise.<sup>125</sup> At a minimum, a statewide clearinghouse function to aid communities in identifying potential mediators would itself be highly useful.

Many states already have a state-level office of dispute resolution, which provide a natural locus for coordinating funding, administration, and perhaps even oversight of local mediation efforts. These offices could act as resources to advise parties about dispute resolution options, and could train, provide, or recommend mediators. A state-level office could also review state law and even local regulations to identify any barriers to the use of mediation, and recommend changes to those laws.<sup>126</sup> It might also be very helpful for legislators and other public officials, and the public itself, to have good data about religious land use disputes. A state-level office of dispute resolution could provide tracking, analysis, and reporting functions

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both procedural and substantive areas of land use regulation.

<sup>125</sup> I thank John Lande for suggesting this possibility, and for pointing out that a similar system of shared neutrals already exists among federal agencies.

<sup>126</sup> The tremendous variability of land use regulatory regimes makes any specific recommendations for legislative or regulatory change impractical in the context of this article. It will be important, in the context of a particular dispute, to examine applicable laws and regulations, and identify what impediments they may pose for the use of mediation. For example, authorizing legislation of some sort may be required to authorize deviation from established procedures and to permit the use of mediation in some states, or in some local jurisdictions. City attorneys and other local government counsel are likely to be in the best position to undertake such an analysis.

with respect to these disputes, functions that are commonly found at the state level. In summary, whether employing prescriptive regulations or incentives, any programmatic effort to encourage mediation in religious land use disputes is more likely to be effective if implemented on a statewide basis, since only the largest cities or metropolitan areas would be able to sustain their own programs.

In the end, however, it will not be enough to simply provide the process for resolving these disputes. Mediation's value is instrumental, and there must be persons of good will on all sides of a dispute who bring open minds and open hearts to the task of engaging in a dialogue about their differences. Happily, such qualities are a prominent concern in the ethical teachings of all major religious traditions as well as other philosophical traditions. They might be referred to collectively as the "ethic of reciprocity."<sup>127</sup>

In the Christian gospels, Jesus is questioned on the matter of living a holy life:

[A]nd one of them, a lawyer, asked him a question to test him. "Teacher, which commandment in the law is the greatest?" [Jesus] said to him, "'You shall love the Lord your God with all your heart, and with all your soul, and with all your mind.' This is the greatest and first commandment. And a second is like it: 'You shall love your neighbor as yourself.' On these two commandments hang all the law and all the prophets."<sup>128</sup>

Through this exchange, the gospel narrative draws into dynamic tension two separate injunctions from the Hebrew Scriptures.<sup>129</sup> When read together in this manner, they offer a spacious and adaptable standard for right conduct in everyday life.<sup>130</sup> From a dualistic perspective the twin commandments

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<sup>127</sup> For a quick survey of this "ethic of reciprocity" in other world religions and other major philosophical systems, see the website of Ontario Consultants for Religious Tolerance, at <http://www.religioustolerance.org/reciproc.htm> (last visited April 5, 2006).

<sup>128</sup> *Matthew* 22:35-40 (New Revised Standard Version) (all subsequent citations are to this version). See, also, *Mark* 12:38-41; *Luke* 10:25-37. Cf. *Romans* 13:8-10 ("Owe no one anything, except to love one another; for the one who loves another has fulfilled the law. The commandments, 'You shall not murder; You shall not steal; You shall not covet'; and any other commandment, 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."); *Galatians* 5:14 (same); *James* 2:8 (same).

<sup>129</sup> *Deuteronomy* 6:5 ("You shall love the Lord your God with all your heart, and with all your soul, and with all your might."), and *Leviticus* 19:18 ("you shall love your neighbor as yourself").

<sup>130</sup> This passage, through its radical reductionism, might be seen as a rebuke to a tradition of legalistic interpretations of scripture. However, there was already by this time a tradition of scholarship associated with the Talmudic sage Rabbi Hillel that had produced

might seem paradoxical, but from a third eminently practical perspective, the resulting tension forms a crucible for living a moral life in the context of a diverse community.

Arguably, the burden of this declaration is that all life is lived in the context of *relationship*—relationship with one’s own existential or religious commitments, but also relationship with the human and nonhuman world with which we are inextricably interconnected. Philosopher and theologian Martin Buber explored similar territory in his philosophy of dialogue, famously declaring that, “All real living is meeting.”<sup>131</sup> Mediation, as conceived in this article, provides a form and forum for the gathering of persons who are in conflict with one another. It offers the parties to a religious land use dispute an opportunity to “come to the table,” to engage in dialogue, and to seek resolution—even, perhaps, reconciliation—in the very space that divides them: the place of meeting.<sup>132</sup> That space between disputants is the location of what conflict resolution experts call the Third

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an identical formulation: “What is hateful to you, do not do to your neighbor; that is the whole Torah, the rest is commentary; go and learn it.” See Talmud, *Shabbat 31a* (quoted in THE NEW OXFORD ANNOTATED BIBLE 43 New Testament (3rd ed. 2001)). A similar reductionism characterizes classical Zen koan literature. In one koan, for example, a monk asks a Zen master to summarize everything the Buddha taught during the course of his 45-year teaching career. The master replied, simply, “An appropriate statement.” THE BLUE CLIFF RECORD 94 (Thomas Cleary & J.C. Cleary trans., 1992). This deft stroke, too, was intended perhaps as a rebuke by the partisans of Zen, whose nascent Buddhism was deeply intertwined with native Taoist beliefs, to distance themselves from the heavily intellectualized and systematic tradition of Indian Buddhist thought that accompanied Buddhism’s arrival in China. Like the Golden Rule, this classic Zen formulation offers a simple yet profound ethic, unburdened by centuries of tradition and scholarship, but capable of providing guidance for one’s actions in every circumstance.

<sup>131</sup> MARTIN BUBER, I AND THOU 11 (Ronald Gregor Smith trans., Charles Scribner’s Sons 2d ed. 1958), quoted in Ackerman, *supra* note 7, at 28. Mediator Gary Gill-Austern describes Buber’s conception of dialogue this way:

Buber tells us that human beings have a twofold attitude to the world. The individual, the “I,” exists in relationships characterized as I-It and I-Thou. The I-It describes our relations with nature and people in the everyday; it is where we dwell most of the time. In the I-It, the I sees the subjects of its perception as “other” and available for its utilitarian needs. In this relationship, the “I” is primary, if not “all.” In contrast, the I-Thou describes a relation of mutuality, where neither I is primary. In some sense, therefore, the I in the I-Thou is different from the I in the I-It. In the I-Thou, each I enters the “between” to meet the other, the Thou. The place of meeting—the between—is where the I and the Thou engage in dialogue.

Gary L. Gill-Austern, *Faithful*, 2000 J. Disp. Resol. 343, 351-52 (2000) (footnotes omitted).

<sup>132</sup> See Gill-Austern, *supra* note 131, at 352. Buber’s use of the term “meeting” was not limited to actual dialogues between people, but his broader metaphorical sense of the term certainly included the more literal case, as suggested here.

Story,<sup>133</sup> or the Mediative Perspective:<sup>134</sup> the outlook of a disinterested and neutral third party—such as a mediator—who is not being asked to decide the dispute, has no stake in the outcome, is unconcerned with assigning moral responsibility or blame, but is simply interested in helping the parties resolve the dispute themselves.

Again, it is not enough to simply offer this space. Success in mediation will require an effort by the parties to simultaneously consider their own interests along side the interests of their neighbors and their community. It will require a stance towards the dispute that acknowledges the importance of the underlying civic relationship, and the intertwining of one's own interests with the interests of others.<sup>135</sup> For the religious-minded, such disputes may even function as a crucible for one's religious practice, providing the opportunity to cultivate wisdom and compassion. For others perhaps more community-minded than religious, an equivalent opportunity for moral growth and understanding would be presented.

A resolution achieved through mediation no more guarantees that the "right" or "correct" result will be reached any more than does a court or jury trial. Rather, a community's choice to mediate a religious land use dispute elevates certain process values—the democratic ideals of dialogue and deliberation, along with community building—in the effort to resolve the dispute. This effort through mediation to consciously engage the tension of competing interests, done in the spirit of civic virtue, offers a clear alternative to both administrative land use adjudication and to litigation. Mediation, in this view, offers a free and diverse people the

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<sup>133</sup> See STONE, ET. AL., *supra* note 88, at 149-155 ("In addition to your story and the other person's story, every difficult conversation includes an invisible Third Story. The Third Story is the one a keen observer would tell, someone with no stake in your particular problem.")

<sup>134</sup> See GARY J. FRIEDMAN ET AL., *SAVING THE LAST DANCE: MEDIATION THROUGH UNDERSTANDING* (videotape, Program on Negotiation at Harvard Law School and The Center for Mediation in Law).

<sup>135</sup> The effort to find an appropriate resolution in the face of competing interests is also very much at the heart of our system of justice. Benjamin Cardozo described justice as:

a concept far more subtle and indefinite than any that is yielded by mere obedience to a rule. It remains to some extent, when all is said and done, the synonym of an aspiration, a mood of exaltation, a yearning for what is fine or high...Perhaps we shall even find at times that when talking about justice, the quality we have in mind is charity....

FRED R. SHAPIRO, *OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS* 231 (Oxford University Press 1993). Justice Cardozo, in this evocation of the Golden Rule, meant to describe a transcendent value. But the underlying premise—that predetermined rules, attitudes and responses may not always be of great value, or may even be harmful, in the context of a particular dispute—contains the seeds of an eminently practical view of dispute resolution. Indeed, a responsive ad hoc approach to conflict is virtually synonymous, for some, with the techniques and strategies associated with mediation.

31-Mar-06]

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opportunity to overcome the differences that sometimes painfully divide them, and work to determine their own destiny—together.