
FEDERAL LAND USE INTERVENTION AS MARKET RESTORATION

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ABSTRACT

Although most land-use regulation in the United States remains local, the federal government has played an increasing role. Some federal intervention, particularly in the environmental area, has involved affirmative federal regulation superimposed on the local regulatory scheme. But other federal intervention operates differently by overriding local regulation to permit markets to operate. In addition to the Takings Clause, examples include the Religious Land Use and Institutionalized Persons Act, the Telecommunications Act, the Fair Housing Act, and the First Amendment's adult-use jurisprudence.

In each of these areas, local regulation survives only if it leaves intact a sufficiently thick market for the uses federal law seeks to protect. To mount a successful challenge, the landowner must demonstrate that the local regulation would leave consumers without adequate access to federally protected uses.

In evaluating the adequacy of markets for federally protected uses, municipal boundaries are sometimes, but not always, critical. When the concern is assuring access to religious facilities or adult uses, a municipality should be able to justify a reasonable ordinance, despite its exclusionary effects, by demonstrating the availability of reasonable access in neighboring communities. But when access to municipal facilities—particularly schools—is at issue, municipal boundaries are critical, and access in neighboring communities is unlikely to prove adequate.

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INTRODUCTION

Local regulation—particularly zoning—shapes real estate markets throughout the United States. By determining what a landowner may and may not do on a parcel of land, zoning affects both the value of the land and the character of the community. For decades, scholars and practitioners have debated whether zoning improves the shape of the real estate market or makes it worse. On the plus side, by excluding uses that impose external costs on neighboring homeowners, zoning has contributed to neighborhood stability and protected home values.¹ On the minus side, zoning has increased housing costs,² contributed to economic and racial segregation,³ and facilitated NIMBYism.⁴

Both the advantages and the disadvantages associated with zoning arise, in large measure, because local governments bear the primary responsibility for land-use regulation. Local governments are in the best position to assess the impact new development will have on existing residents—in part because those residents are most likely to have a voice in local politics.⁵ Conversely, because

¹ See WILLIAM A. FISCHER, ZONING RULES! THE ECONOMICS OF LAND USE REGULATION 175-78 (2015) (“Among [zoning’s] most prominent advantages was protection of home values, especially in the suburbs . . .”).

² See Peter Ganong & Daniel Shoag, *Why Has Regional Income Convergence in the U.S. Declined?*, J. URB. ECON. 76, 79-82 (2017) (demonstrating that regulation-induced housing supply constraints reduce permits and raise housing prices); Joseph Gyourko, Albert Saiz & Anita Summers, *A New Measure of the Local Regulatory Environment for Housing Markets: The Wharton Residential Land Use Regulatory Index*, 45 URB. STUD. 693, 710 (2008) (“Median house value in highly regulated places is nearly double that in lightly regulated places . . .”); see also RYAN AVENT, THE GATED CITY loc. 1038 (2011) (ebook) (arguing that limits on land use lead to limited housing supply growth and therefore higher home prices); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 392-403 (1977) (detailing potential economic effects of growth controls).

³ See Jonathan T. Rothwell & Douglas S. Massey, *Density Zoning and Class Segregation in U.S. Metropolitan Areas*, 91 SOC. SCI. Q. 1123, 1133-34, 1140-41 (2010) (finding zoning regulations that limit density are responsible for significant class segregation); Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 801-02 (2009) (concluding that zoning that limits density is one source of racial segregation). But see Christopher Berry, *Land Use Regulation and Residential Segregation: Does Zoning Matter?*, 3 AM. L. & ECON. REV. 251, 251 (2001) (finding no significant difference in residential segregation between zoned Dallas and unzoned Houston).

⁴ NIMBY is an acronym for “not in my backyard” and refers to neighbors’ opposition to placing land uses perceived as undesirable in their own neighborhoods. See Michael Lewyn, *Deny, Deny, Deny*, 44 REAL EST. L.J. 558, 558 (2016) (“American zoning law allows ‘Not In My Back Yard’ (NIMBY) activists to effectively veto new housing in their neighborhoods.”).

⁵ See Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 HARV. J. ON LEGIS. 289, 296 (2011) (highlighting that only local governments have capacity to discover and act upon local preferences); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 887 (1983) (contending

local voices predominate in local politics, outsiders' interests often receive short shrift.⁶ To compensate, when land uses have a broader impact, state and federal governments sometimes superimpose their own regulations on those adopted by local government.⁷

legitimacy of local decision-making may derive from combination of enabling residents to participate in decisions and ensuring decision makers know the issues directly).

⁶ See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1132-33 (1996) (noting that existence of local boundaries creates spillover effects not borne by members of community taking action).

In his classic article, Professor Robert Ellickson argued that a "majoritarian model" that is "stacked against those who benefit from new housing construction" was most likely to prevail in small suburbs of well-to-do residents. Ellickson, *supra* note 2, at 405-07. Professor William Fischel has made this homeowner-centric "median-voter" model of local government a centerpiece of his account of local government. See WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES 87-89 (2001) (explaining his hypothesis that "Median Voters Work Best in Local Government").

By contrast, Ellickson assumed that developers and other organized minorities would be more influential in central cities and larger political units. See Ellickson, *supra* note 2, at 408 ("Developer influence should be at its greatest in a large, complex, local government whose voting population includes many tenants and whose homeowners represent a wide range of income classes. Most central cities and many of the older suburban counties have these characteristics." (footnotes omitted)). More recently, Professors Roderick Hills and David Schleicher have argued that even in cities, nonpartisan elections or one-party control leads city councils to defer to each member on issues specific to her district, in effect duplicating the median-voter model. See Roderick M. Hills, Jr. & David N. Schleicher, *Balancing the "Zoning Budget"*, 62 CASE W. RES. L. REV. 81, 102-03 (2011) ("[T]he absence of party leaders means that individual legislators cannot take credit for the overall benefits of housing nor fairly apportion the electoral blame of individual votes to allow more housing into specific districts."); David Schleicher, *City Unplanning*, 122 YALE L.J. 1670, 1703 (2013) ("[N]oncompetitive legislatures frequently feature universal logrolls, in which each member is given the power to decide issues specific to her district.").

⁷ See generally Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397 (2012) (detailing federal permitting schemes). Most regulation by federal and state governments has been enacted since 1970, when Congress enacted the National Environmental Policy Act, although some states began to regulate certain land uses earlier. See FISCHEL, *supra* note 1, at 49-51. For an early discussion of state regulation, see FRED BOSSELMAN & DAVID CALLIES, COUNCIL ON ENVTL. QUALITY, THE QUIET REVOLUTION IN LAND USE CONTROL 1 (1971) ("This country is in the midst of a revolution in the way we regulate the use of our land. It is a peaceful revolution, conducted entirely within the law."). As Professor Ashira Pelman Ostrow notes, most states have done little to supplant local land-use regulation. Ostrow, *supra*, at 1437-38 ("[S]tates have always retained broad discretion to modify or reduce local land-use authority but have generally refused to do so.").

As Professor Fischel points out, the superimposition of controls by higher levels of government created a sort of "double veto," making development more difficult. FISCHEL, *supra* note 1, at 54 ("The Double Veto Undercuts the Smart Growth Movement[.]").

In a number of other areas, however, federal constitutional or statutory law operates differently—not by imposing more onerous regulations on land use, but instead by overriding local regulations in order to allow freer operation of market forces. The Federal Constitution’s Takings Clause⁸ is the most prominent example, but not the only one. The Telecommunications Act of 1996 limits local power to regulate the siting of cell phone facilities.⁹ The Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) constrains local authority to regulate a variety of religiously oriented uses.¹⁰ The Fair Housing Act prohibits local regulation that reduces the availability of housing to members of protected groups.¹¹ The First Amendment protects adult entertainment from local regulation.¹²

These seemingly disparate areas of federal intervention raise common issues. Although a body of excellent scholarship has developed in each area,¹³ that scholarship has not explored the common foundations of federal limits on local regulation.¹⁴ In each area, federal intervention is premised on a perceived defect in the local decision-making process: failure to consider externalities generated

⁸ U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”).

⁹ See Telecommunications Act of 1996 § 704(a), 47 U.S.C. § 332(c) (2012).

¹⁰ See Religious Land Use and Institutionalized Persons Act of 2000 § 2, 42 U.S.C. § 2000cc (2012).

¹¹ See Fair Housing Act § 804, 42 U.S.C. § 3604 (2012).

¹² See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 56 (1986) (finding ordinance limiting location of adult theaters to be a “time, place, and manner” restriction valid only if it does not unreasonably limit avenues of communication).

¹³ For telecommunications facilities, see generally, for example, Alexander W. Judd, *What Once Was Old Is New Again: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities*, 46 URB. LAW. 865 (2014). For RLUIPA, see generally, for example, John Infranca, *Institutional Free Exercise and Religious Land Use*, 34 CARDOZO L. REV. 1693 (2013); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810 (2004); Alan C. Weinstein, *The Effect of RLUIPA’s Land Use Provisions on Local Governments*, 39 FORDHAM URB. L.J. 1221 (2012). For the Fair Housing Act, see generally, for example, Austin W. King, *Affirmatively Further: Reviving the Fair Housing Act’s Integrationist Purpose*, 88 N.Y.U. L. REV. 2182 (2013); Stacy Seicshnaydre, *Disparate Impact and the Limits of Local Discretion After Inclusive Communities*, 24 GEO. MASON L. REV. 663 (2017). For adult-oriented uses and the First Amendment, see generally, for example, David L. Hudson, Jr., *The Secondary-Effects Doctrine: Stripping Away First Amendment Freedoms*, 23 STAN. L. & POL’Y REV. 19 (2012).

¹⁴ Professor Ostrow’s work is an exception. In *Process Preemption*, *supra* note 5, she compares federal regulatory regimes that substantively preempt local law when it comes to choosing sites for locally undesirable uses with the Telecommunications Act, which cedes control to localities so long as they follow federal procedural mandates. In *Land Law Federalism*, *supra* note 7, Ostrow catalogues the patchwork of federal land-use regulation, focusing on a variety of federal strategies for dealing with spillovers.

by the regulation itself or insufficient regard for nonmajoritarian values. The federal limits operate not by mandating any particular development, but by invalidating certain types of regulation. In effect, federal regulation operates to limit local suppression of market forces in each of these areas.

The failure of municipalities to consider externalities extends well beyond these discrete areas of federal intervention. Overwhelming empirical evidence establishes that in a number of areas of the country, local land-use regulation is responsible for the high cost of housing and the consequent inability of outsiders to move to areas in which they might be most productive.¹⁵ Federal regulation has eschewed a global approach to the problem of housing cost, focusing instead on resuscitation of market forces in narrow areas of federal concern while otherwise leaving local regulation intact.

The general deference to local regulation reflects widespread support for zoning among its primary beneficiaries: existing homeowners seeking to preserve the values of their homes against the effect of development that might change neighborhood character.¹⁶ When homeowner interests, effectuated through the local governments they dominate, are pitted against the interests of diffuse housing consumers across the country, it should not be surprising that homeowner interests prevail. However conclusive the economic data on the impact of local regulation on the housing market, the absence of tangible harm to identifiable victims has generally not energized Congress or state regulators to displace local zoning regimes.

By contrast, local regulations that interfere with the location of churches, adult theaters, or telecommunications facilities generate a highly visible clash with organized interest groups. Not surprisingly, these are the areas in which federal law provides a modicum of protection against the exercise of local zoning authority.

But federal law does not displace local regulation whenever a federally defined interest is at stake. This Article explores the balance Congress and the courts have struck to allow municipalities to protect residents against local externalities while ensuring that the local market is not closed to federally protected uses.

First, municipal actions are invalid per se if they intentionally treat federally protected uses less favorably than comparable uses outside the umbrella of federal protection. In this instance, restraining the market threatens no

¹⁵ See, e.g., Edward L. Glaeser & Joseph Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FED. RES. BANK N.Y. ECON. POL'Y REV., June 2003, at 21, 23 (finding that homes in high-cost areas are expensive "primarily because of government regulation"). For a discussion of the effect of skewing housing away from desirable cities, see AVENT, *supra* note 2, at loc. 1156 ("[P]opulation growth will be channeled to places with flexible housing supplies . . .").

¹⁶ See FISCHER, *supra* note 6, at 74-75, 229-30 (emphasizing importance to homeowners of maintaining prices of their homes, which represent largest chunks of undiversified portfolios).

permissible local objectives since, by hypothesis, the municipality would have permitted equivalent uses to operate.

Second, when local regulation does not intentionally discriminate against federally protected uses but nevertheless limits or prohibits those uses in order to achieve reasonable local objectives, doctrine sustains local regulation so long as the local regulation leaves intact a sufficiently thick market for the federally protected uses. That is, to mount a successful challenge, the landowner must demonstrate that the local regulation would leave consumers without adequate access to federally protected uses.

Third, in evaluating the adequacy of markets for federally protected uses, municipal boundaries are sometimes, but not always, critical. Markets do not always respect borders. Should a local regulation be invalid if consumers have ready access to federally protected uses in neighboring communities? Must each municipality provide precisely the same access to religious assembly, strip clubs, and multifamily housing as all of its neighbors? Although some federal statutes and case law appear to provide an affirmative answer, those statutes and decisions rarely provide satisfactory justifications. Municipal boundaries are functions of state law. If a large municipality could accommodate federal interests by permitting adult theaters (or churches) in a single area, is there a reason to require two separate areas if the state has divided the same geographic region into two separate municipalities?

The answer to these questions ought to depend on the nature of the federal concern. When the concern is ensuring access to religious facilities or adult uses, a municipality ought to be able to justify a reasonable ordinance, despite its exclusionary effects, by demonstrating the availability of reasonable access in neighboring communities. By contrast, when access to municipal facilities—including schools—is at issue, as it is with the Fair Housing Act, municipal boundaries are critical and access across boundaries is unlikely to prove adequate.

Part I provides a brief history of local land-use regulation. Part II describes the emergence of and rationale for federal limits on local regulation. Part III explores the appropriate balance between federal and local interests, highlighting the importance of available alternative sites in ensuring that local regulation does not stifle federal interests. Part IV turns to the significance of municipal boundaries in assessing the adequacy of alternative sites, analyzing why and when a municipality ought to be able to invoke sites outside its borders to defend against a federal challenge.

I. BACKGROUND

A. *Zoning's Nuisance-Control Origins*

Nearby industrial uses have the potential to decrease the value of residential properties. Concerns about this conflict led Los Angeles to enact a 1909

ordinance prohibiting industrial uses in particular areas.¹⁷ New York City's more comprehensive ordinance, enacted in 1916, served as a catalyst for zoning in municipalities across the country.¹⁸ The New York ordinance was concerned not only about conflict arising from industrial use, but also about the effect skyscrapers might have on the availability of light for neighboring parcels.¹⁹ As a result, the ordinance regulated not only land use, but also the building envelope, limiting the bulk of buildings without restricting their height.²⁰

Proponents of zoning emphasized the expertise of planners who could scientifically lay out municipalities to promote the general welfare. Proponents also championed zoning as a boon for the poor. Municipal regulation and enforcement of zoning ordinances would relieve the poor from the burdens of costly nuisance litigation against noxious users.²¹ And, unlike purchasers in wealthy communities, residents in less affluent communities were less likely to benefit from private restrictive covenants as a weapon against industrial users.²²

Two events hastened the spread of zoning to municipalities across the country. First, the Supreme Court upheld the general constitutional validity of zoning in *Village of Euclid v. Ambler Realty Co.*²³ Second, the Department of

¹⁷ See *Ex parte Quong Wo*, 118 P. 714, 715 (Cal. 1911) (in bank) (describing Los Angeles's industrial-use ordinance).

¹⁸ See Alfred Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 834 (1924) (noting "remarkable spread" of zoning following New York City's enactment); Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 715 (2010) (noting other cities' quick embrace of zoning following New York City's adoption of zoning code in 1916).

¹⁹ See Georgette C. Poindexter, *Light, Air, or Manhattanization?: Communal Aesthetics in Zoning Central City Real Estate Development*, 78 B.U. L. REV. 445, 460-61 (1998) (noting that commission appointed before enactment of first New York ordinance was concerned with darkened streets and buildings); Comment, *Building Size, Shape, and Placement Regulations: Bulk Control Zoning Reexamined*, 60 YALE L.J. 506, 508 (1951) (observing that chief objective of New York ordinance was to secure adequate lighting of buildings and to put limits on size of skyscrapers).

²⁰ The 1916 ordinance required that buildings fit within an angle running upward from the middle of the street. Under this scheme, builders could obtain maximum bulk by building to a particular height at the base and then setting back the remainder of the building to form a "wedding cake" shape. See Poindexter, *supra* note 19, at 462 & n.113. Other cities developed height restrictions. *Id.* at 454-60.

²¹ See generally Martha A. Lees, *Preserving Property Values? Preserving Proper Homes? Preserving Privilege?: The Pre-Euclid Debate over Zoning for Exclusively Private Residential Areas, 1916-1926*, 56 U. PITT. L. REV. 367, 393 (1994) (quoting report from Boston City Planning Board opining that "[t]he rich man can often protect himself against various forms of nuisances by legal action. The poor man cannot indulge in the luxury of a law suit").

²² *Id.* at 394 (reporting city planning consultant's view that cheaper areas tend not to have restrictive covenants).

²³ 272 U.S. 365, 395 (1926) (holding that zoning regulations that are not "clearly arbitrary and unreasonable" are constitutional).

Commerce appointed a committee that developed the Standard State Zoning Enabling Act, a model statute suitable for adoption by state legislatures.²⁴

B. *Suburbanization, Exclusion, and Fiscal Zoning*

The explosive growth of American suburbs in the post-World War II era created new opportunities to use zoning as a tool for the exclusion of undesirables—including potential residents of low-cost housing. Until World War II, the scarcity of automobiles and highways had limited the expansion of suburbs.²⁵ Cities used zoning to benefit the wealthy by excluding apartments from single-family neighborhoods, but cities could not feasibly exclude heavy industry, housing for the poor, or other undesirable uses. In the absence of well-developed transportation networks, industry and all forms of labor had to be located within reasonable proximity to each other.²⁶

Expanded transportation networks made it feasible for the middle and upper classes to separate themselves from heavy industry, from the poor, and from other undesirable land uses. Zoning facilitated that separation. Every municipality had incentives to exclude development that would not generate enough tax revenue to pay for the services the development would need.²⁷ As a result, most vacant land was zoned for single-family residences on large lots or for clean commercial uses. In accordance with the Tiebout model of intermunicipal competition,²⁸ some municipalities accepted heavier industrial uses in return for the tax revenues they would produce, but few municipalities

²⁴ See generally ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (1926) (proposing model act and emphasizing importance of close adherence to its language).

²⁵ Until automobiles became commonplace, most new homes were built and sold within walking distance of rail transportation corridors, creating a finger-shaped pattern of development. The automobile permitted development of the areas between the fingers. See KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 172-89 (1985); *id.* at 189 (“After 1920 suburbanization began to acquire a new character as residential developments multiplied, as cities expanded far beyond their old boundaries, and as the old distinctions between city and country began to erode.”).

²⁶ See *id.* at 13-16 (describing “walking city” as one in which residential and commercial functions are mixed and distances between home and work are short); William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 320 (2004) (noting that until advent of electrically powered streetcars in 1880, most people walked to work in American cities).

²⁷ See FISCHEL, *supra* note 1, at 132 (noting that “anemic tax base” would be unable to finance public services).

²⁸ Professor Charles Tiebout revolutionized thinking about local government when he argued that competition among municipalities would regulate municipal provision of public goods because potential residents would shop among municipalities for their preferred bundles of public goods. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

would generate tangible benefits from low-cost housing.²⁹ Moreover, the fiscal incentive to exclude certain uses extended beyond housing and heavy industry. Religious uses consume services without generating tax revenue. Although most communities are nevertheless willing to tolerate churches, some municipalities have been hostile to unorthodox religious users because of fears about their potential effect on neighboring property values.³⁰

Of course, municipalities have sought to exclude other uses, even when they generate tax revenue. Local residents tend to abhor change and fear that most new uses will make their neighborhoods worse.³¹ Some uses face particularly

²⁹ Fischel has suggested that a limited degree of community diversity might be a public good and that municipalities might prefer some quantum of low-cost housing even if that housing generates adverse fiscal consequences. See FISCHEL, *supra* note 1, at 149.

³⁰ The degree of municipal hostility to religious uses in the land-use process has been the subject of some controversy. In an article cited by proponents of RLUIPA, Professor Douglas Laycock documented a number of instances in which land-use regulations thwarted religious users, particularly unorthodox users. See Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 769-83 (1999). By contrast, an empirical study concluded that, during the study period, only one percent of religious institutions seeking a permit or license were denied the permit. Mark Chaves & William Tsitsos, *Are Congregations Constrained by Government? Empirical Results from the National Congregations Study*, 42 J. CHURCH & ST. 335, 341 (2000) (analyzing nationally representative sample of 429 congregations that sought permits or licenses); see also Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859, 860 (2007) (finding little evidence, in empirical study of zoning decisions in New Haven, Connecticut, that land-use process disadvantaged religious users). Others see a larger problem with federal micromanaging. See 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, 313 (2003) (“[T]here is no local arena into which Congress has been unwilling to venture. Indeed, the situation is so bad that the debate has become whether there is *any* identifiable arena of local control left.”).

As Fischel has noted, some of the hostility is not to churches themselves, but to activities loosely related to churches that bear substantial similarity to commercial activities. FISCHEL, *supra* note 1, at 54 (“Religious institutions often have auxiliary activities that are arguably related to their mission but nonetheless look (and sound and smell) like commercial uses.”).

³¹ Cf. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 417 (1986) (discussing fear of change in context of group homes).

strong opposition. Fast food restaurants,³² gasoline stations,³³ and strip clubs³⁴ have been among the most disfavored uses, largely based on the perception that their adverse impact on neighborhood character exceeds whatever benefits they generate through increased tax revenue.

Despite its effectiveness, zoning alone proved to be too blunt an exclusionary tool for many municipalities. Requiring single-family homes on large lots was one way to prevent drain on municipal coffers. But even homes on smaller lots—or condominiums—might be fiscally advantageous if the municipality could control the size of the units (potentially reducing the number of expensive school children) and shift the cost of providing services, which is ordinarily borne by the municipality, to the developer. To maximize municipal gain, municipalities developed devices to reserve for officials greater discretion over development.³⁵

First, municipalities frequently imposed overly restrictive ordinances with the intention of relaxing the restrictions for fiscally attractive development.³⁶ Second, municipalities adopted devices like the planned-unit development, which enabled developers to propose a project that did not conform to some existing zoning restrictions; the municipality would then provide input into and approval of the final project.³⁷ These embellishments eliminated one of zoning's supposed advantages: its elimination of uncertainty about what uses and structures were permitted—or prohibited—on any given parcel.

The discretionary review process has taken hold in cities as well as suburbs. Although cities have less capacity to exclude uses altogether, the practice of aldermanic privilege and its equivalents simulate suburban exclusion; each local

³² See, e.g., *Mead Square Commons, LLC v. Village of Victor*, 948 N.Y.S.2d 514, 516 (App. Div. 2012) (upholding village's blanket ban on fast-food restaurants in central business district).

³³ See, e.g., *BP Prods. N. Am. Inc. v. Village of Oakwood*, 8th Dist. Cuyahoga No. 83598, 2004-Ohio-3119, at ¶ 2 (“[V]oters in the Village of Oakwood . . . eliminated gasoline service stations as a permitted use in a local business district . . .”).

³⁴ See, e.g., *Sutton v. Chanceford Township*, 298 F. Supp. 3d 790, 793 (M.D. Pa. 2018) (“The plaintiffs allege that in 2013 their partnership was denied a zoning permit necessary to open a cabaret featuring nude dancing in the shopping center.”).

³⁵ See Stewart E. Sterk, *Exploring Taxation as a Substitute for Overregulation in the Development Process*, 78 BROOK. L. REV. 417, 420-22 (2013) (discussing “as-of-right” development).

³⁶ For instance, municipalities might create “holding zones” for undeveloped land, requiring developers to obtain a zoning amendment before doing any development. See Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 972 (1976) (“In the absence of a comprehensive plan, this policy-making procedure is particularly subject to arbitrariness.”). An ordinance that permits only single-family homes on excessively large lots accomplishes the same objective as a formal holding zone.

³⁷ See Rose, *supra* note 5, at 879 (describing various discretion-preserving devices).

representative has an incentive to exclude from her district uses that would benefit the city as a whole.³⁸

C. *The Effects of Exclusion*

From the standpoint of each municipality, the exclusion strategy may be economically rational.³⁹ From a broader perspective, however, municipal exclusion exacerbates sprawl, increases the cost of housing, and generally makes unpopular uses less accessible to the minority of consumers who find them valuable.⁴⁰

Fiscal incentives to exclude are greatest in areas that provide expansive government services—predominantly the “blue” states on the east and west coasts. In municipalities that provide fewer government services and impose lower taxes, new development has less fiscal impact—positive or negative—on existing residents. Empirical studies support the proposition that excessive regulation has had the most significant impact on housing costs on the coasts.⁴¹ The impact of excluding uses other than housing is less quantifiable. Nevertheless, the same regulatory features that reduce the supply of housing undoubtedly reduce the supply of other fiscally unattractive uses.

D. *The Role of States*

State interests in attracting and retaining businesses are in tension with exclusionary practices that drive up housing costs. Although states may not be well-suited to displace local land-use regulation, states could limit local regulatory authority in ways that make exclusion more difficult. For instance, states could streamline local procedures and could constrain municipal exercise of discretionary authority.

In general, however, state legislatures have not taken significant steps to combat local exclusion. In fact, in some states, particularly California and New York, legislatures have exacerbated the exclusion problem by mandating environmental reviews that expand the potential for local exclusion and generate

³⁸ See Roderick M. Hills, Jr. & David Schleicher, *Planning an Affordable City*, 101 IOWA L. REV. 91, 113 (2015) (describing operation of aldermanic privilege in zoning context).

³⁹ See FISCHER, *supra* note 1, at 158-60 (noting that fiscal zoning restrained fiscal free riders and protected public services from congestion).

⁴⁰ *Id.* at 289-327; see also Nicole Stelle Garnett, *Unsubsidizing Suburbia*, 90 MINN. L. REV. 459, 487-88 (2005) (book review) (discussing how exclusionary zoning and growth controls contribute to sprawl).

⁴¹ See Edward L. Glaeser, Joseph Gyourko & Raven Saks, *Why Is Manhattan So Expensive? Regulation and the Rise in House Prices*, 48 J.L. & ECON. 331, 335 (2005) (finding typical home costs in twelve of twenty-one markets were no more than 110 percent of cost of physical structure and land, while gap was substantially higher in four California markets and in Boston, New York City, Norfolk-Newport News, Salt Lake City, and Washington).

additional delays.⁴² A few states have taken a more direct role in the land-use regulatory process, but most of them have done so by superimposing a state regulatory scheme atop the local regulatory structure, not by limiting local regulatory authority.⁴³

Suburban legislators often play a dominant role in state politics, especially when the issues generate passionate response from their constituents. Developers, the primary opposition group, have typically been unable to break that stranglehold.

Some state courts, most notably the Supreme Court of New Jersey in its *Mount Laurel* decisions,⁴⁴ have taken steps to limit local exclusionary policies, but their efforts have yielded limited success.⁴⁵ Moreover, state court efforts have largely been limited to local restrictions on housing; state courts have rarely intervened to combat other forms of exclusion.

II. FEDERAL INTERVENTION IN THE LOCAL LAND-USE PROCESS

Against this background, federal law has imposed a set of patchwork constraints on local exclusion of disfavored uses. Federal intervention has not been systematic. Instead, federal limits have emerged through a combination of statutory and judge-made doctrines.

⁴² See, e.g., CAL. PUB. RES. CODE § 21002 (West 2019) (requiring consideration of feasible alternatives and implementation of feasible mitigation measures in all publicly licensed projects); N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney 2006) (detailing lengthy requirements of environmental impact statements); Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041, 2055 (1992) (describing potential weaponization of environmental review statutes by development opponents).

⁴³ See, e.g., HAW. REV. STAT. §§ 205-1 to -18 (2017); OR. REV. STAT. §§ 197.005-.285 (2017); VT. STAT. ANN. tit. 10, §§ 6001-6007 (2019) (all requiring approvals by state or regional agencies).

⁴⁴ S. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 390, 410 (N.J. 1983) (“After all this time, ten years after the trial court’s initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance.”); S. Burlington Cty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 716 (N.J. 1975) (“This case attacks the system of land use regulation by defendant Township of Mount Laurel on the ground that low and moderate income families are thereby unlawfully excluded from the municipality.”).

⁴⁵ With respect to *Mount Laurel*, see Stuart Meck, *New Jersey's Mount Laurel Doctrine and Its Implementation: Under Attack, But Safe (for Now)*, PLAN. & ENVTL. L., Jan. 2014, at 4, 10 (concluding that *Mount Laurel* has not eliminated exclusionary zoning in New Jersey, but that, absent *Mount Laurel*, residential development might be even less dense than current patterns).

A. *The Takings Clause*

The oldest and most familiar federal limitation on local exclusion emanates from the Federal Constitution's Fifth Amendment, which provides, in relevant part, "nor shall private property be taken for public use, without just compensation."⁴⁶ Through a combination of per se rules⁴⁷ and a balancing test,⁴⁸ takings doctrine invalidates particularly onerous restrictions on land use.

Takings doctrine does not target particular types of exclusion. Instead, it operates to protect "investment-backed" expectations from government interference.⁴⁹ Landowners challenging government action have generally found takings litigation an ineffective weapon; challenges rarely succeed.⁵⁰ The prospect of takings litigation, however, may have a deterrent effect on municipal officials contemplating restrictions on development.⁵¹

B. *The Fair Housing Act*

Enacted in 1968, the Federal Fair Housing Act focused on rooting out discrimination by landlords, real estate brokers, and other participants in the private real estate market. The statute's language, however, was broad enough to encompass public decision makers. By its terms, the statute makes it unlawful to "make unavailable . . . a dwelling to any person because of race, color, religion, sex, familial status, or national origin."⁵²

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,⁵³ the Supreme Court first confronted, but did not decide, whether the Fair

⁴⁶ U.S. CONST. amend. V.

⁴⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030-31 (1992) (establishing that regulation constitutes per se taking if it deprives landowner of all economically productive uses of the land); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (establishing that government's permanent physical occupation of land constitutes per se taking regardless of absence of diminution in value).

⁴⁸ Takings cases not governed by a per se rule are subject to what has come to be known as the *Penn Central* balancing test, because the Court in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), indicated that the Court's "essentially ad hoc, factual inquiries" were dependent on a number of identified factors. *Id.* at 124.

⁴⁹ *Id.* ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . .").

⁵⁰ See James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35, 62-66 (2016) (finding very low success rate in regulatory taking claims that do not fall within per se rules).

⁵¹ See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1666-73 (2006) (suggesting that takings doctrine may deter local regulation because successful takings claims would have disproportionate effect on local budget).

⁵² Fair Housing Act § 804(a), 42 U.S.C. § 3604(a) (2012).

⁵³ 429 U.S. 252 (1977).

Housing Act applied to a zoning decision made by a public body.⁵⁴ In that case, the Court remanded to the Seventh Circuit, which decided—as had other circuits⁵⁵—that the statute did apply to public zoning decisions.⁵⁶ The Seventh Circuit also decided that Fair Housing Act claims, unlike equal protection claims, did not require proof of discriminatory intent.⁵⁷

The challenge to the village's refusal to rezone in *Arlington Heights*, like many Fair Housing Act challenges before and since, was accompanied by strong evidence of local public animus toward members of minority groups. In *Arlington Heights* itself, some public comment focused on the desirability of introducing housing that would be racially integrated.⁵⁸ Zoning determinations are typically made after public hearings, and residents often make heated statements, some of which reveal racial bias. Proving that decision makers acted on these public biases is often more challenging. To deal with that problem, federal courts, including the Seventh Circuit on remand in *Arlington Heights*, borrowed discriminatory impact doctrine from Title VII of the Civil Rights Act.⁵⁹ These courts effectively held that when a Fair Housing Act plaintiff can prove that the local ordinance has a discriminatory effect on members of protected groups, the burden shifts to municipal officials to justify their action.⁶⁰

Although the federal courts of appeals had all endorsed discriminatory impact analysis in the Fair Housing Act context, the Supreme Court did not do so until 2015, when it decided *Texas Department of Housing & Community Affairs v.*

⁵⁴ *Id.* at 271 (leaving statutory claims for Seventh Circuit's consideration upon remand).

⁵⁵ See, e.g., *United States v. City of Black Jack*, 508 F.2d 1179, 1183 (8th Cir. 1974); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 436 F.2d 108, 114 (2d Cir. 1970).

⁵⁶ *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1294 (7th Cir. 1977) (“[T]he Village's refusal to rezone constituted a violation of [the Fair Housing Act].”). Although the court concluded that courts should be less willing to find a violation of the Fair Housing Act when a governmental body acts within the ambit of its authority, it further concluded that this was only one factor of several and did not constitute a bar to a Fair Housing Act claim. *Id.*

⁵⁷ *Id.* at 1290 (“We therefore hold that at least under some circumstances a violation of [the Fair Housing Act] can be established by a showing of discriminatory effect without a showing of discriminatory intent.”).

⁵⁸ *Arlington Heights*, 429 U.S. at 257-58 (“Some of the comments, both from opponents and supporters, addressed . . . the desirability or undesirability of introducing at this location in Arlington Heights low- and moderate-income housing, housing that would probably be racially integrated.”).

⁵⁹ See also, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (“[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate [in a discriminatory manner].”).

⁶⁰ On remand in *Arlington Heights*, the Seventh Circuit did not explicitly adopt a burden-shifting approach. Instead, it listed a number of factors to weigh in assessing disparate impact claims and then added that “we must decide close cases in favor of integrated housing.” 558 F.2d at 1294.

*Inclusive Communities Project, Inc.*⁶¹ In the meantime, the Department of Housing and Urban Development (“HUD”) had promulgated regulations articulating guidelines for discriminatory-effect litigation: once the plaintiff establishes discriminatory effect, the burden shifts to the defendant to establish that the practice is necessary to achieve “substantial, legitimate, nondiscriminatory interests.”⁶² If the defendant satisfies that burden, the plaintiff then has the burden of establishing that those interests could be served by another practice with less discriminatory effect.⁶³ Although the *Inclusive Communities* opinion did not explicitly endorse the HUD guidelines, it did not reject them either.

Statistical evidence generally serves as the foundation for disparate impact claims. Mere refusal to rezone land to permit high density development does not, by itself, suffice to make out a disparate impact claim that survives summary judgment.⁶⁴ If it did, every refusal to upzone would give rise to a Fair Housing Act claim. Evaluating statistical evidence, however, requires answers to preliminary questions. Of what relevance is the availability of other low-cost housing in this or other municipalities? And what is the relevant market: existing residents of the municipality or other residents who might want to relocate?

The Fair Housing Amendments Act of 1988 imposes an additional limitation on a municipality’s ability to exclude persons with disabilities: the municipality must offer reasonable accommodation for those disabilities.⁶⁵ Reasonable accommodation claims have been most successful when nonprofits have challenged zoning restrictions that prevent the use of existing homes as group homes for the disabled.⁶⁶ They have been less successful when developers seek zoning approvals to build large-scale facilities that would serve the disabled.⁶⁷

⁶¹ 135 S. Ct. 2507, 2525 (2015) (“The Court holds that disparate-impact claims are cognizable under the Fair Housing Act . . .”).

⁶² 24 C.F.R. § 100.500(c)(2) (2018).

⁶³ *Id.* § 100.500(c)(3).

⁶⁴ *See, e.g.,* Reinhart v. Lincoln County, 482 F.3d 1225, 1232 (10th Cir. 2007) (dismissing claim based on increase in lot size from two acres to five acres for failure to produce sufficient statistical evidence of disparate impact).

⁶⁵ *See* Fair Housing Amendments Act of 1988, sec. 6, § 804, 102 Stat. 1619, 1620-21 (codified at 42 U.S.C. § 3604 (2012)) (defining discrimination against persons with handicap to include refusal to make reasonable accommodations in “rules, policies, practices, or services”).

⁶⁶ *See, e.g.,* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 738 (1995) (holding that ordinance’s definition of “family” violated statute); Pac. Shores Props., LLC v. City of Newport Beach, 730 F.3d 1142, 1172 (9th Cir. 2013) (invalidating city’s special permit requirement for group homes); Oconomowoc Residential Programs, Inc. v. City of Milwaukee, 300 F.3d 775, 787 (7th Cir. 2002) (holding that denial of variance from ordinance requiring dispersal of group homes constituted violation of statute).

⁶⁷ *See* Cinnamon Hills Youth Crisis Ctr., Inc. v. Saint George City, 685 F.3d 917, 924 (10th Cir. 2012) (upholding summary judgment in favor of city when city denied variance to

C. RLUIPA

RLUIPA⁶⁸ provides religious institutions with a set of protections against exclusion by local zoning authorities. Although Congress enacted the statute in response to changes in the Supreme Court's Free Exercise Clause doctrine in areas removed from zoning, RLUIPA's focus on zoning and land use reflected the view that zoning authorities frequently treated religious groups unfavorably.⁶⁹

The statute includes three major limitations. First, it requires each municipality to treat religious assemblies on equal terms with other assemblies.⁷⁰ Second, the statute prohibits total exclusion of religious assemblies.⁷¹ Finally, and most significantly, RLUIPA prohibits imposition or implementation of a land-use regulation that imposes a "substantial burden" on religious exercise unless the government entity can show a compelling state interest in the regulation and that no less restrictive means of satisfying that interest are available.⁷² That is, if a land-use regulation imposes a substantial burden on religious exercise, it must satisfy the Supreme Court's "strict scrutiny" standard.⁷³

operate residential treatment center on top floor of motel); *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997) (upholding denial of permit for 10,360 square foot, twelve bathroom structure for physically disabled in single-family residence area).

⁶⁸ 42 U.S.C. §§ 2000cc to 2000cc-5 (2012).

⁶⁹ Congress enacted RLUIPA after the Supreme Court held an earlier statute—the Religious Freedom Restoration Act ("RFRA")—unconstitutional. *See City of Boerne v. Flores*, 521 U.S. 507, 511 (1997), *superseded by statute*, Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The RFRA was the congressional response to *Employment Division v. Smith*, in which the Court had upheld an Oregon statute denying unemployment benefits to members of the Native American Church who had lost their jobs because they had used peyote. 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488, *as recognized in* *Holt v. Hobbs*, 574 U.S. 352 (2015); *see also City of Boerne*, 521 U.S. at 512-13 ("Congress enacted RFRA in direct response to the Court's decision . . ."). In enacting the RFRA, Congress had relied on its enforcement power under Section 5 of the Fourteenth Amendment and the Court held that the RFRA extended beyond the remedial power conferred on Congress by that section. Congress responded to *City of Boerne* by enacting RLUIPA, relying this time on its authority under the Spending and Commerce Clauses. *See Burwell*, 573 U.S. at 695-96; *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005).

⁷⁰ 42 U.S.C. § 2000cc(b)(1).

⁷¹ *Id.* § 2000cc(b)(3).

⁷² *Id.* § 2000cc(a)(1).

⁷³ *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (holding that statute "must be the least restrictive means of achieving a compelling state interest" to satisfy strict scrutiny).

RLUIPA was not designed to provide religious institutions with a blanket exemption from local land-use regulation.⁷⁴ Yet, doctrine imported from constitutional law and from other federal statutes makes it clear that strict scrutiny is an extraordinarily difficult standard to satisfy.⁷⁵ As a result, the critical inquiry in RLUIPA litigation frequently focuses on whether the municipality's restriction imposes a substantial burden on religious exercise.

All permit requirements and geographic limitations impose some financial burden on all applicants, including religious institutions and their congregants. However, courts have not been willing to conclude that all financial burdens are substantial within the statute's meaning.⁷⁶

Instead, courts have typically sustained "substantial burden" challenges in two circumstances. First, when a religious institution can establish reasonable investment-backed expectations in developing a particular site for religious use, municipal interference is likely to constitute a "substantial burden." For instance, when a religious institution seeks to expand operations on an existing site, courts typically find that a requirement that the church find a new site imposes a substantial burden.⁷⁷ Similarly, if the church buys land zoned to permit a religious use, a subsequent change that would prohibit the use—and require purchase of a new parcel—typically constitutes a substantial burden.⁷⁸

⁷⁴ See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 762 (7th Cir. 2003) (holding that RLUIPA does not favor religious uses in form of "an outright exemption from land-use regulations" and does not give religious uses a "free pass").

⁷⁵ The Court has described "strict scrutiny" as an "exacting standard." *McCullen*, 573 U.S. at 478.

⁷⁶ See, e.g., *Andon, LLC v. City of Newport News*, 813 F.3d 510, 515-16 (4th Cir. 2016) (holding that scarcity of other affordable land did not make variance denial a substantial burden, especially when church knew property was nonconforming); *Eagle Cove Camp & Conference Ctr., Inc. v. Town of Woodboro*, 734 F.3d 673, 681 (7th Cir. 2013) (holding that fact that religious user "has spent considerable time and money on various applications for rezoning does not constitute, *prima facie*, a substantial burden"), *abrogated by* *Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015) (observing that *Eagle Cove*'s definition of substantial burden "effectively limits the Act to those beliefs or practices that are 'central' to religious beliefs; its approach did not survive *Hobby Lobby* and *Holt*"); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (finding that permit denial did not constitute substantial burden when church had no reasonable expectation it would be granted and did not show difficulty of obtaining permit in other zones).

⁷⁷ See, e.g., *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 352-53 (2d Cir. 2007).

⁷⁸ See *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 557-58 (4th Cir. 2013) (holding that church may have been substantially burdened when it bought property zoned to permit churches and county subsequently rezoned to prevent church from building); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir. 2012) (finding substantial burden where church bought parcel in area where zoning permitted churches but town had used environmental review process to block church). The same rationale applies when the church buys land with the reasonable belief that a church would be a permitted use,

Second, if the municipality's action left the religious entity with no sites feasible for the proposed use, the municipality's act may constitute a substantial burden.⁷⁹ The cost of available sites, however, is not enough to create a substantial burden.⁸⁰ The religious entity must compete for land with other market participants, but if the municipality has so constrained the land market that the church cannot compete, the municipality has violated RLUIPA.

D. *Adult Uses*

Municipalities have long regulated adult uses—theaters featuring sexually provocative films and performances and bookstores featuring sexually provocative books and magazines. Congress has not acted to protect adult uses from regulation, but the Supreme Court, relying on the First Amendment, has indicated that municipalities have limited power to regulate establishments that feature sexually explicit content. In the principal cases—*Young v. American Mini Theatres, Inc.*,⁸¹ *City of Renton v. Playtime Theatres, Inc.*,⁸² and *City of Los Angeles v. Alameda Books, Inc.*⁸³—the Court has rejected challenges to municipal ordinances but, in doing so, has also warned of the limits on municipal power.

In particular, the Court has made it clear that a municipality must justify regulation of adult uses by reference to the “secondary effects” they create: increased crime, diminution of neighboring property values, or lost revenue for other retail businesses.⁸⁴ Moreover, in imposing constraints on adult uses, a

even if the land is not currently zoned to permit churches. In one instance, a church purchased a parcel located between two other churches, which was zoned for residential use at that time, and sought rezoning of the parcel. *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin*, 396 F.3d 895, 898 (7th Cir. 2005). In holding that the city's refusal to rezone constituted a substantial burden on the church, the court emphasized that the city's only concern was possible future use for nonchurch purposes, a concern the church had agreed to address by “bind[ing] itself by whatever means are necessary not to sell the land for a nonreligious institutional use” *Id.* at 901.

⁷⁹ See *Int'l Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1070 (9th Cir. 2011) (denying city's motion for summary judgment because church's expert examined 196 parcels zoned for assembly use and found them all unsuitable); *Guru Nanak Sikh Soc'y v. County of Sutter*, 456 F.3d 978, 989 (9th Cir. 2006) (finding substantial burden where reasons for denial of permit were so broad they could potentially apply to all future applications); cf. *Eagle Cove Camp*, 734 F.3d at 681 (emphasizing availability of other sites that could have supported proposed camp); *Petra Presbyterian*, 489 F.3d at 851 (emphasizing church's failure to establish paucity of other land available for churches).

⁸⁰ See *Andon, LLC*, 813 F.3d at 515-16.

⁸¹ 427 U.S. 50 (1976) (plurality opinion).

⁸² 475 U.S. 41 (1986).

⁸³ 535 U.S. 425 (2002) (plurality opinion).

⁸⁴ *City of Renton*, 475 U.S. at 47-48 (noting that Renton ordinance was aimed at secondary effects of adult theaters: “The ordinance by its terms is designed to prevent crime, protect the

municipality must rely on studies that establish the existence of these secondary effects. Not every municipality must conduct its own study; a municipality may rely on studies conducted elsewhere⁸⁵ so long as challengers have adequate opportunity to attack the validity and applicability of these studies.⁸⁶

Once a municipality substantiates the secondary effects of prohibited adult uses, the municipality may pursue a variety of strategies to alleviate those effects. The municipality can concentrate adult uses away from downtown and residential areas or it can disperse them by requiring a specified distance between adult-use sites.⁸⁷

The Court has made it clear, however, that even regulation of secondary effects has its limits: municipalities may not exclude adult uses altogether. To be upheld, an ordinance must allow for “reasonable alternative avenues of communication.”⁸⁸ In the words of Justice Kennedy, concurring in *Alameda Books*, “a city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact.”⁸⁹

As a matter of logic, Justice Kennedy’s standard, taken literally, would appear impossible to satisfy. An adult establishment would have little reason to challenge exclusion from a particular site if other available sites were equally favorable. Moreover, Justice Kennedy’s standard is in tension with the Court’s formulation in *City of Renton*, which requires only that the municipality provide adequate area in which adult uses can lawfully operate, leaving users to “fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees.”⁹⁰

In general, courts of appeals have construed the Supreme Court’s framework to permit restriction of adult uses so long as the municipality provides sufficient acreage to accommodate potential adult uses.⁹¹ By contrast, when a municipality

city’s retail trade, [and] maintain property values . . . not to suppress the expression of unpopular views”).

⁸⁵ *Id.* at 51 (“The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities . . .”).

⁸⁶ *Alameda Books*, 535 U.S. at 438-39 (noting that municipality may not get away with “shoddy data or reasoning” and that if plaintiffs “succeed in casting doubt on a municipality’s rationale . . . the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance”).

⁸⁷ *City of Renton*, 475 U.S. at 52.

⁸⁸ *Id.* at 53.

⁸⁹ *Alameda Books*, 535 U.S. at 449 (Kennedy, J., concurring).

⁹⁰ *City of Renton*, 475 U.S. at 54.

⁹¹ See *Lund v. City of Fall River*, 714 F.3d 65, 73 (1st Cir. 2013) (upholding ordinance when eight sites totaling 0.24% of city’s land area were zoned to permit adult entertainment); *Tollis Inc. v. County of San Diego*, 505 F.3d 935, 942 (9th Cir. 2007) (upholding ordinance even though percentage of land area available for adult uses (sixty-eight sites) was smaller

permitted adult uses on fewer parcels than the number of known applications, the Eleventh Circuit invalidated its ordinance.⁹²

E. *The Telecommunications Act of 1996*

Universal cell phone coverage requires construction of cell phone installations at regular intervals. These installations, and particularly cell phone towers, are unpopular with immediate neighbors and are frequent targets of local regulation.

When Congress enacted the Telecommunications Act of 1996, it included Section 332 to promote cell phone service and to foster competition in the cell phone industry,⁹³ objectives that local regulation had impeded.⁹⁴ While preserving the authority of state and local governments to regulate placement of wireless service facilities,⁹⁵ the statute constrained that authority in several ways.⁹⁶ First, the statute prohibited unreasonable discrimination against providers.⁹⁷ Second, local governments could no longer regulate in a way that would “have the effect of prohibiting the provision of personal wireless services.”⁹⁸ Third, the statute required that any denial of a request to locate a facility be in writing and supported by substantial evidence.⁹⁹ Fourth, the statute explicitly prohibited municipalities from considering the environmental effects of radio frequency emissions from facilities that complied with the Federal Communications Commission’s recommendations.¹⁰⁰

Although the statute has provoked considerable litigation over when a denial has the effect of prohibiting service¹⁰¹ and what constitutes substantial

than in *City of Renton*); Ill. One News, Inc. v. City of Marshall, 477 F.3d 461, 465 (7th Cir. 2007) (upholding ordinance when four percent of land area was available for adult uses).

⁹² Fly Fish, Inc. v. City of Cocoa Beach, 337 F.3d 1301, 1312 (11th Cir. 2003) (finding ordinance invalid because it limited adult uses to three sites, specified by metes and bounds, when four adult establishments had previously existed within the city).

⁹³ 47 U.S.C. § 332(a) (2012) (listing improvement of spectrum use, encouraging competition, and providing services to largest feasible number of users as factors the Commission should take into account in managing the spectrum for mobile services).

⁹⁴ See Susan Lorde Martin, Comment, *Communications Tower Sitings: The Telecommunications Act of 1996 and the Battle for Community Control*, 12 BERKELEY TECH. L.J. 483, 488 (1997) (describing tendency of local boards to deny variances for construction of towers).

⁹⁵ 47 U.S.C. § 332(c)(7)(A).

⁹⁶ See Ostrow, *supra* note 5, at 325-35 (discussing process restrictions embedded in Telecommunications Act).

⁹⁷ 47 U.S.C. § 332(c)(7)(B)(i)(I).

⁹⁸ *Id.* § 332(c)(7)(B)(i)(II).

⁹⁹ *Id.* § 332(c)(7)(B)(iii).

¹⁰⁰ *Id.* § 332(c)(7)(B)(iv).

¹⁰¹ Compare *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 53 (1st Cir. 2009) (overturning denial of variance and permit because denial effectively prohibited service), *with*

evidence,¹⁰² both its purpose and its effect are clear: the statute operates to restore markets that would otherwise be stymied by local regulation.

III. BALANCING FEDERAL AND LOCAL INTERESTS: DISCRIMINATORY INTENT, DISCRIMINATORY EFFECT, AND THE ROLE OF AVAILABLE ALTERNATIVE SITES

A. Introduction

The land uses protected by federal law have the potential to create externalities that are appropriately within the purview of local government. Although the empirical evidence is shaky,¹⁰³ many believe that multifamily housing and religious uses, if unregulated, can create congestion, traffic, and parking problems that impose costs on existing local residents.¹⁰⁴ Adult uses may increase the incidence of criminal activity, reducing property values for neighboring commercial and residential owners.¹⁰⁵ Cell phone towers may create aesthetic issues that reduce the desirability of neighboring properties.¹⁰⁶ In each case, local land-use regulation might operate to reduce the external costs prospective users would otherwise impose on existing owners.

VoiceStream Minneapolis, Inc. v. St. Croix County, 342 F.3d 818, 836 (7th Cir. 2003) (upholding denial of permit for failure to show permit denial effectively prohibited services).

¹⁰² Compare NE Colo. Cellular, Inc. v. City of North Platte, 764 F.3d 929, 937 (8th Cir. 2014) (finding that substantial evidence supported denial), with Ogden Fire Co. No. 1 v. Upper Chichester Township, 504 F.3d 370, 392 (3d Cir. 2007) (finding no substantial evidence to support zoning board's permit denial).

¹⁰³ See, e.g., MARK OBRINSKY & DEBRA STEIN, NAT'L MULTI HOUS. COUNCIL, OVERCOMING OPPOSITION TO MULTIFAMILY RENTAL HOUSING 7-9 (2007), <https://www.nmhc.org/link/f1fc4bb3e8504f89b7edca13c5753222.aspx> [<https://perma.cc/JT6H-KVME>] (concluding that apartments have few adverse effects on local finances or congestion).

¹⁰⁴ For examples of neighbor concern about the congestion effect of apartments, see Tracy McManus, *Neighbors Fear Traffic from Proposed Clearwater Apartment Complex*, TAMPA BAY TIMES (Oct. 29, 2015), <http://www.tampabay.com/news/growth/neighbors-fear-traffic-from-proposed-clearwater-apartment-complex/2251782>; Diane Stafford, *Parking Overflow from New Apartments Is Ruining Midtown KC, Residents Say*, KAN. CITY STAR (July 31, 2017, 7:00 AM), <http://www.kansascity.com/news/local/article164156692.html> [<https://perma.cc/9JHA-ALLL>]. With respect to religious uses, see Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861, 877 (2000) (noting cases emphasizing noise and congestion accompanying religious uses).

¹⁰⁵ See Alan C. Weinstein & Richard McCleary, *The Association of Adult Businesses with Secondary Effects: Legal Doctrine, Social Theory, and Empirical Evidence*, 29 CARDOZO ARTS & ENT. L.J. 565, 566-67 (2011) (finding association between adult entertainment and crime).

¹⁰⁶ See Stephen L. Locke & Glenn C. Blomquist, *The Cost of Convenience: Estimating the Impact of Communication Antennas on Residential Property Values*, 92 LAND ECON. 131, 142 (2016) (finding proximity to cell phone towers causes some diminution in property values).

At the same time, however, federally protected land uses may impose external costs that federal law requires neighbors to accept. Multifamily housing may reduce property values, not merely because of congestion costs, but because of real or perceived racism.¹⁰⁷ Religious uses may reduce values because of antipathy toward nontraditional—or all—religious groups.¹⁰⁸ Sexually provocative performances may offend community values.¹⁰⁹ Cell phone facilities may engender fear of environmental effects, despite federal research establishing their safety.¹¹⁰

In each case, the objective of federal law is to allow local regulation to control the first type of externality, but not the second type. So long as markets exist for multifamily housing, for religious uses, for adult theaters and bookstores, and for cell phone facilities, municipalities may not shut down those markets even if a majority or supermajority of local residents conclude that allowing them to flourish will have an adverse effect on community character or property values.

In assessing the validity of a local regulation that stymies an owner proposing a federally protected use, the availability of alternative sites sometimes, but not always, plays a significant role.¹¹¹ In particular, when evidence establishes that the municipality's target is the federally protected use itself, rather than the use's impact on congestion, traffic, crime, or aesthetics, the availability of alternative sites typically is not, and should not be, a defense against a challenge to municipal action.¹¹² By contrast, if regulation disadvantages federally protected interests, but the municipality's purpose is to regulate congestion, traffic, crime, or other externalities, the availability of alternative sites becomes important in assessing the validity of local regulation.¹¹³ And, as Part IV demonstrates, in some circumstances the availability of alternatives is and should be relevant even if the only alternatives are located outside the municipality whose action is challenged.

¹⁰⁷ See J. Rosie Tighe, *Public Opinion and Affordable Housing: A Review of the Literature*, 25 J. PLAN. LITERATURE 3, 10 (2010) (noting that concerns about affordable housing mirror concerns about racially integrated neighborhoods).

¹⁰⁸ For a discussion of the antipathy towards religious intensity and minority sects, see Laycock, *supra* note 30, at 760.

¹⁰⁹ See Britt Cramer, *Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine*, 86 TEMP. L. REV. 577, 580 (2014) (citing statistics on moral opposition to pornography and strip clubs).

¹¹⁰ Some scientists have suggested that the fear is not entirely baseless. See, e.g., B. Blake Levitt & Henry Lai, *Biological Effects from Exposure to Electromagnetic Radiation Emitted by Cell Tower Base Stations and Other Antenna Arrays*, 18 ENVTL. REVIEWS 369, 389-90 (2010) (suggesting that existing federal standards may be too lax).

¹¹¹ See *infra* Part IV.

¹¹² See *infra* Sections III.B, III.C.

¹¹³ See *infra* Sections III.B, III.C.

B. *Discriminatory Intent*

Federal limits on land-use regulation are designed to protect unpopular uses against exclusion from the market. Neither the Federal Constitution nor federal statutes guarantee those uses' success in the market. The Fair Housing Act does not guarantee housing to minority residents who cannot afford it, RLUIPA does not guarantee funding to churches that want to spread the word, the First Amendment does not provide free space to adult theaters, and the Telecommunications Act does not guarantee cell phone providers free access to suitable sites for transmission facilities. Instead, each of these federal measures guarantees roughly equal access to the market.

When a municipality designs its land-use regulation to exclude federally protected uses, the regulation is invalid even if the municipality might have been able to justify those regulations on other bases.

Consider first the Fair Housing Act. If a landowner seeking to build housing for a protected class can establish that the municipality intentionally discriminated against members of a protected class, the municipality's restrictions constitute discriminatory treatment and are invalid per se; it does not matter that the municipality could have justified the restriction with otherwise-permissible reasons.¹¹⁴

Sometimes, the discrimination appears on the face of the ordinance. For instance, in *Nevada Fair Housing Center, Inc. v. Clark County*,¹¹⁵ the court invalidated a county ordinance requiring that group homes for three to six disabled adults be separated from other such group homes by at least 1500 feet.¹¹⁶ The ordinance included no comparable spacing limitation for homes occupied by unrelated adults without disabilities.¹¹⁷

In other cases, the facts established at trial leave little doubt that the municipality's objective was to exclude protected groups from the market. For instance, in *MHANY Management, Inc. v. County of Nassau*,¹¹⁸ the Second Circuit, in affirming a finding of disparate treatment, focused on the sequence of events that led to the exclusion of multifamily housing on a redevelopment site in an overwhelmingly white municipality. The municipality rezoned the site to permit only single-family homes immediately after a public outcry that saw community residents, at a public hearing, express concerns about the "flavor" of the community¹¹⁹ and the possibility that the proposed complex could have "four

¹¹⁴ See, e.g., *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 425 (2d Cir. 1995) (granting standing to anyone who suffers cognizable harm due to discriminatory housing practice).

¹¹⁵ No. 2:05-cv-00948, 2007 WL 610640 (D. Nev. Feb. 23, 2007).

¹¹⁶ *Id.* at *9 (finding that ordinance neither benefited disabled nor responded to legitimate safety concern).

¹¹⁷ *Id.*

¹¹⁸ 819 F.3d 581 (2d Cir. 2016).

¹¹⁹ *Id.* at 609.

people or ten people in an apartment.”¹²⁰ In marked contrast to the time and effort municipal officials had previously devoted to a proposed amendment that would have permitted multifamily housing, little study accompanied this rezoning.¹²¹

Similarly, RLUIPA’s “equal terms” provision invalidates local land-use provisions that discriminate against religious uses. The statute provides that “[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.”¹²² Courts have applied the statute to invalidate ordinances that permit recreational centers or other places of assembly while prohibiting churches and other religious assemblies. For instance, in *Covenant Christian Ministries, Inc. v. City of Marietta*,¹²³ the Eleventh Circuit invalidated an ordinance that excluded all religious institutions from a residential zone but permitted parks and recreational centers in the same zone.¹²⁴

In like fashion, the Supreme Court’s adult-use jurisprudence makes it clear that an ordinance that targets adult entertainment violates the First Amendment unless the municipality can establish through study that its ordinance is designed to limit secondary effects but not speech itself.¹²⁵ The ordinance is invalid

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² 42 U.S.C. § 2000cc(b)(1) (2012).

¹²³ 654 F.3d 1231 (11th Cir. 2011).

¹²⁴ *Id.* at 1236 (finding that ordinance violated RLUIPA).

¹²⁵ As the Court explained in *City of Renton*, “[t]he appropriate inquiry . . . is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication.” *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986). If an ordinance does not serve a substantial governmental interest—e.g., avoidance of the secondary effects associated with adult uses—the inference is that the Court will not treat the regulation as “content-neutral” speech regulation. *See id.* at 48-49. Justice Kennedy’s concurrence in *Alameda Books* appears to go further, indicating that to be valid, the *purpose* of a regulation on adult entertainment must be to regulate secondary effects, not to regulate speech. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 447 (2002) (Kennedy, J., concurring) (“If a zoning ordinance is directed to the secondary effects of adult speech, the ordinance does not necessarily constitute impermissible content discrimination. A zoning law need not be blind to the secondary effects of adult speech, *so long as the purpose of the law is not to suppress it.*” (emphasis added)). Justice Kennedy’s concurrence is significant because he supplied the necessary fifth vote for reversing the Ninth Circuit’s grant of summary judgment to the adult business owners. His concurrence is consistent with doctrine under the Fair Housing Act, RLUIPA, and the Telecommunications Act. By contrast, the Court’s opinion in *City of Renton* suggested that even if the regulation was motivated in part to disadvantage adult uses, the regulation may be valid if its effect is to advance a legitimate governmental purpose—restriction of secondary effects. *City of Renton*, 475 U.S. at 41. In *City of Renton*, Justice Rehnquist’s majority opinion invoked the constitutional principle that “this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” *Id.* at 48 (quoting *United States v. O’Brien*, 391 U.S.

whether or not the municipality permits the prohibited use elsewhere within its borders.

Cases decided under the Telecommunications Act reflect the same story: when a municipality targets cell phone facilities for reasons Congress has precluded—particularly the alleged environmental harm associated with radiation from these facilities—the municipality’s permit denial will not be sustained even if independent bases might support the municipality’s decision. Thus, in *T-Mobile Northeast LLC v. Loudoun County Board of Supervisors*,¹²⁶ the Fourth Circuit invalidated a site plan denial where the Board had articulated a number of reasons for its decision, including the facility’s “negative environmental impact.”¹²⁷ The court held that the impermissible reason irreparably tainted the Board’s decision, precluding remand for reconsideration. The court observed that, though the board would “omit its concerns over radiation when giving reasons for denial of the application” on remand, “the radiation concerns would nonetheless persist as part of the decisionmaking process.”¹²⁸

When a municipality intentionally targets a federally protected use for unfavorable treatment, the municipality cannot insulate its action from invalidation by identifying alternative sites at which it permits the targeted use. Even if those other sites would generate less traffic or congestion, or would promote other reasonable municipal objectives, the municipality forfeited its right to pursue those objectives when it intentionally discriminated against federally protected uses. As the court in *T-Mobile* recognized, once the federally protected user establishes intentional discrimination, the municipality’s statements about other reasons that might justify interference with the market become suspect.¹²⁹

C. *Discriminatory Effect*

In the absence of intentional discrimination against federally protected uses, federal law tolerates some interference with the market available to those uses. That tolerance reflects an acceptance of local government’s traditional role in allocating the burdens associated with development that generates external

367, 383 (1968)). In *Alameda Books*, Justice Kennedy appears to reject that position, treating motive as critical: “Though the inference may be inexorable that a city could reduce secondary effects by reducing speech, this is not a permissible strategy. The *purpose and effect* of a zoning ordinance must be to reduce secondary effects and not to reduce speech.” *Alameda Books*, 535 U.S. at 445 (Kennedy, J., concurring) (emphasis added). Whether the Court as a whole has shifted from the position articulated in *City of Renton* remains to be seen.

¹²⁶ 748 F.3d 185 (4th Cir. 2014).

¹²⁷ *Id.* at 190 (listing board’s four reasons, including negative environmental impact, for denying special exception to silo site application).

¹²⁸ *Id.* at 195.

¹²⁹ *See id.*

costs. But local regulation must leave a functioning market for federally protected uses; local government retains power to determine *where* protected uses may locate, but it must ensure that adequate alternative sites remain available.

1. Adult Uses

Adult-use doctrine focuses most explicitly on the adequacy of alternative sites. The Supreme Court has indicated that once the municipality establishes that its regulation of adult uses is directed at their secondary effects, the regulation should be sustained so long as the municipality's regulations have left the user with adequate alternative sites.¹³⁰ Those sites need not be available for sale or lease; in the Court's words, adult uses "must fend for themselves in the real estate market."¹³¹

Despite the Court's protestations, the Court's doctrine does not place adult uses on an "equal footing" with other prospective purchasers. As the supply of sites available for adult uses shrinks, competition among adult users may increase the price for those sites, reducing the number of adult users willing to operate. But so long as adult uses create secondary effects that other uses do not, there is no compelling reason to require municipalities to enable adult uses to operate on a precisely equal footing.

Thus, courts have consistently upheld adult-use ordinances when the municipality can identify alternative sites on which adult uses are permitted, even if the sites are unattractive and few in number. For instance, in *McDoogal's East, Inc. v. County Commissioners*,¹³² the Fourth Circuit upheld an ordinance even though all of the available sites were either vacant land or already devoted to existing uses.¹³³ And in *Lund v. City of Fall River*,¹³⁴ the First Circuit concluded that the city had provided enough alternative sites when only 0.24% of the city's land area—a total of eight sites—was available for adult uses.¹³⁵

Local regulation may not, however, be so constricting that some adult uses must shut down regardless of their willingness to pay higher prices for land. Thus, in *Fly Fish, Inc. v. City of Cocoa Beach*,¹³⁶ the Eleventh Circuit

¹³⁰ *City of Renton*, 475 U.S. at 53 (emphasizing that ordinance that leaves 520 acres available for adult theater sites provides reasonable alternative avenues of communication).

¹³¹ *Id.* at 54.

¹³² 341 F. App'x 918 (4th Cir. 2009).

¹³³ *Id.* at 930.

¹³⁴ 714 F.3d 65 (1st Cir. 2013).

¹³⁵ *Id.* at 69-73; *see also* Cricket Store 17, L.L.C. v. City of Columbia, 676 F. App'x 162, 166 (4th Cir. 2017) (per curiam) (finding that forty-six sites is a sufficient number of alternatives); *Ill. One News, Inc. v. City of Marshall*, 477 F.3d 461, 464-65 (7th Cir. 2007) (finding that city that devoted four percent of its land area to adult uses provided adequate alternatives).

¹³⁶ 337 F.3d 1301 (11th Cir. 2003).

invalidated an ordinance that limited adult uses to three sites even though four adult-use sites had operated within the municipality's borders before enactment of the ordinance.¹³⁷ In that circumstance, the municipality's ordinance attempted to do more than relocate the federally protected use; the transparent effort was to reduce the volume of adult entertainment.

2. RLUIPA

The availability of alternative sites is also a critical factor in evaluating RLUIPA claims. The statute prohibits absolute exclusion of all religious uses.¹³⁸ In the absence of a complete exclusion, a religious user must establish that local regulation imposes a substantial burden on religious exercise in order to prevail on a RLUIPA claim.¹³⁹ If the municipality provides adequate alternative sites for a proposed religious use, the religious user faces an uphill battle in establishing that a zoning regulation imposes a substantial burden. As with adult uses, the municipality is entitled to determine the locations at which it permits religious uses so long as it leaves a sufficiently thick market in which potential users can operate.¹⁴⁰

A municipality's freedom to regulate the location of religious uses is subject to two significant qualifications. First, when a religious user attempts to expand operations on an existing site, courts almost invariably conclude that a municipal prohibition constitutes a substantial burden on religious exercise.¹⁴¹ Second, when the religious user purchases a parcel with a reasonable expectation, based on then-existing law, that the proposed use would be permitted on the parcel, a subsequent prohibition typically constitutes a substantial burden.¹⁴²

¹³⁷ *Id.* at 1309-11 (finding lack of alternative locations to be dispositive in finding zoning ordinance unconstitutional).

¹³⁸ 42 U.S.C. § 2000cc(b)(3) (2012).

¹³⁹ *Id.* § 2000cc(a). As an alternative, the user can establish that the regulation treats religious assemblies or institutions on less than equal terms or that the regulation discriminates against a religious assembly or institution on the basis of religion. *See id.* §§ 2000cc(b)(1)-(2). Equal treatment and discrimination claims are the sort of intentional discrimination discussed in Section III.B, *supra*.

¹⁴⁰ *See, e.g.,* *Mesquite Grove Chapel v. DeBonis*, 633 F. App'x. 906, 908 (9th Cir. 2015) (finding that church "presented no evidence that other sites are unsuitable"); *Petra Presbyterian Church v. Village of Northbrook*, 489 F.3d 846, 851 (7th Cir. 2007) (holding that prohibition on churches in industrial zone did not impose substantial burden when church failed to prove that "paucity of other land available for churches made the exclusion . . . a substantial burden to it").

¹⁴¹ *See, e.g.,* *Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 348-52 (2d Cir. 2007).

¹⁴² *See* *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County*, 915 F.3d 256, 265 (4th Cir. 2019) (finding plausible substantial burden claim where planning board denied site plan in district where churches were permitted as a matter of right); *Bethel World Outreach Ministries v. Montgomery Cty. Council*, 706 F.3d 548, 552-53 (4th Cir. 2013) (finding

In neither of these situations does the availability of alternative sites provide the religious user with an adequate market alternative. The burden on the religious user is most evident when the user seeks to expand an existing facility. Such a facility almost inevitably involves expenditures on improvement of value only to the religious institution; if the institution were required to sell the property to consolidate operations elsewhere, it would likely have to forfeit the value of those improvements.¹⁴³ Even when the religious user has not made physical improvements and can sell the original parcel at the initial purchase price, the user will often face costs in time and money if forced to acquire different property and to pay for a new set of development plans.

3. Telecommunications Act of 1996

Although the Telecommunications Act preserves local authority to regulate the placement of cell phone facilities, the statute does not permit local governments to exercise that power in ways that encumber the market for cell phone service. First, the statute seeks to encourage competition by prohibiting local discrimination among providers.¹⁴⁴ Second, the statute provides that regulation “shall not prohibit or . . . have the effect of prohibiting the provision of personal wireless services.”¹⁴⁵

The availability of alternative sites becomes critical when a carrier contends that a permit denial effectively prevents the carrier from providing service. To prevail on a challenge, the carrier must first show that the proposed facility would remedy significant gaps in service.¹⁴⁶ If there are no gaps, the challenged

substantial burden where church bought property on which church use was originally permitted but later precluded); *Fortress Bible Church v. Feiner*, 694 F.3d 208, 212 (2d Cir. 2012) (finding substantial burden where church was denied permit in area where zoning apparently permitted churches).

¹⁴³ Although it might be possible to convert a church building into residential apartments or to some other use, the price a developer would pay for the church’s parcel would reflect the cost of conversion. As a result, the market value of the parcel as a whole will typically be less than the sum of the land value and the cost of the religious user’s improvements. If the municipality were to exercise its eminent domain power to acquire the church property, the municipality would typically be required to compensate for the cost of the improvements rather than their value because the church would be treated as a “specialty.” *See, e.g., Rochester Urban Renewal Agency v. Patchen Post, Inc.*, 379 N.E.2d 169, 171-72 (N.Y. 1978) (discussing valuation of churches and similar buildings as “specialties”).

¹⁴⁴ *See* 47 U.S.C. § 332(c)(7)(B)(i)(I) (2012) (“The regulation . . . shall not unreasonably discriminate among providers of functionally equivalent services . . .”).

¹⁴⁵ *Id.* § 332(c)(7)(B)(i)(II).

¹⁴⁶ What constitutes a significant gap in service remains a much-litigated issue. It is now well established that a municipality cannot rely on reliable service by another carrier to refute a carrier’s claim that a facility is necessary to remedy a gap in its service. *See* *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B)*, 24 FCC Red. 13994, ¶ 57 (2009) (adopting reading of statute requiring only that carrier show significant gap in its own

regulation cannot have the effect of prohibiting service. But even if the proposed facility would remedy gaps in service, the municipality can successfully defend the challenge if alternative sites are available to remedy those gaps.¹⁴⁷

In the First and Seventh Circuits, the provider's challenge will succeed only if the carrier can prove that no alternative sites would remedy the service gap.¹⁴⁸ In other circuits, the carrier need only prove that its chosen site is the means of providing coverage that is least intrusive on the values the permit denial was designed to protect.¹⁴⁹ Although the "least intrusive means" standard is designed to impose a lesser burden on service providers, it too requires an examination of alternative sites.¹⁵⁰ Ultimately, if the municipality can establish that alternative sites would adequately satisfy market demand, the municipality is free to deny an application at a particular location.

4. The Fair Housing Act

The availability of alternative sites also plays a role in assessing whether local regulation has a disparate impact on members of a group protected by the Fair Housing Act. Virtually all zoning restrictions increase the cost of new housing, and in that sense, any refusal to rezone or refusal to permit a development project has a disparate impact on those with less money.¹⁵¹ Although the poor are not a

service); *see also* *T-Mobile Cent., LLC v. Charter Township of West Bloomfield*, 691 F.3d 794, 806 (6th Cir. 2012) (determining whether significant gap in service focused on coverage of applicant provider or other provider). Courts have held that isolated dead spots do not amount to a gap in coverage. *See, e.g., MetroPCS, Inc. v. City & County of San Francisco*, 400 F.3d 715, 733 (9th Cir. 2005), *abrogated on other grounds by* *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293 (2015). At the same time, intermittent or unreliable service may constitute a "gap." *See AT&T Mobility Servs., LLC v. Village of Corrales*, 642 F. App'x 886, 890-91 (10th Cir. 2016) (finding that lack of reliable service is a legitimate consideration in deciding whether coverage gap is significant).

¹⁴⁷ *See, e.g., Second Generation Props., L.P. v. Town of Pelham*, 313 F.3d 620, 635 (1st Cir. 2002) (finding that applicant who shows gap in service must also show that there are no feasible alternative sites).

¹⁴⁸ *See Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 52 (1st Cir. 2009) (requiring provider to show that its application reflected the "only feasible plan"); *VoiceStream Minneapolis, Inc. v. St. Croix County*, 342 F.3d 818, 835 (7th Cir. 2003) (holding that VoiceStream failed to show that its proposal was only feasible plan for closing coverage gap).

¹⁴⁹ *See T-Mobile Cent.*, 691 F.3d at 808 (adopting least intrusive means standard); *MetroPCS*, 400 F.3d at 734-35 (same); *APT Pittsburgh Ltd. P'ship v. Penn Township*, 196 F.3d 469, 480 (3d Cir. 1999) (same); *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999) (same).

¹⁵⁰ *See, e.g., T-Mobile Cent.*, 691 F.3d at 808 (emphasizing carrier's good-faith efforts to identify and investigate alternative sites).

¹⁵¹ *Cf. Hemisphere Bldg. Co. v. Village of Richton Park*, 171 F.3d 437, 440 (7th Cir. 1999) ("Anything that makes housing more expensive hurts handicapped people; but it would be absurd to think that the FHAA overrides all local regulation of home construction.").

class protected by the Fair Housing Act, black people, and perhaps members of other protected classes, are statistically more likely to have lower incomes and less wealth than white people.¹⁵² A broad construction of disparate impact might, therefore, invalidate all zoning restrictions, at least in the absence of a compelling interest that could not be satisfied by less restrictive means. Courts have not been ready to take disparate impact that far. Instead, they assume that zoning itself passes muster and then focus on the impact of a particular ordinance or permit denial on members of protected groups.¹⁵³

From that perspective, the availability of alternative sites becomes important, and several courts have dismissed disparate impact claims based on municipal demonstrations that apartments—or other low-cost housing—are available elsewhere within the municipality.¹⁵⁴ These decisions assume that a glut of low-cost housing establishes that the market is already being served adequately and that existing restrictions have not caused exclusion on the basis of race.¹⁵⁵

The availability of alternative sites also serves as evidence that the municipality has not engaged in disparate treatment. Typically, courts that have invoked the availability of alternatives as a basis for dismissing disparate impact claims have also dismissed disparate treatment claims.¹⁵⁶

Not all courts have been willing to dismiss Fair Housing Act claims based on the availability of alternative sites. Most recently, in *Avenue 6E Investments, LLC v. City of Yuma*,¹⁵⁷ the Ninth Circuit rejected an alternatives-based defense,

¹⁵² See Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*, BOARD GOVERNORS FED. RES. SYS. (Sept. 27, 2017), <https://doi.org/10.17016/2380-7172.2083> [<https://perma.cc/YT29-U8ZB>] (showing that white families had median family wealth of \$171,000 and median income of \$61,200 compared to \$17,600 and \$35,400 for black families, respectively, in 2016).

¹⁵³ See, e.g., *Reinhart v. Lincoln County*, 482 F.3d 1225, 1229-31 (10th Cir. 2007) (holding prima facie case of disparate impact requires more than showing that regulation would increase housing costs and that members of protected groups tend to be less wealthy—plaintiff “must provide evidence indicating before-and-after costs of dwellings and the percentages of protected and nonprotected persons who will be priced out of the market as a result of the increase”); *Hallmark Developers, Inc. v. Fulton County*, 466 F.3d 1276, 1287 (11th Cir. 2006) (awarding summary judgment to county because statistics based on general population of homeowners and renters had not established relationship to actual applicant flow).

¹⁵⁴ See *Artisan/Am. Corp. v. City of Alvin*, 588 F.3d 291, 298 (5th Cir. 2009) (noting availability of other sites for low-cost housing elsewhere in municipality); *Hallmark Developers*, 466 F.3d at 1287 (finding that availability of other housing is a relevant consideration).

¹⁵⁵ *Hallmark Developers*, 466 F.3d at 1287 (“If there is a glut in the market of homes in [developer’s] projected price range, the lack of the . . . particular development is not likely to have an impact on *anyone*, let alone adversely affect one group disproportionately.”).

¹⁵⁶ See *id.* at 1283; see also *Artisan/Am. Corp.*, 588 F.3d at 298.

¹⁵⁷ 818 F.3d 493 (9th Cir. 2016).

emphasizing that the defense had the potential to interfere with the Fair Housing Act's integration objective.¹⁵⁸

In *Avenue 6E*, the city refused to rezone land in a predominantly white area to accommodate homes on smaller lots. When a developer sued, the city sought summary judgment on the disparate impact claim on the ground that there was "an adequate supply of similarly priced and modelled housing" in another quadrant of the city.¹⁵⁹ In holding that the city was not entitled to summary judgment, the court emphasized that real estate markets vary from mile to mile and perhaps even from block to block.¹⁶⁰ Adopting the city's argument "would permit cities to block legitimate housing projects that have the by-product of increasing integration simply by scouring large swaths of a city for housing in another part of town that is largely populated by minority residents"¹⁶¹

Even the court in *Avenue 6E* did not suggest that the availability of alternative sites is irrelevant in assessing disparate impact.¹⁶² Instead, the court's focus was on the multiplicity of markets within the municipality. Under the court's analysis, the alternative sites would have to be located in a comparable market to serve as a defense to a disparate impact claim.

5. Summary

In each of these areas of federal regulation, if a municipality can demonstrate reasonable efforts to accommodate the market for federally protected uses, then the municipality remains free to pursue its ordinary zoning policies. When the municipality can demonstrate that its regulatory scheme makes available a reasonable number of comparable sites suitable for the federally protected use, the federally protected user faces a difficult road in seeking to invalidate municipal action.

IV. THE ROLE OF MUNICIPAL BOUNDARIES

As the preceding sections have established, federal intervention in local land-use regulation advances two objectives: First, it precludes intentional discrimination against federally protected interests even in the absence of proof that discrimination has an adverse effect on those interests. Second, it ensures that local regulation does not interfere with markets in ways that, even unintentionally, disadvantage those federally preferred interests. In establishing

¹⁵⁸ See *id.* at 510 (noting that interference with FHA's integration objective allows municipalities to make decisions based on racial motivations instead of legitimate objectives).

¹⁵⁹ *Id.* at 501.

¹⁶⁰ *Id.* at 511 (noting that *Hallmark* rule "ignores the fact that neighborhoods change from mile to mile").

¹⁶¹ *Id.*

¹⁶² See *id.* at 512 ("Indeed, if a city shows that truly comparable housing is available in close proximity to a proposed development, such a showing would be a relevant factor in deciding whether its zoning decision had a disparate impact in that circumstance.").

that its regulations do not unduly interfere with markets for those interests, the municipality can generally rely on evidence that it has provided adequate alternative sites for federally preferred uses. This Part examines a related question: Must each individual municipality provide alternative sites, or is it enough that alternative sites are available in neighboring municipalities?

A. *Municipal Boundaries and State Law*

The dominant conception of municipalities treats them as creatures of the states in which they sit.¹⁶³ Although that conception has been heavily criticized,¹⁶⁴ it remains true that state law determines how municipalities are formed¹⁶⁵ and, in many cases, how existing municipalities may expand through annexation,¹⁶⁶ merge with neighboring municipalities,¹⁶⁷ or dissolve altogether.¹⁶⁸

State law also determines which municipalities have authority to enact zoning ordinances. The variation among states is significant. In Hawaii, for instance, zoning authority is concentrated in five counties; the state has no smaller units

¹⁶³ The principle, often referred to as Dillon's rule, was most fully articulated by Justice John Dillon of the Supreme Court of Iowa, author of the leading nineteenth-century treatise on municipal corporations. Justice Dillon wrote that "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist." *City of Clinton v. Cedar Rapids & Mo. River R.R.*, 24 Iowa 455, 475 (1868), *superseded by constitutional amendment*, IOWA CONST. art. III, § 38A, *as recognized in* *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007). The Supreme Court subsequently embraced Justice Dillon's conception. *See Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them.").

¹⁶⁴ *See, e.g.*, David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 489-90 (1999) (rejecting conception of local governments as administrative agents of states); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1210 (1999) (noting that Supreme Court, in denying Eleventh Amendment immunity to counties and municipalities, has rejected argument that only state legislatures can speak for state subdivisions).

¹⁶⁵ *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 74-77 (1990) (describing state law rules governing municipal formation).

¹⁶⁶ *See id.* at 77-81 (surveying different state practices while noting that some states do not permit annexation at all).

¹⁶⁷ *See* Andrew J. Bruck & H. Joseph Pinto III, *Overruled by Home Rule: The Problems with New Jersey's Latest Effort to Consolidate Municipalities*, 32 SETON HALL LEGIS. J. 287, 334-35 (2008) (describing New Jersey's consolidation regime).

¹⁶⁸ *See* Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1375-84 (2012) (describing state law variation on dissolution of municipalities).

of local government.¹⁶⁹ In contrast, counties in Connecticut—a state with less land area than Hawaii—play no significant role in zoning.¹⁷⁰ Instead, Connecticut’s statutes confer zoning authority on the state’s municipalities, consisting largely of 169 separate towns.¹⁷¹ Similarly, Massachusetts, with slightly more land area than Hawaii, disperses zoning authority among 351 cities and towns.¹⁷² Other states deploy an intermediate pattern: incorporated municipalities wield zoning authority within their borders (and perhaps slightly beyond their borders), while counties retain zoning authority in unincorporated areas.¹⁷³

Compare the potential impact of federal intervention in Hawaii and Connecticut. Assume that a Hawaii county establishes the secondary effects of adult entertainment in a downtown area. If *City of Renton* were construed to require the county to ensure adequate alternative sites, the county would retain broad leeway about where to permit adult entertainment. By contrast, a Connecticut town with less than two square miles of land area would be significantly more constrained in siting adult uses, even if neighboring municipalities accommodated adult uses. Similar disparities would exist if federal law required each zoning entity to accommodate religious uses or low-cost housing.

If the entity enacting the prohibition had to demonstrate the availability of alternatives within its borders, states would have an incentive to regulate on a statewide basis to ensure that alternatives were available within the boundaries of the enacting entity.¹⁷⁴ A number of states have taken precisely this course with respect to adult uses.¹⁷⁵ For instance, New Jersey’s relevant statute prohibits operation of sexually oriented businesses within one thousand feet of each other, or of churches, schools, hospitals, or districts zoned for residential

¹⁶⁹ HAW. REV. STAT. § 46-4 (2017) (granting zoning authority to counties).

¹⁷⁰ See CONN. GEN. STAT. § 8-1 (2019) (conferring zoning authority on municipalities).

¹⁷¹ See *List of Connecticut Towns & Counties Including Year Established*, CT STATE LIBRARY, <https://ctstatelibrary.org/cttowns/counties> [https://perma.cc/AG98-3K5X] (last visited Aug. 22, 2019).

¹⁷² See MASS. GEN. LAWS ch. 40A, § 1A (2017) (defining zoning as “ordinances and by-laws, adopted by cities and towns to regulate the use of land”); *Massachusetts City and Town Websites*, MASS.GOV, <https://www.mass.gov/lists/massachusetts-city-and-town-websites> [https://perma.cc/EL6M-WLCP] (last visited Aug. 22, 2019) (indicating that Massachusetts has 351 cities and towns).

¹⁷³ See, e.g., N.C. GEN. STAT. § 160A-360(d)-(e) (2018).

¹⁷⁴ See Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959, 978 (2007) (noting that, in the long run, states can exercise power over local governments to change baseline conditions under which federal-local interaction occurs).

¹⁷⁵ See, e.g., MINN. STAT. § 617.242 (2018) (providing that cities and towns need not site adult entertainment establishments within their borders if such an establishment already exists within fifty miles of the city or town).

use, unless a municipal zoning ordinance provides otherwise.¹⁷⁶ Providing states with an incentive to enact statutes like these serves no federal interest.

B. *Markets and Municipal Boundaries*

The disparity among the states in how zoning authority is allocated among local governments belies any notion that municipal boundaries are co-extensive with markets for employment, housing, entertainment, or religion. Massachusetts's two-square-mile municipalities cannot possibly satisfy all of the needs of local residents, while few residents of Hawaii's island of Moloka'i would regard a trip to the island of Maui as an adequate substitute for local churches, employment, or entertainment.

The correlation between municipal boundaries and markets was considerably stronger before the advent of modern transportation systems.¹⁷⁷ The absence of efficient transportation limited the ability of shoppers, parishioners, and employees to travel beyond their home towns on a regular basis. Towns were limited in size by how far residents could reasonably walk.¹⁷⁸

The advent of rail transportation later changed that dynamic in and around major cities, but towns still concentrated around railroad stations.¹⁷⁹ Not until automobile use proliferated did it become feasible for many individuals to shop, worship, or work miles from home without serious inconvenience. By then, however, municipal boundaries in many states had been set, and those boundaries, often created in the eighteenth and nineteenth centuries,¹⁸⁰ bore no relation to twenty-first century markets dominated by regional shopping malls rather than downtown streets.

The upshot is this: if federal intervention in the land-use process is designed to ensure that federally protected uses are able to meet market demand, this objective might be accomplished without making room for each protected use in every municipality. Only when the market is defined by municipal borders should federal law compel each municipality to provide access within its borders.

¹⁷⁶ N.J. STAT. ANN § 2C:34-7 (West 2019).

¹⁷⁷ See Briffault, *supra* note 6, at 1133 (noting that when communities were more separated by unincorporated land, people focused more of their activity within territorial limits of their locality).

¹⁷⁸ See JACKSON, *supra* note 25, at 101 (explaining that most houses would typically be built within walking distance of town center before advent of cheap transportation).

¹⁷⁹ See *id.* ("In Brookline, for example, the 40 percent of the population that was Irish almost inevitably lived in small, inexpensive houses on the low-lying land near the town center and [rail] station.").

¹⁸⁰ See FISCHER, *supra* note 1, at 33 (noting that local governments covered entirety of many states by end of nineteenth century).

C. Doctrine

In light of the variation among states in how they confer zoning authority, and the loose correlation between municipal boundaries and markets, federal doctrines that take a hard-edged approach to exclusion are problematic. Legal presumptions provide a better approach to the problem of local exclusion and are generally, but not entirely, consistent with existing doctrine.

1. Adult Uses

The Supreme Court's opinions in *City of Renton* and *Alameda Books* strongly suggest that each municipality must accommodate adult uses within its borders.¹⁸¹ In *City of Renton*, Justice Rehnquist's opinion for the Court framed the inquiry as whether the city's ordinance "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."¹⁸² In examining whether access was reasonable, the Court focused on the fact that the ordinance left 520 acres—more than five percent of its land area—open to adult theaters, emphasizing that the city "has sought to make some areas available for adult theaters and their patrons."¹⁸³ The Court never directly said that the "reasonable access" had to be within the city's borders, but one could easily draw that inference from the focus on the land the city had zoned to permit adult uses.

Because of the posture of the case, Justice O'Connor's plurality opinion in *Alameda Books* did not address reasonable alternatives.¹⁸⁴ *Alameda Books* was a five-four decision, and Justice Kennedy's vote was necessary to constitute the majority.¹⁸⁵ His concurrence argued that to sustain an adult-use ordinance, a municipality must show that the ordinance "has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."¹⁸⁶ As with Justice Rehnquist's opinion in *City of*

¹⁸¹ See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986) (highlighting general principle that restraining speech based on its content is presumptively invalid); see also *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) (plurality opinion) (same).

¹⁸² *City of Renton*, 475 U.S. at 50.

¹⁸³ *Id.* at 54.

¹⁸⁴ In *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *rev'd*, 535 U.S. 425 (2002) (plurality opinion), the Ninth Circuit had held that the adult user was entitled to summary judgment because the city had failed to present evidence to demonstrate a link between the type of adult establishment maintained by the adult user and negative secondary effects. *Id.* at 720. The Supreme Court reversed that determination, concluding only that the ordinance was not invalid on its face. *Alameda Books*, 535 U.S. at 443. Because the Court held only that the city's evidence was sufficient to withstand summary judgment, it had no occasion to consider whether the city had provided sufficient alternative sites. *Id.*

¹⁸⁵ See *Alameda Books*, 535 U.S. at 428.

¹⁸⁶ *Id.* at 449 (Kennedy, J., concurring).

Renton, Justice Kennedy did not expressly require that the quantum of speech left intact must be speech within the municipality, but one could reasonably draw that inference.

In both *City of Renton* and *Alameda Books*, however, the primary attack on the ordinance was that the municipal ordinance improperly targeted the speech itself and that the municipality had marshalled insufficient evidence that the prohibited speech would generate secondary effects.¹⁸⁷ The adequacy of alternatives was of secondary importance, and evidence of alternatives served primarily to rebut the claim that the speech itself was a target. Los Angeles is a major metropolis; Renton is a medium-sized city that encompasses twenty-three square miles¹⁸⁸ and houses a major Boeing factory.¹⁸⁹ In each case, an ordinance that completely excluded adult uses would have constituted some evidence that the municipality was targeting the speech rather than its secondary effects and, in light of the size of the municipality, some evidence that the municipality had stifled access to adult uses.

Thus, in the context of cases like *City of Renton* and *Alameda Books*, the availability of alternatives serves two functions: First, availability provides evidence that the municipality is not trying to suppress speech.¹⁹⁰ Second, availability ensures that a market is available for both speakers and listeners.¹⁹¹

Alternative sites in the vicinity, but outside municipal boundaries, address the second function but not the first. But if the first function's focus is on the municipality's intent, rather than on the exclusion's effect, the fact of exclusion itself should not be dispositive. Rather, complete exclusion should provide evidence of intent to suppress speech—though, especially in a small municipality, that evidence might be evaluated against other evidence suggesting more benign reasons for the exclusion.

A presumption of invalidity is the most promising way to accommodate federal and local interests. Absolute exclusion of adult uses should be presumed to violate the First Amendment. A municipality could rebut the presumption by

¹⁸⁷ See *City of Renton*, 475 U.S. at 47 (repelling this attack by finding that “the Renton ordinance is aimed not at the *content* of the films shown at ‘adult motion picture theatres,’ but rather at the *secondary effects* of such theaters on the surrounding community.”); see also *Alameda Books*, 535 U.S. at 429-30 (discussing respondents’ evidence-sufficiency argument as central to determining case).

¹⁸⁸ *QuickFacts: Renton City, Washington*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/rentoncitywashington/INC110217> [<https://perma.cc/ER3M-DKRJ>] (last visited Aug. 22, 2019).

¹⁸⁹ See Andrew McIntosh, *Boeing Renton Pushes 10,000th 737 Jet Out of Factory and Sets Guinness World Record*, PUGET SOUND BUS. J. (Mar. 13, 2018, 5:16 PM), <https://www.bizjournals.com/seattle/news/2018/03/13/boeing-renton-737-10000-southwest-guinness-record.html>.

¹⁹⁰ See *City of Renton*, 475 U.S. at 50 (implying that availability of alternative avenues of communication may defeat claim of speech suppression).

¹⁹¹ See *id.*

demonstrating not only the existence of secondary effects, but also that local residents enjoy reasonable access to adult uses within a reasonable distance from home.

One might object that a presumption generates unnecessary litigation that a hard-and-fast rule might avoid. But, in practice, 'hard-and-fast' rules incentivize municipalities to provide minimal and inconvenient access to adult uses within their boundaries, leading to litigation about whether access is adequate.

Although most courts have read these Supreme Court opinions as requiring each zoning authority to accommodate adult uses within its boundaries, a number of courts have authorized the zoning authority to rely on alternative sites available within the broader region. The Supreme Court of New Jersey has been most explicit in adopting a regional approach. By state statute, no sexually oriented business may operate within one thousand feet of another sexually oriented business, nor can one operate within one thousand feet of a church, school, residential district, or certain other uses unless a municipal zoning ordinance provides otherwise.¹⁹² In *Township of Saddle Brook v. A.B. Family Center, Inc.*,¹⁹³ the Supreme Court of New Jersey held that the statute did not violate the Constitution, even though it precluded all adult uses within the township, because the adequacy of alternative sites should be evaluated by reference to a market that includes other municipalities within reasonable proximity to the township.¹⁹⁴ By holding that the township bore the burden of proving the adequacy of alternatives, the court in effect created a rebuttable presumption of invalidity.

Because *Saddle Brook* involved a state statute, considering alternative sites within the state was consistent with the view that to sustain a ban on adult uses, reasonable alternatives must be available within the zoning authority's boundaries. But, in *Borough of Sayreville v. 35 Club, L.L.C.*,¹⁹⁵ the Supreme Court of New Jersey went even further, holding that available sites outside the state were relevant in evaluating a challenge to the statewide adult-use restriction.¹⁹⁶

A New York federal court took a similar position in *MJ Entertainment Enterprises, Inc. v. City of Mount Vernon*,¹⁹⁷ upholding Mount Vernon's ordinance limiting the proximity of adult-use sites to other such sites, as well as to residential districts, parks, and schools, even though the ordinance would permit only one additional adult-use site in a city of 50,000 people.¹⁹⁸ The court

¹⁹² N.J. STAT. ANN. § 2C:34-7 (West 2019).

¹⁹³ 722 A.2d 530 (N.J. 1999).

¹⁹⁴ *Id.* at 535-36 (employing reasonable proximity test).

¹⁹⁵ 33 A.3d 1200 (N.J. 2012).

¹⁹⁶ *Id.* at 1206 (asking "whether the Borough identified available alternate sites within the relevant market area").

¹⁹⁷ 328 F. Supp. 2d 480 (S.D.N.Y. 2004).

¹⁹⁸ *Id.* at 482-83.

emphasized that Mount Vernon bordered New York City, where hundreds of adult entertainment venues were available to Mount Vernon residents.¹⁹⁹

The facts underlying the Eighth Circuit's decision in *Peterson v. City of Florence*²⁰⁰ most vividly illustrate the folly of a blanket rule that would require each municipality to accommodate adult uses within its borders. The City of Florence, a municipality with a population of thirty-nine people,²⁰¹ adopted an ordinance permitting only residential uses and explicitly prohibiting sexually oriented businesses within two hundred fifty feet of parks, schools, and residential districts.²⁰² When the would-be proprietor of a nude dancing establishment sought to enjoin enforcement of the ordinance, the court held that the city was entitled to summary judgment, finding that areas outside the city provided adequate alternative sites for adult uses.²⁰³ The court emphasized the burdens on the tiny municipality's infrastructure if it were required to accommodate commercial uses, including adult uses.²⁰⁴

Finally, the Seventh Circuit, in dictum, invoked federalism principles in endorsing the doctrine that opportunities for adult use need not be limited to the municipality's borders. In *Illinois One News, Inc. v. City of Marshall*,²⁰⁵ the court upheld a city ordinance that had the effect of limiting adult uses to four percent of the city's land area.²⁰⁶ While concluding that the city had made enough land available for adult use, Judge Easterbrook noted that the Fourteenth Amendment's command is to the states and concluded that the way states carve up regulatory responsibility is not a matter of federal concern.²⁰⁷

Although most adult-use cases continue to focus on the availability of sites within municipal boundaries, those cases typically involve ordinances enacted by counties or larger cities. In that context, total exclusion of adult uses creates a stronger inference of intent to suppress speech and also threatens to impose more significant travel burdens on residents forced to escape the boundaries of a larger geographic entity. As the court in *MJ Entertainment* emphasized, context is critical, and substituting a presumption of invalidity for a hard-and-fast rule allows courts to focus on context.²⁰⁸

¹⁹⁹ *Id.* at 488-89.

²⁰⁰ 727 F.3d 839 (8th Cir. 2013) (per curiam).

²⁰¹ *Id.* at 841. The city occupies two-tenths of a square mile. *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 844.

²⁰⁴ *Id.* at 843.

²⁰⁵ 477 F.3d 461 (7th Cir. 2007).

²⁰⁶ *Id.* at 466.

²⁰⁷ *Id.* at 463-64.

²⁰⁸ *MJ Entm't Enters., Inc. v. City of Mount Vernon*, 328 F. Supp. 2d 480, 487-88 (S.D.N.Y. 2004) (describing context as "so very important" to individual case).

2. RLUIPA

As with adult uses, doctrine surrounding RLUIPA appears to require each municipality to accommodate religious uses within its borders.²⁰⁹ In particular, boundaries are critical to RLUIPA's express prohibition on regulation that "totally excludes religious assemblies from a jurisdiction."²¹⁰ The statute, however, does not define "religious assembly," and many of the religious uses at issue in litigation—for instance halfway houses²¹¹ and dormitories²¹²—might not qualify as religious assemblies. Moreover, the statute does not require that municipalities permit religious assemblies as a matter of right; a municipality can avoid RLUIPA's total-exclusion provision by treating religious uses as "conditional uses," allowing the municipality to retain considerable control over the shape and location of those uses.²¹³ As a result, the total-exclusion provision has generated relatively little litigation. Nevertheless, to the extent this provision is enforced, it appears to be an overbroad mechanism for accomplishing federal objectives. Consider, for instance, a municipality like the City of Florence, with its population of thirty-nine. Its residents must leave the city for all of their commercial and recreational needs; little purpose would be served by requiring the municipality to make land within its borders available for religious uses.

RLUIPA's "substantial burden" provision constitutes a more significant limitation on municipal land-use authority.²¹⁴ RLUIPA case law makes it clear that the statute does not guarantee religious users land suitable for worship and other religiously oriented activities. Instead, the statute is designed to ensure adequate access to real estate markets.

Consider, for instance, *Andon, LLC v. City of Newport News*.²¹⁵ When a religious entity challenged the city's denial of a setback variance for construction of a church, the Fourth Circuit held that the complaint failed to state a substantial burden claim.²¹⁶ The church argued that its burden was substantial because it could not find an alternative site that met the congregation's desired

²⁰⁹ See 42 U.S.C. § 2000cc(b)(3) (2012).

²¹⁰ *Id.*

²¹¹ See, e.g., *House Where Jesus Shines, Inc. v. City of Bellmead*, No. 08-ca-00117, 2009 WL 10669318, at *1 (W.D. Tex. Sept. 11, 2009) (declining to summarily dismiss case where city banned church's halfway house via ordinance).

²¹² See, e.g., *Congregation Rabbinical Coll. of Tartikoff, Inc. v. Village of Pomona*, 280 F. Supp. 3d 426, 483 (S.D.N.Y. 2017) (discussing village's ordinance banning dormitories at religious school).

²¹³ See, e.g., *Vision Church v. Village of Long Grove*, 468 F.3d 975, 990 (7th Cir. 2006).

²¹⁴ 42 U.S.C. § 2000cc(a) ("No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person . . .").

²¹⁵ 813 F.3d 510 (4th Cir. 2016).

²¹⁶ *Id.* at 512.

location, size, and budgetary limitation.²¹⁷ In rejecting this argument, the court noted that “[t]he absence of affordable and available properties within a geographic area will not by itself support a substantial burden claim under RLUIPA.”²¹⁸ The court emphasized that RLUIPA did not provide religious users with an “automatic exemption” from local land-use regulation, suggesting that religious users were subject to the same market constraints as other users.²¹⁹

As with adult uses, when RLUIPA’s federal object is to ensure market access, rather than to guarantee results, municipal boundaries should be relevant but not dispositive. The issue is likely to arise most frequently when a municipality denies a religious user’s application for a zoning amendment, a variance, or other discretionary approval. To support the denial, the municipality should be required to show the availability of alternative sites, but those sites need not be within the municipality’s borders.

Although there is sparse authority on the issue, *Livingston Christian Schools v. Genoa Charter Township*²²⁰ embodies a variant on this approach. After the township denied an existing Christian school’s application for a special use permit, which would have enabled the school to relocate, the school brought a substantial burden claim against the township under RLUIPA.²²¹ In awarding summary judgment to the township, the Sixth Circuit emphasized that the school had the alternative of remaining at its existing location, which was twelve miles away from the school’s proposed location but only 1.2 miles further from the county’s center than the proposed location.²²² The court concluded that this alternative site justified the award of summary judgment even though the existing school was located outside the township’s borders because, in a RLUIPA case, “courts should . . . be allowed to consider . . . whether the plaintiff had easy access to properties in a neighboring jurisdiction.”²²³

One aspect of the court’s analysis is troubling: the court’s opinion could be read as placing the burden on the school to demonstrate that alternative sites were not available, rather than placing the burden on the town to identify alternative sites.²²⁴ On the facts of *Livingston Christian Schools*, however, the

²¹⁷ *Id.* at 513.

²¹⁸ *Id.* at 516.

²¹⁹ *Id.*

²²⁰ 858 F.3d 996 (6th Cir. 2017).

²²¹ *Id.* at 999.

²²² *Id.* at 1008-09 (finding no “substantial burden on the religious exercise” imposed by alternative locations).

²²³ *Id.* at 1011.

²²⁴ The court’s opinion indicated that the school had the “obligation to provide evidence to substantiate its claims,” and concluded that it “failed to produce evidence that would be admissible at trial about *why* the alleged drop in enrollment occurred.” *Id.* at 1007. That language, however, was in response to the town’s identification of an alternative site—the site at which the school had previously been operating. Nothing in the opinion suggests that the school would have borne the burden to demonstrate the suitability of alternative sites if the town had not identified any potential sites.

town had already identified an alternative site—the existing school site—making it reasonable to shift the burden to the school to demonstrate why the site was inadequate.

The basic point illustrated by *Livingston Christian Schools* is that potential sites outside the municipality are relevant in determining whether a permit denial imposes a “substantial burden” on a religious user.

3. The Telecommunications Act

Sites outside municipal boundaries are largely irrelevant when a municipality considers an application for a cell phone facility. When an applicant offers evidence that a facility is necessary to remedy a gap in coverage, the applicant is effectively establishing that any existing extraterritorial facilities are inadequate to close the gap. Additionally, because virtually all municipalities retain control over siting of cell phone facilities, municipalities will not be able to establish that the applicant’s needs could be met by a not-yet-approved site in a nearby municipality. As a result, with telecommunication facilities, a presumption is functionally identical to a blanket rule requiring identification of alternative sites within the municipality’s borders.

4. The Fair Housing Act

Municipal boundaries should, and do, play a critical role in assessing disparate impact claims in Fair Housing Act litigation. In contrast to adult-use and RLUIPA cases, a municipality cannot rely on alternative sites in neighboring municipalities as a defense to a Fair Housing Act claim. The structure of the market for housing is fundamentally different from the structure of the market for adult uses and religious uses.

The client base for adult uses and for religious uses is largely indifferent to municipal boundaries. Distance and travel time matter, but for those choosing a congregation with which to worship or a place to obtain adult entertainment, municipal boundaries are largely irrelevant. As a result, in ensuring that municipal action does not interfere with providing an adequate market for those uses, the availability of sites in neighboring municipalities is a relevant factor.

The housing market presents a different picture. Crossing a border from one municipality to the next brings different schools, different police, and different taxes—all of which may be critical to the potential home buyer or renter.²²⁵

²²⁵ Empirical research supports the Tieboutian thesis that jurisdictional differences matter to housing purchasers. Numerous studies establish that housing prices are correlated with the perception of school quality. See, e.g., Thomas A. Downes & Jeffrey E. Zabel, *The Impact of School Characteristics on House Prices: Chicago 1987-1991*, 52 J. URB. ECON. 1, 22-23 (2002) (finding correlation between housing prices and consumers’ perception of quality of local schools); Thomas J. Kane, Stephanie K. Riegg & Douglas O. Staiger, *School Quality, Neighborhoods, and Housing Prices*, 8 AM. L. & ECON. REV. 183, 183 (2006) (finding some correlation between perceived quality of neighboring school districts and price of housing

Schools, in particular, play a prominent role in the choice of housing location. Buyers pay a significant premium for homes in districts perceived to have strong school systems.²²⁶ As a result, the housing market may change significantly as one moves across the often invisible boundaries between municipalities. For example, Garden City cannot point to neighboring Hempstead as a source of equivalent and available housing when Hempstead's average SAT scores are 453 points lower.²²⁷

Because municipal boundaries play such a significant role in consumer housing decisions, an affluent, homogeneous community cannot plausibly defend a discriminatory impact claim by arguing that the availability of housing outside its borders mitigates any alleged discriminatory effect. Moreover, although the Fair Housing Act itself does not mandate school integration, successful integration in schools may provide the surest path to rooting out discrimination in all aspects of social and economic life, including housing.²²⁸ At the same time, however, school integration is difficult to accomplish without housing integration.²²⁹ And evidence further suggests that housing integration is itself more significant than school integration in improving the educational

along their shared border). For the correlation between housing prices and taxation, see generally Eric B. Johnson & Randall Walsh, *The Effect of Property Taxes on Location Decisions: Evidence from the Market for Vacation Homes* (Nat'l Bureau of Econ. Research, Working Paper No. 14793, 2009).

²²⁶ See Downes & Zabel, *supra* note 225, at 3 (finding that housing prices are sensitive to test scores but not to expenditures per student); Kane, Riegg & Staiger, *supra* note 225, at 184-85 (finding evidence that schools have significant effect on property values but that homes in school districts perceived to be strong attract different populations, which also contributes to property values).

²²⁷ The New York State Department of Education reported that for 2015, the average SAT score (aggregating critical reading, mathematics, and writing) in Garden City Public Schools was 1653, while the average score in Hempstead Union Free School District was 1200. See Paige McAtee, *Long Island School Districts Ranked by SAT Scores*, PATCH (May 20, 2016, 4:20 PM), <https://patch.com/new-york/huntington/long-island-public-high-schools-sat-scores-ranked-highest-lowest-0> [<https://perma.cc/44ZR-6GUD>].

²²⁸ Data suggests that low-income students perform better when they attend schools with high-performing students. See JONATHAN ROTHWELL, BROOKINGS, HOUSING COSTS, ZONING, AND ACCESS TO HIGH-SCORING SCHOOLS 10 (2012), <https://www.brookings.edu/research/housing-costs-zoning-and-access-to-high-scoring-schools> [<https://perma.cc/PUU4-CMP2>] (“[L]ow-income students in higher-scoring schools perform better on exams than their peers elsewhere.”).

²²⁹ Professor Lee Fennell emphasizes the disincentives for wealthy municipalities to open their schools to children of the poor, especially when exclusionary zoning is available as a weapon to keep out the poor. Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 660-62 (2002) (book review) (“A rational school district may do better for itself by excluding low-income students even when those low-income students come with substantial numbers of dollars attached.”).

performance of minority students.²³⁰ It should not be surprising, then, that there are no reported cases in which courts have recognized a defense to Fair Housing Act claims based on the availability of alternatives in neighboring municipalities.

Of course, the Fair Housing Act does not compel any municipality to build houses for any particular group. In fact, the statute does not guarantee construction of any housing at all, and it certainly does not guarantee affordable housing. Even if density restrictions were relaxed, market forces in “desirable” municipalities might keep land costs high, which, in turn, would induce developers to build more profitable luxury housing rather than affordable housing. To remedy this lack of affordable housing, a state could require municipalities to incentivize developers to include affordable housing in their projects, as the Supreme Court of New Jersey has done in its *Mount Laurel* cases,²³¹ but the Fair Housing Act does not go so far. Instead, the Fair Housing Act operates to level the playing field by requiring each municipality to eliminate constraints on the housing market for members of protected groups.

CONCLUSION

To date, neither Congress nor any state legislatures have taken comprehensive action to combat the most serious problem generated by local land-use regulation: its effect on the cost of housing, especially in the nation’s most expensive metropolitan areas. Although the federal government has implemented a number of programs to promote construction of affordable housing, these programs do not deal with zoning’s impact on the cost of all housing.²³²

Congress and the Supreme Court have, however, acted on a smaller scale to protect a number of vulnerable uses against local interference. In each of these areas, federal intervention is designed not to guarantee the success of those vulnerable uses, but to ensure that local regulation does not unduly interfere with their access to potential markets. As a result, local governments must establish that their regulations leave those uses with reasonable alternative access.

²³⁰ See David Card & Jesse Rothstein, *Racial Segregation and the Black-White Test Score Gap*, 91 J. PUB. ECON. 2158, 2159 (2007) (concluding that move from highly segregated city to integrated city eliminates one-quarter of raw differential in SAT scores between blacks and whites and that neighborhood segregation matters more than school segregation).

²³¹ S. Burlington Cty. NAACP v. Township of Mount Laurel, 456 A.2d 390, 440-41 (N.J. 1983) (requiring municipality to make effort to produce low-income housing); S. Burlington Cty. NAACP v. Township of Mount Laurel, 336 A.2d 713, 727-28 (N.J. 1975) (discussing obligation of municipalities to provide for “reasonable opportunity for an appropriate variety and choice of housing, including, of course, low and moderate cost housing”).

²³² See, e.g., 42 U.S.C. § 12741 (2012) (authorizing HUD Secretary to make funds available for affordable housing); *id.* § 8101 (establishing Neighborhood Reinvestment Corporation).

Whether a local government can support its restrictions by reference to alternative access outside its borders should, and generally does, depend on the structure of the market for the particular federally protected use. When federal law protects adult uses or religious uses, a municipality should be entitled to defend its restrictions by demonstrating that the market is adequately served by sites outside its boundaries. On the other hand, when fair housing is at stake, even alternative sites within the municipality's borders will often be inadequate because the municipality may encompass several different housing markets distinguished by different schools, demographics, and neighborhoods.