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# CONSTITUTIONAL OFF-LOADING AT THE CITY LIMITS

*Sarah L. Swan*

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## CONSTITUTIONAL OFF-LOADING AT THE CITY LIMITS

Sarah L. Swan\*

*The most constitutionally divisive issues in the United States today often play out literally on the ground, in the realm of land use. For instance, towns that have proclaimed themselves to be “sanctuary cities for the unborn” do not want abortion clinics opening up in neighborhood medical complexes, localities with “small town values” do not want strip clubs sprouting up on Main Street, and cities that support gun control do not want new firing ranges coming to their commercial districts. When municipalities try to exclude these constitutionally protected uses, however, a perennially perplexing question arises: Does it matter that whatever is being limited can be easily accessed beyond a locality’s borders? In other words, can one municipality constitutionally justify its exclusion of a particular service or facility by pointing to availability in a neighboring town?*

*The answer, it turns out, largely depends on size. Across multiple constitutional contexts, courts frequently allow small localities to look beyond their borders and exclude particular facilities, yet typically prohibit large cities from doing that exact same thing. When mapped onto the political geography of the United States, this “horizontal tailoring” effectively means that small, conservative “red” towns can maintain and even deepen their conservative community character through exclusions, while large “blue” cities are prohibited from crafting their progressive community character through similar exclusionary methods. A tailored approach thus appears to privilege the self-determination of small localities over that of big cities, with potentially partisan political consequences.*

*This Article argues, however, that this is not the end of the story. This Article shows that the ability to engage in “constitutional off-loading” comes at substantial risk for small localities, while the prohibition on constitutional off-loading comes with a potential benefit for big cities. When courts look beyond a locality’s borders, they undermine the significance of those borders and highlight the fundamental interconnectedness and interdependencies of that locality with other areas in the region. This vision profoundly undermines the version of localism espoused in cases like *Milliken v. Bradley* and *Warth v. Seldin*, and weakens the arguments of small localities that they should be taken seriously as independent constitutional actors.*

*Conversely, the inability of cities to engage in constitutional off-loading comes with a potential benefit. By reinforcing the meaning of a city’s borders and applying the same rule to cities as applies to states (that is, that neither can engage in constitutional off-*

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loading beyond their territorial borders), the constitutional off-loading jurisprudence strengthens and fortifies arguments for recognizing a “big city localism” and pushes toward recognition of a constitutional status for large cities. The correlated benefits and burdens of constitutional off-loading may therefore ultimately push toward a more balanced localism for all.

## INTRODUCTION

Some of the most constitutionally divisive issues in the United States today play out literally on the ground, in the realm of land use. Unpersuaded by the constitutional protections surrounding certain uses, towns that have proclaimed themselves to be “sanctuary cities for the unborn” do not want abortion clinics in neighborhood medical complexes,<sup>1</sup> localities with “small town values” do not want strip clubs on Main Street,<sup>2</sup> and cities that support gun control do not want firing ranges in their commercial districts.<sup>3</sup> When municipalities try to exclude these constitutionally protected uses, however, a perennially perplexing question arises: Does it matter that whatever is being limited can be easily accessed beyond a locality’s borders?<sup>4</sup> In other words, can one municipality constitutionally justify its exclusion of a particular service or facility by pointing to availability in a neighboring town?

Those familiar with the hoary Supreme Court cases of *Schneider v. New Jersey*<sup>5</sup> and *Missouri ex rel. Gaines v. Canada*<sup>6</sup> might think that the answer is a firm no: localities may not off-load their constitutional obligations onto their neighbors. After all, the Court in *Schneider* famously proclaimed that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”<sup>7</sup> And the Court in *Gaines* forcefully declared that:

[E]ach [state is] responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which

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<sup>1</sup> Over a dozen localities in Texas have self-described in this way. See Dionne Searcey, *The Wall Some Texans Want to Build Against Abortion*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/us/politics/texas-abortion-sanctuary-cities.html> [https://www.perma.cc/ZA64-APB5]. These localities have passed ordinances that “would levy fines if an abortion clinic tries to open.” *Id.*

<sup>2</sup> See, e.g., Judy Keen, *Cities Use Local Laws to Curb Strip Clubs*, ABC NEWS (Mar. 16, 2008, 1:21 PM), <https://abcnews.go.com/Business/story?id=4458564> [https://www.perma.cc/UA2X-LWQF].

<sup>3</sup> See, e.g., *Ezell v. City of Chicago*, 651 F.3d 684, 691 (7th Cir. 2011).

<sup>4</sup> Many casebooks ask this question as well. See, e.g., RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 153–54 (8th ed. 2016) (“Would it be appropriate to permit small towns . . . to adopt regulations that are more protective of community interests and more intrusive on individual rights as long as big cities like New York City and Philadelphia are subject to the constitutional norms that apply to states and the federal government?”).

<sup>5</sup> 308 U.S. 147 (1939).

<sup>6</sup> 305 U.S. 337 (1938).

<sup>7</sup> *Schneider*, 308 U.S. at 163.

cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do.<sup>8</sup>

But neither of these cases in fact determines whether a *locality* can point to a neighboring jurisdiction to excuse itself from what would otherwise be constitutionally obligatory. While *Schneider*, “[l]ike many other First Amendment epigrams . . . lends itself to being stripped of its context and recited talismanically,”<sup>9</sup> the case actually concerned the specific issue of whether an ordinance could constitutionally prohibit pamphlet distribution on a public street.<sup>10</sup> Courts have indicated that this public forum decision has little relevance in other contexts.<sup>11</sup> And *Gaines* was about *states*, not municipalities, and it is unclear whether the decision applies to localities at all.<sup>12</sup>

In truth, the question remains somewhat unsettled. But, the relevant case law suggests that some localities *can* in fact exclude certain constitutionally protected but unwanted facilities from their communities if those facilities can be easily accessed in neighboring jurisdictions.<sup>13</sup> While the Supreme Court has never definitively determined the issue,<sup>14</sup> multiple state and federal court decisions suggest that small localities can keep unwanted land uses out of their towns, as long as residents can still conveniently access the service immediately beyond its technical borders.<sup>15</sup> Courts have let small localities exclude things like sexually oriented businesses,<sup>16</sup> a Christian school,<sup>17</sup> and a firing range<sup>18</sup> on the basis that neighboring localities offer a ready alternative.

<sup>8</sup> *Gaines*, 305 U.S. at 350.

<sup>9</sup> JULES B. GERARD & SCOTT D. BERGTHOLD, LOCAL REGULATION OF ADULT BUSINESS § 4:12 (2020).

<sup>10</sup> *Schneider*, 308 U.S. at 150.

<sup>11</sup> See GERARD & BERGTHOLD, *supra* note 9, § 4:12.

<sup>12</sup> See *Gaines*, 305 U.S. at 348–50.

<sup>13</sup> Affordable or public housing presents similar problems. However, because low-cost housing has not yet received constitutional protection, this Article does not explore it as an example of constitutional off-loading. See, e.g., Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015) (“[T]here is no formal federal, state, or constitutional right to housing in America . . .”).

<sup>14</sup> The Eighth Circuit has noted that the “Supreme Court has left open the question whether, at least in the case of small municipalities, opportunities to engage in the restricted speech in neighboring communities may be relevant to determining the existence of adequate alternative channels.” *Peterson v. City of Florence*, 727 F.3d 839, 843 (8th Cir. 2013) (per curiam); see also *Little Rock Fam. Plan. Servs. v. Rutledge*, 397 F. Supp. 3d 1213, 1311 (E.D. Ark. 2019) (noting in the abortion context that “[t]he Court acknowledges that the Supreme Court did not explicitly address whether out-of-state abortion facilities should be considered in the undue burden analysis”), *aff’d in part, appeal dismissed in part*, 984 F.3d 682 (8th Cir. 2021).

<sup>15</sup> See *infra* section II.A, pp. 844–51.

<sup>16</sup> See, e.g., *Peterson*, 727 F.3d at 844.

<sup>17</sup> See, e.g., *Livingston Christian Schs. v. Genoa Charter Twp.*, 858 F.3d 996, 1011–12 (6th Cir. 2017).

<sup>18</sup> See, e.g., *Chi. Gun Club, LLC v. Village of Willowbrook*, No. 17 C 6057, 2018 WL 2718045, at \*8 (N.D. Ill. June 6, 2018).

Yet although courts often generously allow small localities to look beyond their borders and exclude particular facilities, courts have held larger localities to a higher constitutional standard.<sup>19</sup> Courts have been perhaps surprisingly amenable to exclusions for small localities, but they have been almost uniformly hostile when cities try to make similar arguments.<sup>20</sup> So, the situation is this: a city like Chicago cannot exclude a firing range, even though there may be a plethora of easily accessed firing ranges offered in the adjoining suburbs.<sup>21</sup> Yet, at the same time, one of Chicago's *suburbs* might be able to exclude a firing range, on the basis that such ranges are available in Chicago.<sup>22</sup>

This approach, in which small towns and suburbs can look to neighboring jurisdictions to validly exclude an unwanted land use, while larger municipalities cannot, is an example of "horizontal tailoring."<sup>23</sup> A tailored approach makes some sense here: "Small townships cannot . . . provide a full panoply of services and facilities; some things will necessarily have to be excluded."<sup>24</sup> Thus, it makes sense to give those localities more leeway to carefully curate themselves within their smaller sphere, so long as, as a factual matter, residents can easily access constitutionally protected services just over the locality's borders. Big cities, on the other hand, have more space and can more easily offer a full menu of options, so it seems reasonable to require them to do so.<sup>25</sup>

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<sup>19</sup> Local government terms can sometimes not align with common usage. Technically, any locality that has become a municipal incorporation is a "city." So, "cities" can technically be, and often are, very small. For example, "[m]ore than three-quarters of all municipalities have fewer than 5,000 inhabitants, and fewer than 500 municipalities have populations greater than 50,000." Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 77 (1990). Further, there is often a disconnect between how people understand their locality or community and how those who study local government would describe it. For example, a large number of people classify Phoenix as a suburb, despite it having the sixth largest population (approximately 1.7 million) in the United States. David Montgomery, *How to Tell if You Live in the Suburbs*, BLOOMBERG: CITYLAB (July 7, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-07-07/how-to-define-american-suburbs> [<https://www.perma.cc/36FX-HRZ6>]; *Quick-Facts: Phoenix City, Arizona*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/phoenixcityarizona/PST045219> [<https://www.perma.cc/Z7AX-6D9H>]. For ease of reference, though, this Article reverts to the colloquial uses of the terms, using "town" to signify a small locality even if it is incorporated, and "city" to signify a large locality.

<sup>20</sup> See *Ezell v. City of Chicago*, 651 F.3d 684, 696–97 (7th Cir. 2011).

<sup>21</sup> See *id.*

<sup>22</sup> Cf. *Willowbrook*, 2018 WL 2718045, at \*8 (allowing a Chicago suburb to exclude a firing range on the basis that such ranges are available in other nearby Chicago suburbs).

<sup>23</sup> Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1631 (2005).

<sup>24</sup> Sarah Swan, *Targeting Community Character*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (May 7, 2020), <https://sites.law.duke.edu/secondthoughts/2020/05/07/targeting-community-character> [<https://www.perma.cc/LZ7M-K6FT>].

<sup>25</sup> Importantly, this view persists even where easy access to the relevant facility or service immediately outside a large city's borders has been established factually. See, e.g., *Ezell*, 651 F.3d at 693, 697.

Importantly, though, the extra leeway given to small towns in this context coincides with a long-standing lament of local government law scholarship that small towns are often the favored recipients of localism, while cities get short shrift.<sup>26</sup> Small localities tend to attract beneficent and empowering notions of self-determination from courts and state legislators, whereas cities are viewed with more suspicion and less claim to any inherent value of local autonomy.<sup>27</sup> These differing views arise from underlying normative ideas about the fundamental nature of small towns and big cities: small localities are viewed as organic, self-sprung, homogeneous communities, whereas cities are seen as chaotic, heterogeneous, cosmopolitan, cater-to-all-stripes spaces devoid of any real claim to community.<sup>28</sup> It therefore seems natural that courts would deny cities exclusionary abilities, while extending them to small towns.<sup>29</sup>

So, when courts engage in horizontal tailoring at the local level, they are both reflecting and constructing the view that small towns are entitled to greater latitude in self-determining their community character. And this has an important political valence: when mapped onto the political geography of the United States, in which small towns tend to be conservative and larger cities tend to be progressive,<sup>30</sup> the judicial approach of “horizontal tailoring” according to size effectively means that small, conservative “red” towns can maintain and even deepen their conservative community character through exclusions, while large “blue” cities are prohibited from crafting their progressive community character through similar exclusionary methods.

However, this Article argues that all is not lost for cities. This Article shows that for small towns, the exclusionary benefit they receive may come with a corresponding burden. When courts look beyond the geographical boundaries of a small locality, they inadvertently highlight the fundamental interconnectedness of those localities with other areas in the region. This interdependency profoundly undermines the version of localism espoused in cases like *Milliken v. Bradley*<sup>31</sup> and *Warth v.*

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<sup>26</sup> See, e.g., Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1208 (2018).

<sup>27</sup> See Alan Greenblatt, *Why Cities Have More People but Less Clout*, GOVERNING (Feb. 17, 2021), <https://www.governing.com/now/why-cities-have-more-people-but-less-clout.html> [https://www.perma.cc/GT5M-Z35T].

<sup>28</sup> See Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 382–83, 391 (1990); Richard Florida, *Tolerance and Intolerance in the City*, BLOOMBERG: CITYLAB (May 29, 2015, 1:27 PM), <https://www.bloomberg.com/news/articles/2015-05-29/a-new-study-tries-to-determine-what-a-tolerant-city-looks-like> [https://www.perma.cc/LYA2-KXRK].

<sup>29</sup> See Briffault, *supra* note 28, at 386, 392.

<sup>30</sup> See JONATHAN A. RODDEN, WHY CITIES LOSE: THE DEEP ROOTS OF THE URBAN-RURAL POLITICAL DIVIDE 4–5 (2019).

<sup>31</sup> 418 U.S. 717 (1974).

*Seldin*,<sup>32</sup> and it weakens the argument of small localities that they should be taken seriously as independent constitutional actors.<sup>33</sup>

Conversely, the inability of cities to engage in constitutional off-loading may come with a corresponding benefit. By reinforcing the meaning of a city's borders, and applying the same rule to cities as applies to states (that is, that neither can engage in constitutional off-loading beyond their territorial borders), constitutional off-loading jurisprudence strengthens arguments for recognizing a "big city localism," including a special constitutional status for large cities.<sup>34</sup> In other words, with this greater responsibility may actually come greater power, and increased constitutional responsibility may empower cities in ways even more lasting and meaningful than mere siting decisions would allow.<sup>35</sup>

This Article proceeds as follows: Part I explains how localities create their community character and connects community character to the polarized political geography of the United States. Part II describes the horizontally tailored landscape of constitutional off-loading. Part III addresses the justifications for this tailoring, including its roots in normative conceptions of what small and large localities are and should be, and explores the impact of horizontal tailoring on the existing polarized landscape of red towns and blue cities. Part IV considers the consequences of this tailored approach to constitutional off-loading and argues that constitutional off-loading jurisprudence may ultimately help reallocate the burdens and benefits of localism more fairly.

## I. POLITICAL COMMUNITY CHARACTER

This Part describes how municipalities create and construct their identity and community character, and the role of constitutional community character in this construction. This Part also explores how zoning enables municipalities to construct both the ideological and the physical aspects of community character, and explains how the political identity of American municipalities correlates with size: small towns are typically conservative, while larger cities are almost universally progressive.

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<sup>32</sup> 422 U.S. 490 (1975).

<sup>33</sup> See, e.g., *id.* at 509; *Milliken*, 418 U.S. at 741–42.

<sup>34</sup> See, e.g., David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 581 (1999).

<sup>35</sup> See *id.* at 580–81.

*A. Political Community Character and Partisan Geography*

Municipalities carefully construct and fiercely protect their community character.<sup>36</sup> A heady mix of sociocultural, economic, geographical, and environmental factors, community character is made up of a “composite of characteristics” that combine to reflect the heart or fundamental nature of a community.<sup>37</sup> Community character describes the nature of the shared political and physical vision that a majority of community members hold,<sup>38</sup> and how they conceive of their group identity. Communities can be understood as “historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life,” and community character or municipal identity describes that collective “special sense.”<sup>39</sup>

Perhaps more than ever, that collective community character or “special sense of the common life” includes specific shared moral beliefs and particular political and constitutional commitments. American localities have become increasingly vocal about the political character of their communities and now often express their positions on particular constitutional controversies as a prominent form of self-definition. This formulation frequently comes out in the register of “sanctuary” declarations, as localities signal their political and constitutional commitments through declarations that they are (or emphatically are not) a certain kind of sanctuary city, like a sanctuary city for the purposes of immigration,<sup>40</sup> or a “Second Amendment sanctuary” that supports gun rights,<sup>41</sup> or a “First Amendment sanctuary” that will not restrict social gatherings during a global pandemic,<sup>42</sup> or a “sanctuary city for the unborn”

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<sup>36</sup> In some states, though, counties and towns may be “largely artificial constructs” resulting from “rectangular land surveys of the national government” rather than from “settlement patterns.” Rick Su, *Democracy in Rural America*, 98 N.C. L. REV. 837, 854 & n.92 (2020). Community character therefore may have less purchase in these particular kinds of rural local governments.

<sup>37</sup> Gary Pivo, *How Do You Define Community Character?: Adapting the Environmental Impact Statement Process to Snoqualmie*, Washington, 23 SMALL TOWN, Nov.–Dec. 1992, at 4, 6.

<sup>38</sup> See RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 222–23 (Penguin Books 2003) (1977).

<sup>39</sup> Kenneth A. Stahl, *The Challenge of Inclusion*, 89 TEMP. L. REV. 487, 492 (2017) (quoting MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 62 (1983)).

<sup>40</sup> See Pratheepan Gulasekaram et al., *Essay, Anti-sanctuary and Immigration Localism*, 119 COLUM. L. REV. 837, 839 (2019).

<sup>41</sup> See Darrell Miller, *Second Amendment Sanctuary Counties*, DUKE CTR. FOR FIREARMS L.: SECOND THOUGHTS BLOG (June 7, 2019), <http://sites.law.duke.edu/secondthoughts/2019/06/07/second-amendment-sanctuary-counties> [<https://www.perma.cc/4VEM-TQUY>] (noting that localities calling themselves Second Amendment sanctuaries “may be engaging in . . . ‘constitutional politics’ — the effort to mobilize citizens in an act of constitution-making outside of the courts”).

<sup>42</sup> G. Wayne Miller, *Burrillville Council Says Raimondo’s Coronavirus Orders Are Unconstitutional, Declares “First Amendment Sanctuary,”* PROVIDENCE J. (June 25, 2020, 10:39 AM), <https://www.providencejournal.com/story/news/coronavirus/2020/06/25/burrillville-council-says-raimondors-quos-coronavirus-orders-are-unconstitutional-declares-rsquo-first/42437749> [<https://www.perma.cc/TE52-B7RJ>].

where abortion is shunned,<sup>43</sup> or a “Statuary Sanctuary City” where memorials to divisive historical figures will be preserved and cherished.<sup>44</sup>

These municipal declarations are meant to convey a bundle of closely held and community-defining political beliefs.<sup>45</sup> Immigration “sanctuary cities” or “welcoming” localities define themselves as open and protective of immigrants, asserting that the constitutional anticommandeering doctrine includes the right to refuse to use local resources to assist with federal immigration enforcement.<sup>46</sup> Other “anti-sanctuary” localities, on the other hand, enthusiastically agree to assist U.S. Immigration and Customs Enforcement in its endeavors.<sup>47</sup> Localities that self-describe as “Second Amendment sanctuaries” are self-defining through their devotion to firearms and commitment to an unconstrained reading of the Second Amendment.<sup>48</sup> Cities that are emphatically not Second Amendment sanctuaries, like Chicago, head in the other cultural direction, adopting numerous gun control measures and preferring a significantly more cabined version of constitutional gun rights to define their cultural identity.<sup>49</sup> Some localities that identify as “sanctuary cities for the unborn” have passed ordinances declaring that *Roe v. Wade*<sup>50</sup> and its entire ensuing line of jurisprudence are unconstitutional;<sup>51</sup> other

<sup>43</sup> Searcey, *supra* note 1.

<sup>44</sup> Alisha Ebrahimji, *An Ohio City Is Accepting Unwanted, Controversial Statues from Across the Country*, CNN (July 6, 2020, 1:31 PM), <https://www.cnn.com/2020/07/06/us/newton-falls-statuary-sanctuary-city-trnd/index.html> [<https://www.perma.cc/T6CC-4ME2>].

<sup>45</sup> City charters also demonstrate and construct community character. See Nestor M. Davidson, *Local Constitutions*, 99 TEX. L. REV. 839, 875 (2021).

<sup>46</sup> See Gulasekaram et al., *supra* note 40, at 872–73.

<sup>47</sup> These latter type of localities typically enter into what are called 287(g) agreements. See Claudia Flores, *A Controversial ICE Program and the Decision Facing Localities This June*, CTR. FOR AM. PROGRESS (May 16, 2019), <https://americanprogress.org/issues/immigration/news/2019/05/16/460871/controversial-ice-program-decision-facing-localities-june> [<https://www.perma.cc/DB2U-MVT5>]. In California, a “sanctuary state,” some cities like Huntington Beach sued, arguing that the state law infringed on municipal powers. See Rose Cuison Villazor & Pratheepan Gulasekaram, *The New Sanctuary and Anti-sanctuary Movements*, 52 U.C. DAVIS L. REV. 549, 552 (2018).

<sup>48</sup> See Shawn E. Fields, *Second Amendment Sanctuaries*, 115 NW. U. L. REV. 437, 439–40 (2020).

<sup>49</sup> See Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 367 n.1 (2019) (“In the aftermath of the Parkland school-shooting tragedy, some cities in Florida, fearful of retaliation by their state — which prohibits local gun control measures — posted ironic ‘warning’ signs stating that their jurisdiction is ‘Protected by Second Amendment Security.’” (citing Sarah Holder, *Florida Cities’ New Tactic in the Fight for Gun Reform*, BLOOMBERG: CITYLAB (Apr. 5, 2018, 10:46 AM), <https://www.citylab.com/equity/2018/04/south-florida-cities-want-to-control-guns-on-their-own-terms/557207> [<https://www.perma.cc/TN9C-JR5L>])).

<sup>50</sup> 410 U.S. 113 (1973).

<sup>51</sup> See, e.g., Allison Babka, *Ohio City Passes Ban on Abortions, Even Though No Abortion Providers Are Actually Located There*, CLEV. SCENE (Oct. 26, 2021, 2:20 PM), <https://www.clevescene.com/scene-and-heard/archives/2021/10/26/ohio-city-passes-ban-on-abortion-providers-are-actually-located-there> [<https://www.perma.cc/HY6C->

localities, like New York City, explicitly praise *Roe v. Wade* and establish funding streams to help women obtain abortions.<sup>52</sup>

The polarization evident in these varying sanctuary self-definitions squarely correlates with size. America has a “highly polarized partisan geography,” where political community character and size of locality are entwined.<sup>53</sup> Simply put, small towns are usually “red,” and big cities are usually “blue.”<sup>54</sup> Big-city residents tend to have vastly “different social values and preferences” than those in small or rural localities<sup>55</sup>; those who live in metropolitan areas “are substantially more liberal on moral issues than are residents of nonmetropolitan areas”<sup>56</sup> while “non-metropolitan counties and especially rural areas are still substantially more conservative than cities and their suburbs.”<sup>57</sup> “[C]hurch attendance and religiosity” are highest where population density is lowest, a trend that reaches back into the 1970s, when “conservative Christianity and accompanying conservative social views were already highly correlated with population density.”<sup>58</sup>

### B. Political Community Character and Land Use

Local residents want to see their moral and political identity built into their towns and cities. Thus, land use — which “deals with the very nature of community composition” — becomes the battlefield where the fight for the soul of a city takes place.<sup>59</sup> Municipal identity is created in part from a shared commitment of a majority of community members to the same political vision,<sup>60</sup> and communities want to see

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R4Q7] (quoting an ordinance in Mason, Ohio, which states that *Roe v. Wade* “[i]nvented a constitutional right for pregnant women to kill their unborn children” and is “a lawless and unconstitutional act of judicial usurpation”).

<sup>52</sup> See Council Res. 1635-A, 2013 Sess. (N.Y.C. 2013); Mark Osborne, *New York City Set to Become 1st City to Fund Abortion Services*, ABC NEWS (June 15, 2019, 2:22 AM), <https://abcnews.go.com/Politics/york-city-set-1st-city-fund-abortion-services/story?id=63730538> [<https://www.perma.cc/FFB4-PBSZ>]; see also NAT’L INST. FOR REPROD. HEALTH, LOCAL REPRODUCTIVE FREEDOM INDEX 6 (2019); Devon Haynie, *The Cities Protecting Abortion Rights*, U.S. NEWS & WORLD REP. (Oct. 22, 2019, 5:14 PM), <https://www.usnews.com/news/cities/articles/2019-10-22/a-report-from-an-abortion-rights-group-measures-cities-on-reproductive-freedom> [<https://www.perma.cc/9P97-WM8N>].

<sup>53</sup> RODDEN, *supra* note 30, at 3.

<sup>54</sup> See *id.* at 3–5.

<sup>55</sup> *Id.* at 85.

<sup>56</sup> *Id.* at 88.

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

<sup>58</sup> *Id.* at 86.

<sup>59</sup> Agustín León-Moreta & Vittoria R. Totaro, *What Can Local Governments Do? Variation Across States*, in COOPERATION AND CONFLICT BETWEEN STATE AND LOCAL GOVERNMENT 111, 116 (Russell L. Hanson & Eric S. Zeemering eds., 2021).

<sup>60</sup> See SENNETT, *supra* note 38, at 41.

that shared political vision manifested in their physical environment.<sup>61</sup> “What a city or neighborhood is, or what it will become, depends to a significant degree on its physical structure,” and localities therefore frequently try to carefully curate which businesses can take root in their community, to ensure that the businesses that both inform and reflect the nature of the town are consistent with that shared vision.<sup>62</sup> So, for instance, as the mayor of a small Iowa town openly acknowledged when a strip club wanted to open in the business district: “This is a Christian community, and we just don’t feel like we need anything like that in town.”<sup>63</sup> Conversely, large cities might be fine with a strip club opening, but balk when a pregnancy crisis center or gun shop wants to do the same, as both facilities conflict with the city’s more progressive community character.<sup>64</sup>

When disputes over siting these facilities erupt, the would-be sitters have constitutional protections on their side. But localities, in turn, have zoning. The two are more evenly matched than one might think. “Zoning, prosaically understood, is the primary tool of land use, a mechanism by which local governments regulate the placement and distribution of the components of our built environment.”<sup>65</sup> Zoning determines what can go where and whether a particular facility can become part of the community at all.<sup>66</sup> This power is enormously important for community creation, so powerful, in fact, that “towns have incorporated simply to gain the power to zone.”<sup>67</sup> Through zoning, “groups can encourage uses of physical spaces that they like and discourage uses they do not like,” making it “a powerful instrument for instituting and transmitting norms of behavior spatially.”<sup>68</sup> Zoning involves “excluding . . . undesirable uses of space, and, by extension, undesirables.”<sup>69</sup> It is “a

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<sup>61</sup> See Britt Cramer, *Zoning Adult Businesses: Evaluating the Secondary Effects Doctrine*, 86 TEMP. L. REV. 577, 581 (2014) (“Deciding where to permit different kinds of businesses and activities is often a contentious political struggle that impacts economic activity, city character, and quality of life for residents.”).

<sup>62</sup> Lea S. VanderVelde, *Local Knowledge, Legal Knowledge, and Zoning Law*, 75 IOWA L. REV. 1057, 1063 (1990).

<sup>63</sup> Andrew J. Nelson, *Iowa Cities Try to Limit Adult Entertainment After Strip-Club Operator Sets Up Shop near Homes in Moorhead*, OMAHA WORLD-HERALD (June 30, 2015), [https://omaha.com/state-and-regional/iowa-cities-try-to-limit-adult-entertainment-after-strip-club-operator-sets-up-shop-near/article\\_fa3a68do-63a4-59d7-bc10-084172e53876.html](https://omaha.com/state-and-regional/iowa-cities-try-to-limit-adult-entertainment-after-strip-club-operator-sets-up-shop-near/article_fa3a68do-63a4-59d7-bc10-084172e53876.html) [<https://www.perma.cc/F6CX-D2S6>].

<sup>64</sup> See, e.g., Jeff Parrott, *South Bend Mayor Pete Buttigieg Vetoes Anti-abortion Group’s Rezoning*, SOUTH BEND TRIB. (Apr. 27, 2018, 5:00 PM), <https://www.southbendtribune.com/story/news/local/2018/04/27/south-bend-mayor-pete-buttigieg-vetoes-anti-abortion-groups-rezoning/46350661> [<https://www.perma.cc/DN5Z-45FW>].

<sup>65</sup> Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374 (2001).

<sup>66</sup> See *id.*; Cramer, *supra* note 61, at 581–82.

<sup>67</sup> Schragger, *supra* note 65, at 405.

<sup>68</sup> *Id.* at 374.

<sup>69</sup> *Id.* at 375.

central mechanism for controlling entrance into a community, establishing norms of order there, and transmitting those norms to its residents.”<sup>70</sup>

Towns wanting to keep out particular uses therefore have a powerful ally in zoning law, one that they frequently use to develop and maintain their desired community character.<sup>71</sup> However, localities walk a fine line in that, technically, localities cannot intentionally discriminate against constitutionally protected uses.<sup>72</sup> In reality, though, localities block and impede constitutionally protected uses all the time in an effort to preserve or create a particular version of community character.<sup>73</sup> They are able to do so by listing other more constitutionally acceptable reasons for imposing an ordinance or denying a special use permit.<sup>74</sup> For example, if the facility in question is a First Amendment–protected use, the city will have to meet a low-threshold burden of showing that it is primarily concerned with the “secondary effects” of the business, even if the city has other fairly obvious community character motivations as well.<sup>75</sup> Municipalities can easily ensure that they can jump these small hurdles: a conservative locality that would prefer not to have “immoral” businesses like strip bars or sexually oriented businesses within its borders will be “careful to create detailed records to support its assertions that either dispersal or concentration of adult establishments is justified by concerns about secondary effects”<sup>76</sup> such as increased crime or traffic in the relevant area.<sup>77</sup> These records, which are essentially “politically motivated documents that purport to make a ‘neutral’ or ‘unbiased’ evaluation while the communities for which they

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<sup>70</sup> *Id.* at 405.

<sup>71</sup> *Cf.* Cramer, *supra* note 61, at 580 (“As recently as May 2014, nearly two-thirds of Americans surveyed asserted that they believed that pornography is morally wrong. . . . [C]ountless jurisdictions throughout the United States have taken measures to restrict and regulate access to [strip clubs]. . .”).

<sup>72</sup> *See* Daniel R. Aaronson et al., *The First Amendment in Chaos: How the Law of Secondary Effects Is Applied and Misapplied by the Circuit Courts*, 63 U. MIA. L. REV. 741, 742 (2009).

<sup>73</sup> *See id.*

<sup>74</sup> *See id.*

<sup>75</sup> *See* John Fee, *The Pornographic Secondary Effects Doctrine*, 60 ALA. L. REV. 291, 292 (2009) (noting that the secondary effects doctrine “provides that a regulation will be treated as content-neutral and subject to intermediate scrutiny, despite its content-discriminatory form, if the primary purpose of the regulation is to control the secondary effects rather than the primary effects of speech”).

<sup>76</sup> Cramer, *supra* note 61, at 594. The secondary effects doctrine “permits local government entities . . . to regulate speech activities indirectly through zoning in limited circumstances, namely when the secondary effects of such speech (such as increase in crime or neighborhood decay) are deemed sufficiently detrimental.” *Id.* at 579.

<sup>77</sup> When regulation targets secondary effects, the question becomes whether reasonable alternatives are available, as “the regulation should be sustained so long as the municipality’s regulations have left the user with adequate alternative sites.” Stewart E. Sterk, *Federal Land Use Intervention as Market Restoration*, 99 B.U. L. REV. 1577, 1603 (2019).

are prepared are clearly seeking a specific, predetermined course of action” are nevertheless generally persuasive.<sup>78</sup>

For example, in one case, a mayor told the press: “We’re not going to tolerate this kind of filth in [this city].”<sup>79</sup> Although this kind of statement seems damning, it did not torpedo the city’s argument that the zoning ordinance was aimed at the secondary effects of the business.<sup>80</sup> In another case, a city attorney requested that his staff provide an “in depth memo” researching the regulation of sexually oriented businesses, and “in a handwritten comment” on the memo request, the city attorney had written: “Please get together and draft a legal opinion on this — I want to shut these places down! Somehow.”<sup>81</sup> That too was not enough to defeat the city’s argument that it was targeting secondary effects with its actions.<sup>82</sup> And in fact, at least one circuit has held that “discriminatory intent by the municipality is not considered in connection with the substantial burden analysis” related to a religious use (“although it is considered by other circuits”).<sup>83</sup> While there are limits to this, in general, so long as a locality does not come across as excluding or limiting the putative siting of a facility on the sole grounds of moral distaste or aversion to it, the locality can extensively limit the possibility of siting that facility.<sup>84</sup>

When municipalities exclude constitutionally protected uses, the question of whether a locality can argue the right has been accommodated because it is available in an adjoining jurisdiction comes up repeatedly, appearing in slightly different guises depending on which specific constitutional right is at issue. Regardless of whether the question is presented as one of reasonable alternatives, substantial or undue

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<sup>78</sup> Cramer, *supra* note 61, at 594 (“[F]rom a city’s perspective ‘[t]he best defense . . . is a strong legislative record’: ‘The courts look to whether there is sufficient evidence in the record that the purpose of the ordinance is to lessen undesirable secondary effects. While some evidence of improper motives (such as a statement in the newspaper by a council member about how the immoral acts performed in such businesses wreck [sic] moral havoc on the town) is not enough to invalidate an ordinance, a clean, well-established legislative record is worth the effort when the SOB operator is crying to a district court jury about his constitutional rights.’” (alteration in original) (footnote omitted) (quoting REGINA ATWELL, WHY AND HOW OUR CITY ORGANIZED A JOINT COUNTY-WIDE SEXUALLY ORIENTED BUSINESS TASK FORCE 1, 3 (1997))).

<sup>79</sup> Phillips v. Borough of Keyport, 107 F.3d 164, 169 (3d Cir. 1997).

<sup>80</sup> See *id.* at 175 (noting that the Borough may nevertheless “be able to carry their burden of showing that the ordinance is reasonably designed to address the reasonably foreseeable secondary effect problems”).

<sup>81</sup> Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 859 (8th Cir. 1994).

<sup>82</sup> The court noted that “[t]he City Attorney testified that in the ordinances he was ‘in no way, shape, form or fashion . . . attempting to’ ‘put these people and these sorts of businesses out of business.’ ‘We knew that the law didn’t allow that.’” *Id.* at 864 (alteration in original).

<sup>83</sup> Adam Cmty. Ctr. v. City of Troy, 381 F. Supp. 3d 887, 902 (E.D. Mich. 2019) (discussing the Sixth Circuit’s approach).

<sup>84</sup> See Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1257 (5th Cir. 1992) (“Cities may not regulate . . . out of a mere distaste for the message . . .”).

burden, or some other doctrinal framing, the essence stays the same: Can a locality use the availability of the contested use or facility outside of its immediate borders to establish the constitutionality of its own actions?<sup>85</sup> In other words, can one municipality craft its own community character in part by showing that a neighboring locality offers an alternative siting?

## II. SIZE MATTERS FOR CONSTITUTIONAL OFF-LOADING

This Part travels through the case law on constitutional off-loading and demonstrates how, in multiple contexts, courts have adopted a tailored approach when addressing this question. Many courts allow small localities to look beyond their borders to justify an exclusion, while very few have permitted large cities or states to do so.

### A. *Small Towns*

Over multiple constitutional contexts, courts have permitted small towns and suburbs to rely on the availability of alternative sites lying outside the locality's borders when examining the constitutionality of a locality's actions.<sup>86</sup> Specifically, courts have allowed small localities to exclude sexually oriented businesses, religious premises, and firearm facilities on the basis that the constitutionally protected use is available in a nearby jurisdiction.

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<sup>85</sup> For sexually oriented businesses, assuming the court finds that the zoning ordinance is a time, place, or manner restriction and is content neutral, the city must show that the "ordinance is designed to serve a substantial government interest," like a concern over secondary effects, and that "reasonable alternative avenues of communication" remained available. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986). For abortion clinics, the question will relate to whether the ordinance poses an "undue burden." For religious facilities, the question will be one of whether there is a "substantial burden," and questions relating to Second Amendment facilities often pull from both First Amendment and abortion jurisprudence. See *infra* notes 147, 181 and accompanying text.

<sup>86</sup> This treatment has occurred less often in the abortion context, which mostly focuses on whether a state has to provide access within the state. See *infra* pp. 858–59. However, in *Femhealth USA, Inc. v. City of Mount Juliet*, 458 F. Supp. 3d 777 (M.D. Tenn. 2020), Mount Juliet, a suburb of Nashville, attempted to defend a zoning ordinance restricting the available areas for siting the suburb's only abortion clinic by pointing to the presence of a clinic in nearby Nashville. *Id.* at 802. In granting the plaintiff abortion clinic's request for a preliminary injunction, the court noted that the Nashville clinic was itself unable to accommodate existing demand for services but did not directly address whether the court would have allowed Mount Juliet's restriction if the Nashville clinic were better able to handle demand. See *id.* At the intralocality level, "[o]nly one court . . . has actually upheld a locational restriction facially discriminating against abortion clinics in part because abortion services were available in other parts of the city, and it recanted its analysis on remand." Alan E. Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1, 34 n.95 (1988) (citations omitted) (citing *W. Side Women's Servs., Inc. v. City of Cleveland*, 450 F. Supp. 796, 798 (N.D. Ohio), *aff'd*, 582 F.2d 1281 (6th Cir. 1978), *remanded to* 573 F. Supp. 504 (N.D. Ohio 1983)).

I. *Sexually Oriented Business Cases.* — The starting point for considering whether municipalities can off-load their constitutional obligations onto their neighbors is the Supreme Court’s decision in *Schad v. Borough of Mount Ephraim*.<sup>87</sup> In *Schad*, the proprietors of an adult bookstore offering coin-operated devices that display adult films added additional devices that allowed customers to view a live nude dancer instead of just a video.<sup>88</sup> The borough of Mount Ephraim, a small suburb of Philadelphia, had a very broad zoning ordinance in place banning all forms of live entertainment, so it fined the bookstore for offering these new peep shows.<sup>89</sup> The bookstore then brought suit, alleging the zoning ordinance violated the First and Fourteenth Amendments.<sup>90</sup>

In its defense, Mount Ephraim tried to justify its ordinance partly on the basis that nude dancing was available in nearby Philadelphia, a much larger metropolis approximately a fifteen-minute drive away.<sup>91</sup> Mount Ephraim argued that since Philadelphia housed such “entertainment,” alternative avenues were readily available.<sup>92</sup> The Court, however, noted that the record did not actually contain any evidence of this alleged availability, nor were there any findings in this regard by the courts below.<sup>93</sup> Given this absence, and quoting *Schneider v. New Jersey* for the proposition that “one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,”<sup>94</sup> the Court was not persuaded by the borough’s argument in this regard.<sup>95</sup>

The case, though, did not turn on this point. The Court held that the borough’s ordinance violated the First Amendment, but did so on the basis that the ordinance was simply too broad.<sup>96</sup> Applying the test that content-neutral time, place, and manner regulations “must serve significant state interests [and] leave open adequate alternative channels

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<sup>87</sup> 452 U.S. 61 (1981).

<sup>88</sup> *Id.* at 62.

<sup>89</sup> *See id.* at 63–64.

<sup>90</sup> *See id.* at 65.

<sup>91</sup> *See* Transcript of Oral Argument at 30, *Schad*, 452 U.S. 61 (No. 79-1640); *Schad*, 452 U.S. at 76. Importantly, but not squarely addressed within the decision, Philadelphia (in Pennsylvania) is located in an entirely different state from the borough in question (in New Jersey). Thus, *Schad* actually implicated the question of whether a locality could look not just over local borders but also over state borders. While a regional view that extended beyond Mount Ephraim’s borders might have been appropriate, crossing state lines in this regard is another matter entirely. *See infra* section II.D, pp. 857–61.

<sup>92</sup> *Schad*, 452 U.S. at 76.

<sup>93</sup> *See id.*

<sup>94</sup> *Id.* at 76–77 (quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939)).

<sup>95</sup> *Id.* at 77.

<sup>96</sup> *Id.* at 72.

of communication,” the Court found that the ordinance’s breadth extended too far.<sup>97</sup> In banning all live entertainment, the ordinance “prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments,”<sup>98</sup> and Mount Ephraim had failed to justify such a capacious ordinance.<sup>99</sup>

Despite the unconstitutionality of this particular ordinance, a majority of the Justices in *Schad* actually supported the position that a small locality *could* potentially ban all sexually oriented businesses, particularly if such businesses were available in nearby jurisdictions.<sup>100</sup> They simply found that Mount Ephraim’s remarkably broad ordinance banning all live entertainment had failed to pass constitutional muster.<sup>101</sup> Although the holding initially led some commentators to assert that *Schad* stands for the proposition that *no* locality can ban sexually oriented businesses from within its borders,<sup>102</sup> multiple courts have now acknowledged that this is not a correct reading of the case.<sup>103</sup> Five Justices explicitly agreed that a small locality like Mount Ephraim could “entirely ban commercial live entertainment”<sup>104</sup> and “zone out such uses completely,”<sup>105</sup> and a total of eight members of the Court “suggest[ed], either implicitly or explicitly, that residential and rural municipalities may possess more flexibility as to the alternative-avenues requirement than do other municipalities.”<sup>106</sup>

Numerous state and federal courts have subsequently applied the suggestion in *Schad* that small localities may look outside their borders to meet the alternative-avenues requirement. In *Keego Harbor Co. v. City of Keego Harbor*,<sup>107</sup> for example, the Sixth Circuit considered whether Keego Harbor, a small town with a population of approximately 3,000 people, violated the First Amendment rights of the plaintiff through its ordinance that effectively banned adult movie theatres from

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<sup>97</sup> *Id.* at 75–76; see also *id.* at 74; Matthew L. McGinnis, Note, *Sex, But Not the City: Adult-Entertainment Zoning, the First Amendment, and Residential and Rural Municipalities*, 46 B.C. L. REV. 625, 635–36 (2005).

<sup>98</sup> *Schad*, 452 U.S. at 65.

<sup>99</sup> *Id.* at 72.

<sup>100</sup> See GERARD & BERGTHOLD, *supra* note 9, § 4:4.

<sup>101</sup> See *id.* As one commentary noted, careful parsing of *Schad* reveals that “the actual holding of the case was quite narrow. The seven Justices composing the majority agreed without reservation on only two points: (1) The appellants were entitled to challenge the ordinance as facially overbroad, and (2) [t]he borough had failed to justify its ordinance.” *Id.*

<sup>102</sup> See, e.g., Steve McMillen, Note, *Adult Uses and the First Amendment: The Stringfellow’s Decision and Its Impact on Municipal Control of Adult Businesses*, 15 TOURO L. REV. 241, 297 (1998).

<sup>103</sup> For a discussion of bans, see generally Joseph Blocher, *Bans*, 129 YALE L.J. 308 (2019).

<sup>104</sup> GERARD & BERGTHOLD, *supra* note 9, § 4:4. Those Justices were Chief Justice Burger and Justices Stewart, Powell, Rehnquist, and Stevens. *Id.*

<sup>105</sup> *Id.* § 4:6.

<sup>106</sup> McGinnis, *supra* note 97, at 638.

<sup>107</sup> 657 F.2d 94 (6th Cir. 1981).

the town.<sup>108</sup> The Sixth Circuit stated that areas beyond the borders of Keego Harbor could be considered:

The Constitution simply says that a community may not take steps that deny an exhibitor means to a market. The record is clear in this case that the market embraces most if not all of Oakland County. There is nothing in the law . . . nor should there be that requires each and every hamlet, no matter how small, to provide a space for explicit sex films . . .<sup>109</sup>

In *Diamond v. City of Taft*,<sup>110</sup> the court adopted similar reasoning, allowing consideration of areas that were “outside the city limits of Taft but within the City’s ‘Sphere of Influence’” in its analysis of alternative avenues.<sup>111</sup> Likewise, the Eighth Circuit in *Peterson v. City of Florence*<sup>112</sup> found that areas outside the tiny hamlet with a population of thirty-nine people “provided adequate alternative sites for adult uses,”<sup>113</sup> and the city “ha[d] in no way denied Plaintiffs a reasonable opportunity to open and operate an adult use business elsewhere in Lyon County.”<sup>114</sup>

In *MJ Entertainment Enterprises, Inc. v. City of Mount Vernon*,<sup>115</sup> the court also looked beyond local borders when considering whether there were reasonable alternative avenues for siting a sexually oriented business. Mount Vernon, “a small, densely populated” suburb “on the north border of the Bronx,”<sup>116</sup> had an ordinance that “would permit only one additional adult-use site.”<sup>117</sup> The court held that the ordinance was constitutional, in part because “Mount Vernon bordered New York City, where hundreds of adult entertainment venues were available to Mount

<sup>108</sup> See *id.* at 96.

<sup>109</sup> *Id.* (quoting the district court’s oral opinion). The Sixth Circuit ultimately reversed the decision, on the basis of “the first prong of the content-neutrality doctrine,” but did not disturb “the district court’s findings as to the alternative avenues requirement.” McGinnis, *supra* note 97, at 644. Indeed, the Sixth Circuit specifically noted in the closing of its judgment that it did not intend to reverse the district court in regards to the broad approach to alternative avenues: “We do not hold that every unit of government, however small, must provide an area in which adult fare is allowed.” *Id.* (quoting *Keego Harbor*, 657 F.2d at 99).

<sup>110</sup> 29 F. Supp. 2d 633 (E.D. Cal. 1998), *aff’d*, 215 F.3d 1052 (9th Cir. 2000).

<sup>111</sup> *Id.* at 638. Taft was “a small rural town in Kern County, California, with a population of 6,800.” *Diamond*, 215 F.3d at 1054.

<sup>112</sup> 727 F.3d 839 (8th Cir. 2013) (per curiam).

<sup>113</sup> Sterk, *supra* note 77, at 1615.

<sup>114</sup> *Peterson v. City of Florence*, 884 F. Supp. 2d 887, 894 (D. Minn. 2012), *aff’d per curiam*, 727 F.3d 839 (8th Cir. 2013); see also GERARD & BERGTHOLD, *supra* note 9, § 4:6. But cf. Wolfe v. Village of Brice, 997 F. Supp. 939, 945 (S.D. Ohio 1998) (interpreting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), to mean that all municipalities regardless of size must offer “a reasonable opportunity to open and to operate an adult theater within the city”).

<sup>115</sup> 328 F. Supp. 2d 480 (S.D.N.Y. 2004).

<sup>116</sup> *Id.* at 482. Mount Vernon had a “population of 68,381 people and a land area of only 4.36 miles.” *Id.*

<sup>117</sup> Sterk, *supra* note 77, at 1614.

Vernon residents.”<sup>118</sup> The court noted that determining whether reasonable alternative avenues exist is “context-specific,”<sup>119</sup> and an important factor in that analysis can be availability in neighboring locales.<sup>120</sup>

The sexually oriented business context, though, is somewhat unusual in that a plurality of the Supreme Court noted in *Young v. American Mini Theatres, Inc.*<sup>121</sup> that the Constitution does not protect sexually oriented speech as much as it does other forms.<sup>122</sup> Dryly observing that “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice,” a plurality of the Court suggested that the lesser weight of these sexually oriented businesses’ rights might make it more inclined to be flexible in this context.<sup>123</sup> However, as the next two sections show, the same constitutional off-loading trend occurs in additional contexts, like religious and gun-related land uses.

2. *Religious Facilities Cases.* — Small localities also appear to receive more leeway to look beyond their borders than large cities do when religious facilities are at issue. While it may seem odd that small towns, which tend to be more religious, might be hostile to religious uses at all, practical concerns like parking and traffic often influence willingness to accommodate, and if a community identifies as having a particular religiosity, it may not welcome uses that reflect a different brand of spirituality.<sup>124</sup> Town residents are often “concerned that religiously affiliated uses will change the religious or ethnic composition” of their community.<sup>125</sup> Localities may thus try to push religious uses outside their borders and onto their neighbors.<sup>126</sup>

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<sup>118</sup> *Id.* at 1615. The court described Mount Vernon as “filled with churches, parks, community centers and schools. Residential zones comprise 87% of the land within Mount Vernon. Only 13% of the City’s land area — which, by the court’s math, is slightly over one-half acre — is zoned for commercial and industrial uses.” *MJ Ent. Enters.*, 328 F. Supp. 2d at 482.

<sup>119</sup> *MJ Ent. Enters.*, 328 F. Supp. 2d at 487.

<sup>120</sup> See *id.* at 488; see also *Whyton Corp. v. Armstrong Township*, No. 1354 C.D. 2008, 2009 WL 9097088, at \*10–11 (Pa. Commw. Ct. June 11, 2009) (approving of the trial court’s decision to consider evidence of available sites — specifically, in the nearby city of Williamsport, population 30,000 — outside of the defendant township, population 717, *id.* at \*9).

<sup>121</sup> 427 U.S. 50 (1976).

<sup>122</sup> *Id.* at 70 (plurality opinion).

<sup>123</sup> *Id.*

<sup>124</sup> STEWART E. STERK ET AL., *LAND USE REGULATION* 513 (3d ed. 2020).

<sup>125</sup> *Id.* Further, religious organizations are often tax exempt from otherwise applicable property taxes. See, e.g., *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F. Supp. 2d 961, 972 (N.D. Ill. 2003) (“As a religious institution, pursuant to Illinois law . . . Vineyard currently pays no taxes on the subject property.”).

<sup>126</sup> See, e.g., *Adam Cmty. Ctr. v. City of Troy*, 381 F. Supp. 3d 887, 891 (E.D. Mich. 2019). Adam Community Center is a “religious non-profit organization” serving the Muslim community out of an office building in Troy, Michigan. *Id.* at 890. Every effort it made to purchase a suitable space in the city to establish a mosque was thwarted by private residents swooping in to buy the property instead. *Id.* at 891. A city employee told the plaintiff that “it should probably look to neighboring cities such as Rochester, Michigan to find a suitable property for a mosque.” *Id.*

When they do so, the question of whether small localities can point to available alternative sites in neighboring jurisdictions becomes important.<sup>127</sup> Often, the question arises as a function of the “first national land-use ordinance,”<sup>128</sup> the Religious Land Use and Institutionalized Persons Act<sup>129</sup> (RLUIPA), a statute designed to offer an extra layer of protection to religious rights guaranteed by the Constitution.<sup>130</sup> Under RLUIPA, a formal municipal ban that “totally exclude[d] religious assemblies” would constitute a facial violation of the statute,<sup>131</sup> but so long as such uses are theoretically possible, small localities may be able to look beyond their borders to prove no substantial burden has occurred.<sup>132</sup>

In *Livingston Christian Schools v. Genoa Charter Township*,<sup>133</sup> for example, the Sixth Circuit allowed an exclusion on the basis that alternative sites were available outside municipal borders.<sup>134</sup> The court noted that several “sister circuits have addressed the issue of when the availability of other properties defeats a substantial-burden claim”<sup>135</sup>

<sup>127</sup> See Sterk, *supra* note 77, at 1604 (“The availability of alternative sites is also a critical factor in evaluating [Religious Land Use and Institutionalized Persons Act (RLUIPA)] claims. The statute prohibits absolute exclusion of all religious uses. 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.” (footnote omitted)).

<sup>128</sup> Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1839 (2004).

<sup>129</sup> Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified at 42 U.S.C. §§ 2000cc to 2000cc-5).

<sup>130</sup> See Schragger, *supra* note 128, at 1839 (“To Congress and the law’s supporters, RLUIPA is necessary to prevent local governments from discriminating against particular religions (or religion in general) by limiting religious congregations’ ability to build or expand places of worship. The charge is that localities enforce religious bigotry through the strategic use of often vague and standardless land-use ordinances and development processes. To its critics, RLUIPA is a dramatic interference with local power to enforce generally applicable zoning rules and an unnecessarily broad exemption that allows religious organizations (and no others) to flout a community’s reasonable land-use concerns.” (footnote omitted)).

<sup>131</sup> Sterk, *supra* note 77, at 1616 (quoting 42 U.S.C. § 2000cc(b)(3)(A)).

<sup>132</sup> Notably, “roughly 80 percent of RLUIPA claims filed in federal court fail.” Emma Green, *The Quiet Religious-Freedom Fight that Is Remaking America*, THE ATLANTIC (Nov. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/11/rluipa/543504> [https://www.perma.cc/5FKN-FTMN]; see also DANIEL P. DALTON, LITIGATING RELIGIOUS LAND USE CASES xxiii (2d ed. 2016) (noting hesitancy among religious organizations to file RLUIPA lawsuits against municipalities).

<sup>133</sup> 858 F.3d 996 (6th Cir. 2017).

<sup>134</sup> *Id.* at 1011–12. Livingston Christian School operated initially in the town of Pinckney, Michigan, and when it needed to relocate, the school signed a lease with a church in Genoa Charter Township, *id.* at 998, a small locality with a population of close to 20,000 and an area of approximately thirty-six square miles, see *Genoa Township Profile*, GENOA TWP, <https://www.genoa.org/community/profile> [https://perma.cc/7FAQ-HDR6]. However, the school needed a special-use permit to operate, which the township denied. *Livingston Christian Schs.*, 858 F.3d at 998. The school then began a short-term lease in a former public school located outside the township. *Id.* at 999–1000. When the school contested the denial of the special-use permit, the district court granted summary judgment, finding there was no substantial burden on the exercise of religion because “the Pinckney and Whitmore Lake properties were ‘ready alternatives’ for [the school].” *Id.* at 1005.

<sup>135</sup> *Livingston Christian Schs.*, 858 F.3d at 1005.

and held that “easy access to suitable property in a neighboring jurisdiction” can defeat an RLUIPA claim.<sup>136</sup> In the court’s view, “the proper inquiry should be . . . functional and factually driven. When a religious institution has an available alternative outside of a desired jurisdiction, and where the distance from the desired location to the alternative property is reasonably close, the artificial boundaries of a particular jurisdiction become less important.”<sup>137</sup>

In fact, the court noted that “the boundaries of jurisdictions on the local-government level are often arbitrary in practice,” so “[h]olding that a religious institution is substantially burdened any time that it cannot locate within such a small area — even if it could locate just across the border of the town limits — would be tantamount to giving religious institutions a free pass from zoning laws.”<sup>138</sup> Echoing the First Amendment decision in *Schad*, the circuit court held that “RLUIPA does not automatically require every minor municipality to have at least one religious school within its borders.”<sup>139</sup>

3. *Guns*. — Given that gun rights are a flashpoint for political community character, it is not surprising that courts have been called to

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<sup>136</sup> *Id.* at 1011. But the requirement of “easy” access can be important. In *Islamic Center of Mississippi, Inc. v. City of Starkville*, 840 F.2d 293 (5th Cir. 1988), the court found that because few of the Muslim students who would be worshipping at the mosque in question had vehicles, the ordinance “making a mosque relatively inaccessible within the city limits to Muslims who lack automobile transportation” was a substantial burden on the exercise of religion, *id.* at 299, and the fact that, if they had vehicles, they could drive to an area outside the city did not help the ordinance, *see id.* at 300.

<sup>137</sup> *Livingston Christian Schs.*, 858 F.3d at 1011. According to one lower court, the Sixth Circuit identified three primary factors for substantial-burden analysis under RLUIPA: “(1) whether the religious institution has a feasible alternative location from which it can carry on its mission; (2) whether the religious institution will suffer substantial delay, uncertainty, and expense due to the imposition of the regulation; and (3) whether the plaintiff has imposed the burden on itself.” *Adam Cmty. Ctr. v. City of Troy*, 381 F. Supp. 3d 887, 902 (E.D. Mich. 2019) (citation omitted) (citing *Livingston Christian Schs.*, 858 F.3d at 1004).

<sup>138</sup> *Livingston Christian Schs.*, 858 F.3d at 1011.

<sup>139</sup> *Id.* The court went on to note that it was not finding that “a religious institution can never establish a RLUIPA claim based on the inability to locate within a particular jurisdiction.” *Id.* at 1012. Instead, the court clarified that its holding was simply that “the determination of whether a substantial burden exists due to geographical limitations is factual in nature,” and in the particular circumstances of the case no substantial burden existed. *Id.* As a counterexample, the court noted that “[a] religious institution, for example, might have a mission of catering specifically to lower-income individuals located in an urban center, which might be thwarted by relocating to a suburb that lacked public transportation.” *Id.* In essence, “[t]he 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.” Sterk, *supra* note 77, at 1618. Professor Stewart Sterk proposes that “[a]s 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.” *Id.* at 1617.

consider whether gun shops and facilities can be excluded from one locality if they are readily available in a nearby jurisdiction.<sup>140</sup> Courts in this context, too, have held that small localities may look outside themselves for the purpose of constitutional analysis.<sup>141</sup>

For example, in *Chicago Gun Club v. Willowbrook*,<sup>142</sup> the court dismissed the gun club's complaint that Willowbrook's refusal to grant it a special-use permit to operate an indoor gun range violated the Second Amendment.<sup>143</sup> Willowbrook's zoning theoretically allowed for the possibility of indoor gun ranges, but none actually existed in this small municipality with a population of approximately 8,500 near Chicago.<sup>144</sup> There was, however, a plethora of accessible options outside of the village's borders.<sup>145</sup> Speaking on derivative standing<sup>146</sup> and drawing from First Amendment jurisprudence, the court held that "the Second Amendment right of the public to train in firearm proficiency — particularly as concerns any residents of Willowbrook or neighboring towns who would be intent on training at the Club — has already been abundantly accommodated by [those] nearby facilities."<sup>147</sup>

<sup>140</sup> See, e.g., *Chi. Gun Club, LLC v. Village of Willowbrook*, No. 17 C 6057, 2018 WL 2718045, at \*8 (N.D. Ill. June 6, 2018).

<sup>141</sup> But the argument that small towns can exclude was not successful in *Kole v. Village of Norridge*, No. 11 C 3871, 2017 WL 5128989 (N.D. Ill. Nov. 6, 2017), where the court did not let a town of around 15,000, *Quick Facts*, VILL. OF NORRIDGE, <https://www.villageofnorridge.com/our-village/quick-facts> [<https://perma.cc/ULJ9-LG4B>], look over its borders in the Second Amendment context, *Kole*, 2017 WL 5128989, at \*14. In a similar case, a court noted "[i]t was no answer . . . that plenty of gun ranges were located in the neighboring suburbs, or even right on the border of Chicago and the suburbs." *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 938 (N.D. Ill. 2014) (citing *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011)).

<sup>142</sup> No. 17 C 6057, 2018 WL 2718045.

<sup>143</sup> *Id.* at \*10–11.

<sup>144</sup> *Id.* at \*1.

<sup>145</sup> *Id.* at \*8 ("Defendants highlight two gun ranges in DuPage County, in which Willowbrook sits, immediately accessible to Village residents: Article II Range sits to the north in Lombard, Illinois, just under fourteen miles from the Village; to the southwest is Bolingbrook's The Range at 355, less than nine miles away and located just off I-55, the major expressway servicing the southwest suburbs. To Willowbrook's east sits another pair of gun ranges even closer than the two just mentioned: Midwest Guns & Pistol Range lies just seven miles from the Village, in Lyons; Shoot Point Blank, in Hodgkins, is hardly five miles away." (footnote omitted)).

<sup>146</sup> Since "the Constitution does not confer a freestanding right on commercial proprietors to sell firearms," plaintiffs like this must show that the residents have been impeded from purchasing firearms. *Teixeira v. County of Alameda*, 873 F.3d 670, 673 (9th Cir. 2017) (en banc).

<sup>147</sup> *Willowbrook*, 2018 WL 2718045, at \*8. This decision also shows how Second Amendment jurisprudence is informed by jurisprudence on other constitutional rights:

Urged by the City in [*Ezell v. City of Chicago*] "to import the 'undue burden' test from the Court's abortion cases," the Seventh Circuit instead relied on the profusion of federal free speech jurisprudence to craft a standard of review for the challenged gun range ban. The court noted that . . . "First Amendment analogues are more appropriate . . . and on the strength of that suggestion, [the Seventh Circuit] and other circuits have already begun to adapt First Amendment doctrine to the Second Amendment context." Following suit, both parties cite to *City of Renton v. Playtime Theatres, Inc.* . . .

*Id.* at \*6 (second alteration in original) (second omission in original) (citation omitted).

### B. Counties

Small localities can also look beyond their borders for the purposes of constitutional analysis when the relevant ordinance has been enacted at the *county* level.<sup>148</sup> Counties are typically the sole level of government dictating land use in unincorporated areas and sometimes an additional level of government dictating land use when localities have incorporated.<sup>149</sup> When county ordinances are at issue, county borders set the relevant field of inquiry. Because the county is often a large juridical unit comprising a substantial physical area that includes both incorporated and unincorporated areas, the particular borders or demarcations of those smaller areas become less important when considering constitutional siting questions arising at the county level. So, if a small locality uses a county ordinance to refuse to site a particular building, that locality can almost certainly use the availability in other localities within the county as an important criterion.<sup>150</sup>

Even the Supreme Court acknowledged in *Schad* that if Mount Ephraim's ordinance had instead been enacted at the county level, the borough might "very well" have been able to exclude the sexually oriented business without a problem.<sup>151</sup> In that scenario, the jurisdictional unit at issue would have been the county, and as long as sites were available within the county's borders, it would not have mattered that no sites were available in Mount Ephraim specifically. In other words, Mount Ephraim may not have been able to prohibit all live entertainment within its borders with a local ordinance, but a *county* ordinance could constitutionally achieve the same practical effect (no live entertainment in Mount Ephraim) by expanding the juridical frame to include surrounding areas within the county where such entertainment was possible.

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<sup>148</sup> Counties typically "cannot legislate within incorporated areas," and they "traditionally provided services only in their unincorporated areas" (though they more often provide services on a contract basis to incorporated areas now as well). DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 34 (7th ed. 2010).

<sup>149</sup> See Michelle Wilde Anderson, *Sprawl's Shepherd: The Rural County*, 100 CALIF. L. REV. 365, 367–68 (2012).

<sup>150</sup> See, e.g., *Int'l Eateries of Am., Inc. v. Broward County*, 941 F.2d 1157, 1165 (11th Cir. 1991) (looking to other available sites within Broward County, Florida, to determine whether countywide zoning scheme was constitutional).

<sup>151</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76 (1981) ("The Borough nevertheless contends that live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough. Its position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County . . .").

In *Teixeira v. County of Alameda*,<sup>152</sup> this reasoning was tested in the context of the Second Amendment. In *Teixeira*, an aspiring gun-store operator sued the county for denying his conditional-use application.<sup>153</sup> The county had an ordinance prohibiting gun stores in unincorporated areas from being located within 500 feet of a residential zone or other conflicting use like a school, liquor store, or other gun store.<sup>154</sup> The plaintiff, who wanted to open a gun store in an unincorporated area, produced a study showing that under the ordinance it was “virtually impossible to open a gun store [anywhere] in unincorporated Alameda County” that would not offend this rule.<sup>155</sup> Nevertheless, using the county borders to delineate the relevant area and including within those borders incorporated municipalities (over which the county had no land-use jurisdiction) within those county borders, the court held that because the county as a whole was already home to ten gun stores (three in unincorporated areas and six in incorporated municipalities), and one existing store was only “approximately 600 feet away” from the proposed site, the ordinance did not violate the Second Amendment.<sup>156</sup> In these county cases, then, the specific borders of each locality are largely irrelevant, and small localities need not independently accommodate constitutionally protected uses, as long as a neighboring area within the county will do so.

### C. Big Cities

Although small localities — either through their own ordinances or the operation of county ordinances — can look to availability in neighboring localities for the purposes of constitutional analysis, many courts have expressed the view that *large* cities cannot do this.<sup>157</sup> When large

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<sup>152</sup> 873 F.3d 670 (9th Cir. 2017) (en banc).

<sup>153</sup> *Id.* at 673.

<sup>154</sup> *Id.* at 674.

<sup>155</sup> *Id.* at 676; see also Sterk, *supra* note 77, at 1610 (“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.”).

<sup>156</sup> *Teixeira*, 873 F.3d at 679–80.

<sup>157</sup> Sometimes this point is implicit. See Sterk, *supra* note 77, at 1612–13. Sterk notes that “the Supreme Court’s opinions in *City of Renton* and [*City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)] strongly suggest that each municipality must accommodate adult uses within its borders.” *Id.* at 1612. He continues:

Los Angeles is a major metropolis; Renton is a medium-sized city that encompasses twenty-three square miles and houses a major Boeing factory. 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

cities are at issue, courts “continue to focus on the availability of sites within municipal boundaries,” declining to look beyond municipal borders in their exploration of whether alternatives are available.<sup>158</sup> For example, when dealing with large localities in the sexually oriented business context, courts typically limit the inquiry of alternative avenues to the area specifically “within the city in question” (as the Ninth Circuit phrased it in *Topanga Press, Inc. v. City of Los Angeles*<sup>159</sup>). The Supreme Court in *City of Renton v. Playtime Theatres, Inc.*<sup>160</sup> and *City of Los Angeles v. Alameda Books, Inc.*<sup>161</sup> also limited its inquiry to within city limits.<sup>162</sup> Similarly, in the religious-facilities context, courts in cases like *International Church of the Foursquare Gospel v. City of San Leandro*<sup>163</sup> and *Freedom Baptist Church of Delaware County v. Township of Middletown*<sup>164</sup> restricted their inquiry to areas within the city limits when considering whether alternative sites exist.<sup>165</sup> And in the gun context, in cases like *Jackson v. City & County of San Francisco*,<sup>166</sup> courts

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size of the municipality, some evidence that the municipality had stifled access to adult uses.

*Id.* at 1613 (footnotes omitted). According to Sterk:

[T]he availability of alternatives serves two functions: First, availability provides evidence that the municipality is not trying to suppress speech. Second, availability ensures that a market is available for both speakers and listeners. Alternative sites in the vicinity, but outside municipal boundaries, address the second function but not the first.

*Id.* (footnotes omitted).

<sup>158</sup> *Id.* at 1615; *see, e.g.*, *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532–33 (9th Cir. 1993) (looking only within the city limits of the City of Los Angeles); *Ill. Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 939, 947 (N.D. Ill. 2014) (striking down a citywide gun sales ban, in part on the rationale that “if all cities and municipalities can prohibit gun sales and transfers within their own borders, then all gun sales and transfers may be banned across a wide swath of the country if this principle is carried forward to its natural conclusion,” *id.* at 939).

<sup>159</sup> 989 F.2d 1524; *see id.* at 1529 (“[T]he test for determining whether the Adult Businesses’ First Amendment rights are threatened is whether a local government has ‘effectively den[ie]d . . . [the Adult Businesses] a reasonable opportunity to open and operate’ their enterprise within the city in question.” (alteration in original) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986))).

<sup>160</sup> 475 U.S. 41.

<sup>161</sup> 535 U.S. 425 (2002).

<sup>162</sup> *See Sterk, supra* note 77, at 1612 (noting that these cases “strongly suggest” the inquiry is limited to each city’s borders).

<sup>163</sup> 673 F.3d 1059 (9th Cir. 2011). San Leandro has a population of approximately 90,000. *QuickFacts: San Leandro City, California*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/fact/table/sanleandrocitocalifornia/INC110219> [<https://perma.cc/X5NR-49AX>].

<sup>164</sup> 204 F. Supp. 2d 857 (E.D. Pa. 2002).

<sup>165</sup> *See id.* at 870–71. The court, relying on *Schad*, stated that it is “well-established that a municipality cannot entirely exclude a type of conduct that the First Amendment protects.” *Id.* at 870. The court noted that “the Court in *Schad* rejected Mt. Ephraim’s defense that the ordinance was constitutional because patrons could see nude dancing in other towns.” *Id.* at 871. The court declared the “*Schad-Schneider* rule remains firmly established.” *Id.* The court noted that subsection b(3) of RLUIPA says that “[n]o government shall impose or implement a land use regulation that . . . totally excludes religious assemblies from a jurisdiction.” *Id.* at 870 (quoting 42 U.S.C. § 2000cc(b)(3)).

<sup>166</sup> 746 F.3d 953 (9th Cir. 2014).

approached siting gun facilities in a similar fashion, often suggesting that larger localities must meet a more stringent burden than smaller ones.<sup>167</sup> Indeed, even in *Willowbrook*, the court noted that “[t]he more people [the ordinance] affects or the heavier the burden on the core [Second Amendment] right, the stricter the scrutiny.”<sup>168</sup>

In *Ezell v. City of Chicago*,<sup>169</sup> a recent Second Amendment case, the trial court tried to import the principles governing small-town constitutional off-loading to a scenario involving Chicago.<sup>170</sup> Just as courts have done with small towns, the trial judge found that the City of Chicago could fairly look beyond its borders to justify an ordinance that functionally banned firing ranges from the city.<sup>171</sup> Like the court in *Livingston Christian Schools v. Genoa Charter Township*, the trial court noted that city limits were mere “artificial boundaries.”<sup>172</sup> Further, the trial court noted that there were no fewer than “fourteen firing ranges within fifty miles of the City’s limits[,] any one of which may actually be closer to an individual’s residence than the one being proposed to be

<sup>167</sup> See *id.* at 967. Indeed, sometimes cities cannot even exclude uses from other neighborhoods in the same city. See, for example, *West Side Women’s Services, Inc. v. City of Cleveland*, 573 F. Supp. 504 (N.D. Ohio 1983), in which the defendants “argue[d] that the impact of the ordinance in question upon the physician-patient relationship, and, consequently, upon the woman’s decision to have an abortion, is minimal since the ordinance only applies to a very small portion of Cleveland and since abortion services are available elsewhere in the City.” *Id.* at 518. The court found the defendant’s position “unavailing” because it accounted for the degree of the burden but ignored “the nature of the interference with the abortion decision.” *Id.* Further, the court noted that “an ordinance which interferes with a woman’s exercise of her fundamental right is not safe from constitutional challenge merely because it is limited in its geographical scope. The Supreme Court . . . noted that ‘a state-created obstacle [to obtaining an abortion] need not be absolute to be impermissible.’” *Id.* (alteration in original) (quoting *Maher v. Roe*, 432 U.S. 464, 473 (1977)). Relying then on *Schad* and *Schneider*, the court noted that it would also:

be inconsistent with constitutional guarantees to overlook housing discrimination in one area of a city on the theory that minorities may freely live in other parts of that city. The constitutionality of an ordinance restricting the availability of abortions must be determined on the basis of the burdens actually imposed by the restrictions and the justification for it. It is not sufficient merely to view the ordinance in light of all the other options available.

*Id.* (citation omitted). The court concluded its analysis by noting that “[t]he question is not whether the activity may be engaged in elsewhere, but whether it was constitutional to restrict it in the manner chosen by defendants.” *Id.*

<sup>168</sup> *Chi. Gun Club, LLC v. Village of Willowbrook*, No. 17 C 6057, 2018 WL 2718045, at \*4 (N.D. Ill. June 6, 2018) (second and third alterations in original) (quoting *Ill. Ass’n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 936 (N.D. Ill. 2014)).

<sup>169</sup> No. 10 C 5135, 2010 WL 3998104 (N.D. Ill. Oct. 12, 2010), *rev’d*, 651 F.3d 684 (7th Cir. 2011).

<sup>170</sup> See *id.* at \*7. The dissenting judge in *Gun Range, LLC v. City of Philadelphia*, 2018 WL 2090303 (Pa. Commw. Ct. May 7, 2018), indirectly suggested Philadelphia could look beyond its borders for the purposes of constitutional analysis: “Absent such a showing that existing gun shops in Philadelphia, *other nearby gun shops located outside of Philadelphia*, and gun shows are insufficient to serve those in Philadelphia who want to buy weapons, a derivative Second Amendment claim has not been established.” *Id.* at \*14 (Pellegrini, J., dissenting) (emphasis added).

<sup>171</sup> *Ezell*, 2010 WL 3998104, at \*7.

<sup>172</sup> *Id.*

brought into the City's borders for training."<sup>173</sup> The judge found that plaintiffs therefore "failed to meet their burden" under the test for an injunction "to show how the travel outside of the City's borders is more onerous and therefore irreparable."<sup>174</sup>

On appeal, though, the court found that the trial judge should not have considered the availability of extraterritorial firing ranges.<sup>175</sup> The circuit court instead held that whether ranges were available outside of the city limits was irrelevant, having little to do with standing or the underlying claim.<sup>176</sup> Specifically, a resident's *factual* access to a range was not the correct question, according to the circuit court:

The question is not whether or how easily Chicago residents can comply with the range-training requirement by traveling outside the city . . . . The pertinent question is whether the Second Amendment prevents the City Council from banning firing ranges everywhere in the city; *that ranges are present in neighboring jurisdictions has no bearing on this question.*<sup>177</sup>

The court went on to say that it was "a profoundly mistaken assumption" that a constitutional violation might turn on "the extent to which [a constitutional right] can be exercised in another jurisdiction."<sup>178</sup> Quoting the old adage from *Schneider* that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place,"<sup>179</sup> the court reasoned that "[t]he same principle applies here."<sup>180</sup> The court then declared: "It's hard to imagine anyone suggesting that Chicago may prohibit the exercise of a free-speech or religious-liberty right within its borders on the rationale that those rights may be freely enjoyed in the suburbs. That sort of argument should be no less unimaginable in the Second Amendment context."<sup>181</sup>

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 694 (7th Cir. 2011).

<sup>176</sup> *Id.* at 697 ("Focusing on individual travel harms was mistaken for another equally fundamental reason. The plaintiffs have challenged the firing-range ban on its face, not merely as applied in their particular circumstances. In a facial constitutional challenge, individual application facts do not matter."); *see also* *Jackson v. City & County of San Francisco*, 746 F.3d 953, 957 (9th Cir. 2014) ("San Francisco asserts that [the plaintiff] has not suffered an injury in fact because she could easily obtain hollow-point ammunition outside San Francisco. But the injury [the plaintiff] alleges is not the inconvenience of leaving San Francisco; rather, she alleges that the Second Amendment provides her with a 'legally protected interest' to purchase hollow-point ammunition . . . within San Francisco. That [she] may easily purchase ammunition elsewhere is irrelevant." (citation omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992))).

<sup>177</sup> *Ezell*, 651 F.3d at 696–97 (emphasis added).

<sup>178</sup> *Id.* at 697.

<sup>179</sup> *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939).

<sup>180</sup> *Ezell*, 651 F.3d at 697.

<sup>181</sup> *Id.*; *see also* *Ill. Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 938–39 (N.D. Ill. 2014) ("The City argues in response that these ordinances do not ban acquisition, but merely regulate *where* acquisition may occur. It is true that some living on the outskirts of the City

Ironically, though, while the circuit court was incredulous that Chicago could possibly limit the exercise of First Amendment rights on the basis that those rights could be exercised in its suburbs, the converse is in fact demonstrably true: Chicago may not be able to make this kind of argument successfully, but many suburbs and small towns *have* succeeded in making these sorts of arguments.<sup>182</sup> Chicago may not be able to exclude a firing range even when firing ranges are easily accessible in neighboring suburbs, but those suburbs could very well successfully argue that *they* can exclude firing ranges on the basis that ranges are available in Chicago.<sup>183</sup>

#### D. States

In the case of *Missouri ex rel. Gaines v. Canada*, the Supreme Court set down a categorical rule that a state cannot look to another state to fulfill its constitutional obligations under the Equal Protection Clause.<sup>184</sup> In *Gaines*, the University of Missouri School of Law had denied admittance to Lloyd Gaines solely on the basis that he was Black.<sup>185</sup> At that time, it was “contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri.”<sup>186</sup> The law school registrar suggested to Gaines that he should instead apply for a specific statutory benefit: a Missouri statute provided that until a law school was developed at the Black university in the state, Missouri would pay for Black students to attend law school in adjoining states.<sup>187</sup> In other words, in order to avoid desegregating its own law schools, Missouri would pay the tuition of Black students attending law schools in neighboring states.<sup>188</sup>

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might very well currently live closer to gun stores now than they would absent these ordinances. But *Ezell* makes clear that this type of argument ‘assumes that the harm to a constitutional right is measured by the extent to which it can be exercised in another jurisdiction. That’s a profoundly mistaken assumption.’ It was no answer there that plenty of gun ranges were located in the neighboring suburbs, or even right on the border of Chicago and the suburbs. Instead, the Seventh Circuit drew on First Amendment jurisprudence to reason that Second Amendment rights must be guaranteed within a specified geographic unit — be it a city or a State. . . . [T]he fact that Chicagoans may travel outside the City to acquire a firearm does not bear on the validity of the ordinance *inside* the City.” (citations omitted) (quoting *Ezell*, 651 F.3d at 697)).

<sup>182</sup> See, e.g., *supra* section II.A.1, pp. 845–48.

<sup>183</sup> See, e.g., *Chi. Gun Club, LLC v. Village of Willowbrook*, No. 17 C 6057, 2018 WL 2718045, at \*8 (N.D. Ill. June 6, 2018).

<sup>184</sup> See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 350 (1938).

<sup>185</sup> *Id.* at 342–43.

<sup>186</sup> *Id.* at 343 (quoting *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 785 (Mo. 1937) (alteration in original), *rev’d*, 305 U.S. 337 (1938)).

<sup>187</sup> See *id.* at 342–43.

<sup>188</sup> See *id.* at 343–44. As noted in the judgment, a similar factual scenario had also been held to violate the Equal Protection Clause in *Pearson v. Murray*, 182 A. 590, 593–94 (Md. 1936). *Gaines*, 305 U.S. at 345.

The Court held that this scheme violated the Equal Protection Clause on the basis that “[t]he white resident is afforded legal education within the State,” while “the negro resident having the same qualifications is refused it there and must go outside the State to obtain it.”<sup>189</sup> Moreover, the Court stressed that a State absolutely cannot off-load its equal protection obligations onto another state. The Court declared that “[m]anifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction,” and that one of the badges or duties of sovereignty is that each state is “responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do.”<sup>190</sup>

This prohibition on state constitutional off-loading is reflected in contemporary abortion jurisprudence. In the abortion context, multiple courts have also said that states cannot look to the availability of abortions and clinics in neighboring states to justify their own onerous restrictions.<sup>191</sup> While the Supreme Court has not explicitly or determinatively answered “whether out-of-state abortion facilities should be considered in the undue burden analysis,” its decision in *Whole Woman’s Health v. Hellerstedt*<sup>192</sup> at least implies that constitutional analysis stops at the state border.<sup>193</sup> And many lower courts that have considered the question have also found that a state may not look beyond its borders for the purposes of constitutional justification.<sup>194</sup> For example, in

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<sup>189</sup> *Gaines*, 305 U.S. at 349.

<sup>190</sup> *Id.* at 350.

<sup>191</sup> See *Little Rock Fam. Plan. Servs. v. Rutledge*, 398 F. Supp. 3d 330, 415–16 (E.D. Ark. 2019) (describing the relevant case law); B. Jessie Hill, *The Geography of Abortion Rights*, 109 GEO. L.J. 1081, 1093 (2021) (“[C]ourts have so far held that a regulation that would force the closure of a state’s last abortion clinic constitutes an unconstitutional undue burden . . .”). Interestingly, though, the court in *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015), in holding that Wisconsin cannot look to Illinois to fulfill its constitutional obligations regarding abortion accommodation in part because impoverished women cannot afford the trip, noted that “[t]he State of Wisconsin is not offering to pick up the tab, or any part of it,” perhaps suggesting that the situation might be different if it were. *Id.* at 919.

<sup>192</sup> 136 S. Ct. 2292 (2016).

<sup>193</sup> See *Rutledge*, 398 F. Supp. 3d at 416. In *Whole Woman’s Health v. Hellerstedt*, the Supreme Court reversed a Fifth Circuit decision that had upheld regulations on abortion in Texas in part because women could obtain abortions in nearby New Mexico. *Hellerstedt*, 136 S. Ct. at 2304, 2320. The Supreme Court held instead that the Texas statute “was facially unconstitutional because it imposed an undue burden on women seeking abortions in Texas,” implying that accessibility in New Mexico was not a relevant factor in the undue burden analysis. See *Rutledge*, 398 F. Supp. 3d at 416 (analyzing this decision).

<sup>194</sup> See *Rutledge*, 398 F. Supp. 3d at 415–16 (surveying lower court decisions).

*Planned Parenthood of Arkansas & Eastern Oklahoma v. Jegley*,<sup>195</sup> the court “declined to consider the availability of abortions at out-of-state clinics when determining if the contracted-physician requirement imposes an undue burden on women seeking medication abortions in Arkansas,”<sup>196</sup> a decision consistent with numerous other federal court decisions that “have held that States may not outsource their duty to protect the constitutional rights of their citizens.”<sup>197</sup> These cases include *Jackson Women’s Health Organization v. Currier*,<sup>198</sup> which held that the undue burden analysis “focuses solely on the effects within the regulating state”;<sup>199</sup> *Planned Parenthood of Wisconsin, Inc. v. Schimel*,<sup>200</sup> where the court declined to consider the availability of abortions in Chicago as a justification for the closing of Wisconsin’s last clinic;<sup>201</sup> and *Little Rock Family Planning Services v. Rutledge*,<sup>202</sup> where the court ultimately held that “[g]iven the legal authorities reviewed by this Court and the possibility that a neighboring state might unilaterally alter access to abortion, the Court declines to consider out-of-state abortion providers in this analysis.”<sup>203</sup>

The rule prohibiting states from engaging in constitutional off-loading does have some detractors, however, as dissenting opinions in abortion cases continue to advocate looking past state boundaries. Further, in *Borough of Sayreville v. 35 Club, L.L.C.*,<sup>204</sup> the New Jersey Supreme Court held that a state zoning statute permitted looking beyond state borders in the First Amendment context.<sup>205</sup> In that case, the Borough of Sayreville, located in New Jersey, argued that, for the purpose of determining whether reasonable alternative avenues existed to

<sup>195</sup> No. 15-cv-00784, 2016 WL 6211310 (E.D. Ark. Mar. 14, 2016), *vacated*, 864 F.3d 953 (8th Cir. 2017).

<sup>196</sup> *Rutledge*, 398 F. Supp. 3d at 415; *see Jegley*, 2016 WL 6211310, at \*32.

<sup>197</sup> *Rutledge*, 398 F. Supp. 3d at 415.

<sup>198</sup> 760 F.3d 448 (5th Cir. 2014).

<sup>199</sup> *Id.* at 457.

<sup>200</sup> 806 F.3d 908 (7th Cir. 2015).

<sup>201</sup> *See id.* at 918; *see also* *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1360–61 (M.D. Ala. 2014) (holding that the “threshold difficulties related to losing an abortion clinic in [one’s] home city” could constitute a burden regardless of whether out-of-state providers could be considered, *id.* at 1361).

<sup>202</sup> 397 F. Supp. 3d 1213 (E.D. Ark. 2019), *aff’d in part, appeal dismissed in part*, 984 F.3d 682 (8th Cir. 2021).

<sup>203</sup> *Id.* at 1311–12. In the facts of that case, “the closest out-of-state abortion providers” were in Memphis, “a 300-mile round trip from Little Rock.” *Id.* at 1312. The district court: infer[red] that, if the availability of an out-of-state abortion provider within 12 miles of the Texas border was not enough in *Hellerstedt* to ameliorate the burdens imposed by Texas’ surgical-center requirement, then the distances at issue in this case to out-of-state abortion providers will not relieve any undue burden created by the OBGYN requirement.

*Id.*

<sup>204</sup> 33 A.3d 1200 (N.J. 2012).

<sup>205</sup> *Id.* at 1202–03.

site a sexually oriented business, the relevant market area included part of Staten Island, New York.<sup>206</sup> The zoning law at issue had been enacted at the state level (specifically in response to the Supreme Court's ruling in *Schad*)<sup>207</sup> and allowed for a regional analysis extending beyond the borders of any given locality.<sup>208</sup> Somewhat consistent with this view, the trial court had held that Staten Island, New York, could be considered part of the relevant market area, since "it was no different . . . except for a bridge and a toll."<sup>209</sup>

The appellate court disagreed. Partly on the basis that no one in New Jersey had "an electoral voice in the affairs of Staten Island," the appellate court held that this area of New York could not fairly be included in the relevant market area.<sup>210</sup> The New Jersey Supreme Court, however, held that Staten Island could indeed be included, and courts could consider "the existence of sites that are located outside of New Jersey."<sup>211</sup> The court reasoned that travel between the states was as easy as travel within a state, and since residents of one municipality had no electoral voice in a different municipality, the fact that they also had no electoral voice in a different state was irrelevant.<sup>212</sup> The court noted that if the situation were such that all or even most of the alternatives were located in a different state, the exclusion might not pass constitutional muster, but it found that the trial court could nevertheless consider the sites beyond the state's borders in its analysis.<sup>213</sup>

A dissenting New Jersey Supreme Court justice aptly highlighted the errors in this reasoning. The dissent began by noting the extent to which this opinion diverged from national precedent: "Today, this Court becomes the first in the nation to suggest that a state can geographically restrict constitutionally permissive expression within its borders, in part, by offering a neighboring state as an alternative forum."<sup>214</sup> The dissent reiterated that the issue the court was deciding was "whether New Jersey can tell one of its citizens that a sexually oriented business cannot be operated in a particular location in the State because — as part of this Court's equation — a neighboring state will accommodate its expressive activities."<sup>215</sup> As the dissenting justice noted:

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<sup>206</sup> See *id.* at 1203–04.

<sup>207</sup> See *id.* at 1209.

<sup>208</sup> See *id.* at 1205–06, 1210.

<sup>209</sup> *Id.* at 1205 (alteration in original).

<sup>210</sup> *Id.* at 1206 (quoting *Borough of Sayreville v. 35 Club, L.L.C.*, 3 A.3d 1268, 1275 (N.J. Super. Ct. App. Div. 2010)).

<sup>211</sup> *Id.* at 1203.

<sup>212</sup> See *id.* at 1210–11.

<sup>213</sup> See *id.* at 1212.

<sup>214</sup> *Id.* at 1213 (Albin, J., dissenting).

<sup>215</sup> *Id.*

[I]t cannot be that the right to exercise expressive rights in this State under the New Jersey Constitution depends *in any measure* on whether alternative avenues of communication are available in another state. If our State places restrictions on disfavored speech or expressive activities, the solution is not that New Jersey citizens can exercise their rights in another state. However convenient it may be for New Jersey citizens to travel to Staten Island, that cannot be a basis to abridge their rights in this State.<sup>216</sup>

Leaving aside New Jersey's deviation in this regard, however, the vast majority of courts that have considered the issue have prohibited states from looking beyond their borders to justify potential constitutional infringements. In sum, while a *locality's* ability to engage in constitutional off-loading may be tailored to size, *states* are governed by a more stable rule that prohibits them from off-loading their constitutional obligations onto their neighboring states. In general, states and big cities cannot look beyond their borders, but small towns and suburbs may look beyond theirs.

### III. HORIZONTAL TAILORING AND CONSTITUTIONAL OFF-LOADING

When courts hinge constitutional off-loading on a factor like size, they are practicing what Professor Mark Rosen terms “horizontal [t]ailoring.”<sup>217</sup> This Part situates constitutional off-loading within the existing theory of horizontal tailoring. It suggests that horizontal tailoring in the context of constitutional off-loading is deeply tied to normative ideas about the differing natures of small towns and big cities and their respective claims to “community.”

#### A. *Justifications for Horizontal Tailoring*

When courts allow small localities, but not big cities, to engage in constitutional off-loading, they are engaging in “horizontal tailoring,”<sup>218</sup> a jurisprudential approach that is somewhat unusual, yet not unheard of, in the American constitutional system.<sup>219</sup> A relative of its better-known counterpart, vertical tailoring (which occurs when the same legal principle is “appl[ie]d differently to different levels of government”<sup>220</sup>), horizontal tailoring occurs when the same legal principle is applied differently within the *same* level of government.<sup>221</sup> For example, vertical tailoring occurs in equal protection jurisprudence when federal and state governments cannot make property ownership a condition of voting, but

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<sup>216</sup> *Id.* at 1215.

<sup>217</sup> Rosen, *supra* note 23, at 1631.

<sup>218</sup> *Id.*

<sup>219</sup> *See id.* at 1517.

<sup>220</sup> *Id.*

<sup>221</sup> *See id.* at 1631.

certain local governments can.<sup>222</sup> Horizontal tailoring occurs wherever constitutional laws apply differently across entities on the same governmental level (in this case, localities).<sup>223</sup>

Vertical tailoring has many fans and is usually based on the simple justification that “different levels of government systematically vary in important ways,” and constitutional applications should thus vary accordingly, too.<sup>224</sup> One important site of this variance is in geographic reach and scope of impact<sup>225</sup>: a local book ban might be troubling, but much less so than a nationwide ban, because “[t]he quantum of the constitutionally problematic interference is smaller” at the local level.<sup>226</sup> Further, problems might be specific to the local level, and solvable there: a town with a large percentage of neo-Nazis might justifiably pass a regulation banning Nazi marches, while the same regulation at the national level may not be constitutionally valid.<sup>227</sup> But, while these variations among the vertical levels of government theoretically may justify vertical tailoring, at the state and local level, at least, local governments

<sup>222</sup> *Id.* at 1517–18 (“Similarly, although the Dormant Commerce Clause prohibits states from adopting protectionist measures that discriminate against sister states, no such antiprotectionism principle has been reverse-incorporated against the federal government. Consequently, Congress can authorize protectionist regulations that states cannot.” *Id.* at 1518.)

<sup>223</sup> Horizontal tailoring also occurs:

When two different municipalities in the same state impose different restrictions on the exercise of fundamental rights within their respective borders, [but] courts are *not* accustomed to scrutinizing this as a mode of state action. They do not attribute both ordinances back to the parent state and examine the resulting variation, even where a statute passed by the state explicitly imposing those same territorially limited restrictions would evoke rational basis or heightened scrutiny.

Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 295 (1987) (footnote omitted).

<sup>224</sup> Rosen, *supra* note 23, at 1521; *see also* Schragger, *supra* note 128, at 1816 (arguing for a “Religion Clause jurisprudence that differentiates between national- or state-level religion-affecting actions and local ones, providing for more rigorous scrutiny of the former and more deference to the latter”). Justices including “Chief Justice Rehnquist and Justices Holmes, Cardozo, Jackson, Harlan, Fortas, Powell, Stewart, Stevens, Blackmun, Ginsburg, Scalia,” and Thomas have called for vertical tailoring in certain contexts. Rosen, *supra* note 23, at 1517. Rosen also argues that vertical tailoring is supported by a number of political theories, including that of Professor Robert Nozick, whose analysis suggests that qualifying small polities should be granted more extensive regulatory powers than large polities. *See id.* at 1615.

<sup>225</sup> Rosen, *supra* note 23, at 1615 (“Another systemic difference across different levels of government that might justify Tailoring is the number and identity of the polity’s citizens. Each polity is constituted by a different ‘we.’ The varying number and identity of citizens that are represented in a particular polity can have significant consequences in respect of democratic theory. A limitation on one level of government accordingly might have very different democratic effects when it is applied to another level.”).

<sup>226</sup> *Id.* at 1602. Rosen notes that Justice Harlan adopted this position when he wrote:

[N]o overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

*Id.* (quoting *Roth v. United States*, 354 U.S. 476, 506 (1957) (Harlan, J., dissenting)).

<sup>227</sup> *See id.* at 1615.

usually cannot regulate in ways that would be found to be unconstitutional at the state level.<sup>228</sup>

Horizontal tailoring, where constitutional principles are applied differently across the *same* level of government, presents an even “more difficult challenge” than does vertical tailoring.<sup>229</sup> The idea is initially jarring, as most would think “[a] regime under which the U.S. Constitution permitted New York to bar its citizens from doing act X in New York but did not permit New Jersey to similarly regulate its citizens”<sup>230</sup> would be indefensible — violating both core equal protection principles and any notion of the rule of law.<sup>231</sup>

Nevertheless, “some horizontal [t]ailoring already exists” at the local level.<sup>232</sup> The community standards doctrine, for example, allows a “place-by-place” determination of what constitutes obscenity, which “permit[s] differing levels of obscenity regulation in such diverse communities as Kerrville[, Texas] and Houston, Texas.”<sup>233</sup> The end result is that “‘material may be proscribed in one community but not in another’ as a matter of constitutional law.”<sup>234</sup> So, “the identical activity may be constitutionally protected in one place (for instance, certain adult magazines in San Francisco) but not in others (the same adult magazines in a more conservative community such as Salt Lake City).”<sup>235</sup>

Recently, a swell of scholarship has argued for increased horizontal tailoring at the local level, and “a burgeoning call for the radical decentralization of constitutional norms down to the city, neighborhood, and

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<sup>228</sup> *But see* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 171 (2005) (comparing *Romer v. Evans*, 517 U.S. 620 (1996), to *Equality Foundation of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997), and arguing that “[c]ity charter amendments barring anti-discrimination protection do not violate equal protection because the locality has in a sense ‘internalized’ the costs and benefits of the legislation . . . . Identical state constitutional amendments, in contrast, violate equal protection because the state has not internalized the costs of the legislation”).

<sup>229</sup> Rosen, *supra* note 23, at 1633.

<sup>230</sup> *Id.*

<sup>231</sup> Nevertheless, the application of some constitutional rights is far from uniform. In the Fourth Amendment context, for instance:

[P]olice authority to search and seize individuals, regulated by the Fourth Amendment, hinges on state and local decisions to criminalize particular behaviors, which themselves can be variously defined. Consequently, one’s Fourth Amendment freedom from search and seizure in California differs from that enjoyed in Florida, Texas, Maine, and the Dakotas. It also differs within states themselves, as a result of the significant criminal lawmaking authority of local governments.

Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009).

<sup>232</sup> Rosen, *supra* note 23, at 1633.

<sup>233</sup> *Id.* (alteration in original) (quoting *Hoover v. Byrd*, 801 F.2d 740, 742 (5th Cir. 1986)).

<sup>234</sup> *Id.* (quoting *United States v. Peraino*, 645 F.2d 548, 551 n.1 (6th Cir. 1981)).

<sup>235</sup> *Id.* at 1634.

even block level increasingly asserts the rights of small-scale, territorially defined jurisdictions to govern themselves.”<sup>236</sup> From the Fourth Amendment to firearms and establishment claims, arguments for tailoring the application of laws to the specific will or needs of a locality have been made in numerous contexts.<sup>237</sup> All of these arguments are fundamentally premised on the idea that substate units should be allowed to decide the bounds of legality for themselves, in ways that will necessarily differ.

The persuasiveness of these localist arguments varies with context.<sup>238</sup> For the present question of constitutional off-loading, some factors do support horizontal tailoring.<sup>239</sup> Like the differing vertical levels of government, small and large localities can also “systematically vary in important ways.”<sup>240</sup> As one scholar put it, we all intuitively understand that “a city of 6 million persons is different from a city of 100,000 or a town of 400.”<sup>241</sup>

First, as a practical matter, smaller localities usually have less surface area dedicated to site facilities. As many judges note when describing the square mileage of the locality at issue, a town of two square miles does not have a lot of space to mete out and must make difficult choices about how that small amount of land should be used.<sup>242</sup> Smaller localities simply cannot accommodate the same number of uses as bigger ones — they cannot pack all the things into their space in the same way that a sprawling metropolis can. Nonetheless, it is important to note that the cases of constitutional off-loading typically arise when someone seeking to site a constitutionally protected use has found a particular site that would work for their facility — despite the scarcity of land —

<sup>236</sup> Schragger, *supra* note 65, at 374–75.

<sup>237</sup> See, e.g., Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82, 85–86 (2013); Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 371 (2018); Schragger, *supra* note 128, at 1816.

<sup>238</sup> See Logan, *supra* note 237, at 413–15.

<sup>239</sup> Sterk argues that perhaps constitutional off-loading should be tailored to the specific nature of the *market* at issue. He asserts that:

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.

Sterk, *supra* note 77, at 1621.

<sup>240</sup> Rosen, *supra* note 23, at 1521.

<sup>241</sup> Schragger, *supra* note 128, at 1818.

<sup>242</sup> See, e.g., *MJ Ent. Enters., Inc. v. City of Mount Vernon*, 328 F. Supp. 2d 480, 482 (S.D.N.Y. 2004) (describing Mount Vernon as having “a land area of only 4.36 miles” with only “13% of the City’s land area . . . zoned for commercial and industrial uses”).

if ordinances or special use permits were structured or allocated differently.<sup>243</sup>

Second, the land uses in a small town arguably have a more noticeable impact on community character. A gun shop or strip bar in the middle of a town of 500 people can shift municipal identity and convey a community character that might differ from the prevailing views of the community. A gun shop or strip bar in the middle of a city of five million does this to a much lesser extent.<sup>244</sup> When there are three businesses in town, and one of them is a gun shop or a strip bar, it has a greater impact than if there are three thousand businesses in close proximity.

Third, given the smaller footprint of small towns, errors of exclusion may have less impact. The small scale of the local in general might weigh in favor of tailoring, since local laws are “jurisdictionally cabined” such that “[e]ven if a locality gets the balance wrong, the effects on . . . liberty are geographically contained.”<sup>245</sup> The dissent in *Schad* seemed to support this view when it remarked that:

Mount Ephraim is a small community on the periphery of two major urban centers where this kind of entertainment may be found acceptable. The fact that nude dancing has been totally banned in this community is irrelevant. “Chilling” this kind of show business in this tiny residential enclave can hardly be thought to show that the appellants’ “message” will be prohibited in nearby — and more sophisticated — cities.<sup>246</sup>

Finally, and most importantly, different normative conceptions of small towns and big cities inform horizontal tailoring. Small towns and large cities are, in the legal and cultural imagination, entirely different kinds of communities, with vastly differing claims to local governance and self-determination. These differing normative conceptions inform and profoundly influence horizontal tailoring decisions.

#### *B. The Differing Normative Views of Small Towns and Big Cities*

In the popular and legal imagination, small towns are entitled to special claims of community and self-determination.<sup>247</sup> Small towns

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<sup>243</sup> See, e.g., *id.* at 483.

<sup>244</sup> See McGinnis, *supra* note 97, at 626.

<sup>245</sup> Schragger, *supra* note 128, at 1846.

<sup>246</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87 (1981) (Burger, C.J., dissenting).

<sup>247</sup> See Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN ST. L. REV. 647, 674–75 (2014) (describing the powerful role of imagination in conceptions of localities).

have long been associated with morality and virtue<sup>248</sup> and with traditional American and civil values.<sup>249</sup> Small towns and suburbs are imagined as cohesive communities established by like-minded people in order to live the kind of life they have all determined to be the best one.<sup>250</sup> Their localities are imagined as an idealized form of association, a “romantic image” teeming with “belongingness, oneness, solidarity, and affective connection that, it is imagined, were once fostered in traditional, face-to-face villages.”<sup>251</sup> Small towns and suburbs are where white picket fences are painted and cups of sugar shared, where backyard cookouts are held and families lovingly raised, and where “stability, family, privacy, children, and community” find their purest expression.<sup>252</sup>

In cases like *Schad*, these communities are envisioned as arising from “individual acts of voluntary association, an outcome of individuals who have consented to join in a group.”<sup>253</sup> This vision aligns well with Charles Tiebout’s highly influential model of local government, where local denizens are viewed as voter-consumers who flit between multiple possible localities until they find and stay in the locality that fits them just right.<sup>254</sup> On this view, local communities emerge as entities freely chosen by residents who have come together with their shared vision of an ideal community.

Consistent with this vision of self-directed sorting, the resulting communities are then seen as “enabling the protection of individuals from state control.”<sup>255</sup> Rather than “‘creatures of the state’ who [may] themselves threaten individual freedom,”<sup>256</sup> small localities are instead shelters from the state storm. Conceived thusly, these communities create a private, nearly sacred space, where the “state” must not unduly intrude.<sup>257</sup> Chief Justice Burger venerated such communities in his dissent in *Schad* and suggested that they are indeed entitled to the highest forms of self-determination. Referring specifically to small localities, he declared that “[t]he towns and villages of this Nation are not, and should

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<sup>248</sup> See Schragger, *supra* note 65, at 436 & n.222 (citing scholarship that notes the culturally defined contrast between “sinful” urban life and “virtuous” suburban life that buttressed the creation of suburbs and argues suburbia began as a repudiation of the corruption and “turmoil” in cities).

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*

<sup>251</sup> GERALD E. FRUG, CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS 57 (2001).

<sup>252</sup> Schragger, *supra* note 65, at 436.

<sup>253</sup> *Id.* at 387.

<sup>254</sup> See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419–20 (1956).

<sup>255</sup> FRUG, *supra* note 251, at 58.

<sup>256</sup> *Id.*

<sup>257</sup> See *id.*

not be, forced into a mold cast by this Court.”<sup>258</sup> Rather, “because . . . a community of people are — within limits — masters of their own environment,”<sup>259</sup> “[c]itizens should be free to choose to shape their community so that it embodies their conception of the ‘decent life.’”<sup>260</sup>

Acknowledging that such self-determination necessarily includes a robust ability to exclude, Chief Justice Burger noted that this power of self-determination “will sometimes mean deciding that certain forms of activity — factories, gas stations, sports stadia, bookstores, and surely live nude shows — will not be allowed.”<sup>261</sup> And this, according to Chief Justice Burger, is quite right, for “[t]o say that there is a First Amendment right to impose every form of expression on every community, including the kind of ‘expression’ involved here, is sheer nonsense.”<sup>262</sup>

The localist instinct underlying such statements has long empowered suburbs and small towns.<sup>263</sup> For smaller localities, potent notions of “community” have “become a mechanism for building high normative and literal walls in legal, social, and physical space.”<sup>264</sup> Once erected, anyone attempting to enter those walls bears the burden of “justifying [the] encroachment.”<sup>265</sup> Aspiring encroachers and their constitutional protections thus crash directly into these powerful ideas of community. When someone seeking to site a constitutionally protected use wants to do so in a locality that does not want them there, the ensuing dispute “pit[s] community-specific needs against constitutional norms. This debate is structured as a clash between a . . . community’s efforts to solve

<sup>258</sup> *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 87 (1981) (Burger, C.J., dissenting).

<sup>259</sup> *Id.* at 85.

<sup>260</sup> *Id.* at 87.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 88. In the case, the powerful rhetoric of community trumps even the concern that the residents of one community have no formal political rights in another’s governance. As Justice Blackmun voiced in *Schad*:

Were I a resident of Mount Ephraim, I would not expect my right to attend the theater or to purchase a novel to be contingent upon the availability of such opportunities in “nearby” Philadelphia, a community in whose decisions I would have no political voice. Similarly, I would not expect the citizens of Philadelphia to be under any obligation to provide me with access to theaters and bookstores simply because Mount Ephraim previously had acted to ban these forms of “entertainment.” . . . [I]n attempting to accommodate a locality’s concern to protect the character of its community life, the Court must remain attentive to the guarantees of the First Amendment, and in particular to the protection they afford to minorities against the “standardization of ideas . . . by . . . dominant political or community groups.”

*Id.* at 78–79 (Blackmun, J., concurring) (citations omitted) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

<sup>263</sup> See FRUG, *supra* note 251, at 64 (quoting Briffault, *supra* note 28, at 444).

<sup>264</sup> Schragger, *supra* note 65, at 471.

<sup>265</sup> *Id.* at 403 (“[T]he three accounts of community offer widely divergent rationales for deferring to local constitution-making — individual choice, community preservation, civic engagement — [but] each shifts the burden of justifying encroachment on local norms to the encroacher.”).

pressing local problems [or engage in self-determination] and the liberal abstractions of due process [and other constitutional rights] imposed by . . . outsiders.”<sup>266</sup> The choice is then between “community autonomy and paternalism.”<sup>267</sup> Either the community is able to engage in self-determination, or the Constitution “imposes a norm by force that the affected community does not share.”<sup>268</sup>

Neither option, “respect or force,” offers “much of a choice.”<sup>269</sup> Moreover, both threaten to increase political polarization. Allowing small municipalities to perform the exclusions they like, on the basis that neighboring jurisdictions offer the constitutionally protected activity, enables these localities to adopt an increasingly extreme constitutional community character that is associated with increased polarization:

[G]roups that create a closed community of shared values eventually grow to reject engagement with the larger, more heterogeneous community, which they see as corrupt and alien. Richard Sennett calls this a form of “pseudo-speciation,” in which “a tribe will act as though it is the only assemblage of human beings who are really human.”<sup>270</sup>

When we live in small homogeneous groups, “the social milieu of daily life — the conversations and interactions with localized circles of contacts including family, coworkers, and friends — shapes and reinforces partisanship.”<sup>271</sup> “[W]e do not need to get along” with anyone unlike ourselves “because we already live in neighborhoods of like minds, sorted by invisible boundary lines that create and define the spaces in which we live,” where the ideas we already hold are reinforced and repeatedly validated.<sup>272</sup>

Contact theory, which posits that interactions between members of differing social groups under certain conditions reduce intergroup prejudice and hostility, also suggests that empowering small communities to engage in further exclusions can increase xenophobia and intolerance.<sup>273</sup> Thus, by pushing toward even more extreme polarization, constitutional off-loading — and other forms of tailoring — may “risk undermining our Constitution and tearing asunder our national political union. The very point of the Constitution . . . is to ensure the uniform protection of rights everywhere in the country. Such uniformity is what defines our national character” and is arguably “a prerequisite for citizens’ respect

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<sup>266</sup> *Id.* at 373 (footnote omitted).

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> Stahl, *supra* note 39, at 511 (quoting SENNETT, *supra* note 38, at 308).

<sup>271</sup> RODDEN, *supra* note 30, at 59.

<sup>272</sup> Schragger, *supra* note 65, at 458.

<sup>273</sup> See Jesse Singal, *The Contact Hypothesis Offers Hope for the World*, THE CUT (Feb. 10, 2017), <https://www.thecut.com/2017/02/the-contact-hypothesis-offers-hope-for-the-world.html> [https://perma.cc/G4XU-V52J] (providing an overview of the theory and supporting scholarship).

for the Constitution.”<sup>274</sup> The court in *West Side Women’s Services v. City of Cleveland*<sup>275</sup> voiced this principle when it declared that “a municipality has no legitimate interest in shielding certain members of a community from constitutionally protected activities which they find offensive on personal, moral, or even religious grounds.”<sup>276</sup> Indeed, it is inherent in constitutionally protected rights “that the right[s] may be exercised . . . in defiance of the contrary opinion of the sovereign and other third parties.”<sup>277</sup>

But if courts did find that even small localities could not look to their neighbors for the purposes of justifying constitutional exclusions, and instead forced unshared but constitutional norms on small communities, that too could lead to increased polarization.<sup>278</sup> Imposing norms on those who do not share them often breeds resentment, an already very live issue in nonurban areas.<sup>279</sup> Thus, despite the “widely accepted view” that the whole point of having constitutional rights is to ensure that those who do not agree with them nevertheless provide space for them,<sup>280</sup> the powerful rhetoric and value of community self-determination can outweigh even these constitutional values.<sup>281</sup> The view that “[w]hen local norms are the product of choice and not either a product or an instrument of oppression, they should be deemed legitimate,”<sup>282</sup> is particularly powerful when it comes to small localities and suburbs, and, so long as factual access remains constant, many courts are content to allow principles of self-determination to justify constitutional off-loading.

However, this powerful rhetoric, rooted in ideas of associative communities and claims to traditional American values, leaves out large cities.<sup>283</sup> While small towns are commonly framed as bastions or exemplars of community, the idea that big cities might also be associative communities gets little traction.<sup>284</sup> Once community is synonymous

<sup>274</sup> Rosen, *supra* note 23, at 1632; *see also* Logan, *supra* note 231, at 145.

<sup>275</sup> 573 F. Supp. 504 (N.D. Ohio 1983).

<sup>276</sup> *Id.* at 523.

<sup>277</sup> *Id.* (quoting *Charles v. Carey*, 627 F.2d 772, 778 (7th Cir. 1980) (alteration in original)).

<sup>278</sup> *See* RODDEN, *supra* note 30, at 91.

<sup>279</sup> *See, e.g., id.* (“In a study of rural Wisconsin, Kathy Cramer reports a confluence of partisan and place-based rural identity, whereby partisanship is driven as much by resentment of urban elites as by specific policy preferences.” (citing KATHERINE CRAMER, *THE POLITICS OF RESENTMENT: RURAL CONSCIOUSNESS IN WISCONSIN AND THE RISE OF SCOTT WALKER* (2016))).

<sup>280</sup> Mark D. Rosen, *Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community*, 77 TEX. L. REV. 1129, 1133 (1999).

<sup>281</sup> *See id.*

<sup>282</sup> Schragger, *supra* note 65, at 387.

<sup>283</sup> *Cf.* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 76–78 (2014) (arguing that big cities are in fact a type of associative community as well).

<sup>284</sup> *See id.* at 74–75 (“The case law explicitly considering whether cities can invoke associational standing is thinner than that dealing with cities suing as *parens patriae*, and the results are mixed.” *Id.* at 74.).

with “the idealized small town,” it becomes “a tautology: a large, diverse population is deemed inconsistent with community because community has already been defined as a small and homogeneous group.”<sup>285</sup> Whether viewed in a negative or positive light, cities are associated with diversity, heterogeneity, and inclusivity.

On the negative view, city heterogeneity is linked with disorder, chaos, filth, and moral depravity.<sup>286</sup> Garbage and danger lurk on every street, as unsavory characters wait in the wings to corrupt all who dare to pass.<sup>287</sup> Strangers view each other suspiciously, and no cups of sugar are exchanged.

On the positive view, cities are still diverse, heterogeneous, and inclusive, but in a good way. Urban theorists like Iris Young and Gerald Frug imagine the city as a “being together of strangers,”<sup>288</sup> “a cosmopolitan . . . community in which difference is celebrated and impersonal relations embraced.”<sup>289</sup> The public here “is heterogeneous, plural, and playful, a place where people witness and appreciate diverse cultural expressions that they do not share and do not fully understand.”<sup>290</sup> This different kind of community means that “[i]ndividuals with a desire for diversity and openness to new experiences are drawn to the bright lights and bustle of city centers.”<sup>291</sup> They understand that “city living also mandates tolerance of a certain collective, public life that appears to be antithetical to a tradition of rural or suburban individualism,” and make a big city their chosen place to live in part because of this.<sup>292</sup> The only shared commitment of the individuals in a big city under this conception is an understanding that “being together entails some common problems and common interests, but they do not create a community of shared final ends, of mutual identification and reciprocity,”<sup>293</sup> nor do individuals expect that the end goal of the big city is to “dissolv[e] into unity or commonness.”<sup>294</sup>

Under both views, cities cannot lay claim to the concept of “community” like small towns and suburbs can. The strength of the

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<sup>285</sup> Stahl, *supra* note 39, at 513.

<sup>286</sup> See Martha Grace Duncan, *In Slime and Darkness: The Metaphor of Filth in Criminal Justice*, 68 TUL. L. REV. 725, 792 (1994) (suggesting that “criminality and cities are linked by their common association with filth”).

<sup>287</sup> See, e.g., *Schleifer v. City of Charlottesville*, 159 F.3d 843, 848 (4th Cir. 1998) (stating that youths on the streets of cities at night “risk[] becoming another victim of the assaults, violent crimes, and drug wars that plague America’s cities” and noting “the dangers of the streets”).

<sup>288</sup> FRUG, *supra* note 251, at 11 (quoting IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 237 (Princeton Univ. Press 2011) (1990)).

<sup>289</sup> Stahl, *supra* note 39, at 513.

<sup>290</sup> *Id.* (quoting YOUNG, *supra* note 288, at 241).

<sup>291</sup> RODDEN, *supra* note 30, at 84.

<sup>292</sup> Schragger, *supra* note 26, at 1211 (citing STEVEN CONN, *AMERICANS AGAINST THE CITY: ANTI-URBANISM IN THE TWENTIETH CENTURY* 62 (2014)).

<sup>293</sup> FRUG, *supra* note 251, at 11 (quoting YOUNG, *supra* note 288, at 238).

<sup>294</sup> *Id.* (quoting YOUNG, *supra* note 288, at 237).

small-town-as-the-quintessential-community notion crowds out all potential alternative claims. Big cities, with their heterogeneity, necessarily cannot access the same strong notion of community that graces small towns.

Given these normative understandings of small towns and cities as fundamentally different kinds of places, it seems only logical to deny cities exclusionary powers and instead require inclusion from them. Allowing small towns to exclude and requiring big cities to include thus both reflects and reinforces common normative understandings of the inherent nature of towns and cities. A horizontal tailoring approach allows small localities and suburbs significant power to craft their community character through exclusion, and to craft a character that can be quite extreme. Horizontal tailoring requires cities to be the heterogeneous, inclusive communities they are imagined to be, while simultaneously letting small localities continue their homogeneity and avoid the “hard work” of inclusive community building.<sup>295</sup>

#### IV. THE LOCALIST CONSEQUENCES OF TAILORING CONSTITUTIONAL OFF-LOADING

At first glance, allowing small towns greater exclusionary power in the form of constitutional off-loading looks like a win for small-town localism. However, this Part demonstrates that constitutional off-loading doctrine may ultimately undermine small-town power. At the same time as tailored constitutional off-loading allows small towns to exclude, which looks like an acknowledgement of small-town autonomy, this exclusion depends on interpreting the borders of small localities as easily collapsible. And once borders are interpreted in that way, claims to localism are weakened.

For big cities, on the other hand, the denial of their ability to constitutionally off-load initially looks like a denial of their autonomy. However, this denial is also premised on a particular interpretation of the meaning of borders, though this time, that interpretation is that big-city borders retain their legal and political significance. This view of city borders as inexorably compelling can reify city claims to localism in other contexts. Moreover, by insisting that the same prohibition on constitutional off-loading applies to both states and big cities (but not small localities), constitutional off-loading jurisprudence functionally equates cities with states, bolstering arguments that cities have a better claim to

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<sup>295</sup> FRUG, *supra* note 251, at 11. The power of these normative ideas of small towns and big cities is largely what prevents a “leveling up” response to the problem of constitutional off-loading, under which no locality could look beyond its own borders, from seeming plausible. Nevertheless, because the ultimate consequences of a tailored approach to constitutional off-loading may be to move toward a more balanced localism, this is not necessarily a negative.

independent constitutional status and recognition than their smaller counterparts.

### A. *Dissolving Small-Town Borders*

Localism depends on borders. But borders are inherently slippery creatures; they are paradoxically “both absolutely compelling and hopelessly arbitrary.”<sup>296</sup> Legal and social practices determine which characterization rules the day. As Professor Richard Ford has described, borders are not just fictional lines on a map; they are “real”:

[B]ut they are real because they are constantly being *made* real, by county assessors levying property taxes, by police . . . stopping at the city limits[], [and] by registrars of voters checking identification for proof of residence. Without these practices, the lines would not “be real” — the lines don’t preexist the practices.<sup>297</sup>

The paradoxical tension between the compelling and arbitrary aspects of borders imbues many local government cases, but the legal and social practices surrounding small-town and suburban borders have, for the most part, emphasized these local borders as incredibly compelling. Courts have routinely reinforced small-town and suburban borders as unassailable. In the small-town and suburban context, borders are seen as important community creators and as mechanisms that separate one group from another and justify that community’s self-governance and self-determination, regardless of costs imposed on other communities or individuals beyond those borders.

1. *Borders Create Communities.* — Borders delineate the jurisdictional bounds of a territory and create a distinct legal and political community within those boundaries.<sup>298</sup> Claims to self-determination — “claims that certain groups should be permitted to make law for themselves” — are “acts of legal and spatial construction” that largely depend on defined and sturdy borders.<sup>299</sup> These “formal boundaries clarify a place’s ‘social and economic identity,’” creating a “self-governing political unit[] where no distinct community previously existed.”<sup>300</sup> That self-governing political unit is then given “the power to regulate land use and to design a mix of taxes and services that attracts settlers the locality desires.”<sup>301</sup>

<sup>296</sup> Richard T. Ford, *Law’s Territory (A History of Jurisdiction)*, 97 MICH. L. REV. 843, 850 (1999).

<sup>297</sup> *Id.* at 856.

<sup>298</sup> Schragger, *supra* note 65, at 415 (“Boundary-creating norms are justified as exercises of local autonomy while creating the community that asserts autonomy in its name.”).

<sup>299</sup> *Id.* at 404.

<sup>300</sup> Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1142 (1996) (quoting GREGORY R. WEIHER, *THE FRACTURED METROPOLIS: POLITICAL FRAGMENTATION AND METROPOLITAN SEGREGATION* 35 (1991)).

<sup>301</sup> *Id.*

But just as local borders create a community within their walls, they also signal who is outside of that community. Indeed, as one scholar asserts: “[T]he meaning of community happens at borders between communities, not solely (or even primarily) inside them.”<sup>302</sup> At the local level, “[j]urisdictional lines are more than neutral mechanisms for distributing local preferences; they become normatively electrified fences between ‘us’ and ‘them’ that are often impossible to cross.”<sup>303</sup>

The power of borders to separate those inside and outside of a community is partially responsible for the long-bemoaned fracturing and proliferation of local governments that occur in metropolitan areas.<sup>304</sup> Local borders became a mechanism for racial and social segregation, as “[w]hites saw incorporation [into separate localities] as a means for separating themselves from African Americans.”<sup>305</sup> They used borders to create “[n]ewly incorporated towns [that] often had significantly lower concentrations of African-American residents than did the counties from which they were carved.”<sup>306</sup> The infamous “white flight” into the suburbs and the resulting “city/suburb dichotomy” is primarily “a function of a localism invested in rigorous boundary maintenance,”<sup>307</sup> and “[l]ocal boundary lines have often been drawn in order to take advantage of the opportunity local government law provides incorporated communities to [separate from others and] control local land use.”<sup>308</sup>

In allowing an aspiring community to separate from the others around it, local boundary lines also serve the important legal role of generally insulating the decisions of that community from their impacts on those outside the communities. This separation gives rise to the long-standing boundary problem that plagues local government: “The creation of a place for meaningful self-government (in space and in politics) for those inside the (metaphorical and sometimes literal) gates always affects (and often injures) those who are outside the gates.”<sup>309</sup> In other words, the decisions of individual localities within their borders constantly impact those outside the borders. Yet because of the power of those borders, those outside them have little say in what happens inside, and those inside need not consider those outside at all.

2. *Borders Allow Communities to Ignore Externalities.* — Although those within a locality’s borders can ignore the impacts of their decisions

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<sup>302</sup> Schragger, *supra* note 65, at 440.

<sup>303</sup> *Id.* at 438.

<sup>304</sup> See Briffault, *supra* note 300, at 1141–42.

<sup>305</sup> *Id.* at 1142.

<sup>306</sup> *Id.*

<sup>307</sup> Schragger, *supra* note 65, at 436.

<sup>308</sup> Briffault, *supra* note 300, at 1141–42.

<sup>309</sup> Schragger, *supra* note 65, at 374.

on neighboring jurisdictions, those impacts nevertheless exist, and they can be significant.<sup>310</sup> For example:

One town's decision to approve a new shopping center . . . can siphon retail customers from businesses in the next town over; one community's decision to place a cap on new housing units can force home prices up throughout the region, and so on. Communities are generally under no obligation to consider the impacts of their activities on neighboring communities, and given each community's need to maximize its own tax base in order to provide constituents with services at the lowest possible tax rate, each has a strong incentive to act in its own self-interest.<sup>311</sup>

Independence as a juridical unit, which is premised on borders, usually immunizes smaller localities from taking into account or adjusting for any externalities imposed on others.

Often, though, one locality is able to exclude only because another has *included*. For instance, “[s]uburban exclusiveness is dependent on the neighboring cities’ refusal to exclude; some places have to be open for others to be closed. And just as the identity of the excluding suburb is enabled by its neighbors’ openness, their identity as less ‘exclusive’ is created by the exclusion.”<sup>312</sup> While allowing small localities to constitutionally craft their community character by excluding appears to “give[] communities the power to preserve their unique cultural identities and preferences . . . [.] in reality, it makes one community’s right to exclude . . . contingent on other communities permitting them.”<sup>313</sup> An example of this occurs in the context of dry counties: dry counties are often right next to wet ones, with liquor stores accessible immediately over the relevant border.<sup>314</sup> In other words, the dry county can exist only because there is a wet one nearby.

When borders and the self-determination that flows from them allow a locality to “simply refuse to allow land uses that must be located somewhere in the region, it dumps the burden onto neighboring communities and creates what Richard Babcock termed ‘municipal primogeniture.’”<sup>315</sup> Under municipal primogeniture, “the first communities to exclude undesirable land uses have absolute freedom to do so, but the

<sup>310</sup> *Id.*

<sup>311</sup> Stahl, *supra* note 39, at 508 (footnote omitted).

<sup>312</sup> Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 284 (1993).

<sup>313</sup> Stahl, *supra* note 39, at 511.

<sup>314</sup> See generally H. Jason Combs, *The Wet-Dry Issue in Arkansas*, 43 PA. GEOGRAPHER 66 (2005). While sometimes other jurisdictions allowing something one jurisdiction wants to ban works to the advantage of the banning jurisdiction, it can also undermine the ban entirely. Thus, states have sometimes prohibited residents from accessing something in another state that has been banned in their home states. For example, the plaintiff couple in *Loving v. Virginia*, 388 U.S. 1 (1967), was convicted of evading Virginia’s ban on interracial marriage by marrying in Washington, D.C. See Dorothy E. Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 N.Y. L. SCH. L. REV. 175, 178–79 (2014–2015).

<sup>315</sup> Stahl, *supra* note 39, at 510–11 (citing RICHARD F. BABCOCK, *THE ZONING GAME* 150 (1966)).

remaining communities are then forced to absorb the regional demand simply because they have ‘come too late to the planning banquet.’<sup>316</sup> When small localities are viewed as individually packaged goods separated by their borders, it gives rise to this first-mover problem.

The kind of self-interest visible in the first-mover problem is also visible in the “free-rider” problem that metropolitan boundaries create. Boundaries of small localities, at least in metropolitan areas, have traditionally allowed small localities to benefit from the good parts of cities, while insulating them from having to bear any of the costs. There is a history of smaller localities, particularly suburbs, somewhat parasitically benefiting from neighboring cities while at the same time avoiding bearing many of those cities’ costs and burdens. An “overwhelming majority” of people “live[s] in municipalities with fewer than 50,000 people,” but the overwhelming majority of these are in metropolitan centers.<sup>317</sup> These smaller localities can offer the governance possibilities of a small town, while they are dependent on the “employment offerings, education, health care, cultural amenities[, and] other opportunities” that proximity to the city offers.<sup>318</sup> Residents sometimes move into these localities “as a result of very deliberate, calculated decisions” that there, they “can access the benefits of the city without having to pay for those benefits or the associated burdens of city life.”<sup>319</sup>

3. *Courts Allow Localities to Use Borders for Parochial and Parasitic Purposes.* — Courts have generally permitted this and long allowed small towns to be selfish and parochial when they want to be.<sup>320</sup>

<sup>316</sup> *Id.* at 511.

<sup>317</sup> Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 483 (2007).

<sup>318</sup> *Id.* at 484.

<sup>319</sup> Tyson, *supra* note 247, at 673.

<sup>320</sup> Some state courts have been pushing for greater accommodation of regional concerns:

In Pennsylvania, California and New York, the courts acknowledged the regional consequences of local zoning actions, condemned municipal parochialism and required local governments to take regional needs and requirements into account when they regulate land use. These courts ordered local governments to serve the general welfare of the state or region when they zone, not just the interests of the locality, and directed the lower state courts to look to the extralocal effects of local actions when they review local land use decisions. In addition, these courts appealed to their states to take a greater role in land use planning and in overseeing local zoning.

Briffault, *supra* note 19, at 43 (footnotes omitted). In New Jersey, the famous decision of *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), was meant to be an antidote to this kind of self-interested behavior. In that case, “[a] wealthy, white suburb of Camden and Philadelphia, Mt. Laurel, New Jersey used restrictive zoning to block construction of affordable housing within its boundaries. The NAACP, representing low-income African-American and Latino populations, challenged the town’s exclusionary practices — incredibly, they won.” Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 816 (2021) (footnote omitted). Through the *Mount Laurel* decision and the subsequent ones it gave rise to, the New Jersey Supreme Court:

And they often do want to be: communities regularly plan and zone “in pursuit of . . . parochial goals” and ignore the external impact of those decisions on the surrounding area.<sup>321</sup> With judicial blessing, small-town and suburban borders have historically enabled local residents “to use local powers to insulate their parochial interests from broader regional concerns,”<sup>322</sup> and allow the encompassed communities “to escape from the fiscal burdens of the surrounding metropolitan region.”<sup>323</sup>

Three decisions most clearly illustrate this trend. First, in *Village of Euclid v. Ambler Realty Co.*,<sup>324</sup> the Supreme Court expressly rejected the notion that a locality should take regional needs into consideration in devising its zoning ordinances.<sup>325</sup> Instead, in keeping with the beneficent localism offered to suburbs and small localities, the Court maintained that “the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit, within the limits of the organic law of its creation and the State and Federal Constitutions.”<sup>326</sup> In its decision, the Court “condoned an intentionally parochial system that relies upon local political boundaries[] to determine the scope of land-use regulatory authority.”<sup>327</sup>

Second, in *Warth v. Seldin*, when low-income plaintiffs from Rochester claimed that they had been “zoned out” by a zoning ordinance in Penfield that functionally excluded them from that town,<sup>328</sup> the Court “treated the boundary between Penfield and Rochester as immutable. Because petitioners did not live in Penfield or have a current interest in

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required every municipality to provide affordable housing for its “fair share” of the regional demand. In contrast to the *Euclid* Court, the *Mount Laurel* court required municipalities to exercise their land-use regulatory authority to promote the welfare of the *state* as a whole, rather than exclusively to benefit their own residents. The ensuing decades have proven that *Mount Laurel*'s fair-share approach is the exception, rather than the rule. The regional approach to affordable housing has been difficult to implement in New Jersey itself and has been ignored by the vast majority of states.

Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1415–16 (2012) (footnotes omitted). Notably, the state's Fair Housing Act also contains a Regional Contribution Agreement, which:

permits a suburb to transfer up to half of its fair share obligation to another community in its region in exchange for cash. The suburb avoids dedicating land to residences for poor people, while the transferee — usually a city — gains funds to renovate or construct housing for the poor already within it. In effect, affluent suburbs subsidize housing in beleaguered cities.

J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2273 (1997) (book review) (footnote omitted).

<sup>321</sup> Note, *Zoning for the Regional Welfare*, 89 YALE L.J. 748, 748 (1980).

<sup>322</sup> Briffault, *supra* note 19, at 6.

<sup>323</sup> Briffault, *supra* note 300, at 1142.

<sup>324</sup> 272 U.S. 365 (1926).

<sup>325</sup> *See id.* at 389.

<sup>326</sup> *Id.*

<sup>327</sup> Ostrow, *supra* note 320, at 1412.

<sup>328</sup> *See Warth v. Seldin*, 442 U.S. 490, 493 (1975).

property in Penfield, they did not have the standing to challenge the zoning ordinance regardless of its effect on the ability to become future residents of Penfield.”<sup>329</sup>

Finally, in *Milliken v. Bradley*, the Supreme Court upheld the sanctity of local borders when it refused to order a regional remedy to the segregation in Detroit’s school system.<sup>330</sup> The Court treated the local boundaries as “sacrosanct,”<sup>331</sup> and the plaintiffs could not look beyond the city limits for a remedy for school segregation. In the Court’s decision, the local government line separating “black city dwellers and white suburban residents” was imagined to be an “inviolable boundary — a barrier, really — between the two[;] . . . a boundary with sufficiently strong legal meaning” that it “defined legal personhood and fundamental rights and . . . could not be transgressed without the rights themselves being (metaphorically) invaded.”<sup>332</sup> On this telling, “Detroit and an adjacent suburb, such as Grosse Pointe, were no more or less integral parts of some greater whole than were Detroit and, say, Honolulu.”<sup>333</sup>

4. *Constitutional Off-Loading Is Premised on Local Borders as Arbitrary.* — The judicially envisioned, fortified border so crucial to claims of local power dissolves when small localities engage in constitutional off-loading. Although it might seem like an exercise in exclusion and localism to allow a small locality to refuse to accommodate a constitutionally protected use, that act of exclusion hinges on the border being understood as arbitrary and fallible. And once a local border is perceived as arbitrary and fallible, the locality inside is recreated as situated, embedded, and intricately connected with its surrounding area. Because “[t]he shape of localism is contingent on how the walls between

<sup>329</sup> Schragger, *supra* note 65, at 419.

<sup>330</sup> See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1875 (1994).

<sup>331</sup> *Id.*

<sup>332</sup> David Delaney, *The Boundaries of Responsibility: Interpretations of Geography in School Desegregation Cases*, in THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE 54, 64–65 (Nicholas Blomley et al. eds., 2001).

<sup>333</sup> *Id.* at 65. For a contrasting approach to the one the court adopted in *Milliken*, see *Hills v. Gautreaux*, 425 U.S. 284 (1976), where:

[T]he Court upheld a lower court’s order requiring the federal Department of Housing and Urban Development (HUD), which had practiced racial discrimination in its siting of public housing projects in Chicago, to site future housing in the suburbs. The Court reasoned that because HUD had authority to operate in the Chicago housing market, which extended beyond the Chicago city limits, the larger boundary of the housing market determined the territorial scope of the remedy. Moreover, the remedial order against HUD did not impair the zoning autonomy of Chicago’s suburbs, since HUD had no authority to build housing without a local application or approval. Unlike the *Milliken* remedy, the *Gautreaux* order “would not consolidate or in any way restructure local governmental units. The remedial decree would neither force suburban governments to submit public housing proposals to HUD nor displace the rights and powers accorded to local government entities under federal or state housing statutes or existing land-use laws.”

BRIFFAULT & REYNOLDS, *supra* note 4, at 146 (quoting *Gautreaux*, 425 U.S. at 305–06).

[communities] are built and conceived,”<sup>334</sup> when those walls are porous and permeable, the localism that depends on them dissolves.

Returning to Richard Ford’s border metaphor, constitutional off-loading makes the lines less real. When small towns constitutionally off-load, they are highlighting the arbitrariness of their own boundaries, as well as the interconnectedness of the various fragmented local governments within a metropolitan region. Constitutional off-loading accurately reflects the reality that “[t]he localities within major metropolitan areas are not [independent] ‘communities’ within the traditional sense of the term.”<sup>335</sup> Yet acknowledging this actuality flies in the face of the localism small localities assert. When constitutional off-loading doctrine acknowledges that borders are arbitrary and people pass through localities seamlessly and without even knowing where the border is most of the time; and that “[o]ur society is no longer a collection of insular communities” but instead composed of “highly interdependent” communities<sup>336</sup> and “most local governments are fragments of larger, economically interdependent regions,”<sup>337</sup> the basis of small-town localism is directly implicated.

Small local governments often erect borders purposely to get self-determination. But in the context of constitutional off-loading, they argue that these borders are more arbitrary than compelling,<sup>338</sup> and use this interconnectedness as leverage to get *more* self-determination in the form of excluding constitutionally protected purposes. Small local governments try to use regional realities to justify exclusion in the same way they always have: “Regional concerns were advanced, if at all, to defend exclusion; in a metropolitan area, it was thought, a person or land use denied a place in the zoning locality could relocate elsewhere in the region.”<sup>339</sup>

But this blows back in a particular way. Once jurisdictional lines are read as irrelevant for the purposes of constitutional off-loading, the lines between small localities that are so crucial to their claims of autonomy blur, morphing the area instead into a broader, regional conglomerate. The practice of constitutional off-loading dissolves the jurisdictional lines, those same lines that are so necessary to any claim of

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<sup>334</sup> Schragger, *supra* note 65, at 404.

<sup>335</sup> Briffault, *supra* note 300, at 1142.

<sup>336</sup> *City of Huntington Beach v. Becerra*, 257 Cal. Rptr. 3d 458, 486 (Ct. App. 2020) (quoting *Baggett v. Gates*, 649 P.2d 874, 880 (Cal. 1982)).

<sup>337</sup> Briffault, *supra* note 19, at 5.

<sup>338</sup> *Cf.* Richard Thompson Ford, *Law and Borders*, 64 ALA. L. REV. 123, 132–33 (2012) (discussing *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60 (1978), in which the Supreme Court described a locality as a “convenient agenc[y],” *id.* at 71, for the state).

<sup>339</sup> Briffault, *supra* note 19, at 40–41.

democratic autonomy and independent constitutional significance.<sup>340</sup> Their dissolution negates the status of the locality as an independently relevant juridical unit.

In *Illinois One News, Inc. v. City of Marshall*,<sup>341</sup> the Seventh Circuit usefully articulated the implications of constitutional off-loading on a small locality's constitutional and political significance. In finding that the small city of Marshall (population 4,569 in 2010)<sup>342</sup> could constitutionally limit adult uses to only four percent of the city's geographical area,<sup>343</sup> Chief 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."<sup>344</sup> If the state of Illinois wanted the city of Marshall to be solely a "bedroom community" and the area around it to be a site for adult businesses, "what would be the constitutional objection? *Illinois* would have satisfied *its* obligation to ensure that time, place, and manner regulations leave ample opportunities for speech."<sup>345</sup>

Moreover, the court suggested that it might not even make sense to talk about constitutional off-loading as about localities at all, since "[a] constitutional doctrine expressed in terms of municipal rather than state boundaries could not have any long-term effect."<sup>346</sup> The court noted that since municipal borders can be easily adjusted, it makes little sense to hold that the constitutionality of the availability of a particular plot of land turns on whether it is currently designated as inside or outside of a locality's borders.<sup>347</sup> The court queried:

If we were to hold that 4% of the land at the southern end of Marshall is too little, the City could annex some currently unincorporated land on the

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<sup>340</sup> Cf. Ford, *supra* note 338, at 131 ("No constitutionally recognized value protected the integrity of Tuscaloosa's boundaries.")

<sup>341</sup> 477 F.3d 461 (7th Cir. 2007).

<sup>342</sup> *Marshall, Illinois Population 2021*, WORLD POPULATION REV., <https://worldpopulationreview.com/us-cities/marshall-il-population> [<https://perma.cc/4275-R9QL>].

<sup>343</sup> See *Ill. One News*, 477 F.3d at 463–64.

<sup>344</sup> Sterk, *supra* note 77, at 1615 (emphasis added); see also *Boss Cap., Inc. v. City of Casselberry*, 187 F.3d 1251, 1254 (11th Cir. 1999) (finding that a zoning ordinance restricting adult entertainment establishments to "four or five sites" is most likely constitutionally adequate and declining to rule on whether sites outside the city count). This is not to say that courts have universally welcomed this approach. See, e.g., *Wolfe v. Village of Brice*, 997 F. Supp. 939, 945 (S.D. Ohio 1998) (explaining that the door to allowing small localities to ban adult businesses that was "apparently opened by the *Schad* and *Keego Harbor* Courts appears to have been closed by the *Renton* Court, when that Court held that the First Amendment requires that a city refrain from effectively denying citizens a reasonable opportunity to open and to operate an adult theater within the city"). The court in *Wolfe* refused to look beyond the village's borders to the nearby City of Columbus in its analysis. See *id.* at 944.

<sup>345</sup> *Ill. One News*, 477 F.3d at 463.

<sup>346</sup> *Id.*

<sup>347</sup> Interestingly, state borders are also adjustable, see Joseph Blocher, *Selling State Borders*, 162 U. PA. L. REV. 241, 265 (2014), though not as easily as those of localities, see *id.* at 285.

north and offer that instead as a site for adult businesses. But if land to the north of the City's current border would supply a constitutionally adequate venue for speech if the City extended its border by half a mile or so, why is the same parcel a constitutionally inadequate venue when it is outside the City's border?<sup>348</sup>

In the court's view, "[t]he constitutional rule is that a person have adequate opportunity to speak, not that the land be in one polity (the City of Marshall) rather than another (Clark County)."<sup>349</sup> In other words, as the Seventh Circuit acknowledged, where a small locality is at issue, it makes the most sense to speak of the *state* as the relevant juridical unit.

Thus, as the Seventh Circuit points out, understanding local borders as arbitrary and permeable undermines the claims of small localities that they should be seen as constitutionally relevant units more generally. The claim was already a difficult one to make, since the formal starting point is that "there is no constitutional principle of local autonomy. For constitutional purposes, local governments are not solemn political associations but rather subdivisions of state government."<sup>350</sup> In fact, "[l]ocalities are all but invisible to the Constitution."<sup>351</sup> In the era of various forms of "sanctuary" cities, localities have been trying to become more visible and have been seeking acknowledgement as valid constitutional interpreters and actors.<sup>352</sup> Municipalities are joining in popular

<sup>348</sup> *Ill. One News*, 477 F.3d at 463–64. The court made a similar point later in the case, noting "*Schad* reserved judgment on this subject, however, and since then at least one court of appeals has expressed sympathy for the argument that a small community might insist that adult business remove to outside its borders." *Id.* at 464 (citing *Boss Cap.*, 187 F.3d 1251). The court focused on the dissonance of allowing exclusions in some contexts but not others, noting:

Large cities such as Chicago can insist that adult businesses stay away from residential areas and schools, while leaving plenty of land for their operation. But if it is constitutional for Chicago to insist that these businesses move a mile or two to find a suitable spot, why can't Marshall insist that The Gift Spot move a few hundred yards? The answer "because Marshall is so small that even a short move will place us outside its borders" falls flat. Suppose all county seats in rural Illinois were two miles square (four square miles), while equivalent cities in Indiana were six miles square (36 square miles). Could it be that the Constitution would allow Indiana's cities to establish 2,000 foot (or 5,000 foot) buffer zones between residential areas and adult businesses, while Illinois's cities could not have more than 200 feet of separation? That's the gist of Illinois One's argument, and it makes little sense given that the same first amendment applies in both Illinois and Indiana.

*Id.* The court went on to say that "[l]ike the Court in *Boss Capital*, however, we need not reach closure on this subject, for we agree with the district court's conclusion that land available in Marshall itself supplies an adequate alternative." *Id.*

<sup>349</sup> *Id.* at 463–64.

<sup>350</sup> Ford, *supra* note 296, at 849.

<sup>351</sup> Schragger, *supra* note 65, at 469. Ironically, though, "this very invisibility provides them with a power to exclude that even states — at whose sufferance localities are said to exist — cannot exercise." *Id.*

<sup>352</sup> Sometimes these stances are unconstitutional stances. See John E. Finn, *Sanctuaries Protecting Gun Rights and the Unborn Challenge the Legitimacy and Role of Federal Law*, THE

constitutionalism and asserting “active and ongoing control over the interpretation and enforcement of constitutional law.”<sup>353</sup> They are also asserting the significance of themselves as political and constitutional entities.

But the claims to independent constitutional significance that small localities and suburbs make are undermined by constitutional off-loading. Constitutional off-loading depends on submerging the locality within the broader region around it, a move that directly contradicts claims to autonomy, independence, and self-governance as a constitutional matter.

In addition to undermining the claims to constitutional visibility and relevance advanced by small localities, constitutional off-loading also has important implications for interlocal wealth disparities and for the insular and parasitic behaviors enabled by strong borders.<sup>354</sup> If, as the Seventh Circuit suggests, constitutional off-loading pushes in favor of seeing the state as the relevant constitutional unit, “[i]nterlocal wealth and spending disparities [become] more vulnerable to legal attack.”<sup>355</sup> When “local governments [are] treated as creatures of the state and local public service responsibilities traced back to state delegations,”<sup>356</sup> a space is freed up to circulate more than just constitutionally protected land uses among its localities. Specifically, it becomes possible to also reassign and recirculate wealth. Historically, “the value of local autonomy was central to the defense against the demand for greater equality. . . . Interlocal inequality and local exclusion were not justified per se, but were excused as inevitable costs of a strong local government system — the price that must be paid to protect local autonomy.”<sup>357</sup> The

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CONVERSATION (Oct. 15, 2019, 7:14 AM), <https://theconversation.com/sanctuaries-protecting-gun-rights-and-the-unborn-challenge-the-legitimacy-and-role-of-federal-law-122988> [https://perma.cc/M796-J978] (“The Sanctuaries for Life movement, for example, encourages communities to pass ‘ordinances and statutes that prevent abortions from being performed and/or funded within the jurisdiction.’ That goes well beyond what the Constitution’s supremacy clause permits. Similarly, Second Amendment sanctuaries that reject all regulations on firearms, whether federal, state or local, also reach well beyond the limits of healthy constitutional dissent. . . . At their best, sanctuary movements are a sign of a strong and vibrant constitutional community, a visible sign of what I have called the ‘Civic Constitution.’ Under the Civic Constitution, questions concerning the meaning and application of constitutional principles to public life are the responsibility of all citizens and not just of judges. In its worst forms, however, a sanctuary movement subverts the Constitution by denying its very authority.”).

<sup>353</sup> Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 959 (2004).

<sup>354</sup> See Briffault, *supra* note 19, at 1–2.

<sup>355</sup> *Id.* at 23; see also Richard Thompson Ford, *Beyond Borders: A Partial Reply to Richard Briffault*, 48 STAN. L. REV. 1173, 1188 (1996) (proposing to “sever taxation from local jurisdiction” and “centralize the collection of tax revenue and distribute the sum according to need,” such that “localities would cease to view themselves as fiscally autonomous units competing with each other . . . and instead see that the prosperity of each depends on the prosperity of the whole”).

<sup>356</sup> Briffault, *supra* note 19, at 23.

<sup>357</sup> *Id.* at 23–24.

practice of constitutional off-loading pushes against that local autonomy notion, freeing up space for those, and other, equality arguments to expand.

### B. Affirming Big-City Borders

Constitutional off-loading paints small-town and suburban borders as arbitrary and insignificant, thereby undermining the very basis of small-town localism. At the same time, by refusing to allow big cities to look beyond their borders, constitutional off-loading affirms those big-city borders as compelling. This validation, in turn, bolsters big-city claims to localism. It elevates cities onto the same conceptual plain as states: by applying the same rule to cities as is applied to states (that is, that neither can off-load their constitutional obligations onto their adjoining neighbors), courts strengthen the arguments for recognizing that cities are entitled to “big city localism” and to a special constitutional status.

1. *Big Cities, Borders, and Localism.* — Despite the significant economic, social, and cultural contributions large cities offer the United States,<sup>358</sup> big cities have traditionally not received the full benefits of localism. In particular, big cities have been “less able than the suburbs to assert the values of local autonomy over the course of the twentieth century,”<sup>359</sup> since “[m]uch of the localism that informs contemporary local government law is attributable to the tendency of courts and legislators to conceptualize local governments in terms of small size, relatively homogenous populations and residential nature — features characteristic of the suburbs but atypical of big cities.”<sup>360</sup> In actuality, “[t]he American city’s legal and political autonomy has long been precarious,”<sup>361</sup> and the case of *Hunter v. City of Pittsburgh*,<sup>362</sup> in which the Supreme Court held that municipal corporations are “political subdivisions of the state” over which “[t]he state has ‘absolute discretion,’” often stymies big-city claims to enhanced autonomy and power.<sup>363</sup>

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<sup>358</sup> See, e.g., Amy Liu & Alan Berube, *Big Cities Aren't Dividing America. They Hold the Key to our Collective Future.*, BROOKINGS INST.: THE AVENUE (Nov. 9, 2021), <https://www.brookings.edu/blog/the-avenue/2021/11/09/big-cities-arent-dividing-america-they-hold-the-key-to-our-collective-future> [<https://perma.cc/4V62-ZX5Q>]. New York City, for example, is the “single largest regional urban economy” in the United States, with a GDP of an estimated \$1.4 trillion in 2020. Sean Ross, *New York's Economy: The 6 Industries Driving GDP Growth*, INVESTOPEDIA (Sept. 27, 2021), <https://www.investopedia.com/articles/investing/011516/new-yorks-economy-6-industries-driving-gdp-growth.asp> [<https://perma.cc/3XBV-BNN4>].

<sup>359</sup> Schragger, *supra* note 26, at 1208.

<sup>360</sup> Briffault, *supra* note 19, at 4–5.

<sup>361</sup> Schragger, *supra* note 26, at 1166.

<sup>362</sup> 207 U.S. 161 (1907).

<sup>363</sup> Toni M. Massaro & Shefali Milczarek-Desai, *Constitutional Cities: Sanctuary Jurisdictions, Local Voice, and Individual Liberty*, 50 COLUM. HUM. RTS. L. REV. 1, 86 (2018) (quoting *Hunter*, 207 U.S. at 178).

Indeed, virulent “anti-urbanism is an enduring feature of American federalism.”<sup>364</sup> As Professor Richard Schragger has described, “the U.S. intergovernmental system is generally anti-city,”<sup>365</sup> and “anti-urban bias is built into the basic structure of the U.S. Constitution and is a notable feature of state and congressional legislative districting.”<sup>366</sup> This anti-urban bias is itself connected to urban-rural political polarization, as “anti-urban bias . . . is a function of a political bias that emerges because rural and suburban voters tend to vote Republican, while urban dwellers tend to vote Democratic, and increasingly so.”<sup>367</sup> And “large segments of the population [define] themselves in opposition to those city dwellers who do not appear to share small-town, suburban, or rural values.”<sup>368</sup>

Nevertheless, even with anti-urban bias going strong, courts do sometimes acknowledge that of course cities are more than mere creatures of the state and “not purely administrative components of state government. One certainly finds evidence in state law that cities represent distinct, democratic communities of interest. Even the Supreme Court of the United States has at times described cities this way.”<sup>369</sup> And state allocations that grant home rule authority to big cities, but not small towns, suggest that there are good reasons to see big cities as independently important governmental units that are capable of exercising broad governmental powers.<sup>370</sup> Constitutional off-loading, too, positions big cities as independently important juridical units through its insistence that big-city borders are meaningful and significant, and not merely arbitrary lines that can be conceptually crossed at will. In shoring up and reifying big-city borders, constitutional off-loading (perhaps inadvertently) also shores up and strengthens big-city claims to localism.

2. *Treating Cities like States.* — When courts prohibit big cities from constitutional off-loading and insist that big cities must accommodate constitutionally protected land use within their own borders, those decisions can be read to suggest that big cities are significant, autonomous

<sup>364</sup> Schragger, *supra* note 26, at 1167.

<sup>365</sup> *Id.* at 1168.

<sup>366</sup> *Id.* at 1188. See Paul A. Diller, *Reorienting Home Rule: Part 1 — The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287, 291 (2016), for documentation of this insight.

<sup>367</sup> Schragger, *supra* note 26, at 1191.

<sup>368</sup> *Id.* at 1167.

<sup>369</sup> David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218, 2238 (2006).

<sup>370</sup> See Frank J. Goodnow, *Municipal Home Rule*, 21 POL. SCI. Q. 77 (1906). “The original form of home rule amendment treated the home rule municipality as an *imperium in imperio*, a state within a state, possessed of the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference.” Briffault, *supra* note 19, at 10.

units, of a stature where, like states, they have to meet their own constitutional obligations.

Although acknowledged to be separate entities, big cities are often understood to share some similarities with states. Specifically, large cities:

[H]ave largely retained their association with the exercise of group power rather than with individual rights. In the popular mind, they remain examples of mini-sovereigns, linked more with the taxation and regulation of their residents than with their ability to protect them from state control. As a result . . . the power of the nation's major cities has been subjected to persistent state intervention while suburban power has grown.<sup>371</sup>

This conceptual linkage between cities and the exercise of state power has often seemed to work against big-city claims to localism, as then “cities are viewed as centralizers” and “suburbs and small towns are where local self-government is perceived to flourish.”<sup>372</sup> In the context of constitutional off-loading, however, this view that cities should be thought of like states actually supports localism. Constitutional off-loading aligns big cities with states, obligating both of these entities to independently meet constitutional requirements without regard for over-the-border accommodations.

The tailored approach to constitutional off-loading suggests that small localities and big cities can both be equated with their states, but in two entirely different senses. Small towns are equated with their states in the sense that small towns are rendered constitutionally invisible, and the overarching state is seen as the juridical body responsible for ensuring constitutional obligations are met. Big cities, on the other hand, are equated with their states in the sense that both big cities and states are seen as having a status that requires them to meet constitutional requirements. The “dignity” of states requires that they fulfill their own constitutional obligations; big cities may have a similar dignity that requires them to fulfill theirs.<sup>373</sup>

This analogue may strengthen the position of big cities in contests with states over state preemption. Because municipalities are creatures of the state as a matter of formal law, states hold incredibly vast power over them.<sup>374</sup> States sometimes exercise this power capriciously and punitively. For instance, states have started a wave of new “hyper preemption” laws, which have recently been used to “remove significant

<sup>371</sup> FRUG, *supra* note 251, at 58.

<sup>372</sup> Schragger, *supra* note 26, at 1208.

<sup>373</sup> See, e.g., Barron, *supra* note 34, at 612 (“Local governments are too central to the lives of too many people to serve as passive administrative agents of state majorities without an independent interest in enforcing constitutional norms.”).

<sup>374</sup> See Josh Bendor, Note, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL’Y REV. 389, 390 (2013) (discussing the impact of *Hunter v. Pittsburgh*, 207 U.S. 161 (1907)).

regulatory authority from cities.”<sup>375</sup> These hyper preemption laws are distinctly partisan, typically occurring when Republican state governments prohibit “municipalities from enacting socially progressive or liberal-leaning regulation.”<sup>376</sup> They enhance the more mundane kind of preemption laws with punitive bite, requiring not only that regulatory power be removed but also often allowing “[i]ndividual local officials [to] be sued, fined, or removed (or some combination of all three) for trying to enact regulations in prohibited fields” or providing that local government entities themselves can be “fiscally penalized for such attempts, either through the withholding of state funds, or through fines.”<sup>377</sup>

Because of their subordinate status to states, cities have had difficulty defeating such state preemption.<sup>378</sup> Nevertheless, cities have been “fighting back, defending against preemption with claims based on state constitutional ‘home rule’ immunity, state constitutional constraints on unfairly targeting local governments, as well as federal equal protection, due process, and other constitutional arguments.”<sup>379</sup> But “the legal structure of intrastate preemption does not favor cities,” and “given the contemporary landscape of increasing state hostility, there is an urgency to thinking creatively about new legal arguments, as well as building on instances of successful local advocacy, where they can be found.”<sup>380</sup>

Constitutional off-loading doctrine can be part of this contestation. The prohibition on constitutional off-loading for big cities suggests that cities are more than mere political subdivisions.<sup>381</sup> And if, unlike small towns, big cities are going to be held responsible as independent juridical units for accommodating constitutionally protected uses, cities could argue that they should be understood more as independent juridical units in the context of preemption as well.

3. *Big Cities as Constitutional Actors.* — In assigning to cities the same obligations as states have regarding constitutional off-loading, constitutional off-loading jurisprudence renders cities increasingly constitutionally visible and strengthens arguments that big cities might be more than constitutional nonentities. The “lack of federal constitutional

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<sup>375</sup> Sarah L. Swan, *Preempting Plaintiff Cities*, 45 *FORDHAM URB. L.J.* 1241, 1243 (2018). See generally Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 *GEO. L.J.* 1469 (2018) (discussing the phenomenon of hyper preemption).

<sup>376</sup> Swan, *supra* note 375, at 1243 (citing Richard Briffault, Essay, *The Challenge of the New Preemption*, 70 *STAN. L. REV.* 1995, 1997–98 (2018)).

<sup>377</sup> *Id.* at 1244.

<sup>378</sup> See Scharff, *supra* note 375, at 1522.

<sup>379</sup> Richard Briffault et al., *The Troubling Turn in State Preemption: The Assault on Progressive Cities and How Cities Can Respond*, 11 *ADVANCE* 3, 3 (2017).

<sup>380</sup> *Id.*

<sup>381</sup> See generally Paul A. Diller, *Reorienting Home Rule: Part 2 — Remedying the Urban Disadvantage Through Federalism and Localism*, 77 *LA. L. REV.* 1045 (2017).

recognition of cities<sup>382</sup> has long troubled many commentators, and there is significant scholarly momentum coalescing around arguments that cities should have more constitutional status. Scholars have made efforts “to envision cities as important constitutional actors, who should be authorized to protect individual rights and raise various constitutional claims — even First Amendment ones — against their states.”<sup>383</sup> This scholarship “emphasizes the important and constructive role that cities could play in resolving contemporary constitutional disputes.”<sup>384</sup> As the sanctuary cities’ declarations also show, “[c]ities themselves, moreover, have recently asserted their independent interpretive authority in ways that defy their stereotyped role as obstacles to constitutional enforcement.”<sup>385</sup>

The tailored approach of constitutional off-loading strengthens big-city claims to enhanced constitutional recognition. Indeed, compelling arguments supporting increased constitutional status for big cities already exist, rooted in a variety of bases. In addition to core arguments based on principles of democracy and political association,<sup>386</sup> one line of argumentation draws on the “diverse demographic composition and challenging socioeconomic reality in many large cities” to make claims to constitutional visibility on the basis of antidiscrimination and equal representation principles.<sup>387</sup> Another line “invoke[s] economic and social rights,” and a third argues that city empowerment should arise from big cities’ unique brand of community, claims that “emanate directly from the urban condition itself.”<sup>388</sup>

Constitutional off-loading provides an additional basis for such arguments, one grounded in a mutuality of benefits and burdens. Historically, imposing responsibility has been a means of recognizing a certain

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<sup>382</sup> Blank, *supra* note 49, at 377.

<sup>383</sup> *Id.* at 374–75 (footnotes omitted).

<sup>384</sup> Barron, *supra* note 369, at 2220; *see id.* (“My own argument on behalf of local constitutionalism, Richard Schragger’s recent study of the role of the local in the ‘doctrine and discourse’ of religious liberty, and Heather Gerken’s defense of dissenting through local decisionmaking all identify cities as useful participants in constitutional contestation.” (footnotes omitted)).

<sup>385</sup> *Id.*

<sup>386</sup> *See, e.g.*, Barron, *supra* note 34, at 491 (“[L]ocal governments are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of . . . public questions . . . .”); Bendor, *supra* note 374, at 397 (arguing that municipalities should be able to “claim some constitutional rights against their creating states” and also against other municipalities); Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 36 (2012) (“[I]ncluding local public entities in constitutional debates may serve to strengthen those debates, along with the efficacy of local governments . . . .”).

<sup>387</sup> RAN HIRSCHL, *CITY, STATE: CONSTITUTIONALISM AND THE MEGACITY* 14 (2020); *see id.* at 179, 182 (arguing that “[o]ftentimes, cities lack proportional voice in the bodies that make crucial decisions concerning many of the very policy issues that affect them,” *id.* at 179, and that “cities’ deficient constitutional status . . . leaves them badly in need of financial support,” *id.* at 182).

<sup>388</sup> *Id.* at 203 (arguing that density can be a basis for enhanced constitutional status).

kind of status held by a particular person or entity.<sup>389</sup> When courts impose a higher constitutional burden on big cities, as they do in constitutional off-loading jurisprudence, it suggests a latent recognition that big cities are independent, significant, juridical units, a recognition that should matter not only for constitutional burdens, but also for constitutional benefits.

### CONCLUSION

In the politically polarized landscape of the contemporary United States, many constitutional battles are fought not in a theoretical ideological sphere, but on the ground, through “brick and mortar” issues of siting facilities that offer constitutionally protected uses.<sup>390</sup> Currently, in constitutional off-loading jurisprudence, courts allow small towns significantly more leeway to exclude constitutionally protected uses, while strictly requiring cities to make room for them.<sup>391</sup> Because of the political geography of the United States, this tailored approach essentially allows small, conservative “red” towns to maintain and even deepen their community character through exclusions, while prohibiting large, liberal “blue” cities from crafting their community character through similar exclusionary methods. This distinction may exacerbate “sectional conflicts” and appears to be yet another instance of small towns receiving a more special deference in local government law than big cities receive.

Here, however, small towns may have won the battle but lost the war. The ability to engage in constitutional off-loading may come at a substantial cost for small localities, while the prohibition on constitutional off-loading for cities may come with a corresponding benefit. When courts look beyond a locality’s municipal borders, they undermine the very significance of those borders and highlight the fundamental interconnectedness and interdependencies of those localities with other areas in the region. And when courts refuse to look beyond the borders of a big city, they affirm the political and potentially constitutional significance of those entities.

If it is true that “[t]he surest way to reduce the level of urban-rural polarization is to begin to ‘unbundle’ the urban and rural packages offered by the two parties,”<sup>392</sup> constitutional off-loading may

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<sup>389</sup> The growing literature on sovereignty as responsibility is also rooted in this connection. See, e.g., Luke Glanville, *The Antecedents of “Sovereignty as Responsibility,”* 17 EUR. J. INT’L RELS. 233, 234–35 (2010).

<sup>390</sup> Sarah Holder, *The Subtle Ways Cities Are Restricting Abortion Access*, BLOOMBERG: CITYLAB (June 3, 2019, 8:00 AM), <https://www.bloomberg.com/news/articles/2019-06-03/how-zoning-law-is-used-against-abortion-providers> [<https://perma.cc/YAC9-UHJ7>].

<sup>391</sup> Constitutional off-loading can also be situated within the broader analytical frame of “how U.S. constitutional rights are refracted through the lens of state and local government normative preferences.” Logan, *supra* note 231, at 176.

<sup>392</sup> RODDEN, *supra* note 30, at 261.

inadvertently help this process. By ultimately working against the usual privileges of autonomy offered to small towns, constitutional off-loading jurisprudence may lead to increased recognition of the interdependencies that support small-town existence. At the same time, constitutional off-loading doctrine requires cities to exemplify a model of inclusive community building, and suggests that through fulfilling a higher constitutional obligation, cities may find a path toward increased recognition. By evening the localism playing field in this way, constitutional off-loading may ultimately push toward a more balanced localism for all.