

# LAND USE FEDERALISM’S FALSE CHOICE

*Michael C. Pollack\**

ABSTRACT.....	708
INTRODUCTION .....	708
I. VALUING LOCAL DEMOCRACY .....	714
A. <i>Why Value Local Democracy</i> .....	714
B. <i>Local Democracy and Institutional Decisionmaking</i> .....	719
II. DESIGN CHOICES FOR NATIONALIZING LAND USE LAWS .....	723
A. <i>Why Nationalize</i> .....	723
1. <i>Regulating Markets</i> .....	723
2. <i>Protecting Rights</i> .....	725
B. <i>What Restrictions to Impose</i> .....	727
1. <i>Decision-Displacing Rules</i> .....	727
2. <i>Decision-Channeling Rules</i> .....	729
C. <i>How to Nationalize</i> .....	732
1. <i>Fiat</i> .....	732
2. <i>Incentive</i> .....	732
III. ACCOUNTING FOR LOCAL DEMOCRATIC COST .....	737
A. <i>Displacement and Channeling</i> .....	737
B. <i>Fiat and Incentive</i> .....	749
IV. WEIGHING LOCAL DEMOCRATIC COST .....	753
CONCLUSION.....	757

---

\* Harry A. Bigelow Teaching Fellow and Lecturer in Law, The University of Chicago Law School. For helpful suggestions and conversations, I thank Will Baude, Paul Crane, Ryan Doerfler, Lee Fennell, Barry Friedman, Ben Grunwald, Daniel Hemel, Todd Henderson, Aziz Huq, Genevieve Lakier, Saul Levmore, Nadia Nasser-Ghods, John Rappaport, Nicholas Stephanopoulos, Lior Strahilevitz, Mark Templeton, Heather Whitney, and participants at the University of Chicago Law School Faculty Work-in-Progress Workshop.

## ABSTRACT

*Debates about land use federalism—like those about federalism more broadly—often focus on whether policies and priorities ought to be set at the national or local level. But such categorical judgments about national intervention are inadequate because they obscure the diversity of mechanisms by which nationalization can and does occur. This Article draws attention to the importance of this underappreciated legislative design choice and develops a framework within which to evaluate it. This Article observes that nationalization can take the form of rules that either displace local decisionmaking or channel it, and that those rules can be implemented either by fiat or by way of incentive. These are not equivalent in terms of their effects on local democracy. Quite the contrary: the threat to the values of local democracy that motivate land use federalism arises primarily from decision-displacing fiat nationalizations—a tool that is likely unnecessary for most categories of land use goals. On the other hand, national action that channels land use decisionmaking or that incentivizes outcomes can achieve its ends while avoiding pernicious effects on local democracy. In fact, these forms of national action can even enhance local democracy. By confronting the full range of nationalizing options and accounting for their varied democratic impacts, this Article offers a solution to the federalist–nationalist dilemma in land use law, and may chart a path through the same thicket in other contexts.*

## INTRODUCTION

All politics may be local, but few areas of law and policy are considered more quintessentially local than land use. A common refrain in the scholarship and discourse surrounding land use is thus that it “has always been an intensely local area of the law.”<sup>1</sup> “No serious scholar,” it has been asserted, “supports an expanded role for the national government in traditional land use regulation.”<sup>2</sup>

---

1. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 839 (1983); see, e.g., *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (“[R]egulation of land use [is] a function traditionally performed by local governments.”); see also Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) (“Land use control is the most important local regulatory power.”); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 98 (1999); Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1399 & n.4 (2012) [hereinafter Ostrow, *Land Law*] (collecting sources).

2. Sara C. Bronin, *The Quiet Revolution Revived: Sustainable Design, Land Use Regulation, and the States*, 93 MINN. L. REV. 231, 262 (2008); see, e.g., A. Dan Tarlock, *Land Use Regulation: The Weak Link in Environmental Protection*, 82 WASH. L. REV. 651, 653 (2007) (“The United States has . . . limited federal control largely to retained public lands, and enshrined the idea that land should be controlled at the lowest level of government, if at all.”); Eric T. Freyfogle, *The Particulars of*

These are plausible normative commitments. For one thing, property owners tend to particularly value local control of land use issues<sup>3</sup>—whether for emotional reasons,<sup>4</sup> reasons of personal autonomy,<sup>5</sup> or economic reasons.<sup>6</sup> For another, local control of land use is efficient and serves broader societal interests. First, local actors know their communities and their idiosyncratic needs best, or at least better than lawmakers in Washington.<sup>7</sup> Second, local government is most accountable and responsive to the people whose interests are implicated by land use decisions and who can participate in that decisionmaking process.<sup>8</sup> And on top of all of that, the weight of tradition tilts in favor of local control, given that land use has been a local matter from “the early days of the Republic.”<sup>9</sup>

And yet, the federal government has carved out a meaningful and diverse role for itself in land use decisionmaking.<sup>10</sup> For example, the Religious Land Use and Institutionalized Persons Act (RLUIPA)—which

*Owning*, 25 *ECOLOGY L.Q.* 574, 580 (1999) (“Direct federal regulation [of land use], for many citizens, is simply taking things too far.”).

3. See, e.g., WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 5–6 (2001) [hereinafter FISCHEL, *HOMEVOTER HYPOTHESIS*]; Lee Anne Fennell, *Homes Rule*, 112 *YALE L.J.* 617, 617–18 (2002) (reviewing FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra*); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 *N.Y.U. L. REV.* 1624, 1645–52 (2006). Indeed, for these reasons, local land use decisionmaking “often feature[s] robust rates of local participation and influence.” Heather K. Gerken, *Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 24 (2010).

4. See Gerald E. Frug, *Beyond Regional Government*, 115 *HARV. L. REV.* 1763, 1789 (2002); Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 *HARV. L. REV.* 1810, 1874 (2004).

5. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 *COLUM. L. REV.* 346, 452 (1990); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957, 957 (1982).

6. See FISCHEL, *HOMEVOTER HYPOTHESIS*, *supra* note 3, at 75.

7. See Bronin, *supra* note 2, at 262; Buzbee, *supra* note 1, at 92; Freyfogle, *supra* note 2, at 580; Rose, *supra* note 1, at 887 (noting importance of “decisionmakers who know the issues directly”).

8. See, e.g., FRED BOSSELMAN & DAVID CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROL* 3 (1972) (noting that “local zoning so strongly emphasizes” “the values of citizen participation and local control”); Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 *IND. L.J.* 311, 335 (2003); Ashira Pelman Ostrow, *Process Preemption in Federal Siting Regimes*, 48 *HARV. J. ON LEGIS.* 289, 294–97 (2011) [hereinafter Ostrow, *Process Preemption*]; Rose, *supra* note 1, at 883–87; Schragger, *supra* note 4, at 1871.

9. Bronin, *supra* note 2, at 236; see Buzbee, *supra* note 1, at 92, 98.

10. See Craig Anthony Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 *J. LAND USE & ENVTL. L.* 441, 486–87 (2007) (making similar observation); Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 *J. MARSHALL L. REV.* 253, 255 (2012) (“The federal government . . . seemingly maintaining a low profile when it comes to usurping local land use control, has probably had the greatest influence on [it] over the last forty years . . .”). *But see, e.g.*, William A. Fischel, *The Evolution of Zoning Since the 1980s: The Persistence of Localism* 4 (Sept. 1, 2010) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1686009](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1686009) (noting that while “many formerly local activities such as road building, public health, care for the poor, school finance, prosecution of corruption, and water quality regulation (even drinking water regulation), have been largely pre-empted by the state and federal government,” “[t]he most striking quality about zoning is that it is still local”).

has been described as a “national land-use ordinance”<sup>11</sup>—prohibits localities from imposing by land use regulation substantial burdens on religious exercise that do not further compelling governmental interests and that are not the least restrictive means of doing so.<sup>12</sup> The Telecommunications Act of 1996 (TCA) requires localities to follow decisionmaking procedures similar to those applicable to federal administrative agencies whenever they wish to deny a telecommunications company’s application to build or modify a cell phone tower in the community.<sup>13</sup> The Fair Housing Act (FHA) subjects localities to liability if their actions have the disparate impact of “mak[ing] unavailable” housing to persons on the basis of race or other protected criteria.<sup>14</sup> The list goes on: the Energy Policy Act of 2005 grants the federal government the authority to preempt land use regulations with respect to siting certain energy transmission lines;<sup>15</sup> federal transportation law requires localities to regionally engage in certain long-term land use planning efforts as a condition of receiving federal highway funds;<sup>16</sup> and a variety of environmental laws, including the Clean Water Act and the Coastal Zones Management Act, provide or deny funds in an effort to incentivize certain land uses and deter others.<sup>17</sup>

Some of these statutes have proven quite controversial precisely because they risk intruding upon local control. For example, though it was enacted with little dissent, RLUIPA remains the subject of much debate within the academy—both on its merits and because of the belief that it is an unwarranted interference with an area set aside for local decisionmaking.<sup>18</sup> RLUIPA has become even more controversial with the public at large in the wake of increased demands for religious accommodations.<sup>19</sup> Even the TCA, which has met with a fair degree of

---

11. Schragger, *supra* note 4, at 1839.

12. 42 U.S.C. § 2000cc(a)(1) (2012).

13. 47 U.S.C. § 332(c)(7)(B) (2012).

14. 42 U.S.C. § 3604(a) (2012).

15. 16 U.S.C. § 824p(b) (2012).

16. 23 U.S.C. § 134(i) (2012).

17. *See, e.g.*, Coastal Zone Management Act, 16 U.S.C. § 1455(d) (2012); Coastal Barriers Resources Act, 16 U.S.C. § 3501(b) (2012); Clean Water Act, 33 U.S.C. § 1281(g) (2012).

18. *See, e.g.*, Zachary Bray, *RLUIPA and the Limits of Religious Institutionalism*, 2016 UTAH L. REV. 41, 42, 61; Marci A. Hamilton, *The Constitutional Limitations on Congress’s Power over Local Land Use: Why the Religious Land Use and Institutionalized Persons Act Is Unconstitutional*, 2 ALB. GOV’T L. REV. 366, 369 (2009) (calling RLUIPA “the most reckless federal intervention in local land use law and community decision-making in history”); Lawrence G. Sager, *Panel One Commentary*, 57 N.Y.U. ANN. SURV. AM. L. 9, 14 (2000); Patricia E. Salkin & Amy Lavine, *The Genesis of RLUIPA and Federalism: Evaluating the Creation of a Federal Statutory Right and its Impact on Local Government*, 40 URB. LAW. 195, 215, 255–56 (2008); Schragger, *supra* note 4, at 1844–48.

19. *See, e.g.*, Arthur H. Gunther III, *Community View: RLUIPA Ripe for Challenge*, J. NEWS (May 28, 2014, 2:23 PM), <http://www.lohud.com/story/opinion/contributors/2014/05/22/rlui-pa-rockland-land-use-environment/9458553/>.

success, has faced the charge that it “conscript[s]” localities into federal service.<sup>20</sup>

This debate about federal land use regulation is a classic federalism debate, and the arguments against these land use statutes are the same arguments raised against national solutions more generally. For example, federalism scholars often emphasize how local variation nurtures local democracy and “promotes choice, competition, participation, experimentation, and the diffusion of power.”<sup>21</sup> At the same time, the arguments in favor of these land use statutes are the arguments often made by proponents of national solutions in general. Some policy questions demand national uniformity,<sup>22</sup> they contend, and some questions of rights must not be subordinated to reductive claims of “states’ rights.”<sup>23</sup>

But particularly with respect to land use federalism, these sorts of arguments paint with too broad a brush.<sup>24</sup> As this Article shows, there is great diversity in federal land use law. This diversity exists not only in

---

20. *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 824 (2015) (Thomas, J., dissenting) (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in part and dissenting in part)).

21. Gerken, *supra* note 3, at 6; *see, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court’s “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467–69 (1995) (contending that federalism promotes diversity and enhances preference-satisfaction); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 389–404 (1997) (explaining that federalism promotes participation, accountability, innovation, tailoring, diversity, and liberty); Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 YALE L. & POL’Y. REV. 1, 4 (1996) (“Federalism now serves both as an instrument of the modern administrative state and as a rather flexible institutional accommodation to the extraordinary diversity of American society and to the challenges that this diversity poses for national unity.”).

22. Reed Abelson, *Proposals Clash on States’ Role in Health Plans*, N.Y. TIMES (Jan. 13, 2010), <http://www.nytimes.com/2010/01/14/health/policy/14insure.html> (quoting Democratic Representative John Garamendi arguing during the drafting of the Affordable Care Act that “[t]he role of the federal government is to put in place a national marketplace” and Democratic Representative James Clyburn saying that “[y]ou cannot allow them to have a states-rights approach [to health care]”).

23. *See* MALCOLM M. FEELEY & EDWARD RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* 53, 115–23 (2008); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 44–57 (1995); Gerken, *supra* note 3, at 44, 46.

24. These arguments are also often deployed opportunistically. *See, e.g.*, Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953, 998 (2016) (noting that arguments about appropriate levels of policymaking “largely depend on the partisan composition of each government rather than something about state versus federal authority as such”); Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1307 (1999) (“[F]ederalism is consistently . . . employed only derivatively, as a tool to achieve some other ideological end . . . .”); Garrett Epps, Opinion, *The Opportunist’s Friend (and Foe): States’ Rights*, N.Y. TIMES (Nov. 20, 2001), <http://www.nytimes.com/2001/11/20/opinion/the-opportunist-s-friend-and-foe-states-rights.html> (“[W]hen it comes to states’ rights, we are all hypocrites.”); Michelle Goldberg, *If at First You Don’t Secede*, SALON (Nov. 16, 2004, 7:55 PM), [http://www.salon.com/2004/11/17/states\\_2/](http://www.salon.com/2004/11/17/states_2/) (arguing that, in the event abortion were to be prohibited nationwide, “pro-choice states [would] rely[] on the doctrine of federalism, or states’ rights, to defend themselves,” and observing that such an “opportunistic and even hypocritical” embrace of federalism by the left is “nothing new”); Albert R. Hunt, *States’ Rights, Depending on the Issue*, N.Y. TIMES (June 28, 2015), <http://www.nytimes.com/2015/06/29/us/politics/states-rights-depending-on-the-issue.html> (noting pledges by Republican presidential candidates to prohibit at the national level the legalization of marijuana at the state level).

terms of the aspects of local land use decisionmaking that these statutes nationalize but also in terms of the ways in which they do so. Indeed, *how* Congress nationalizes is as consequential as *what* it chooses to nationalize.<sup>25</sup> More important, most of the mechanisms available to Congress can actually achieve a balance that satisfies national priorities amidst a rich local democracy. Even better, many can make local democracy even more vibrant and even more responsive.<sup>26</sup>

To demonstrate as much, this Article evaluates the implications of three key legislative design choices. The first is a threshold question: what is the goal of the nationalization? Some efforts aim to minimize or eliminate cross-jurisdictional coordination problems that stymie national policy goals and inhibit national markets. Others aim to protect rights that the national government believes are underprotected at the local level.<sup>27</sup> The second choice has to do with the mechanism by which that goal will be achieved: what type of restriction on local decisionmaking will be imposed? Congress may impose *decision-channeling* constraints that require localities to take certain deliberative steps before making certain decisions, or it may impose *decision-displacing* rules that limit the set of decisions localities may make in the first place.<sup>28</sup> Finally, the third choice asks: how will those restrictions be implemented? Whether a nationalization displaces or channels local decisionmaking, Congress may either impose those requirements by fiat or elicit compliance by way of condition or incentive.<sup>29</sup>

My analysis of the varied effects that these legislative design choices have on local democracy reveals that the threat to local democracy comes chiefly from a particular type of nationalization: decision-displacing rules imposed by fiat. This particular mechanism fails to employ local knowledge and, even worse, introduces structural decisionmaking biases that make local government less responsive and less participatory.

By contrast, decision-channeling statutes can achieve their ends while avoiding pernicious effects on local democracy because they leave ultimate

---

25. Cf. Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2022 (2014) (advocating a focus on “the details of the federal statutory design” and their varied federalism implications). This attention to means is likewise in the spirit of some of the scholarly discussion about the federalism implications of commandeering as opposed to preemption. See, e.g., Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1634–35 (2006).

26. In this way, just as Heather Gerken has offered her own account of “why nationalists should stop worrying and learn to love federalism,” Gerken, *supra* note 3, at 44; see also Heather K. Gerken, *Federalism as the New Nationalism*, 123 YALE L.J. 1889, 1892 (2014) (explaining how federalism can serve nationalist ends), this Article suggests the converse in the context of land use law: with the right means, federalists might stop worrying and learn to love nationalism.

27. See *infra* Part II.A.

28. See *infra* Part II.B.

29. See *infra* Part II.C.

decisionmaking in the hands of local institutions. Even if those institutions are not optimally responsive, a decision-channeling nationalization at least avoids making them less so, and where those institutions are responsive, decision-channeling approaches make more robust use of them than decision-displacing approaches do. But more importantly, decision-channeling nationalizations can alter how local institutions behave in ways that *improve* their functioning by decreasing decisionmaking bias, harnessing local knowledge, and creating sites of bargaining and participation. Nationalization by incentive can offer similar responsiveness gains over nationalization by fiat because it catalyzes local conversations about priorities.

For these reasons, Congress ought to give these mechanisms presumptive priority over those that displace local decisionmaking by fiat, even if doing so means restricting the locality's room to maneuver to a slightly greater degree. For example, Congress ought to prefer a national law that instructs localities to take certain deliberative steps before approving blue houses over a national law that demands that localities not approve any blue houses. It also ought to prefer a law that instructs localities to take certain deliberative steps before approving both blue houses and purple houses over a no-blue-house command.

Of course, this rule of presumptive priority is just that: a presumption. There may well be circumstances in which a nationally imposed decision-displacing rule, responsiveness costs and all, is the only thing that will do. But in light of the success of alternative mechanisms discussed in this Article, those circumstances will arise less frequently than one might think. Rather than include all or even most national priorities, they are likely to be limited to situations in which local decisionmaking is characterized by deeply entrenched and conscious biases against the exercise of constitutional rights.<sup>30</sup> Make no mistake: this is a small set of the bases for nationalization. Moreover, even within this narrow band, a range of channeling mechanisms might still get the job done.

This Article proceeds in four parts. Part I discusses the traditional democratic participation and responsiveness arguments in favor of local control of land use. It then develops a lens for evaluating how national constraints on local land use decisionmaking impact those values. Part II sets out in more detail the three central legislative design choices that Congress faces and illustrates them with example statutes. Part III evaluates the implications of those choices under the framework developed in Part I. It identifies the source of the threat to local democracy, and it demonstrates the superiority of channeling rules and of incentives. Finally, Part IV grapples with the conditions under which at least some local democratic

---

30. See *infra* Part IV.

costs might be necessary for the achievement of certain national goals, and argues that those conditions are rare. But even if one were to quarrel over the precise metes and bounds of that set of circumstances, understanding the promise of decision-channeling and incentive mechanisms offers a way to bridge the federalist–nationalist divide in land use, and perhaps beyond. Federalists have less to fear from efforts at nationalization that leave space for local control, and nationalists can safely embrace local control when it can be channeled in the direction of national priorities.

## I. VALUING LOCAL DEMOCRACY

In this Part, I begin by explaining why national land use law’s effects on local democracy warrant particular focus. I then argue that failures of local democracy are best understood in this context as structural biases in decisionmaking processes and as institutional barriers that separate decision makers from sources of community knowledge.

### A. *Why Value Local Democracy*

One traditional argument in favor of local democratic control of land use decisionmaking is what William Fischel called the “homevoter hypothesis”: a land use regime with meaningful and low-cost opportunities for local participation is of unique importance to property owners because, having made substantial investments in their property, “the best hope of maintaining or improving [their] investment[s] is ‘voice,’ involvement in the political process.”<sup>31</sup> Even beyond this investment-backed explanation, there remains an “emotional—and politically powerful—attachment to local decisionmaking on specific issues” like land use,<sup>32</sup> perhaps rooted in part in the perception that property ownership is “closely connected to core areas of personal autonomy.”<sup>33</sup> Whatever the precise mix of explanations, property owners strongly “prefer to find their land locally planned and regulated by persons they know and can more easily influence rather than

---

31. FISCHEL, HOMEVOTER HYPOTHESIS, *supra* note 3, at 75; *see, e.g.*, Fennell, *supra* note 3, at 626 (noting that, because exit is costly, “people are also motivated to act politically, using ‘voice’ to influence the actions taken by the municipality”); Serkin, *supra* note 3, at 1648 (explaining that the fact that a person’s home “usually represents her most significant asset” combined with her “strong personal attachment to her property, creates a powerful incentive for homeowners to . . . carefully polic[e] local government land use decisions”).

32. Frug, *supra* note 4, at 1789.

33. Briffault, *supra* note 5, at 452; *see* Radin, *supra* note 5, at 957–58 (discussing property’s role in “personhood” and autonomy).



by persons more remote by measures of distance, knowledge, and susceptibility to influence.”<sup>34</sup>

Property owners are not wrong to place great importance on their ability to effectively exercise voice when it comes to land use policymaking. Whereas dissatisfied members of most institutions can exercise both voice and exit to improve their lot,<sup>35</sup> exit is fraught in a number of ways in the context of property ownership. Though Charles Tiebout famously conceived of local government as an institution from which people may exit in response to unsatisfactory government policies,<sup>36</sup> the fact is that, even when a homeowner can move, he or she cannot take his or her land along for the ride.<sup>37</sup> This asset immobility is a problem for exit because it means that an exiting homeowner must arrange both to sell his land in the jurisdiction from which he intends to exit and to purchase new land in the jurisdiction into which he intends to enter.<sup>38</sup> These transactions—along with mundane tasks like moving one's belongings—are costly in terms of both money and time.<sup>39</sup>

To say that moving simply “cost[s] money” in the sense of transaction costs,<sup>40</sup> however, risks understating the burden in two ways. First, exit for a homeowner almost always requires the existence of unsatisfied demand for a home in the jurisdiction of sale and available supply of an acceptably comparable home in the jurisdiction of purchase. Neither is guaranteed. Market conditions may be such that it is not feasible to offload burdened property or to relocate to relatively less burdened property. At a minimum, the premium the homeowner would have to pay in the jurisdiction of purchase or suffer in the jurisdiction of sale may be so substantial that it outweighs whatever gripe he or she had with local government. And because the price of land in the jurisdiction of sale will reflect the quality of

34. Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 453 (2000); see Bronin, *supra* note 2, at 238; Freyfogle, *supra* note 2, at 580.

35. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 21 (1970).

36. Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 424 (1956); see, e.g., Vicki Been, “Exit” as a Constraint on Land Use Exactions: *Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 506–28 (1991); Rose, *supra* note 1, at 886–87.

37. See Carol M. Rose, *Takings, Federalism, Norms*, 105 YALE L.J. 1121, 1126 (1996) (book review) (noting that “the potential safeguard of ‘exit’ is blocked” with respect to land “because the owner cannot pick it up and take it away”).

38. See, e.g., Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 487 (2000); Richard Epstein, *Exit Rights Under Federalism*, 55 L. & CONTEMP. PROBS. 147, 154–59 (1992); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL F. 53, 58–59. Of course, the landowner could choose to retain the land in the jurisdiction from which he seeks to exit, but that strategy only liberates the landowner, not his valuable asset, from the local government he seeks to escape.

39. See Fennell, *supra* note 3, at 626 (“[H]omeowners are often in no position to comparison shop; moving is relatively costly and may be extraordinarily painful if it means realizing a loss.”).

40. Durchslag, *supra* note 38, at 511.

that jurisdiction's government—particularly its land use policies—the exit premium ought to be especially high when a locality is poorly governed, which is precisely when one would want exit to be an effective tool of accountability.<sup>41</sup> Second, for most people, a house is not simply an asset and a locality is not simply a set of policies. These are homes and communities in which people invest significant social and emotional capital, and to which people develop understandable attachments.<sup>42</sup> The prospect of losing the “sense of belonging” that attends long-term residency in a locality is an additional barrier to effective exit that must not be underestimated.<sup>43</sup>

Of course, people can and do change communities all the time notwithstanding these emotional and practical hurdles, and they may sometimes do so in response to a locality's policy choices.<sup>44</sup> It is enough for present purposes to make the simple observations that “[i]t is rare for homeowners to move just because the public service mix is not to their liking,” and that exit is at the very least an imperfect proposition given the price-capitalization problem discussed above.<sup>45</sup> Without effective and low-cost means to exit in the face of undesirable policy choices, the ability to make “an attempt at changing the practices, policies, and outputs” of the institution by exercising voice, “rather than . . . escap[ing] [it],” is of paramount importance.<sup>46</sup> Local land use processes that are characterized by a robust participatory democracy give property owners that opportunity.

Property owners' desire for local democratic control of land use decisionmaking is also understandable simply as a manifestation of the fact that the ability to be heard is a “primal” value for many Americans.<sup>47</sup> Whether or not it is wholly rational to care about being heard as much as

---

41. See FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 3, at 75 (explaining that, “[b]ecause the new knowledge [of poor policies] is likely to be public, moving in response to bad news is more difficult because the seller would get a lower price for her house than otherwise”); Robert Ellickson, *Federalism and Kelo: A Question for Richard Epstein*, 44 TULSA L. REV. 751, 762 n.66 (2009); Somini, *supra* note 38, at 59.

42. See HIRSCHMAN, *supra* note 35, at 76 (discussing family and community ties as barriers to exit).

43. Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 41 (1989); see also Gregory S. Alexander, *Conditions of “Voice”: Passivity, Disappointment, and Democracy in Homeowner Associations*, in COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENT AND THE PUBLIC INTEREST 145, 153 (Stephen E. Barton & Carol J. Silverman eds., 1994) (noting that residents “are to a considerable extent locked in” owing to their investments).

44. Indeed, the degree to which exit is feasible and the costs associated with exit “are empirical questions” that ultimately “will vary from community to community” and “region to region.” Durchslag, *supra* note 38, at 488.

45. FISCHER, HOMEVOTER HYPOTHESIS, *supra* note 3, at 75.

46. HIRSCHMAN, *supra* note 35, at 30.

47. Barry Friedman & Maria Ponomarenko, *Democratic Policing*, 90 N.Y.U. L. REV. 1827, 1837 (2015) (“Accountability is primal to American democracy.”).

people do, and in all of the ways that people do, it cannot seriously be denied that participatory democracy is widely regarded as a fundamental feature of American institutions.<sup>48</sup> We see responsiveness as having utility in and of itself, we view participation as an end worth pursuing in politics and in corporate governance, and we agitate for a voice in our schools, our associations, and our communities, so that we can express our preferences and share the relevant information we possess.<sup>49</sup> As President Obama put it in his 2016 State of the Union Address, “[D]emocracy breaks down when the average person feels their voice doesn’t matter; that the system is rigged in favor of the rich or the powerful or some special interest.”<sup>50</sup>

Not only does democracy break down when we feel like we are not able to make ourselves heard, but the government’s reputation is damaged in the process. A range of literature in various disciplines has recognized that one’s perception of government’s responsiveness is associated with one’s satisfaction with the government’s decisions and with one’s compliance with the law.<sup>51</sup> As Tom Tyler put it, “[l]egal authorities gain

---

48. See A.E. Dick Howard, *Does Federalism Secure or Undermine Rights?*, in *FEDERALISM AND RIGHTS* 11, 13 (Ellis Katz & G. Alan Tarr eds., 1996) (“The essence of being a citizen is to have the opportunity, not simply to vote for those who make the laws, but also to have a voice in how decisions are to be fashioned, what choices to be made.”); Gerald E. Frug, *The City as a Legal Concept*, 93 *HARV. L. REV.* 1059, 1068 (1980) (describing the widely felt desire for what Hannah Arendt called “public freedom”—the ability to participate actively in the basic societal decisions that affect one’s life”) (quoting HANNAH ARENDT, *ON REVOLUTION* 114–15, 119–20 (1962)).

49. See Friedman & Ponomarenko, *supra* note 47, at 1839 (noting that “[p]ublic participation is central to executive governance at all levels of government” and arguing that policing warrants increase democratic accountability); Spencer Overton, *Voter Identification*, 105 *MICH. L. REV.* 631, 657 (2007) (noting that public participation “further[s] self-fulfillment and self-definition of individual citizens who play a role in shaping the decisions that affect their lives”).

50. Barack Obama, State of the Union Address (Jan. 12, 2016), <https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-%E2%80%93-prepared-delivery-state-union-address>; see also *McCutcheon v. FEC*, 134 S. Ct. 1434, 1468 (2014) (Breyer, J., dissenting) (explaining that the appearance of corruption, a form of procedural injustice, “can lead the public to believe that its efforts to communicate with its representatives or to help sway public opinion have little purpose,” and that “a cynical public can lose interest in political participation altogether”); *id.* (“Democracy, the Court has often said, cannot work unless ‘the people have faith in those who govern.’” (quoting *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 (1961))). Indeed, federal agencies are required to consider the federalism implications of their regulations specifically because Americans want to be heard and believe “that issues that are not national in scope or significance are most appropriately addressed by the level of government closest to the people.” Exec. Order No. 13132, 64 *Fed. Reg.* 43,255 (Aug. 4, 1999).

51. See, e.g., Karyl A. Kinsey, *Deterrence and Alienation Effects of IRS Enforcement: An Analysis of Survey Data*, in *WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT* 259, 264–76 (Joel Slemrod ed., 1992); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 *ADMIN. L. REV.* 343, 377–79 (2009) (citing studies that observe that “individuals’ judgments about the fairness of the government’s decisionmaking process, rather than the decisions themselves, dominate how individuals generalize from their own experience to their overarching views on the legitimacy of government authorities”); Elizabeth Mullen & Janice Nadler, *Moral Spillovers: The Effect of Moral Violations on Deviant Behavior*, 44 *J. EXPERIMENTAL SOC. PSYCHOL.* 1239, 1244 (2008); Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1399, 1415 (2005); Overton, *supra* note 49, at 657 (arguing that the accountability that results from citizens’ ability to be heard “ensures democratic legitimacy,

when they receive deference and cooperation from the public,” and such deference and cooperation are more forthcoming when the public has the ability to “state [its] views to an authority and to feel that those views are being considered.”<sup>52</sup> For this reason, and particularly given the salience of land use decisions for property owners, it is in the local government’s interest to make those decisions with processes that are, and are perceived to be, fair and open to democratic participation.<sup>53</sup>

Finally, even setting aside the interests of property owners and of local governments, local control of land use decisionmaking with processes that are open to robust participation is most likely to result in context-appropriate land use regulation. As the literature has long recognized, local government is best positioned to be responsive to community needs and to react to knowledge about local conditions—an advantage of unique relevance with respect to wise land use planning.<sup>54</sup> While making the most of that potential no doubt requires that local governments in fact employ processes that are able to effectively gather that information,<sup>55</sup> even a locality that is only partially open to local participation will often be better

---

which in turn may increase the likelihood that citizens will voluntarily comply” with government decisions (footnote omitted).

52. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 283, 300 (2003).

53. Indeed, land use planners understand this dynamic quite well. Because they want residents “to buy into programs,” they prefer fora that effectively “let[] [residents] have their say” and that give them a real opportunity to decide for themselves “the kind of landscape they want to inhabit.” Freyfogle, *supra* note 2, at 581.

54. See *supra* notes 1–8 and accompanying text; see also BOSSELMAN & CALLIES, *supra* note 8, at 3 (noting that “local zoning so strongly emphasizes” “the values of citizen participation and local control”); Bronin, *supra* note 2, at 238 (“Scholars have argued that localities should have sole decision-making powers over land use because local individuals understand the unique characteristics of their land better than outsiders do and can therefore make fairer or more competent decisions. By the same logic, outsiders lack an understanding of how decisions about land use could impact the aesthetic character, property values, and demographic makeup of the local community.” (footnote omitted)); Freyfogle, *supra* note 2, at 580 (“Sensible land use decisions require knowledge of the land itself, in its many variations. . . . Local people typically know the land better than outsiders. For land planning to prove successful, their knowledge is needed just as much as their cooperation. Then, too, there is the reality that many land use impacts are primarily local, however widespread their furthest ripples.”); Ostrow, *Process Preemption*, *supra* note 8, at 294 (noting that local officials are “in the best position to respond to community land use preferences” because they are “both part of and accountable to the local community”); Serkin, *supra* note 3, at 1649–50 (explaining that “actual participation in local decisionmaking is relatively easy” because local meetings “are physically easier to reach than those in the state capital or Washington, D.C.” and because they are “more accessible in important, intangible ways” like personal connections and low barriers to entry). The additional common argument in favor of local control based on its historical pedigree may be of descriptive value, but it has little normative force of its own. See Buzbee, *supra* note 1, at 94 (arguing that local control is “not a historical accident” but rather reflects relative competence of local government to control land use).

55. See Richard Schragger, *Flint Wasn’t Allowed Democracy*, SLATE (Feb. 8, 2016, 4:57 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2016/02/a\\_big\\_reason\\_for\\_the\\_flint\\_water\\_crisis\\_no\\_democracy\\_there.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2016/02/a_big_reason_for_the_flint_water_crisis_no_democracy_there.html) (arguing that the Flint water crisis was attributable to the absence of robust levers of accountability and responsiveness in Flint, which has been run by a state-appointed city manager rather than a locally elected government).

than an extralocal land use planner at developing site-specific land use policies. Any effort on the part of Congress or a federal agency, for example, to gather local knowledge or to improve upon the pathways of learning and citizen participation that local governments have at their disposal would be an “operational nightmare” that would entail substantial costs only to likely fall short.<sup>56</sup>

### *B. Local Democracy and Institutional Decisionmaking*

This Article trains its focus on two key pathways by which federal law can impact these values of participatory democracy in the context of local land use. The first is that federal law can either create or reduce structural decisionmaking bias. Specifically, federal law might block pathways through which people can access decision makers and make their voices heard, or it might create new pathways or open up existing ones. The second is that federal law might either harness or silence local expertise and community knowledge.

Take structural decisionmaking bias first. This is an important measure of local participatory democracy because, in our political system, the pure preferences of the people are mediated at all levels of government through elected or appointed representatives. As a result, evaluating local democracy is about something other than asking how frequently preferences become policies. After all, while each representative must be responsive to his or her constituents, and while each person may make his or her voice heard, it is rarely if ever the case that all views can be satisfied or that a single representative or official can carry out the expressed will of each of his or her constituents on every vote and every issue. A whole set of people with a range of diverse interests must funnel their preferences into that single policy maker, who in turn must often negotiate and work with other policy makers.

Put another way, we want government to hear and be open to people's interests and preferences, but we do not necessarily expect it to mirror each individual's preferences at all times. Instead, a representative government is most able to be responsive to the people as a whole where the venues in which substantive values are debated are “open to those of all viewpoints on something approaching an equal basis.”<sup>57</sup> In such an institution,

---

56. Kayden, *supra* note 34, at 451; *see also* Bronin, *supra* note 2, at 262–63 & n.147; Durchslag, *supra* note 38, at 492; Freyfogle, *supra* note 2, at 580; Ostrow, *Process Preemption*, *supra* note 8, at 296.

57. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 74 (1980). I recognize that Ely, along with Neil Komesar, whose work I discuss below, set out to conceptualize democratic malfunctions in order to describe the proper judicial role with respect to governmental decisionmaking. But while this Article is not concerned specifically with the role of courts in local land

representative decision makers have a duty “to take into account the interests of all those their decisions affect,”<sup>58</sup> even if they do not have a duty to do the impossible and enact the will of each and every constituent at all times.

Malfunctions in a representational system can therefore be understood as occurring where points of access to decisionmaking processes are unavailable to some or all of the people governed by the institution in question.<sup>59</sup> This lack of access can arise in a number of ways. The first is through consciously created barriers. The most straightforward example is where a majority engages in intentional discrimination to either “chok[e] off the channels of political change” or to “systematically disadvantage [the] minority out of simple hostility” or prejudice.<sup>60</sup> This type of malfunction can also occur where a *minority* special interest captures government and controls decisionmaking.<sup>61</sup> Just as with majoritarian bias, this sort of minoritarian bias means that “important interests are unrepresented.”<sup>62</sup> Finally, even absent prejudice, this failure of access can exist where a particular group’s interests—majority or minority or otherwise—are elevated above the ordinary give-and-take of politics such

---

use decisionmaking. Ely and Komesar’s accounts of malfunction need not be limited by the particular response to malfunction that they both studied and, to some extent, advocated. As the following discussion shows, their insights about how to diagnose a failure of representation are quite adaptable to this Article’s purposes. Moreover, shifting the focus away from judicial intervention avoids a common critique of Ely’s work, which is that it can only “identif[y], in a value-neutral manner, . . . areas in which legislative decisionmaking suffers from systemic biases,” but cannot help courts avoid making “the same sort of substantive value choices inherent in ordinary legislative decisionmaking.” Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 783 (1991) (emphasis omitted). This Article uses Ely and Komesar’s accounts of malfunction only to do the former (i.e., the thing those accounts are best suited to do): diagnose the creation or reduction of systemic bias.

58. ELY, *supra* note 57, at 100; see Howard, *supra* note 48, at 19 (“Representative government requires that the connection between the governors and the governed not simply take place on election day; there must be the continuing opportunity for citizens to tell office-holders just what is on their minds.”); see also Overton, *supra* note 49, at 657 (noting that full and open participation “exposes decision-makers to a variety of ideas and viewpoints, which ensures fully informed decisions”).

59. See Wendy Wagner, *The Participation-Centered Model Meets Administrative Process*, 2013 WIS. L. REV. 671, 690 (offering similar definition focused on circumstances in which limited access points and varied levels of information costs create “an institutional process that . . . is not equally open to all participants”).

60. ELY, *supra* note 57, at 103; see WILLIAM A. FISCHER, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 121 (1995) [hereinafter FISCHER, REGULATORY TAKINGS] (expressing Ely’s concern as “making sure that democracy does not systematically exclude people from the process”).

61. See generally Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

62. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 214 (1994) [hereinafter KOMESAR, IMPERFECT ALTERNATIVES]; see *id.* at 26–27 (noting the “two traditional and paradoxically opposite perceptions of political malfunction—the overrepresentation of concentrated interests (special interest legislation) and the overrepresentation of dispersed larger interests (the tyranny of the majority)”).

that the group is immunized from the obligation to “pull, haul, and trade” in order to see its preferences enacted into law.<sup>63</sup>

In addition to these conscious or intentional blockages, failures of access can also inhere in the structure of a decisionmaking system itself.<sup>64</sup> This form of representational malfunction must not be discounted because decisionmaking bias is not just the province of malicious individuals in positions of power. Rather, good and well-intentioned people are capable of biased decisionmaking too if they are supplied with biased information, bound by skewed voting rules, or locked into a narrow set of possible decisions.<sup>65</sup> And a biased information supply can exist not only because of conscious efforts on the part of representatives to listen only to particular voices but also because of structural factors like high information and organizational costs that affect the ability of particular groups to make themselves heard.<sup>66</sup> It is therefore necessary to account for “forces permeating the entire political process” that can limit the effective exercise of voice.<sup>67</sup>

In short, while animus against minorities is of course one especially pernicious form of structural bias, it does not define the extent of the potential problem. Rather, failures of representational responsiveness exist where aspects of the decisionmaking process—procedures, voting rules, or other limitations on an institution's room to maneuver—either intentionally or unintentionally block pathways of access and voice.

Note that this account is not focused on the substantive values that the government adopts or enacts into law, but rather on the ways in which the government sets policy, receives information, and makes decisions. By remaining agnostic on the outputs of the decisionmaking process, this evaluative approach avoids becoming bound up in the evaluator's subjective preferences with respect to particular decisions. Moreover, while there might be circumstances in which a particular outcome might be

---

63. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994); see FISCHER, REGULATORY TAKINGS, *supra* note 60, at 367 (noting the danger for representation when local decisionmaking is “insulated from the give-and-take of pluralistic policies” and where regulation impacts property owners “for whom political coalitions are unlikely prospects”).

64. See Neil K. Komesar, *A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society*, 86 MICH. L. REV. 657, 683 n.52 (1988) [hereinafter Komesar, *A Job for the Judges*] (defining malfunction as the failure of a system to represent citizen interests).

65. See *id.* at 680.

66. See KOMESAR, IMPERFECT ALTERNATIVES, *supra* note 62, at 71–75, 83–84, 91 (discussing organizational costs, free-rider problems, and other similar barriers); Komesar, *A Job for the Judges*, *supra* note 64, at 673.

67. Komesar, *A Job for the Judges*, *supra* note 64, at 677–78 (“Once one considers the implications of these systemic forces, a conception of political malfunction based on the personal animus or stereotyping of legislators seems too limited a basis for defining political malfunction.”); see FISCHER, REGULATORY TAKINGS, *supra* note 60, at 123 (noting problem of “institutional traps” that undermine responsiveness); *id.* at 324 (describing failures of political process as occurring where “the protections of . . . political voice are forestalled at the local level”).

welcomed or considered good for the general welfare regardless of how it was reached—the kind of thing that an outcome-focused approach would capture—ending the analysis there risks assuming that the outcome could not have been reached in a better, more participatory way. Focusing on how the government made or could have made that decision, by contrast, allows us to question that assumption and to weigh the desired outcome against our ideals of participation and responsiveness.<sup>68</sup> Finally, evaluating the opportunities for participation in the decisionmaking system maps directly onto the very values that, as discussed above, ground the pervasive preference for local control of land use decisionmaking.<sup>69</sup>

The second component of participation and responsiveness is the degree to which local government is structurally able or encouraged to absorb community knowledge and to act in response to it. As discussed above, the inputs that the people provide for local government are not just their views on outcomes, but also information they possess about the facts on the ground and about the potential impacts of particular decisions. So just as a failure of local democracy can occur where pathways of voice are systematically blocked, a similar failure can occur where decisionmaking is systematically divorced from community knowledge. This may be because local government has chosen to be blind to information from particular sources or communities, or it may be because aspects of the decisionmaking process prevent local government either from accessing that information or from acting on it.

Before moving on, one piece of clarification is in order. By developing this account of participation and responsiveness, I make no baseline claim about the degree to which local governments are open to or responsive to community preferences or knowledge in the absence of national intervention.<sup>70</sup> Instead, this Article, like the conversation it seeks to shape, is about our reactions to land use law at the federal level and the need to account for the varying impacts of the options in the federal government's tool kit. It therefore focuses on federally imposed *changes* to local government decisionmaking, and the effect of such interventions. For all

---

68. See *infra* Part IV.

69. See *supra* Part I.A.

70. For example, David Schleicher has observed that there are reasons to doubt the quality of state democracy and its ability to “produce policies or outcomes that are responsive to preferences of residents of the state.” David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. (forthcoming 2017) (manuscript at 7), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2739791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2739791). While his focus is on state government—an institution beyond the focus of this Article—and while he concedes that his claims carry less weight with respect to *local* government (particularly smaller local governments), *id.* at 3, 16, the point is well-taken. Indeed, this concern about the quality of local democracy only makes more salient the need Schleicher recognizes to “enhanc[e]” local democracy. *Id.* at 10. As discussed in Part III, *infra*, certain nationalizing mechanisms carry that precise potential, and they do so by bypassing possible electoral pathologies.



the reasons discussed in this Part, whether local government is highly responsive or nonresponsive, federal laws that make it less responsive are presumptively more troubling than laws that do not. And while there may be circumstances where that presumption could be overcome, making such a claim requires understanding the full set of nationalizing options, the democratic costs associated with those options, and the stakes associated with incurring those costs. The balance of this Article explores these concerns.

## II. DESIGN CHOICES FOR NATIONALIZING LAND USE LAWS

To evaluate the democratic costs of federal laws that nationalize local land use decisionmaking, we next need to recognize and understand their diversity. Without such an understanding, the evaluative task can too easily devolve into one-off policy assessments that do not yield much in the way of broader insights. Or worse, it can reduce to the facile and misplaced denunciation of any use of any national tool in the context of local land use as wrong. To begin to explore which national tools are most threatening—or most beneficial—for local democracy, this Part offers a descriptive account of the menu of choices that federal legislators must make when designing laws that nationalize land use. First, what is the purpose of the nationalization? Second, what restrictions will be imposed? And third, how will those restrictions be conveyed and enforced?

### *A. Why Nationalize*

The question of what goal Congress might want to achieve when nationalizing land use decisionmaking is both theoretical and bounded by doctrine. Congress, after all, can only act pursuant to its enumerated powers, so like any federal law, a nationalizing land use law must be linked to such a power.

#### *1. Regulating Markets*

The first basis for nationalization is to regulate markets and mitigate market failures. Congress may choose to intervene in local land use decisionmaking where there are collective action problems, where disuniformity is to be avoided, where there is a danger of free-riding, or where action by states and localities generates negative externalities.<sup>71</sup>

---

71. See Serkin, *supra* note 3, at 1677–78 (discussing ways in which localities may site undesirable land uses close to neighbors or impose growth controls that effectively export density and other costs of growth into neighboring areas).

These various problems can make the establishment of networks in which goods or services can be delivered difficult or impossible, and in so doing they can generate substantial inefficiencies. Further, these inefficiencies represent real harms to communities, natural environments, and livelihoods that an individual local government cannot unilaterally abate. Such a state of affairs is one in which the federal government might use its authority “[t]o regulate Commerce . . . among the several States”<sup>72</sup> in order to coordinate and impose regulations, uniform standards, cost-sharing requirements, and the like.

Examples of federal Commerce Clause intervention to address market failures in the land use context abound. One example is the Telecommunications Act of 1996 (TCA), which was enacted “to promote competition and higher quality in American telecommunications services and to ‘encourage the rapid deployment of new telecommunications technologies.’”<sup>73</sup> Among many other policy innovations, the TCA aimed to enhance nationwide cell phone coverage.

At the time, one of the primary obstacles to cell service was stiff local opposition to the necessary infrastructure, specifically cell phone towers.<sup>74</sup> A classic reflection of NIMBYism, this opposition was likely bolstered by the fact that relatively few Americans even had cell phones in 1996.<sup>75</sup> But while each locality’s decision to reject a cell phone tower or to impose specific conditions on siting, form, and the like benefited the immediate community (by minimizing, offsetting, or preventing aesthetic damage), it harmed the rest of the region and the country (by interfering with uniform cell coverage). Local land use decisionmaking thus stood in the way of a smoothly functioning national market. As the House Report on the bill that would become the TCA put it, local land use decisionmaking was “creat[ing] an inconsistent and, at times, conflicting patchwork of requirements.”<sup>76</sup> And because neither neighboring communities nor regional interests could override the locality’s authority to exclude, this coordination problem “inhibit[ed] the deployment” of cell phone service.<sup>77</sup>

Congress could, of course, have chosen to leave cell tower siting entirely in the hands of localities, notwithstanding these problems. The

---

72. U.S. CONST. art. I, § 8, cl. 3.

73. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005) (quoting Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)).

74. See Ostrow, *Process Preemption*, *supra* note 8, at 319 & n.198 (collecting sources).

75. In 1996, roughly 44 million Americans were cell phone subscribers. See *Background on CTIA’s Wireless Industry Survey*, CTIA—WIRELESS ASS’N 2 (2014) [https://web.archive.org/web/20160713153714/http://www.ctia.org/docs/default-source/Facts-Stats/ctia\\_survey\\_ye\\_2013\\_graphics-final.pdf?sfvrsn=2](https://web.archive.org/web/20160713153714/http://www.ctia.org/docs/default-source/Facts-Stats/ctia_survey_ye_2013_graphics-final.pdf?sfvrsn=2). In 2013, that number had increased by 660%: over 335 million Americans used cell phones. *Id.*

76. H.R. REP. NO. 104-204, at 94 (1995), as reprinted in 1996 U.S.C.C.A.N. 10, 61.

77. *Id.*

Senate version of the TCA would have done just that.<sup>78</sup> But the version of the bill that was drafted in the House of Representatives, and that ultimately became law, embraced the rationale of nationalizing an aspect of land use decisionmaking in order to foster a coherent and efficient market.<sup>79</sup> The House concluded that “it is in the national interest that uniform, consistent requirements . . . be established as soon as possible” so as to “speed deployment and the availability of competitive wireless telecommunications services which ultimately will provide consumers with lower costs as well as with a greater range [of] options for such services.”<sup>80</sup>

## 2. *Protecting Rights*

The second goal that a land use nationalization might be designed to achieve is the enforcement of a constitutional right that Congress thinks localities are failing to protect—either because they are violating that right themselves or because they are permitting violations to occur. While the original constitutional design allocated to Congress no such authority, the Reconstruction Amendments enacted in the wake of the Civil War do. Specifically, Section Five of the Fourteenth Amendment, like Section Two of the Thirteenth and Fifteenth Amendments, gives Congress the authority to “enforce, by appropriate legislation,” the provisions of those Amendments.<sup>81</sup> And as the Supreme Court incorporated most of the provisions of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment, Congress’s remedial power concomitantly grew to embrace the protection of those rights as well.

One of the statutes that Congress has enacted pursuant to this authority is a major land use law: the Religious Land Use and Institutionalized Persons Act (RLUIPA). Understanding RLUIPA requires a bit of history, beginning with a 1990 case upholding a state law prohibiting the use of peyote even when used in religious rituals.<sup>82</sup> In *Employment Division, Department of Human Resources v. Smith*, the Supreme Court ruled that such a “neutral law of general applicability” is constitutional even if it

---

78. H.R. REP. NO. 104-458, at 207 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10, 222; see also Ostrow, *Land Law*, supra note 1, at 1419.

79. To be sure, Congress was likely influenced by the lobbying and persuasion of telecommunications companies that were able to coordinate more effectively at the federal level than were diffuse local interests. But what the telecommunications companies were seeking, and what Congress created, was a more uniform decisionmaking regime that would be more receptive to their market goals.

80. H.R. REP. NO. 104-204, at 94.

81. U.S. CONST. amend. XIV, § 5; see also *id.* amend. XIII, § 2 (giving Congress the “power to enforce this article by appropriate legislation”); *id.* amend. XV, § 2 (same).

82. *Emp’t Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990).

imposes a substantial burden on a religious practice.<sup>83</sup> Congress was displeased with a holding that it saw as insufficiently protective of religious freedom,<sup>84</sup> so it enacted the Religious Freedom Restoration Act (RFRA) in 1993 to prohibit federal, state, and local governments from “substantially burden[ing]” a person’s exercise of religion—even by way of a neutral law of general applicability—unless the government in question could satisfy a version of strict scrutiny.<sup>85</sup> To justify imposing this limitation on the set of policies that state and local governments could enact or apply, Congress relied on Section Five of the Fourteenth Amendment.<sup>86</sup>

The Supreme Court soon rebuffed this effort, however, and held in *City of Boerne v. Flores* that RFRA was not “appropriate legislation” to enforce the Fourteenth Amendment’s substantive rights guarantees—specifically, the First Amendment’s Free Exercise Clause.<sup>87</sup> The Court concluded that such prophylactic rules are only appropriate remedial measures under Section Five where there is “a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”<sup>88</sup> With respect to RFRA, Congress had failed to demonstrate that its strong medicine was responsive to any “pattern of religious discrimination in this country.”<sup>89</sup>

Congress returned to the drawing board to craft a religious liberty statute that would apply against states and localities but would survive the Court’s review. It therefore focused on those areas of state and local law for which it thought it could build a sufficient record of religious discrimination. The result was RLUIPA: a mini-RFRA focused in large part on local land use.<sup>90</sup>

Though Congress invoked other enumerated powers in addition to Section Five of the Fourteenth Amendment in an effort to bolster

---

83. *Id.* at 879. Laws that “discriminate[] against some or all religious beliefs or [that] regulate[] or prohibit[] conduct because it is undertaken for religious reasons” are not “neutral” and remain prohibited by the Free Exercise Clause. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993).

84. *See City of Boerne v. Flores*, 521 U.S. 507, 512 (1997) (“Congress enacted RFRA in direct response to the Court’s decision in [*Smith*].”).

85. 42 U.S.C. §§ 2000bb-1, 2000bb-2(1) (2012).

86. *See City of Boerne*, 521 U.S. at 516–17. The portion of RFRA incumbent on the federal government needs no such foundation, as Congress is free to legislate limits on its own lawmaking authority. It has nonetheless garnered criticism on its merits. *See, e.g.*, MARCI A. HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 7–9, 274, 298–302 (2005); Marci A. Hamilton, RFRA PERILS, <http://www.rfraperils.com> (last visited Feb. 12, 2017) (describing the “RFRA culture war”).

87. *City of Boerne*, 521 U.S. at 517, 536.

88. *Id.* at 520.

89. *Id.* at 531.

90. As its title indicates, RLUIPA also covers the treatment of institutionalized persons, but those provisions are beyond the scope of this Article.

RLUIPA's constitutionality,<sup>91</sup> RLUIPA remains best understood as a rights-protecting nationalization rather than a market-regulating nationalization because of the nature of what Congress aimed to accomplish. Moreover, because these other bases of authority have more limited reaches, RLUIPA is, as discussed below, at its most potent only with the aid of Section Five.<sup>92</sup>

### *B. What Restrictions to Impose*

The next choice Congress must make is what type of restriction to impose on local decisionmaking. Both market regulation and rights protection can be accomplished by means that fall into two basic categories.

#### *1. Decision-Displacing Rules*

First, Congress can displace local decisionmaking by restricting the set of actions that localities can permissibly take. If Congress perceives a market failure or an externality it would like to see abated, or a right it would like to see protected, it can simply forbid outcomes that are inconsistent with those goals or demand outcomes that advance those goals.

The most salient example of a decision-displacing rule in the land use context is RLUIPA. RLUIPA provides that “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,” unless imposing the burden furthers a compelling governmental interest and represents the least restrictive means of doing so.<sup>93</sup> This provision displaces local decisionmaking because it carves out a set of outcomes a locality might reach—those that impose substantial burdens on religious exercise but that do not further compelling governmental interests and that are not the least restrictive means of doing so—and declares them off limits.

The statute applies this displacing rule to three categories of cases, each corresponding to a distinct lever of constitutional authority: (1) those in

---

91. See 42 U.S.C. § 2000cc(a)(2) (2012) (invoking the Commerce Clause and the Spending Clause as well as Section Five); Schragger, *supra* note 4, at 1838–39 (noting same).

92. See *infra* notes 94–101 and accompanying text.

93. 42 U.S.C. § 2000cc(a)(1). RLUIPA defines religious exercise as including “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Id.* § 2000cc-5(7)(A). The statute also provides that its protections “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” *Id.* § 2000cc-3(g). Finally, the statute explains that the “use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.” *Id.* § 2000cc-5(7)(B).

which the burden is imposed in a program that receives federal money;<sup>94</sup> (2) those in which the burden affects interstate or foreign commerce;<sup>95</sup> and (3) those in which the burden is imposed “in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.”<sup>96</sup> The first is premised on Congress’s spending power (a concept further discussed below<sup>97</sup>), the second on its Commerce Clause power, and the third on its remedial power under Section Five of the Fourteenth Amendment.<sup>98</sup> Additionally, RLUIPA prohibits governments from implementing land use regulations that either “totally exclude[]” religious organizations from a jurisdiction or that “unreasonably limit[]” them within the jurisdiction.<sup>99</sup>

The third category of cases to which the substantial burden standard applies—the one about land use regulations in which the government makes individualized assessments—sweeps up a substantial swath of local land use decisionmaking. Indeed, it describes the nature of nearly every local land use decision other than the creation of a zoning plan or ordinance in the first instance. Decisions to grant or deny variances, building permits, landmark statuses, and the like are all examples of decisions made as part of a system of individualized assessments: they all involve the application of particular facts or circumstances to the governing rules embodied in a local land use ordinance or zoning plan.<sup>100</sup> RLUIPA’s largest piece thus imposes a decision-displacing nationalization on even those local decisions that have no impact on interstate or foreign commerce and no relationship with a federal spending program.<sup>101</sup> Instead, RLUIPA displaces those

---

94. *Id.* § 2000cc(a)(2)(A).

95. *Id.* § 2000cc(a)(2)(B).

96. *Id.* § 2000cc(a)(2)(C).

97. *See infra* notes 119–127.

98. *See* 146 Cong. Rec. S7774, S7775 (daily ed. July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy identifying the three distinct jurisdictional hooks and mapping them onto the three categories of cases).

99. 42 U.S.C. § 2000cc(b)(3). RLUIPA also requires that governments treat religious and nonreligious land uses on equal terms, and prohibits governments from discriminating on the basis of religion. *Id.* § 2000cc(b)(1)–(2). These provisions more closely echo existing constraints imposed by the Free Exercise and Equal Protection Clauses, and so are not further discussed in this Article.

100. *See* Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 58 (2012) (“Common individualized assessments include decisions about conditional use permits, variances, and spot re-zoning.”).

101. RLUIPA makes clear that these jurisdictional hooks may not be cross-applied to distinct circumstances by providing a limitation on the judicial relief available to a plaintiff in the event that the Commerce Clause hook is not satisfied. *See* 42 U.S.C. § 2000cc-2(g).

decisions for the express purpose of protecting religious rights the federal government thinks are underprotected at the local level.<sup>102</sup>

## 2. *Decision-Channeling Rules*

Rather than displace local decisions, Congress might instead channel local decisionmaking by erecting deliberative hoops through which a state or locality must jump before it is permitted to work its will.<sup>103</sup> In other words, the locality may be left free to reach whatever solution it chooses, so long as it structures its decisionmaking in certain ways and around certain required steps.<sup>104</sup> A Congress that enacts such a decision-channeling rule is, of course, not truly agnostic about outcomes. Far from it, such a Congress chooses to act because it has identified a problem worth solving and because it has a particular preferred national outcome. But it leaves localities with space to choose their own precise paths, rather than exclude possible outcomes altogether.<sup>105</sup>

---

102. Though this Article's primary concern is not with the size of the federal footprint, but rather with its character and shape, an underappreciated recent development in RLUIPA's reach makes this Article's implications all the more salient. In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that RFRA's coverage of "person[s]" includes closely held for-profit corporations. 134 S. Ct. 2751, 2767–75 (2014). It also may have lowered the "substantial burden" bar at least somewhat. *See id.* at 2775–79 (a substantial burden exists where government demands that persons "engage in conduct that seriously violates their religious beliefs" and accompanies that demand with "economic consequences [that] will be severe"); *see also* *Zubik v. Burwell*, 136 S. Ct. 1557, 1560–61 (2016) (declining to address whether having to state one's religious objection constitutes a substantial burden when the government takes responsive action to achieve its ends, and remanding). Though the Court has never decided a RLUIPA case having to do with the land use provisions, it and various lower courts have explained that RLUIPA's language ought to be interpreted *in pari materia* with RFRA's. *See, e.g., Hobby Lobby*, 134 S. Ct. at 2761, 2781; *Redd v. Wright*, 597 F.3d 532, 535 n.2 (2d Cir. 2010); *Adkins v. Kaspar*, 393 F.3d 559, 567–68 (5th Cir. 2004). Accordingly, it is plausible that RLUIPA's protection could extend to for-profit businesses just like Hobby Lobby, and that those businesses could more easily claim that a land use decision violates RLUIPA. This observation went unaddressed in *Hobby Lobby* itself and has received relatively little attention in the wake of that decision. *But see* *Bray, supra* note 18, at 55–58, 92–94; *Ross Campbell, Note, Hobby Lobby as a Land Use Case: Charting For-Profit RLUIPA Claims*, 10 N.Y.U. J.L. & LIBERTY 884 (2016); *Stephen R. Miller, Hobby Lobby's "Passing Strange" Interpretation of RLUIPA: An Unlikely, but Potentially Dramatic, Impact on Land Use Law?*, LAND USE PROF BLOG (July 1, 2014), [http://lawprofessors.typepad.com/land\\_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html](http://lawprofessors.typepad.com/land_use/2014/07/hobby-lobbys-passing-strange-interpretation-of-rluipa-and-the-cases-unlikely-but-potentially-chillin.html).

103. *Cf. Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (contrasting constraints that "alter the range of conduct" in which an actor may engage with those that "regulate only the *manner of determining*" the outcome).

104. While scholars of cooperative federalism have recognized that "Congress may not only displace the states through federal law but also empower the states by conferring resources and new forms of authority on them," *Bulman-Pozen, supra* note 24, at 968, this account is incomplete because it does not emphasize this channeling option. (The displacing mechanism has already been discussed, and the discussion below about incentives captures much of the empowerment option. *See infra* Part II.C.2).

105. *Cf. Montgomery v. Louisiana*, 136 S. Ct. 718, 736 (2016) (noting that the choice of process "may have . . . some effect on the likelihood that" a particular outcome will be reached, but does not control outcomes).

This mechanism may sound less onerous from a practical perspective, but this is not necessarily so. Indeed, decision-channeling nationalizations may impose substantial costs on states and localities that decision-displacing nationalizations avoid. New hoops will entail not only the direct costs of jumping through them but also a broader set of costs associated with hiring more employees and creating new processes or agencies. These may even raise concerns about states and localities being “conscript[ed] in[to] ‘the national bureaucratic army.’”<sup>106</sup> Finally, a local decision maker might prefer to have his decision imposed exogenously. In that case, he would be able to invest fewer resources in decisionmaking and might even escape electoral responsibility if his constituents do not like the result.

The TCA is a classic decision-channeling statute. After initially considering a decision-displacing “uniform policy” governing the siting of cell towers,<sup>107</sup> Congress ultimately required that a locality that receives an application to build or modify a cell tower must act on the request “within a reasonable period of time” and, in the event that it denies the request, must issue a decision that is “in writing” and is “supported by substantial evidence contained in a written record.”<sup>108</sup> Any person “adversely affected” by the locality’s decision or by the locality’s failure to make a timely decision may, within thirty days, commence a lawsuit in federal court and have that suit heard and decided “on an expedited basis.”<sup>109</sup>

The effect of these federally imposed decisionmaking constraints is to place a framework generally applicable to federal administrative agencies onto the shoulders of localities. This is not to say that the TCA subjects localities to each and every provision of the Administrative Procedure Act, but when Congress prescribed that a locality “shall” act within a reasonable period of time and “shall” issue any denials in writing and with substantial

---

106. *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 824 (2015) (Thomas, J., dissenting) (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in part and dissenting in part)); see *Petersburg Cellular P’ship v. Bd. of Supervisors*, 205 F.3d 688, 697–705 (4th Cir. 2000) (Niemeyer, J.) (arguing that the channeling component of the TCA unconstitutionally commandeers localities in violation of the Tenth Amendment); cf. *Montgomery*, 136 S. Ct. at 735 (noting in the criminal context a reluctance to impose procedural requirements on states so as to “avoid intruding more than necessary upon the States’ sovereign administration of their criminal justice systems”).

107. H.R. REP. NO. 104-458, at 207 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10, 222; see *Petersburg Cellular*, 205 F.3d at 698 (Niemeyer, J.) (noting that the House proposal “would have given authority to the [FCC] to regulate *directly* the siting of towers”); Ostrow, *Land Law*, *supra* note 1, at 1419 (explaining that the House “first considered granting the [FCC] exclusive siting authority over telecommunications towers” and that this proposal “would have entirely preempted the local land-use process”).

108. 47 U.S.C. § 332(c)(7)(B)(ii)–(iii) (2012).

109. *Id.* § 332(c)(7)(B)(v).



evidence contained in a written record,<sup>110</sup> it subjected localities to what it understood to be “the traditional standard used for judicial review of agency actions.”<sup>111</sup> As the Supreme Court recently clarified in *T-Mobile South, L.L.C. v. City of Roswell*, Congress’s use of the term “substantial evidence” “invoked” the body of federal administrative law that requires that agencies “articulate . . . satisfactory explanation[s] for [their] action[s].”<sup>112</sup> Congress, the Court explained, accordingly did not just require localities to take actions supported by substantial evidence, but to actually “state . . . reasons” that are themselves rooted in substantial evidence.<sup>113</sup> Those reasons could be stated in a variety of formats or documents, including but not limited to the writing that communicates the denial, but they still must be stated “clearly enough to enable judicial review.”<sup>114</sup> The only caveat, the Court emphasized, is that a locality that chooses to state its reasons in writing separately from the writing communicating the denial of a siting application must do so “at essentially the same time as it communicates its denial.”<sup>115</sup>

Note that only decisions to *deny* siting applications are subject to the full set of hoops imposed by this channeling rule. All requests must be acted upon in a reasonable period of time, and all final actions or failures to act are subject to expedited judicial review, but only those decisions “to deny . . . request[s] to place, construct, or modify personal wireless service facilities” need be in writing and supported by written reasons which are themselves supported by substantial evidence contained in a written record.<sup>116</sup> Quite plainly, this differential treatment was rooted in Congress’s perception of the problem: localities were underprotecting the interests of telecommunications companies, subscribers, and the national telecommunications network, while overprotecting the exclusionary interests of residents. But rather than displace local decisionmaking in order to expand telecommunications networks, Congress channeled local deliberative processes with reason-giving requirements.<sup>117</sup>

---

110. *Id.* § 332(c)(7)(B)(ii)–(iii); see *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 128 (Breyer, J., concurring) (observing that the TCA “requires local zoning boards . . . [to] maintain a ‘written record’ and give reasons for denials ‘in writing’”).

111. H.R. REP. NO. 104-458, at 208 (1996) (Conf. Rep.), as reprinted in 1996 U.S.C.C.A.N. 10, 223.

112. 135 S. Ct. 808, 815 (2015) (quoting *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)); see *id.* at 822 (Roberts, C.J., dissenting) (agreeing on this point).

113. *Id.* at 815 (majority opinion).

114. *Id.* at 816.

115. *Id.*

116. 47 U.S.C. § 332(c)(7)(B)(iii) (2012).

117. To be sure, the TCA also contains a few components that may appear to be weakly displacing. It forbids a locality from “unreasonably” discriminating among “providers of functionally equivalent services,” provides that a locality’s siting regulations and decisions “shall not prohibit or

### C. *How to Nationalize*

Once Congress has identified a problem that it wishes to solve and is authorized to solve, and once it has chosen a restriction to impose, the last question it must answer is how to implement that restriction.

#### 1. *Fiat*

Congress's first option is simply to demand compliance with its restriction by fiat. The Commerce Clause and the Reconstruction Amendments, coupled with the Supremacy Clause, give Congress the authority to do exactly that, and Congress might choose to rely exclusively on that authority. The TCA and two pieces of RLUIPA—the Section Five and Commerce Clause pieces discussed above—take this form: they both set out requirements with which localities must comply. A locality that does not comply with those federal commands can be sued in federal court by a prospective land user that wishes to avail itself of the protections of federal law, be they decision-displacing or decision-channeling, and can be enjoined from acting contrary to federal law.<sup>118</sup>

#### 2. *Incentive*

Rather than demand compliance by fiat, Congress may attempt to elicit voluntary compliance by conditioning the receipt of federal funding on the adoption by states and localities of particular outcomes or decisionmaking practices. When Congress acts in this fashion, it does so on the basis of a third constitutional hook: its “spending power.”<sup>119</sup> The Supreme Court has

---

have the effect of prohibiting the provision of personal wireless services,” and prohibits a locality from making siting decisions on the basis of alleged environmental effects of cell tower radio frequency emissions so long as the towers comply with FCC regulations on the topic. *Id.* § 332(c)(7)(B)(i), (iv). But these are not displacing rules to the same degree that RLUIPA is. The first is a simple antidiscrimination mandate under which a locality cannot unreasonably prefer Verizon towers to T-Mobile towers. It can, however, prefer the former to the latter if doing so is not unreasonable, and it can treat both Verizon and T-Mobile towers as generously or as harshly as it wants. The second prohibits a locality from banning all cell towers, but says nothing about individual cases. Finally, the third prohibits localities from relying on one particular basis for its decision, but leaves the locality free to reach any decision it wants on any other bases.

118. *See, e.g.*, 42 U.S.C. § 2000cc-2(a) (2012) (providing that “[a] person may assert a violation of [RLUIPA] as a claim or defense in a judicial proceeding and obtain appropriate relief against a government”); *id.* § 2000cc-2(c) (providing that a state court adjudication of a claimed RLUIPA violation “shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum”); 47 U.S.C. § 332(c)(7)(B)(v) (providing that “[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with” the TCA provisions discussed here may sue in “any court of competent jurisdiction”).

119. *See* U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general

long upheld the power of Congress to “attach conditions on the receipt of federal funds” in order to ““further broad policy objectives.””<sup>120</sup> In fact, the Court has held that when Congress takes this particular tack, it is not limited by the enumerated powers directly granted to it in the Constitution.<sup>121</sup> Instead, objectives outside of Congress’s powers “may nevertheless be attained through the use of the spending power and the conditional grant of federal funds” so long as the objective “serve[s] general public purposes”; the conditions and consequences are noncoercive, unambiguously stated, and relate “to the federal interest in particular national projects or programs”; and neither the objective nor the conditions are independently barred by other constitutional provisions.<sup>122</sup>

The requirement that the conditions and consequences be noncoercive is perhaps the most restrictive of the requirements, but while it has been the source of the most litigation, it does not ultimately appear to be an especially strong constraint on Congress. While the Court has refrained from drawing any bright lines, its most recent statements in *National Federation of Independent Business v. Sebelius (NFIB)* suggest that Congress crosses the line somewhere after its conditions imperil 0.5% of a state’s total budget and somewhere before they threaten 10% of a state’s total budget.<sup>123</sup> The latter amounts to “economic dragooning that leaves the States with no real option but to acquiesce,”<sup>124</sup> whereas the former constitutes “relatively mild encouragement” that is permissible because it leaves states with a choice, “not merely in theory but in fact.”<sup>125</sup> Moreover, the Court has suggested that unconstitutional coercion is more likely to arise, if anywhere, with respect to threats of withdrawals of funding, rather than to conditional grants of funding.<sup>126</sup> Accordingly, Congress has a quite

---

Welfare of the United States.”); *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980) (Burger, C.J.) (plurality opinion).

120. *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove*, 448 U.S. at 474); see Buzbee, *supra* note 1, at 107–08 (discussing the “basic concept” of conditional federal spending).

121. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999) (“Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and . . . acceptance of the funds entails an agreement to the actions.”); see *New York v. United States*, 505 U.S. 144, 166 (1992) (explaining that Congress may “encourage a State to regulate in a particular way, [and] hold out incentives to the States as a method of influencing a State’s policy choices”).

122. *Dole*, 483 U.S. at 207–08, 211.

123. 132 S. Ct. 2566, 2604–06 (2012) (plurality opinion) (contrasting the statute in *Dole*, which imperiled less than 0.5% of the state’s budget, with the Affordable Care Act, which threatened “over 10 percent,” and noting that “[i]t is enough for today that wherever that line may be, this statute is surely beyond it”).

124. *Id.* at 2605.

125. *Dole*, 483 U.S. at 211–12.

126. See *NFIB*, 132 S. Ct. at 2603 (framing the States’ objection to the Medicaid expansion as being to the fact that, “[i]nstead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States’ existing Medicaid funds”); *id.* at 2607 (“Nothing in our opinion precludes Congress from offering funds under the Affordable Care

broad remit to use federal dollars to encourage states and localities to take actions consistent with federal goals.<sup>127</sup>

Congress has used some form of this particular nationalizing option in a number of land use statutes aimed at protecting the environment. Many of these, however, are designed primarily to incentivize states rather than localities by offering funding to state coffers—which can then disburse money to localities.<sup>128</sup> While statutes like these may call for or even require local involvement in state decisionmaking, the interposed presence of the state government between the locality and the federal government makes such statutes somewhat distinct from the likes of RLUIPA and the TCA, which operate directly on localities. While the impacts of federal law on state government are beyond the scope of this Article, these statutes provide useful illustrations of this category of federal legislative action. Moreover, the federal government can also engage in this type of arrangement with localities directly.

One frequently cited example of an incentive-based land use nationalization that operates as a conditional grant is the Coastal Zone Management Act of 1972 (CZMA).<sup>129</sup> The CZMA was enacted to advance the “national interest in the effective management, beneficial use, protection, and development of the coastal zone,” and to “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.”<sup>130</sup> The statute seeks to achieve these ends through the development at the state level of plans that govern land use decisionmaking in ways that protect coastal zones, comply with broad federal standards, and are developed in coordination with and assure the “full participation” of localities.<sup>131</sup> In this way, the CZMA takes the form of a decision-channeling rule: it does not prescribe or forbid particular decisions, but shapes the way in which decisions are reached. But rather than impose that channeling rule by fiat,

---

Act to expand the availability of health care, and requiring that States accepting such funds comply with the conditions on their use. What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding.”)

127. See, e.g., Samuel R. Bagenstos, *Viva Conditional Federal Spending!*, 37 HARV. J.L. & PUB. POL’Y 93, 95 (2014) (concluding that, under *NFIB*, unconstitutional coercion arises primarily where Congress conditions continued participation in a “very large” and “preexisting conditional spending program” on participation “in an entirely separate and distinct program”).

128. See Ostrow, *Land Law*, *supra* note 1, at 1427 (collecting examples).

129. 16 U.S.C. §§ 1451–1466 (2012); see, e.g., Buzbee, *supra* note 1, at 110–11; Ostrow, *Land Law*, *supra* note 1, at 1429; Salkin, *supra* note 10, at 278–79.

130. 16 U.S.C. §§ 1451(a), 1452(1); see Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 59 (2011) (explaining that the CZMA was “designed to protect coastal resources from intense development pressures that isolated local land use planning could no longer contain”). “Coastal zone” is defined, in lengthy detail, at 16 U.S.C. § 1453(1)–(4), but it essentially includes any oceanfront, Great Lake, or connecting bays and estuaries, as well as any adjacent shoreland.

131. 16 U.S.C. § 1455(d)(1), (3)(B).

the CZMA incentivizes its adoption. Grant money is offered for the purpose of the state's administration of a CZMA plan, and states that do not create such plans suffer no consequence other than simply not receiving the associated grant money.<sup>132</sup> In this way, participation in the CZMA's channeling regime is "entirely voluntary."<sup>133</sup>

Additionally, Congress has at times bypassed the states and directly offered substate actors money to fund certain federally favored land use actions. For example, the Transportation Equity Act for the 21st Century (TEA-21) marked a "small break" from the traditional funding preference for highway construction and offered localities and substate regional transportation agencies funding for other types of transportation projects that reduced congestion and furthered other federal environmental policy goals.<sup>134</sup> Portions of the Housing Act of 1937—still in effect today—employ similarly targeted funding to encourage and subsidize the siting and creation of low-income public housing approved by and in partnership with local public housing authorities.<sup>135</sup> These types of funding programs demonstrate that Congress can shape the direction of local land use in favor of certain federal priorities by offering funding directly to localities and substate entities. Setting aside other budgetary constraints, Congress could certainly engage in more land use nationalization of this type if it chose.<sup>136</sup> In addition to this form of "carrot," Congress could also resort to the "stick" of threatening to withdraw funding for certain local programs if localities do not follow a federally preferred land use policy.

---

132. *Id.* § 1455(a)–(c); Ryan, *supra* note 130, at 59.

133. Ostrow, *Land Law*, *supra* note 1, at 1429; *see* 136 Cong. Rec. E542 (daily ed. Mar. 6, 1990) (statement of Rep. Walter B. Jones) (same); FRED P. BOSSELMAN, DUANE FEURER & TOBIN M. RICHTER, *FEDERAL LAND USE REGULATION 215* (1977) (same).

134. Buzbee, *supra* note 1, at 111; *see* Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified as amended in scattered sections of 23 U.S.C.); Ostrow, *Land Law*, *supra* note 1, at 1427; *TEA-21 – A Summary – Protecting Our Environment*, FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/tea21/sumenvir.htm> (last updated Apr. 5, 2011). Funding for the TEA-21 in particular was always set to lapse after 2003, *see TEA-21: Moving Americans into the 21st Century*, FED. HIGHWAY ADMIN., <http://www.fhwa.dot.gov/tea21/index.htm> (last visited Feb. 14, 2017), but the Department of Transportation continues to draw on other appropriation streams to fund local transportation projects.

135. 42 U.S.C. §§ 1437–1437f (2012); *see* Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. REV. 983, 989–90 (2010).

136. As they grant the money they are appropriated by Congress, federal agencies engage in quite a bit of this sort of incentive-based nationalization of land use priorities as well. *See, e.g., About Us*, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, <http://www.sustainablecommunities.gov/mission/about-us> (last updated Mar. 2, 2015) (interagency partnership between HUD, DOT, and EPA formed to "improve access to affordable housing, increase transportation options, and lower transportation costs while protecting the environment").

\* \* \*

Beyond the statutes that form the focus of this Article, a whole range of federal land use statutes can be described by reference to this set of design choices. For one well-known example, consider the provision of the FHA that forbids localities from “mak[ing] unavailable” housing to persons on the basis of race and other criteria.<sup>137</sup> This provision, the Supreme Court recently confirmed, imposes disparate impact liability on localities.<sup>138</sup> It thus takes the form of a decision-displacing rule: like RLUIPA, it carves out a set of outcomes—those that make housing unavailable to persons on the basis of particular criteria—and deems those outcomes unlawful.<sup>139</sup> And it is imposed by fiat because it takes the form of a command that aggrieved parties can wield in court to seek relief from noncompliant localities. To take another example, the Intermodal Surface Transportation Efficiency Act of 1991 requires states and localities, as a condition on receipt of federal highway funds, to engage in particular forms of long-range land use planning.<sup>140</sup> It does not prescribe or forbid specific outcomes like a decision-displacing rule does; instead, it channels land use decisionmaking by requiring certain analyses and thought processes. And because the scheme is linked to the receipt of federal funding, adoption of the channeling constraint is incentivized by federal law.<sup>141</sup>

One could go on. But the key takeaway at this juncture is that the array of nationalizing land use statutes on the books is in fact quite diverse with respect to these three important legislative design choices.

---

137. 42 U.S.C. § 3604(a) (2012).

138. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507 (2015).

139. If this provision only contemplated disparate treatment liability—in other words, if it meant only that localities cannot take actions for which race or other protected statuses are a reason for the action—then it would be more similar to the previously discussed provision of the TCA that prohibits localities from relying on a particular basis for its decision while refraining from forbidding any particular decision. *See supra* note 117.

140. *See* 23 U.S.C. § 134(i) (2012); Ostrow, *Land Law*, *supra* note 1, at 1427.

141. A boundary case is the Clean Air Act, which conditions the receipt of federal highway funding on the development of pollution-control plans. 42 U.S.C. § 7506(c) (2012). The Act does not explicitly demand or prohibit a particular plan, which suggests it is non-displacing. (The only choice it arguably displaces is the choice not to have a pollution-control plan at all, which is akin to the TCA’s weak “displacement” of a locality’s choice to prohibit all cell towers. *See supra* note 117.) Instead, it sets out a series of things that must be considered and included in the development of a plan. 42 U.S.C. § 7410. That approach suggests a decision-channeling mechanism. Coupled with the conditional spending hook, the Act thus appears to be another example of an incentive-based channeling nationalization. However, the elements that plans are required to contain leave relatively little room for discretion. For example, each plan must “require, as may be prescribed by the [EPA] Administrator,” the installation of equipment and periodic reports by certain polluters, and the “correlation” of such reports by state agencies. *Id.* § 7410(a)(2)(F). Further, the various requirements of the broader statutory scheme interact to further limit the scope of discretion. While formally channeling, then, provisions like this one come close to displacing. And they do so by incentive—a combination not yet encountered in this Article.

## III. ACCOUNTING FOR LOCAL DEMOCRATIC COST

This Part assesses the implications for local democracy of the legislative design choices set out above. But rather than begin with the motives for nationalization, it focuses on the two mechanism choices—displacement versus channeling, and fiat versus incentive—because, as will become clear below, that is where most of the variation lies. However, as Part IV explores, the motives are relevant to determining whether and when the local democratic costs of a particular mechanism should counsel against its use.

*A. Displacement and Channeling*

The first of the two mechanism dimensions, and perhaps the most salient, is Congress's choice whether to nationalize land use law through imposition of a decision-displacing rule like RLUIPA, or a decision-channeling rule like the TCA. Analysis of both of these statutes reveals that displacement biases local decisionmaking significantly more than channeling does. In fact, the channeling mechanism offers substantial gains for local participatory democracy.

Take decision-displacing rules first. These are rules that set certain outcomes off limits for localities. Recall that RLUIPA, for example, provides that “[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution,” unless imposing the burden furthers a compelling governmental interest and represents the least restrictive means of furthering that interest.<sup>142</sup> Put another way, RLUIPA's displacing rule lifts certain land use questions—those in which one or more of the possible outcomes might impose a substantial burden on religious exercise without a compelling justification or by way of means more restrictive than necessary—out of the local decisionmaking process and resolves them in favor of a particular class of land users.<sup>143</sup>

Moreover, because local land use boards are “extremely vulnerable to the threat of litigation” and are “worr[ie]d about the time, expense, and social cost of litigating against” well-funded or well-respected landowners,

---

142. 42 U.S.C. § 2000cc(a)(1) (2012).

143. See Schragger, *supra* note 4, at 1844, 1846 (expressing skepticism about RLUIPA because it “take[s] an entire category of activity . . . out of the hands of local regulatory authorities” and because it “impos[es] a norm of religious favoritism regardless of the specifics of any particular community”). Even if RLUIPA instead imposed a lower level of scrutiny, the same qualitative description would be appropriate, although the set of off-limits outcomes would be smaller.

they are likely to err against violating a displacing rule.<sup>144</sup> The result is at least some overprotection of the land use singled out by federal law. The degree of acquiescence to the nationally protected land use will almost certainly vary with both the haziness of the law's boundaries and the difficulties of demonstrating that they have not been transgressed. But in the RLUIPA context, for example, the opacity of what precisely constitutes a substantial burden,<sup>145</sup> and the difficulty of satisfying the requirement that a substantial burden serve a compelling government interest with the least restrictive means,<sup>146</sup> make likely a relatively high degree of overprotection.<sup>147</sup>

Regardless of the precise size of the set of land use questions for which local governments understand their decisions to have been displaced, this kind of local acquiescence is fundamentally at odds with democratic responsiveness. A decisionmaking process that results in the repeated acquiescence to the demands of a particular type of claimant is one that is systemically biased in favor of that claimant class. Such bias is problematic whether the class represents a majority or minority interest in the locality. Either way, a particular group has been singled out and told that it need not “pull, haul, and trade” to get what it wants from its local government.<sup>148</sup> Moreover, such bias is problematic whether or not the individual members of the local government would have, in a particular case, reached the same conclusion had their decision not been displaced by federal law. Either way, the decisionmaking process has been biased by both the direct and *in terrorem* effects of the national decision-displacing rule. Finally, the embedded bias means that local government is less able to effectively respond to the informational inputs of the community. Rather than promote stakeholders' ability to share information that aids informed decisionmaking, and rather than amplify local government's ability to act

---

144. Sara C. Galvan, Note, *Beyond Worship: The Religious Land Use and Institutionalized Persons Act of 2000 and Religious Institutions' Auxiliary Uses*, 24 YALE L. & POL'Y REV. 207, 231 (2006).

145. See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2775–76 (2014) (concluding that a substantial burden existed under RFRA where the obligations of the law conflicted with the plaintiffs' religious beliefs and where disobedience carried substantial “economic consequences”). While future RFRA litigation may shed light on that test, see *supra* note 102, it remains to be seen whether it will clarify the opacity in a way that offers comfort or even greater risk for localities.

146. See *Hobby Lobby*, 134 S. Ct. at 2780 (noting that “[t]he least-restrictive-means standard is exceptionally demanding”).

147. See Salkin, *supra* note 10, at 293 (“The threat of RLUIPA litigation and the costs that it entails . . . give local governments a strong disincentive to impose limitations on development projects proposed by religious groups, even where they might conflict with long term plans and legitimate community concerns.”); Salkin & Lavine, *supra* note 18, at 255–56; Galvan, *supra* note 144, at 231–32.

148. *Johnson v. DeGrandy*, 512 U.S. 997, 1020 (1994). As Richard Schragger has pointed out, RLUIPA thus “prevents the local negotiation of the religious–secular relationship,” which may have the added pernicious effect of “engender[ing] hostility toward religion in general or spark[ing] specific sectarian animosities.” Schragger, *supra* note 4, at 1847–48.



based on that information, a decision-displacing rule is blind to community knowledge and substantially limits the locality's ability to make context-appropriate decisions in light of such knowledge.

Not only do decision-displacing nationalizations like RLUIPA fare poorly in terms of responsiveness, their failure creates the very problems for citizens' relationships with local government discussed in Part I.A. Whether viewed from the perspective of homeowners without an exit option, governments interested in instilling compliance with the law, or Americans with an intrinsic desire to be heard, displacing nationalizations like RLUIPA impose significant costs on local democracy because the structural biases they create shut down the access points and opportunities for robust participation that people expect and value. When federal law eliminates potential land use outcomes or even demands particular outcomes, residents understandably feel they have been "disenfranchise[d]."<sup>149</sup>

Indeed, in at least some sense, residents have been locally disenfranchised: the decision maker under a displacing law like RLUIPA is effectively the national government and not the local government. Insofar as laws like RLUIPA require localities to reach results that some or even many residents would have otherwise sought to shape or even oppose, those residents are unable to hold their own local governments accountable in any meaningful way. After all, even if they exercise their prerogative to punish local decision makers by replacing them with other people, the replacements will be bound all the same by the displacing constraint. RLUIPA and its ilk thus short-circuit the most basic form of accountability in local government. It is no wonder people feel as if they have been silenced: they are unable to transform opposition to land use decisions into effective voice in the moment, or into retrospective electoral discipline.<sup>150</sup>

That sense of voicelessness can be expected to spill over into a whole range of other problems. Some include the potential for reduced respect for

---

149. Gunther, *supra* note 19; see Durchslag, *supra* note 38, at 492 ("[O]ne can hardly imagine a greater disincentive to political engagement at the local level . . . than severely circumscribing its major policy making role, controlling its physical and environmental amenities.").

150. The saga of the attempt by the government of the City of Yonkers to comply with a federal court order requiring the desegregation of public housing in that city in the late 1980s, recently and faithfully depicted in the HBO miniseries *Show Me a Hero* and the book on which it was based, is all too illustrative. See generally LISA BELKIN, *SHOW ME A HERO: A TALE OF MURDER, SUICIDE, RACE, AND REDEMPTION* (1999); *Show Me a Hero* (HBO Miniseries 2015). In the face of overwhelming public opposition on the one hand, and ruinous court-imposed penalties on the other, the city government tried to satisfy its federal obligations and quell local resistance by pointing the finger at federal authorities. It did not work. Perceiving that they were not being listened to by their local government, residents twice lashed out and exercised their electoral voice to replace the mayor and members of the city council, only to find twice that the new government was equally bound by federal law. Tensions and resentment lingered for years.

and compliance with other decisions of the governing body.<sup>151</sup> For example, outrage about acquiescence to nationally favored land uses might well lead other landowners to be uncooperative with local authorities with respect to modifications they might wish to make to their own properties. This is so regardless of whether those landowners know that federal law and not local government is really to blame.<sup>152</sup> Given the research discussed above, one ought to expect at least some degree of “If the church/factory/etc. can do whatever it wants, why shouldn’t I?” action on the part of other landowners.<sup>153</sup> Other consequences might include financial costs. Because homeowners value effective voice, as noted above, one would expect that homes in a municipality with a relatively high frequency of nationally protected land uses—and therefore a relatively high frequency of acquiescence—will be less attractive to the average buyer and will therefore lose more value, all else equal, than homes in a municipality relatively unburdened by the use that federal law has favored.<sup>154</sup>

Finally, the welfare costs that attend feelings of powerlessness and “disaffection with the entire political process” must not be ignored.<sup>155</sup> Losing is never fun, but where a person perceives that she has suffered “systematic depredations” in a process that she “has little opportunity to influence” or in which she feels unrepresented, those losses are particularly acute.<sup>156</sup> And where those losses occur with respect to decisions that affect property, the financial and emotional investments that people have made in their property mean that the losses sting that much more.

The fact that RLUIPA is a powerful tool for religious land uses is by no means a revelation. Nor is it revelatory that the results of that powerful tool may come at the expense of neighbors and other land users. In fact, this is

---

151. See *supra* notes 51–53 and accompanying text.

152. Indeed, even if the landowner knows that federal law is to blame to some degree, see Siegel, *supra* note 25, at 1632, he or she may believe that local government is not doing enough to resist, or is not pushing the envelope sufficiently to test the limitations of federal law, and may therefore perceive local government to be the more immediate cause of unfairness. The Yonkers public housing crisis is again illustrative. See *supra* note 150. Moreover, the resident may even be correct about the allocation of blame, given that local authorities may exploit the cover offered to them by federal law to make more decisions they might not otherwise be able to justify to their constituents.

153. See *supra* note 51.

154. See *supra* notes 31–50 and accompanying text.

155. FISCHER, REGULATORY TAKINGS, *supra* note 60, at 150.

156. Rose, *supra* note 37, at 1126; see FISCHER, REGULATORY TAKINGS, *supra* note 60, at 165 (“[T]here is a special demoralization cost that attaches to lack of representation in the political process.”); Durchslag, *supra* note 38, at 486 (describing costs stemming from the sense “that those regulated have little leverage to influence the political system in their favor in the future”). This point about the importance a property owner attaches to the process by which his property or his neighbors’ property is regulated borrows from Frank Michelman’s observation about “demoralization costs” in the context of government takings made without the assurance of compensation. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARV. L. REV. 1165, 1214–15 (1967).

what Congress desired.<sup>157</sup> But the problem for local democracy is not that Congress gave religious landowners “a special right to challenge land use laws,” even though that has been a primary objection leveled by many critics of RLUIPA.<sup>158</sup> That charge misses the mark almost entirely. Instead, the problem is that Congress chose a particular *type* of powerful tool. Local acquiescence, and the costs and consequences of that acquiescence, are attributable to RLUIPA’s displacing nature, not to the mere existence of its special protection.

Perhaps the best way to demonstrate that diagnosis is to compare the responsiveness effects of a displacing rule like RLUIPA to those of a statute that offers special protection to a particular land use in a channeling fashion. As discussed above, the TCA is one such statute: it gives telecommunications companies a special right to challenge land use decisions, but it does so in a markedly different way. And it does so with notably different consequences.

In contrast to RLUIPA’s displacing mechanism, the TCA’s channeling mechanism does not declare any outcomes off limits.<sup>159</sup> Instead, the constraint it imposes is a reason-giving one. Whereas RLUIPA provides that a land use decision that imposes a substantial burden on religious exercise without serving a compelling governmental interest by the least restrictive means is off limits no matter the amount of explanation or “substantial evidence” the locality can give, the TCA permits a locality to make whatever decision it wishes so long as it can explain itself in writing with reasons supported by “substantial evidence.” Simply put, where a displacing nationalization takes a set of decisions away from localities, a channeling nationalization leaves the full set of decisions to local

---

157. Whether that policy choice was a wise, necessary, or constitutional one is beyond the scope of this Article, though some have claimed that it is none of those things. *See, e.g.*, Hamilton, *supra* note 8, at 344–51; Salkin & Lavine, *supra* note 18, at 256; Stephen Clowney, Comment, *An Empirical Look at Churches in the Zoning Process*, 116 YALE L.J. 859 (2007). *But see, e.g.*, Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. DAVIS L. REV. 755, 783 (1999).

158. Marci Hamilton, *The Federal Government’s Intervention on Behalf of Religious Entities in Local Land Use Disputes: Why It’s a Terrible Idea*, FINDLAW (Nov. 6, 2003), <http://writ.corporate.findlaw.com/hamilton/20031106.html>; *see* HAMILTON, *supra* note 86, at 94, 106 (RLUIPA offers “preferential treatment” for religious landowners and “alters the balance” between properties); Bray, *supra* note 18, at 43 (RLUIPA “provides religious landowners with special protections”); Sager, *supra* note 18, at 14 (decrying RLUIPA’s “remarkable privileging of the land use interests of churches over all but the most weighty of land use concerns”); Salkin & Lavine, *supra* note 18, at 255 (RLUIPA “provid[es] religious groups with an unfair advantage”).

159. The TCA does also provide that a locality may not discriminate among providers and may not effectively prohibit outright the availability of cell service, *see* 47 U.S.C. § 332(c)(7)(B)(i) (2012); *supra* note 117, but that is a far cry from prescribing outcomes in individual cases. The TCA also declares one rationale off limits: a locality may not make siting decisions on the basis of alleged environmental effects of cell tower radio frequency emissions so long as the towers comply with FCC regulations on the topic. *See* 47 U.S.C. § 332(c)(7)(B)(iv); *supra* note 117. But the locality remains free to reach any decision it wishes so long as it can point to any other rationale.

decisionmaking so long as the localities take specified steps as they deliberate.

In this way, decision-channeling rules are far less costly in terms of democratic responsiveness than are decision-displacing rules. First, nothing in a channeling rule like the TCA demands repeated acquiescence to a particular type of claimant or a particular class of requests—either by placing particular outcomes off limits or by operating upon localities’ risk aversion.<sup>160</sup> It thus does not inject systemic decisionmaking bias. Second, such statutes do not alleviate any class of claimant from the obligation to bargain, to give and take, and to participate in the same local fora as all other land users. Consider the background of the *T-Mobile* case discussed above. After reviewing T-Mobile’s application, the city’s zoning board recommended that the city council require T-Mobile to move the planned cell tower to mitigate its aesthetic impact, to build a fence around the tower, and to plant thirty-three evergreen trees around the tower.<sup>161</sup> Perceiving these conditions to be the cost of approval, T-Mobile was prepared to agree to all of them, and offered a presentation at a two-hour public hearing at which it engaged with and responded to concerns raised by members of the community.<sup>162</sup> A land user protected by a decision-displacing nationalization like RLUIPA, by contrast, would have only the weakest of incentives to engage in this kind of back-and-forth because the displacing statute operates as a trump. A decision-channeling nationalization like the TCA offers no such trump. Finally, and very much related, channeling nationalizations permit local government to gather and respond to community knowledge. In fact, they actively foster such informed decisionmaking.

By faring better for local democracy than displacing nationalizations, channeling nationalizations avoid negative impacts on citizens’ relationships with local government. Because statutes like the TCA disenfranchise no one, there is no reason for citizens to feel like they have not been heard, even when a cell tower they oppose ultimately gets built. There is accordingly little reason to fear that property values will reflect a perception of ineffective voice,<sup>163</sup> and little reason to worry that citizens

---

160. See Ostrow, *Process Preemption*, *supra* note 8, at 293 (noting that the TCA operates on “the siting process, without disempowering local governments” (emphasis omitted)).

161. *T-Mobile S., LLC v. City of Roswell*, 731 F.3d 1213, 1215 (11th Cir. 2013), *rev’d*, 135 S. Ct. 808 (2015).

162. See *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 812 (2015); *T-Mobile*, 731 F.3d at 1215–16. The first condition was, however, one to which the proposed tower’s neighbor was not prepared to agree. See *id.* at 1215 n.1.

163. Of course, if the existence of too many cell phone towers in a particular locality is viewed negatively, the fact of the towers itself may cause a decrease in property values. But that is a different sort of cost: one that is attributable to the decision made by the locality, not to the way in which the decision was made. And, perhaps more important, it is a cost for which residents can effectively punish

will feel entitled to be uncooperative: they can expect the same less-than-certain probability of success within the give-and-take of the zoning process as the telecommunications company can. Finally, because these statutes do not introduce systemic bias, they achieve their ends without imposing the welfare costs that attend depredations the landowner perceives he “has little opportunity to influence.”<sup>164</sup>

It gets even better. Federally imposed channeling constraints like the TCA may actually result in broader responsiveness *improvements* for localities. First, channeling constraints reduce the impact of biases—both personal and structural—that may already be in the system. This is a familiar concept in administrative law: the process of gathering information, considering evidence, and giving articulable reasons produces more careful and fair decisionmaking.<sup>165</sup> As the D.C. Circuit once put it, reason-giving requirements result in “reflective findings, in furtherance of even-handed application of law, rather than impermissible whim, improper influence, or misplaced zeal.”<sup>166</sup> Cognitive and social psychology research concurs that “one of the best mechanisms” for improving decisionmaking “is forcing oneself to consider alternatives and [to] carefully review

---

the local government because the responsibility is plainly allocated to the local government itself. No external rule forces any locality to approve “too many,” or any number of, towers. If a local government does so, it has either acted contrary to the wishes of its constituents or has failed to accurately perceive the constraint imposed on it by federal law—sins for which it should suffer ordinary electoral consequences in a functioning system of accountability. In short, whereas displacing nationalizations like RLUIPA short-circuit local accountability by seizing decisions and making it impossible for residents to directly punish the relevant decisionmakers, with all the consequences that disjunction entails, *see supra* notes 149–156 and accompanying text, channeling nationalizations like the TCA leave the system of local accountability in place.

164. Rose, *supra* note 37, at 1126.

165. *See, e.g.,* Nestor M. Davidson & Ethan J. Leib, *Regleprudence—At OIRA and Beyond*, 103 GEO. L.J. 259, 303 (2015); Michael A. Livermore & Richard L. Revesz, *Rethinking Health-Based Environmental Standards*, 89 N.Y.U. L. REV. 1184, 1233 (2014) (noting that reason-giving limits discretion, promotes transparency, legitimates “the exercise of administrative discretion,” and “improv[es] the quality of agency decisionmaking directly . . . by forcing agencies to examine issues they might otherwise ignore”); Rose, *supra* note 1, at 899–900 (noting that a reason-giving requirement “encourages an exploration of issues and potential accommodations”); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995) (noting that “reason-giving mandate[s] . . . drive out illegitimate reasons when they are the only plausible explanation for particular outcomes”); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1813 (2012) (explaining that scholars and courts “theorize the practice of reason giving as central to constraining and legitimating administrative agencies” because the practice advances “rationality”); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1280–81 (2009) (noting that reason-giving limits the scope of discretion and ensures that “relatively selfish policy options [are] discarded in favor of more public-spirited alternatives”); Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1091 (2000) (explaining the ways in which “judgments may change as a result of reason giving in the public domain”). Professor Ostrow has explicitly linked this observation to the context of the TCA. *See Ostrow, Process Preemption, supra* note 8, at 292–93, 299–300, 319–20 (explaining that the TCA’s requirements compel local governments to consider wider interests).

166. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

arguments against one's position."<sup>167</sup> Engaging in these sorts of metacognitive actions not only reduces the impact of whim or improper influence but also reduces the negative side effects of overconfidence and the common but erroneous belief that one sees things just like everyone else does.<sup>168</sup> Similarly, the management and organizational learning literature recognizes that, when decision makers are required to engage in regularized information collection and are forced to demonstrate that they have confronted and learned from information they might not otherwise have known of or considered, the result is that "the biasing effects of preexisting knowledge structures" and preexisting assumptions are "mediate[d]."<sup>169</sup>

Across contexts, then, scholars and judges agree that regularizing openness to stakeholder input and demanding reason-giving accountability can debias decisionmaking.<sup>170</sup> That is a valuable goal in and of itself,<sup>171</sup> but these kinds of deliberative requirements can go a step further by changing the community's relationship with local government. For all the reasons discussed above, the more that a locality's decisionmaking provides a forum for the effective exercise of voice, the more faith the public will have in local government and in the outcomes it generates, and the more compliance and satisfaction should be expected.<sup>172</sup> This increase in faith,

167. Jeffrey J. Rachlinski & Cynthia R. Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 588 (2002); see *id.* at 610–11 (explaining that, because decisional biases are often features of human cognition rather than intentional prejudices, they can be minimized by the "public vetting and explanation" that comes with information-gathering and reason-giving).

168. Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 496–99 (2002).

169. Kenneth A. Bamberger, *Regulation as Delegation: Private Firms, Decisionmaking, and Accountability in the Administrative State*, 56 DUKE L.J. 377, 441–42 (2006).

170. See Ostrow, *Process Preemption*, *supra* note 8, at 330 (arguing that the TCA's reason-giving requirement leads zoning boards "to exercise principled discretion" and "promotes more deliberative and rational decisionmaking").

171. Indeed, scholars and an ABA task force studying local land use decisionmaking have endeavored to move local government toward more responsiveness with channeling reforms. See *id.* at 326 & nn.253–54 (collecting sources).

172. As Judge Henry Friendly once said, "A statement of reasons may even make a decision somewhat more acceptable to a losing claimant." Henry J. Friendly, "*Some Kind of Hearing*", 123 U. PA. L. REV. 1267, 1292 (1975); see Mantel, *supra* note 51, at 377–79 (noting that perceived fairness of processes translates into perceived fairness of government generally); Rose, *supra* note 1, at 900 (noting particularly in land use context that "explanation ultimately helps to reconcile the parties" and that losers "may be at least partially mollified if they know the reasons" for the decision). The broader point about increased public trust and accountability pervades the literature. See, e.g., Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (explaining that reasoned decisionmaking "furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgments of its decision-makers"); Donald J. Kochan, *Constituencies and Contemporaneity in Reason-Giving: Thoughts and Direction After T-Mobile*, 37 CARDOZO L. REV. 1, 30–34 (2015) (noting that reason-giving promotes rule-of-law values, increases governmental legitimacy, promotes public participation, and enables accountability); Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 111 (2007) (explaining that reason-giving "increases the power of participants" in decisionmaking and thus

and in the perception that local government can be a place where members of the community are heard and responded to, can in turn generate more engagement by the public—which can further enhance decisionmaking and further improve public perceptions of government. In this way, channeling nationalizations and reason-giving requirements can set off virtuous circles of self-reinforcing enhancements in participation and responsiveness. Moreover, as localities adapt to decisionmaking practices in a particular context—say, cell tower siting—those practices may start to be understood as generally applicable norms of good government. And as decision makers regularize openness, learning, and reason-giving, they may find it efficient or otherwise beneficial to engage in those same practices and begin similarly virtuous circles even when not expressly required by federal law.<sup>173</sup>

Not only can federal decision-channeling requirements cause these valuable spillover effects, but they may also often be the only politically feasible or normatively desirable action that can. As for feasibility, it is hard to imagine the federal government agreeing on, or even understanding, all the details necessary to enact a sweeping “Improve Local Democracy Now” statute that would shape local decisionmaking across the board. And as for normative concerns, it is also not at all clear that such a statute would be a good idea, as it would stifle process-based innovation and variation at the local level. But by taking channeling-based action in the context of particular subjects of national interest—like the telecommunications grid—Congress can spur reform at the local level and set off a chain reaction that, while likely taking different paths in different localities, may build towards improvements in local responsiveness and accountability.

Even setting aside these benefits, channeling nationalizations like the TCA impose lower costs on democratic responsiveness than displacing nationalizations like RLUIPA, and they do so while still achieving their ends.<sup>174</sup> The number of cell phone towers has “increased exponentially” since 1996.<sup>175</sup> According to one industry source, there were 30,045 cell

---

“reinforces participatory rights”); Short, *supra* note 165, at 1861, 1871 (explaining that reason-giving “create[s] social relationships and organizational structures that tend to channel the exercise of agency discretion within politically and socially acceptable parameters,” “facilitat[es] cooperation and collective action[.]” and “justif[ies] the outcomes . . . in widely acceptable terms”); Staszewski, *supra* note 165, at 1278, 1282–84 (explaining how reason-giving promotes legitimacy and “deliberative accountability”).

173. See Michael C. Pollack, *Judicial Deference and Institutional Character: Homeowners Associations and the Puzzle of Private Governance*, 81 U. CIN. L. REV. 839, 890 (2013) (emphasizing that reason-giving can become habit).

174. See Ostrow, *Process Preemption*, *supra* note 8, at 293 (noting that the TCA “has succeeded in achieving its federal land use goals”).

175. Ostrow, *Land Law*, *supra* note 1, at 1420.

sites in the country when the TCA was enacted in 1996; by 2013, there were 304,360.<sup>176</sup> To be sure, this growth is not attributable solely to the TCA. As cell phone usage expanded, some residents presumably started to attach some nonzero value to adequate cell coverage and accordingly weakened or abandoned their opposition. But this preference-shifting account of the TCA's success is incomplete. First, it is questionable whether coverage would have expanded sufficiently to get that change in preferences started without the TCA. Second, a person who sees a cell phone tower from his back porch every day is unlikely to consider the value of cell coverage to be worth the aesthetic costs and the diminished property value.

Instead, courts have recognized that the most important effect of the TCA is that the hoops it imposed prompted localities to think more critically about *why* they were denying siting applications.<sup>177</sup> Specifically, the TCA demanded that localities hear telecommunications companies out, and in the process prompted localities to critically evaluate preconceptions, costs, and benefits in ways consistent with the psychological research discussed above. When required to rationalize their decisions based on evidence, localities reached conclusions consistent with the aims of federal law—and they did so all on their own, without the responsiveness-eliminating hand of displacing nationalization.<sup>178</sup>

One might protest that the difference I observe here is due simply to the specific reaches of the two statutes, not to their mechanisms. In other words, one might say that RLUIPA is simply a more intrusive law, full stop, than is the TCA because the special right that RLUIPA affords its

---

176. *Background on CTIA's Wireless Industry Survey*, *supra* note 75, at 2.

177. *See, e.g., T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cty.*, 546 F.3d 1299, 1306 (10th Cir. 2008) (attributing TCA's success to "reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities such as cell phone towers, and by protecting against 'irrational or substanceless decisions by local authorities'" (first citing *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115 (2005); then quoting *Sw. Bell Mobile Sys. v. Todd*, 244 F.3d 51, 57 (1st Cir. 2001))).

178. I acknowledge that the fact that the TCA's channeling requirement only attaches to denials and not grants, *see* 47 U.S.C. § 332(c)(7)(B)(iii) (2012), might suggest that this expansion of cell coverage is merely the result of local governments rolling over at the expense of their citizens to avoid the obligations of justifying their decisions with reasons. But this is unlikely for two reasons. First, unlike with RLUIPA, local decision makers are unable to shift blame to a federal decision-displacing rule. *See supra* note 152 and accompanying text. None exists. So if local decision makers are granting undesirable cell tower applications simply to avoid reason-giving requirements, one would expect them to suffer electoral consequences—or to be disciplined *ex ante* by the prospect of electoral consequences. Second, those decision makers have their own non-electoral incentives to consider. They live in their communities and should therefore be expected to avoid granting applications that may harm their own property values. Indeed, the underprovision of cell tower sites prior to the enactment of the TCA discussed above, *see supra* notes 74–77 and accompanying text, was likely attributable to some combination of these two forces. It defies belief to suggest that these powerful electoral and financial incentives could be outweighed by the benefit of not having to come up with a coherent reason for a denial decision.



preferred class of claimant is broader or weightier than the special right that the TCA affords its preferred class. That is unlikely the causal story for a few reasons. First, as discussed above, the TCA is really quite intrusive in its own right: it entitles a particular set of claimants to demand a far more elaborate hearing than other claimants are entitled to and it holds local governments to a more demanding denial standard with respect to those privileged claimants.<sup>179</sup> Second, that explanation would ignore what the administrative law principles and the cognitive and behavioral research discussed above have revealed about group decisionmaking for decades, namely that deliberative processes matter.<sup>180</sup> Contending that the difference in RLUIPA and the TCA's responsiveness costs has nothing to do with the differences in their deliberative mechanisms is at odds with these foundational ideas.

Still, it is fair to object that the reach of the TCA in particular may leave localities with more room to maneuver than does the reach of RLUIPA, which may make these responses less than completely satisfying on their own. But a thought experiment with a hypothetical channeling RLUIPA that has a reach equal to or greater than the RLUIPA that exists today demonstrates that the degree of bias caused by RLUIPA is more attributable to its mechanism than to its reach.

Imagine that instead of the RLUIPA we have, Congress provided that a locality must convene a special Board of Religious Land Use Oversight to review the decisions of the ordinary zoning board, not only with respect to the land use denials that impose "substantial burdens" on religious exercise but also with respect to land use denials that impose any burden on religious exercise.<sup>181</sup> Imagine further that this Board would consist of community faith leaders selected by the local government across faiths for fixed terms.<sup>182</sup> And to make the federally required procedure really quite intrusive, this Board would have the unchecked authority to reverse by simple majority a denial decision from the regular zoning board with respect to religious land use requests. Everyone else would be stuck with the denials handed down by the regular authorities. This Board would,

---

179. Again, some have argued that the TCA violates the Tenth Amendment. *See supra* note 106 and accompanying text.

180. *See supra* notes 165–173.

181. To return to the simplified hypothetical from the Introduction, this channeling RLUIPA is equivalent to a federal law that would instruct localities to take certain deliberative steps before approving houses colored blue and purple. *See supra* page 713. The RLUIPA we have is equivalent to a federal law that instructs localities not to approve any blue houses.

182. I am not suggesting that faith leaders will necessarily be consciously biased in favor of religious land users, but rather that they can be expected to be relatively less unconsciously biased against religious land users, given their knowledge of those land users' needs. The same effect can be achieved with lay members that, through experience on the Board, develop similar knowledge that may mitigate unconscious biases they may have once held.

however, be bound by channeling rules similar to those set out in the TCA.<sup>183</sup> It would be required by federal law to hold hearings open to public participation and to make decisions within a reasonable timeframe. It would also be required to issue written decisions with reasons that are rooted in substantial evidence contained in a written record and that are made available “essentially contemporaneously” with the written denial.<sup>184</sup> And any person adversely affected by the Board’s decision would be permitted to commence within thirty days an expedited lawsuit in federal court.

Setting aside any Establishment Clause or other constitutional concerns about this particular Board,<sup>185</sup> the differential impact on local responsiveness as compared to the RLUIPA we have today is apparent. This decision-channeling framework would be even more far-reaching than RLUIPA because it would be triggered by land use denials that impose any burden on religious exercise, not just by those that impose substantial burdens. And yet, it would inject less systemic bias than would a decision-displacing nationalization. Rather than demand acquiescence to a particular class of claimant, this channeling rule would keep the locus of decisionmaking centered in the community and would create a site of community engagement and potential negotiation.<sup>186</sup> By creating a space for bargaining and accommodation that would bring more stakeholders to the table—or at least invite them to it—such a channeling rule could foster more nuanced, context-appropriate, and mutually beneficial outcomes than would a displacing rule, for all the reasons discussed above.

Moreover, even if the possibility of changed outcomes were very small, this shift would remain of central importance. While the channeling rule would still privilege a class of claimant, it would do so by fostering a local forum in which members of the community could be heard and in which the privileged land users would be obligated to make their cases and respond to concerns. In addition, the fact that the Board would need to be able to offer reasons backed by substantial evidence in a record would have a similar information-forcing effect. As a result of both, all interested

---

183. See 47 U.S.C. § 332(c)(7)(B)(ii)–(iii), (v); *supra* notes 108–109 and accompanying text.

184. *T-Mobile S., LLC v. City of Roswell*, 135 S. Ct. 808, 812 (2015).

185. After all, some have argued that RLUIPA already violates the Establishment Clause. See, e.g., Schragger, *supra* note 4, at 1846–47 (arguing that RLUIPA’s “sheer breadth” “raises significant Establishment Clause concerns”). *But see* *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (upholding the institutionalized persons portion of RLUIPA against a facial Establishment Clause challenge). That question is beyond the scope of this Article. This particular Board might also raise potential Tenth Amendment concerns or might even run afoul of some state laws. I bracket these concerns as well in this stylized example in order to focus on the channeling mechanism’s distinct implications for local democracy.

186. *Cf.* Schragger, *supra* note 4, at 1848 (criticizing RLUIPA because it “prevents the local negotiation of the religious–secular relationship, closing off the option for local communities to deal with religious conflict collectively and where it is likely taking place”).

parties would perceive that their views and information mattered and would develop better understandings of each other's needs and preferences. Moreover, the Board would be accountable to the voices of all citizens through both the elected officials who appoint the Board members and the Board's own reason-giving obligations—obligations that would be enforced by substantial evidence review in federal court. For these reasons, regardless of the frequency with which the Board might reach any particular outcome, we could expect to see more compliance, less damage to property values, and more satisfaction with local government.<sup>187</sup>

To be sure, whether because of its scope or its character, or both, this channeling RLUIPA might fail to harness some of the spillover benefits discussed above. It might even interfere with local responsiveness more than the TCA does, and its substantive reach might be troubling as a matter of policy for a number of reasons. But one could say the same about the RLUIPA we have. Instead, the important points are, first, that it would interfere with local responsiveness *less* than RLUIPA's displacing nationalization, and second, that it would hold out the prospect of triggering improvements in the functioning of local democracy.

### *B. Fiat and Incentive*

The second of the two mechanism dimensions is Congress's choice whether to implement a displacing or channeling restriction by fiat, as with RLUIPA and the TCA, or by incentive, as with spending programs like the CZMA or TEA-21. For reasons similar to those discussed with respect to why channeling biases local decisionmaking less than displacing does, incentives impose less bias than fiat does. Moreover, incentives can even enhance local participatory democracy.

First, offers of money in exchange for the adoption of federally preferred outcomes or decisionmaking processes do not dictate the adoption of either. Instead, the choice to adopt either one is left in the hands of the locality, and that is a choice about which people can make their various interests and views heard within whatever local democratic

---

187. One could imagine a similar revision of the decision-displacing FHA provision that prohibits land use decisions that have the effect of making housing unavailable on the basis of race or other protected criteria. *See supra* notes 137–139 and accompanying text. Instead, a federal statute might require localities to convene Boards of Fair Housing that would give the same protected classes special rights to access appellate procedures that require open hearings and written reasons supported by substantial evidence, all backed by review in federal court. As with RLUIPA, such a shift would offer greater protection to local democracy and might even enhance it. How to tell whether that preservation of local democracy might come at too great a cost to other values is explored in Part IV, *infra*.

access points exist in the community.<sup>188</sup> This desire to “direct development” in ways that minimize environmental harm while avoiding “federal displacement of local choices”<sup>189</sup> was, for example, part of why Congress chose the CZMA’s incentive mechanism. Moreover, by putting a concrete price on the decision, the very offer of federal money has the potential to catalyze or make more salient a local dialogue on the relevant land use issue. It may thus increase the level of democratic engagement surrounding that issue.<sup>190</sup>

Of course, this is not to say that the access points to participate in those local choices are always robust. If they are, then a noncoercive offer of federal money will tap into that local democracy and might make the community even more engaged with it. But if local democracy is otherwise closed to meaningful participation, the ability to choose whether to accept or reject the federal condition is unlikely to dramatically change those circumstances. In this way, conditional nationalization is, at worst, neutral in its effect on local democracy. Fiat nationalization, by contrast, has a far more damaging worst-case scenario. While it might improve local responsiveness if it takes the form of a channeling nationalization, it will actively harm local responsiveness if it takes the form of a displacing nationalization. Conditional nationalization, at a minimum, avoids these potential costs.

Second, conditional spending programs generally entail federal review of local activities to ensure that the federal money is being used in a manner consistent with the federal goal and with any other federal conditions. This sort of oversight serves a version of the role that reason-giving requirements can serve. As discussed above in the context of channeling nationalizations, such requirements improve decisionmaking by debiasing it and by forcing more metacognitive reflection.<sup>191</sup> Similarly, routine oversight “creates incentives for state and local officials to consider repercussions of their actions that might otherwise be neglected,” “deters sloppy work,” and “reduces the risk of corrupt or patronage-driven development projects.”<sup>192</sup> Where the condition is the adoption of a federal

---

188. See Buzbee, *supra* note 1, at 108–09 (“[S]tate and local governments remain the primary decisionmakers regarding land use . . . All conditional federal spending schemes leave state and local governments with greater locally sensitive discretion than would be the case with direct federal intervention.”); Ostrow, *Land Law*, *supra* note 1, at 1427 (“[W]hile conditional spending seeks to guide state and local decision making, the decision-making authority itself remains in the hands of local regulators.”).

189. Buzbee, *supra* note 1, at 111.

190. See *id.* at 121 (noting that federal dollars that come with a targeted purpose “provoke greater local political participation,” especially if they come with participation requirements).

191. See *supra* notes 165–173.

192. Buzbee, *supra* note 1, at 108; see *id.* at 114 (noting that conditional federal spending can “serve to encourage more open state, regional, and local planning processes” and can “modify[] what might otherwise be insulated or uninformed decisionmaking”).

decision, incentive-based implementation can thus buy some of the benefits of channeling even while taking the form of a displacing rule. Where the condition is itself about the manner in which subsequent decisions are reached, incentives can double down on those benefits.

Finally, while there is certainly a risk that the federal government's offer goes unaccepted—a concern that does not accompany fiat nationalization—conditional spending can nonetheless be an effective form of nationalization in the land use context.<sup>193</sup> For example, in the case of the CZMA, states have “responded enthusiastically, welcoming both federal support and national recognition of the need for comprehensive coastal management.”<sup>194</sup> Thirty-four out of thirty-five eligible states and territories participate in the CZMA and now have federally approved coastal management plans, along with the grant money that accompanies them.<sup>195</sup>

Adapting the fiat nationalizations discussed in this Article into incentive-based efforts would, aside from requiring the federal government to spend money, be relatively easy to imagine. The TCA's channeling mechanism is already quite good for local democracy, but one could imagine instead incentivizing the same decisionmaking architecture much in the way that the CZMA does—namely with an offer of funding to support the process and the development of cell tower infrastructure. Such an alteration to the statute would create a potential node of democratic engagement around the offer of funding and, if it were accepted, an additional layer of oversight that might further debias and improve local decisionmaking. As for RLUIPA, federal law could make a similar shift and instead hold out an offer of funding to support land use development that revolves around a local commitment not to impose substantial burdens on religious exercise in the absence of compelling reasons. Or it could even withhold other sources of federal money if localities make no such commitment, though withholding funding for a distinct federal program might raise concerns about unconstitutional coercion.<sup>196</sup> Assuming that those concerns were overcome, however, an incentive-based RLUIPA

---

193. Indeed, some have raised the concern that incentive nationalizations like the Clean Air Act may be *too* effective, to the point of unconstitutional coercion. See Jonathan H. Adler, *Judicial Federalism and the Future of Federal Environmental Regulation*, 90 IOWA L. REV. 377, 436–37 (2005).

194. Ryan, *supra* note 130, at 59.

195. See *Coastal Zone Management Programs*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. OFFICE FOR COASTAL MGMT., <https://coast.noaa.gov/czm/mystate/>. Illinois is the newest participant, with its plan gaining approval in 2012. *Id.* Alaska had a plan but withdrew from the program in 2011. *Id.*

196. See *supra* notes 126–127 and accompanying text. Either of these approaches might also raise a variety of Establishment Clause concerns, but as noted above, see *supra* note 185 and accompanying text, I bracket those concerns here. RLUIPA happens to be a land use statute that, because of its subject matter, has potential Establishment Clause implications, but this discussion about the implications of legislative design choices is distinct from the subject matter of particular statutes.

would improve on the existing fiat RLUIPA by making local participation in the scheme a matter of local democratic policymaking.

\* \* \*

In terms of both the displacing-versus-channeling choice and the fiat-versus-incentive choice, it is apparent that not all land use nationalization is equally bad for local democracy. The following chart summarizes—even if only somewhat crudely—the statutory designs that pose the greatest threat to local democracy (indicated with an “X”) and those that are less worrisome (indicated with a check mark).<sup>197</sup>

	<b>Displacing</b>	<b>Channeling</b>
<b>Fiat</b>	X	✓
<b>Incentive</b>	✓	✓

Contrary to the more bleak impression that pervades the discourse, much land use nationalization of the channeling or incentive-based type can actually advance local responsiveness by decreasing bias in decisionmaking processes, creating spaces for bargaining and participation, and making meaningful use of community knowledge. There is therefore not only good reason not to fear these mechanisms, but good reason to embrace them.

The responsiveness costs that ought to be a source of concern instead come chiefly from a specific type of land use nationalization: displacing fiat nationalization. It is plainly true that this category of nationalization injects substantial structural bias into the operations of local land use decisionmaking and reduces the impact of community knowledge. With respect to this brand of national action, then, the literature is correct to worry about the costs to local democracy.

---

197. In offering this depiction, I do not mean to suggest that these design choices are completely binary or that the lines between these boxes are always crisp. For example, some channeling mechanisms could leave localities more room to maneuver than others. To some degree, the latter may operate more like displacing mechanisms. *See infra* notes 209–211 and accompanying text (making same observation); *supra* note 141 (discussing Clean Air Act).

## IV. WEIGHING LOCAL DEMOCRATIC COST

Having concluded that the threat to local democracy from land use nationalization lies primarily with displacing restrictions imposed by fiat, the next question is whether and when achieving a national land use goal in that way—in other words, entering the box in the upper-left corner of the chart depicted above—may be worth the costs.<sup>198</sup> After all, while advancing or protecting local democracy is crucially important for all of the reasons discussed in Part I, it is not the only value at stake. The degree to which the substance of the federal goal may be achieved—whether market-regulating or rights-protecting—is without a doubt relevant as well.

In light of the foregoing analysis, displacing fiat nationalization ought to be employed—and these local democratic costs accordingly incurred—only where alternative mechanisms will not effectively achieve the national goal. In nearly all circumstances, displacing fiat nationalization may more swiftly and assuredly fulfill the national land use goal, but it will do so at great cost to important values shared by people and localities—and with concrete consequences like disillusionment, backlash, and so on. The TCA, CZMA, TEA-21, Housing Act, and others demonstrate that channeling rules and incentive schemes hold out the promise of offering the same bang for the federal government's buck in terms of correcting the trajectory of a locality's land use decisionmaking. And they do so not only with fewer collateral consequences, but with substantial positive spillover effects as well.

Of course, it is impossible to offer a complete account of the circumstances in which channeling and incentive mechanisms will effectively achieve national goals. Knowing whether a particular goal can be achieved at lower responsiveness costs will necessarily turn on evidence offered in the context of specific problems Congress aims to solve. With its attention properly focused on its full set of options, and with the costs of each more completely understood, Congress should seek out precisely this kind of information in hearings and as it considers land use legislation.

But even while recognizing the necessarily context-specific nature of the question, it is possible to sketch a general understanding of the categories of national action for which responsiveness costs may be necessary evils that ought to be subordinated to national land use policy goals. As a first cut, displacing fiat nationalization, costs and all, is more likely to be appropriate with respect to rights-based nationalizations than

---

198. See, e.g., Richard Briffault, "What About the 'Ism'?" *Normative and Formal Concerns in Contemporary Federalism*, 47 VAND. L. REV. 1303, 1319–20 (1994) (observing that the values of federalism and local democracy may clash with both market-regulating and rights-protecting efforts).

with respect to market-regulating ones.<sup>199</sup> This is the case because the effective protection of rights, by its very nature, often requires the imposition of at least some local democratic costs. After all, constitutional rights are *meant* to be “trumps” that are not simply left to the whims of democratic politics.<sup>200</sup> To say that local democratic costs are sometimes incurred in the course of protecting rights is essentially to describe what it means for something to be a constitutional right: the protection and enforcement of such rights may well mean limiting the choices (or reasons for choices) available to democratic government. Similarly, the explicit and direct enforcement of rights also has an expressive purpose. The federal government can send a very powerful signal that a right is worthy of great respect by demanding such respect—without any variation—through displacing fiat nationalization.<sup>201</sup> Sending such a signal can be considered part of the national goal. Accordingly, even assuming that channeling or incentives could equally achieve the concrete rights-protecting aim, such a mechanism might sacrifice at least some of the messaging quality that displacing fiat rights enforcement can offer.

By contrast, the interests at play with respect to land use statutes that regulate markets are qualitatively distinct. Such policy aims are supposed to be the *result* of the democratic process, and *subject to* the qualities and commitments protected and expressed by rights. Whereas constitutional rights can coherently be elevated above the local democratic process without entirely betraying local democracy, the same cannot be said for these kinds of policy priorities. Put another way, while imposing costs on

---

199. There are no doubt instances of market regulation in the land use context that might also be motivated by the protection of constitutional rights like those guaranteed by the Takings Clause. While these boundary cases might be closer calls, their roots in constitutional guarantees generally make them more similar to rights-protecting nationalizations than to market-regulating nationalizations, for the reasons discussed below.

200. I borrow here the Dworkinian language of rights as trumps. See RONALD DWORKIN, *TAKINGS RIGHTS SERIOUSLY* xi (1977). In so doing, I do not mean to adopt the broadest, and most criticized, conception that rights are trumps in the sense that they always overcome the collective will. See, e.g., Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 729 (1998) (offering the critique that “governments can infringe even the most fundamental rights if its justifications” satisfy strict scrutiny); Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 301, 306 n.22 (2000) (collecting sources). Rather, because I simply mean to distinguish rights from policy preferences, it is sufficient here to invoke the narrower view that rights are distinct from the kinds of interests that can be “balanced away at the majority’s discretion” in the course of ordinary democratic politics. Linda McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989, 1045 (1994) (discussing Dworkin’s theory). In other words, constitutional rights have the potential to supersede the preferences of political majorities and to therefore operate upon, rather than within, the democratic process. See Waldron, *supra*, at 302 (“[T]he function of rights is to preclude governmental actions motivated by reasons that denigrate or express contempt for certain members or sections of the community.”).

201. See Howard, *supra* note 48, at 22 (“The idea of justice connotes consistency in the law, the notion that all citizens should enjoy the same rights.”); Waldron, *supra* note 200, at 305 (noting “the partly expressive and symbolic character of rights”).



local democracy in service of constitutional rights reflects the purpose of constitutional rights, doing so in service of market regulation has no such justification. Indeed, affording national regulatory policy aims the same trump-like status as rights would have no limiting principle: there would be no reason to permit any local variation or local participation at all.

More concretely, rights-protecting aims come with two significant limitations on Congress's ability to impose on localities. The first is that the Fourteenth Amendment's text provides that the set of rights that Congress may vindicate is closed and limited to those set out in the Constitution.<sup>202</sup> The second is that the Supreme Court has circumscribed Congress's authority to protect that closed set of rights by requiring that Congress's efforts be "congruen[t] and proportional[]" to "the injury to be prevented or remedied."<sup>203</sup> As a result, accepting the imposition of the responsiveness costs that come with displacing fiat nationalization in the context of the protection of rights is to accept them with respect to an inherently narrow range of possible action. This ensures that they will be incurred with relative rarity.

If one were to accept those costs with respect to market-regulating policy aims, by contrast, there would be little such limitation. The set of aims Congress may pursue under its Commerce Clause power is "expansive," and the means available to Congress are not limited by any sort of proportionality test.<sup>204</sup> Moreover, the process of determining those policy priorities is ill-suited to identifying the biases that are worth correcting—or deploying as trumps—withstanding the costs for local democracy because it is driven by interest groups acting within the political system itself. It may be a process well suited to identifying biases that a particular political coalition would like to alter, but that coalition cannot be expected to account for the local democratic costs of its preferences. With respect to rights, by contrast, the work of identifying the biases that may be worth correcting even at great cost for local democracy has already been done by the Constitution itself.

At most, then, the set of national land use goals for which the responsiveness costs of displacing fiat nationalization might be acceptable are more likely to be those on the rights-protecting side of the ledger. Insofar as RLUIPA is designed to protect rights, it is therefore plausible

---

202. U.S. CONST. amend. XIV, § 5.

203. *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

204. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2586 (2012) (opinion of Roberts, C.J.). While the Court's fractured decision in *NFIB* stands for some limitation on Congress's Commerce Clause authority, no Justice disputed that "Congress has broad authority under the Clause," which embraces activities that have a "substantial effect" on interstate commerce and even those that do so only "when aggregated with similar activities of others." *Id.* at 2585–86 (quoting *United States v. Darby*, 312 U.S. 110, 119 (1941)); *see id.* at 2616 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part); *id.* at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

that the fact that it is a displacing fiat nationalization with costs for local democracy might be justified.<sup>205</sup> Market regulation is qualitatively distinct, however, and accepting the costs of displacing fiat nationalization for that kind of policy goal lacks either the theoretical or doctrinal limitations that attend rights-protecting legislation. A decision-displacing TCA would therefore be very difficult to defend.

But just because a decision-displacing land use statute like RLUIPA might be justified because it is meant to protect rights does not mean that displacement is the only, or even optimal, mechanism by which to do so. Indeed, not all rights-based land use nationalizations necessarily require that degree of imposition on local democracy. As Part I.B discussed, decisionmaking biases that might result in local rights violations exist in two forms: conscious biases and, perhaps more innocent, structural biases.<sup>206</sup> The promise of channeling is quite compelling with respect to the latter because structural biases result from incomplete information or inadequately thoughtful deliberation. When rights are locally underprotected as a result of this kind of systemic failure, reason-giving requirements are likely to offer an adequate solution that harnesses and improves, rather than overrides, local democracy.<sup>207</sup> By contrast, when rights are underprotected as a result of deeply entrenched, conscious biases against a particular group, the promise of reason-giving and deliberation is at its lowest ebb. After all, a decision maker knowingly committed to harming or underserving a particular group may simply go through the motions, or even lie about his or her reasons, when confronted with a reason-giving obligation. If local democracy is so malicious, rather than merely broken, then it may be necessary to put a stop to that malice by imposing a displacing rule by fiat, notwithstanding the responsiveness costs.<sup>208</sup>

Even in the case of conscious bias, however—the case in which siding with rights over democracy is the strongest—Congress may still be able to avoid the tradeoff. Though this Article’s discussion of legislative design choice draws a sharp distinction between decision-displacement and decision-channeling,<sup>209</sup> there are a range of channeling mechanisms, and some of them fall much closer to the displacing end of the spectrum. For

---

205. The same might be said about the FHA. *See supra* note 187.

206. *See supra* Part I.B.

207. *See supra* Part III.A.

208. *See* Komesar, *A Job for the Judges*, *supra* note 64, at 711–12 (discussing potential for “counterbias” in such cases). Indeed, identifying the need for counterbias is already part of the thought process required by the congruent-and-proportional test set out in *City of Boerne’s* interpretation of Section Five of the Fourteenth Amendment. *See supra* notes 88–89 and accompanying text. While that test does not explicitly incorporate the consideration of local democratic cost, the proportionality requirement is quite amenable to it.

209. *See supra* Part II.B.

example, one-sided veto rights or supermajority voting requirements are not entirely displacing because they do not dictate outcomes in particular cases and instead “regulate only the manner of determining” outcomes,<sup>210</sup> but neither are they as outcome-neutral as reason-giving requirements. They can therefore tilt the scales much more substantially in favor of a particular group while still leaving a role for local democracy that is more robust than what displacing nationalizations permit. After all, giving a particular group a veto still provides space for bargaining, logrolling, and the rest of the democratic process to play out as others try to shape decisions to avoid the veto, even as it puts that protected group in control. The hypothetical Board of Religious Land Use Oversight I offered as a replacement for RLUIPA is another example of a mechanism that is channeling in nature but that is strongly tilted in favor of a particular group.<sup>211</sup> By employing these sorts of approaches, a Congress that wishes to protect a particular right from conscious violation in the context of local land use decisionmaking might be able to achieve its ends without resorting to displacing fiat legislation.

In short, the set of circumstances in which the costs of displacing fiat nationalization may be truly necessary evils in the context of land use policy is small and limited to particularly stubborn, conscious biases that result in rights violations at the local level. But even that case is not immune from the broader lesson: Policy makers must recognize the full set of mechanisms at their disposal and carefully consider the full range of local democratic costs before they resort to a decision-displacing fiat mechanism in service of a national land use goal.

#### CONCLUSION

The prospect of nationalization is often characterized as a threat to local democracy and the important values it represents. But it is fair to say that local control has a dark side too. Localities labor under substantial pressures to prioritize parochial interests at the expense of regional and national goals, and history is marked with shameful episodes of systematic rights violations perpetrated by local governments. It is indeed a simple statement of fact that the protection of constitutional rights and the orderly functioning of nationwide markets may sometimes call for national intervention. And particularly when local government is poisoned by deeply entrenched and conscious biases against the exercise of constitutional rights, the national government may be justified in displacing local decisionmaking and imposing its own outcomes.

---

210. *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis omitted).

211. *See supra* notes 181–187 and accompanying text.

Short of such extreme circumstances, however, acting nationally need not mean choosing national control over local control. This is a false choice. Nationalization can take many forms, and nearly all of them impose minimal costs on local democracy. Whether addressing market failures or remedying rights violations that result from structural biases, decision-channeling rules and incentive-based programs offer Congress the ability to achieve its ends while preserving at the local level a real role for community knowledge and meaningful opportunities for voice and access. Indeed, these mechanisms can actually improve local democracy by harnessing community knowledge, catalyzing participation, and debiasing local government decisionmaking. Nationalization thus has the potential both to achieve its goals and to generate positive spillovers for localities and citizens' relationships with them.

Policy makers and scholars therefore both ought to reassess Congress's efforts at nationalization. In the land use context, Congress deserves more credit than it is often given for its frequent use of channeling and incentive mechanisms. With respect to statutes like RLUIPA, however, Congress ought to reconsider its foray into displacing local land use decisionmaking and explore whether alternative mechanisms might better protect the values of local control while offering equally effective protection of the rights at issue. These insights need not stop at land use and zoning, either. From environmental regulation to infrastructure development, and from education policy to drug laws, more attention ought to be given to the promise of channeling and of incentives to offer at once the best of federalism and of nationalism.