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Breaking Up Payday: Anti-agglomeration Zoning and Consumer Welfare

SHEILA R. FOSTER*

In the last decade, dozens of local governments have enacted zoning ordinances designed to limit the concentration of payday lenders and other alternative financial services providers (AFSPs), such as check-cashing businesses and auto title loan shops, in their communities. The main impetus for these ordinances is to shield economically vulnerable residents from the industry's lending practices in the absence of sufficiently aggressive federal and state consumer protection regulation.

This Article casts considerable doubt on whether zoning is the appropriate regulatory tool to achieve the consumer protection and welfare goals animating these ordinances. The author's analysis of the aftermath of payday-lending zoning restrictions in one state demonstrates that while such laws may play a role in reducing the number of payday lenders in the immediate urban area, they do not shield consumers from these lenders altogether. Further, the economic literature on agglomeration economies suggests that there are costs to consumer welfare from limiting or breaking up retail agglomerations. Such "anti-agglomeration" zoning restrictions can prevent consumers from capturing the benefits of the price and product competition that result from retail agglomerations.

This Article concludes that if the main impetus behind anti-agglomeration zoning measures is to protect local residents from the high interest rates and loan terms associated with the payday-lending industry, it might be that these measures are working against their intended purpose and actually harming consumers who lack viable financial services alternatives. As such, in weighing the costs and benefits of payday-lender agglomeration, lawmakers should consider more carefully the effects of anti-agglomeration zoning measures on consumer welfare.

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I. INTRODUCTION

In the last decade, dozens of local governments have enacted zoning ordinances designed to limit the concentration of payday lenders and similar "alternative financial services providers" (AFSPs), such as check-cashing businesses and auto title loan shops, in their communities.[1] Advocates of these local laws contend that payday lending and similar businesses have been proliferating at a rate that is troubling.[2] In some communities, these businesses are more ubiquitous than Starbucks coffee shops and McDonald's restaurants.[3] The ubiquity of payday lenders in certain communities is due, some argue, to a "spatial void" left by more traditional lenders that have decamped from many middle-class and low-income communities in significant numbers.[4] Largely because of their high fees and controversial loan-rollover practices, payday loans are said to trap consumers in a cycle of debt and dependency from which it is difficult to emerge.[5]

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[1] *See infra* Part II.C.3.

[2] Several states prohibit outright the operation of payday-lending establishments, while others impose usury limits on consumer loans, which effectively prohibit payday lending in the state. Thirty-eight states, however, specifically authorize payday lenders to operate within certain defined limits. It is in many of these states where local governments have been the most active in regulating payday lenders through land-use laws. *See infra* Part II.C.2.

[3] *See, e.g.*, Leah A. Plunkett & Ana Lucía Hurtado, *Small-Dollar Loans, Big Problems: How States Protect Consumers from Abuses and How the Federal Government Can Help*, 44 SUFFOLK U. L. REV. 31, 31 (2011).

[4] *See* discussion *infra* Part II.B.

[5] *See* CONSUMER FIN. PROT. BUREAU, PAYDAY LOANS AND DEPOSIT ADVANCE PRODUCTS: A WHITE PAPER OF INITIAL DATA FINDINGS 4 (2013) [hereinafter CFPB WHITE PAPER], *available at* http://files.consumerfinance.gov/f/201304_cfpb_payday-dap-white

Although the empirical evidence on the consumer-welfare impacts of payday lending is mixed,[6] many local governments are convinced that payday lenders do more harm than good in their communities. As such, recently passed zoning ordinances are designed to break up existing payday-lender agglomeration and to curb the concentration of new payday lenders.[7] They do so by prohibiting the location of any new payday-lending business within close distance of another payday lender and often within close distance of residential zones, schools, parks, or major throughways.[8] This Article introduces the concept of "anti-agglomeration" zoning to highlight and explore the benefits and costs of zoning restrictions designed to de-concentrate payday lenders as a putative means of protecting consumers from this industry.

Local governments have broad authority to regulate the location and operation of payday lenders within their borders. The Supreme Court's opinion in *Village of Euclid, Ohio v. Ambler Realty Co.* established the general principle that zoning restrictions can legitimately be designed to protect the public safety, health, and welfare of residents.[9] This "public welfare" justification is broad enough to impose few limits on a local government's zoning authority,

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paper.pdf ("A primary focus is on what we term 'sustained use'—the long-term use of a short-term high-cost product evidenced by a pattern of repeatedly rolling over or consistently re-borrowing, resulting in the consumer incurring a high level of accumulated fees."). Payday lenders contend, however, that high fees and interest rates are justified by the high risks associated with the borrowers to whom they cater. These borrowers have lower incomes, fewer assets, often bad or no credit histories, and may change residences quite frequently. As such, loan losses and fixed operating costs may justify the rates charged by payday lenders. *See generally* Aaron Huckstep, *Payday Lending: Do Outrageous Prices Necessarily Mean Outrageous Profits?*, 12 FORDHAM J. CORP. & FIN. L. 203 (2007); Mark Flannery & Katherine Samolyk, *Payday Lending: Do the Costs Justify the Price?* (FDIC Ctr. for Fin. Research, Working Paper No. 2005-09, 2005), *available at* http://www.fdic.gov/bank/analytical/cfr/2005/wp2005/CFRWP_2005-09_Flannery_Samolyk.pdf; Paige Skiba & Jeremy Tobacman, The Profitability of Payday Loans (Dec. 10, 2007) (unpublished manuscript), *available at* http://www.cpla-acps.ca/english/reports/Vanderbilt%20Oxford%20profitability%20study%2012%2010%202007.pdf. This debate is beyond the scope of the Article. The point that this Article will engage is whether usury and other consumer protection laws are the more appropriate regulatory mechanism than are land-use laws for controlling the relationship between lender risk and consumer protection.

[6] *See infra* Part II.A.

[7] *See generally* Christopher L. Peterson, *"Warning: Predatory Lender"—A Proposal for Candid Predatory Small Loan Ordinances*, 69 WASH. & LEE L. REV. 893 (2012).

[8] These laws are aimed both at preventing the concentration, or agglomeration, of payday lenders in commercial zones, and at limiting their agglomeration within the municipality itself. *See infra* Part III.A. For those payday businesses that already exist within these localities, these laws prevent them from expanding at their current location and restrict how they operate their businesses. *See infra* Part III.A. Other laws prevent, or make it very difficult, for new payday lenders to locate in areas where previous payday lenders were located. *See infra* Part III.A.

[9] Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 395 (1926) (requiring a "substantial relation[ship]" between the zoning mechanism and the public health, safety, morals, or general welfare of the citizenry the local government is trying to protect).

particularly the authority to exclude, separate, or limit particular types of land uses deemed harmful in some way to the local community.[10] As land-use scholars have pointed out, local governments have long limited the siting and concentration of "controversial" retail commercial establishments—including tattoo shops, marijuana-dispensing facilities, pawn shops, and adult businesses—to protect their residents and community character from the negative spillovers associated with these land uses.[11] Although the primary impetus motivating many of these ordinances is to shield economically vulnerable residents from payday lenders,[12] there is little doubt these ordinances fall within the broad "public welfare" rationale of *Euclid.*

The legality of payday zoning regulations, however, raises the underlying question of the relationship between land-use controls and consumer protection,

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[10] *See, e.g.*, Vill. of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (declaring that zoning power could be used to create a "quiet place where yards are wide, people few, and motor vehicles restricted . . . . to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people"); Berman v. Parker, 348 U.S. 26, 33 (1954) (holding that values that represent public welfare include the "spiritual as well as [the] physical, aesthetic as well as monetary").

[11] *See, e.g.*, Patricia Salkin, *Regulating Controversial Land Uses*, 39 REAL EST. L.J. 526, 526 (2011) (noting that "controversial" land uses are often subject to strict zoning constraints because they are aesthetically undesirable, generate undesirable traffic or noise, threaten to decrease surrounding property values, or are bad for existing businesses because they drive away patrons from commercial areas).

[12] Concerns about secondary negative effects of payday-lender concentration are also often cited as a reason for these zoning ordinances. *See infra* Part V.B. However, it is clear from the legislative findings, public debates, and local media coverage that many of these zoning ordinances are primarily motivated by a concern for the financial security of local residents and a desire to protect economically vulnerable populations from payday lenders. *See, e.g.*, Holly Heinrich, *Texas Cities Take Action To Regulate Payday Lenders*, TEX. TRIB. (May 3, 2012), http://www.texastribune.org/2012/05/03/faced-city-ordinances-payday-lobbies-reappear/ (noting that these ordinances come on the heels of state consumer protection laws which some city councils felt were not comprehensive enough); OVERLAND PARK, KAN., MUNICIPAL CODE tit. 5, ch. 5.72, § 5.72.010 (2007), *available at* http://www.opkansas.org/wp-content/uploads/downloads/572-Payday-and-Title-Loan-Businesses.pdf (legislative findings indicate that "[t]hese businesses should be regulated . . . because certain payday and title loan lending practices have proven detrimental to the financial security of individuals and families residing in the City," and their lending practices "often have an unreasonably adverse effect upon the elderly, the economically disadvantaged and other residents of the City"); GLADSTONE, MO., ORDINANCE NO. 4.036 (2007), *available at* http://www.gladstone.mo.us/documents/ordinances/payday_loan_zoning/PaydayloanZoningOrdinance.pdf (purpose of ordinance is to reduce the clustering of payday lenders in part because they have been found to "adversely [a]ffect some segments of society, such as the elderly, and military personnel, and are viewed as creating burdensome financial strain on the lower and lower-middle class populations within local communities"); *PUBLIC HEARING: Consideration of a Proposed Ordinance Amending Title 5 of the Logan Municipal Code Placing Density Limitations on Non-depository Financial Institutions Adding Sections 5.19.010 and 5.19.020–09-39* (Utah 2009), *available at* http://www.loganutah.org/City%20Council/Minutes/2009/May19.pdf (councilmember statement that it is the government's task to protect "the disadvantaged" and "the impoverished" from payday-lending companies).

or welfare.[13] This Article explores that relationship and questions whether the regulation of payday lenders through zoning restrictions is the best way to achieve the consumer-welfare goals animating these laws. Land-use scholars have long posited a relationship between zoning and consumer welfare by recognizing the ways that zoning protects homeowners from declining home values.[14] Zoning that separates or excludes less desirable land uses (and less desirable residents)[15] from residential neighborhoods also protects a homeowner's consumer surplus—i.e., the value placed on the home that lies above and beyond its market value.[16]

The flip side of exclusionary zoning, however, is *concentration*. Classic Euclidean zoning not only separates and excludes incompatible land uses from residential areas, but also forces together compatible land uses into their own

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[13] Although the Article uses the terms "consumer welfare" and "consumer protection" sometimes interchangeably, it acknowledges that the terms speak to distinct sets of concerns. Consumer welfare refers to the benefits derived from the consumption of a good or service, as compared to the costs of that consumption. Consumer welfare might be measured by individual preferences for a good or service or the overall net benefits of consumption of that good or service. *See, e.g.*, *Glossary of Statistical Terms*, ORG. FOR ECON. CO-OPERATION & DEV. (OECD), http://stats.oecd.org/glossary/detail.asp?ID=3177 (last updated Mar. 15, 2002). Consumer protection, on the other hand, typically refers to the methods employed to ensure the rights of consumers by guaranteeing that producers and suppliers efficiently respond to meet consumers' stable preferences. *See, e.g.*, COLIN SCOTT & JULIA BLACK, CRANSTON'S CONSUMERS AND THE LAW 1 (William Twining & Christopher McCrudden eds., 3d ed. 2000).

[14] As William Fischel argues in his work, zoning restrictions became increasingly ubiquitous and exclusionary over time because homeowners had no effective means of insuring assets against the threat of nonconforming uses and against value-reducing development brought on by improved transportation means. William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 URB. STUD. 317, 321–23 (2004); *see also* Daniel P. McMillen & John F. McDonald, *Land Values in a Newly Zoned City*, 84 REV. ECON. & STAT. 62, 62 (2002) (finding, after controlling for initial land use and the endogeneity of zoning decisions, that residential zoning led to higher land value growth rates than commercial zoning).

[15] Zoning that excludes those unable to pay the level of local property taxes that support the kind of public goods that the community prefers is referred to as "fiscal zoning." *See, e.g.*, Edwin S. Mills & Wallace E. Oates, *The Theory of Local Public Services and Finance: Its Relevance to Urban Fiscal and Zoning Behavior*, *in* FISCAL ZONING AND LAND USE CONTROLS: THE ECONOMIC ISSUES 1, 6–11 (Edwin S. Mills & Wallace E. Oates eds., 1975).

[16] As Bradley Karkkainen has argued, this consumer surplus is protected through the exclusion from the neighborhood "commons" of land uses inconsistent with its "character." Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 68 (1994). To the extent that the "character" of the neighborhood is capitalized in the market value of individual parcels, protecting the collective resources of the community is another way that Euclidean zoning adds to and protects home values. *Id.* at 68–70. Thus, a purchaser of residential property in an urban neighborhood buys not only a particular parcel of real estate, but also a share in the "neighborhood commons." *Id.* ("Typically, differences in the neighborhood commons may be as crucial to a decision to purchase as differences in individual parcels.").

zones—e.g., commercial and industrial zones.[17] This is why payday lenders and other AFSPs are typically located in retail-zone clusters, usually strip malls or heavily traveled commercial thoroughfares, as either stand-alone storefronts or co-operating with another retail business.[18] Moreover, just as exclusion can generate both positive and negative "spillovers" well beyond the boundaries of a particular piece of property,[19] so too can concentration generate negative and positive spillovers. While land-use law and scholarship are accustomed to the "negative externalities" that result from the concentration of certain industrial or commercial land uses,[20] the positive benefits of such concentration have been largely ignored.[21]

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[17] Commercial zones, for example, force various kinds of shops, restaurants, entertainment facilities, and office buildings to locate together.

[18] *See Advance America Cash Centers*, PAYDAY LOAN FACTS, http://www.paydayloanfacts.com/the-brands-of-payday/advance-america-cash-centers/ (last visited Jan. 7, 2014) (describing the business practices of the largest store-based payday-loan chain); *see also* KELLY GRIFFITH ET AL., CONTROLLING THE GROWTH OF PAYDAY LENDING THROUGH LOCAL ORDINANCES AND RESOLUTIONS 3–8 (2007), *available at* http://www.consumerfed.org/pdfs/Resources.PDL.LocalOrdinanceManual11.13.12.pdf.

[19] *See* LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES 2–4 (2009). One of the main critiques of Euclidean zoning is that its exclusionary tendencies fall too easily into the trap of excluding classes of people, such as the poor, and not just classes of land uses from suburban communities:

> Once exclusion for the benefit of a favored class of property owners was sanctioned as the raison d'être of zoning, the benefits of municipal incorporation became irresistible. . . . Virtually every state in the nation has conferred upon its citizens the right to incorporate a new municipality; to be immune from annexation by the central city; to engage in exclusionary zoning that creates expensive havens of single-family homes devoid of any modest housing; to legislate, tax local property, and provide services solely in the interests of their local residents; in short, to be utterly self-interested in defining borders and policies that usually result in race and class divisions.

SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 108 (2004).

[20] Indeed, an anti-nuisance rationale is built into the framework of Euclidean zoning. In his opinion in *Euclid*, Justice Sutherland explicitly referred to the law of nuisance to justify the scope of power that localities have to segregate particular types of land uses that are "offensive and dangerous." Vill. of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 387–89 (1926); *see also* Case Comment, *Zoning and the Law of Nuisance*, 29 FORDHAM L. REV. 749, 750–51 (1961). Industrial land uses, for instance, are set apart from residential uses to avoid harm to nearby property and persons. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 693 (1973) ("Where a noxious use is permitted, planning officials generally try to place it adjacent to activities not particularly vulnerable to the type of harm caused by that use. For example, most zoning ordinances cluster industrial uses, often placing the cluster adjacent to railroad tracks.").

[21] A notable exception is a recent article by Gideon Parchomovsky and Peter Siegelman, discussed *infra* in Part IV.C. *See* Gideon Parchomovsky & Peter Siegelman, *Cities, Property, and Positive Externalities*, 54 WM. & MARY L. REV. 211, 246–60 (2012).

As economists have written in extensive literature on agglomeration economies, the spatial concentration of certain industries can give rise to economies of scale, which result in supply- and demand-side "positive agglomeration externalities."[22] These benefits can be captured on the supply side by retail firms that concentrate in commercial zone clusters and on the demand side by both firms and retail consumers engaged in comparison shopping. Zoning restrictions that force firms to locate close to their rivals—i.e., to agglomerate—can generate demand-side benefits for consumers by reducing their search costs and incentivizing firms to compete on price and greater product and format variety.[23]

This Article extends the link between zoning and retail firm proximity one step further to argue that zoning restrictions, which limit or prevent firm agglomeration, can increase search costs and reduce the incentives for competition between retail firms. As such, zoning limitations on retail firm proximity can frustrate the internalization of positive externalities not just by firms, as legal scholars have argued,[24] but also by retail consumers. This Article posits that zoning, which restricts firm location and density, risks depriving consumers of the agglomeration benefits that competition between proximate firms can provide.

If the primary impetus behind anti-agglomeration zoning measures is to protect local residents from the lending practices associated with the payday-lending industry, and therefore to improve consumer welfare, it might be that these measures are working against their intended purpose. This is particularly so if the competition that results from firm agglomeration would benefit consumers in the absence of more stringent federal or state financial regulation. That is, if market competition has the potential to discipline lenders through agglomeration economies, then anti-agglomerative measures might be harming consumers who lack viable financial services alternatives. This is not to say that zoning controls cannot play a role in striking the right balance between reducing or limiting the negative externalities that might be associated with some kinds of retail agglomerations and the positive benefits that such agglomerations generate, especially for consumers.[25] Rather, the anti-agglomeration zoning ordinances at issue in this Article seem to be concerned with the former but completely ignore the latter.

The Article proceeds as follows. Part II examines the link between payday lending and consumer welfare and argues that land-use ordinances aimed at regulating the payday industry are an attempt, in part, to fill a spatial and regulatory void that has resulted in the proliferation of payday lenders in certain

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[22] *See infra* Part IV.A.

[23] *See infra* Part IV.B.

[24] Daniel B. Rodriguez & David Schleicher, *The Location Market*, 19 GEO. MASON L. REV. 637, 646 (2012) (arguing that zoning limitations on commercial development are a supply-side restriction, making it difficult for firms to capture the positive spillovers from close proximity).

[25] *See infra* Parts IV–V.

communities. Part III begins to explore the anti-agglomerative character of recently enacted payday-lender zoning restrictions through an analysis of data on the location of payday lenders in California localities before and after the passage of payday zoning ordinances. Based on this brief study, this Part concludes that anti-agglomeration zoning laws are unlikely to protect or shield consumers from payday lenders even if they are successful in reducing the concentration of such lenders in a given municipality.

Part IV then considers whether breaking up payday agglomerations has implications for consumer welfare. This Part considers the literature on retail agglomerations, zoning, and competition. There is evidence that, by concentrating retail firms closely together, restrictive zoning controls can increase the degree of competition between firms and that this competition has direct and positive payoffs for consumers in the form of increased product and service variety and decreased prices for similar products and services. Based on this literature, Part V argues that zoning restrictions that make it difficult for payday lenders and other AFSPs to form retail agglomerations are likely to have a negative effect on consumer welfare. The potential cost to consumer welfare of breaking up payday agglomerations thus should be weighed against whatever benefits there are to avoiding potentially negative spillovers from those agglomerations.

II. CONTROLLING PAYDAY

Local land-use regulation of the payday-lending industry occurs against the backdrop of a spatial and regulatory void that has allowed these businesses to proliferate in certain communities. The empirical evidence suggests that the spatial concentration of payday lenders is, at least in part, the result of the lack of a robust presence of more traditional lenders in some communities, in addition to the barriers to traditional lending faced by many in these communities. Moreover, the lack of a stronger federal and state role in regulating the payday-lending industry has created what might be characterized as a regulatory gap, into which local governments have stepped.

A. *The Benefits and Costs of Payday Lending*

Payday loans are short-term cash given to borrowers in exchange for a personal check (or, in some instances, borrowers sign over electronic access to their checking accounts), which is held by the lender until a date in the future, usually the borrower's next payday.[26] The lenders charge a percentage fee up front (e.g., twelve percent) on the amount borrowed. Some fees can add up to an

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[26] *Consumer Information—Payday Loans*, FED. TRADE COMMISSION (Mar. 2008), http://www.consumer.ftc.gov/articles/0097-payday-loans. Payday-loan customers are required to have a bank account and a job or other source of income. *See id.*

annual percentage rate (APR) of interest in excess of 400 percent.[27] Many borrowers will also renew the loans several times before they are able to pay the principal in full. Several studies suggest that the survival of the payday-lending industry depends on a business model of "chronic borrowing."[28]

Yet, it is also the case that access to quick cash, even at high interest rates, can prevent the economically vulnerable from falling further behind.[29] Studies show that most payday-loan borrowers have incomes between $15,000 and $50,000.[30] Payday-loan consumers generally suffer from liquidity and credit constraints and turn to these products when they encounter a financial emergency and perceive their alternatives to be limited.[31] For both local policymakers and researchers, one of the fundamental questions is whether the fees and short-term repayment terms for payday loans help borrowers who are experiencing financial hardship or lead them into even worse long-term

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[27] *See, e.g.*, Kelly D. Edmiston, *Could Restrictions on Payday Lending Hurt Consumers?*, FED. RES. BANK KAN. CITY ECON. REV., First Qtr. 2011, at 63, 63–65, *available at* http://kc.frb.org/publicat/econrev/pdf/11q1Edmiston.pdf (explaining that while payday lenders often charge fees rather than interest payments, in effect these charges are interest and require computing an effective annual interest rate; author gives as an example a typical payday loan charge of $15 per $100 borrowed, thus if the term of the loan is two weeks, then the effective annual interest rate is 390 percent); Robert DeYoung & Ronnie J. Phillips, *Payday Loan Pricing* 1 (The Fed. Reserve Bank of Kan. City Econ. Research Dep't, Research Working Paper No. 09-07, 2009) (giving as an example a typical $300 two-week loan which might carry a $50 finance charge; this amounts to a 435% APR of interest).

[28] A number of state government studies found that consumers typically rolled over their loans ten to twelve times each year. Kelly J. Noyes, Comment, *Get Cash Until Payday! The Payday-Loan Problem in Wisconsin*, 2006 WIS. L. REV. 1627, 1637; *see also* KEITH ERNST ET AL., CTR. FOR RESPONSIBLE LENDING, QUANTIFYING THE ECONOMIC COST OF PREDATORY PAYDAY LENDING 3–5 (2003) (revised Feb. 2004), *available at* http://www.responsiblelending.org/payday-lending/research-analysis/CRLpaydaylendingstudy121803.pdf ("[B]orrowers who receive five or more payday loans per year account for 91% of payday lenders' revenues."); Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 864 (2007). Not all scholars believe that there is an empirically-supported link between fringe banking, including payday lending, and consumer financial distress. *See, e.g.*, Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 IND. L.J. 1361, 1399–1402 (2011) (noting that credit in the fringe economy is specifically structured to prevent borrowers from experiencing financial distress; because repayment is guaranteed by the structure of the transaction, it is difficult for borrowers to take on unmanageable debt loads).

[29] *See, e.g.*, THE PEW CHARITABLE TRUSTS, REPORT NO. 3, PAYDAY LENDING IN AMERICA: POLICY SOLUTIONS, front matter (2013) [hereinafter PEW POLICY SOLUTIONS], *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2013/Pew_Payday_Policy_Solutions_Oct_2013.pdf ("Most often, they use the loans to pay rent, utility bills, and other routine obligations . . . .").

[30] *E.g.*, Richard Hynes, *Payday Lending, Bankruptcy, and Insolvency*, 69 WASH. & LEE L. REV. 607, 632 (2012); Brian T. Melzer, *The Real Costs of Credit Access: Evidence from the Payday Lending Market*, 126 Q.J. ECONOMICS 517, 523 (2011).

[31] *See, e.g.*, Sumit Agarwal et al., *Payday Loans and Credit Cards: New Liquidity and Credit Scoring Puzzles?* 3–4 (Nat'l Bureau of Econ. Research, Working Paper No. 14659, 2009), *available at* http://www.nber.org/papers/w14659.pdf?new_window=1.

financial difficulties. The literature on this question is relatively extensive, but inconclusive, suggesting that while payday lending may prevent many low- and moderate-income individuals from falling further behind, there may be risks for other individuals who use these products.

One measure of whether payday lending harms consumers is to compare bankruptcy rates of consumers with payday loans and those without such loans. Some studies find that payday loans are associated with higher personal bankruptcy rates,[32] while others have concluded that there is no tangible link between payday loans and bankruptcy filings.[33] Still other researchers have attempted to measure payday loans' consumer and welfare effects by comparing the financial status and difficulties of individuals who have access to payday loans to those who do not have access to such credit. As with other research in this area, the studies using this comparison are inconclusive. Some researchers have found that payday loans have "limited average effects (positive or negative) on financial well-being,"[34] while other studies have found that payday

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[32] *See generally* Robert Mayer, *Payday Lending and Personal Bankruptcy*, 50 CONSUMER INTERESTS ANN. 76 (2004) (examining bankruptcy petitions in the most populous counties in Illinois, New Mexico, and Wisconsin and finding that payday-loan debtors declare bankruptcy more quickly than non-payday-loan borrowers); *see also* Donald P. Morgan et al., *How Payday Credit Access Affects Overdrafts and Other Outcomes*, 44 J. MONEY, CREDIT & BANKING 519, 524–26 (2012) (examining Chapter 13 bankruptcy filings per 10,000 persons at the state level between 1998 and 2008 and finding that bankruptcy rates had decreased after payday-loan bans were enacted, but also finding that complaints against lenders and debt collectors had increased); Paige Marta Skiba & Jeremy Tobacman, *Do Payday Loans Cause Bankruptcy?* 1 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 11-13, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=126 6215 (examining administrative data from one large payday-loan provider and finding higher bankruptcy rates among individuals who took out payday loans).

[33] *See* ROBERT SHAPIRO, SONECON, THE CONSUMER AND SOCIAL WELFARE BENEFITS AND COSTS OF PAYDAY LOANS: A REVIEW OF THE EVIDENCE 12 (2011), *available at* http://www.sonecon.com/docs/studies/Report-Payday-Loans-Shapiro-Sonecon.pdf (citing a recent study that examined the bankruptcy rates before and after eight states had banned payday loans, and before and after eleven other states had enacted legislation permitting payday loans, and finding higher bankruptcy rates in the eight states that had banned short-term lending, after those bans took effect); Lars Lefgren & Frank McIntyre, *Explaining the Puzzle of Cross-state Differences in Bankruptcy Rates*, 52 J.L. & ECON. 367, 391 (2009) (finding that the existence of payday loans does not affect bankruptcy rates, and that high levels of bankruptcy are predicated on family structure, race, and education); Petru S. Stoianovici & Michael T. Maloney, Restrictions on Credit: A Public Policy Analysis of Payday Lending 2 (Oct. 28, 2008) (unpublished Ph.D. dissertation, Clemson University), *available at* http://papers.ssrn.com/sol3/papers/cfm?abstract-id=1291278 (examining state-level data between 1990 and 2006, and controlling for state restrictions on payday lenders, finding no empirical evidence that payday lending leads to more personal bankruptcy filings).

[34] *See, e.g.*, Neil Bhutta et al., *Payday Loan Choices and Consequences* 27 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 12-30, 2012), *available at* http://papers. ssrn.com/sol3/papers.cfm?abstract_id=2160947 (noting that their conclusion might be true

credit helps consumers' overall credit standing.[35] Still, there is evidence that payday loans carry financial risks for consumers, particularly low-income households.[36]

In all, despite the comprehensive research in this area and the relative abundance of literature on the consumer and social costs of payday loans, the debate on this issue remains unresolved. This is due, at least in part, to the fact that many of the relevant studies arguably suffer from methodological shortcomings. As Robert Shapiro explains, most studies in the area rely on "indirect analytic approaches," which do not measure the "marginal cost of credit to consumers when payday loans are restricted, with controls over other variables."[37] Notwithstanding the limitations and inconclusiveness of the

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because payday loans are "small and uncollateralized, limiting their potential benefits and risks").

[35] *See, e.g.*, DONALD P. MORGAN, FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 273, DEFINING AND DETECTING PREDATORY LENDING 2–3 (2007), *available at* http://www.newyorkfed.org/research/staff_reports/sr273.pdf (comparing debt and delinquency rates over a one-year period in households in states with varying levels of access to payday loans and finding that households with unlimited access to payday loans were less likely to have missed a debt payment); Edmiston, *supra* note 27, at 64 (examining county-level consumer credit data and concluding that restrictions on payday lending not only deny consumers access to credit, but also "limit their ability to maintain formal credit standing, or force them to seek more costly credit alternatives"); Jonathan Zinman, *Restricting Consumer Credit Access: Household Survey Evidence on Effects Around the Oregon Rate Cap*, 34 J. BANKING & FIN. 547, 549 (2010) (Oregon's payday "cap" effectively decreased short-term borrowing in the state but also reduced the supply of credit available for residents, compelling former payday borrowers to seek "incomplete and plausibly inferior substitutes," such as checking account overdrafts, late bills, or both); *see also* DONALD P. MORGAN & MICHAEL R. STRAIN, FED. RESERVE BANK OF N.Y., STAFF REPORT NO. 309, PAYDAY HOLIDAY: HOW HOUSEHOLDS FARE AFTER PAYDAY CREDIT BANS (2007) (revised Feb. 2008), *available at* http://www.newyorkfed.org/research/staff_reports/sr309.pdf (finding that compared with households in states where payday lending is permitted, households in Georgia have bounced more checks, complained more to the Federal Trade Commission about lenders and debt collectors, and filed for Chapter 7 bankruptcy protection at a higher rate; also finding that North Carolina households have fared about the same).

[36] *See* Melzer, *supra* note 30, at 550 (loan access makes it more difficult for low-income households to pay mortgage, rent, and utility bills, and also increases the likelihood of consumers delaying necessary medical and dental care as well as prescription drug purchases); Dennis Campbell et al., Bouncing Out of the Banking System: An Empirical Analysis of Involuntary Bank Account Closures 6 (Dec. 3, 2008) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1335873 (the presence of payday lending is positively associated with bank account closures).

[37] SHAPIRO, *supra* note 33, at 12–13. Shapiro insists that in order to address this limitation the analysis needs accurate, individual-level data that can link payday-loan borrowing with other variables. However, because those data are unavailable to researchers, they must "make various assumptions about financial distress and access to other forms of credit, which in turn weaken their findings." *Id.* at 13. Indeed, some studies have attempted to address the shortcomings that most payday-lending analyses suffer from by developing a "kind of laboratory environment" in which the researchers try to control for other variables.

empirical research on the welfare effects of payday lending, it is indisputable that the payday-lending industry has grown considerably over the last two decades in response to high levels of consumer demand for its products. This demand is quite high among residents who have "little or no precautionary savings to draw on for emergencies" and have less access to the conventional sources of credit that their more prosperous counterparts use to help alleviate their financial problems.[38]

B. *The Geography of Payday Lending*

To understand the ubiquity of payday lenders and other AFSPs in certain communities, it is important to understand the way in which supply and demand for these financial products interact with the demographics of the populations served. This Section examines the demographic factors that influence the geography of payday lending, including the presence or absence of traditional commercial banks near these populations.

A key assumption of the literature on AFSPs is that payday lenders and similar firms tend to locate close to their potential customer base. The closer that payday lenders are to potential customers, the more apt are those customers to visit these storefronts.[39] The same arguably can be said of traditional banks and lenders. Therefore, we might expect to see commercial bank branches and payday lenders occupy different neighborhoods at different rates if their potential customer bases are distinct. Likewise, we might expect to see both alternative and traditional financial services institutions in the same neighborhoods if their customer bases overlap.

Id. at 15; *see also* Bart J. Wilson et al., *An Experimental Analysis of the Demand for Payday Loans*, 10 B.E. J. ECON. ANALYSIS & POL'Y 1 (2010) (concluding that access to payday loans increases the probability of financial survival by thirty-one percent, as a larger portion of the participants with hypothetical access to payday loans survived financially, while those without access to loans were at a "nontrivially higher risk" of being unable to manage and survive financial setbacks); *see also* Peterson, *supra* note 7, at 922–23 (noting the difficulty of tracking borrowers because borrowers are reluctant and unable to self-report their economic difficulties, tend to change jobs and relocate more often than affluent families, and payday lenders do not report borrowers' repayment patterns with national credit bureaus).

[38] SHAPIRO, *supra* note 33, at 7; *see* THE PEW CHARITABLE TRUSTS, REPORT NO. 2, PAYDAY LENDING IN AMERICA: HOW BORROWERS CHOOSE AND REPAY PAYDAY LOANS 9 (2013) [hereinafter PEW BORROWERS] (quoting a borrower who says, "I'm like everybody else, living paycheck to paycheck, still not having enough to come through at the end"); *see also* PEW POLICY SOLUTIONS, *supra* note 29.

[39] *See, e.g.*, WEI LI ET AL., CTR. FOR RESPONSIBLE LENDING, PREDATORY PROFILING: THE ROLE OF RACE AND ETHNICITY IN THE LOCATION OF PAYDAY LENDERS IN CALIFORNIA 7 (2009), *available at* http://www.responsiblelending.org/california/ca-payday/research-analysis/predatory-profiling-exec-summary.pdf (citing a survey of California payday-loan borrowers in which "the leading reason a customer chose a particular store was because they 'saw a payday location and went in'").

Payday lenders tend to be located in urban areas and close to economically vulnerable populations, as these groups constitute the vast majority of short-term lenders' customer base. A number of studies and analyses find that payday lenders are clustered disproportionately near communities consisting of low- and middle-income populations, African-Americans, Latinos, immigrants, and members of the military.[40] Many in these populations tend to be "unbanked" or "underbanked,"[41] face liquidity challenges, are burdened with an impaired credit history, or face institutional barriers that make it difficult to qualify for traditional loan products.[42] As such, it is not surprising that these groups constitute a disproportionate number of payday-lending consumers.[43]

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[40] *See id.* at 25 (payday lenders tend to cluster in African-American and Latino communities); KENNETH TEMKIN & NOAH SAWYER, FANNIE MAE FOUND., ANALYSIS OF ALTERNATIVE FINANCIAL SERVICE PROVIDERS 3 (2004), *available at* http://www.urban.org/UploadedPDF/410935_AltFinServProviders.pdf (AFSPs tend to cluster in neighborhoods with minority and low-income residents; this finding holds true regardless of a city's geographic location or socioeconomic composition); Mark L. Burkey & Scott P. Simkins, *Factors Affecting the Location of Payday Lending and Traditional Banking Services in North Carolina*, 34 REV. REGIONAL STUD. 191, 198 (2004) (areas with a higher density of payday lenders tend to have higher concentrations of recent immigrants); *see also* Alice Gallmeyer & Wade T. Roberts, *Payday Lenders and Economically Distressed Communities: A Spatial Analysis of Financial Predation*, 46 SOC. SCI. J. 521, 529 (2009) (payday lenders are more likely to populate neighborhoods that have lower income, moderate poverty, and higher percentages of ethnic minorities, immigrants, young adults, elderly, military personnel, and those working in non-management or professional occupations); Ellen E. Schultz & Theo Francis, *Social Insecurity: High-Interest Lenders Tap Elderly, Disabled*, WALL ST. J., Feb. 12, 2008, at A1 (noting that in many states payday lenders cluster around subsidized housing complexes for the elderly and disabled). *But see* THOMAS E. LEHMAN, CONSUMER CREDIT RESEARCH FOUND., A CRITIQUE OF "RACE MATTERS: THE CONCENTRATION OF PAYDAY LENDERS IN AFRICAN-AMERICAN NEIGHBORHOODS IN NORTH CAROLINA" 9–11 (2006), *available at* http://www.creditresearch.org/editor/assets/files/060209Critique_of_Race_Matters_FINAL.pdf (some studies challenged as flawed on the basis of their overreliance on bivariate studies and the failure to control for key neighborhood characteristics which may skew the correlation between ethnicity and location).

[41] A recent FDIC study concludes that "more than one in four households (28.3 percent) are either unbanked or underbanked, conducting some or all of their financial transactions outside of the mainstream banking system." FED. DEPOSIT INS. CORP., 2011 FDIC NATIONAL SURVEY OF UNBANKED AND UNDERBANKED HOUSEHOLDS 4 (2012).

[42] *See generally* MICHAEL S. BARR ET AL., INSUFFICIENT FUNDS: SAVINGS, ASSETS, CREDIT, AND BANKING AMONG LOW-INCOME HOUSEHOLDS (Rebecca M. Blank & Michael S. Barr eds., 2009).

[43] A number of studies find that payday loan users tend to be low- and middle-income, members of ethnic minority groups (namely African-Americans), young and middle-aged, renters, and military personnel. *See, e.g.*, AMANDA LOGAN & CHRISTIAN E. WELLER, CTR. FOR AM. PROGRESS, WHO BORROWS FROM PAYDAY LENDERS?: AN ANALYSIS OF NEWLY AVAILABLE DATA 5–10 (2009); Matthew B. Gross et al., *Who Uses Alternative Financial Services, and Why?*, 58 CONSUMER INTERESTS ANN. (2012), *available at* http://www.consumerinterests.org/assets/docs/CIA/CIA2012/2012-57%20who%20uses%20alternative%20financial%20services%20and%20why.pdf; Edward C. Lawrence & Gregory Elliehausen, *A Comparative Analysis of Payday Loan Customers*, 26 CONTEMP. ECON. POL'Y 299, 305–06

One explanation for why payday lenders and other AFSPs have clustered in certain neighborhoods is that more traditional financial service branches have decamped in significant numbers from these neighborhoods. Notably, the payday-lending industry emerged during the 1990s in response to the withdrawal of traditional lenders from the small-loan market.[44] Payday lenders and other AFSPs are thus arguably responding to an unmet demand by serving the underbanked in the absence of the availability or accessibility of similar products and services from traditional lenders.[45] In other words, payday lenders are filling a "spatial void" left by the departure of these banks.

The evidence on the existence of a spatial void is fairly convincing, if more nuanced than the term "spatial void" suggests. Many studies have compared the location of AFSPs with that of traditional banks in a variety of local and regional markets. Most of these studies have found that banks are not completely absent from neighborhoods where AFSPs—particularly payday lenders and check-cashing firms—tend to concentrate. However, when compared to other neighborhoods with different demographics, banks are *relatively* less concentrated in areas where AFSPs are most concentrated.[46] Given the presence of both traditional banks and AFSPs in many

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(2008); Michael A. Stegman, *Payday Lending*, 21 J. ECON. PERSP., Winter 2007, at 169, 173–74. It should be noted, however, that payday loans to military personnel have been illegal since 2008 and studies finding a high percentage of military payday customers antedate the relevant law. *See infra* Part II.C.1 (discussing John Warner National Defense Authorization Act of 2007).

[44] GREGORY ELLIEHAUSEN & EDWARD C. LAWRENCE, CREDIT RESEARCH CTR., PAYDAY ADVANCE CREDIT IN AMERICA: AN ANALYSIS OF CUSTOMER DEMAND, at iv (2001).

[45] It is worth noting that, in light of the rapid growth and success of the payday-lending industry over the past two decades, several traditional banks and credit unions have responded to the market by developing products with attractive loan terms. Generally, however, these efforts have failed because in comparison to payday loans, competing products offer far less in terms of convenience and privacy. Moreover, in certain cases, competing products end up merely supplementing a consumer's collection of payday loans. *See* Michael Kenneth, *Payday Lending: Can "Reputable" Banks End Cycle of Debt?*, 42 U.S.F. L. REV. 659, 661, 696 (2008); Victor Stango, *Some New Evidence on Competition in Payday Lending Markets*, 30 CONTEMP. ECON. POL'Y. 149, 149, 150–51, 158–60 (2012) (similarly finding the inability of credit unions to compete with payday lenders).

[46] *See, e.g.*, Gregory D. Squires & Sally O'Connor, *Fringe Banking in Milwaukee: The Rise of Check-Cashing Businesses and Emergence of a Two-Tiered Banking System*, 34 URB. AFF. REV. 126, 130 (1998) (noting that while there are two banks for every check-cashing business in low-income and minority census tracts, there are roughly ten banks for each check-cashing business in white areas). More specifically, the findings suggest that traditional banks tend to concentrate in areas with higher median incomes and larger white populations, while AFSPs tend to concentrate closer to lower-income and minority populations. *See* TEMKIN & SAWYER, *supra* note 40, at 11–24; Burkey & Simkins, *supra* note 40, at 203; Steven M. Graves, *Landscapes of Predation, Landscapes of Neglect: A Location Analysis of Payday Lenders and Banks*, 55 PROF. GEOGRAPHER 303, 311–12 (2003); Tony E. Smith et al., *Alternative Financial Service Providers and the Spatial Void Hypothesis*, 38 REGIONAL SCI. & URB. ECON. 205, 208–26 (2008).

neighborhoods, it is fair to conclude that, at least to some extent, payday lenders and other AFSPs appear to fill a financial services supply gap.

Evidence supporting the spatial void hypothesis, however, does not explain why consumers who have geographic access to both traditional financial services and AFSPs would use the services of the latter given the higher costs associated with these products.[47] Nor does it necessarily suggest why AFSPs continue to enter markets where there is a robust traditional banking presence.[48] The short answer is that even in neighborhoods heavily populated with traditional banking sources, some populations make the understandable, and even rational, choice to use alternative products over more traditional banking products.

For one, "physical access to banks does not always translate into functional access to financial services and products."[49] In addition to the institutional barriers faced by some demographic groups,[50] many consumers prefer payday loans because of their convenience, ease, and lack of borrower restrictions.[51] Indeed, one recent study found that borrowers' preference for payday loans over similar credit union products is driven "most strongly by credit unions' shorter hours of operation, a lack of privacy conferred [upon customers,] . . . and the fact that defaulting on a credit union payday loan harms one's credit score."[52] The riskiness of payday loans therefore is discounted in favor of factors that

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[47] *See* Smith et al., *supra* note 46, at 206–07 (suggesting various possible answers to this question); *see also* MATT FELLOWES & MIA MABANTA, BROOKINGS, BANKING ON WEALTH: AMERICA'S NEW RETAIL BANKING INFRASTRUCTURE AND ITS WEALTH-BUILDING POTENTIAL 1 (2008), *available at* http://www.brookings.edu/~/media/research/files/reports/2008/1/banking%20fellowes/01_banking_fellowes.pdf (finding that most AFSPs, like payday lenders and check cashers, are located within one mile of a bank or credit union branch and that more bank and credit union branches per capita are located in low-income neighborhoods than in high-income neighborhoods).

[48] Payday lenders appear to be locating in areas with banks, and there is evidence that they are competing with these banks for low- and moderate-income customers. H. Evren Damar, *Why Do Payday Lenders Enter Local Markets? Evidence from Oregon*, 34 REV. INDUS. ORG. 173, 190 (2009) (payday lenders are more likely to locate in areas that have more bank branches, larger populations, and higher percentage of Hispanics).

[49] Jane Cover et al., *Minorities on the Margins? The Spatial Organization of Fringe Banking Services*, 33 J. URB. AFF. 317, 340 (2011).

[50] *Id.* (noting, particularly for immigrants, institutional barriers like identification requirements or a credit history to open an account).

[51] Stango, *supra* note 45, at 149, 150–51, 158–60 (finding evidence that most payday borrowers have a strong preference for less restrictive but higher priced, more convenient, standard payday loans even when faced with the choice of a similar credit union version of a payday loan).

[52] *Id.* at 151, 158–60 (responses to survey indicate that the most important "soft" features of payday lenders are hours, privacy, and location); *see also* Edmiston, *supra* note 27, at 70 (noting that, unlike traditional lenders, payday lenders typically do not report to credit agencies and thus seem less risky; in the event that finances do not improve over the course of the loan period, defaulting on a payday loan would typically not harm the borrower's formal credit standing).

appear to decrease the time, effort, and social stigma associated with facing a financial emergency.[53]

Moreover, it is not necessarily the case that traditional banking products contain the most competitive terms for economically vulnerable populations. Even when customers have equal access to traditional banking products, such as overdraft credit protection, the associated fees and interest can be more expensive than payday loans.[54] Similarly, the fees associated with exceeding the credit limit on a credit card are in many cases significantly higher than the fee on an equivalent payday loan.[55] This evidence thus suggests that payday lenders and other AFSPs need not depend on a spatial void to compete with more traditional financial institutions. In other words, the existence and popularity of payday lenders in many communities is not dependent on the absence of traditional institutions. Both can and do coexist in the same geographic area, with payday lenders able to compete with and provide a competitive substitute for more traditional overdraft financial products.

C. *The Regulation of Payday Lending*

As the previous sections explain, the popularity of payday lending can be explained by a number of factors, including the diminished presence of traditional lenders in some communities, the ease and convenience of payday lending as compared to more traditional bank products, and the competitiveness of payday-lending terms when compared to similar bank and credit union products. The increased presence of payday lenders in many communities across the country has prompted concern and action by many local governmental officials. These local governments have sought to control the presence and concentration of payday lenders through restrictive zoning regulations that appear to fill a regulatory gap created by fairly permissive federal and state regulation of the industry.

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[53] Fred Fernatt et al., *A Risk-Tolerance Paradox: Are Payday and Car Title Loan Customers Really More Risk Tolerant than Others?* 3 INT'L REV. SOC. SCI. & HUMAN. 214, 225–26 (2012); Paige Marta Skiba & Jeremy Tobacman, *Payday Loans, Uncertainty, and Discounting: Explaining Patterns of Borrowing, Repayment, and Default* 2 (Vanderbilt Univ. Law Sch. Law & Econ., Working Paper No. 08-33, 2008), *available at* http://www.vanderbilt.edu/econ/sempapers/Skiba.pdf.

[54] *See, e.g.*, Marc Anthony Fusaro, *Hidden Consumer Loans: An Analysis of Implicit Interest Rates on Bounced Checks*, 29 J. FAM. & ECON. ISSUES 251, 251 (2008) (finding that overdraft protection fees can be much more expensive than payday loans and that the median implicit interest paid by Bounce Protection Program consumers is over 4000%); *see also* BRIAN T. MELZER & DONALD P. MORGAN, COMPETITION IN A CONSUMER LOAN MARKET: PAYDAY LOANS AND OVERDRAFT CREDIT 5 (2012).

[55] *See, e.g.*, Edmiston, *supra* note 27, at 71 ("As of March 2010, the average over-the-limit fee was between $36 and $39. On a two-week, $100 loan, typical of most payday loans, the effective rate of interest could exceed 1,000 percent.").

1. *The Limited Federal Regulation of Payday Lending*

Historically, substantive federal regulation of the payday-loan industry has been limited. The most important federal law regulating the payday-loan industry is the Truth in Lending Act (TILA).[56] In 2000, with Congress's authorization, the Federal Reserve Board clarified that payday loans constitute credit for the purposes of TILA and, therefore, are subject to the statute's disclosure requirements with respect to fees and finance charges.[57] An additional piece of significant federal legislation is the John Warner National Defense Authorization Act for Fiscal Year 2007 (John Warner Act).[58] In response to the advocacy of military service members, Congress imposed a thirty-six percent APR cap on payday loans to military personnel and their dependents, which preempts any interest rates allowed under state usury statutes.[59] Nonetheless, the law has little impact on the larger practice of payday lending since the Act applies only to military personnel and their families. Aside from the John Warner Act, however, no federal law regulates the interest rates, fees, or other loan terms of the payday industry.

While the payday-lending industry historically has operated with virtually no federal regulation of its terms,[60] the recent establishment of the Consumer

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[56] Truth in Lending Act (TILA), Pub. L. No. 90-321, 82 Stat. 146, 146-59 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f (2012)).

[57] *See* 65 Fed. Reg. 17129-01, 17130 (Mar. 31, 2000) (to be codified at 12 C.F.R. pt. 226). Early case law indicates that payday lenders often asserted that their business operations were outside the purview of TILA because, rather than extending consumer credit, they merely were offering check-cashing services. Nonetheless, courts have held almost unanimously that payday lending is an extension of credit governed by TILA and the regulations promulgated thereunder. *See, e.g.*, Hamilton v. York, 987 F. Supp. 953, 957 (E.D. Ky. 1997); Miller v. HLT Check Exchange (*In re* Miller), 215 B.R. 970, 974 (Bankr. E.D. Ky. 1997).

[58] Pub. L. No. 109-364, 120 Stat. 2083 (2012). For an argument that the payday-lending industry targets financially vulnerable military families, see generally Stephen M. Graves & Christopher L. Peterson, *Predatory Lending and the Military: The Law and Geography of "Payday" Loans in Military Towns*, 66 OHIO ST. L.J. 653 (2005).

[59] The law effectively made it illegal to lend to military service personnel since it prohibits the kind of fees and terms that have made the industry profitable. The key section of the Act, Section 670, is entitled "Limitations on terms of consumer credit extended to servicemembers and dependents." *See* 120 Stat. 2083. The Act also places strict disclosure requirements on lenders, prohibits rollovers, and proscribes lenders from requiring servicemembers to enter into agreements with mandatory arbitration clauses. *See* Allison S. Woolston, *Neither Borrower Nor Lender Be: The Future of Payday Lending in Arizona*, 52 ARIZ. L. REV. 853, 859 (2010) (footnotes omitted) (for a brief background on the John Warner Act).

[60] Payday lenders are of course regulated by many federal laws that are not specific to the industry but nevertheless subject the industry to laws and regulations. These include the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (2012), as implemented by Regulation B, 12 C.F.R. pt. 202; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (2012); the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* (2012); the Gramm–Leach–Bliley Act, 15 U.S.C. § 6801 *et seq.* (2012); and the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.*

Financial Protection Bureau (CFPB), a federal agency created under the Dodd–Frank Wall Street Reform and Consumer Protection Act (Dodd–Frank Act) that focuses solely on consumer financial protection, suggests that the federal government might begin to step up its regulation of the industry.[61] In recent guidance, the CFPB has acknowledged that it intends to exercise fully its regulatory authority over financial service providers, including its authority to examine them for compliance with Title X of the Dodd–Frank Act, which prohibits unfair, deceptive, and abusive acts and practices.[62] The CFPB just recently expanded its probe of the auto-lending industry, focusing on the sale of financial products like extended warranties, suggesting that the agency is likely to aggressively implement its supervision and regulatory authority over various kinds of lenders.[63] Yet, for all of its recent warnings, it is questionable how aggressively the CFPB can regulate the payday-lending industry given that the agency lacks statutory authority to regulate interest rates.

2. *State Authorization, Toleration, and Prohibition*

Although TILA and the John Warner Act specifically regulate payday lenders to some extent, most of the regulatory control of the industry occurs at the state level. State legislation governs both licensing and lending practices of the industry. While state payday-lending laws vary greatly, they can be classified into three general categories: (1) explicit toleration; (2) informal prohibition; and (3) complete prohibition.

(2012), as implemented by Regulation E, 12 C.F.R. pt. 205, as well as Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (2012).

[61] The CFPB's regulatory authority and enforcement arm applies to large banks, large credit unions and their affiliates, and non-bank entities that offer or provide consumer financial products or services. Thus, for the first time, non-banks engaging in financial transactions, including mortgage brokers, private education lenders, credit card companies, and payday lenders, are subject to federal supervision and regulation. With respect to its enforcement power, the CFPB can conduct joint investigations, issue subpoenas and civil demands, bring cease and desist and injunction proceedings, and conduct hearings. Furthermore, the CFPB has the authority to bring civil proceedings in the U.S. district courts, or in any state court in a district where the defendant is located, resides, or is conducting business to seek relief for violations of federal consumer financial laws. Lauren E. Galeoto et al., *The Consumer Financial Protection Bureau: The New Sheriff in Town*, 129 BANKING L.J. 702, 703–04, 706 (2012).

[62] *See* 12 U.S.C. § 5531(a) (Supp. IV 2011); *see* CFPB WHITE PAPER, *supra* note 5, at 45.

[63] The CPFB also warned auto lenders against high-interest loans in March 2013, opining that the practice discriminates against certain minority groups. *See* Robin Sidel & Alan Zibel, *Regulators Scrutinize Auto Lenders Over Add-Ons*, WALL ST. J., May 3, 2013, at A1. According to some practitioners, as the CFPB "evolves and the meaning of 'abusive' morphs into a more concrete meaning," parties within the agency's purview can "best protect themselves by engaging in best practices that comply with the Bureau's guidance." Galeoto et al., *supra* note 61, at 708.

The most common pattern in recent years has been the explicit authorization of payday lending through state enabling legislation.[64] Generally, these statutes set maximum loan amounts, restrict the number of permissible rollovers, and place ceilings on fees and finance charges.[65] The second most common pattern is the informal prohibition of payday lending through the application of usury laws that require lenders to comply with interest rate caps on consumer loans.[66] The final regulatory regime that state legislatures have adopted is to prohibit explicitly payday lending. In these states, payday lending is illegal anywhere within the state's borders.[67]

Even when payday lending is prohibited, effectively or explicitly, lenders have been able to circumvent state usury ceilings and make loans through the Internet and toll-free telephone numbers. Indeed, the rise of online payday lending raises the question whether state bans and restrictions merely drive potential storefront customers to online borrowing.[68] Some have argued that

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[64] Thirty-eight states currently have laws that permit payday lending and directly regulate payday lenders. *See Payday Lending Statutes*, NAT'L CONF. ST. LEGISLATURES, http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx (last updated Sept. 12, 2013).

[65] For example, Michigan's "Deferred Presentment Service Transactions Act" limits loan amounts to $600 in a thirty-one day period and permits lenders to charge up to fifteen percent in service fees, depending on the size of the loan. MICH. COMP. LAWS § 487.2153 (2005).

[66] The eight states that currently fall into this category are: Connecticut, Maryland, Massachusetts, New Jersey, New York, Pennsylvania, Vermont, and West Virginia. Generally, the prohibition takes the form of a usury limit on all consumer loans, with no specific carve out for payday lending. New York provides one of the clearest examples of this type of regulation. While New York does not have specific payday-lending legislation, the legislature has imposed a sixteen percent interest rate cap on small loans which essentially makes payday lending illegal in the state. *See* N.Y. GEN. OBLIG. LAW § 5-501(1) (McKinney 2011); N.Y. BANKING LAW § 14-1(1) (McKinney 2012). However, because of under-enforcement, special loopholes, or both, payday lending remains a prominent industry in some of these states. *See, e.g.*, John Sandman, *Is the Payday Loan Business on the Ropes?*, REUTERS (Sept. 21, 2012, 12:03 PM), http://blogs.reuters.com/great-debate/2012/09/21/is-the-payday-loan-business-on-the-ropes/ (stating that even after then-New York Attorney General, Andrew Cuomo, settled with two out-of-state payday lenders in 2009, the parties "simply resurfaced in some other form").

[67] Five jurisdictions currently fall into this category: Arizona (ARIZ. REV. STAT. ANN. § 6-1263 (2010)); Arkansas (ARK. CODE ANN. § 23-52-101–23-52-117 (2013)); District of Columbia (D.C. CODE § 26-319(a) (2014)); Georgia (GA. CODE ANN. § 16-17-1 (2004)); and North Carolina (N.C. GEN. STAT. § 53-166(a) (2013)). Georgia's Payday Lending Act of 2004, for instance, states that "the practice of engaging in activities commonly referred to as payday lending, deferred presentment services, or advance cash services and other similar activities are currently illegal." GA. CODE ANN. § 16-17-1(e).

[68] A relatively recent report by the PEW Charitable Trusts indicates that sixteen percent of U.S. payday-loan borrowers obtained their loans online in 2011. PEW BORROWERS, *supra* note 38. It is estimated that in 2011, the volume of online payday loans was $13 billion, up more than 120 percent from $5.8 billion in 2006. *See* Jessica Silver-Greenberg, *Major Banks Aid in Payday Loans Banned by States*, N.Y. TIMES, Feb. 23, 2013, http://www.ny

turning to online payday loans is not in the best interest of consumers since online lenders operating outside of the jurisdiction of state regulation generally are able to charge higher fees and do not offer as much consumer protection as provided by regulated storefront lenders.[69] The online payday-lending industry believes, however, that its products can be superior to those offered by payday-lender storefronts precisely because the lack of regulation allows them to offer longer-term loans (thus avoiding rollovers) with fully disclosed rates and costs. Regardless of the merits of these arguments, online lenders have emerged as another source of short-term financing and operate largely outside of any state's regulatory reach.

3. *Local Zoning Restrictions as Consumer Regulation*

While federal and state legislation has curbed some of the problems that critics associate with payday lending, many city councilmembers and consumer advocates concerned with the number and location of payday-lending businesses believe that these statutes have not gone far enough. Several local governments have responded to the growth of the industry by imposing restrictions of their own on payday lenders. Because local governments are limited in their ability to regulate the terms of payday loans directly,[70] they have turned to the one quintessential source of local authority that they possess—the power to regulate land within their boundaries—in order to address the spread of payday lenders in their communities.[71]

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times.com/2013/2/24/business/major-banks-aid-in-payday-loans-banned-by-states.html?_r=0. Moreover, a growing number of lenders are setting up online operations either in the more "hospitable states" or offshore in "far-flung locales," such as Belize, Malta, and the West Indies, in order to more easily skirt statewide interest rate caps and attract the largest number of customers possible. *Id.*; *see also* Kevin Wack, *Payday Lenders Assail Online Competitors*, AM. BANKER (Mar. 4, 2013), http://www.americanbanker.com/issues/178_43/payday-lenders-assail-online-competitors-1057212-1.html.

[69] *See, e.g.*, Shane M. Mendenhall, *Payday Loans: The Effects of Predatory Lending on Society and the Need for More State and Federal Regulation*, 32 OKLA. CITY U. L. REV. 299, 312–14 (2007) (explaining how the payday-lending industry has followed recent technological advances to offer payday loans via the Internet and discussing the ways in which Internet payday loans can be especially risky to borrowers). In December 2012, for instance, Minnesota's attorney general settled with one online lender over claims that the lender was operating without a license to make loans with effective annual interest rates as high as 1564%. Silver-Greenberg, *supra* note 68. Arkansas' attorney general also sued several online lenders in January 2012, alleging that the businesses were breaking state law by charging fees in excess of the state's seventeen percent annual interest rate cap. *Id.*

[70] *See infra* notes 76–77.

[71] As Nestor Davidson has argued, local governments often react to the legal-structural constraints they face by "apply[ing] traditional legal tools in novel ways when barred from responding to problems more directly" rather than taking the scope of their legal authority as a given. Nestor M. Davidson, *Leaps and Bounds*, 108 MICH. L. REV. 957, 958 (2010) (citation omitted) (reviewing GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION (2008)).

Many municipalities, for instance, recently have enacted moratoria on the development of new payday-loan businesses.[72] Dozens of local governments have responded to the growth of the industry by imposing land-use restrictions on where payday lenders may locate.[73] Because payday-loan businesses generally are considered commercial uses, municipalities are able to exclude such offices from residential districts without difficulty.[74] However, although courts have upheld ordinances that effectively exclude payday lenders from certain districts, cities that attempt to prohibit payday lenders from all commercial districts may face some judicial scrutiny.[75] The issue of preemption also looms large when localities are considering how to regulate payday lenders. Generally, courts will invalidate a zoning ordinance on preemption grounds if such ordinance conflicts with a state law that explicitly allows

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[72] Such ordinances, which officials refer to as "interim zoning" or "stop-gap" measures, permit local governments to maintain the status quo until they have time to examine and adopt new land-use regulations. These stop-gap measures also preclude payday lenders from rushing to submit license applications before more restrictive zoning laws go into effect. Amy Lavine, Zoning Out Payday Loan Stores and Other Alternative Financial Services Providers 8 (July 13, 2011) (unpublished manuscript) (citation omitted), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1885197. For examples, see YOUNGTOWN, ARIZ., CODE § 17.16.040(D) (2002) ("Nonchartered financial services are not a permitted use in any class of district within town boundaries."); BELLEFONTAINE, MO., CODE § 29-9 (2010) ("A business, other than a pawnbroker operating in conformity with this zoning code, engaged in providing short-term loans to the public as a primary or substantial element of its business and which is not licensed by the appropriate state or federal agency as a banking or savings and loan facility, including . . . payday lenders . . . shall be prohibited in all zoning districts of the city of Bellefontaine Neighbors, Missouri.").

[73] Courts have consistently upheld identical zoning restrictions on check-cashing businesses and, even in the absence of specific limitations on payday lenders, have reasoned that payday-lending businesses are governed by the same laws. *See, e.g.*, Roman Check Cashing, Inc. v. N.J. Dep't of Banking & Ins., 777 A.2d 1, 6–8 (N.J. 2001); Fin. Servs., L.L.C. v. Zoning Bd. of Adjustment, 741 A.2d 121, 126–28 (N.J. Super. Ct. 1999); EZMONEY Wis., Inc. v. City of Wauwatosa Bd. of Zoning Appeals, 321 Wis. 2d 477, 477 (Ct. App. 2009).

[74] Moreover, cities that also wish to exclude payday lenders from certain historic districts, mixed-use districts, and various specialty commercial districts can generally do so without much legal scrutiny. *See* Lavine, *supra* note 72, at 12.

[75] Courts treat the total exclusion of lawful uses with some suspicion. Hawthorne v. Vill. of Olympia Fields, 790 N.E.2d 832, 841, 844 (Ill. 2003) (holding that the total exclusion of daycare homes exceeded the village's authority); English v. Augusta Twp., 514 N.W.2d 172, 174 (Mich. Ct. App. 1994) (recognizing that a zoning ordinance "may not totally exclude a lawful land use where (1) there is a demonstrated need for the land use in the township or surrounding area, and (2) the use is appropriate for the location"); State *ex rel.* Sunshine Enters. of Mo., Inc. v. Bd. of Adjustment of St. Ann, 64 S.W.3d 310, 311–12 (Mo. 2002) (city cannot deny a payday lender a license to operate where the lender's services constituted both a "personal services" use and a "bank" use and thus qualified as a permitted by-right use in the subject zoning district).

payday lenders to operate.[76] Local governments are also preempted from directly regulating the rates that these lenders charge because both federal and state legislation often occupy the field of usury regulation.[77]

Given that zoning ordinances are not immune from preemption, rather than outright excluding payday lenders, local governments have opted to impose various types of restrictive zoning provisions designed to exclude, disperse, or limit the number of payday lenders in a given municipality. To the extent that most of the recent ordinances are aimed at breaking up payday-lender concentrations, and not simply with reducing negative spillovers to the neighborhood "commons," the next Part examines whether breaking up payday agglomerations has the potential to enhance consumer protection by effectively shielding consumers, through physical separation, from payday lenders.

III. BREAKING UP PAYDAY

Local governments have reacted to the concentration of payday lenders by limiting their proximity to one another and to most other land uses. The intent of these ordinances is to break up payday concentrations and, in the process, to drive these businesses away from local residents altogether. This Part will explore whether payday zoning restrictions are likely to accomplish their manifest purpose of protecting consumers from payday lenders. An examination of the location pattern and distribution of California's payday lenders, both before and after the passage of local zoning ordinances, provides a small window into this question. This study of California payday-lender location lends great skepticism to the claim that zoning ordinances designed to disrupt or prevent payday-lender concentrations shield or protect consumers from payday lenders.

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[76] *See, e.g.*, *Sunshine*, 64 S.W.3d at 314 (state law authorizing under-$500 lenders preempted the city's ordinance, which prohibited payday lending in all of the city's zoning districts).

[77] Some cities have imposed restrictions on lending practices, including interest rate and fee caps and provisions permitting borrowers to cancel their loans. *See, e.g.*, CLAYTON, OHIO, ORDINANCE NO. O-03-08-07 § 731.08(a)(3), 731.12(a) (2008). Such regulations are quite susceptible to preemption challenges, however. *See, e.g.*, Advance Am., Cash Advance Ctrs. of Fla., Inc. v. Seminole Cnty., Fla., Case No. 00-CA-1665-16-L (Fla. Cir. Ct. 2001) (finding unconstitutional on preemption grounds a municipality's ordinance which regulated various remunerative and consumer protection aspects of payday-lending services governed by state law). Not only are local governments preempted from acting in ways inconsistent with state law, but states are also limited in this area of consumer financial protection by federal laws. *See, e.g.*, Depository Institutions Deregulation and Monetary Control Act, 12 U.S.C. § 1735f-7a(a)(1) (2012) (preempting some state usury laws); Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 1044 (2012) (allowing preemption of "state consumer financial laws" under certain circumstances).

A. *Anti-concentration Ordinances*

One straightforward way of avoiding payday-lender concentrations is to limit the number of such businesses that can operate within a given municipality. Local governments accomplish this with strict caps on the number of permissible payday lenders (e.g., a maximum of two payday-loan stores in the city) or on a per capita basis (e.g., one payday-loan store for every 5000 residents).[78] In the absence of payday-lender caps, however, one of the more common strategies to avoid payday-lender concentration is to impose separation or distance restrictions.

Separation or distance restrictions are designed to prevent the concentration of payday lenders—a problem that exclusionary zoning strategies tend to exacerbate by forcing these businesses into particular areas of a municipality.[79] Such restrictions do so by prohibiting new payday lenders from operating within close proximity to existing payday lenders, or to similar businesses, usually requiring them to be between 500 feet and one mile apart.[80]

Separation or distance ordinances can also control the density of payday lenders by making it difficult for payday lenders to locate *anywhere* within the municipality. Many recently passed zoning restrictions prohibit payday lenders from locating in close proximity to most other kinds of allowable land uses—including residential areas, hotels and motels, museums, landmarks, schools and similar educational institutions, churches and other places of worship, parks, other state or federally chartered banks, and other financial institutions (e.g., credit unions and savings associations).[81]

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[78] *See, e.g.*, AMERICAN FORK CITY, UTAH, DEV. CODE § 2-5.46(B)(4) (2008) ("Check cashing and other similar businesses . . . [s]hall be limited to one Check Cashing or other similar business per 10,000 in population, to include all residents in American Fork City within the City's geographic boundaries."); SAN JOSE, CAL. ORDINANCE tit. 20, ch. 20.70, 20.80, 20.200.875 (2012) (caps the number of outlets at current level; new owner can move into existing lending site within six months of vacancy, otherwise lender must be one-fourth mile from other lender and low-income areas).

[79] Some local ordinances require that payday-loan stores be located in shopping centers or multi-tenant commercial buildings. GLADSTONE, MO., ORDINANCE NO. 4.036 (2007); CLARK COUNTY, NEV., § 30.44.020 (2005); CLAYTON, OHIO, ORDINANCE NO. O-03-08-07, § 731.10 (2008); COLUMBIA, S.C., ORDINANCE NO. 2009-109, § 17-294 (2009).

[80] *See, e.g.*, CLAYTON, OHIO, ORDINANCE O-03-08-07, § 731.11 (2008) ("No permit shall be issued for any Payday Lender that is located within one thousand (1,000) feet of any other Payday Lender Business . . . ."); LITTLE ELM, TEX., CODE § 106-35 (2010) ("A lot containing an alternative financial service shall be located at least 1,000 feet from any lot containing another alternative financial service . . . .").

[81] *See, e.g.*, SOUTH TUCSON, ARIZ., ORDINANCE § 24-526 (2010) ("No non-chartered financial institution use group will be within one thousand (1,000) feet of any other non-chartered financial institution use group, nor permitted within five hundred (500) feet of any residential zone, public playground, and/or park."); LA MIRADA, CAL., CODE § 21.45.020 (2008) ("No check cashing establishment shall be located within five hundred feet . . . of any school, church, state- or federal-chartered bank, loan institution, savings association, credit union, or brokerage house."); AMES, IOWA, ORDINANCE NO. 4111, § 29.1312 (2012)

Given that payday lenders already are concentrated in many municipalities and within commercial zones in those municipalities, one might ask how these zoning measures operate to de-concentrate existing firms. One means of doing so is to impose discretionary permit review or renewal, which requires that even existing lenders are subject to special conditions to continue operating.[82] These mechanisms also give local governments flexibility to ensure that proposed payday-lending businesses will be compatible with neighboring uses and that negative externalities will be mitigated through constraints on these businesses' design and operation.[83]

By making it difficult to locate in a particular jurisdiction and by imposing more demanding operational requirements and restrictions, we might expect to see a reduction in the number of payday stores opening and operating in a given jurisdiction in the years following the enactment of the zoning ordinance. We might also expect to see payday stores dispersing at a rate, and a distance, that makes it far less convenient and more costly for local residents to locate and patronize payday lenders. Alternatively, we would want to know whether payday lenders are simply moving to nearby municipalities without such ordinances, raising the question whether these ordinances are simply redistributing lenders around the region, or the state. These questions will be explored in the next Part, which takes a snapshot of the impact of zoning restrictions on payday lenders in California.

B. *The California Experience*

Based on publicly available data, this Part examines the location and distribution of payday lenders in California both before and after the enactment

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(requiring outlets to be more than 1000 feet from schools, childcare centers, other payday lenders, land zoned for residential uses, any arterial street, commercial highway zones, and overlay districts). Still others require payday lenders to be located a fair distance away from adult businesses and liquor stores to avert high concentrations of disfavored commercial uses and preclude borrowers from spending their loans on certain products and services. *See, e.g.*, RIVERSIDE, CAL., MUNICIPAL CODE ch. 19.280.030(A)(3) (2007) ("The business shall be located a minimum distance of 1,000 feet from any existing . . . businesses licensed by the State of California for off- or on-sale of alcoholic beverages . . ."); OCEANSIDE, CAL., ZONING ORDINANCE, art. 36, §§ 3601, 3604 (2008) (requires special operating permit for payday lenders classified as adult businesses; not permitted within 1000 feet of similar businesses or within 500 feet of home, church, park, or school).

[82] *See, e.g.*, CUYAHOGA FALLS, OHIO, GEN. DEV. CODE § 1131.03.H (2009) (requiring initial as well as periodic review to ensure continued appropriateness of the permit; in deciding whether to issue a permit, and whether to add mitigating conditions, the city can consider factors such as the general character of the area, unique attributes of the lot, specific building, design, or sign features that make the use more appropriate, buffering or screening to minimize the impact of the use, and any special operational requirements).

[83] These development procedures also allow community members to become involved in the process, as notice, hearings, and appeals procedures are commonplace. Community members that want to object to new stores can try to convince zoning officials not to permit any new additional businesses under these procedures. Lavine, *supra* note 72, at 20.

of zoning ordinances that impose separation and distance requirements on new payday stores.[84] This examination reveals that a correlation exists between the passage of restrictive zoning ordinances and a significant reduction in the presence of new payday-lending businesses in the municipality with the zoning restriction. This examination also reveals a similar reduction in the number of new payday lenders in cities within close proximity (5–10 miles) of a municipality with payday zoning restrictions. Because this reduction might be attributable to the impact of the recent economic downturn, which happens to coincide with the time period following the passage of many of these zoning ordinances, this Part also examines the distribution of payday lenders in other municipalities around the state that have not passed a restrictive zoning ordinance nor are located in close proximity to a city that has such ordinance.

The result of this empirical examination supports the conclusion that restrictive zoning ordinances have failed, even in a recession, to drive payday lenders away from local residents. The data also, however, strongly suggest that the recent economic downturn has had an independent effect on the number of new payday lenders entering local markets post-2008, regardless of whether there is a restrictive zoning ordinance in place. In any event, whether on account of these ordinances or the impact of the recession, or both, it is clear that the number of payday-lending businesses across California has been in decline over the past decade. Nevertheless, it is also clear that payday lenders continue to enter into local markets and to concentrate within them, whether or not a restrictive zoning ordinance is in effect. This analysis raises considerable doubt about the effectiveness of zoning ordinances which limit payday-lender concentrations in achieving the consumer protection goals that animate them.

Payday lending began in California as an extension of the check-cashing industry in the 1990s and has since become widespread.[85] State lawmakers enacted the 2003 California Deferred Deposit Transaction Law (CDDTL),

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[84] The data used to assess the location pattern and distribution of payday lenders in California came from the state's Department of Corporations. *Search for a Financial Services Licensee*, CAL. DEP'T BUS. OVERSIGHT, front matter, http://www.dbo.ca.gov/FSD/licensees/default.asp (last visited Jan. 20, 2014). The Department licenses and regulates payday lenders in the state of California, among other financial services and securities businesses. Some of the information obtained for this study was collected from the Department's website, while other information was obtained through a public information request. The data obtained lists the name, address, license number, and license date of every payday lender in the state. If a lender has been removed from the Department's active license listing, the data indicates that the lender has either "surrendered" its license or the license was "revoked" and records the date on which the license became inactive.

[85] LESLIE COOK ET AL., REPORT ON THE STATUS OF PAYDAY LENDING IN CALIFORNIA 4–5 (2009). The Department of Corporations estimated that there were approximately 2500 payday-lending businesses in the state by the end of 2006. *Id.* at 5. Moreover, in 2006 alone, roughly one million Californians had received payday loans (at an average of ten loans per borrower). *Id.* Insight, the Center for Community and Economic Development, also has noted that each year roughly 12.7% of California households take out one or more loans with a payday lender.

which provides that the maximum loan amount a payday lender can issue to a consumer is $300 and the maximum fee that a payday lender can charge is fifteen percent of the face amount of the check.[86] Following the enactment of CDDTL, a number of municipalities moved to limit the number of payday-lending outlets by adopting "distance" ordinances.[87] Oakland was the first city, in 2004, to adopt distance restrictions designed to curb the spread of payday lending within the city's borders,[88] and a number of other local governments soon followed.[89] Among those that have adopted ordinances restricting payday lenders from locating within a certain distance of each other and other land uses since 2004 are: La Mirada,[90] Norwalk,[91] Pico Rivera,[92] San Francisco,[93] and Sacramento.[94]

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[86] This means that the largest amount of loan principal that a lender can advance at the highest fee permitted by law is $255 ($45 fee). The CDDTL also prohibits late fees, interest, and rollovers. California Deferred Deposit Transaction Law, CAL. FIN. CODE § 23035 (West 2004).

[87] Because the CDDTL regulates the monetary aspects of payday lending, local government officials legally cannot alter interest rates or impose financially based limitations and, therefore, have attempted to regulate payday lending by amending their zoning ordinances.

[88] In addition to requiring a special use permit for check cashers and payday lenders, the 2004 ordinance provides that these two kinds of businesses must be at least 1000 feet from each other and at least 500 feet from a host of other kind of land uses. These include: (1) community education civic activities; (2) state and federally chartered banks, savings associations, credit unions, and industrial loan companies; (3) community assembly civic activities; and (4) liquor stores. OAKLAND, CAL., PLANNING CODE § 17.102.430 (2004).

[89] It should be noted that several other municipalities in California, including Long Beach, Los Angeles, Oceanside, Rialto, and San Diego, have passed zoning laws that primarily impose special permit procedures which give officials flexibility to make sure that payday-lending businesses are consistent with neighboring uses and that any negative effects will be reduced through conditions on the stores' design and operation.

[90] LA MIRADA, CAL., CODE § 21.45.020 (2008) (requires a minimum distance of 1000 feet between any two payday-lending businesses and a minimum distance of 500 feet between payday-lending outlets and schools, churches, state or federally chartered banks, loan institutions, savings associations, credit unions, and brokerage houses).

[91] NORWALK, CAL., CODE § 17.04.095 (2010) (limits the total number of payday-lending establishments that may operate in the city to eight, restricts payday-lending establishments to certain zones, and requires that payday-lending establishments be no less than 1320 feet from each other).

[92] PICO RIVERA, CAL., CODE § 18.40.050(C) (2009) (restricts payday lenders to certain zones and requires a minimum distance of 2640 feet between any two payday-lending outlets).

[93] S.F., CAL., PLANNING CODE § 249.35 (2008) (prohibits payday lenders' location in certain "Restricted Use Districts" and requires that new payday-lending outlets be located at least a quarter mile—1320 feet—from any existing "fringe financial service").

[94] SACRAMENTO, CAL., ORDINANCE 2009-017 (2009) (payday-lending and check-cashing businesses may not be established or located within 1000 feet of any other check-cashing or payday-lending business; church or faith congregation; school; or financial institution, including state or federally chartered banks, savings associations, or credit

After Oakland became the first city in California to set minimum distance requirements for payday-lending outlets, the number of payday lenders moving into the city decreased dramatically. In particular, the California Department of Corporations (DOC) issued twenty licenses to payday lenders in Oakland in 2004—the year that the city's zoning ordinance went into effect.[95] The following year, however, only two new payday-lending businesses moved into the city of Oakland. Since 2004, only fifteen licensees have set up shop as payday lenders in Oakland, and of those fifteen outlets, only seven currently are licensed to operate. As a result, although the DOC issued thirty-five payday licenses between 2004 and 2012, only sixteen of those licenses were active as of December 31, 2012. This represents a 55% reduction in active payday licenses in Oakland since the passage of the ordinance, marking a substantial decline in the number of such businesses operating within the locality.[96]

At the same time, since the enactment of Oakland's zoning ordinance, the number of new payday-lending outlets has also declined in neighboring cities (within a ten-mile radius of Oakland), although not quite as dramatically. San Leandro, for instance, a city roughly one-fifth the size of Oakland, has seen a significant decline in the number of payday lenders opening for business in the city. Specifically, while the DOC issued five payday-lending licenses in 2004 alone, only seven in total were issued in the ensuing seven years (2005–2012), an average of one new license per year. Only five of twelve licenses are still active, representing a mere 42% survival rate of active payday-lending businesses in San Leandro since 2004. Likewise, the number of new licenses issued to payday lenders declined in nearby Alameda, where the DOC issued four licenses to payday lenders in Alameda in 2004 alone, but only a total of seven in the ensuing seven years (2005–2012). Only four of the seven licenses are still active, representing a 57% survival rate of active payday businesses since 2004. The story is similar in Hayward, and to a lesser extent in Emeryville and Berkeley, as the following table (Table 1) illustrates.

Moreover, this pattern is repeated, to varying degrees, in virtually every municipality that has passed a restrictive zoning ordinance directed at the payday-lending industry, as Table 1 illustrates. That is, subsequent to the passage of a restrictive zoning ordinance, the number of new licenses issued to payday lenders drops significantly, and sometimes dramatically, both in the city

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unions; check cashers and payday lenders also may not be established or located within 500 feet of any existing residential zone).

[95] The CDDTL became operative on December 31, 2004, and required that every payday lender operating within the reach of this law must obtain a license by that date to operate or continue operating. CAL. FIN. CODE § 23100 (West 2004). Thus, some lenders that may have obtained licenses in 2004 could have already been in existence. It is not clear from the data provided how many of these businesses were currently operating and how many were just entering the market in 2004.

[96] It is worth noting that the available data does not reveal how many payday-lending businesses were in operation in Oakland at different points in time, such as 2004, 2008, and 2012.

with the new law as well as in surrounding cities without such restrictions. Table 1 presents the data on the number of licenses issued to payday lenders within cities that have enacted distance ordinances and within closely proximate cities—a ten-mile radius—both before and after passage of the ordinance.

Table 1: *Licenses to "Deferred Deposit" Firms Within a Ten-Mile Radius of Cities with Distance Ordinances*

City (Date of Ordinance)	New Licenses (Before Ordinance)	New Licenses (After Ordinance)	Current Active Licenses *as of 12/31/2012*
	2004	***2005–2012***	
Oakland (2004)	20	15	16
Alameda	4	3	4
San Leandro	5	7	5
Hayward	9	8	7
Emeryville	2	0	1
Berkeley	3	1	3
	2004–2008	***2009–2012***	
San Francisco (2008)	57	3	29
Daly City	9	0	5
South San Francisco	4	0	2
	2004–2008	***2009–2012***	
La Mirada (2008)	12	1	5
Fullerton	20	4	14
Bellflower	17	0	11
Buena Park	8	1	5
Whittier	12	0	7
	2004–2009	***2010–2012***	
Sacramento (2009)	125	3	70
Citrus Heights	27	3	12
Roseville	7	1	6
	2004–2009	***2010–2012***	
Pico Rivera (2009)	13	0	8
East Los Angeles	2	1	1
Montebello	13	3	8
Monterey Park	2	1	1
South El Monte	1	1	1
	2004–2010	***2011–2012***	
Norwalk (2010)	18	0	9
Downey	7	3	7
Artesia	0	1	0
Paramount	1	1	1
Total	**398**	**61**	**238**

Source: California Department of Corporations

There are two striking observations about these data. The first is the obvious decline in the number of new licenses issued to payday lenders after the year in which the ordinance was enacted. There is a significant reduction in new payday licenses issued during this period in all municipalities shown on the chart. The second observation is the number of payday lenders still operating in the municipality. While the number of new licenses has declined significantly in all municipalities, the industry has not disappeared, particularly in those cities with restrictive zoning ordinances. Thus, while these ordinances *arguably* have had some success in halting the further concentration of payday lenders in California cities, they have not succeeded in preventing access by consumers to these businesses. New payday businesses continue to open, even in cities with restrictive zoning ordinances, and existing businesses continue to operate.

Nevertheless, one objection to drawing any conclusion about the effect of restrictive zoning ordinances on payday lenders is the possibility that other factors or forces could explain the observed decrease in payday lenders. One obvious force potentially affecting the number of new payday lenders entering a local market is the recent recession: the 2008–2009 economic downturn and its aftermath. For instance, it might be that fewer payday lenders sought to enter local markets because of the erosion of their customer base as job layoffs and unemployment rates increased. Most of the California distance ordinances were passed during this recession, in the period between 2009 and 2012, but it is impossible to tell from Table 1 what effect the recession has had on payday-lending markets.

In order to isolate the potential effect of the recession on the payday-lending industry, it is necessary to compare the pre- and post-recession licensing patterns of payday lenders in cities that have not enacted payday zoning restrictions and are not located in close proximity to those that have such ordinances in effect. The following table (Table 2) contains the relevant data on other cities in California with a significant number of payday lenders. Specifically, for these cities, Table 2 presents the number of lenders licensed as of 2004, the year after the California state law regulating the terms of payday loans took effect, the ensuing years leading up to the recession, and then the immediate years following the onset of the recession.

As Table 2 depicts, the pattern of payday licensing in these cities reveals a substantial decline in new payday licenses issued during the height of the recession, between 2009 and the end of 2012. A similar decline during the same period is reflected in Table 1 in cities with restrictive zoning ordinances and in closely proximate surrounding cities. The pattern reflected in both charts thus strongly suggests that the impact of the recent recession likely plays a significant role in the decline in payday lenders in California, regardless of whether the city has a restrictive zoning ordinance in effect during this period.

Table 2: *Licenses to "Deferred Deposit" Firms in Cities Without Distance Ordinances nor in Close Proximity to Cities with Distance Ordinances*

City	New Licenses Before 2004	New Licenses 2005–2008	New Licenses 2009–2012	Current Active Licenses as of 12/31/12
Anaheim	28	23	13	26
Bakersfield	41	25	3	42
Fresno	64	51	4	66
Los Angeles	147	111	37	149
Modesto	29	5	2	27
Pasadena	12	7	3	11
Pomona	17	18	5	16
Riverside	26	26	7	28
San Bernadino	25	7	3	21
San Diego	71	46	18	67
San Jose	45	34	7	39
Stockton	26	19	3	27
Santa Ana	24	23	13	32
Van Nuys	21	25	6	14
Total	**576**	**420**	**124**	**565**

Source: California Department of Corporations

This is not to say that zoning restrictions have not had any effect on the reduction and de-concentration of payday lenders in a particular locality. It might be that such ordinances provided an additional deterrent, beyond the recession, for new payday lenders to enter some local markets. This effect is difficult to measure by publicly available data, however. What the data does establish is that restrictive zoning ordinances have not been able to, even during a recession, completely separate payday lenders from consumers. Indeed, the recession may have had the most powerful effect in reducing the numbers of payday lenders in all municipalities across California. Nevertheless, it is also clear that payday lenders continue to enter local markets and operate within those markets.

Zoning restrictions designed to limit the number of payday lenders within a locality, prevent them from locating near each other, or both, still might have some role to play in reducing the concentration, or agglomeration, of payday lenders in some local markets. This raises the question whether zoning laws aimed at preventing or disrupting the agglomeration of payday lenders in a city or urban region serve to protect or help consumers in some way. Another way of asking this is whether there are any benefits to consumer welfare in allowing payday lenders to agglomerate in a particular municipality. The next Part suggests that the answer is likely yes and, further, that zoning restrictions which prevent or break up such agglomerations can harm the very consumers they are meant to protect. That is, in the absence of the financial regulatory reform payday-lending critics desire, allowing some degree of payday-lender agglomeration has the potential upside of reducing lending rates and changing

some of the other loan features that consumer advocates find most troublesome.[97]

IV. ZONING, AGGLOMERATION, AND CONSUMER WELFARE

Classic Euclidean zoning, by separating commercial uses from residential uses, and concentrating those firms in designated zones, can facilitate the development of positive spillovers, which firms can capture by being located close to one another. These spillovers are what economists call "positive agglomeration externalities."[98] Legal scholars recently have begun to wrestle with the relationship between zoning and agglomeration economies, but have done so only through the prism of supply-side externalities—i.e., the positive spillovers that result from being located close to workers and other firms in the industry.[99] As this Part argues, zoning controls can also shape the degree to which demand-side externalities—i.e., the positive benefits that accrue from being located close to consumers—operate to increase the welfare of consumers.

A. *Retail Agglomerations and Consumer Behavior*

Since the 1980s, economists have explored the idea that positive externalities from industry clusters are the cause of increased productivity of firms and individuals.[100] Clustered firms benefit both from economies of scale and from economies of specialization, which can help stimulate growth and innovation in an industry.[101] Evidence of industry clusters are found in the automobile industry in Detroit, the theater and garment industries in New York

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[97] This Article brackets the question of what kind of agglomeration patterns would be desirable, given the complexity of agglomeration economics. Competitive price pressure, for example, may depend on the existence of a variety of business formats and other factors sensitive to a particular industry. *See infra* Parts IV.B, V.A.

[98] Positive externalities occur when the "net benefits to being in a location together with other firms increase with the number of firms in the location." W. Brian Arthur, *"Silicon Valley" Locational Clusters: When Do Increasing Returns Imply Monopoly?*, 19 MATHEMATICAL SOC. SCI. 235, 237 (1990).

[99] *See infra* notes 103, 107.

[100] Economists have focused on externalities first suggested by Alfred Marshall in PRINCIPLES OF ECONOMICS 55 (abr. ed. 2006).

[101] Paul Krugman famously stressed the role of reduced transportation costs in getting materials from suppliers and to customers. *See* Paul Krugman, *Increasing Returns and Economic Geography*, 99 J. POL. ECON. 483, 485 (1991). It should be noted, however, that there is some dispute over the geographic distance over which agglomeration benefits appear to attenuate. *See, e.g.*, Brian T. McCann & Timothy B. Folta, *Location Matters: Where We Have Been and Where We Might Go in Agglomeration Research*, 34 J. MANAGEMENT 532, 541 (2008) [hereinafter McCann & Folta, *Location Matters*] (summarizing the disagreement among researchers about what distance agglomeration measures should be aggregated).

City, and the technology industry in Silicon Valley, among others.[102] However, the same agglomeration economies can be found in local service markets and among smaller-scale retail businesses, such as automobile dealers, shoe stores, hotels, and mall food courts.[103]

Much of the agglomeration economics literature has focused on supply-side explanations for why some firms cluster together. These include economies of scale as a result of being in close proximity to suppliers and workers and the positive spillovers from the ease of sharing knowledge and technological expertise with other firms.[104] Demand-side externalities, however, offer much more explanatory power for retail industries and local sellers of consumer goods and services than for producers of national scale goods, which benefit more from supply-related externalities.[105] Demand-side externalities are common to those businesses or industries in which product or service heterogeneity exists and consumers wish to inspect their products and services prior to purchase.[106]

On the demand side, economists have long postulated that consumer search behavior can lead retail firms to cluster.[107] Consumer search costs are influenced by retail firm location, in part, because buyers have imperfect information and agglomeration facilitates the ability to discover and inspect the goods and services of multiple firms.[108] Positive spillovers can occur when

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[102] *See, e.g.*, PAUL KRUGMAN, GEOGRAPHY AND TRADE 35 (1991) (most manufacturing sectors and many producer-service industries have a large presence in a few geographical locations and very little going on elsewhere); *see also* RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS, REVISITED 189 (2012) (citing the *maquiladora* electronic and auto parts districts in Mexico, the clusters of disk-drive manufacturers in Singapore, the flat-panel display industry in Japan, clusters of insurance companies in Hartford, casinos in Las Vegas, furniture manufacturing in High Point, North Carolina, and advanced imaging laboratories in Rochester, New York). *See generally* Glenn Ellison & Edward L. Glaeser, *Geographic Concentration in U.S. Manufacturing Industries: A Dartboard Approach*, 105 J. POL. ECON. 889 (1997) (discussing Silicon Valley-style localizations of individual manufacturing industries in the United States).

[103] *See, e.g.*, Stephen Brown, *Retail Location Theory: The Legacy of Harold Hotelling*, 65 J. RETAILING 450, 451 (1989).

[104] Specifically, knowledge- and technology-intensive industries that require high innovation and have a common technology core are more likely to benefit from supply-side externalities, such as specialized labor, specialized inputs, and knowledge spillovers. Brian T. McCann & Timothy B. Folta, *Demand- and Supply-Side Agglomerations: Distinguishing Between Fundamentally Different Manifestations of Geographic Concentration*, 46 J. MGMT. STUD. 361, 368–70 (2009) [hereinafter McCann & Folta, *Demand- and Supply-Side*].

[105] *See generally id.* (explaining that supply-side and demand-side explanations for agglomeration are quite distinct and discussing different kinds of agglomerations, although in some rare industries, supply- and demand-side externalities overlap).

[106] *Id.* at 368 (noting the applicability and relevance of demand-side externalities in shoe stores, automobile dealers, and hotels).

[107] Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41, 53–54 (1929) (positing that firms cluster to attract consumers that want to minimize travel costs when making a purchase).

[108] Charles Stuart, *Search and the Spatial Organization of Trading*, *in* STUDIES IN THE ECONOMICS OF SEARCH 17, 17 (S.A. Lippman & J.J. McCall eds., 1979); Konrad Stahl,

heterogeneous retailers selling comparable goods or services co-locate together,[109] or when firms in the same industry co-locate and provide a wider variety of firms from which to choose, thereby increasing the chances that consumers will purchase from the agglomeration.[110] As more of these firms join the agglomeration, and consumer search costs are reduced, more consumers are drawn to the agglomeration and the net benefits of agglomeration increase for the firms in that location.[111]

The demand-side benefits extend not only to the agglomerating firms, but also to consumers in ways that have implications for consumer welfare. As the next Part explains, one effect of retail agglomerations is to incentivize firms to compete on price and product variety. When rival firms compete with each other, this is undoubtedly good for consumers. Indeed, there is evidence that consumers can benefit from lower pricing on similar goods and services from increased price competition by closely proximate rival firms.

B. *Firm Proximity and Retail Competition*

Conventional economic wisdom suggests that zoning restrictions reduce the number of firms in a location and, with fewer firms, reduce competition among firms.[112] However, the relationship between zoning restrictions and retail competition is more ambiguous and complex than economists had initially assumed.[113] Whether zoning decreases retail competition by increasing the

Differentiated Products, Consumer Search, and Locational Oligopoly, 31 J. INDUS. ECON. 97, 97 (1982) (firms can reduce search costs by locating closer to consumers and, in turn, the reduction of consumer search costs may lead to a spatial concentration of demand that firms in the same industry, despite being competitors, find it profitable to locate close to one another); *see also* B. Curtis Eaton & Richard G.. Lipsey, *Comparison Shopping and the Clustering of Homogenous Firms*, 19 J. REGIONAL SCI. 421, 422 (1979).

[109] Boudhayan Sen et al., *Demand Externalities from Co-Location* 20–21 (Yale Univ. Cowles Found., Discussion Paper No. 1850, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2002302 (finding positive spillovers in increased spending on groceries from the co-location of grocery stores and gas stations).

[110] McCann & Folta, *Demand- and Supply-Side, supra* note 104, at 371 (all that is required for a reduction in search costs is a grouping of similar firms from which customers can choose).

[111] *Id.* at 368. Of course, there are diseconomies of scale on the demand side if agglomerations significantly intensify local competitive pressures and innovation or product diversification suffers. *Id.* at 380–81; *see also* Jeffrey H. Fischer & Joseph E. Harrington, Jr., *Product Variety and Firm Agglomeration*, 27 RAND J. ECON. 281, 282–85 (1996) (finding that greater consumer demand motivates firms to cluster, but only when there is substantial product heterogeneity is this effect sufficiently strong to counterbalance the increased competition that accompanies agglomeration).

[112] David B. Ridley et al., Retail Zoning and Competition 3 (2011), *available at* https://faculty.fuqua.duke.edu/~dbr1/research/zoning-competition.pdf (Duke Univ., Working Paper).

[113] For example, the presence of competitor firms in a commercial zone may operate either to attract other retail firms or to make competitors less likely to enter the market. For

market power (or monopolies) of certain firms or intensifies competition by forcing competitors to locate closer together depends on factors particular to each industry and perhaps even to each firm. A firm's expected payoffs from locating close to competitors is very much shaped by the presence of agglomeration economies, the market characteristics of the particular industry, distance to consumers, and the ability to differentiate itself by product or service format.[114]

One way that retail firms respond to zoning restrictions that force firms to locate closer together than they otherwise would is through differentiation strategies. There is evidence that retail firms tend to increase format (or product) variety, without reducing firm entry, as a reaction to land-use controls that decrease their proximity to one another.[115] We might see, for example, food retailers continue to enter into a crowded, competitive market, but vary their format by size and product variety. As such, a commercial zone might contain a mix of supermarkets, supercenters, convenience stores, and mass-merchandising stores that sell food and other items.[116] As one recent study explains, "Consumers may wish to shop at stores of different formats: they may shop mostly at a supercenter and then shop at a close-by natural food store or limited assortment store for select products."[117]

The close proximity of rival retailers will likely generate demand-side agglomeration benefits for firms willing to vary their formats and for consumers comparing products and services. In particular, competing retailers with heterogeneous formats gain additional customer traffic and consumers benefit from a more robust variety of products and shopping formats.[118] These

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some firms, even though the intensity of retail competition decreases with distance between firms, consumer demand can incentivize firms to locate within closer proximity to one another. *See, e.g.*, A. Yeşim Orhun, *Spatial Differentiation in the Supermarket Industry: The Role of Common Information*, 11 QUANTITATIVE MARKETING & ECON. 3, 34 (2013) (explaining that empirical results demonstrate that these two counteracting incentives are traded off differently by different types of supermarkets).

[114] Tatyana Kuzmenko, An Empirical Model of Firm Entry with Zoning 9–10 (Oct. 26, 2007), *available at* http://econ.duke.edu/uploads/media_items/firmentryandzoning.original.pdf (Duke Univ., Working Paper).

[115] Sumon Datta & K. Sudhir, *Does Reducing Spatial Differentiation Increase Product Differentiation? Effects of Zoning on Retail Entry and Format Variety*, 11 QUANTITATIVE MARKETING & ECON. 83, 101 (2013) [hereinafter Datta & Sudhir, *Reducing*] (explicating that when zoning restrictions proliferate in a market, entering grocery retailers are more likely to exhibit greater diversity in their store formats as a means to mitigate the reduced scope for spatial differentiation).

[116] *Id.* at 86.

[117] *Id.* at 108.

[118] *See* Sumon Datta & K. Sudhir, The Agglomeration–Differentiation Tradeoff in Spatial Location Choice 35 (2011) (unpublished manuscript) [hereinafter Datta & Sudhir, Agglomeration] (finding that grocery consumers not only value economies of scope from the presence of other, non-grocery businesses at a location, but they also value the agglomeration of multiple grocery stores at the location; and finding that consumers are

agglomeration benefits are apt to be even greater in centralized (versus outskirt) commercial zones, given the ease with which consumers can access different retail formats and the tendency for smaller retailers to locate there.[119]

Moreover, where zoning restrictions facilitate competitive firm agglomeration, there is a fairly direct relationship between zoning controls and price competition. As David Ridley et al. demonstrate, the smaller and more concentrated the area in which retail firms agglomerate, the stronger is the correlation with lower prices for consumers.[120] That is, the number of firms is not as important a variable in price competition as the space available for firms to locate in a particular area. The larger the zoned area, and the more distance between firms, the higher prices tend to be, even between rivals.[121] As such, where firms are forced to locate closer to one another, in a centralized commercial "strip" for example, there is a clear incentive to compete on price.[122] Thus, an unintended consequence of zoning, which concentrates commercial retailers, might be to increase price competition under certain circumstances. This competition obviously benefits consumers if it results in lower prices for similar products.[123]

C. *Zoning For and Against Agglomeration*

As we have seen, traditional Euclidean zoning controls can facilitate both supply- and demand-side positive spillovers by not only concentrating firms together in a commercial zone, but also by decreasing the distance between firms.[124] The converse is likely also the case, however. Zoning regulations that restrict the entry of rival retailers or impose separation requirements that push

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more likely to visit locations with multiple grocery stores when the cluster of stores consists of different formats).

[119] Datta & Sudhir, *Reducing*, *supra* note 115, at 86 (explaining that centralized zoning leads to greater retail format variety with a number of smaller retail formats, relative to outskirt zoning which leads to more homogenous larger zoning format).

[120] *See* Ridley et al., *supra* note 112, at 20.

[121] *Id.* at 20–21 (explaining that markets with more space for firms tend to have more firms and higher prices).

[122] *Id.* at 21–22 (noting the risk that lower prices can drive out firms, or induce less entry, which can result eventually in prices rising somewhat).

[123] *See* Jerry Hausman & Ephraim Leibtag, *Consumer Benefits from Increased Competition in Shopping Outlets: Measuring the Effect of Wal-Mart*, 22 J. APPLIED ECONOMETRICS 1157, 1176 (2007) (finding that Wal-Mart's "superstore" entry into a new geographic market creates a direct price effect by offering a lower-price option to consumers and an indirect price effect by causing traditional supermarkets to lower their prices because of the increased competition).

[124] *See, e.g.*, Datta & Sudhir, *Agglomeration*, *supra* note 118, at 38–39 (finding that when zoning is more restrictive, some retail grocery stores agglomerate because they recognize that by co-locating they can gain from agglomeration benefits, which may outweigh the relatively constrained benefits from spatial differentiation).

firms farther apart risk a reduction in the positive agglomeration benefits that might accrue to firms and consumers.

Legal scholars have recently begun to recognize the ways in which zoning mechanisms can frustrate, as well as facilitate, supply- and demand-side positive agglomeration externalities for firms. As Daniel Rodriguez and David Schleicher have argued, zoning limitations on commercial development can be thought of as a supply-side restriction, making it difficult for firms to capture the spillovers from close proximity. Such restrictions impede the "location market" and can raise transport costs, reduce the advantages market size yields, and interrupt the flow of information spillovers.[125] The same can be said on the demand side of the agglomeration benefits ledger. Gideon Parchomovsky and Peter Siegelman, for example, urge cities to use their zoning and other land-use planning tools to not only establish commercial districts, but also to ensure the right mix of various sizes and layouts within the commercial districts to maximize the positive externalities from commercial agglomerations.[126] This kind of careful agglomerative planning, they argue, would help attract consumers to downtown areas and create a higher volume and more attractive mix of stores that would allow for the internalization of positive externalities among retailers.[127]

This Article takes these arguments one step further and argues that zoning limitations on retail firm proximity can frustrate the internalization of positive externalities by consumers, not just firms. Specifically, zoning which restricts firm location risks depriving consumers of the agglomeration benefits that competition between proximate firms can provide. This is not to say that all location restrictions imposed on retail firms threaten consumer welfare. Exactly where the balance is struck between the right degree of concentration and separation will depend on a number of factors, including the topography of a particular municipality, the proximity of businesses that locate there, and the characteristics of certain industries. The point here is that zoning controls can be deployed in ways that have important implications for consumers of retail goods and services. These implications have relevance, the next Part argues, for the assessment of whether zoning restrictions on payday lenders further the consumer protection and welfare goals that animate them.

V. ANTI-AGGLOMERATION ZONING AND CONSUMER WELFARE

The previous Part argued that zoning restrictions can both facilitate and frustrate the positive benefits of retail agglomerations, particularly for consumers. Traditional zoning restrictions that force firms to locate closer together, such as in a commercial zone, can benefit consumers by reducing

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[125] *See* Rodriguez & Schleicher, *supra* note 24, at 638, 653.

[126] Parchomovsky & Siegelman, *supra* note 21, at 246–60 (relying on literature on the economics of shopping malls).

[127] *Id.*

search costs and inducing format and price variety. Given the potentially positive relationship between zoning, agglomeration economies, and consumer welfare, this Part examines the benefits and costs of using zoning laws to prevent or limit payday-lender agglomeration.

A. *The Benefits of Payday Agglomeration*

Payday lenders are retail service firms able to take advantage of agglomeration economies by co-locating in commercial zones or "strips." It is very common to find clusters of AFSPs—payday lenders, check cashers, auto title lenders, etc.—in these zones in part because of the supply-side and demand-side scale economies that result from spatial proximity. Payday lenders and other AFSPs are able to capture the positive spillovers from shared local labor market pools, shared local media and advertising which attract consumers to the agglomeration, and the development and access to overhead services—such as store supervision—which can be spread across multiple stores in the cluster.[128]

It logically follows that consumer search costs are lowered and product, format, and price variety are likely to increase when payday lenders cluster together. That is, payday-loan customers are better able to compare the variety and pricing of different financial services if payday lenders are located within a defined geographical area. This is particularly the case for low- and middle-income populations, the majority of payday customers, who own fewer automobiles per capita and are more dependent on public transportation than their wealthier counterparts. In fact, the very existence of commercial zones, which forces retailers to concentrate, benefits consumers with fewer transportation options. Not only are their search costs lowered by such concentration, but the ability to engage in comparison shopping is facilitated (and often made possible) by retail agglomeration.

The presence of multiple payday lenders and other AFSPs is often accompanied by format variety among them. It is not uncommon to find in an AFSP agglomeration both stand-alone payday lenders as well as multi-service storefronts, or "financial supermarkets," which offer check cashing, money orders, bill payment, tax preparations, and wire remittances. The literature on retail firm agglomeration in the banking industry suggests that such format and product and service variety results in part from firm efforts to differentiate themselves from their competitors. Market differentiation benefits financial services consumers by giving them more choices, resulting in consumer surplus, as compared to markets in which there is no product or format differentiation

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[128] *See, e.g.*, AMITABH BHATNAGER, RURAL MICROFINANCE AND MICROENTERPRISE: INFORMAL REVOLUTION 48–49 (2008) (Many "'one-stop' shops . . . offer[ ] a real alternative to those who have traditionally been outside the financial mainstream . . . . The advantages of these entities for the customer include locational convenience, few requirements, rapidity of loan decisions, and multiple services.").

among banks.[129] This consumer benefit exists even in the absence of explicit price differentiation.

Whether payday-lender agglomeration leads to increased consumer welfare or price competition is more difficult to say. On the one hand, payday lenders operate within a financial services marketplace much like traditional retail banks. If traditional retail bank branch agglomeration increases consumer welfare or price competition through product or format variety, the same arguably would be true of AFSPs like payday lenders. One study of payday loan pricing in Colorado provides some evidence of this. The authors compared payday-lender finance charges over a six-year period, including on loans extended before and after the state legislature imposed a price ceiling on payday loans.[130] The study found that before the price ceiling was imposed, loan prices were more competitive and generally lower, particularly in local markets with a large number of payday lenders. After the legislation, however, the competitive effects disappeared and lending prices gravitated toward the regulatory price ceiling over time.[131]

There is some reason to suspect that demand for payday loans may be price-inelastic, even in an unregulated market.[132] Price inelasticity may be a function of inelastic consumer demand for payday lending in markets where borrowers have limited financial service choices.[133] In such markets, it may be tempting

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[129] *See, e.g.*, Mian Dai & Yuan Yuan, *Product Differentiation and Efficiencies in the Retail Banking Industry*, 37 J. BANKING & FIN. 4907, 4908 (2013) (finding that the presence of both single-market and multi-market banks results in a consumer surplus; that consumer surplus drops by almost thirty percent when only single-market banks or only multi-market banks are allowed to operate).

[130] DeYoung & Phillips, *supra* note 27, at 2.

[131] *Id.* at 12 (finding that the percentage of payday loans carrying the maximum legal finance charge increased "systematically" from 69% in 2000 to 97% in 2006). Moreover, strategic pricing behavior emerged in which lenders began charging lower prices to first-time customers and higher prices to repeat borrowers. Lenders in largely minority (African-American and Hispanic) neighborhoods and near military bases also began charging higher prices. *Id.* at 3 n.3 (noting that the data sample ends in December 2006, prior to federal legislation that limited interest rates on loans to military personnel).

[132] *See, e.g.*, Robert Mayer, *When and Why Usury Should Be Prohibited*, 116 J. BUS. ETHICS 513, 518 (2012) (relying on data that show that most lenders in a given market charge essentially the same fees for their loans, and that these fees are almost always the same for all customers, regardless of their creditworthiness). *But see* Matt Zwolinski, *Are Usurious? Another New Argument for the Prohibition of High Interest Loans?*, 1 BUS. ETHICS J. REV. 22, 25 (2013) (responding to Mayer by arguing that another way to read the data is that price convergence suggests that payday-lending markets are in fact competitive and that market competition has pushed prices toward equilibrium). *Cf.* Robert Mayer, *The Cost of Usury*, 1 BUS. ETHICS J. REV. 44, 47 (2013) (noting that Zwolinski's critique fails to address his claim that when prices are unregulated the more solvent majority cross-subsidizes the least creditworthy minority; Zwolinksi ignores completely the distributive effects of different price regimes in different states in an unregulated market).

[133] This may indeed be the case in some neighborhoods, but not in others. As Part II.B. explained, in many communities, consumers have access to both traditional banking

for payday lenders to exploit this demand inelasticity, leaving room for little or no price competition.[134] If, in the end analysis, price inelasticity characterizes most payday-lending markets, then this would lead us to believe that payday agglomerations may not have the same effect on price as exists in other retail agglomerations. This result would be consistent with findings that customers of payday lenders cite convenience (e.g., ease of access, lower credit restrictions, etc.) over price as the determining factor in where they obtain their loan.[135] As such, it may be that the main cost to consumers of breaking up payday agglomerations is the reduction in convenience and lower search costs of consuming a product or service that they have already decided has utility for them.

However, the relationship between payday-lending markets and regulation is dynamic enough to resist an easy conclusion on the question of price competition. As an example, the authors of the Colorado study mentioned above found that there was still market differentiation and price variation among payday lenders even in a price-controlled market (where prices seemed to be gravitating toward a statutory price ceiling). That is, even with a price ceiling, payday stores affiliated with multiple locations (so-called multi-shop branches) charged higher prices than single-store "mom-and-pop" payday lenders.[136] Much like traditional bank branches in a local market, then, the presence of both single- and multi-market payday lenders likely adds some degree of price differentiation, which can benefit consumers.[137] The question for local

products and payday lenders. The fact that some consumers prefer the convenience and ease of payday loans does not mean that they lack choice. However, it is undoubtedly the case that some consumers—e.g., those with poor credit, those facing institutional or discriminatory barriers, etc.—have extremely limited financial service choices and thus may not benefit from an unregulated payday lending marketplace.

[134] *See, e.g.*, DeYoung & Phillips, *supra* note 27, at 3 (suggesting that payday lenders in Colorado exploited demand inelasticity in minority and military communities, leading to higher prices in those communities).

[135] Zwolinski, *supra* note 132, at 25.

[136] DeYoung & Phillips, *supra* note 27, at 3. The authors also found that multi-store firms were more likely than independent stores to charge lower prices to first-time customers and higher prices on long-maturity loans that roll over less frequently. *Id.* at 3–4. On the other hand, multi-store firms also tended to charge lower prices than single-store lenders near military bases and in minority neighborhoods. *Id.* at 4. The authors posit that "with higher franchise values at stake, these firms may have willingly absorbed small reductions in lending margins in order to reduce the headline risk associated with consumer advocate criticism (and the eventual[] possibility of regulatory intervention)." *Id.*

[137] The authors explain why these two types of stores are likely to exhibit different pricing behaviors:

> Because multi-store affiliates are essentially branch locations, they are likely to act like revenue centers rather than profit centers, following pricing strategies that are dictated by headquarters rather than by local management. Customers may also be willing to pay higher prices for loans at these stores, ceteris paribus, due to actual (better store locations, nicer in-store amenities) or perceived (advertising-driven) quality differences. On average, about 83 percent of the loans in our data were written at payday stores

governments thus might be how best to encourage retail service branch and format variety among lenders as a way of encouraging more robust price and product competition. That is, if local governments are going to regulate payday lenders through their zoning power, they might deploy this power to encourage a mix of smaller, independent firms and larger, multi-shop branches to agglomerate.[138]

Evidence of a dynamic relationship between payday-lending markets and state financial regulation suggests that anti-agglomeration zoning regulations are likely to be, at best, neutral and, at worst, harmful to consumer welfare. At best, anti-agglomeration zoning may reduce the number of payday lenders but not eliminate them altogether, as the California experience suggests.[139] If consumers are apt to use payday lenders over other alternatives for reasons of access and convenience, then they will continue to do so albeit with fewer choices. Even in markets with stubborn price inelasticity, the existence of fewer options is likely to have some negative impacts on consumer choices among payday lenders and may increase consumer search costs if they have to increase the time and effort expended on comparison shopping. At worst, anti-agglomeration zoning threatens to remove the incentive for product, format, and price competition that firm proximity can induce. Given the high demand for payday lenders in some economic classes and the lack of attractive alternatives, it is difficult to see how preventing payday firm agglomeration increases the welfare of those customers inclined toward utilizing these lenders.

B. *The Costs of Payday Agglomeration*

As the previous Part argued, the relationship between payday-lender agglomeration and enhanced consumer welfare is at least theoretically solid, even if a definitive conclusion about that relationship begs for more empirical

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> affiliated with multi-store companies; MULTISTORE is a dummy variable that indicates these loans. The sign of coefficient on this variable is theoretically ambiguous: while the revenue-maximization and product-differentiation phenomena both predict a positive sign, the potential for scale economies within these larger organizations may allow affiliates in multi-store firms to charge lower prices. To the extent that successful product differentiation creates higher franchise value at these firms, multi-store payday lenders may be hesitant to pursue pricing strategies that elicit reactions from consumer groups and the press (e.g., exploiting price inelastic demand associated with racial status, military status, or the elderly) in order to protect that value.

Id. at 18 (footnote omitted).

[138] *See, e.g.*, Parchomovsky & Siegelman, *supra* note 21, at 248 (arguing that cities should use their zoning and other land-use planning powers to not only establish commercial districts where retail firms can agglomerate, but also to ensure the right mix of various sizes and layouts within the commercial districts to maximize the positive externalities from commercial agglomerations).

[139] Moreover, if the lenders that are driven out tend to be smaller "mom-and-pop" stores, restrictive zoning ordinances could undermine price competition by unwittingly attracting larger and more national lenders likely to charge higher prices.

data. One objection to the focus on the positive agglomeration externalities of payday-lender concentrations is that such analysis fails to acknowledge the negative costs associated with such agglomerations. Some account of these costs is necessary given the basic orientation of land-use controls toward management of the larger urban environment, or commons.[140]

One way to conceptualize the negative costs associated with agglomeration is congestion. A typical example of this congestion is the increased traffic that results from an increase in density of firms or people. This increased density can lead to higher transportation costs and more effort for residents or shoppers to navigate a particular area.[141] In the case of retail firms that sell products or services that tend to draw a lot of foot or vehicular traffic, the risk of congestion increases for each additional firm that co-locates close to existing businesses. Of course congestion in and of itself is not necessarily a bad thing. If the proliferation of Starbucks (or other coffee shops) brings increased vehicular or foot traffic to a local area, this kind of congestion is most often viewed as a positive gain for surrounding businesses, property values, and the attractiveness of the neighborhood. In other words, many kinds of retail agglomerations result in congestion, but not all forms of congestion are desirable.

The question is not only whether there will be an increase in congestion—i.e., the amount of foot (or vehicular) traffic—but whether that increase will impose adverse impacts on third parties. Such "negative agglomerations," as David Schleicher terms them, involve factors that have increasing returns to scale but a negative effect, such as crime.[142] The classic modern example of such negative agglomerations is New York City's Times Square in the 1970s and 1980s, with its concentration of adult-oriented businesses, single-room occupancy hotels, and X-rated movie theaters. These businesses were frowned upon by local residents and city leaders for attracting dense foot traffic of the wrong type—addicts, drug dealers, prostitutes, pimps, and the like. This foot traffic increased violent crime in the area, imposing costs on surrounding neighborhoods, tourists, and theatergoers and eventually led to the elimination of these land uses from the area.[143]

The concentration of payday lenders arguably carries the risk of congestion and the negative spillover effects of this congestion. Although much of the

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[140] *See generally* Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011).

[141] *See* McCann & Folta, *Location Matters*, *supra* note 101, at 559.

[142] David Schleicher, *The City as a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507, 1528–29. Heavy vehicular traffic, for instance, at some point creates an increased risk of accidents to pedestrians and other cars, and a significant increase in the pollution load in the surrounding community. And heavy foot traffic can bring an increase in loitering and crime.

[143] *See generally* William J. Stern, *The Unexpected Lessons of Times Square's Comeback*, CITY J. (1999), *available at* http://city-journal.org/html/9_4_the_unexpected.html (discussing the elimination of the sex industry in the area and overall revitalization of Times Square during the 1980s).

impetus motivating restrictive payday zoning ordinances is the protection of consumers and consumer welfare, local lawmakers invariably argue that the concentration of payday lenders has a negative impact on economic revitalization in the commercial areas where they are concentrated—i.e., the equivalent of a "blight" argument.[144] Specifically, they fear an increased risk of attracting crime due to the concentration of cash carried by payday store customers, and they also cite the potential for declining neighborhood property values.[145] Such potential negative spillovers lend credence to proponents of anti-agglomeration ordinances aimed at the payday industry even if there is yet no definitive empirical basis for establishing that these effects will materialize.[146]

One way to evaluate arguments about the negative spillovers that can result from retail agglomerations, especially in the absence of strong empirical evidence, is to examine the nexus between the primary and secondary effects of the land use. When lawmakers express concerns about the negative spillovers

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[144] *See generally* Colin Gordon, *Blighting the Way: Urban Renewal, Economic Development, and the Elusive Definition of Blight*, 31 FORDHAM URB. L.J. 305 (2004) (noting the expanded definition of blight over time and the breadth of municipalities' ability to use eminent domain and other land-use tools to redevelop areas that are deemed capable of higher or better development).

[145] *See, e.g.*, IRVING, TEX., ORDINANCE 2009-9070 (2009) (noting the "detrimental effect on local property values and economic redevelopment"); Alix Bryan & Sandra Jones, *Chesterfield Considers New Zoning for Payday Lenders and Pawnshops*, WTVR, http://wtvr.com/2013/01/04/chesterfield-considers-new-zoning-for-payday-lenders-and-pawnshops/ (last updated Jan. 4, 2013, 7:59 PM) (stating that the planning commission in Chesterfield County, Virginia, is considering new zoning rules that would apply to pawnshops and payday lenders because there is a "legitimate concern" that such businesses might promote criminal activity).

[146] The empirical evidence is decidedly mixed on the relationship between crime and the presence of payday lending, and it is difficult to separate correlation from causation. *See* Heather Luea, Does Payday Lending Impact Neighborhood Crime Rates? (2010) (unpublished manuscript) (finding that census tracts in Nashville, Tennessee, with payday-lending stores had lower property crime rates than census tracts without these lenders); Adair Morse, Payday Lenders: Heroes or Villains? 3 (2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1344397 (finding that, in times of distress, access to credit reduces 1.22 foreclosures per 1000 homes and prevents 2.67 larcenies per 1000 households). *But see* Charis E. Kubrin et al., *Does Fringe Banking Exacerbate Neighborhood Crime Rates?: Investigating the Social Ecology of Payday Lending*, 10 CRIMINOLOGY & PUB. POL'Y 437, 456 (2011) (a case study of Seattle, Washington, finding that even after controlling for various factors generally associated with neighborhood crime rates, there is a significant, positive relationship between payday lending and crime). *See also* Harold E. Cuffe, Financing Crime?: Evidence on the Unintended Effects of Payday Lending 15 (July 2013) (unpublished manuscript), *available at* http://www.melbournein stitute.com/downloads/conferences/LEW2013/LEW2013_papers/CuffeHarold_LEW2013.p df (citing monthly observations of police agencies in several states finding that access to payday lending contributes substantially to the "financially motivated crimes" of larceny, fraud, and forgery, with roughly five additional arrests per 100,000 individuals monthly following the introduction of access to payday lending).

from a particular land use, often those reasons are difficult to separate from concerns about the underlying, primary use of the land. That is, there can be a thin line between the primary and secondary effects of a particular land use. Such is the case when lawmakers want to limit the concentration or location of certain controversial retail industries—e.g., adult entertainment shops, medical marijuana dispensaries, liquor stores, etc.—by citing the potential for increased traffic, noise, loitering, and other negative impacts these businesses are expected to bring.[147] A concentration of liquor stores, medical marijuana dispensaries, pawn shops, and the like is disfavored precisely because the product or service that they sell is believed to attract (or generate) the *type* of clientele or traffic that either will be undesirable to surrounding neighbors and businesses, or might create nuisances and increase criminal activity in the area.[148]

While in some sense the risks attendant to the attraction of a particular type of clientele or traffic are "secondary" to the business of selling the product or service, these spillover effects nevertheless flow directly from the sale of the product or service itself. In such cases, land use restrictions are as much directed at the underlying enterprise as they are at the range of potential impacts that flow directly from that enterprise, and this reality is underscored by the close nexus between the primary use of the land and the potential secondary effects on the surrounding neighborhood. However, the fact that local governments cannot completely or explicitly ban these primary land uses forces proponents of restrictive zoning laws to craft their arguments in line with the jurisprudence upholding such restrictions based on their "secondary effects."[149]

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[147] *See, e.g.*, RIVERSIDE, CAL., ORDINANCE No. 449.225 (2006) (prohibiting location of medical marijuana dispensaries in residential areas or in close proximity to schools, churches, day care centers, and other sensitive uses and citing as the justification the increased loitering, traffic congestion, parking problems, noise, and other harmful secondary effects of such businesses); City of Riverside v. Inland Empire Patients Health & Wellness Ctr., 300 P.3d 494, 512–13 (Cal. 2013) (upholding Riverside ordinance, finding no state preemption even though state law provides for legal use of marijuana for medical purposes).

[148] *See* Salkin, *supra* note 11, at 526. For an argument that the routine activities at an adult business site attract predators, generating a "hot spot of predatory crime," see Lawrence W. Sherman et al., *Hot Spots of Predatory Crime: Routine Activities and the Criminology of Place*, 27 CRIMINOLOGY 27, 39 (1989); *see also* Patricia L. Brantingham & Paul J. Brantingham, *Nodes, Paths and Edges: Considerations on the Complexity of Crime and the Physical Environment*, 13 J. ENVTL. PSYCHOL. 3, 8 (1993).

[149] This is particularly the case where the underlying land use's primary purpose has an expressive character protected by the First Amendment. *See generally* Young v. Am. Mini Theatres, 427 U.S. 50 (1976) (upholding an "anti-skid row ordinance" that prohibited adult businesses from locating within 1000 feet of any two existing adult businesses or within 500 feet of any residential area on the grounds that it is the secondary effects of crime and neighborhood deterioration which these zoning ordinances attempt to avoid, not the dissemination of "offensive speech"); Renton v. Playtime Theatres, 475 U.S. 41 (1986) (upholding similar ordinance based on the secondary effects of adult theaters on the surrounding community).

Yet, because of the close nexus between the primary use and secondary effects of some land uses, limiting the latter is akin to directly restricting the former.

The potential secondary effects of payday-lender concentration have a fairly attenuated nexus with the primary enterprise of the land use and its effects on consumer welfare. Unlike the aforementioned controversial land uses, it is not the case that the underlying enterprise of providing short-term loans to working adults attracts the kind of retail customer undesirable to other businesses or neighbors or is likely to create street nuisances. To the extent that cash-carrying customers are vulnerable prey for street thieves, the same could be said for traditional bank branches, which are typically not the target of restrictive zoning laws. This is not to say that there are no secondary effects from the concentration of payday lending or that they should be ignored. Rather, given the weak nexus between the primary use and secondary effects of payday lenders, the secondary effects justification should be more carefully scrutinized—both normatively and empirically[150]—to ensure that rational land-use planning is motivating the zoning restrictions.

It might be argued that, even if anti-agglomeration zoning deprives consumers of the benefits of payday agglomerations, the potential reduction of any negative externalities associated with the agglomeration may justify these losses. Such a balancing act, however, sidesteps the larger context in which these ordinances have arisen. That is, to the extent that most of the recent ordinances aimed at limiting or breaking up payday-lender agglomerations are concerned with consumer protection and welfare, reducing negative spillovers to the neighborhood "commons" does not directly address the question of whether payday land-use restrictions enhance consumer welfare or consumer protection. If consumer welfare is at the heart of restrictions on payday lenders, then lawmakers should at least consider both the benefits and costs of payday-lender concentration on consumers.

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[150] Some courts have already begun to scrutinize restrictions on land uses such as adult entertainment businesses which, as argued, enjoy a closer nexus between primary and secondary effects. *See, e.g.*, Abilene Retail #30, Inc. v. Bd. of Comm'rs, 492 F.3d 1164, 1175 (10th Cir. 2007) (ruling that a local government in a rural area could not have reasonably relied on studies of secondary effects that did not examine businesses in an entirely rural area); Encore Videos, Inc. v. City of San Antonio, 330 F.3d 288, 294–95 (5th Cir. 2003) (declaring adult business ordinance unconstitutional because none of the secondary effects studies cited in the legislative record had studied "take-home" adult media stores where no adult entertainment is presented or viewed on the premises). *But see* Richland Bookmart, Inc. v. Knox Cnty., 555 F.3d 512, 526 (6th Cir. 2009) (holding that a local government may rely on a study of secondary effects that did not address the particular category of adult business challenging the ordinance); Doctor John's v. Wahlen, 542 F.3d 787, 793 (10th Cir. 2008) (rejecting claim that the "on-site/off-site" distinction is relevant in initially judging whether a local government reasonably relied on the studies in enacting its regulations).

VI. CONCLUSION

This Article argues that payday-lender zoning restrictions arose in response to a spatial and regulatory void that exists in the financial services marketplace. For many low- and moderate-income users, "alternative" financial service providers can provide a raft to keep them financially afloat. It is also the case that, as consumer advocacy groups have argued, the use and abuse of payday lending products can place economically vulnerable consumers at greater risk. There is no shortage of commentary urging policymakers to tighten rules on payday lending interest rates and practices in order to better protect the consumers who depend on these loans for financial solvency. Restrictive zoning ordinances aimed at the payday industry are a direct response to the failure of federal and state regulators to provide stronger protections to payday-loan consumers. In a sense, then, these ordinances have become a species of consumer protection regulation.

Given the consumer protection provenance of restrictive payday zoning laws, it is fair to ask about the relationship between anti-agglomerative character of these laws and consumer welfare. This Article casts considerable doubt on whether these laws protect consumers in any meaningful way by reducing the number of, but not eliminating completely, payday lenders in some municipalities. More importantly, the Article contends that breaking up payday-lender agglomerations can harm consumer welfare by decreasing market competition among rival lenders. Such competition can provide consumers—particularly vulnerable consumers with limited access and options to more traditional financial service providers—more product and pricing options than they might have in the absence of this competition. Where this turns out to be (empirically) true, these zoning restrictions may leave payday lending consumers economically worse off than they were in an unfettered payday-location market. This Article suggests that lawmakers should more carefully weigh the costs and benefits of payday-lender agglomeration and consider specifically whether and how anti-agglomeration zoning harms or enhances consumer welfare.