

2010

## Direct Voting by Property Owners

Thomas W. Merrill  
*Columbia Law School*, [tmerril@law.columbia.edu](mailto:tmerril@law.columbia.edu)

Follow this and additional works at: [https://scholarship.law.columbia.edu/faculty\\_scholarship](https://scholarship.law.columbia.edu/faculty_scholarship)



Part of the [Constitutional Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275 (2010).  
Available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/351](https://scholarship.law.columbia.edu/faculty_scholarship/351)

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact [scholarshiparchive@law.columbia.edu](mailto:scholarshiparchive@law.columbia.edu).

# Direct Voting by Property Owners

Thomas W. Merrill†

*Direct voting by property owners is a widespread but controversial tool for resolving disputes over local collective goods. Direct voting has powerful advantages, in that it can harness the superior knowledge of many local minds, resolve controversies in a way that is perceived to be legitimate, and eliminate corrupt dealmaking. But it also has serious pitfalls, if local voters are poorly informed, or if they ignore external effects on other communities, or if the process is distorted by majoritarian or minoritarian bias. To capitalize on the advantages of local voting, and minimize the risks, this Article proposes that direct voting be limited to local property owners, in a one-owner, one-vote fashion. The issues chosen for resolution by direct voting should also be ones with uniform high stakes for property owners, and minimal spillover effects outside the voting community. Applications to controversies over the creation of local historic districts and the use of eminent domain for economic development are discussed.*

## INTRODUCTION

Disputes about the provision of local collective goods have often been resolved by direct voting among local citizens. Special assessment districts, zoning referenda, and business improvement districts are familiar examples.<sup>1</sup> In this Article, I consider the conditions that must be met to make direct democracy a potentially valuable tool for resolving local controversies. A variety of local policy disputes examined in this Symposium are potential candidates for resolution through such a mechanism. A partial list includes consolidation of school districts,<sup>2</sup> elimination of industrial zoning districts,<sup>3</sup> the acquisition of conservation areas,<sup>4</sup> and the use of tax increment financing

---

† Charles Evans Hughes Professor of Law, Columbia Law School.

This Article has benefited from comments of participants at The University of Chicago Law School's Symposium, *Rethinking the State and Local Government Toolkit*, and from a faculty workshop at Wisconsin Law School. Many thanks to Bob Ellickson for reading and commenting on an earlier version of this Article and to Erin Brantley Webb for outstanding research assistance.

<sup>1</sup> See Robert C. Ellickson and Vicki L. Been, *Land Use Controls: Cases and Materials* 401–09, 619–34 (Aspen 3d ed 2005) (discussing how various land use issues have been resolved by voting).

<sup>2</sup> See generally William A. Fischel, *Neither "Creatures of the State" nor "Accidents of Geography": The Creation of American Public School Districts in the Twentieth Century*, 77 U Chi L Rev 177 (2010) (examining the history of school consolidation).

<sup>3</sup> See generally Roderick M. Hills, Jr and David Schleicher, *The Steep Costs of Using Noncumulative Zoning to Preserve Land for Urban Manufacturing*, 77 U Chi L Rev 249 (2010) (arguing that the traditional justifications for industrial zoning districts are not compelling).

<sup>4</sup> See generally Christopher Serkin, *Entrenching Environmentalism: Private Conservation Easements over Public Land*, 77 U Chi L Rev 341 (2010) (observing how conservation easements have been used to entrench land use regulations and make them difficult for future lawmakers to repeal).

(TIF).<sup>5</sup> I add to the list by presenting a case study from New Haven, Connecticut, in which direct voting by property owners was used to determine whether to establish a historic preservation district. I also consider whether direct local voting might be adopted to decide controversies about using eminent domain to promote economic development.

I reach three principal conclusions. First, when direct voting is used to resolve local controversies, restricting the franchise to property owners is a promising strategy for assuring that voters are sufficiently informed and motivated to render a decision that accords with the preferences of the members of the community. Making votes proportional to property holdings is not necessary or even desirable in all cases: a rule of one-owner, one-vote may have greater legitimacy. Second, direct voting should be limited to proposals in which the benefits and costs are largely internalized to the voting community. When significant costs are likely to be borne by those outside the community, direct voting may be more prone to NIMBYism<sup>6</sup> than other decisional mechanisms. Third, direct voting works best when the stakes for members of the community are high and relatively uniform. This minimizes the risk of either majoritarian abuse or minoritarian capture, both of which may be of greater concern when direct voting is used relative to other decisional mechanisms. These conclusions can serve as a basis for determining, within a comparative institutional choice framework, when direct voting is a promising alternative to more conventional mechanisms of collective choice.

## I. LOCAL DIRECT DEMOCRACY: PROMISE AND PITFALLS

Local governments provide a variety of collective goods ranging from streets and sidewalks to law enforcement to land use controls. The general question I explore is whether and under what conditions direct voting by local citizens can be an effective tool for resolving conflicts over the provision of these local collective goods. I begin by considering in the abstract why direct democracy is a potentially attractive mechanism for resolving local political disputes and also why it presents certain pitfalls. This sets the stage for considering how direct voting should be structured in resolving local controversies and

---

<sup>5</sup> See generally Richard Briffault, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, 77 U Chi L Rev 65 (2010) (discussing why tax increment financing has become so widespread).

<sup>6</sup> See Part I.B.2.

why limiting the vote to property owners makes sense in this context. I begin with three advantages and then consider three pitfalls.

## A. The Advantages of Direct Democracy

### 1. The wisdom of many minds.

The most intriguing advantage of direct democracy is that it may result in better decisions than other mechanisms, such as representative democracy (for example, a city council), delegated administrative authority (for example, a zoning board), or judicial review (for example, courts interpreting broad constitutional provisions). The argument can be framed in terms of the “many minds” theorem that has recently attained a degree of prominence in political science and public law scholarship.<sup>7</sup> Originally credited to the Marquis de Condorcet and often called the Condorcet Jury Theorem or just the Jury Theorem,<sup>8</sup> the argument posits that under certain limiting conditions, the larger the group making a decision, the more likely the decision will be correct. A common illustration is provided by experiments in which people are asked to guess how many jelly beans are in a jar: the larger the number of persons guessing, the closer the average guess comes to being correct.

What are the limiting conditions for ensuring that many minds are better than fewer minds? There are basically three. First, the competence of the voters must be sufficiently high that the average voter is more likely to get the answer right than wrong. Second, voters must cast their votes independently of each other, in the sense that no one’s vote is required by the vote of any other. Third, voters must have the same understanding of the choices before them on which they are voting.<sup>9</sup>

---

<sup>7</sup> See, for example, Cass R. Sunstein, *A Constitution of Many Minds: Why the Founding Document Doesn't Mean What It Meant Before* 7–10 (Princeton 2009) (discussing the application of “many minds” arguments to constitutional interpretation); Adrian Vermeule, *Law and the Limits of Reason* 25–55 (Oxford 2009) (summarizing the various versions of the “many minds” argument and expressing skepticism regarding its utility beyond hypothetical scenarios); Cass R. Sunstein, *Infotopia: How Many Minds Produce Knowledge* 195–203 (Oxford 2006) (describing how tools like Wikipedia and prediction markets can successfully aggregate the information held by “many minds” into a useful and novel creation); James Surowiecki, *The Wisdom of Crowds* 22, 36–39, 41–43, 70–72 (Doubleday 2004) (outlining the conditions—diversity, independence, and decentralization—that make many minds more likely to come to a good conclusion than a single mind).

<sup>8</sup> See Paul H. Edelman, *On Legal Interpretations of the Condorcet Jury Theorem*, 31 *J Legal Stud* 327, 327–29 (2002).

<sup>9</sup> See Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 *J Legal Analysis* 1, 5–6, 9 (2009) (explaining that the Jury Theorem requires that the group’s “mean competence is better than random[.]” that there is “independence of the group members’ views or guesses[.]” and “insofar as [one is] interested in the aggregation of judgments . . . the group members must be asking the same question”). See, for example, Sunstein, *Infotopia* at 25–26 (cited in note 7) (applying the

Other conditions that one might think are necessary for the Jury Theorem to hold evidently are not. It is not necessary that each voter be sufficiently competent and well informed that he is more likely to be right than wrong. It is only necessary that *on average* voters are more likely to be right or wrong. More accurate decisions will be reached by expanding the number of voters, even if quite a few voters are ignorant of the facts or hold bizarre views.<sup>10</sup> Nor it is necessary that every voter have the same information about the pros and cons of the issue, just that they agree about what it is they are voting on.<sup>11</sup>

It is also not necessary—and this is especially important—that there be some objective right answer to the question on which voting takes place, like the number of beans in a jar. The Jury Theorem also works if each voter is asked which choice will best promote her *preferences* about different outcomes.<sup>12</sup> If each voter is asked to choose which outcome best advances her preferences, then the aggregate vote will tell us “which collective choice will maximize satisfaction of the preferences of the majority.”<sup>13</sup> This characteristic, in particular, means that the Jury Theorem is potentially adaptable to disputes in which conflicting value judgments and differing predictions about future effects are at play—in short, to controversies over the provision of local collective goods.

If the conditions of the Jury Theorem hold, one can readily see how direct voting would be superior to other decisional mechanisms in resolving local controversies. Direct voting entails “more minds” being devoted to the task at hand than does representative voting by a local legislative body, or action taken by an administrative board, or a ruling by a court. This will be a particular advantage if the decision turns heavily on information about local values and facts on the ground.

## 2. Democratic legitimacy.

A second advantage of direct democracy is that it generates decisions that are perceived as being legitimate because they are an expression of community will. The Supreme Court’s decision in *City of*

---

theorem in explaining the credibility and corresponding popularity of Zagat guides which are an aggregation of consumer survey answers).

<sup>10</sup> See Vermeule, *Limits of Reason* at 28 (cited in note 7).

<sup>11</sup> *Id.* at 32.

<sup>12</sup> Edelman, 31 *J Legal Stud* at 332–33 (cited in note 8) (noting that under the “polling model” of the theorem we can just assume “that what is considered right is the answer that the majority of all voters would pick”).

<sup>13</sup> Vermeule, *Limits of Reason* at 32 (cited in note 7).

*Eastlake v Forest City Enterprises*<sup>14</sup> provides a classic expression of this perspective. The Court there upheld against a constitutional challenge a city ordinance requiring that all zoning changes be approved by a 55 percent vote in a local referendum.<sup>15</sup> The democratic pedigree of direct voting, the Court said, is superior to that of ordinary legislation. “Under our constitutional assumptions, all power derives from the people, who . . . can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.”<sup>16</sup> A local referendum, the Court said, “is the city itself legislating through its voters—an exercise by the voters of their traditional right . . . to [determine] . . . what serves the public interest.”<sup>17</sup> In short, resolving local controversies by direct voting “is a classic demonstration of ‘devotion to democracy.’”<sup>18</sup>

Whether or not these sentiments are correct as a matter of constitutional theory,<sup>19</sup> they are an accurate reflection of popular beliefs. We pride ourselves in being a democracy, and the closer a decision comes to being made by “the people themselves,” the stronger its democratic credentials.<sup>20</sup>

Given the perception that direct democracy reflects the common will, it is a particularly useful tool for resolving sharply contested issues that elected representatives and administrators may be reluctant to decide themselves. Often local decisions have the aspect of “tragic choices,” in the sense that they involve clashes between incommensurate values that cannot be easily compromised and are likely to be

<sup>14</sup> 426 US 668 (1976).

<sup>15</sup> *Id.* at 679.

<sup>16</sup> *Id.* at 672–73 (observing that this reservation of power is the basis for things like town hall meetings, which are analogous to the referendum process at issue in the case).

<sup>17</sup> *Id.* at 678, quoting *Southern Alameda Spanish Speaking Organization v Union City*, 424 F2d 291, 294 (9th Cir 1970) (discussing the constitutionally favored position that referendum procedures traditionally occupy).

<sup>18</sup> *Forest City Enterprises*, 426 US at 679, quoting *James v Valtierra*, 402 US 137, 141 (1971).

<sup>19</sup> The argument has been made, for example, that direct democracy is unconstitutional under the Guarantee Clause, US Const Art IV, § 4, which guarantees the states a “Republican form of government.” See, for example, Catherine A. Rogers and David L. Faigman, “*And to the Republic for Which It Stands*”: *Guaranteeing a Republican Form of Government*, 23 Hastings Const L Q 1057, 1058–59 (1996); Hans A. Linde, *When Initiative Lawmaking Is Not “Republican Government”*: *The Campaign against Homosexuality*, 72 Or L Rev 19, 39–44 (1993).

<sup>20</sup> Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 47 (Oxford 2004) (explaining that even James Madison—who was highly skeptical of “popular constitutionalism”—believed that it is the people who ultimately “declare [the Constitution’s] true meaning and enforce its observance”). See also Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L J 1503, 1513–31 (1990) (discussing conceptions of direct democracy as an authoritative expression of majority will, as well as significant problems with this conception).

irreversible once taken.<sup>21</sup> Such agonizing decisions may be particularly difficult for government officials to make, since some people will be angry whichever way they choose. This, arguably, makes such tragic choices good candidates for resolution through direct voting, where the people sit collectively as a kind of jury that reaches decisions that are difficult to resolve by reasoned argument or policy analysis, given the conflicting values at stake.

There is admittedly a tension between this second advantage of direct democracy—rendering decisions that are seen as legitimate expressions of the community will—and the first advantage previously discussed—achieving decisions that more accurately reflect the collective preferences of the community. As Frank Michelman has suggested, the two justifications reflect competing models of local government legitimacy.<sup>22</sup> The Jury Theorem presupposes that “all substantive values or ends” are “strictly private and subjective.”<sup>23</sup> Local decisional mechanisms from this perspective should be devised to maximize the satisfaction of these individual subjective preferences. The emphasis on self government, by contrast, “depends at bottom on a belief in the reality—or at least the possibility—of public or objective values and ends for human action.”<sup>24</sup> From this perspective, local decisional mechanisms should be structured so as to foster collective deliberation about the nature of these objective values and ends.

At a more practical level, the two advantages have different implications for how direct voting might be structured. The many minds perspective of the Jury Theorem suggests that the key variable is to assure that voters are sufficiently well informed and motivated that their judgments are more likely than not to be correct. This suggests limiting the size of the voting pool in ways that increase the likelihood that those who vote are competent in the relevant sense. The community self-determination advantage, by contrast, suggests that the key variable is inclusiveness, such that the outcome can be said to be one that

---

<sup>21</sup> See Guido Calabresi and Philip Bobbitt, *Tragic Choices* 17 (Norton 1978). Calabresi and Bobbitt do not define “tragic choices” in their book. Based on their examples, such as allocating scarce kidney dialysis machines among potential users, I infer that tragic choices are collective decisions that require choosing between incommensurate values that cannot be easily compromised (for example, by splitting the difference) and are likely to be irreversible.

<sup>22</sup> Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *Ind L J* 145, 148–57 (1977–1978).

<sup>23</sup> *Id.* at 148 (discussing that in this model, the legislature becomes a “market-like arena” with votes, rather than money, serving as the medium of exchange).

<sup>24</sup> *Id.* at 149 (discussing that in this model, the legislature now becomes the forum tasked with identifying and achieving these ends).

reflects the full spectrum of membership in the community. This suggests expanding the size of the voting pool in line with the principle of universal suffrage. Some compromise in the nature of the franchise may therefore be necessary in order to tap into both advantages.

### 3. Incorruptibility.

A third advantage of direct democracy is that it is corruption free, in the broadest sense that includes not just bribery and extortion, but any kind of special interest influence. Key to this is the use of the secret ballot. If the choice of the individual voter is shielded from public exposure, then it is nearly impossible to buy votes. As an Arkansas court once explained, the secret ballot “checks bribery through the uncertainty that the bribed party will vote as he promised.”<sup>25</sup> Virtually any other decisional mechanism will be more susceptible to special interest influence. A variety of inducements can be dangled before city council members and zoning commissioners in an effort to adopt or block controversial local proposals. Even state court judges are not immune from outside influence, especially if they must stand for periodic election.<sup>26</sup> The decisions of city councils, zoning boards, and state courts are publicly reported, which facilitates monitoring by the “briber” of the “bribed.”

## B. The Pitfalls of Direct Democracy

Against these advantages of direct democracy weigh some well-known pitfalls.

### 1. Voter ignorance.

The first pitfall, voter ignorance, is simply the inverse of the Jury Theorem. The Theorem shows that if voters, on average, are more likely than not to choose correctly, then as the number of voters increases, the probability of a majority reaching the correct result approaches certainty. If this condition is reversed, and the average voter is more likely than not to choose incorrectly, then as the number of voters in-

---

<sup>25</sup> *Jones v Glidewell*, 13 SW 723, 725 (Ark 1890) (holding that voters cannot be deprived of their legal right to a secret ballot). See also *Burson v Freeman*, 504 US 191, 203 (1992) (noting that the secret ballot has been advocated for “its usefulness in preventing bribery, intimidation, disorder, and inefficiency at the polls”).

<sup>26</sup> See, for example, *Caperton v AT Massey Coal Co*, 129 S Ct 2252, 2263–64 (2009) (overturning a state court decision in which one participating judge had been elected with the support of \$3 million from an officer of a corporation that was a party to the case).



creases, the probability of the majority reaching an *incorrect* result approaches certainty. The prospect of using direct democracy to achieve results that maximize satisfaction of preferences is thus critically dependent on voters having sufficient information about their options, and being sufficiently motivated to draw upon that information, in order to satisfy the condition that the average voter is more likely than not to decide correctly.

There are many possible sources of voter ignorance and apathy. If each voter has a relatively small stake in the outcome, then voters will have little incentive to invest time and effort in gathering information about the issue, and indeed will have little incentive to participate in the voting at all. One reason voters may have a small stake in the outcome is because the voter's probability of affecting the outcome is small. This gives rise to the paradox that although larger numbers of voters produce better answers in theory, as the number of voters increases, the incentives of voters to inform themselves falls, making it more likely that voters will be poorly informed. After a point, increasing the size of the voting pool may in fact produce worse outcomes.<sup>27</sup> One implication of this is that direct democracy should not be used in large polities like the nation or the state (as in California's notorious initiatives) but should be reserved for local issues where the number of voters is much smaller.

Voters may also have small stakes if the issue under consideration does not have a great impact on the individual voter's welfare. If the voter does not perceive that much rides on the outcome, then the voter is likely to remain rationally ignorant about the issue, even if the number of voters is small.<sup>28</sup> For example, if the issue is whether to buy a new fire truck, voters will likely have little incentive to inform themselves about the relevant variables, even in a small town. This suggests another implication, which is that direct democracy should be reserved for issues of relatively high importance or public salience and should not be used to address issues of routine governance.

Where the stakes for voters are low, either because of a low probability of affecting the outcome or small individual stakes or both, other distortions are likely to enter the picture. Even if most voters have low stakes, some will have high stakes. For example, the members

---

<sup>27</sup> See Vermeule, *Limits of Reason* at 44 (cited in note 7) (noting the "possibility that competence might be endogenous to numbers") (emphasis omitted).

<sup>28</sup> Consider Elizabeth Garrett and Mathew D. McCubbins, *When Voters Make Laws: How Direct Democracy Is Shaping American Cities*, 13 *Pub Works Mgmt & Pol* 39, 42 (2008) (observing that when bond issues appear on a ballot without other major issues, voter turnout will be lower).

of the fire department will have a disproportionate interest in whether the city gets a new fire truck, even if most voters do not. Where the stakes are skewed in this fashion, the voting pool will be distorted by selection effects, either in terms of who votes or how much information different groups of voters have.<sup>29</sup> If some interest groups have disproportionate stakes in the controversy, they may engage in advertising or get-out-the-vote campaigns, with the result that voter opinions may become a function of which group has a larger budget for electioneering efforts.<sup>30</sup> Again, the lesson would seem to be that direct democracy should be limited to relatively small communities on issues of relatively high uniform importance.

## 2. Exaggerated NIMBYism.

The second pitfall is that direct voting can exacerbate the tendency of local governments to engage in NIMBYism—the “not in my backyard” syndrome. NIMBYism is ubiquitous in local government. All local governments have a tendency to try to capture benefits for their constituents and export costs to those living elsewhere. Sometimes the phenomenon is obvious: any local governing body is likely to conclude that halfway houses for recovering drug addicts should be located in some other community. Often it is more subtle: minimum lot size requirements, for example, may be a way of excluding lower income households that impose a disproportionate burden on local

---

<sup>29</sup> See Vermeule, *Limits of Reason* at 45–46 (cited in note 7); Garrett and McCubbins, 13 *Pub Works Mgmt & Pol* at 42 (cited in note 28). See also Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 *U Chi Roundtable* 17, 18 (1997) (noting that special interests play an important role in the debate over ballot measures because they often determine what issues will be placed on the ballot and how these ballot measures will be written).

<sup>30</sup> Multiple studies have revealed that special interest spending often influences statewide initiatives. See generally Larry J. Sabato, Howard R. Ernst, and Bruce A. Larson, eds, *Dangerous Democracy?: The Battle over Ballot Initiatives in America* (Rowman & Littlefield 2001) (surveying the scholarship and various seminal studies in political science and law on the initiative process and its defects). Groups with high stakes in the outcome and the budgets to fund their efforts can pay for advertising and professional canvassing efforts. See, for example, Stephen P. Nicholson, *The Political Environment and Ballot Proposition Awareness*, 47 *Am J Polit Sci* 403, 403–10 (2003) (finding that information distortions can preclude voters from making reasoned and informed decisions at the ballot box); Garrett, 4 *U Chi Roundtable* at 23 (cited in note 29) (discussing the distorting influence of special interest spending in statewide initiatives). They can also afford to place issues on the ballot in the first place, which can be an expensive business in some states. See Todd Donovan, et al, *Contending Players and Strategies: Opposition Advantages in Initiative Elections*, in Shaun Bowler, Todd Donovan, and Caroline J. Tolbert, eds, *Citizens as Legislators: Direct Democracy in the United States* 80, 94 (Ohio State 1998) (reporting that the average qualification cost for placing a proposition on the ballot in California was over \$1 million by the mid-1990s).

schools and social services.<sup>31</sup> The critical point for present purposes is not that direct voting causes NIMBYism, but that it is likely to exaggerate the problem of NIMBYism if used to resolve issues having significant extraterritorial effects.

The point here stands in contraposition to the second advantage of direct voting: the superior legitimacy that comes from a decision made by the people themselves. Direct voting cannot claim superior legitimacy when used to decide questions that have significant effects on persons who are outside the community and who thus are not allowed to vote. An extreme example would be a local vote to dam a river, with the effect of denying water to all downstream communities. This will hardly be regarded as legitimate by the downstream communities. They may in fact view it as uniquely illegitimate and perceive it as a direct expression of desire by one community to exploit another.

The point here also relates to the third advantage of direct voting: the incorruptibility of direct democracy. This incorruptibility comes from the fact that direct voting, at least by secret ballot, eliminates the ability to contract. But where local governmental decisions have significant external effects outside the community, contracting provides a potential solution to extraterritorial effects. Interest groups outside the community may be able to strike bargains with elected officials or administrative personnel within the community to induce them to modify their decisions so as to take extraterritorial interests into account. In other words, elected or appointed officials may enter into Coasean bargains with outside groups that mitigate the extraterritorial effects.<sup>32</sup> Local voters casting secret ballots cannot do this.

Suppose the issue is whether to permit a new landfill for garbage in a local community. The landfill will impose costs on the community—if only the psychic costs to residents in knowing that they live in the kind of place where landfills are located.<sup>33</sup> At the same time, the

---

<sup>31</sup> Lawrence G. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 *Stan L Rev* 767, 794–95 (1969) (recognizing that minimum floor space and lot size requirements will lead to a lesser demand on welfare programs and schools). See also, for example, Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *Yale L J* 385, 390–403 (1977) (discussing the methods by which communities can limit new housing construction and the effect these methods have on housing prices). See generally William A. Fischel, *An Economic History of Zoning and a Cure for Its Exclusionary Effects*, 41 *Urban Stud* 317, 317–40 (2004) (analyzing the history of exclusionary zoning).

<sup>32</sup> See generally R.H. Coase, *The Problem of Social Cost*, 3 *J L & Econ* 1 (1960).

<sup>33</sup> See Thomas W. Merrill, *The Story of SWANCC: Federalism and the Politics of Locally Unwanted Land Uses*, in Richard J. Lazarus and Oliver A. Houck, eds, *Environmental Law Stories* 283, 290–92, 316–18 (Foundation 2005) (providing a history of opposition to the construction of a

landfill will yield significant benefits to garbage-generating residents throughout a larger geographic area, such as the county in which the community is located. Suppose the cost-benefit equation is negative for the local community but positive for the county as a whole. If the decision whether to permit the construction of the landfill is put to a local vote, the outcome can easily be predicted: local voters will say, "Not in my backyard, thank you very much." If the decision is made by local officials the outcome may be the same. But it is also possible that the entity proposing to construct the landfill may be able to persuade local officials to act in the interest of the county, rather than the local community. It might be able to do so by "bribing" the local officials with campaign contributions or promises of reciprocal political support on other issues. Or, it might be able to do so by offering to provide certain offsetting benefits to the community, such as the construction of a new school or a park, in effect transferring some of the gains obtained from the landfill operation to community residents, in order to overcome their opposition.<sup>34</sup>

The point is not that Coasean bargains are a particularly effective way of solving extraterritorial spillover effects. As Clay Gillette has shown, the barriers to interjurisdictional bargaining are many.<sup>35</sup> The point is simply that when decisions are made by local direct voting, Coasean bargains are ruled out. Optimal jurisdictional scope thus becomes all the more important. The clear implication is that direct voting should not be used to decide on proposals whose costs or benefits will be borne largely by persons outside the community.

### 3. Exaggerated majoritarian (and minoritarian) bias.

Like NIMBYism, another pervasive difficulty associated with local government is what Neil Komesar calls majoritarian and minoritarian bias.<sup>36</sup> Majoritarian bias occurs when majorities use their superior voting strength to exploit minorities; minoritarian bias occurs when mi-

---

new landfill in Bartlett, Illinois and noting that some of this opposition may have been due to a perception that richer communities were dumping their garbage on lower-income areas).

<sup>34</sup> See, for example, Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 Colum L Rev 473, 517-28 (1991) (suggesting that people who are deciding where to live act as "consumer-voters" when considering communities' public service packages).

<sup>35</sup> See Clayton P. Gillette, *Regionalization and Interlocal Bargains*, 76 NYU L Rev 190, 213-19 (2001) (arguing that contracting costs limit interlocal bargaining).

<sup>36</sup> See Neil K. Komesar, *Law's Limits: The Rule of Law and the Supply and Demand of Rights* 55-87 (Cambridge 2001) (discussing majoritarian and minoritarian bias in the context of zoning).

norities use their superior ability to organize for collective action to exploit majorities. Jim Crow laws provide a familiar example of majoritarian bias. Licensing laws that restrict entry into occupations provide a familiar example of minoritarian bias. Majoritarian and minoritarian bias are ubiquitous in government. To a significant degree they are in the eye of the beholder, since identifying outcomes as “biased” requires specifying an appropriate baseline, which will often be contestable.<sup>37</sup>

As in the case of NIMBYism, the concern here is not that direct voting causes majoritarian or minoritarian bias, which will always be present to some degree. Rather, the concern is that direct voting may exacerbate the tendency toward bias relative to what it would be in a system in which decisions are made by elected representatives, appointed officials, or courts. The crux of the problem is measuring intensities of preferences.<sup>38</sup> Elected and appointed officials (and even judges) have ways of assessing not only the numerical support for one position versus another but also the intensity with which these preferences are held. A position weakly favored by a numerical majority will not necessarily be adopted if it is intensely opposed by a minority. Nor will a measure favored by a well-organized minority necessarily prevail if it opposed by a poorly organized majority. There are a variety of reasons for this. Assuming both the majority and minority are part of the same political community, government officials may feel an obligation to try to maximize the well-being of both groups. Or they may realize that they will have repeated interactions over time with members of both groups, and that building goodwill with constituents requires taking intensities of preferences into account. Or, as noted in connection with the discussion of NIMBYism, there may be various formal and informal contractual arrangements that intense minorities can forge with officials, in order to persuade them not to follow majority sentiment on a particular issue.

Each of these tempering forces is missing from direct democracy. When voters are asked their views about a policy issue directly, they are likely to consider only their own preferences, not the interests of the community as a whole. Voters do not have to worry about reelection or about forging long-term relationships with groups that may have different views. And as previously discussed, voters cannot enter into

---

<sup>37</sup> See Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 *L. & Soc. Inq.* 959, 989–90 (1997).

<sup>38</sup> See Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 270–71 (Harvard 2008).

contracts to modify their votes. Thus, there is reason for concern that direct democracy would increase the incidence of majoritarian bias.

One might think that minoritarian bias would be less likely to occur under direct voting, and this will be true for issues as to which voters have high enough stakes to inform themselves and participate in the voting process. But it is possible to imagine situations where a majority of voters has low stakes and a minority has high stakes, with the result that direct voting generates minoritarian bias. Suppose the issue is whether to raise the pay of teachers in the local public schools by 10 percent. School teachers will understand the significance of the proposal well, and they and their families and friends will be highly motivated to turn out for the vote. But the majority may not be sufficiently motivated to inform themselves of the implications (for example, for future tax increases) or to bother to vote. The result may be that the minority with high-stakes votes in large numbers and in a way that favors its interests, whereas the majority with low stakes has low turnout and votes more randomly. If the measure passes, it may be reflective of minoritarian bias.

The implications of majoritarian bias would seem to be that direct voting should be avoided, if possible, where the issue is one in which weak majoritarian preferences are pitted against intense minoritarian preferences. The implications of minoritarian bias for direct voting are similar to the implications drawn from considering the pitfall of voter ignorance: direct voting should be limited to issues where the stakes are relatively high and uniformly distributed among local voters.

## II. THE CONNECTICUT HISTORIC DISTRICTS ACT AND THE PROPOSED SAINT RONAN-EDGEHILL HISTORIC DISTRICT

To provide a concrete example of local direct voting in operation, I examine a recent controversy in New Haven, Connecticut, about whether to create a neighborhood historic preservation district. This would have imposed legal restraints on exterior modifications of structures, thereby helping to preserve the distinctive architectural ambience of the neighborhood—a kind of local collective good. But it would have done so at the cost of restricting individual owner autonomy. The statute that governed the decision required an affirmative vote of two-thirds of neighborhood property owners.

The Connecticut Historic Districts Act was adopted in substantially its present form in 1965.<sup>39</sup> Under the Act, the city council or mayor appoints a study committee to investigate and issue a written report on the desirability of establishing a historic preservation district.<sup>40</sup> The report is submitted to the Connecticut Commission on Culture and Tourism and the local zoning commission for their comments and recommendations.<sup>41</sup> Copies of the report and recommendations are then submitted to each owner of record of real property in the proposed district.<sup>42</sup> An open public meeting is convened to discuss the proposal.<sup>43</sup> If the study committee decides to go forward after considering the comments at the public meeting, the municipal clerk mails sealed ballots to all owners of record of property in the district.<sup>44</sup> Each owner of property having an assessed property tax valuation of at least \$1,000 on which property taxes were paid in the previous year is entitled to one vote.<sup>45</sup> Co-owners cast fractional votes equal to their percentage ownership interest, and no owner is entitled to more than one vote.<sup>46</sup>

If two-thirds of all property owners voting approve the creation of a district, the matter is submitted to the city council for its consideration.<sup>47</sup> The city council can enact an ordinance establishing the proposed historic district, reject the proposal giving a statement of reasons, or return the proposal to the study committee for consideration of amendments.<sup>48</sup> An affirmative vote of two-thirds of property owners is therefore a condition precedent for the adoption of a historic district but does not itself have any legal force. The action that creates the district is the ordinance adopted by the city council. The statute contains no procedure for abolishing a historic district once one has been created.

The consequences of establishing a historic district are significant. Once a historic district is approved, it is subject to the oversight of a

---

<sup>39</sup> Conn Gen Stat Ann §§ 7-147a–y (West). For further background and another case study involving the application of the statute in New Haven, see Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 Yale L J 768, 777–85 (2007).

<sup>40</sup> Conn Gen Stat Ann § 7-147b.

<sup>41</sup> Conn Gen Stat Ann § 7-147b(c).

<sup>42</sup> Conn Gen Stat Ann § 7-147b(e).

<sup>43</sup> Conn Gen Stat Ann § 7-147b(d) (requiring that the Commission's comments and recommendations must be read "in full" at this hearing).

<sup>44</sup> Conn Gen Stat Ann § 7-147b(g).

<sup>45</sup> Conn Gen Stat Ann § 7-147b(g).

<sup>46</sup> Conn Gen Stat Ann § 7-147b(g) (providing that corporations have their votes cast by the CEO or her designee).

<sup>47</sup> Conn Gen Stat Ann § 7-147b(i).

<sup>48</sup> Conn Gen Stat Ann § 7-147b(i).

historic district commission, composed of five voting members serving staggered five year terms.<sup>49</sup> This may either be a commission that oversees multiple historic districts within a municipality, or a commission created solely for one district. The commission is empowered to review and approve all proposed “alterations” to the “exterior architectural features” of all buildings and structures (including signs, fences, sidewalks, and walls) in the district.<sup>50</sup> Alterations include demolitions, erections, or modifications of buildings or structures, but do not include changes to the color of paint.<sup>51</sup> Residents who wish to make an alteration must submit an application to the commission together with an \$85 application fee, and the commission may require supporting architectural plans and specifications.<sup>52</sup> Unless the commission determines the matter is not subject to its approval, the matter is considered at a public hearing. If a majority of the commission determines that the alteration is acceptable, it issues a certificate of appropriateness.<sup>53</sup>

The commission is empowered to seek injunctions against persons who violate the ordinance. It is also authorized to ask the local superior court to impose fines of up to \$100 per day for continuing violations of the ordinance, or up to \$250 a day for willful violations. Any monies collected in such actions “shall be used by the commission to restore the affected buildings, structures, or places to their condition prior to the violation.”<sup>54</sup>

The Connecticut Historic Districts Act was recently applied to a proposal to make the Saint Ronan-Edgehill neighborhood in New Haven, where I then lived, as a protected historic district.<sup>55</sup> Located

---

<sup>49</sup> Conn Gen Stat Ann § 7-147c(d) (noting that such members are not paid for serving on the commission).

<sup>50</sup> Conn Gen Stat Ann § 7-147a (defining the scope of the commission’s regulatory power).

<sup>51</sup> Conn Gen Stat Ann § 7-147d(c).

<sup>52</sup> Conn Gen Stat Ann § 7-147d(c).

<sup>53</sup> The commission is directed in passing on a proposed alteration to consider “the historical and architectural value and significance, architectural style, scale, general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood.” Conn Gen Stat Ann § 7-147f(a).

<sup>54</sup> Conn Gen Stat Ann § 7-147h(b).

<sup>55</sup> The Saint Ronan-Edgehill area was originally created out of two large estates, that of the Hillhouse family to the south and that of Whitney clan, of cotton gin fame, to the north. See Jim Shelton, *Whitneys and Hillhouses Slept Here*, New Haven Reg E1 (Apr 12, 2007). It was subdivided in stages starting in the late nineteenth century, with the most intensive development occurring in the period from 1900 to 1929. The houses are architecturally unique; their designs were commissioned by New Haven’s elite, with manufacturers, professionals, and Yale professors represented in roughly equal numbers. Colonial Revival is the most prevalent architectural style, with Queen Anne style, Gothic Revival, Shingle style, Arts and Crafts, and Tudor Revival also represented. According to the Historic District Commission’s study report: “These distinguished



north of the Yale University campus between Whitney Avenue and Prospect Avenue, this is one of New Haven's most desirable residential neighborhoods. The proposed district included over 280 homes and several institutional facilities, including the Yale Divinity School, three grammar schools, three churches, and the Connecticut Agricultural Experimental Station. There are no industrial or commercial facilities in the area. Like the rest of New Haven, it is covered by a zoning ordinance that regulates uses, setback lines, and the like.<sup>56</sup> The area in question is generally zoned "RS-1," which permits single-family residences only.<sup>57</sup>

An earlier attempt to create a historic district for the Saint Ronan-Edgehill neighborhood failed in 1990, when a majority of property owners, but less than the required two-thirds voted to approve the proposal.<sup>58</sup> A second attempt was launched in 2005. According to the study report,

[R]esidents became concerned that the neighborhood might not continue to preserve its many historically and architecturally significant buildings and streetscapes while under pressure from development. Neighbors expressed growing concern that lots would be excessively subdivided, institutions would encroach, and distinguished historical buildings would be torn down and replaced by McMansions of no historical or architectural merit.<sup>59</sup>

The proposal to adopt a historic district followed the script laid down by the Connecticut statute. The New Haven Historic District Commission appointed a study committee. The committee obtained grants funding the effort and hired an architectural historian to write a handsome study report, featuring colored photos and capsule histories of each house in the area. The study committee unanimously recommended the creation of a historic district. This was in turn endorsed by the New Haven Historic District Commission.

---

and eclectic buildings, are within a setting of broad streets, spacious lots, and mature trees. This setting itself contributes to the St. Ronan-Edgehill District's overall unity of architectural expression." St. Ronan-Edgehill Neighborhood Study Committee, *Study Report: St. Ronan-Edgehill Historic District* 18 (Apr 2008) ("St. Ronan Study Report").

<sup>56</sup> See City of New Haven, Connecticut, Ordinance No 1565 (Apr 7, 2008) (establishing zoning districts for the City of New Haven).

<sup>57</sup> See New Haven, Connecticut, *City Zoning Map*, online at [http://www.cityofnewhaven.com/CityPlan/pdfs/Regulations/Zoning\\_Fullsize\\_Map\\_Index.pdf](http://www.cityofnewhaven.com/CityPlan/pdfs/Regulations/Zoning_Fullsize_Map_Index.pdf) (visited Nov 8, 2009).

<sup>58</sup> *St. Ronan Study Report* at 1 (cited in note 55).

<sup>59</sup> *Id.*

As the public meeting approached, it became clear that the neighborhood was divided on the proposal, as it had been in 1989–1990. While proponents cited fears of subdivisions and McMansions, opponents said they feared oversight by the “taste police” and opined that the additional degree of restriction would “hurt property values.”<sup>60</sup> As the voting grew near, political activity among the residents intensified. Dueling emails circulated among members of the neighborhood association.<sup>61</sup> Proponents and opponents disagreed about whether local contractors regarded the commission approval process, as it applied in other New Haven historic districts, to be burdensome. Opponents pointed out that the concerns cited in the study report about subdivisions and teardowns were purely hypothetical and were already regulated by the zoning laws. Opponents also highlighted ambiguities about what sorts of exterior alterations would be subject to commission approval, voicing concerns that, for example, replacing a concrete driveway with asphalt would be subject to commission veto. Proponents countered that the commission had approved two-thirds of the requests made in other historic districts, usually on the first meeting. They also reported that the commission had promised to revise its guidelines to make them more “user friendly.”<sup>62</sup>

By the time voting began, both proponents and opponents were canvassing door to door and convening small groups of neighbors to discuss the pros and cons of a historic district. Although the issue received relative little attention in the local media and attracted no public advertising, there is little doubt that virtually every property owner in the proposed district was aware of the issue and the arguments for and against its adoption.

When the ballots were counted in the clerk’s office, under the watchful eyes of ten residents, everyone seemed surprised by the result: the proposal was rejected by a margin of two-to-one.<sup>63</sup> This was significantly less support than the previous proposal had garnered in 1990. Published accounts offered few explanations for the outcome.

---

<sup>60</sup> Randall Beach, *Edgehill Residents to Meet on District Plan*, New Haven Reg A1 (May 12, 2008).

<sup>61</sup> Randall Beach, *Debate Rages over Proposed St. Ronan-Edgehill Historic District*, New Haven Reg A3 (Sept 6, 2008) (reporting, for example, that one member expressed fear in an email that adoption of a historic district would create “significant red tape” for contractors, while another member countered that “[a]t [a] public hearing, people who had done renovation in other historic districts didn’t say their contractors were unhappy”).

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

<sup>63</sup> Randall Beach, *Voters Reject Historic District*, New Haven Reg A3 (Sept 24, 2008). A total of 124.89 “no” votes and 63.2 “yes” votes were cast out of approximately 188 votes total. *Id.*

One member of the study committee “attributed the loss to changing demographics of the neighborhood,” noting that the area was less stable and turnover was higher than it had been in earlier years.<sup>64</sup> Whether this is accurate is unclear. One of the leading opponents said that the loss was not due to any disagreement over neighborhood values, but simply to the perception that the creation of a historic district was a “divisive” idea.<sup>65</sup> Perhaps the most straightforward explanation was that the affirmative case was based on speculative harms like subdivisions and teardowns, which had yet to materialize; meanwhile opponents could cite tangible and immediate costs that would be incurred in complying with the commission approval process. Tangible costs evidently weighed more heavily in the minds of property owners worried about preserving their property values than did speculative benefits.

In any event, although the proponents of the historic district were clearly disappointed, they seemed to accept the judgment of the voters as definitive. No one expected to see a third attempt to create a historic district.<sup>66</sup> Importantly, no one questioned the integrity of the balloting process or threatened litigation. In short, the rejection of the proposal, however disappointing to those who had fought to achieve it, was accepted as a legitimate resolution.

### III. LESSONS FOR DIRECT VOTING

The Saint Ronan-Edgehill controversy offers a number of lessons about how direct voting might be structured so as to maximize its advantages and minimize its disadvantages as a tool for resolving disputes over the provision of local collective goods. Four features in particular stand out as being crucial in explaining the apparent success of direct voting in this particular instance. First, the franchise was restricted to property owners, thereby assuring that all voters had a high stake in the correct resolution of the controversy. Second, although only property owners could vote, each owner was limited to one vote, thereby giving each owner an equal voice in the outcome. Third, the issue was one as to which the benefits and costs were overwhelmingly internal to the community, minimizing concerns about NIMBYism. Fourth, the boundaries of the district were drawn in such a way that nearly all owners had similar stakes in the outcome, minimizing concerns about majoritarian and minoritarian bias.

---

<sup>64</sup> Id.

<sup>65</sup> Id.

<sup>66</sup> Id.

### A. The Property Qualification

As we have seen, a crucial issue in determining whether direct voting is an effective device for resolving local political controversies is whether the average voter is likely to be well informed about the relevant facts.<sup>67</sup> The Connecticut Historic Districts Act contains a number of features that are designed to encourage widespread dissemination of information to potential voters. The Act establishes a series of stages in the decisional process, each of which is likely to draw the attention of voters to the issues. There is the appointment of the study committee, the preparation and distribution of the study report, the open public meeting, and the climactic vote by secret ballot. The study report, which is distributed to all property owners in the district, and the public meeting are directly designed to enhance the flow of information. Moreover, since everyone understands that a two-thirds affirmative vote is critical to the success of a proposed district, both proponents and opponents have a powerful incentive to jawbone other community members, thereby providing information and argument that will influence their vote.

The Act is also structured so that the number of persons eligible to vote is neither too large nor too small. The many-minds effect promised by the Condorcet Jury Theorem requires that the voting pool be larger than the number of elected or appointed officials who would otherwise resolve the question, so that more minds are devoted to the question. At the same time, if the voting pool becomes too large, the stakes for individual voters will diminish, and this may weaken voters' incentives to become adequately informed. Because the incentives of voters to gather information are also a function of the importance of the issue for each voter, no mathematical formula can be devised that would tell us what the optimal size of the pool would be for all cases. But it would appear that the size of the voting pool in the Saint Ronan-Edgehill historic district relative to the importance of the issue for voters, in which approximately 280 properties were eligible for voting and 188 ballots were cast, strikes approximately the right balance.

Notwithstanding these important structural elements, in my view the most important feature of the Act, in terms of assuring a well-informed and motivated electorate, is the restriction of the franchise to property owners. The reasons for this are well developed in Bill

---

<sup>67</sup> See Sunstein, *Infotopia* at 28–29 (cited in note 7).

Fischel's work on the "homevoter hypothesis."<sup>68</sup> Homeowners typically have a disproportionate amount of their net worth tied up in the value of their homes. This makes them extremely sensitive to proposals that will affect the value of their homes. Whether for good or ill, the value of local collective goods is capitalized in the price of homes. Home values are affected positively by local collective goods like good schools, low crime rates, and parks. They are affected negatively by poor schools, high crime rates, and high property taxes. Given this capitalization effect, and their nondiversified wealth, "homevoters" have a powerful incentive to inform themselves about any issue that will affect local property values, either positively or negatively.<sup>69</sup>

This feature explains why granting the franchise to property owners, as opposed to all residents, is more likely to produce an informed voting pool. Some residents who are not property owners, such as long-term tenants, may also be well informed about developments that affect the quality of neighborhood life, such as the quality of the schools. But other non-owning residents, including students renting out rooms and live-in household employees, will typically have a more tenuous connection to the neighborhood, and will have little interest in learning about issues that affect the long-term welfare of the community. It would be difficult to devise a test that would differentiate among non-owning residents so as to separate out those who will self inform from those who will not. Limiting the franchise to owners, by contrast, is likely to select a pool of voters who have a strong incentive to inform themselves about any issue that will have a significant impact on property values.<sup>70</sup> As Fischel has demonstrated, this includes virtually every issue involving the provision of local collective goods.<sup>71</sup>

The point, it must be stressed, is not that property owners are more virtuous or that their interests are entitled to greater protection than those of non-property owners. The point is simply that limiting the franchise to property owners is a powerful device for constructing a pool of voters that has the requisite information and motivation to make cor-

---

<sup>68</sup> See generally William A. Fischel, *The Homevoter Hypothesis* (Harvard 2001) (arguing that a homeowner will vote in local elections and community meetings in such a way to maximize the value of his home, as the typical person's largest financial asset is his home).

<sup>69</sup> See *id.* at 4–6.

<sup>70</sup> Consider Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U Pa L Rev 1519, 1548 (1982) (noting that if rents are uncontrolled, landlords may be able to recover gains from the provision of new local collective goods in the form of higher rents, leaving tenants indifferent to whether such collective goods are provided or not).

<sup>71</sup> See Fischel, *Homevoter Hypothesis* at 45–46 (cited in note 68).

rect decisions. It is not clear that there is any other administratively feasible rule that would identify an equally qualified voting pool. If limiting the franchise to property owners is deemed unacceptable for reasons of political morality or constitutional law, then it may be that direct voting should be abandoned as a tool for resolving local controversies.

### B. One-Owner, One-Vote

A second important advantage of direct voting, as previously discussed, is its legitimacy-conferring effect. This is particularly useful in resolving controversies that have the aspect of “tragic choices,” in the sense that they require the resolution of incommensurate values in circumstances where compromise is difficult and the choice is likely to be permanent.<sup>72</sup>

The decision whether to adopt a historic preservation district shares the central features of a “tragic choice.” The dispute, at least in the Saint Ronan-Edgehill neighborhood, was over a predictive judgment about which of two incommensurate effects would predominate: preserving the traditional architectural qualities of the neighborhood or encumbering property owners with needless bureaucratic red tape. This dispute was impossible to compromise given the framework created by the Connecticut statute: either a historic district would be created or not. Finally, it is plausible to think that the decision to create a historic district would be irreversible. The Connecticut statute includes no procedure for decommissioning a historic district once established. While not fatal, this feature would inevitably increase the costs of repeal because of legal uncertainty about how to achieve it. Thus, the episode supports the supposition that direct voting may be an effective way to resolve controversies that are particularly vexing and consequential and as to which government officials may be reluctant to weigh in.

As we have seen, the legitimacy-conferring aspect of direct voting is related to its inclusiveness. From this perspective, one of the intriguing features of the Connecticut Historic Districts Act is that each property owner gets just one vote. Those who own large parcels have no greater say than those with small holdings; nor do owners of multiple parcels get an enhanced voice. If property is owned by multiple owners, they get fractional votes. By contrast, voting rules in special assessment districts, business improvement districts, and common interest communities are nearly always proportioned to the extent of

---

<sup>72</sup> For an explanation of “tragic choices,” see note 21.

property ownership.<sup>73</sup> The rule is \$1 of assessed value equals one vote. The Connecticut rule, one-owner, one-vote, is considerably more egalitarian. Especially in a neighborhood in which nearly all property is owner-occupied single-family residences, a rule of one-owner, one-vote is relatively inclusive.<sup>74</sup> In fact, the Connecticut rule of one-owner, one-vote can be seen as a compromise that taps into both of the first two advantages of direct voting. By limiting the vote to property owners, the statute creates a pool of voters likely to have a strong incentive to inform themselves about the issues. Large property owners will presumably have slightly more incentive to self-inform than small owners. But any one owning some property will have an incentive to gather information, and a modest amount of information widely distributed may be all that is needed for the Jury Theorem to operate. Meanwhile, by limiting each property owner to one vote, the statute makes a significant gesture toward inclusiveness. In giving the franchise to everyone owning some property, no matter how small, and weighing everyone's vote equally, the statute makes it possible to say that the outcome reflects the will of the entire community, and hence is legitimate.

### C. Local Effects

A third important feature of the Saint Ronan-Edgehill proposal is that the impact of adopting a historic district, at least in this instance, would fall almost exclusively on those living in the district. Neighborhood residents would reap the benefits of enhanced protection of architectural and aesthetic values, which would translate into a more pleasant environment and higher property values. Neighborhood residents would also bear the costs of reduced owner discretion

---

<sup>73</sup> See, for example, Clayton P. Gillette, *Voting with Your Hands: Direct Democracy in Annexation*, 78 S Cal L Rev 835, 844 (2005) (depicting the use of property-based voting in annexations); Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 Colum L Rev 365, 373-76 (1999) (same); Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 Duke L J 75, 90-95 (1998) (discussing the use of property-based voting in various community associations including block improvement districts); Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U Chi L Rev 339, 384 (1993) (discussing the use of property ownership in structuring the vote in business improvement districts and other local governance structures); Ellickson, 130 U Pa L Rev at 1539 (cited in note 70) (discussing voting rights in homeowners associations). I am not suggesting that these voting rules are inappropriate in the contexts in which they apply. If persons are being taxed or assessed for collective goods in proportion to their property holdings, then it seems only appropriate that their voting strength should also be calibrated in proportion to their holdings.

<sup>74</sup> Indeed, as far as I am aware, no one in New Haven, a city filled with persons of highly refined sensibilities regarding equality, has ever objected to the historic district voting rule on the ground that it gives the franchise exclusively to property owners.

and the expense and inconvenience of obtaining commission approval for exterior alterations. Of course, one can always cite some external effects. Yale students like to jog in the Saint Ronan-Edgehill neighborhood, and their experiences might be degraded to some small extent if they had to lope pass McMansions rather than stately homes from the early twentieth century. But these effects are either trivial or speculative compared to the primary benefits and costs, which are borne by members of the community.<sup>75</sup>

The internalization of benefits and costs is relevant to both the aggregation of information and the legitimacy of the decision. On the informational front, community internalization means that the informational distortions often associated with popular democracy will be minimized. Individuals and groups living outside the community will have little interest in a proposal whose effects are largely confined to the community. Consequently, we would not expect to see advertising blitzes or the use of professional canvassing, as is often the case with statewide voter initiatives.<sup>76</sup> Furthermore, the internalization of costs and benefits eliminates any concern that the community is attempting to exploit those living elsewhere.

The fact that there are few identifiable externalities in this instance does not mean that other cases involving closely similar issues will not entail significant external effects. Tad Heuer's study of the City Point Historic Preservation District, established in New Haven in 2001, reports that the primary motivation for adopting that district was to thwart an expansion of Interstate 95, which runs along the boundary of the area.<sup>77</sup> This of course is NIMBYism: local property owners wanted to

---

<sup>75</sup> The creation of a historic district affects only the exterior modification of structures; it does not control land use. Thus the creation of a historic district would not affect the quantity of housing in the community, for example whether large homes can be converted into multi-family units, because this is governed by the zoning laws. As previously noted, the Saint Ronan-Edgehill neighborhood is primarily zoned RS-1, which limits construction to single-family homes. Consequently, the establishment of a historic district would not reduce housing opportunities for those living outside the district.

<sup>76</sup> See, for example, Richard L. Hasen, *Parties Take the Initiative (and Vice Versa)*, 100 Colum L Rev 731, 734 (2000) (observing that political parties have begun to use the initiative process to further their own political agendas); Elizabeth Garrett, *Money, Agenda Setting, and Direct Democracy*, 77 Tex L Rev 1845, 1851 (1999) (discussing the influence of money on statewide initiatives); Garrett, 4 U Chi Roundtable at 23 (cited in note 23) (same); Daniel Hays Lowenstein and Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators*, 17 Hastings Const L Q 175, 176 (1989) (recounting how the initiative process is increasingly influenced by out-of-state interests employing national, professional advertising and canvassing firms).

<sup>77</sup> See Heuer, 116 Yale L J at 783–84 (cited in note 39). It was not clear how creating a local historical district would make it more difficult to expand the interstate highway. This amplifies another troubling finding of Heuer—that the residents in the City Point district were poorly



export the costs associated with highway travel onto someone else, in this case the drivers stalled in traffic jams on the overburdened freeway. Comparing the City Point experience and the Saint Ronan-Edgehill experience highlights the extremely context-dependent nature of judgment about whether local decision entails cost exporting. The same regulatory choice, applying the same statutory procedure, may involve significant cost exporting in one case, but not another.

#### D. Uniform Stakes

The Saint Ronan-Edgehill experience also suggests that issues presenting relative uniform stakes for all residents in the community are more likely to avoid the dangers of majoritarian and minoritarian bias. Generally speaking, the decision to adopt a historic preservation district will be one that affects all property owners in the district. Such restrictions will very likely have an impact on every owner's property values, whether by increasing them (by preserving a uniform and pleasing exterior appearance), by decreasing them (by reducing owner autonomy and increasing the costs of making renovations), or some combination of both. The feature of uniform stakes puts everyone in the district in the same boat: the same package of potential benefits and costs applies to all. To be sure, some may be affected more than others by restrictions on modifying exterior architectural features. Someone planning a teardown would be profoundly affected, while a neighbor committed to routine maintenance would not be immediately affected at all. However, over time, routine maintenance segues into projects that apparently would be covered under the Act, such as resurfacing driveways, tuckpointing, and updating exterior lighting fixtures. So the proposal, at least in this instance, appears to have had little distributional impact within the neighborhood.

Obviously, the feature of uniform stakes will not be present in all local voting situations. One can easily imagine other proposals—such as a freeze on building on undeveloped lots—that would impose high costs for some property owners and no costs (and even mild benefits) for others. This would create skewed incentives to gather information about the proposal, with those most immediately affected having strong incentives to inform themselves and participate in the voting

---

informed about the legal consequences of establishing a historic district. See *id.* at 789–93. These findings are quite likely related. If support for the City Point historic district was driven by a mistaken assumption that it would help block expansion of the interstate, then residents may have done little to inform themselves about the actual pros and cons of adopting a historic district, leaving them confused when the survey was later taken about its effects.

process and others who are only indirectly affected having only weak incentives. It would also create obvious potential for majoritarian (or minoritarian) bias, which would dominate the consideration of the merits of the proposal by the burdened owners and might influence benefitted owners as well.

\* \* \*

I recognize that there are dangers of generalizing from one example. There are a number of features of the Saint Ronan-Edgehill experience that may make it difficult to replicate in other contexts. The neighborhood is demographically homogenous, the residents are generally highly educated, many are active in civic affairs, and turnover appears to be low, at least by national standards. My assessment, however, is that these features, while relevant at the margins, are not decisive. The Saint Ronan-Edgehill example suggests that direct voting can be an effective method of resolving local political controversies, provided four limiting conditions are satisfied: the statute limits the franchise to property owners, no property owner has more than one vote, the benefits and costs of the proposal are largely internal to the community, and the issue is one that presents uniform stakes for property owners in the community. When these limiting conditions are met, there is reason to think that direct voting will yield decisions that will maximize satisfaction of community preferences and are likely to be perceived by the polity as legitimate.

#### IV. USING LOCAL VOTING TO RESOLVE DISPUTES OVER ECONOMIC DEVELOPMENT TAKINGS

Could voting by property owners, structured along the lines of the Connecticut Historic Districts Act, be adopted to advise local governments about how to resolve even more controversial issues over local collective goods, such as whether to the use eminent domain for economic development projects?<sup>78</sup>

---

<sup>78</sup> By economic development project, I have in mind a project of the sort at issue in *Kelo v City of New London*, 545 US 469, 473–75 (2005) (involving the use of eminent domain to transfer property to a development corporation in an effort to revitalize the area), and *Poletown Neighborhood Council v City of Detroit*, 304 NW2d 455, 457 (Mich 1981) (permitting the use of eminent domain to transfer property to General Motors for use as an assembly plant). The key elements are the use of eminent domain to assemble a large tract of land in an economically distressed urban area, followed by a transfer of the land to a for-profit commercial entity for construction of a new facility that is projected to generate jobs and tax revenues.

In many respects, economic development takings present features that make them potentially attractive candidates for local direct voting. Whether or not it makes sense to use eminent domain for an economic development project may turn critically on local knowledge. Among the local issues one might want to resolve include: the physical condition of the area selected for development, and its prospects for making a positive contribution to the local economy with and without redevelopment; whether suitable alternative tracts of land are available for the project that do not require eminent domain or that would require less use of eminent domain to assemble; the risks of undertaking a development project given the general level of interest among potential purchasers in acquiring new properties in the area; whether the project has been conceived in a good faith effort to advance the welfare of the community or is being driven by some deal between developers and political insiders; and how difficult it will be for owners living in the area who will be forced to relocate to find equivalent facilities elsewhere given the amount of compensation they will receive. These inquiries will yield different answers in different times and places. They also entail predictive judgments that will yield different answers from different observers. All this suggests that many minds may do better in resolving the question than fewer minds, whether they be elected representatives, economic development commissions, or courts engaged in public use inquiries.

Whether eminent domain should be used to facilitate economic development projects also appears to entail a tragic choice, of the sort that cries out for a more legitimate solution than is likely to be generated if the decision is made by elected officials, bureaucrats, or judges.<sup>79</sup> Any use of eminent domain entails a conflict between two values, both of which society honors deeply. On the one hand, society respects landowner autonomy in deciding whether to sell or otherwise transfer land. Land is protected by what Guido Calabresi and Douglas Melamed call property rule protection.<sup>80</sup> We permit transfer to occur only when the owner consents. Eminent domain stands as a jarring exception to this principle. While an owner receives an award of compensation for property given up, computed in accordance with its es-

---

<sup>79</sup> See Thomas W. Merrill and Henry E. Smith, *The Morality of Property*, 48 *Wm & Mary L Rev* 1849, 1879–84 (2007) (arguing that public opposition to the use of eminent domain for economic development is motivated by a moral instinct that it is wrong to take property from “innocent persons for reasons that are distributionally unjust” and transfer it to private parties).

<sup>80</sup> Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv L Rev* 1089, 1092 (1972).

timated fair market value, he or she is forced by the government to give up the land and relocate. On the other hand, eminent domain is often necessary in order to advance another competing value—the need to overcome barriers to assembly of land in order to provide local collective goods.<sup>81</sup> If a large tract of land must be assembled for a public project, existing owners may hold out, making voluntary assembly expensive or impossible. These barriers to assembly may require recourse to eminent domain.

This clash of values cannot be easily compromised. If the dispute between a landowner and the local community is over the amount of compensation—what the fair market value is—then it should be subject to compromise, and in fact usually is.<sup>82</sup> But if the dispute is over whether the use of eminent domain is a permissible “public use,”<sup>83</sup> then the dispute is much more difficult to compromise. Either the proposed local public good is a “public use” or it is not. Legal authorities sharply disagree about whether the use of eminent domain for economic development projects is a valid public use.<sup>84</sup> Thus the application of the power in this context is not readily amenable to compromise.

Finally, the decision to take title to property by eminent domain is nearly always irrevocable. The power applies to specific assets like land. All land is unique, as both traditional courts of equity and real estate brokers have recognized. Furthermore, the assets taken have usually been developed with specific improvements, which are also usually unique, and the public project ordinarily entails the destruction of these improvements. Once property has been taken by eminent domain and any improvements destroyed, it is irrevocably lost. In this sense eminent domain is different (and more tragic) than other forms of government action, such as taxation and certain applications of the police power that regulate uses of property.

We have no direct evidence about how local voting to resolve economic development takings would work in practice. If the public is asked in opinion polls or in statewide voter initiatives what it thinks

---

<sup>81</sup> See Thomas W. Merrill, *The Economics of Public Use*, 72 Cornell L Rev 61, 74–76 (1986); Calabresi and Melamed, 85 Harv L Rev at 1106–08 (cited in note 80).

<sup>82</sup> Curtis J. Berger and Patrick J. Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 Colum L Rev 430, 440–42 (1967).

<sup>83</sup> See US Const Amend V (“[N]or shall private property be taken for public use without just compensation.”).

<sup>84</sup> Compare *Kelo*, 545 US at 477–80 (Stevens) (stating that eminent domain may be used for economic development as for any other legitimate government purpose) with id at 498–500 (O’Connor dissenting) (arguing that eminent domain may not be used for economic development unless the property taken is so deteriorated it is imposing harm on the community).

about using eminent domain for economic development projects, the answer is resoundingly uniform: “no.”<sup>85</sup> Yet there is reason to believe that local voters, having greater familiarity with local conditions and the circumstances of the taking, might reach more nuanced judgments. Janice Nadler, Shari Diamond, and Matthew Patton have undertaken a careful study of post-*Kelo* opinion polling.<sup>86</sup> They report,

Reaction depends on what is taken (whether land or a business or a home) and how it will be used. For example, the use of eminent domain to take vacant land and run-down buildings for a school garnered almost uniform support (88%) and minimal outright rejection (7%). Part of this strong support might be explained by the minimal harm to the owner because of the nature of the property taken—vacant land. When low-value homes rather than vacant land would be taken to build a school, support dropped from 88% to 33%. Thus, a large proportion of respondents reject the idea of taking homes, even for an important use. The proposed use of the land did affect reactions to takings, however. Although using eminent domain to take low-value homes to build a school garnered the support of 33% of the respondents, support dropped to 7% when low-value homes were to be taken to build high-value homes, and to 4% when low-value homes were to be taken to build a shopping center. The proposed shopping center garnered far more support (55%) when the property taken would be vacant land and run-down buildings.<sup>87</sup>

The authors conclude: “These results suggest that beneath the vigorous public opposition to *Kelo* lay a more nuanced evaluation of government takings—a complex structure of public attitudes not easily gauged at an abstract level by simply measuring attitudes toward eminent domain in general.”<sup>88</sup>

Given that opinion polling results vary widely if the abstract proposition about using eminent domain is supplemented with just a few skeletal facts, it is plausible that voting by local property owners,

---

<sup>85</sup> See Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 Minn L Rev 2100, 2108–14 (2009) (collecting data on the lopsided and negative public reaction to *Kelo*).

<sup>86</sup> Janice Nadler, Shari S. Diamond, and Matthew M. Patton, *Government Takings of Private Property*, in Nathaniel Persily, Jack Citrin, and Patrick J. Egan, eds, *Public Opinion and Constitutional Controversy* 286, 296–306 (Oxford 2008).

<sup>87</sup> Id at 300.

<sup>88</sup> Id at 301.

who presumably would be far better informed about the local situation, would produce even more divergent responses to the question of whether eminent domain should be used for economic development.

It is also plausible that most economic development projects would satisfy the requirement that the benefits and burdens of the proposal be internalized to the community. Often, of course, eminent domain is used for infrastructural projects like airport expansions and highway rights of way. The uncompensated subjective costs associated with using eminent domain for these projects are borne locally, but the benefits are regional or even national in scope. Local voting would not make sense for these kinds of infrastructural projects. Interestingly, however, these projects are not controversial; at least no one claims they are not legitimate public uses. The controversial uses of eminent domain tend to be ones in which both the costs and the purported benefits are local, economic development projects being the primary example. When both the costs and the benefits are largely confined to the local community, local voting becomes a potentially feasible decisional device.

Where the local voting model breaks down is in the requirement that the proposal present uniform stakes for all members of the community. Using eminent domain to facilitate an economic development project will not affect all local property owners equally. Those whose property will be taken may be losers if they experience uncompensated subjective losses, while those whose property is not taken may be winners, at least if the economic development project succeeds in creating new jobs and tax revenues for the community. If we assume that local voting will be based solely on perceived self-interest, then the persons whose property will be taken may vote “no” and their neighbors, who stand to benefit, may vote “yes.” Assuming the benefited neighbors form a majority (or supermajority if that is required), then this will be an example of majoritarian bias: the majority is voting essentially to expropriate the uncompensated subjective value of the minority whose property will be taken for the project.

This is probably an overly reductionist analysis of the situation, however. Social ties formed through interaction among the benefitted and burdened in the community will likely temper any impulse to endorse taking a neighbors’ property for less than pressing reasons.<sup>89</sup>

---

<sup>89</sup> As Bill Fischel observes, “It is difficult for one neighborhood to use municipal power to loot another neighborhood if residents of both shop in the same stores, play in the same softball league, and send their children to the same schools.” William A. Fischel, *The Political Economy of Public Use in Poletown: How Federal Grants Encourage Excessive Use of Eminent Domain*, 2004 Mich St L Rev 929, 935.

And property owners will understand that any decision to take their neighbor's property will set a precedent that can be invoked in the future to take someone else's property—including, potentially, their own.

Nevertheless, it is appropriate to add a further limiting condition before adopting local voting by property owners to determine whether to use eminent domain for economic development. The revenues to compensate owners whose property is taken should come either from local taxes or from a source of outside funding that can be used for a variety of local purposes.<sup>90</sup> If the economic development taking has an opportunity cost for local owners whose property is not taken, then the redistributive element in the picture is greatly attenuated. There is still some redistribution: the owners whose property is taken lose any subjective premium they attach to their property, and the owners whose property is benefitted gain the assembly value created by the use of eminent domain to overcome fragmentation. Yet the potential for redistribution is greatly reduced. If the funding is local, either because local tax revenues must be used for the project or because a block grant or other fungible outside funding must be diverted from other uses, then the limiting condition of uniform stakes is at least approximated.

Before leaving this topic, it is instructive to compare local voting by property owners to the recent proposal of Michael Heller and Rick Hills to adopt "Land Assembly Districts" (LADs) to facilitate local economic development projects.<sup>91</sup> LADs are essentially a collective action mechanism retrofitted onto a neighborhood to facilitate assembly of fragmented property ownership so that the neighborhood can be "auctioned" to the highest bidder (including the current owners, if they are unsatisfied with the prices bid by others). Membership in the LAD consists of all property owners whose land will be sold.<sup>92</sup> The LAD is governed by voting by property owners, with each owner having a vote proportionate to the amount of property she has in the district.<sup>93</sup>

There are three critical differences between LADs and my local voting proposal. First, LADs represent only owners whose property is taken, whereas my proposal entails voting by a larger community of

---

<sup>90</sup> See *id.* at 942–45, 949 (explaining how grants from federal and state governments earmarked for economic development can induce local communities to take property by eminent domain when they would not do so if the costs were internalized to the community).

<sup>91</sup> Michael Heller and Rick Hills, *Land Assembly Districts*, 121 Harv L Rev 1465, 1469 (2008) (explaining that the central goal of the LAD, similar to what condominium organizations accomplish, is to allow persons who hold legal interests in local land to "collectively decide" whether the land should be combined into a larger parcel).

<sup>92</sup> See *id.*

<sup>93</sup> *Id.* at 1492, 1503–07.

which the property to be taken forms a subpart. Second, LADs vote only on whether to accept different bids for the property to be taken, whereas under my proposal voting would occur on the question of whether the taking is a public use, that is, on whether there should be a taking for economic development in the first place. Third, voting in LADs is proportionate to holdings—one-acre, one-vote or \$1 of assessed value equals one vote—whereas under my proposal each owner gets one vote.

Local voting by property owners is superior to a LAD, in my opinion, because it recognizes that the decision whether to proceed with a taking of property for economic development is a multidimensional problem as to which there is no universally correct answer. There may be a correct answer in each individual case, but that answer depends on a host of contextually specific questions—about the condition of the existing property, its current use (residential versus commercial, and so forth), the availability of alternatives, the likelihood that the redevelopment project will succeed, whether the project was conceived in good faith, the relocation options available to displaced owners, and so forth. Answering these questions requires detailed local knowledge.

Heller and Hills's proposal presupposes that the correct answer in each case is determined by a wealth maximization test. If a majority of property owners concludes it will be better off selling the neighborhood, then the neighborhood gets sold; otherwise not. This is a more contextualized approach than most proposals floating around in the legal literature, such as those that would prohibit all takings for economic development. Nevertheless, it ignores the multidimensionality of the problem, including its tragic choice aspects, in a way that would likely make the LAD proposal politically unacceptable.

To see that this is so, consider a variation on the economic development taking at issue in *Kelo v City of New London*.<sup>94</sup> Assume that the proposed redevelopment area comprises twenty acres, most of which consists of abandoned factories and warehouses, but which also includes a handful of occupied homes. The prospects for the success of the plan are dubious, since no developer will take on the project without a large subsidy. There is a strong hint of favoritism, given that a major corporation with a nearby facility stands to benefit disproportionately from the plan. Given the depressed nature of the immediate surroundings, the fair market value of the homes to be taken is low, meaning the

---

<sup>94</sup> 545 US 469 (2005).



owners of these homes will not be able to use their compensation awards to acquire equivalent properties elsewhere. Assume further, contrary to the facts of the case, that the compensation for the takings will come from property taxes paid by members of the local community.<sup>95</sup>

Under Heller and Hills's plan, the LAD will eagerly agree to be sold, provided there is a bidder. The owners of the abandoned factories and warehouses will control the LAD, and will accept any price that includes some increment in assembly value above the fair market value of their properties. The owners of the homes may be bitterly opposed, because the taking will not compensate them for their lost subjective value, but they will be outvoted by the factory and warehouse owners. (Of course, if the development prospects are dubious and there is no subsidy because the funding is from local sources, there may be no bidder.)

If local voting is used, the project will almost surely be rejected. Local voters familiar with the area and the history of the project will view it with skepticism, both because of its doubtful prospects and because of the influence of the uniquely benefitted corporation. They will likely identify with the homeowners and will perceive that they would be uniquely disadvantaged by the project. Disapproval is especially likely given that compensation for the displaced owners must come from local tax revenues. Local voters will not want their tax dollars devoted to a project with a strong probability of failure and dubious distributional implications.

Given the stylized facts of this example, there is little doubt that voting by local property owners reaches the right result, in the sense that it is the result most people would reach if fully informed of the factual context. We know this because these stylized facts are essentially what the public understands the facts of the *Kelo* case to be, except for the added detail about the source of compensation. The public overwhelmingly believes that there should have been no use of eminent domain in *Kelo*. A voting mechanism that promises to reach the opposite result in similar circumstances has little chance of being adopted in our political system. A voting mechanism that would reach the correct outcome, but might reach different outcomes in different contexts where economic development takings would garner stronger local support, has greater promise.

---

<sup>95</sup> The project upheld in *Kelo* was primarily funded by a grant from the state of Connecticut. Local residents effectively had no skin in the game. See *id.* at 475.

## V. A PLEA FOR CONSTITUTIONAL FLEXIBILITY

Direct voting by property owners, although subject to certain limiting conditions, would seem to be a worthy addition to the local government toolkit, at least on an experimental basis. It would be regrettable if courts were to stifle innovations along these lines in the name of constitutional purity. At present, however, there appears to be enough flexibility in existing constitutional doctrine to permit experimentation with direct voting by property owners to continue.

One potential source of constitutional trouble is found in older decisional law invalidating statutes allowing property owners to veto certain uses of property by neighbors, on the ground that these laws impermissibly delegate governmental power to private parties “uncontrolled by any standard or rule.”<sup>96</sup> These troublesome precedents are difficult to distinguish from others, which uphold statutes allowing property owners to consent to uses of property by neighbors that are otherwise prohibited.<sup>97</sup>

It is doubtful that the old nondelegation cases have any continuing force in the realm of direct voting. Recent decisions have held that direct voting mechanisms cannot be characterized as a legislative delegation of power. In *Forest City Enterprises*, the Court held that the “discernible standard” rule is “inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves,” and determined that a charter amendment permitting voters to decide whether a zoned use of property could be altered is not invalid on federal constitutional grounds.<sup>98</sup>

Another potentially troublesome constitutional doctrine is the Supreme Court’s one-person, one-vote principle. The Court has extended this principle to any elected body that “perform[s] important governmental functions” that significantly affect all citizens residing within the electoral district.<sup>99</sup> In particular, the Court has invalidated

---

<sup>96</sup> *Seattle Title Trust Co v Roberge*, 278 US 116, 122 (1928) (holding unconstitutional a city ordinance requiring a person to obtain the written consent of two-thirds of the area property owners before building a philanthropic home for children or elderly people). See also *Eubank v City of Richmond*, 226 US 137, 140–45 (1912) (same).

<sup>97</sup> See, for example, *Thomas Cusack Co v City of Chicago*, 242 US 526, 531 (1917).

<sup>98</sup> 426 US at 675 (determining that a referendum on zoning changes does not violate due process). See also *City of Cuyahoga Falls, Ohio v Buckeye Community Hope Foundation*, 538 US 188, 199 (2003) (reaffirming this principle).

<sup>99</sup> See, for example, *Hadley v Junior College District*, 397 US 50, 53–54 (1970) (applying the one-person, one-vote principle to the election of junior college trustees).

voting schemes that limit the electoral franchise to property owners and property tax payers.<sup>100</sup>

The Court has nevertheless exempted from this rule voting arrangements for special-purpose bodies whose activities are “far removed from normal governmental activities” and whose actions affect certain definable groups of constituents disproportionately more than others.<sup>101</sup> In *Salyer Land Company v Tulare Lake Basin Water Storage District*,<sup>102</sup> the Court upheld a voting scheme for the directors of a public water district, under which landowners enjoyed exclusive voting powers in proportion to their acreage.<sup>103</sup> Although the water district exercised some governmental powers, including employment and contracting powers, and the power of eminent domain, the district could only use these powers to control “the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin.”<sup>104</sup> In *Ball v James*,<sup>105</sup> the Court considered whether an analogous voting scheme for a large water reclamation district offering diverse services, ranging from selling electricity to virtually half of Arizona’s state population, to flood control, to environmental management, likewise escaped the strictures of “one-person, one-vote.”<sup>106</sup> The Court held that the differences between the Arizona and California districts amounted merely

---

<sup>100</sup> *Kramer v Union Free School District*, 395 US 621, 627 (1969) (striking down a voter qualification statute for school district elections limiting the vote to owners or lessees of taxable real property (or their spouses) and parents or guardians of public school children). See also *City of Phoenix v Kolodziejcki*, 399 US 204, 212–13 (1970) (invalidating municipal voting schemes granting only property tax payers the right to vote in elections called to approve the issuance of municipal utility bonds); *Cipriano v City of Houma*, 395 US 701, 706 (1969) (same).

<sup>101</sup> *Hadley*, 397 US at 56 (considering the possibility that there may arise instances “in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with [*Reynolds v Sims*, 377 US 533 (1964)] . . . might not be required”). See also *Avery v Midland County*, 390 US 474, 483–84 (1968) (“Were the Commissioners Court a special-purpose unit of government . . . [performing] . . . functions affecting definable groups of constituents more than other constituents, we would have to confront the question whether such a body may be apportioned in ways which give greater influence to the citizens most affected by the organization’s functions.”).

<sup>102</sup> 410 US 719 (1973). On the same day it decided *Salyer*, the Court affirmed a similar scheme in Wyoming. See *Associated Enterprises, Inc v Toltec Watershed Improvement District*, 410 US 743, 745 (1973) (per curiam) (upholding the requirement that voters in a referendum on whether to create a water district be landowners, and that the creation be contingent on receipt of a majority of the acreage of the lands within the proposed district).

<sup>103</sup> 410 US at 728. Eighty-five percent of the Tulare Lake Basin Water Storage District’s 193,000 acres were farmed by four corporations; however, the district was exclusively devoted to agriculture and populated by only seventy-seven individuals. *Id.* at 723.

<sup>104</sup> *Id.* at 728.

<sup>105</sup> 451 US 355 (1981).

<sup>106</sup> *Id.* at 370–71.

to differences of scale and upheld the constitutionality of property-based voting schemes for large, general purpose water districts.

While the Supreme Court has yet to affirm property-based voting in special purpose districts outside the water conservation context, nothing in *Ball* or *Sayler* suggests that the exception to the one-person, one-vote principle is limited to water conservation districts. The Second Circuit, in *Kessler v Grand Central District Management Association*,<sup>107</sup> extended the one-person, one-vote exception to a Business Improvement District (BID), noting the “greater complexity and novelty of the problems facing urban areas” and “the need for governmental creativity” in addressing urban land use problems.<sup>108</sup> The court concluded that a BID exists for a special, limited purpose, that its activities disproportionately affect property owners, that it does not exercise general governmental powers, and that it thus should not be bound by the Supreme Court’s one-person, one-vote requirement.<sup>109</sup>

The examples of direct voting by property owners considered in this Article would appear to fall within the parameters of the exception created by the Supreme Court to the one-person, one-vote principle in *Ball* and *Sayler* and extended by the courts of appeals in cases like *Kessler*. Provided voting by property owners is used to resolve discrete, local controversies that disproportionately affect property owners, and is not used to control the discharge of general government powers, this tool should not be condemned in the name of one-person, one-vote absolutism.

In addition, if direct local voting is structured along the lines of the Connecticut Historic Districts Act, an affirmative vote of local property owners is not the final step in the process of exercising coercive governmental authority. Such a vote is a necessary condition of governmental action, but the decisive final step is taken by the city council, which is presumably elected in a manner consistent with one-person, one-vote precepts. As a practical matter, the city council is unlikely to defy the will of the local property voters. But the fact that the ultimate legal action is that of the city council, not the voters, should further insulate direct local voting from constitutional challenge under either nondelegation or one-person, one-vote doctrines.

---

<sup>107</sup> 158 F3d 92 (2d Cir 1998).

<sup>108</sup> *Id* at 103 (reasoning that this governmental flexibility must be met with greater judicial flexibility such that the “mere designation of an elective body to perform a large number of functions does not trigger” the one-person, one-vote requirement).

<sup>109</sup> *Id* at 133–34.

## CONCLUSION

Direct voting by property owners holds considerable promise as a decisional tool for local government. If structured properly, it can produce well-informed, highly legitimate, corruption-free decisions. If not structured properly, it could produce irrational outcomes, virulent NIMBYism, and majoritarian and minoritarian bias. I hope I have shown, through the discussion of historic preservation districts and economic development takings, that well-structured local voting by property owners is possible. Further experimentation with this mechanism would appear to be warranted, in an effort to determine whether these suggestive applications can be extended.