
ARTICLE

NEIGHBORHOOD EMPOWERMENT AND THE FUTURE OF THE CITY

KENNETH A. STAHL[†]

In any given metropolitan region, scores of municipalities are locked in a zero-sum struggle for mobile sources of jobs and tax revenue. This competition appears to benefit small, homogeneous suburbs that can directly enact the uniform will of the electorate over large, diverse cities that are often ensnared in conflict between competing interest groups. Cities can level the playing field with suburbs, however, by devolving municipal power to smaller, more homogeneous subgroups, such as neighborhoods. Indeed, many commentators have identified one such effort at neighborhood empowerment, the “business improvement district” (BID), as a key factor in the recent revitalization of many cities. The BID and the related “special assessment district” devolve the financing of infrastructure and services to landowners within a territorially designated area. Courts have widely upheld BIDs and special assessment districts against constitutional challenges.

Cities remain hamstrung in competing with suburbs, however, because courts prohibit cities from delegating what is perhaps the most coveted power of all to neighborhood groups: zoning. Since an unusual series of Supreme Court cases in the early twentieth century, it has been largely settled that cities may not constitutionally delegate the zoning power to sub-municipal groups, at least where the power is delegated specifically to landowners within a certain distance from a proposed land use change (a scheme I designate a “neighborhood zoning district”).

[†] Associate Professor of Law, Chapman University School of Law. J.D., Yale University; B.A., University of Michigan. My thanks to Deepa Badrinarayana, Marisa Cianciarulo, Jonathan Glater, Ernesto Hernandez, Sarah Lawsky, Stephen Lee, Timothy Mulvaney, Anne O’Connell, Hari Osofsky, Matthew Parlow, Carol Rose, Shelley Saxer, Daniel Selmi, Betty Stahl, John Tehranian, Chris Whytock, and participants at the Association for Law, Property and Society Annual Meeting and the Southeastern Association of Law Schools Annual Meeting. Special thanks to the staff at the Rinker Library at Chapman University School of Law, and to Alex Margaritescu for outstanding research assistance.

This Article argues that the judicial prohibition on neighborhood zoning districts is inconsistent with the judiciary’s permissive attitude toward BIDs and special assessment districts. As I demonstrate, the neighborhood zoning district is conceptually identical to the special assessment district/BID. Both devices are designed to enable large, diverse cities to capture some of the governance advantages of small, homogeneous suburbs by providing landowners with the direct ability to manage local externalities. This Article attempts to make sense of the disparate treatment accorded these devices by examining several grounds upon which they could potentially be, and have been, distinguished. I find, however, that the only meaningful distinction between these mechanisms is that special assessment districts/BIDs actually raise far more troubling public policy concerns than neighborhood zoning districts, thus calling into question why the judiciary has been so much more deferential toward the former than the latter. I conclude that courts should broadly defer to municipal delegations of power to sub-local groups, so that cities can work out their own strategies for surviving in an era of intense interlocal competition.

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INTRODUCTION

Some species evade predators by mimicking other creatures, but only one survives by imitating its own predator: the city. It is by now a familiar story that many jobs and people have fled the cities and flocked to the suburbs over the past half-century.¹ Suburbs have been more attractive than central cities as sites for settlement and investment, at least in part because their relatively smaller and more homogeneous populations have enabled suburbs to ensure that landowners’ tax expenditures are concentrated on their own needs, rather than subjected to the redistributive claims of a variety of citywide interest groups.² Suburbs also enjoy wide latitude to use

¹ The population of suburban communities more than doubled between 1950 and 1970, comprising 83% of the nation’s total growth during that period, while American cities suffered a net loss of population from 1950 to 1980. KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 283 (1985). By 1970, more Americans dwelled in suburbs than in cities and rural areas combined, and by 1980 the suburban population in virtually every major metropolitan area outnumbered that of the central city. *Id.* Although cities have experienced a well-documented resurgence in recent years, the majority of Americans continue to reside in relatively small suburban communities. See WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS* 15 (2001).

² See, e.g., Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 506 (1997) (observing that cities’ greater diversity vis-à-vis suburbs is likely to cause a “greater heterogeneity of preferences” and thus a higher degree of dissatisfaction among city residents); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2018 (2000) (arguing that the “smallness and homogeneity” of suburban communities enable them “to wield local powers to exclude undesirables and pursue the locality’s collective self-interest”); Robert C. Ellickson, *New*

the zoning power to protect their tax bases and landowners' property values by excluding undesirable uses without interference from other stakeholders, like real estate developers, who may have divergent demands.³

In recent decades, however, cities have experienced something of a renaissance, which many attribute to city officials' realization that in order to entice and retain investment in the face of suburban competition, cities must somehow provide the benefits that small size and homogeneity afford the suburbs.⁴ Thus, for example, many cities enable neighborhood groups to

Institutions for Old Neighborhoods, 48 DUKE L.J. 75, 89 (1998) (noting that with increasing size, cities are less able to limit and hence more susceptible to influence "by rent-seeking groups such as political machines, municipal unions, public works lobbies, and downtown business interests").

³ See, e.g., FISCHER, *supra* note 1, at 15-16 (arguing that homeowners are the dominant faction in small, suburban communities and that they use zoning controls to protect their own wealth while developers are largely "supplicants"); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 372-74 (1990) (explaining that neighborhood groups in cities cannot effectively control their own zoning because they must compete for power with other interests within the same polity, whereas suburbs, which are frequently just incorporated neighborhoods, can control their own zoning without interference from competing groups).

⁴ See, e.g., Richard Schragger, *Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence*, 3 DREXEL L. REV. 49, 58-61 (2010) (surveying and critiquing literature attributing urban resurgence to efforts by city officials to entice mobile sources of revenue from other cities and suburbs). The widespread assumption that cities and suburbs are locked in a zero-sum competition for mobile sources of revenue stems from the predominant "Tiebout model" of local government. For the origins of this model, see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956). According to the model, individuals in a metropolitan region with a variety of municipal jurisdictions are properly conceived as "consumer-voters" who essentially shop for a municipality that provides them with their preferred package of municipal services. *Id.*; see also Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 507-08 (1991) (explaining that not only do consumers "'shop' for a particular level and combination of public goods," but municipalities may also "compete for residents by trying to offer a desirable package of services at the lowest cost" (footnote omitted)); Briffault, *supra* note 3, at 400 ("The multiplicity of localities assures a range of choices and increases the likelihood that one locality will approximate the mobile consumer-voter's preferences."). Under this model, local governments, and especially central cities, can entice consumer-voters to live in their own communities only by offering superior (or cheaper) amenities and services to neighboring communities. See Edward L. Glaeser, *The Death and Life of Cities* (describing the rise and decline of cities as a function of both private activity and government efforts to offer amenities to citizens and pro-growth regulatory environments to businesses), in MAKING CITIES WORK: PROSPECTS AND POLICIES FOR URBAN AMERICA 22, 25-30 (Robert P. Inman ed., 2009). This model has been criticized but is still highly influential. See Schragger, *supra*, at 66 (arguing that "the basic idea of 'competition' between cities is incoherent" because sound local governance rarely creates growth; rather, prosperity "is often a function of luck, path dependency, or the effects of very small changes in a spatial equilibrium"); Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 U. CHI. L. REV. 311, 315-20 (2010) (criticizing the Tiebout public choice theory for adopting an overly simplistic notion of how cities develop, particularly through the assumption that local policies affect economic development instead of acknowledging the role organic growth plays in development).

self-finance improvements and services for their areas through a “special assessment”⁵ or the related “business improvement district” (BID).⁶ These mechanisms typically work by enabling a percentage of landowners within a territorially bounded district to petition the city for the imposition of a mandatory charge upon all property in the district in order to fund desired amenities for the area.⁷ Likewise, some municipalities have attempted to give neighborhoods the authority to directly exclude undesirable land uses, such as by enfranchising landowners within a geographically defined area to vote on the applicability of specific zoning restrictions within that area.⁸ For ease of reference, I call this device a “neighborhood zoning district.” The special assessment district and the neighborhood zoning district are both, fundamentally, efforts to import into the city the most attractive features of suburban governance by devolving power to the smaller scale of the neighborhood, homogenizing the voting public through the restriction of the franchise to landowners, and insulating the group’s power from the politicking and vote-trading prevalent at the citywide level.⁹

Herein, however, lies the problem that this Article seeks to resolve: although neighborhood zoning districts and special assessment districts are functionally similar mechanisms through which cities can compete with suburbs, courts and scholars treat them as entirely distinct. While courts have routinely upheld the special assessment and the BID against constitutional challenges, the majority of courts have also held that the neighborhood zoning district is an unconstitutional delegation of municipal land use

⁵ See generally ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 619-34 (3d ed. 2005) (introducing the concepts of special assessments and BIDs and discussing the ways in which courts have approached them); Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 397-402 (2004) (describing the evolution of special assessments from a mechanism for financing finite capital improvement projects into a general revenue raising tool).

⁶ See generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 381-87 (1999) (describing the process of BID formation); Symposium, *Business Improvement Districts and the Evolution of Urban Governance*, 3 DREXEL L. REV. 1 (2010) (exploring various legal issues related to BIDs).

⁷ See *infra* Section I.C.

⁸ See, e.g., *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 118 (1928) (describing a local ordinance requiring the consent of two-thirds of property owners located within 400 feet of any proposed group home); *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 527-28 (1917) (evaluating a law requiring the consent of landowners owning the majority of property on a block before a billboard company could put up a billboard on that block); *Eubank v. City of Richmond*, 226 U.S. 137, 141 (1912) (describing an ordinance delegating power to block-front landowners to establish uniform setback lines). See also generally JEFFREY M. BERRY ET AL., *THE REBIRTH OF URBAN DEMOCRACY* 141 (1993) (describing efforts by five cities to devolve land use powers to neighborhood groups).

⁹ See *infra* Section I.D.

power.¹⁰ The courts make no effort to reconcile the two lines of precedent, and indeed seem unaware that there may even be a relationship between them.¹¹ Scholars, too, have endorsed the special assessment and BID while balking at the idea of conferring zoning powers on neighborhood groups, without acknowledging the deep continuities between these two devices.¹² Major consequences for urban policy have ensued. On the one hand, neighborhood groups' inability to exercise more influence over land use decisions has caused significant disenchantment with city government, in some cases even sparking campaigns for secession from the city.¹³ On the other hand, spurred by courts' permissive attitude, cities have increasingly resorted to BIDs as a default option to deal with virtually any urban

¹⁰ See *infra* Sections II.A. & II.B.

¹¹ See, e.g., *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 108 (2d Cir. 1998) (affirming the constitutionality of a BID voting structure without considering neighborhood zoning cases); *Cary v. City of Rapid City*, 559 N.W.2d 891, 895-96 (S.D. 1997) (invalidating a neighborhood zoning ordinance without considering special assessment cases). I discuss the relationship between the two lines of doctrine in more detail *infra* Section II.C.

¹² See Ellickson, *supra* note 2, at 98-99 (endorsing a neighborhood association that would provide services financed by mandatory assessment but expressing skepticism about delegating zoning power); George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 346 (1993) (same). For a more detailed discussion of Ellickson and Liebmann's articles, see *infra* text accompanying notes 132-37 & 266-68. Robert Nelson, the rare scholar who has actually advocated for neighborhood zoning control, neither discusses any of the applicable precedent holding that the delegation of zoning authority to neighborhood groups is unconstitutional, nor directly compares neighborhood zoning districts with special assessment districts, as this Article does. See ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 403-08 (2005) (discussing several lines of potentially applicable precedent but ignoring the delegation cases); *infra* note 138 and accompanying text.

¹³ In New York, residents of the borough of Staten Island initiated a drive to secede from New York City after the United States Supreme Court held that the city's "one borough, one vote" method for electing members of its zoning and budget authority violated the constitutionally mandated "one person, one vote" formula and ordered the city to reconstitute the authority, thereby diluting Staten Island's voice in land use matters. Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 783-85 (1992). Across the continent in Los Angeles, homeowners in the vast adherent suburb of the San Fernando Valley have frequently sought to secede from the city, citing concerns about taxes, school busing, and a desire to exercise tighter control over their own land use. RAPHAEL J. SONENSHEIN, THE CITY AT STAKE: SECESSION, REFORM, AND THE BATTLE FOR LOS ANGELES 72-83 (2004); see also M. Purcell, *Metropolitan Political Reorganization as a Politics of Urban Growth: The Case of San Fernando Valley Secession*, 20 POL. GEOGRAPHY 613, 617-26 (2001). The secession campaigns in both New York and Los Angeles have failed, usually despite significant support within the aggrieved areas, because state law in New York and California, as in most states, requires secession to be approved by a referendum of voters within the entire city. GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 433, 439 (5th ed. 2010).

problem, despite the fact that BIDs often cause troubling inequalities between wealthy and poor neighborhoods in the provision of city services.¹⁴

This Article argues that the judicial proclivity to uphold special assessment districts and BIDs while invalidating neighborhood zoning districts is doctrinally illogical and indefensible as a matter of public policy. Indeed, because neither the jurisprudence nor the scholarly literature acknowledge any connection between these two devices, no one to date has undertaken to defend the disparate treatment accorded them. For purposes of this Article, I read the doctrine and literature broadly in an effort to divine a basis for the divergent lines of case law. On this broad reading, it appears that courts and scholars see the special assessment and BID as essentially voluntary efforts by neighborhood landowners to provide themselves with supplemental services, while they view zoning as the coercive regulation of land use.¹⁵ In addition, courts and commentators seem concerned that if neighborhoods are empowered to zone land, they will do so in such a way as to impose undesired impacts on surrounding areas.¹⁶ Courts and observers exhibit much less concern about the spillover impacts of special assessment districts, perhaps because they assume that such districts merely provide one neighborhood with desired supplemental municipal services and therefore have minimal negative impacts on neighboring areas.¹⁷

As this Article demonstrates, however, these arguments are all seriously flawed. Initially, I show that special assessments are just as coercive and just as likely to impose undesirable spillover impacts as neighborhood zoning districts are. In addition, special assessment districts often present far more troubling public policy concerns than neighborhood zoning districts. Specifically, special assessment districts raise the classic Madisonian problem of a locally dominant majority exploiting a locally vulnerable minority, whereas neighborhood zoning districts are less likely to raise this problem. Arguably, therefore, the courts have their standards of review exactly backward—neighborhood zoning districts deserve *more* deference than special assessment districts, not less. This Article does not argue, however, that courts should simply reverse the current simplistic approach and

¹⁴ See Gerald E. Frug, *The Seductions of Form*, 3 DREXEL L. REV. 11, 17 (2010) (lamenting that the “almost automatic answer when one seeks to create an organization to improve neighborhood life” is “Let’s create a BID,” and asserting that the BID is simply not applicable to the wide array of urban challenges and that “we need more options”); Reynolds, *supra* note 5, at 433-35 (describing the problem of intralocal service inequalities with BIDs and special assessment districts).

¹⁵ See *infra* notes 132-38 and accompanying text.

¹⁶ See *infra* Section III.C.

¹⁷ See *infra* notes 132-35 and accompanying text.

declare that *all* neighborhood zoning districts are valid and *all* special assessments districts are infirm. Rather, it proposes that the courts evaluate the validity of any particular delegation by considering a set of ad hoc factors that assess the extent to which the delegation creates a risk of majoritarian exploitation.

In addition to proposing a new approach to the delegation question, the Article more broadly reexamines the legal status of the neighborhood and particularly the relationship between neighborhoods and municipalities. This Article is part of a larger project which explores the question of why courts have granted incorporated municipalities a privileged status that they deny to unincorporated neighborhoods, notwithstanding that many municipalities are themselves little more than glorified neighborhoods. Here, the judicial skepticism toward neighborhood control of zoning contrasts sharply with a long tradition in which courts have broadly deferred to land use determinations by municipalities.

As before, this distinction between neighborhoods and municipalities seems tenuous as a legal matter and almost backwards as a matter of public policy. A scheme in which neighborhood groups enjoy some limited powers under the oversight of a larger municipal authority could be a far superior system of local government than our existing one, in which scores of autonomous suburbs each have *carte blanche* to make their own land use and fiscal policies without any regard for their neighbors or the general welfare of the region. A revised scheme would also, incidentally, enable cities to compete on a more level economic footing with incorporated suburban communities.

Part I provides some background on the special assessment district and the neighborhood zoning district, revealing the ways in which these devices are functionally symmetrical. Part II then chronicles the wholly divergent paths courts have taken in analyzing special assessment districts and neighborhood zoning districts. Part III examines several possible means of reconciling the two doctrinal lines, but concludes by only deepening the mystery: special assessment districts actually present much greater cause for judicial skepticism than neighborhood zoning districts. This Part then sets forth some analytical tools that courts should use to determine on an ad hoc basis when a delegation of power to a neighborhood group raises red flags. Finally, Part IV broadens the inquiry to the question of neighborhood empowerment more generally, concluding that little justification exists for a jurisprudence that grants incorporated municipalities such an elevated normative position over unincorporated neighborhoods.

I. MANAGING LOCAL EXTERNALITIES BY DEVOLVING POWER TO LANDOWNERS

A. *Neighbors and Externalities*

The aim of this Part is to show that neighborhood zoning districts and special assessment districts are, at their core, symmetrical mechanisms for dealing with local “externalities.”¹⁸ A pair of simple examples will illustrate the basic externality problem. If my neighbor maintains a carefully manicured front lawn, I enjoy for free the aesthetic benefits of her activity. If, by contrast, my neighbor covers her lawn with junk and debris to express her opposition to mass consumer culture, it becomes a blight on the entire neighborhood.¹⁹ Both of these activities are called externalities (a positive and negative externality, respectively)²⁰ because, in either case, the impact of my neighbor’s activity on my property is irrelevant to her decision whether or not to undertake the activity. In the first example, although I benefit from my neighbor’s landscaping, she is unable to seek payment from me for the benefits I have obtained. As a result, if it proves unprofitable for my neighbor to continue tending her lawn, she may cease doing so even if I and many other neighbors derive substantial benefits from it.²¹ Likewise, in the second example, although my neighbor’s junk-strewn lawn causes me significant harm, she is immune to the costs it imposes on me absent nuisance liability, which rarely covers aesthetic harms.²² She will continue

¹⁸ On the concept of externalities generally, see N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 195-213 (6th ed. 2008). On the significance of externalities to land use regulation, see ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 43-45, 110-11, 174-76 (5th ed. 2008); JESSE DUKEMINIER ET AL., *PROPERTY* 46-50 (7th ed. 2010). On externalities and the related issue of “public goods,” see KENNETH A. SHEPSLE & MARK S. BONCHEK, *ANALYZING POLITICS: RATIONALITY, BEHAVIOR, AND INSTITUTIONS* 260-96 (1997).

¹⁹ This hypothetical is loosely inspired by the case of *People v. Stover*, 191 N.E.2d 272, 273 (N.Y. 1963), in which homeowners hung laundry in their front yards to protest high property taxes. The court held that a municipal ordinance that prohibited hanging laundry in front yards, passed in the wake of the protests, did not violate the First Amendment. *Id.* at 276-77.

²⁰ On positive and negative externalities, see MANKIW, *supra* note 18, at 195-201; and SHEPSLE & BONCHEK, *supra* note 18, at 278.

²¹ This problem is the central concern of Richard Musgrave’s classic work on public finance, *The Theory of Public Finance*. As Musgrave puts it, “Establishment of an expensive store may increase real estate values in the neighborhood, even though the store cannot collect for the services thus rendered. . . . Since the market permits a price to be charged for only a part of the services rendered, the development may be unprofitable from the private, but profitable from the public, point of view.” RICHARD A. MUSGRAVE, *THE THEORY OF PUBLIC FINANCE* 7 (1959).

²² See, e.g., DUKEMINIER ET AL., *supra* note 18, at 738 (“Most courts hold that unsightliness alone does not a nuisance make”); ELLICKSON & BEEN, *supra* note 5, at 519 (“Traditional nuisance law did not protect aesthetic sensibilities.”).

to foul our collective landscape with little regard for my well-being as long as doing so is beneficial to herself.²³

While homeowners understandably treasure their aesthetic environment, often more is at stake than just appearances. Studies consistently demonstrate that just about any change in the character of one's neighborhood can have a quantifiable impact—either positive or negative—on local property values. In my hypothetical, for example, my neighbor's well-maintained lawn may increase my home's value, whereas her junk-strewn lawn may diminish it. William Fischel details the extent of this "capitalization" phenomenon: studies have shown that traffic congestion, high crime rates, large housing projects, and local air pollution decreased property values, while growth controls, high-quality local schools, and "[h]aving homeowners rather than renters as neighbors" demonstrably increased home values.²⁴ Property owners, and homeowners in particular, are therefore keenly interested in any neighborhood change, since, for many individuals, the home is by far the most valuable asset they own.²⁵

For these reasons, neighborhoods prize the ability to *bring in* positive externalities—that is, improvements and land uses that residents believe will increase property values and enhance quality of life—and to *keep out* negative externalities—land uses that they believe will decrease property values, increase traffic and noise, and diminish quality of life. To achieve these ends, however, neighborhoods must somehow "internalize" the costs and benefits of those impacts.²⁶ Specifically, they need the power to coerce landowners who benefit from positive externalities, such as the hypothetical well-maintained lawn, to pay for the benefit they receive.²⁷ At the same time, neighborhoods require the ability to force those who generate negative externalities, such as the junk-strewn lawn, to absorb the cost that their

²³ For a theoretical exercise illustrating negative externalities in land use, see DUKEMINIER ET AL., *supra* note 18, at 46-50.

²⁴ FISCHEL, *supra* note 1, at 45-46; *see also* Ellickson, *supra* note 2, at 92 (asserting that the provision of local "public goods" will cause property values in the area to rise).

²⁵ *See* FISCHEL, *supra* note 1, at 8-12 (providing a range of reasons why homeowners are unusually concerned about and willing to take action to prevent potential harms to their homes by negative externalities); William A. Fischel, *Why Are There NIMBYs?*, 77 LAND ECON. 144, 146 (2001) [hereinafter Fischel, *NIMBYs*] (reporting that the "vast majority of mature households" have all of their savings in their homes).

²⁶ *See* MANKIW, *supra* note 18, at 195-201 (discussing the problem of internalizing externalities).

²⁷ This question—how benefitted parties can be made to pay their fair share for benefits that are nonrivalrous and nonexcludable—is one of the central inquiries in public finance. *See generally* MUSGRAVE, *supra* note 21, at 7-8 (providing examples of developments that are profitable from a public, but not a private, point of view).

deleterious activity imposes on their neighbors.²⁸ Over the last few decades, the deed-restricted homeowners association has soared in popularity because it provides neighborhoods with precisely these powers. The homeowners association protects property values and community quality of life by charging mandatory assessments on all homeowners to pay for the provision of positive amenities, such as swimming pools, tennis courts, and gardens, and by strictly regulating the use of land to prevent negative externalities.²⁹

For many neighborhoods, however, the homeowners association is unavailable. In older neighborhoods that were developed without deed restrictions binding each parcel of land to a homeowners association, retroactively creating one is nearly impossible because doing so would require the unanimous consent of all the homeowners in the neighborhood. Economic theory postulates that obtaining unanimity in this situation among any group larger than a few landowners is very difficult because each landowner will have incentives to “hold out” from the agreement.³⁰ For example, if a sufficient number of neighborhood residents are willing to pay for the maintenance of my next-door neighbor’s front lawn, then I might

²⁸ This second question—how to make the generator of negative externalities consider the costs imposed on others—is one of the central problems in land use control. See, e.g., WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 234-37 (1985) (describing and critiquing traditional empirical analyses of the relationship between externalities and zoning).

²⁹ See, e.g., NELSON, *supra* note 12, at 46, 52-55, 74-76 (detailing the increasing popularity of homeowners associations, the “covenants, conditions, and restrictions” through which these associations regulate land use, and the “public” services these associations provide). There is a vast literature on the virtues and vices of homeowners associations. See, e.g., EVAN MCKENZIE, *PRIVATOPIA* (1994); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1521-26 (1982) (describing similarities between local governments and homeowners associations and asserting that voluntariness of homeowners associations is the key distinction between them); Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 849-64 (describing how uniform rules in private developments make it hard for consumers to be fully satisfied with the developments in which they live); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1388-93 (1994) (describing some of the benefits of providing public goods through homeowners associations rather than local governments, including that homeowners associations can satisfy minority preferences and allocate resources better than local governments). This literature is outside the scope of the present Article, however, which focuses on the ability of neighborhoods to control their own externalities where forming a homeowners association is difficult or impossible.

³⁰ See, e.g., Ellickson, *supra* note 2, at 79 (“When relevant owners and residents are heterogeneous and more numerous than a dozen or two, their efforts at voluntary coordination are likely to be beset by significant free rider problems.”); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833 (1999) (noting that the creation of homeowners associations in established neighborhoods is virtually impossible because “the transactions costs of assembling unanimous neighborhood consents voluntarily would be prohibitive”).

decline to agree, thereby continuing to enjoy the presence of the nice lawn without having to pay. Similarly, if a sufficient number of my neighbors are willing to place restrictions on their land to prevent unkempt yards, then I may benefit from the assurance that my neighbors' lawns will remain pristine while keeping my own lot free of restrictions. The specter of this rogue "holdout" or "free rider" will deter otherwise agreeable landowners from joining the association out of fear that they will be forced to pay for a benefit that others obtain for free. Given the choice, most individuals in such a situation will opt not to join the homeowners association, even if it means that everyone in the neighborhood continues to suffer because of the inability to manage local externalities.³¹ This quandary can be overcome, according to the orthodox economic view, only by coercing unanimity through some sort of regulatory scheme.³²

The typical regulatory scheme used to overcome this collective action problem is a combination of zoning and *ad valorem* taxation. Through zoning, the municipality simply dictates the permissible land uses in each neighborhood without the consent of the affected landowners, thereby addressing the negative externality problem.³³ Through *ad valorem* taxation, the municipality levies a charge on landowners in proportion to the assessed value of their property to pay for the benefits all municipal residents receive, again without the consent of the assessed, thus solving the positive externality problem.³⁴ As the Introduction pointed out, this scheme has worked well for landowners in small, incorporated suburbs, where zoning can ensure a fairly homogeneous landowning population with uniform service needs. Landowners have been far less satisfied, however, with the governance of large cities, in which their clout is diminished by a more diverse population and a variety of strong interest groups that make competing demands on municipal government.³⁵

³¹ This scenario is an example of the classic prisoner's dilemma described in the economics literature, in which cooperation between individuals is defeated because each mistrusts the other's willingness to value the collective self-interest above the individual self-interest, causing each to opt for individual self-interest even though all would have been better off cooperating. See MANKIWI, *supra* note 18, at 355-62.

³² See, e.g., Ellickson, *supra* note 2, at 93 (proposing to overcome the free rider problem through a block-level improvement district—or BLID, inspired by BIDs—in which all benefitted owners would be required to pay assessments, regardless of consent); Nelson, *supra* note 30, at 833-34 (proposing to overcome the holdout problem by allowing the creation of homeowners associations through a neighborhood election requiring less than unanimous consent).

³³ See Nelson, *supra* note 30, at 840-41, 844-45 (explaining how zoning is used in existing neighborhoods to overcome the holdout and free rider problems coercively).

³⁴ See MUSGRAVE, *supra* note 21, at 9-10 (identifying taxation as the traditional means of financing public goods).

³⁵ See *supra* note 2.

City officials, seeking to prevent tax-paying landowners from fleeing to adjacent suburbs, have attempted to placate those landowners by giving them the direct power to approve or veto neighborhood changes, freeing the landowners from the need to lobby city hall. Of most significance for present purposes, cities have devised two complementary devices that appear ideally tailored to satisfy landowners' desires: (1) the neighborhood zoning district, which enables landowners to directly manage *negative* local externalities; and (2) the special assessment district, which empowers them to directly manage *positive* local externalities.

B. *The Neighborhood Zoning District*

The most common type of neighborhood zoning district provides that any landowner who desires to use his or her land in a designated manner (say, to operate a nightclub or tavern) must obtain the consent of the owners of some percentage of the land within a certain radius from the proposed land use.³⁶ This type of zoning device is often referred to as a "one-shot deal."³⁷ The affected landowners cast a one-time vote on one proposed development. Afterwards, the district ceases to perform any further functions, unless another land use subject to the referendum provision is proposed for the same site. Frequently, the land use or uses subject to the jurisdiction of the zoning district will be something that is considered a "Locally Undesirable Land Use" (LULU)—that is, a land use with the potential to impose significant negative externalities, such as increased noise, traffic congestion, or decreased property values, on the surrounding area.³⁸

Although the one-shot deal has been most common, in principle the neighborhood zoning district could be constructed as a continuing governmental entity. Robert Nelson, for example, has proposed that landowners

³⁶ Cf. Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 567-72 (1992) (describing the earliest examples of "frontage consent" ordinances in late nineteenth- and early twentieth-century Chicago).

³⁷ See Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1512-26 (2008) (explaining the "one-shot deal" concept and elaborating on its use in a variety of land use contexts, including neighborhood zoning and business improvement districts).

³⁸ See, e.g., *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117-18 (1928) (examining a local zoning measure requiring the consent of property owners before establishing group homes for children and the elderly in a mostly residential zone); *Shannon v. City of Forsyth*, 666 P.2d 750, 751 (Mont. 1983) (considering a zoning ordinance barring mobile homes from certain residential zones unless eighty percent of nearby owners provided consent); *Davis v. Blount Cnty. Beer Bd.*, 621 S.W.2d 149, 150 (Tenn. 1981) (analyzing a county resolution barring the sale of beer within 300 feet of residential dwellings, should the owner of one of those residences object).

within a particular submunicipal territory should be permitted to create, by petition, a "Neighborhood Association in an Established Neighborhood" (NASSEN).³⁹ Once the NASSEN is created, landowners within the NASSEN's territorial jurisdiction would have the power to vote on any proposed zoning changes within the district.⁴⁰ Nelson's scheme does not appear to have been widely adopted, although a few cities have attempted to delegate ongoing zoning powers to defined neighborhood groups.⁴¹

C. *The Special Assessment District*

The "special assessment district" is a device that permits a municipality to provide an improvement that confers a "special benefit" on property in the vicinity, and then to assess the benefitted property owners for the cost of the improvement.⁴² For example, if a sewer line servicing a residential development of fifty homes needs repair, the municipality could perform the repair and then assess the fifty homeowners for the cost.⁴³ Traditionally, the special assessment was also a one-shot deal. The city would assess a one-time charge to finance a one-time physical improvement.⁴⁴ Furthermore, the traditional special assessment usually provided improvements that were placed on or abutting the benefitted land—such as streets or sewers.⁴⁵ In modern times, however, the special assessment has been applied much more broadly. For example, the assessment may finance the provision of positive externalities, such as sanitation or security services that generally benefit the assessed area, or the erection of an improvement, such as a rail station, that promises to increase economic activity or property values in

³⁹ NELSON, *supra* note 12, at 265-67.

⁴⁰ *Id.* at 267.

⁴¹ *See, e.g.,* Schulz v. Milne, 849 F. Supp. 708, 712 (N.D. Cal. 1994) (analyzing the constitutionality of a neighborhood review board de facto empowered by the city to approve all new zoning changes); Rispo Inv. Co. v. City of Seven Hills, 629 N.E.2d 3, 5-6 (Ohio Ct. App. 1993) (examining zoning measures requiring that proposed zoning changes be approved by both a majority of voters citywide *and* in the affected ward).

⁴² For introductory material on special assessment districts, see *supra* note 5.

⁴³ For a typical example of a special assessment involving sewer lines, see Strauss v. Township of Holmdel, 711 A.2d 1385, 1388 (N.J. Super. Ct. Law Div. 1997).

⁴⁴ *See* Reynolds, *supra* note 5, at 399 (describing the evolution of the special assessment from its origins as a "one-time fixed charge").

⁴⁵ *See* Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201, 203-06 (1983) (recounting early special assessments whose benefits could be easily traced to specific properties); Reynolds, *supra* note 5, at 398 (noting that, traditionally, improvements paid for by special assessment had to benefit the assessed property "over and above" the advantage the whole community would derive from the improvements).

the area.⁴⁶ In addition, the modern special assessment district may not necessarily be a one-shot deal, but could be an ongoing operation that assesses a regular charge against landowners for provision of a continuing service.⁴⁷ One widely used modern incarnation of the special assessment district, the BID, requires assessed landowners to pay a recurring charge to an association, which then uses the funds to perform a wide array of ongoing services for the benefit of the assessed landowners.⁴⁸ The BID has traditionally operated in downtown business areas, but several scholars have proposed expanding the concept to allow residential areas to create, by petition of a percentage of landowners, an improvement district that is empowered to levy assessments on neighborhood residents in order to provide collective amenities on an ongoing basis.⁴⁹ The neighborhood or block-front improvement district appears to have gained popularity in recent years.⁵⁰

A city may impose a special assessment or BID on the benefitted landowners without their consent, but the more common course is for a percentage of the nearby property owners to petition the city to create the assessment district.⁵¹ Even where such a petition is not formally required, it is rare for a city to create such a district without the approval of a significant percentage of the assessed landowners.⁵² In many cases, the city's decision to create a special assessment district is subject to a referendum by a percentage of the landowners to be assessed (usually a majority or supermajority).⁵³ For special assessment districts like BIDs, which operate on an ongoing basis, a board of directors is either elected or appointed to manage the budget and operations of the district.⁵⁴ Even when the board is appointed,

⁴⁶ Cf. Reynolds, *supra* note 5, at 399-400 (listing examples of benefits funded through modern special assessments, like fire protection services).

⁴⁷ *Id.* at 399.

⁴⁸ Briffault, *supra* note 2, at 517.

⁴⁹ See Ellickson, *supra* note 2, at 97-98, 100-01 (proposing services and regulations that could be administered by a local improvement district); Liebmann, *supra* note 12, at 351-64 (suggesting a number of amenities and services that private neighborhood groups could provide).

⁵⁰ See Richard Briffault, *The Business Improvement District Comes of Age*, 3 DREXEL L. REV. 19, 21-24 (2010) (noting the sprouting of Philadelphia BIDs in a wide variety of residential neighborhoods, including low-income, minority neighborhoods).

⁵¹ Reynolds, *supra* note 5, at 404.

⁵² See *id.* ("BIDs are rarely, if ever, formed over the objection of a majority of the property owners."); see also Briffault, *supra* note 6, at 381-84 (describing the large role existing businesses and chambers of commerce play in how BIDs are formed in practice).

⁵³ See Briffault, *supra* note 6, at 379-80 (describing how landowners within a proposed BID often have the opportunity to veto its creation if a significant fraction of them file written protests within a specified time period).

⁵⁴ See *id.* at 409-10, 413 (describing the different types of boards of special assessment districts, from advisory to nonprofit district management associations).

it tends to be dominated by landowners.⁵⁵ For the purposes of this Article, I ignore the less common variety of special assessment district in which the city simply imposes the assessment without the consent of assessed landowners.

D. Capitalization, Coercion, and the Public Choice Regulatory Model

The preceding sketch illustrates some of the ways in which the neighborhood zoning district and the special assessment district are conceptually symmetrical. First, both devices provide landowners with the ability to manage local externalities directly. Neighborhood zoning districts permit a percentage of neighboring landowners to keep out (or be paid to allow in) an undesirable new entrant that presumptively causes them disproportionate harm as a result of its proximity; similarly, special assessment districts permit a percentage of neighboring landowners to bring in (if they pay) a desirable new entrant that presumptively brings them disproportionate benefits as a result of its proximity. Second, both devices enable large, diverse cities to capture some of the governance advantages of small, homogeneous suburbs. Devolving direct power over a local land use change to nearby landowners circumvents potential interest-group conflicts prevalent in a diverse city by homogenizing the voting population and thereby ensuring a general consistency of preferences.

The assumption that restricting the franchise to nearby landowners will result in a more uniform set of preferences rests implicitly on the theory of capitalization. According to this theory, the positive or negative impacts of neighborhood change will be reflected in the property values of local landowners whose land is closest to the proposed change.⁵⁶ If all proximate landowners stand collectively to gain or to lose from a proposed new entrant to the neighborhood, they are likely to share similar views on whether to welcome that entrant.⁵⁷ Capitalization also provides a normative basis for limiting the franchise to proximate landowners. Although tenants, employees, visitors, business owners, or others may have a stake in how the neighborhood manages change, capitalization theory holds that none of

⁵⁵ See *id.* at 412-13 (noting that “[b]usinesspeople, especially landowners, generally dominate the membership of these boards, even when that is not required by state enabling legislation” because an appointments process or an election process may be limited to landowners).

⁵⁶ See Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 294 (2010) (“[T]he value of local collective goods is capitalized in the price of homes.”).

⁵⁷ See, e.g., *id.* at 298 (arguing that a proposal to create a historic preservation district has a fairly uniform impact on landowners’ property values and “puts everyone in the district in the same boat”).

these groups is affected as acutely as landowners, since any land use change will directly impact their property values.⁵⁸ Both the special assessment district and the neighborhood zoning district rely implicitly on capitalization to rationalize confining the franchise to landowners based on their disproportionate interest in proximate land use changes.⁵⁹

The most critical similarity between neighborhood zoning districts and special assessment districts, however, is that both devices have a strongly coercive component. Unanimity is rarely required for either of these entities to act. Rather, some percentage of a district's landowners, usually those who own a majority or supermajority of the area's property, have the power to impose their will on the rest. As I have stressed, orthodox economic theory considers this coercive element to be absolutely essential in overcoming the collective action problem that besets the management of local externalities—without coercion, individual landowners will be enticed to hold out or free ride on the efforts of their neighbors.⁶⁰

⁵⁸ *Id.* at 294. While some have argued that limiting the right to vote on land use changes to nearby landowners is undemocratic, defenders of such a limit answer that doing so is legitimate where a land use change is likely to affect property values, because landowners have a disproportionate stake in the outcome. *See, e.g.,* Ellickson, *supra* note 2, at 90-95 (responding to “hyper-egalitarian” criticism of landowner voting with historical examples of the practice and by contending that landowners bear the bulk of the benefits or costs of a board's decisions); Merrill, *supra* note 56, at 297 (arguing that the creation of a historic preservation district has “trivial or speculative” effects on nonlandowners “compared to the primary benefits and costs, which are borne by members of the community”). Merrill further argues that limiting the franchise is legitimate because doing so “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.” Merrill, *supra* note 56, at 294. This same logic informs the Supreme Court's jurisprudence exempting certain “special-purpose” municipal entities from the “one person, one vote” rule of *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (internal quotation omitted), on the grounds that they disproportionately affect landowners. *See infra* text accompanying notes 95-105.

⁵⁹ On the special assessment district and capitalization, *see, for example,* *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 108 (2d Cir. 1998) (“The principal economic benefit from [the BID's] activities . . . plainly accrues to the property owners, who will enjoy an increase in the value of their property.”); Ellickson, *supra* note 2, at 92-93 (arguing that property owners should be given an exclusive franchise in a “block-level institution” charged with providing localized public goods, because landowners are the primary beneficiaries via capitalization). For a similar discussion relating to neighborhood zoning districts, *see, for example,* *Davis v. Blount Cnty. Beer Bd.*, 621 S.W.2d 149, 152 (Tenn. 1981) (upholding an ordinance conditioning approval of a tavern on nearby owners' decision not to protest the approval, reasoning that “[i]t has been recognized that the . . . existence of [a LULU] in close proximity to the property of others may adversely affect the value of their property”).

⁶⁰ *See, e.g.,* Briffault, *supra* note 6, at 394 (“The coercive assessment is essential to the BID.”); Ellickson, *supra* note 2, at 93, 107 (proposing to overcome the free rider problem through BLIDs, in which all affected owners would be required to pay assessments, regardless of whether they agreed to the creation of the district, and acknowledging that the BLID proposal involves coercion); Nelson, *supra* note 30, at 833-34 (proposing a mechanism by which homeowners

Ultimately, both the neighborhood zoning district and the special assessment district obtain their legitimacy from a “public choice” model of local government. Under this model, a free market, in which individuals transact based on their ability and willingness to pay, is the ideal provider of virtually all goods and services; state coercion is legitimate only to the extent that it is necessary to overcome a structural incapacity of the market to satisfy individual preferences.⁶¹ The state, in other words, is merely a continuation of the market by other means.⁶² It exists solely to enable individuals to safeguard their economic self-interest where the market fails to do so.

In the case of the neighborhood zoning district and special assessment district, the public choice model would consider government coercion of dissenting landowners a legitimate form of market substitution because collective action problems (of either the holdout or free-rider variety) frustrate the economic interests of all the neighborhood landowners by making it impossible for them to internalize the costs of local externalities. By the same token, public choice theory would rationalize the restriction of the franchise to landowners on the grounds that, in line with the notion of capitalization, the only reason government coercion is justified at all is to protect the landowners whose property values are bedeviled by externality problems.

Given the similarities between the special assessment district and the neighborhood zoning district, one would expect courts to treat them similarly. Indeed, as we will see in the next Part, when considering the validity of these devices, courts have generally acknowledged the public-choice logic underlying them. Specifically, courts have implicitly accepted the premise that landowners are disproportionately interested in land use changes or new improvements in their neighborhoods. Courts also recognize that both devices are designed to enable nearby landowners to protect the value of their own property. However, as the next Part shows, courts follow these premises to diametrically opposed conclusions. The majority of court decisions hold neighborhood zoning districts to be constitutionally

associations would be created by less than unanimous consent, thereby addressing the difficulties of collective action).

⁶¹ See Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 155-57 (1977-1978) (describing the public choice model and providing an example of how it applies in the context of community organizations). On the application of public choice theory to law generally, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991); MAXWELL L. STEARNS & TODD J. ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009).

⁶² See Michelman, *supra* note 61, at 148 (“In the public choice model, . . . [t]he legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange.”).

infirm because of the likelihood that landowners will make decisions based on their own self-interest. By contrast, almost all courts uphold the constitutionality of special assessment districts in which landowners enjoy disproportionate power on essentially the same grounds—that their amplified voice is justified by their greater interest.

This inconsistency has persisted in the jurisprudence, unresolved and ignored by scholars, because the courts have developed two entirely distinct doctrines to analyze these two devices. Courts scrutinize neighborhood zoning districts under an anachronistic “delegation” doctrine that prohibits the devolution of regulatory power to evidently self-interested parties. In contrast, courts analyze special assessment districts under a more generous doctrine that recognizes the practical need for municipalities to indulge the parochial interests of the property owners who pay the city’s bills. In short, it appears that the cases dealing with the neighborhood zoning district reject the public choice model entirely, whereas the cases dealing with the special assessment district accept it. These two doctrinal lines seem to exist in parallel juridical universes, neither one acknowledging the other or recognizing their incompatibility.

II. PUBLIC CHOICE AND THE JURISPRUDENCE OF NEIGHBORHOOD EMPOWERMENT

A. *Neighborhood Zoning and Standardless Delegation: Revisiting the Eubank-Cusack-Roberge Riddle*

The fate of neighborhood zoning districts was sealed by a series of cryptic Supreme Court decisions from the early twentieth century. Zoning first appeared in American cities in the late nineteenth century in response to the dual pressures of urbanization and industrialization. An exploding urban population and growing industrial and commercial land development resulted in a sharp increase in land use conflicts.⁶³ Of particular concern to city leaders was the effect of new development on the stability of property values in existing neighborhoods with relatively uniform, low-intensity land use patterns, such as single-family residential districts.⁶⁴ Potential

⁶³ See, e.g., SEYMOUR I. TOLL, *ZONED AMERICAN* 74-116 (1969) (describing how changing land use patterns on Fifth Avenue in New York City threatened affluent residential and commercial neighborhoods, leading to adoption of first comprehensive zoning ordinance).

⁶⁴ Cf. Bosselman, *supra* note 36, at 569-70 (explaining that the threat of undesirable uses invading residential areas made homeowners nervous, and “[n]ervous neighbors were bad for the business of people who developed or sold real estate because the perception of security carries a high economic value, and nervousness lowers real estate prices”).

homeowners considering whether to purchase a home in such neighborhoods would surely be wary of purchasing a plot of land that accrued a significant portion of its value from the low-intensity homogeneity of the surrounding neighborhood absent some assurance that the neighborhood would remain homogeneous—particularly during an era when neighborhoods were rapidly changing due to the introduction of ever more intense land uses.⁶⁵ To address this problem, Chicago pioneered the earliest form of zoning ordinance, the “block-front consent” scheme. In 1887, Chicago enacted an ordinance that prohibited new livery stables within 75 feet of any residential area unless the owners of all property within 600 feet consented in writing.⁶⁶ The Illinois Supreme Court upheld this scheme in *City of Chicago v. Stratton*, reasoning that “[i]n matters of purely local concern the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority.”⁶⁷ *Stratton* thus appears to endorse the public-choice logic that “immediately interested” parties should be permitted to determine their own “needs.”

However, the United States Supreme Court’s 1912 decision in *Eubank v. City of Richmond*⁶⁸ cast *Stratton* into serious doubt. In *Eubank*, the Court held that a zoning ordinance enacted by the city of Richmond, Virginia, permitting the owners of two-thirds of the property abutting any street to establish a setback line for buildings on the street was an unconstitutional delegation of power.⁶⁹ The Court reasoned that the ordinance permitted “one set of property owners to control the property right of others” without providing any limitation on those owners’ authority.⁷⁰ Absent any standards, property owners could exercise the zoning power “solely for their own interest or even capriciously.”⁷¹ In rejecting landowners’ “own interest” as a decisionmaking standard, *Eubank* apparently repudiated the underlying public-choice premise of the neighborhood zoning district, which is that landowners should have a voice in proximate land use changes precisely because they are the ones most interested.

Stratton was distinguishable from *Eubank* in that the ordinance at issue in *Stratton* did not permit landowners to *establish* a land use regulation, but

⁶⁵ See, e.g., *id.* at 570-71 (describing the threat livery stables posed to Chicago’s residential neighborhoods in the late nineteenth century).

⁶⁶ *Id.* at 570.

⁶⁷ 44 N.E. 853, 855 (Ill. 1896).

⁶⁸ 226 U.S. 137 (1912).

⁶⁹ *Id.* at 141, 144.

⁷⁰ *Id.* at 144.

⁷¹ *Id.* at 145.

allowed them simply to *waive* an otherwise applicable restriction.⁷² In a later case also involving Chicago, *Thomas Cusack Co. v. City of Chicago*,⁷³ the Supreme Court seemingly salvaged *Stratton*. The Court upheld a municipal ordinance prohibiting the erection of a billboard in any predominantly residential district without the consent of the owners of a majority of the frontage on the street where the billboard was to be erected.⁷⁴ The Court distinguished *Eubank* by noting that the Richmond ordinance had empowered neighbors to impose restrictions, whereas the Chicago ordinance under review empowered neighbors only to lift an otherwise applicable restriction.⁷⁵

The distinction between a valid waiver and an invalid imposition, tenuous from the beginning, was apparently abolished in the last of the Supreme Court's cases on neighborhood zoning districts, the 1928 case of *Washington ex rel. Seattle Title Trust Co. v. Roberge*.⁷⁶ There, the Court considered an ordinance that prohibited the construction of certain types of group homes in areas zoned for single-family residences, but allowed this prohibition to be lifted with the consent of the owners of two-thirds of the property within four hundred feet of the proposed location of the group home.⁷⁷ The Court invalidated the ordinance.⁷⁸ Although the case more closely resembled *Cusack* than *Eubank*, the Court followed *Eubank* in reasoning that the ordinance amounted to a standardless delegation—it conferred on one group of property owners the power to prevent others from using their land without providing standards to constrain that power in any way.⁷⁹ The Court noted that the property owners were “not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the [plaintiff] to their will or caprice.”⁸⁰ Like *Eubank*, then, *Roberge* rejected the public-choice premise that landowners *should* be able to withhold consent for “selfish” reasons such as protecting the value of their property.⁸¹ The *Roberge* Court distinguished *Cusack* on the grounds that billboards—at issue in *Cusack*—were inherently offensive nuisances, whereas the record did not establish the *per se* offensiveness of group homes.⁸²

⁷² See *Stratton*, 44 N.E. at 855.

⁷³ 242 U.S. 526 (1917).

⁷⁴ *Id.* at 527, 531.

⁷⁵ See *id.* at 531.

⁷⁶ 278 U.S. 116 (1928).

⁷⁷ *Id.* at 117-18, 122-23.

⁷⁸ *Id.* at 122.

⁷⁹ *Id.* at 121-22.

⁸⁰ *Id.* at 122 (citation omitted).

⁸¹ *Id.*

⁸² *Id.*

Making sense of this trio of cases proves exceedingly difficult. While *Eubank* and *Cusack* can perhaps be reconciled, *Roberge*'s distinction of *Cusack* cannot withstand scrutiny. If *Roberge* is read to mean that cities lack the power to prohibit group homes in single-family neighborhoods because group homes are not inherently offensive, then *Roberge* is plainly inconsistent with the Supreme Court's landmark ruling in *Village of Euclid v. Ambler Realty Co.*,⁸³ decided just two years earlier. In *Euclid*, the Supreme Court made clear that zoning authority was not limited to restraining offensive uses but could be deployed broadly to protect the character of existing neighborhoods.⁸⁴ If, on the other hand, *Roberge*'s concern was not with the city's power to prohibit the use in question ab initio but rather with the validity of a neighborhood plebiscite on whether to waive the prohibition, then the Court's distinction of *Cusack*, which approved a similar voting scheme, is inexplicable.⁸⁵ In fact, it seems far more sensible for a city to give neighbors a vote on whether to waive a land use prohibition where the offensiveness of the use to be prohibited is debatable (as in *Roberge*) than where the use is indisputably offensive (as in *Cusack*). Indeed, the city would likely be neglecting its duty to protect the public health, safety, and welfare if it permitted some landowners to impose a plainly noxious use on their objecting neighbors.

Not surprisingly, both courts and commentators have struggled to make sense of the doctrine emerging from the *Eubank-Cusack-Roberge* line of cases. The majority of courts cite *Roberge* and *Eubank* as providing the applicable rule that direct delegation of the zoning power to neighborhood groups is prohibited, and either ignore or distinguish *Cusack*.⁸⁶ A minority of

⁸³ 272 U.S. 365 (1926).

⁸⁴ See *id.* at 388 (upholding a zoning ordinance excluding all industrial uses from residential districts, while recognizing that "it may thereby happen that not only offensive or dangerous industries will be excluded, but those which are neither offensive nor dangerous will share the same fate").

⁸⁵ See *Thomas Cusack Co. v. City of Chicago*, 242 U.S. 526, 531 (1917) ("The ordinance in the case at bar . . . permits this prohibition to be modified with the consent of persons who are to be most affected by such modification.").

⁸⁶ See, e.g., *Schulz v. Milne*, 849 F. Supp. 708, 711-12 (N.D. Cal. 1994) (holding that the plaintiff stated a claim of unconstitutional delegation of zoning power to a neighborhood review board on the authority of *Eubank* and *Roberge*); *Emmett McLoughlin Realty, Inc. v. Pima County*, 58 P.3d 39, 41-42 (Ariz. Ct. App. 2002) (citing *Eubank*, *Roberge*, and *Cusack* and holding that the ordinance at issue more closely resembled the invalid neighborhood-consent ordinance struck down by *Eubank* than the valid waiver ordinance upheld in *Cusack*); *Shannon v. City of Forsyth*, 666 P.2d 750, 752 (Mont. 1983) (invalidating a neighbor-consent provision related to the location of mobile homes under the authority of *Eubank* and *Roberge*); *Cary v. City of Rapid City*, 559 N.W.2d 891, 895-96 (S.D. 1997) (invalidating a neighbor-consent provision under *Eubank* and *Roberge* while ignoring *Cusack*); *Am. Chariot v. City of Memphis*, 164 S.W.3d 600, 602-03, 605 (Tenn. Ct. App. 2004) (invalidating a landowner-consent provision allowing restaurant owners to

courts cite *Cusack* and uphold such provisions, and likewise either distinguish or ignore *Eubank* and *Roberge*.⁸⁷ Neither group of decisions makes a convincing case for unifying the doctrine in this area.⁸⁸ Scholars have fared little better. Frank Michelman, one of the most distinguished local-government scholars, undertook an extensive examination of the three cases and ultimately concluded that they could not be reconciled.⁸⁹ Fortunately,

waive a prohibition on where horse-drawn carriages could be located and distinguishing *Cusack* on the grounds that the ordinance in this case was for the benefit of the public, while the ordinance in *Cusack* was only for the benefit of the local property owners); *Williams v. Whitten*, 451 S.W.2d 535, 536, 538 (Tex. Civ. App. 1970) (invalidating a neighbor-consent provision respecting the location of mobile home parks under *Roberge*); *County of Fairfax v. Fleet Indus. Park Ltd. P'ship*, 410 S.E.2d 669, 670, 673 (Va. 1991) (invalidating a provision conditioning zoning changes in a district on the consent of neighbors under *Eubank* and distinguishing *Cusack*); *Town of Westford v. Kilburn*, 300 A.2d 523, 527 (Vt. 1973) (invalidating a consent provision as a standardless delegation without citing *Eubank*, *Roberge*, or *Cusack*); *cf. Gen. Elec. Co. v. N.Y. State Dep't of Labor*, 936 F.2d 1448, 1455 (2d Cir. 1991) ("*Eubank* and *Roberge* remain good law today.>").

⁸⁷ See, e.g., *Nikolas v. City of Omaha*, No. 8:08-87, 2009 WL 529226, at *8-9 (D. Neb. Mar. 2, 2009) (upholding a city code provision prohibiting accessory apartments subject to neighbor approval as a waiver law under *Cusack*, without citing *Roberge* or *Eubank*); *Coffey v. County of Otoe*, 743 N.W.2d 632, 634, 638-39 (Neb. 2008) (upholding under *Cusack* a neighborhood "waiver" scheme permitting residences near animal feeding and waste facilities only if mutual easements were granted, while distinguishing *Eubank* and discussing *Roberge* in a tangential footnote); *Rispo Inv. Co. v. City of Seven Hills*, 629 N.E.2d 3, 11, 12-13 (Ohio Ct. App. 1993) (upholding a neighborhood-consent provision under *Cusack*, among others, while distinguishing *Eubank* and *Roberge* as applicable only to city ordinances and not to city charters granted under home rule); *Davis v. Blount Cnty. Beer Bd.*, 621 S.W.2d 149, 150, 151-52 (Tenn. 1981) (upholding under *Cusack* a consent provision under which a neighbor can veto a proposed permit to sell beer, while distinguishing *Eubank* and citing *Roberge* once in a "see also"); *cf. Hornstein v. Barry*, 560 A.2d 530, 531, 536-37 (D.C. 1989) (en banc) (upholding a provision conditioning the conversion of apartment buildings to condominiums on the consent of a majority of existing tenants, relying on *Cusack* and distinguishing *Roberge* and *Eubank*). *But cf. id.* at 540 (Ferren, J., dissenting) (arguing that *Roberge* rather than *Cusack* is the applicable rule); *id.* at 542-43 (Reilly, J., dissenting in part) (same).

⁸⁸ There is some suggestion in the case law and other literature that the "rule" emerging from the *Eubank-Cusack-Roberge* line is that "consent provisions are valid if they waive a previously applicable zoning restriction, but are invalid if they impose a new zoning restriction." DANIEL R. MANDELKER, *LAND USE LAW* § 6.04 (5th ed. 2003); *cf. Howard Twp. Bd. of Trs. v. Waldo*, 425 N.W.2d 180, 184 (Mich. Ct. App. 1988) (per curiam) (stating the rule that waiver provisions are generally valid but holding that a provision requiring consent from 100% of neighbors was in any event unreasonable). This is a dubious statement of the applicable legal rule. It completely disregards the *Roberge* case, which itself invalidated a "waiver" provision and which, as the most recent of the three Supreme Court decisions, is likely the most authoritative. The stated rule also ignores the substantial number of cases cited *supra* note 86 in which courts have relied on *Roberge* to invalidate neighborhood waiver provisions. As a matter of principle, moreover, the distinction between a "waiver" and an "imposition" is imperceptible and formalistic. In either case, landowners are directly empowered to determine whether to permit a particular land use in proximity to their own properties.

⁸⁹ See Michelman, *supra* note 61, at 164-87 (analyzing these cases and others alternatively under a "public choice" and a "public interest" model, and concluding that neither satisfactorily

for the purposes of this Article, I need not sort out the doctrinal mess these precedents have created. My concern here is how, if at all, we can reconcile the courts' generally skeptical attitude toward neighborhood zoning districts with their permissive approach to special assessment districts. *Cusack* may prove relevant for this discussion later, but for now I focus on *Eubank*, *Roberge*, and their progeny.

If we take the reasoning of *Eubank* and *Roberge* at face value, the trouble with neighborhood zoning districts is their public-choice foundation—that landowners are permitted to exercise regulatory power in accordance with their own selfish interests rather than some conception of the public good. Assuming that is a legitimate concern, however, it should also raise doubts about the validity of special assessment districts, which likewise empower proximate landowners to effectuate their own self-interest. Nevertheless, special assessment districts have managed to evade the scrutiny of the *Roberge* doctrine because courts use an entirely distinct doctrinal framework to assess those devices—a framework in which the self-interest of the enfranchised landowners is considered a point in *favor* of a district's validity.

B. *Special Assessments, BIDs, and the “One Person, One Vote” Rule*

The special assessment is of an older vintage than zoning, having been used since before the Civil War as a means of financing municipal improvements.⁹⁰ Aside from a brief, late-nineteenth century foray by the Supreme Court into special assessment doctrine, the area has traditionally been the province of the state courts.⁹¹ Federal courts again entered the fray, however,

explains the *Roberge* trio). For a more extensive discussion of Michelman's analysis, see *infra* text accompanying notes 190-94.

⁹⁰ See JACKSON, *supra* note 1, at 131 (describing the use of special assessments to fund street pavement in the mid-nineteenth century and later efforts to shift infrastructure costs to municipalities); Diamond, *supra* note 45, at 206-10 (explaining the factors that led to the use of special assessments, particularly in New York, and describing how early courts saw special assessments in a variety of different lights, such as examples of taxation or as private funding of private benefits); see also *supra* notes 44-45.

⁹¹ Toward the close of the nineteenth century, the Supreme Court briefly intervened in special assessment law to require that special assessments be supported by a fairly exacting calculation of the special benefits received by each landowner. See *Norwood v. Baker*, 172 U.S. 269, 290-92 (1898) (invalidating an assessment “because it rested upon a basis that excluded any consideration of benefits”). However, just a few years later, the Court reversed course and held that courts should broadly defer to legislative judgments about benefit, which it deemed “a matter of forecast and estimate.” *Louisville & Nashville R.R. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 433-34 (1905). From that time until the emergence of the “one person, one vote” jurisprudence in the 1960s, the federal courts largely ceded the development of special assessment law to state courts. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86

after the Court's 1968 decision in *Avery v. Midland County*.⁹² In *Avery*, the Court held that local governments with "general governmental powers over an entire geographic area" were required to apportion voting power in accordance with the principle of "one person, one vote"⁹³ articulated in the landmark decision of *Reynolds v. Sims*.⁹⁴ The *Avery* Court left open the possibility that the "one person, one vote" rule might not apply to "a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents."⁹⁵ *Avery* thus seemed to acknowledge that, contrary to *Roberge* and *Eubank*, circumstances might exist in which it would be legitimate for government to delegate power to individuals deemed disproportionately interested in the subject matter of the government regulation.

The Supreme Court subsequently applied *Avery*'s exception in two cases, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*⁹⁶ and *Ball v. James*.⁹⁷ In both cases, the Court evidently accepted the very public-choice premise that *Eubank* and *Roberge* rejected, affirming that the state can constitutionally confer regulatory power on presumptively self-interested landowners in proportion to their presumed degree of interest.⁹⁸ In *Salyer* and *Ball*, plaintiffs challenged the voting structure of special-purpose municipal districts.⁹⁹ Special-purpose districts are similar to special assessment districts in that they are typically financed, at least in part, by assessments on benefitted landowners; they differ, however, in that special-purpose districts are created directly by the state as autonomously functioning local governmental bodies rather than as subdivisions of a general-purpose municipality.¹⁰⁰ The entities in *Salyer* and *Ball* were water-storage

YALE L.J. 385, 472-73 (1977) (endorsing the Supreme Court's implicit decision to leave special assessments to the state courts).

⁹² 390 U.S. 474 (1968).

⁹³ *Id.* at 484-85.

⁹⁴ *See* 377 U.S. 533, 568 (1964) ("We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.").

⁹⁵ 390 U.S. at 483-84.

⁹⁶ 410 U.S. 719 (1973).

⁹⁷ 451 U.S. 355 (1981).

⁹⁸ *See id.* at 370-71 (citing *Avery* and concluding that the facts of the case "justif[y] a departure from the popular-election requirement of the *Reynolds* case"); *Salyer*, 410 U.S. at 728 ("We conclude that the appellee water storage district, by reason [in part] . . . of the disproportionate effect of its activities on landowners as a group, is the sort of exception to the rule . . . the decision in *Avery* . . . contemplated.").

⁹⁹ *Ball*, 451 U.S. at 357; *Salyer*, 410 U.S. at 724-25.

¹⁰⁰ *See* NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 4, 14-15 (1994) (explaining that "[s]pecial districts are independent local governments that generally perform only a few local government functions"

districts that imposed mandatory assessments on landowners who received water from the districts.¹⁰¹ Each parcel of land was assessed based on the benefit it was deemed to receive, and voting rights for the directors of the water districts were apportioned to landowners either according to their parcels' assessed valuations (in *Salyer*)¹⁰² or acreage (in *Ball*).¹⁰³ The voting schemes in the two cases were challenged for violating the "one person, one vote" rule, but the Court held that *Avery* was inapplicable.¹⁰⁴ In both cases, the Court held that the water districts served only the limited purpose of providing water and disproportionately impacted the landowners who paid the assessments and whose land benefitted from receiving the water.¹⁰⁵

In *Ball*, the Court reached this conclusion notwithstanding the fact that the water district encompassed almost half of the population of Arizona, including the Phoenix metropolitan region, and that it generated and sold electric power as a means of generating additional revenue, thus making it a significant player in the overall development of an arid region.¹⁰⁶ Nevertheless, the Court found that the district did not "administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services."¹⁰⁷ Furthermore, the Court held that the district's weighted voting structure was legitimate because there was a "disproportionately greater" relationship between the district's functions and the landowners empowered to vote within it.¹⁰⁸ Weighting votes based on the acreage of land owned was reasonable "since that number reasonably reflect[ed] the relative risks . . . landowners [incurred] and the distribution of the benefits and the burdens of the District's water operations."¹⁰⁹

Salyer and *Ball* thus stand for the proposition that it is constitutionally permissible, and indeed eminently reasonable, for government to delegate regulatory power to landowners who have a disproportionate economic interest in the subject matter of the regulation, at least when two predicates

in contrast to "general purpose local governments"); KATHRYN A. FOSTER, *THE POLITICAL ECONOMY OF SPECIAL-PURPOSE GOVERNMENT* 7-15 (1997) (describing the different types of special-purpose governments, their powers, and the legal bases for their creation).

¹⁰¹ *Ball*, 451 U.S. at 357, 359-60; *Salyer*, 410 U.S. at 721, 723-24.

¹⁰² 410 U.S. at 725.

¹⁰³ 451 U.S. at 359.

¹⁰⁴ See *supra* note 98.

¹⁰⁵ *Ball*, 451 U.S. at 370; *Salyer*, 410 U.S. at 728.

¹⁰⁶ 451 U.S. at 365-66.

¹⁰⁷ *Id.* at 366.

¹⁰⁸ *Id.* at 371.

¹⁰⁹ *Id.*

are satisfied. First, the entity must serve a “special limited purpose”¹¹⁰ rather than a general governmental purpose; and second, it must disproportionately affect a distinct class of constituents.¹¹¹ After *Ball*, it has been left to state and lower federal courts to sort out the knotty analytical problem of how exactly to distinguish “limited-purpose” from “general-purpose” municipalities, and how to determine when one group of constituents is so disproportionately affected by the operations of a governmental entity as to justify departure from “one person, one vote.” A large body of doctrine has therefore developed attempting to interpret and apply *Salyer* and *Ball*. For purposes of this Article, two decisions are particularly relevant because they apply the *Salyer-Ball* line to a traditional special assessment district and a BID, respectively. In doing so, these decisions expressly use public-choice reasoning to legitimize the regulatory mechanisms in question.

In *Southern California Rapid Transit District v. Bolen*, a California agency created to finance and construct a rapid transit system in southern California was empowered to recoup its costs by creating “special benefit assessment districts” surrounding proposed rail stations.¹¹² Landowners within the assessment districts would pay a charge based on the amount of property owned.¹¹³ The agency voted to create several benefit districts after determining that the landowners to be assessed would experience tangible benefits, such as enhanced property values, from the introduction of rail stations near their property.¹¹⁴ The law provided, however, that the creation of a district be subject to a referendum of the affected landowners if “the owners of at least 25 percent of the assessed value of real property within a proposed district” requested it.¹¹⁵ Only landowners subject to the assessment were eligible to vote, and voting was weighted based upon the amount of property owned.¹¹⁶ The court held that this voting scheme was constitutional under the *Salyer-Ball* line because it satisfied the two essential predicates for exemption from the “one person, one vote” rule. First, the special assessment districts did not exercise any “general governmental powers” but were “little more than formalistic, geographically defined perimeters whose *raison d'être* is to serve as the conceptual medium for the recognition of

¹¹⁰ *Salyer*, 410 U.S. at 728.

¹¹¹ *Id.* But see Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 370 (1993) (critiquing the *Salyer-Ball* predicates and arguing that “[n]either criterion is analytically sound”).

¹¹² 822 P.2d 875, 877 (Cal. 1992) (in bank).

¹¹³ *Id.*

¹¹⁴ *Id.* at 878.

¹¹⁵ *Id.* at 877 (internal quotation marks omitted).

¹¹⁶ *Id.*

economic benefits conferred and the imposition of a corresponding fiscal burden.”¹¹⁷ Second, the assessment districts disproportionately affected the enfranchised landowners because “it is they who will most directly feel both the beneficial economic effects of the transit station locations and bear the financial burden of the annual assessments.”¹¹⁸

Similarly, *Kessler v. Grand Central District Management Ass’n* assessed the constitutionality of a BID established by the city of New York in the area surrounding the historic Grand Central Terminal.¹¹⁹ Under city law, all property owners within the territory of the Grand Central District Management Association (GCDMA) were required to pay annual assessments to the GCDMA, which would use the funds to perform services within the district such as maintenance, security, and street signage.¹²⁰ The GCDMA’s stated purpose was to promote business activity within the district for the benefit of the assessed property owners.¹²¹ The president of the GCDMA openly described himself as “a paid employee only of property owners.”¹²² The city law provided that voting for the GCDMA board of directors was to be weighted based on property ownership. Specifically, the enabling statute required that property owners elect a majority of the board.¹²³ Citing *Salyer* and *Ball*, the court found the GCDMA exempt from the “one person, one vote” standard.¹²⁴ The court held that the district had the limited purpose of promoting business within the area, performed a narrow set of functions, lacked regulatory authority, and was subject to substantial governmental oversight.¹²⁵ Furthermore, the GCDMA’s operation had a substantially greater effect on the assessed property owners than others: “The principal economic benefit from GCDMA’s activities . . . plainly accrues to the property owners, who will enjoy an increase in the value of their property.”¹²⁶

Both *Bolen* and *Kessler* thus explicitly rely on capitalization theory as a public-choice justification for the weighted voting structure of the district in question. The fact that landowners stood to benefit economically from the district’s activities legitimized their exercise of disproportionate political

¹¹⁷ *Id.* at 883.

¹¹⁸ *Id.* at 887.

¹¹⁹ 158 F.3d 92, 93 (2d Cir. 1998).

¹²⁰ *Id.* at 95-96.

¹²¹ *Id.* at 104.

¹²² *Id.* at 116 (Weinstein, J., dissenting) (quoting Douglas Feiden, *Midtown Bonds Spark BID Controversy*, CRAIN’S N.Y. BUS., Apr. 6, 1992, at 1).

¹²³ *Id.* at 97.

¹²⁴ *Id.* at 99.

¹²⁵ *Id.* at 104-07.

¹²⁶ *Id.* at 108.

power, whereas in *Roberge* and *Eubank*, that same fact rendered the neighborhood zoning district unconstitutional.

C. *Unifying the Doctrine?*

Kessler and *Bolen*, like most decisions in the *Salyer-Ball* line, make no mention of the parallel *Eubank-Roberge* line. Likewise, none of the cases in the *Eubank-Roberge* line ever mentions the *Salyer-Ball* doctrine. Superficially, the two lines of cases can be distinguished. In the *Eubank-Roberge* line, the plaintiffs were enfranchised landowners within the district whose land was subject to the district's regulatory powers, whereas in the *Salyer-Ball-Kessler* line, the plaintiffs were primarily nonlandowners in the area who were not directly subject to the district's regulatory authority but nevertheless sought the franchise as a matter of equal protection, thus raising a "one person, one vote" issue. As we recall, however, the public choice theory underlying both special assessment and neighborhood zoning districts holds that the confinement of the franchise to landowners *and* the ability of a majority of those landowners to coerce a recalcitrant minority are both mandated by the "market failure" justification for state action. Government coercion is necessary to protect property values in the face of a collective action problem that makes market coordination impossible, and the limitation of the franchise to landowners is necessary because the sole justification for state intervention is to protect landowners' property values.¹²⁷

Thus, to the extent public choice theory supports the *Kessler* court's decision that the franchise may be legitimately confined to landowners on the grounds that landowners are disproportionately affected by the anticipated increase in property values from the enhanced services of the GCDMA,¹²⁸ public choice theory would also hold that a majority of block-front owners in *Roberge* could legitimately prevent a neighboring landowner from siting a group home on his property in order to overcome a collective action problem that could result in the diminution of property values neighborhood-wide.¹²⁹ Likewise, if the special assessment districts in *Bolen* were accurately described as "little more than formalistic, geographically defined perimeters"

¹²⁷ See *supra* notes 61-62 and accompanying text.

¹²⁸ See *Kessler*, 158 F.3d at 108.

¹²⁹ See *supra* notes 61-62 and accompanying text. It could be argued that, setting public choice theory aside, courts should more strictly scrutinize instances of direct coercion (*Roberge/Eubank*) than instances where plaintiffs merely claim to be affected in a noncoercive way by government activity (*Salyer/Ball/Kessler*). I discuss this distinction in detail *infra* in Section III.B. and conclude that it is not a sound basis for distinguishing the *Eubank-Roberge* line from the *Salyer-Ball-Kessler* line.

designed to serve as “conceptual medium[s]” for the recognition of a distinct economic impact, the neighborhood zoning districts in *Roberge* and *Eubank* would also fit that description.¹³⁰

Finally, if the very purpose of state action under the public choice model is to effectuate individual self-interest where the market proves inadequate to do so, then it follows that the individuals empowered to act can of course exercise their authority based on their own self-interest. The cases in the *Salyer-Ball* line accept this logic insofar as they permit the franchise to be confined to landowners with an economic interest in protecting property values, whereas *Eubank* and *Roberge* reject this logic insofar as they refuse to recognize economic interest as a legitimate basis for regulatory activity. In short, where the *Salyer-Ball* line is consistent with the public choice model, the *Eubank-Roberge* line is directly at odds with it.

On its face, then, there is an unresolved contradiction in the jurisprudence. And, as William James said, “whenever you meet a contradiction you must make a distinction.”¹³¹ Unfortunately, the courts have never articulated what that distinction may be, and law review commentators have done little better. For example, George Liebmann has argued that neighborhoods should be empowered to provide a wide range of services similar to those typically provided by BIDs, such as law enforcement and the maintenance of public facilities;¹³² likewise, Robert Ellickson has written glowingly of BIDs, even advocating for the expansion of their use to residential urban neighborhoods outside of downtown areas.¹³³ Ellickson endorses the BID because it enables landowners to circumvent the inefficient “rent-seeking” of big city government and directly provide themselves with desired local amenities.¹³⁴ He further argues that restricting the franchise to landowners is sensible because, given the capitalization literature, landowners are clearly disproportionately affected by the introduction of new local improvements.¹³⁵ This very logic, of course, would also support neighborhood

¹³⁰ S. Cal. Rapid Transit Dist. v. Bolen, 822 P.2d 875, 883 (Cal. 1992) (in bank). Thus, the distinction between “general-purpose” and “special-purpose” governmental entities provides little help in distinguishing neighborhood zoning districts from special assessment districts. For a more detailed discussion of the distinction between general-purpose and special-purpose districts, see *infra* text accompanying notes 142-55.

¹³¹ WILLIAM JAMES, PRAGMATISM & OTHER WRITINGS 24 (Giles B. Gunn ed., Penguin Books 2000) (1907).

¹³² See Liebmann, *supra* note 12, at 351-64 (listing and describing services he would authorize neighborhood organizations to provide).

¹³³ See Ellickson, *supra* note 2, at 82-85 (describing the advantages of block improvement districts (BLIDs), including their small scale and tight-knit social networks).

¹³⁴ *Id.* at 89-90.

¹³⁵ *Id.* at 92-95.

zoning control. However, both Ellickson and Liebmann recoil at the prospect of conferring more than token zoning powers on neighborhood groups.¹³⁶ Neither scholar provides more than a cursory explanation of how they can meaningfully distinguish neighborhood zoning districts from BIDs.¹³⁷ Robert Nelson, the rare scholar who has actually advocated for neighborhood zoning control, has simply ignored the *Roberge* line entirely.¹³⁸

In the following Part, I look beneath the surface of both the doctrine and the commentary in an attempt to discern whether there is a meaningful distinction between neighborhood zoning districts and special assessment districts that may explain the contradiction. Ultimately, I conclude that there is no sound way to distinguish these devices. Indeed, if there is any valid distinction, it is that neighborhood control of zoning is far *less* troublesome as a matter of public policy than the special assessment district.

III. PUBLIC POLICY AND NEIGHBORHOOD EMPOWERMENT

A. *The Risk of Majoritarian Exploitation*

Whenever power is delegated from a higher to a lower level of government, it raises a concern, expressed most famously in James Madison's *Federalist No. 10*, that a locally dominant faction may exploit a vulnerable minority.¹³⁹ In their innovative article *Land Assembly Districts*, Michael Heller and Rick Hills use Madison's framework to argue that both neighborhood zoning districts and BIDs present a risk of majoritarian exploitation.¹⁴⁰ They further contend that Madison's argument in *Federalist No. 10* can help explain both the *Roberge* and the *Salyer-Ball* lines of cases.¹⁴¹ Thus, this

¹³⁶ See *id.* at 99 (proposing a statute that would give an "ordinary BLID" some authority to waive zoning restrictions but otherwise deny regulatory powers); Liebmann, *supra* note 12, at 346, 362 (concluding that several "external effects" create a "strong case" for not giving zoning powers to community associations).

¹³⁷ See *infra* notes 266-68 and accompanying text.

¹³⁸ See NELSON, *supra* note 12, at 404-08 (discussing the *Avery* line as potentially applicable precedent but declining to mention the *Roberge* line).

¹³⁹ See THE FEDERALIST No. 10, at 78 (James Madison) (Clinton Rossiter ed., 2003) (developing a theory explaining why smaller societies are more likely to engender oppressive majorities).

¹⁴⁰ See Heller & Hills, *supra* note 37, at 1500-03 (discussing how the multiple functions performed by BIDs increase the number of opportunities to exploit minority groups); see also *id.* at 1521 (arguing that authorizing neighborhoods to control their own zoning would raise a strong possibility of "intra-group exploitation"). Richard Briffault also acknowledges that BIDs raise "the classic Madisonian possibility of tyranny by a majority faction." Briffault, *supra* note 6, at 457.

¹⁴¹ See Heller & Hills, *supra* note 37, at 1499 & n.83 ("Because of this worry about 'parochial' and 'selfish' behavior, courts have limited the power of neighborhoods to impose new zoning restrictions on parcels" (citing *Eubank* and *Roberge*, among others)).

Section considers whether the problem of majoritarian exploitation can shed any light on the judicial distinction between neighborhood zoning districts and special assessment districts. I conclude that special assessment districts are likely to be *more* susceptible to majoritarian exploitation than neighborhood zoning districts, and are thus *more* deserving of close judicial scrutiny.

1. *The Federalist No. 10* and Neighborhood Homogeneity

As Heller and Hills recapitulate Madison's argument, a large and diverse polity such as a big city is likely to feature a wide variety of pressure groups that forge shifting governing coalitions through logrolling (i.e., trading votes with other pressure groups). This political dynamic enables each group to exert some influence, but none to dominate.¹⁴² As the size of the polity shrinks, however, the number of interest groups also shrinks, thereby making vote-trading difficult and permitting a stable majority to consistently impose its views on a more vulnerable minority.¹⁴³ This problem may be avoided, however, if the boundaries of the polity are drawn narrowly to ensure that the population has fairly uniform interests. Indeed, the public-choice view of local government holds that a homogeneous governing entity is more efficient than a heterogeneous one because it can directly effect the unanimous will of the public without the inefficiencies of vote-trading, such as conflict, bureaucracy, pork-barrel spending, and redistribution.¹⁴⁴

This Madisonian/public-choice perspective proves helpful for the present analysis because it is consistent with both the *Roberge* line and the *Salyer-Ball* line. As Heller and Hills note, the *Roberge* and *Eubank* decisions express a Madisonian apprehension that a dominant group of landowners within a small polity may selfishly exploit a minority to further its own parochial interests.¹⁴⁵ Likewise, the distinction drawn in the *Salyer-Ball* cases between a general-purpose governmental entity that broadly affects

¹⁴² See *id.* at 1499 (explaining how the size of a community affects political dynamics within that community and leads to "vote-trading").

¹⁴³ *Id.*

¹⁴⁴ See, e.g., NELSON, *supra* note 12, at 392-94 (asserting that homogeneity fosters efficiency whereas heterogeneity fosters conflict and redistribution); Michelman, *supra* note 61, at 194 ("There is a good economic argument to the effect that the efficiency of a majoritarian fiscal regime is maximized when homogeneity of preferences among the citizenry is also maximized . . ."); see also Merrill, *supra* note 56, at 298 (positing that delegating power to a group with uniform interests, such as a neighborhood, ensures that the delegation will have "little distributional impact within the neighborhood").

¹⁴⁵ See Heller & Hills, *supra* note 37, at 1499 ("[T]he courts fear that a majority of neighbors will unite around the goal of restricting a nearby parcel's uses and thereby enhance the value of the neighbors' own land at the burdened parcel owner's expense.").

the public at large and a special-purpose entity that performs a narrow function disproportionately affecting certain constituents may reflect a similar public-choice logic. If a small governing entity performs a wide range of functions that implicates a divergence of interests, it is likely to cleave into opposing factions and, absent the possibility of vote-trading in a larger and more diverse entity, a stable majority faction may emerge. An entity that performs only a narrow function over which strong disagreement is unlikely, by contrast, does not present a similar threat that dueling factions will emerge. As such, the *Salyer-Ball* line subjects the former sort of entity—the small, heterogeneous entity with broad powers—to a stricter constitutional standard.¹⁴⁶ Accordingly, Heller and Hills conclude that to the extent a governmental entity is able to homogenize interests within the jurisdiction so as to minimize the risk of majoritarian exploitation, the more likely it is to survive scrutiny under both the *Roberge* and the *Salyer-Ball* doctrines.¹⁴⁷

a. *The Neighborhood Zoning District*

Let us consider both the neighborhood zoning district and the special assessment district under this framework. Beginning with the former, Heller and Hills claim that neighborhood zoning districts are problematic because

the opportunities for intra-group exploitation are high in a neighborhood composed of different-sized structures serving different functions. The possibility that residential owners would burden commercial structures with onerous restrictions is matched only by the possibility that commercial owners would burden residential owners with noxious uses. Even among residential owners, the owners of large and small buildings would have persistently different interests that would invite intra-neighborhood squabbling.¹⁴⁸

Heller and Hills direct this criticism specifically at the scheme proposed by Robert Nelson. Nelson's scheme, we recall, would enable a group of land-owners within a neighborhood to petition for the creation of a neighborhood association, which would then exercise a full complement of zoning powers on an ongoing basis over the entire neighborhood.¹⁴⁹ As I address

¹⁴⁶ See *id.* at 1503-04 (noting the exception to the general "one person, one vote" rule for "special districts that are authorized to pursue only narrowly defined goals").

¹⁴⁷ See *id.* at 1500-05 (arguing that the Land Assembly districts are immune from the problems of Madisonian exploitation because they are homogeneous and have limited powers).

¹⁴⁸ *Id.* at 1521.

¹⁴⁹ See *supra* notes 39-41 and accompanying text.

further below, Heller and Hills's critique of Nelson's scheme has some validity; however, it is totally inapplicable to the neighborhood-consent schemes involved in the *Roberge* trio for three reasons.

First, Heller and Hills concede that the intra-group exploitation concern is mitigated wherever neighborhood control is limited to a "one-shot deal" in which the neighborhood is "not responsible for the ongoing management of different land uses."¹⁵⁰ The one-shot deal, while making vote-trading impossible, will also necessarily limit the ability of a dominant faction to exploit a minority. As it turns out, the neighborhood-consent schemes involved in the *Eubank-Cusack-Roberge* cases were all one-shot deals—landowners were given a one-time power to vote on a proposed land use change within a designated proximity to their property.

Second, the districts at issue in those three cases all had a fairly limited purpose. They did not have general zoning powers, but had jurisdiction only to resolve one discrete issue—to set building lines in *Eubank*, to authorize the construction of a billboard in *Cusack*, and to site a group home in *Roberge*.¹⁵¹ This limited authority likewise would reduce opportunities for conflict among landowners.

Third and finally, Heller and Hills's critique presumes a neighborhood that is relatively diverse in terms of land uses—a mix of commercial and residential uses or, at least, a mix of large and small residential buildings.¹⁵² In *Roberge*, however, the power to approve a group home was delegated only to landowners in districts zoned for single-family homes.¹⁵³ Given the capitalization literature and homeowners' well-documented concern with property values, it is at least plausible that single-family homeowners would have generally uniform interests in excluding group homes. Thus, the neighborhood-consent scheme at issue in *Roberge* is seemingly one that public choice theorists would heartily endorse.

b. *The Special Assessment District*

Ironically, under the criteria just considered, all of the special assessment schemes that we have reviewed—and that the courts have upheld—would be problematic. The special-purpose districts in *Salyer*, *Ball*, and *Kessler* were not one-shot deals, but entities with ongoing governmental powers.¹⁵⁴ The BID in *Kessler* performed a wide range of functions such as

¹⁵⁰ Heller & Hills, *supra* note 37, at 1521.

¹⁵¹ See *supra* Section II.A.

¹⁵² See *supra* note 148 and accompanying text.

¹⁵³ *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117-18 (1928).

¹⁵⁴ See *supra* Section II.B.

sanitation, security, and lobbying city government, not the relatively limited set of functions involved in the *Roberge* trio.¹⁵⁵ Finally, the districts at issue in *Ball*,¹⁵⁶ *Kessler*,¹⁵⁷ and *Bolen*¹⁵⁸ all operated in highly diverse metropolitan areas with a variety of land uses and demographics while limiting the franchise to a small subset of that diverse population.

This combination of factors makes intra-group conflict and exploitation in a small governing entity almost unavoidable. This is especially true for BIDs because the basic function of the BID is to manage public spaces, such as urban downtown areas, that are regularly used by a wide variety of individuals with diverse expectations regarding those spaces' appropriate use.¹⁵⁹ I single out the BID here briefly because it is perhaps the most widely used and controversial device cities have employed in recent years to devolve power upon neighborhood groups.¹⁶⁰ For BIDs, exploitation can occur along at least three axes: among property owners; between property owners and tenants; and between property owners and other users of the space, such as street entertainers, vendors, or the homeless.

i. Conflict Among Landowners in the BID

First, where there is a diversity of land uses, disagreement among landowners is likely to occur, even as early as the formation of the BID. The owners of large office buildings may feel that the BID is superfluous if they are "already . . . providing the supplemental sanitation and security services that the BID would offer,"¹⁶¹ while small business owners may see the mandatory assessments as an unwanted expense on top of already burdensome property taxes.¹⁶² Industrial landowners, who have little concern about making the area attractive for consumers, may not want to pay for services intended to beautify the neighborhood, while residential landowners "may be unable to pass on the BID's costs to tenants or

¹⁵⁵ See Briffault, *supra* note 6, at 432-39 (arguing that the GCDMA in *Kessler* was not a "limited-purpose" entity in the sense meant by *Salyer* and *Ball* because it discharged far too many functions).

¹⁵⁶ See *supra* notes 101 & 103 and accompanying text.

¹⁵⁷ See *supra* notes 101-02 and accompanying text.

¹⁵⁸ See *supra* notes 112-16 and accompanying text.

¹⁵⁹ See Briffault, *supra* note 6, at 416, 429 (noting that BIDs tend to operate in older, developed commercial areas that are open to the public).

¹⁶⁰ See *id.* at 366-67; see also Frug, *supra* note 14, at 17 ("[T]here seems to be an almost automatic answer when one seeks to create an organization to improve neighborhood life: Let's create a BID.").

¹⁶¹ Briffault, *supra* note 6, at 384.

¹⁶² See *id.* at 384-85.

customers.”¹⁶³ Once the BID is in operation, disagreements may arise over its philosophy and priorities. For example, as Richard Briffault notes, there may be tensions between owners of mainstream businesses who seek a clean-cut, tourist-friendly image for the district, and owners of bars, nightclubs, or adult entertainment establishments, who desire to cultivate a more free-wheeling environment.¹⁶⁴ BIDs may even lobby city hall for zoning changes that would make presently existing uses, such as adult entertainment establishments, unlawful within the district.¹⁶⁵ Heller and Hills conclude, accordingly, that the diverse interests of landowners within BIDs “make for contentious neighborhood politics and result in poor governance.”¹⁶⁶ They are not entities of which Madison or the public-choice theorists would be proud.¹⁶⁷

ii. Conflict Between Landowners and Tenants in the BID

BIDs also create potential tensions between landowners as a class and the tenants who are typically disenfranchised. Tenants can be dramatically affected by the operation of a BID, often in very different ways from landowners.¹⁶⁸ Because the *raison d'être* of the BID is to raise property values for the benefit of property owners, an attendant result may be dramatic rent increases for tenants as well as a general gentrification of the area. Higher rents can lead, in turn, to the displacement of “stores that serve poor and working class customers” by “more upscale shops.”¹⁶⁹ Tenants who are not forced out by higher rents will nevertheless have

¹⁶³ *Id.* at 385.

¹⁶⁴ *See id.* at 416 (“BID expenditures to cultivate a distinctive image may be in tension with the interests of particular landowners or businesses whose activities do not fit the image.”).

¹⁶⁵ *See* MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 161 (1999) (discussing the Times Square BID’s efforts to rezone the area to prohibit adult businesses).

¹⁶⁶ Heller & Hills, *supra* note 37, at 1500.

¹⁶⁷ *See* Briffault, *supra* note 6, at 457 (showing how BID governance presents the “classic Madisonian possibility of tyranny by a majority faction”). The critique in this subsection would not apply specifically to the *Salyer-Ball-Kessler* line because those cases involved challenges brought by nonlandowners. However, as discussed *infra* note 240, the vast majority of litigation involving BIDs has been brought by landowners complaining about being subject to the mandatory assessment.

¹⁶⁸ *Id.* at 436 (“BID assessments . . . affect both property owners and nonowners. . . . BID policing strategies, social service programs, street maintenance and repairs and economic development activities can have a direct impact on district residents and on the quality of life in the district.”); *see also* Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 448 (2001) (“Certainly the BID’s construction of sidewalks and other public accommodations and its provision of private security forces, social outreach services, and sanitation services altered the daily lives of the people who lived there, arguably more so than the daily lives of the often-absentee property owners.”).

¹⁶⁹ Briffault, *supra* note 6, at 474-75.

different priorities with regard to the expenditure of BID funds than their landlords will. For instance, while business owners may want to deploy a maximum number of security personnel during the daytime when tourists flock downtown, residential tenants may prefer more security during the evenings, when they return home from work.¹⁷⁰

iii. Conflict Between Landowners and Users in the BID

Finally, BIDs' efforts to improve urban neighborhoods often have impacts on users of the space who many landowners may regard as unwelcome. Street entertainers and food trucks, for example, threaten both to compete with downtown businesses for customers and to detract from the carefully constructed, tourist-friendly environment that BIDs set out to create.¹⁷¹ As to the homeless, there is an inherent tension between their needs to use public spaces for the performance of essential life functions and the BIDs' mission to make public spaces attractive for customers.¹⁷² Several BIDs have been accused of using strong-arm tactics to harass the homeless and force them to leave the area.¹⁷³ While many of these allegations have turned out to be unfounded,¹⁷⁴ and there are those who believe that BIDs have provided many positive services for the homeless,¹⁷⁵ the core interests of the BID and

¹⁷⁰ See Daniel R. Garodnick, Comment, *What's the BID Deal? Can the Grand Central Business Improvement District Serve a Special Limited Purpose?*, 148 U. PA. L. REV. 1733, 1765-67 (2000) (discussing a hypothetical situation in which private security employed by a BID creates greater costs for residents than benefits because the private security is deployed during the day when residents are unable to enjoy it).

¹⁷¹ BIDs have led a recent effort to crack down on food trucks in the city of Los Angeles, claiming that food trucks are free riders on the services provided by BIDs. See Report on Regulation of Mobile Food Trucks from Gerry Miller, Chief Legislative Analyst, L.A. City Council, to the L.A. City Council 1-2 (Feb. 17, 2011) (suggesting a municipal ordinance that would strengthen regulation of food trucks, and discussing BIDs' reasons for desiring additional regulation). My thanks to Ernesto Hernandez for drawing my attention to the Los Angeles food truck controversy and this document in particular.

¹⁷² See Nicholas Blomley, *Introduction to Section I: Public Space*, THE LEGAL GEOGRAPHIES READER 3, 3-4 (Nicholas Blomley et al. eds., 2001).

¹⁷³ See *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 122 (2d Cir. 1998) (Weinstein, J., dissenting) (citing instances in which BID "goon squads" were alleged to have harassed homeless individuals); Briffault, *supra* note 6, at 402-03 (discussing efforts by BIDs in Portland, Baltimore, and Philadelphia to deal with the homeless population including morning "wake-up calls" for persons sleeping on the street).

¹⁷⁴ See Briffault, *supra* note 6, at 402 (noting that an independent investigation by a "leading advocate for the homeless" found no evidence supporting allegations that the Grand Central BID used physical violence against the homeless).

¹⁷⁵ See, e.g., *id.* at 404 (quoting the same advocate's statement that BIDs provide "vitaly important" services for the homeless).

those of the homeless are, at best, difficult to reconcile.¹⁷⁶ Since landowners have most of the voting power in the BID and the homeless have none, the prospects for intra-group exploitation are strong.

iv. Other Special Assessment Districts

While BIDs present the Madisonian problem of majority exploitation rather starkly, the problem is also present on a smaller scale in the governance of special-purpose districts and single-shot special assessment districts, such as the one involved in *Bolen*.¹⁷⁷ Special-purpose districts, even if limited to such issues as water storage, may affect landowners in rather different ways. As the dissent in *Salyer* noted, water districts may create flooding risks that impact landowners adjacent to navigable waterways far more than others.¹⁷⁸ With regard to a case like *Bolen*, the introduction of an improvement such as a rail station into a diverse urban neighborhood may give rise to conflict between landowners with divergent interests. For example, while owners of residential or commercial property might favor a new rail station, owners of industrial property might worry that a new station would increase residential use in the area, perhaps leading to nuisance lawsuits or rezoning requests by new residents. A new rail station could also dramatically affect tenants, who would be forced to endure higher rents (as property values rise), increased noise and foot traffic, and changes to the character of the community.¹⁷⁹

¹⁷⁶ See *id.* at 403 (noting the “tension inherent in BID programs that seek to combine the traditional social service goals of homeless outreach with the security and business development goal of homeless removal”).

¹⁷⁷ See *S. Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875, 877 (Cal. 1992) (in bank) (describing a one-shot special assessment district in which commercial land owners, but not residential landowners, could veto a special assessment to finance a metro rail station).

¹⁷⁸ See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 737-38 (1973) (Douglas, J., dissenting) (comparing the divergent interests of an absentee corporate landowner who tabled a motion to divert flooding in order to advance his own financial interests with the interests of a residential landowner with less political power in the district whose land was flooded as a result).

¹⁷⁹ The appeals court in *Bolen* made exactly this point and found the special assessment scheme invalid under *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970). See *S. Cal. Rapid Transit Dist. v. Bolen*, 269 Cal. Rptr. 147, 156-57 (Ct. App. 1990) (finding that commercial tenants will bear much of the financial burden “by virtue of ‘pass-through’ clauses in their leases”), *rev’d*, 822 P.2d 875; *id.* at 156 (“Because a special assessment will not finance the entire cost of a rapid transit system, part of the financing burden is likely to fall on nonlandowning persons inside the assessment district in the form of general property taxes, sales taxes and similar measures.” (quoting David J. Hayes, Note, *Rapid Transit Financing: Use of the Special Assessment*, 29 STAN. L. REV. 795, 809-10 (1977))).

v. Comparing the Neighborhood Zoning District and the Special Assessment District

In many cases, then, the neighborhood zoning district will present a lesser risk of intra-group exploitation than will the special assessment district. This is evidenced by the fact that virtually all of the legal challenges brought against neighborhood zoning districts have been initiated by landowners within the district,¹⁸⁰ whereas special assessment districts and BIDs have been beset by litigation from both landowners complaining about their assessments¹⁸¹ and nonlandowners complaining about being disenfranchised.¹⁸² This pattern strongly suggests that the BID and special assessment district affect a more heterogeneous array of interests than the neighborhood zoning district, and thus present a heightened risk of majoritarian exploitation.

This contrast should not be too sharply drawn, however. To the extent that special assessment districts or BIDs operate in more homogeneous neighborhoods, the risk of majoritarian exploitation may be limited. For instance, a modern trend, much hailed by Ellickson and Liebmann,¹⁸³ is for the BID concept to be extended outside the downtown area to residential neighborhoods.¹⁸⁴ If such neighborhoods are relatively uniform in character, residents may have fairly consistent interests in bringing in desirable amenities that will increase property values. Outsiders, including peddlers, entertainers, the homeless, and others, arguably have a weaker interest in accessing and exercising control over the character of these residential areas than they do over downtown areas that are also important public spaces. By the same token, neighborhood zoning districts may present a serious risk of exploitation if, as in Nelson's scheme,¹⁸⁵ a fairly heterogeneous group of urban landowners is given ongoing control over a wide range of zoning functions within the neighborhood. As Heller and Hills note, commercial, industrial, and residential landowners may be at odds over what sorts of uses are permissible.¹⁸⁶ In addition, tenants may oppose the introduction of

¹⁸⁰ See cases cited *supra* notes 86 & 87.

¹⁸¹ See cases cited *infra* note 240 and accompanying text.

¹⁸² *Salyer, Ball, Kessler, and Bolen* would all fall into this category.

¹⁸³ See *supra* notes 132-33.

¹⁸⁴ See *supra* note 50.

¹⁸⁵ See NELSON, *supra* note 12, at 259-314 (proposing that state governments create new private neighborhood associations empowered to regulate zoning with less than unanimous consent).

¹⁸⁶ See Heller & Hills, *supra* note 37, at 1521 ("The possibility that residential owners would burden commercial structures with onerous restrictions is matched only by the possibility that commercial owners would burden residential owners with noxious uses.").

land uses that threaten to diminish their quality of life while enriching their landlords; conversely, they may favor the introduction of land uses that bring down their rents, which landlords would oppose for the same reason.¹⁸⁷

The salient point here, however, is that the Madisonian concern about majoritarian exploitation provides no basis for distinguishing neighborhood zoning districts per se from special assessment districts. We cannot simply assume that neighborhood zoning districts are more likely to result in majoritarian exploitation than special assessment districts. Rather, either device may or may not present this problem, depending on how we answer the following questions: Is the district a one-shot deal or an ongoing enterprise? Is the district generally homogeneous or heterogeneous in land uses and demographics? Does the district serve a limited function over which intra-group disagreement is unlikely, or does it perform functions that are likely to breed disagreement among stakeholders? These questions can be answered only ad hoc based on the circumstances of each particular delegation, rather than by categorically distinguishing neighborhood zoning districts from special assessment districts.

2. Preventing Majoritarian Exploitation Through Logrolling

In addition to the foregoing, there is another ad hoc inquiry that is relevant in assessing the risk of majoritarian exploitation under the Madisonian/public-choice normative conception of local government. This inquiry will again demonstrate that there is often greater cause for concern about the accountability of special assessment districts than neighborhood zoning districts.

For Heller and Hills, the problem with delegating power to the neighborhood level is that shrinking the size of the polity and truncating the number of pressure groups makes vote-trading impossible and thereby enables a dominant faction to emerge.¹⁸⁸ This Madisonian problem can be alleviated, we have seen, if the polity in question is sufficiently homogeneous that all stakeholders share relatively uniform interests.¹⁸⁹ The problem can also be alleviated, however, in precisely the opposite direction: by *increasing* the size and heterogeneity of the polity. In short, even if a particular group is

¹⁸⁷ For a similar critique, see, for example, M. Paige Ammons, Book Note, *Private Governance for All: A Desirable Outcome or a Cause for Concern?*, 9 NYU J. LEGIS. & PUB. POL'Y 503, 512-15 (2005) (reviewing NELSON, *supra* note 12) (criticizing Nelson's proposal on the grounds that low-income communities would be susceptible to invasion of LULUs that could diminish quality of life or, conversely, gentrification that could force them to exit the neighborhood).

¹⁸⁸ See *supra* notes 142-43 and accompanying text.

¹⁸⁹ See *supra* notes 144 and accompanying text.

vulnerable to exploitation by a dominant faction at the neighborhood level, this is no cause for concern if the neighborhood group is subject to oversight by an entity that is sufficiently large and diverse to permit the locally disadvantaged group to seek effective relief through logrolling.¹⁹⁰ Indeed, a scheme of decentralization to local groups under the loose oversight of a larger, more diverse authority is just the sort of federalist structure that Madison envisioned.

In an incisive analysis of the *Eubank-Cusack-Roberge* trilogy, Frank Michelman asserts that the divergent results in those cases may be explained in precisely this fashion. According to Michelman, the Court's rulings in the three cases rests implicitly on the principle that the judiciary should defer to a delegation of power where the party presumptively disabled by the delegation had a fair chance of dissuading the larger delegating authority from devolving the power in the first instance. For Michelman, this implicit test reflects a

Madisonian or Dahlian vision of coalitions that form and re-form from issue to issue, of legislators exchanging support here for support there in an ever-shifting alignment of interest groups, making plausible an expectation that over the long run everyone would enjoy a net balance of political gains in excess of losses.¹⁹¹

According to Michelman, the Court may have upheld the delegation in *Cusack* (requiring neighbor consent to site a billboard within certain precincts) on the implicit grounds that the billboard industry, whose interests were adversely affected by the delegation, was "almost certainly a self-conscious and very possibly a formally organized interest-group" and therefore "would have had a fair chance to fight their battle, to protect their interest, to engage effectively in political horsetrade, at the city council level."¹⁹² By contrast, the interests harmed in *Eubank* (which gave block-front owners the power to establish setback lines) had "no comparable logrolling opportunity" for "it is hard to imagine an anti-setback lobby."¹⁹³ Likewise, sponsors of group homes for the elderly or young children (the land use subjected to neighborhood referenda in *Roberge*) "may seem less certain to have been an organized or organizeable interest group capable of effective

¹⁹⁰ See Michelman, *supra* note 61, at 172-74 (describing how logrolling can protect the interests of minorities in a majoritarian scheme).

¹⁹¹ *Id.* at 173.

¹⁹² *Id.* at 172.

¹⁹³ *Id.*

lobbying at the city-council level.”¹⁹⁴ Thus, the delegation in *Cusack* survived scrutiny whereas the delegations in *Eubank* and *Roberge* did not.

Michelman’s analysis proves useful in analyzing the *Salyer-Ball* line as well. The water districts in both *Salyer* and *Ball* were ultimately subject to control by the state, and the *Ball* Court noted that the plaintiffs disenfranchised by the Salt River District were still qualified voters in the state of Arizona.¹⁹⁵ As such, they retained the ability to influence their legislators, “who created and have the power to change the district.”¹⁹⁶ In *Kessler*, the court likewise stressed that the City of New York exercised substantial supervisory authority over the GCDMA.¹⁹⁷

These cases, however, look only to the theoretical availability of oversight and do not examine whether parties disadvantaged by legislation *actually* had a meaningful opportunity to influence a higher-level authority and defend their interests. Michelman’s analysis requires a clear-eyed assessment of the lobbying power of the group disadvantaged by the delegation of power. As a corollary to Michelman’s analysis, we should also assess the relative lobbying power of the group or groups that *benefit* from the delegation of power. A close examination of this question reveals that, in many circumstances, opponents of neighborhood zoning districts will have a far better opportunity to influence the legislative body than opponents of special assessment districts and BIDs. As such, courts should defer more readily to the former than the latter.

a. *The Neighborhood Zoning District*

To begin with neighborhood control of zoning, Michelman’s analysis of the *Roberge* trio correctly suggests that the relative lobbying power of interested groups will often be a highly fact-sensitive inquiry. Nevertheless, we can make some general observations. On one hand, those who advocate for the siting of a locally undesirable land use (LULU) in a particular neighborhood often face an unfavorable political environment because of opposition from neighbors who live near the proposed site,¹⁹⁸ often derisively

¹⁹⁴ *Id.* at 174 n.93.

¹⁹⁵ *Ball v. James*, 451 U.S. 355, 371 n.20 (1981).

¹⁹⁶ *Id.*

¹⁹⁷ See *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 106 (2d Cir. 1998) (“[E]ven the activities that GCDMA performs are subject to close City control.”).

¹⁹⁸ See, e.g., Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787, 788-90 (1994) (“The siting of LULUs . . . has become an extraordinarily difficult public policy challenge.”).

referred to as NIMBYs (“Not In My Backyard”).¹⁹⁹ Because NIMBY groups tend to be relatively small, geographically concentrated, and intensely interested in keeping LULUs out of their neighborhoods, they can readily organize into an effective lobbying force. By contrast, those members of the general public who favor a LULU siting will usually comprise a larger and more geographically dispersed group, and individual members of the group will typically be far less interested in the particular location of a LULU than will its potential neighbors.²⁰⁰

On the other hand, neighborhood groups are not always successful in influencing city hall. As it turns out, many LULUs have at least one very powerful, well-organized interest group in their corner: developers. LULUs such as billboards, gas stations, and nightclubs can of course be very profitable, so developers have strong incentives to ensure that zoning laws liberally permit such uses. Furthermore, developers often have a number of advantages over the homeowners’ groups that oppose them. Developers tend to be “repeat players” at city hall,²⁰¹ which enables them to cultivate relationships with city officials and learn the often esoteric workings of city government.²⁰² Development professionals maintain a variety of professional organizations, such as the Urban Land Institute,²⁰³ through which they can aggregate knowledge and resources to more effectively lobby legislatures.

¹⁹⁹ See Fischel, *NIMBYs*, *supra* note 25, at 144-45 (defining the term NIMBY, and explaining that opposing nearby development may be a rational reaction to uninsurable threats to homeowners’ largest financial asset, to wit, the home).

²⁰⁰ See MICHAEL O’HARE ET AL., *FACILITY SITING AND PUBLIC OPPOSITION* 70-71 (1983) (“People who think a new facility will leave them much worse off than they would be without it are strongly induced to take action against it; people who each have a little bit to gain from its completion are only weakly motivated to support it. When the losers are few in number and known to each other, they also have the ability to act, while a large number of beneficiaries cannot easily organize themselves to take action.”); Been, *supra* note 198, at 789-90 (noting that one explanation for siting problems is that “the benefits of LULUs are spread diffusely over an entire community . . . while their costs are concentrated upon the host neighborhood” (footnote omitted)); see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 52 (3d prtg. 1973) (postulating that “[s]mall groups will further their common interests better than large groups”); Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992) (“If public choice has any one key finding, it is that small groups with high stakes have a disproportionately great influence on the political process.”).

²⁰¹ See ELLICKSON & BEEN, *supra* note 5, at 306 (“[R]eal estate interests tend to be repeat players before the commissions and legislative bodies; accordingly, they may develop personal relationships with members that may compromise the appointed or elected officials’ ability to assess the worth of a particular proposal.”).

²⁰² See, e.g., JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 62 (1987) (“Business people’s continuous interaction with public officials . . . gives them *systemic* power.” (citation omitted)).

²⁰³ See *About ULI*, URBAN LAND INSTITUTE, <http://www.uli.org/about-uli> (last visited Jan. 28, 2013).

The development industry is also supported by a matrix of ancillary interests who profit from development, including the media, the transportation industry, construction unions, and financiers.²⁰⁴ Finally, developers often have considerable financial resources that they can use to make political campaign contributions and lobby for favorable legislation.²⁰⁵

Homeowners, by contrast, have few of these organizing advantages. Far from being repeat players in the land use process, they are typically indifferent toward local government until someone proposes to site a controversial development in their backyard.²⁰⁶ Once that particular controversy passes, homeowners revert to their former, more passive state as a “sack of potatoes.”²⁰⁷ As such, homeowners generally do not form ongoing relationships with city officials, do not have insider knowledge of the land use entitlement process, do not create professional organizations devoted to advancing homeowner interests (although they may create issue-specific groups like “Stop the ____ development”), and do not systematically contribute to political campaigns to advance their interests. In addition, there are no ancillary interest groups who profit from preventing growth and who may therefore be counted on to lobby on behalf of neighborhood groups. And, of course, most homeowners do not possess the financial resources that developers have to influence legislatures.

²⁰⁴ See LOGAN & MOLOTCH, *supra* note 202, at 62-85 (describing in detail the various parts of the development or “growth machine” in the United States, which involves a diverse range of players including politicians, media outlets, utility companies, universities, and recreational establishments).

²⁰⁵ See *id.* at 230-32 (discussing the importance of campaign contributions from developers in local elections which enables the election of “politicians sympathetic to development”); Ellickson, *supra* note 91, at 407-08 (“With the possible exception of municipal labor unions, land-development interests appear to be the largest investors in municipal politics in the United States.”).

²⁰⁶ See, e.g., LOGAN & MOLOTCH, *supra* note 202, at 134 (noting that “urban residents are “naturally disorganized,” whereas business elites are “naturally organized”); Norman I. Fainstein & Susan S. Fainstein, *Regime Strategies, Communal Resistance, and Economic Forces* (describing neighborhood groups as “[v]ulnerable to cooptation, highly disaggregated, leadership-dominated and episodic in intensity,” and concluding that “they will never be the formulators of state policy but can only react to it”), in SUSAN S. FAINSTEIN ET AL., *RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT* 245, 274 (1983); Tracy M. Gordon, *Bargaining in the Shadow of the Ballot Box: Causes and Consequences of Local Voter Initiatives*, 141 PUB. CHOICE 31, 33-34 (2009) (describing the free rider challenges that homeowners may face in organizing to influence city government).

²⁰⁷ See MIKE DAVIS, *CITY OF QUARTZ: EXCAVATING THE FUTURE IN LOS ANGELES* 209-10 (1990) (noting Marx’s depiction of the French peasantry as “a sack of potatoes” and arguing that homeowners who oppose growth are “basically peasant potatoes whose ‘natural’ scale of protest is disaggregated nimbyism”).

Perhaps most importantly, city governments are predisposed to look favorably upon new development that promises to contribute to municipal tax bases depleted by interlocal competition, diminished government subsidies, urban disinvestment, and tax revolts.²⁰⁸ Many cities are in a seemingly constant state of fiscal crisis that requires them to approve new development to compensate for a diminished tax base.²⁰⁹ This fiscal pressure gives developers yet another advantage in the fight for influence at city hall.

How can we reconcile the evidence that homeowners have near veto power over the siting of LULUs with the evidence that developers truly hold the reins of municipal politics? In truth, many factors determine the relative strength that neighborhood groups possess in local politics vis-à-vis developers. Two important factors are the size and heterogeneity of the municipality in question. As William Fischel argues, in small suburban communities where homeowners comprise the vast majority of the voting population, developers may well be reduced to “supplicants.”²¹⁰ In larger, more heterogeneous cities, however, homeowners are only one of many interest groups, and developers’ organizational advantages may give them the edge.²¹¹

Another important factor, hinted at in Michelman’s analysis, is whether the LULU in question offers a net contribution to or a net drain on the local tax base. Tax-generating uses, such as nightclubs, shopping centers, or waste facilities, will likely enjoy a more favorable reception at city hall than tax-draining uses such as low-income housing or group homes.²¹² The empirical

²⁰⁸ See, e.g., Jonathan Schwartz, Note, *Prisoners of Proposition 13: Sales Taxes, Property Taxes, and the Fiscalization of Municipal Land Use Decisions*, 71 S. CAL. L. REV. 183, 184-86, 198-202 (1997) (arguing that increased limits on municipal taxing power has driven a “rush to generate increased sales taxes by bringing shopping centers and large discount retailers to town”).

²⁰⁹ See *id.* at 198-202 (discussing pressures on municipal governments that lead them to promote land uses that will generate sales tax).

²¹⁰ FISCHEL, *supra* note 1, at 16; see also *id.* at 4 (stating that homeowners “are the most numerous and politically influential group within most localities”); *id.* at 15-16 (noting that though developers are not powerless in smaller jurisdictions, their influence is limited because local officials are “responsive to voters whose local economic stake is in the value of their homes and only indirectly in the value of new development”).

²¹¹ See FISCHEL, *supra* note 28, at 212-14 (noting that in cities, the larger number of residents and political issues create “[a]mpl[e] opportunity . . . for special interests to influence political outcomes by lobbying officials, advertising about particular issues, or electioneering for candidates who favor their interests”).

²¹² See Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1134-36 (1996) (discussing a political economy that causes municipalities to “attract new residents and firms that add more to the per capita tax base than they will cost in local services” and to “exclude new residents and activities that cost more . . . than they contribute in tax base”); Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824,

evidence lends some support to this notion. A prominent study of five cities that had conferred some land use authority on neighborhood groups found that cities tended to defer to neighborhoods on most land use matters²¹³ *except* where the development in question was a significant source of revenue. Revenue-generating projects were nearly always approved regardless of neighborhood opposition.²¹⁴ According to the authors, when “jobs and sizable tax revenues are at stake, city hall will use the resources at its command to see that the proposals come to fruition.”²¹⁵

Although it is difficult to draw general conclusions, the foregoing discussion suggests that, at least in some circumstances, cities’ fiscal concerns and the strong influence of developers will induce cities to closely monitor neighborhoods’ exercise of the zoning power, thus minimizing the risk of majoritarian exploitation and, concomitantly, the need for close judicial scrutiny of neighborhood zoning districts.

b. *The Special Assessment District*

Ironically, these same factors—cities’ fiscal concerns and the influence of developers—strongly suggest that cities will not closely monitor the activities of special assessment districts and BIDs, and therefore that these entities warrant stricter judicial scrutiny than neighborhood zoning districts. If cities have incentives to ensure that revenue-generating projects are approved despite neighborhood opposition, they have even greater incentives to outsource the provision and financing of municipal functions such as security and maintenance to quasi-privatized entities that can relieve the city of the need to finance such services.²¹⁶ Likewise, the influential development interests that are often disadvantaged by the devolution of zoning power to neighborhood groups are likely to be strong advocates of special assessment districts and BIDs, which promise to boost the value of their property and increase economic activity in the area.²¹⁷

1834-47 (2003) (reviewing FISCHER, *supra* note 1) (criticizing the political economy of suburbs in which homeowners have incentives to exclude undesirable uses such as affordable housing).

²¹³ See BERRY ET AL., *supra* note 8, at 141 (noting that “the neighborhood associations had an unusually good [win-to-loss] ratio, winning half the issues they initiated and losing none”).

²¹⁴ *Id.* at 142-44.

²¹⁵ *Id.* at 144.

²¹⁶ See *Kessler v. Grand Cent. Dist. Mgmt. Ass’n*, 158 F.3d 92, 131 (2d Cir. 1998) (Weinstein, J., dissenting) (“BIDs decrease both the need and the incentive for the City to expand or maintain the general municipal services it provides to the City as a whole.”); Briffault, *supra* note 6, at 395, 424-25 (discussing how BIDs reduce the need for city governments to expend public money on business interests).

²¹⁷ See Briffault, *supra* note 6, at 425 (noting that BIDs are viewed as “a means of attracting and retaining business”).

Here, I focus again on BIDs before returning to consider other types of special assessment districts. The primary advocates of many BIDs are highly influential, well-organized downtown business interests. BIDs often draw the support of the wealthiest landowners in the city, who, “because of their prominence, . . . have greater access to elected officials and significant opportunity to influence them.”²¹⁸ Daniel Garodnick discusses one chilling example of a BID’s influence on city policy. From 1992 to 1993, New York City fired hundreds of sanitation workers and drastically reduced its street-cleaning schedule as part of an austerity measure during a fiscal crunch.²¹⁹ Because BIDs picked up the slack in wealthier areas of the city, “no pressure [came] from the city’s most influential citizens, and the former street-cleaning schedule was never restored.”²²⁰

The very act of creating a BID takes a massive amount of resources and organizational capacity.²²¹ Once created, BIDs have the capacity to forge their constituent landowners into an even more potent lobbying force. The assessments that BIDs collect from landowners may be used not only to provide services, but to press for favorable regulatory action from city hall.²²² In other words, when cities delegate to BIDs the ability to collect *mandatory* assessments from all neighborhood landowners, they thereby enable BIDs to exert continuing influence over city officials. And BIDs have not been shy about flexing their muscle. They lobby forcefully for new laws and enforcement of existing laws to advance their interests, such as legislation targeting street vendors, adult businesses, and the homeless.²²³

Consider, by contrast, the lobbying power of those who may be disadvantaged by the creation or operation of a BID. As detailed previously, those most likely to be harmed are 1) landowners who dissented from the decision to create the district and are forced to pay the assessment against their will; 2) disenfranchised residential or commercial tenants; 3) unwanted visitors such as street vendors, beggars, or the homeless; and 4) members of the general public whose interests in the use of public space diverge from those of the BID. As a general matter, it is reasonable to conclude that none

²¹⁸ Garodnick, *supra* note 170, at 1763.

²¹⁹ *See id.* (citing Moshe Adler, *Why BID's Are Bad Business*, N.Y. TIMES, Feb. 13, 2000, at CY17).

²²⁰ *Id.* (quoting Adler, *supra* note 219).

²²¹ *See* Briffault, *supra* note 6, at 383 (“The creation of a BID usually requires proponents to invest considerable time, energy, and funds.”).

²²² *See id.* at 441 (describing how tax funding gives BIDs advantages over other community organizations, including the capacity to pressure city government to take action against undesirable private activity, or to increase enforcement of existing regulation).

²²³ *See id.* at 427-28.

of these groups can match the organizational and resource advantages of the BID and its supporters. The dissenting landowners, while they may be influential business leaders, were obviously insufficiently influential to block the formation of the BID. Tenants are typically difficult to organize because they tend to be more transient and have less of a financial stake than landowners.²²⁴ Individuals such as street peddlers, beggars, and the homeless are likely to lack the organizational capacity, professional connections, resources, profit motive, or congruence of interest to effectively lobby city hall against the geographically concentrated, homogeneously interested, amply financed, highly motivated, and well-organized business interests that support BIDs. Likewise, compared to BID proponents, individual members of the public at large are likely too diffuse, heterogeneous, disorganized, and weakly interested in access to public space to mount an effective fight against the BID.²²⁵

As a result of all the foregoing, although most state laws provide for city oversight of BIDs, in practice BIDs have a considerable degree of autonomy. City governments exercise little supervision over BIDs' day-to-day affairs.²²⁶ While there have been some instances in which city governments have constrained BIDs—particularly a dispute of unknown provenance in 1998 between Mayor Rudolph Giuliani and New York City's most prominent BID, the Grand Central Partnership (GCP)²²⁷—BIDs nevertheless exercise a substantial degree of independence.²²⁸ At a minimum, then, there is reason to be leery that cities will exercise close oversight of BIDs.

If I have singled out BIDs for criticism here, a word should also be said about the special-purpose districts involved in *Salyer* and *Ball*. Special-purpose districts, though created at the state rather than the municipal level, raise many of the same exploitation concerns as BIDs. The creation of a special-purpose district, like the creation of a BID, requires organization

²²⁴ See Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 987-88 (1991) (listing reasons why tenants face "substantial obstacles to collective action"); see also Fischel, *NIMBYS*, *supra* note 25, at 145 (noting that homeowners vote in municipal elections fifty percent more frequently than renters do).

²²⁵ Cf. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1194-1200 (1996) (discussing the collective action problem that prevents individual users of urban space from acting to prevent aggressive panhandling).

²²⁶ See Briffault, *supra* note 6, at 410 ("The city government is likely to leave the BID's day-to-day operations to the [district managing association].").

²²⁷ See Garodnick, *supra* note 170, at 1757-59.

²²⁸ See Briffault, *supra* note 6, at 439-42, 456-57 ("BIDs have considerable autonomy in practice. Although the city government plays a central role in the process of BID formation, the city's involvement often drops off sharply once the BID is in operation." (footnote omitted)).

and a huge expenditure of resources.²²⁹ Like BIDs, special districts are most often established as a result of pressure from well-organized developers and other business interests looking to finance infrastructure and services for growth.²³⁰ These groups are able to circumvent opposition by strategically drawing the district boundaries and by limiting the district functions to a specialized purpose that the public perceives as technical and apolitical.²³¹ As a result, opposition to special-purpose districts tends to be weak and disorganized.²³²

In summary, BIDs and special assessment districts often raise greater concerns about intra-group exploitation than do neighborhood zoning districts. As before, however, this point should not be stated without qualification. If the district in question is a “one-shot deal,” it is less likely to form an organized interest group than a district that is empowered to act on an ongoing basis. Furthermore, improvement districts located outside downtown areas, such as in residential neighborhoods, may be less likely to draw support from well-heeled downtown interests, and will raise fewer concerns about access to public space. Thus, in any particular case, an ad hoc inquiry will be necessary to determine whether a group disadvantaged by a delegation of power has sufficient influence at the citywide level to mitigate fears of majoritarian exploitation.

B. “Regulation” or “Supplemental Services”?

I previously mentioned that one distinction between the *Eubank-Roberge* line and the *Salyer-Ball* line is that the former group of cases involved challenges by enfranchised landowners who were subject to the districts’ regulatory authority, whereas the latter cases involved challenges by nonlandowners who were not directly subject to the districts’ coercive

²²⁹ See BURNS, *supra* note 100, at 16-22, 75-108 (describing the collective action problems involved in the creation of special-purpose districts).

²³⁰ See *id.* at 25-32.

²³¹ See FOSTER, *supra* note 100, at 103-04 (arguing that special-purpose districts help developers avoid opposition to their projects because these districts enjoy “low political visibility, wide administrative discretion, financial reach, geographic flexibility, and functional specialization”).

²³² *Bohlen*, admittedly, is a trickier case. On one hand, we could readily surmise that bringing high-speed rail to downtown Los Angeles was likely a priority for Los Angeles’s business and political elite, while principally antagonizing the less powerful industrial property owners and residential or commercial tenants. Hence, *Bohlen* raised the specter of a well-organized interest group exploiting a less influential minority. On the other hand, however, high-speed rail is often politically difficult to implement because of opposition from NIMBY homeowners. See, e.g., *Special Report: Linear*, THE SAINT INDEX (2011), <http://saintindex.info/special-report-linear> (surveying homeowner attitudes toward development and concluding that “linear” developments like high-speed rail are hardest to site because of opposition from NIMBYs and other groups).

authority but sought the franchise on the grounds that the districts' activities affected them.²³³ While I dismissed this distinction as irrelevant from the standpoint of public choice theory, it could be argued that, setting public choice theory aside, courts should more strictly scrutinize instances where plaintiffs have been directly subject to a district's coercive authority (*Eubank/Roberge*) than where they have not (*Salyer/Ball*).

On a close reading, the case law and literature appear consistent with this argument. For example, where the *Eubank* Court observed that the Richmond zoning ordinance empowered one set of owners to determine "the kind of use which another set of owners may make of their property,"²³⁴ the *Ball* Court stressed that the Salt River district "cannot enact any laws governing the conduct of citizens"²³⁵ and that it "does not and cannot control the use to which the landowners who are entitled to the water choose to put it."²³⁶ Similarly, the *Kessler* court emphasized that the GCDMA "ha[d] no authority to enact or enforce any laws governing the conduct of persons present in the district" or any other regulatory authority.²³⁷ Implicitly, then, the courts may be making the entirely sensible point that an entity that engages in coercive regulation should be subject to stricter constitutional constraints than one that merely provides services in a non-coercive way.

Commentators have also stressed the distinction between the regulatory powers of zoning authorities and the noncoercive service-providing powers of special assessment districts. For example, in an official report describing California's special-purpose districts, the California Senate Local Government Committee claimed that "general purpose" municipalities (i.e., cities that exercise the zoning power) are distinct from "limited purpose" municipalities (such as water districts) because the former are empowered to "regulate private behavior," whereas the latter have only the power to "do things,' like building public works projects such as parks and sewers."²³⁸ Similarly, in his proposal to create "block level improvement districts" (BLIDs, inspired by BIDs), Robert Ellickson distinguishes the "supplementary" services he would authorize those districts to provide, such as sanitation

²³³ See *supra* notes 180-82 and accompanying text.

²³⁴ *Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912).

²³⁵ *Ball v. James*, 451 U.S. 355, 366 (1981).

²³⁶ *Id.* at 367-68.

²³⁷ *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 104 (2d Cir. 1998).

²³⁸ CAL. STATE SENATE LOCAL GOV'T COMM., WHAT'S SO SPECIAL ABOUT SPECIAL DISTRICTS? A CITIZEN'S GUIDE TO SPECIAL DISTRICTS IN CALIFORNIA 3 (4th ed. 2010), available at http://www.calafco.org/docs/Special_Districts/Whats_So_Special.pdf.

or capital improvements, from “regulatory powers,” such as neighborhood zoning, as to which he is far more skeptical.²³⁹

As before, however, this distinction between the coercive powers of neighborhood zoning districts and the noncoercive powers of special assessment districts proves false. First, while cases like *Salyer* and *Ball* involved “one person, one vote” challenges brought by nonlandowners, the vast majority of litigation involving special assessments, particularly BIDs, has in fact been brought by landowners or business owners who voted against the creation of the district but were outvoted by a majority of their neighbors and thus forced to pay mandatory assessments against their will.²⁴⁰ These cases, then, presented precisely the same concern as the *Roberge* line—a majority of landowners within a territorially-defined district was empowered to coerce a dissenting minority. Nevertheless, these cases all uphold the validity of BID assessments without citing the *Roberge* line.²⁴¹ Second, although BIDs and special assessment districts do not formally coerce nonlandowners, they exercise strong de facto coercive authority over nonlandowners within the area. Thus, the *Salyer-Ball* line cannot be meaningfully distinguished from the *Eubank-Roberge* line on this basis. In the remainder of this section, I elaborate on each of the two arguments presented here.

1. Landowner Challenges

The distinction Ellickson draws between the “supplementary” services provided by special assessment districts and the “regulatory” activities undertaken by neighborhood zoning districts fails because special assessment

²³⁹ See Ellickson, *supra* note 2, at 96-99 (advocating BLIDs that would perform a wide range of supplementary services but have only limited regulatory powers such as the granting of a zoning variance). In his landmark article on BIDs, Richard Briffault also states that BIDs do not “regulate.” See Briffault, *supra* note 6, at 407-08 (“BIDs are rarely, if ever, authorized to regulate the activities of district landowners, merchants, or residents directly.”).

²⁴⁰ See, e.g., *McGowan v. Capital Ctr., Inc.*, 19 F. Supp. 2d 642, 644-45 (S.D. Miss. 1998) (landowners challenging an assessment levied by a landowner-created BID); *Evans v. City of San Jose*, 4 Cal. Rptr. 2d 601, 602-03 (Ct. App. 1992) (business owner challenging an assessment of a business owner-supported BID); *Jensen v. City & County of Denver*, 806 P.2d 381, 383 (Colo. 1991) (en banc) (same); *City of Seattle v. Rogers Clothing for Men, Inc.*, 787 P.2d 39, 41-42 (Wash. 1990) (en banc) (business owners challenging an assessment levied by a business owner-created BID).

²⁴¹ I discovered only one case in which a court considered a special assessment district to raise a delegation question under *Eubank* and *Roberge*, and, even there, the reference to *Eubank* and *Roberge* appeared only in a partial concurrence. See *Tex. Boll Weevil Eradication Found., Inc. v. Lewellen*, 952 S.W.2d 454, 488 (Tex. 1997) (Hecht, J., concurring in part and dissenting in part, and concurring in the judgment) (concurring in the invalidation of a special assessment district as an improper delegation and citing *Roberge* and *Eubank*).

districts *do* regulate just as surely as neighborhood zoning districts do. While the primary function of the special assessment district is to provide services, that function would be impossible to carry out if the district did not also possess one critical “regulatory” power: the ability to *coerce* all landowners within its territorial jurisdiction to pay a mandatory assessment to defray the cost of a service provided regardless of whether those landowners desire the service. As discussed previously, and as Ellickson himself acknowledges, the element of coercion is essential to the success of the special assessment district, as it is to the neighborhood zoning district, in order to overcome the collective action problem that entices landowners to free ride.²⁴² Thus, as I have noted, most of the litigation regarding special assessments and BIDs has in fact been brought by landowners complaining about having to pay a mandatory assessment imposed upon them by a majority vote of their neighbors.²⁴³

Although both special assessment districts and neighborhood zoning districts are predicated on coercive regulation, a skeptic might nevertheless argue that a mere requirement to pay money is not nearly as onerous an encroachment upon one’s property rights as the deprivation of a landowner’s ability to determine the appropriate use of his or her land. However, a special assessment is not simply a requirement to pay money. The imprimatur of government authority makes it far more potent: a special assessment is a *lien* on one’s land, meaning that it runs with the land, binds subsequent purchasers, and can result in foreclosure if unpaid.²⁴⁴ In some states, a delinquent special assessment lien becomes a personal liability of the landowner, which may be satisfied from the landowner’s wages or other assets.²⁴⁵

Indeed, at common law, courts considered an *affirmative* burden upon one’s land, such as a covenant to pay money, to be a far more severe restraint

²⁴² See Briffault, *supra* note 6, at 394 (“The coercive assessment is essential to the BID.”); Ellickson, *supra* note 2, at 93 (proposing to overcome the free rider problem through a BLID in which all benefitted owners would be required to pay assessments, regardless of consent); *id.* at 107 (acknowledging that the BLID proposal may constitute a “threat to freedom because it would not be created by unanimous consent of the governed”).

²⁴³ See *supra* note 240.

²⁴⁴ See, e.g., OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 99, at 352 (2d ed. 2001) (“Where assessments are not paid on time the usual method of enforcement is a lien on the property benefited.”); Briffault, *supra* note 6, at 393 (listing various consequences of failing to pay an assessment including delinquency sale and filing of a lien).

²⁴⁵ See REYNOLDS, *supra* note 244, § 99.

on land ownership than a *negative* restriction on that land's use.²⁴⁶ Until modern times, courts refused to enforce affirmative covenants against successors who had not expressly contracted for such an obligation, while freely enforcing negative servitudes against subsequent purchasers with notice.²⁴⁷ In the courts' view, a negative restriction limits a landowner's potential investment loss to the value of the land itself. The landowner can simply walk away from the property if it turns out to be an unwise investment. An affirmative obligation, by contrast, endures even if the land becomes worthless, putting all the landowner's assets at risk.²⁴⁸ Although affirmative covenants that run with the land are now generally enforceable,²⁴⁹ courts remain wary about affirmative obligations and frequently refuse to enforce affirmative covenants they perceive as overly burdensome.²⁵⁰

Judicial intuitions about the burdens of affirmative obligations are frequently confirmed in the special assessment context. In fact, as previously observed, the vast majority of lawsuits concerning special assessment districts are brought by assessed landowners complaining about having to pay the assessment.²⁵¹ Although special assessments tend to be relatively small compared to property taxes, landowners often complain that they are excessive when added to the existing burden of mortgage payments, homeowners association fees, homeowners insurance, and property taxes—the latter of which figure to grow even larger if the special assessment district

²⁴⁶ See *DUKEMINIER ET AL.*, *supra* note 18, at 873 (explaining that an affirmative covenant "may impose a large personal liability on a successor" while a negative covenant "limits the successor's loss to the investment in the land itself").

²⁴⁷ See *id.* at 873-74, 892-95 (describing uses that illustrate the contrasting positions courts took on affirmative covenants and negative covenants).

²⁴⁸ *Id.* A particularly chilling case is *Pocono Springs Civic Ass'n v. MacKenzie*, 667 A.2d 233 (Pa. Super. Ct. 1995). In that case, the appellants unknowingly bought property within a homeowners association that was incapable of development because the lot did not meet township sewage requirements. *Id.* at 234. The appellants attempted several times without success to relinquish the property by sale, abandonment and foreclosure. *Id.* at 235. The court held that, as the title owners, the appellants remained personally liable for the annual homeowners association assessments even though their land had become worthless. *Id.* at 235-36.

²⁴⁹ See, e.g., *Neponset Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793, 795, 798 (N.Y. 1938) (holding that an affirmative covenant obligating owners to pay annual assessment to a homeowners' association runs with the land and binds subsequent purchasers with notice). *The Restatement of Property* likewise provides that almost all affirmative and negative covenants are enforceable. See *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 3.2 (2000).

²⁵⁰ See *DUKEMINIER ET AL.*, *supra* note 18, at 873 (discussing an "illustrative" case in which a California court refused to enforce an affirmative covenant requiring a successor to rebuild and maintain a golf course that had fallen into disrepair).

²⁵¹ See Briffault, *supra* note 6, at 446 (noting that most litigation against BIDs is filed by property owners who feel that their BID assessments are too burdensome).

fulfills its promise to increase property values.²⁵² In addition to the unwanted financial burden, many landowners believe that they receive no real value from a special assessment that has been forced upon them for the benefit of others. For example, a business owner who has recently invested in an expensive security system might oppose paying for additional security services.²⁵³ Worse, a special assessment may force a landowner to pay for services that actually harm her personal interests. For instance, a homeowner may be charged an assessment for road improvements that threaten to flood her own property.²⁵⁴ The owner of an adult business may pay mandatory assessments to a BID, only to find that the BID is using the assessed funds on a lobbying campaign to make adult businesses illegal in the district.²⁵⁵

There is no doubt that many zoning restrictions are just as onerous, if not more so, than special assessments. However, a landowner aggrieved by an abusive zoning law at least has the opportunity to seek judicial relief through the Federal Takings, Due Process, Equal Protection, Freedom of Speech, or Free Exercise of Religion Clauses, as well as state law doctrines like nonconforming use or vested rights.²⁵⁶ While many property rights advocates have complained about the ineffectiveness of some of these doctrines,²⁵⁷ landowners still enjoy far more protection against adverse zoning changes than they do against unwanted special assessments. As to the latter, courts defer very broadly to determinations about who is subject to a special assessment, and how much they should be assessed.²⁵⁸ Federal

²⁵² See *id.* at 384-85.

²⁵³ See, e.g., *id.* at 384 (providing the example of landowners who may “already be providing the supplemental sanitation and security services that the BID would offer”).

²⁵⁴ See, e.g., Herón Márquez Estrada & Joy Powell, *Project Produces a Street Fight*, STAR TRIB. (Minneapolis-St. Paul) (Mar. 5, 2011), <http://www.startribune.com/local/south/117275103.html> (describing a lawsuit by residents required to pay for a street improvement project that is flooding their properties).

²⁵⁵ See Briffault, *supra* note 6, at 406-07, 427 (noting that some BIDs lobby city governments “for new laws or the enforcement of existing laws against . . . shops that sell pornography”).

²⁵⁶ For an overview of landowners’ major avenues for challenging zoning ordinances, see generally ELLICKSON & BEEN, *supra* note 5, at 125-232.

²⁵⁷ See generally, e.g., Erin O’Hara, *Property Rights and the Police Powers of the State: Regulatory Takings: An Oxymoron?* (arguing that Supreme Court’s regulatory takings doctrine does not provide much protection for property rights), in *LAND RIGHTS: THE 1990S’ PROPERTY RIGHTS REBELLION* 31 (Bruce Yandle ed., 1995).

²⁵⁸ See REYNOLDS, *supra* note 244, § 99 (“It is often held to be within the legislative discretion of the local governing authorities as to . . . when to use special assessments against particular properties.”).

courts have long abandoned any solicitude for landowners complaining about assessments.²⁵⁹

2. Nonlandowner Challenges

What has been said thus far concerns only the impacts that BIDs and special assessment districts have upon landowners. By contrast, the *Salyer-Ball* line involved challenges brought by nonlandowners who were not directly subject to the districts' power to coerce mandatory assessments. Arguably, then, it would be inappropriate to analogize these cases to the *Eubank-Roberge* line, which involved landowner challenges to the coercive authority of neighborhood zoning districts.

The previous Section showed, however, that BIDs and special assessment districts have significant impacts on nonlandowners within their territories, impacts that are in fact qualitatively similar to the coercive effects of zoning regulations. Like zoning regulations, for example, BIDs actively manage public space in a way that can substantially affect residents' quality of life, such as sparking rent increases, changes in local retail options, or other alterations to neighborhood character.²⁶⁰ Through their management of public space, furthermore, BIDs can entice desirable populations such as tourists, and drive away undesirable people such as food vendors or the homeless. Ellickson goes so far as to state that "the control of disorderly street people" is one of the BID's "central functions."²⁶¹ Richard Schragger accordingly argues that despite *Kessler's* description of the BID as an innocuous provider of aesthetic services that affect only landowners, BIDs engage actively in "defining and delineating the contours of public space itself."²⁶² Thus, while BIDs may not possess formal regulatory powers over nonlandowners, they have strong de facto authority over nonlandowners, and using that authority is one of their major reasons for being.²⁶³

²⁵⁹ See *Louisville & Nashville R.R. v. Barber Asphalt Paving Co.*, 197 U.S. 430, 432-35 (1905) (holding that an assessment for a street improvement did "not go beyond the bounds set by the Fourteenth Amendment"); see also *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 343 (1901) (asserting that assessments are generally constitutional and noting that it is up to the legislature to determine how to appropriately distribute the burdens of the assessment across landowners).

²⁶⁰ See *supra* subsection III.A.1.b.iii.

²⁶¹ See Ellickson, *supra* note 225, at 1199.

²⁶² Schragger, *supra* note 168, at 457; see also *id.* at 449-50 (arguing that the *Kessler* court ignored significant impacts of GCDMA on nonlandowners by describing the BID's powers as "essentially aesthetic").

²⁶³ In his definitive article on BIDs, Richard Briffault argues that BIDs lack real autonomy and hence should not be subject to the "one person, one vote" rule, but he acknowledges that the question is a close one. See Briffault, *supra* note 6, at 438-45. Briffault's argument is subtle, but it is

By contrast, although neighborhood zoning districts may have significant impacts on nonlandowners, such as prospective residents of affordable housing (a point I address in the next Section,) it is unlikely that neighborhood zoning districts will have the kinds of impacts on nonlandowners that BIDs do because they tend to operate in homogeneous residential neighborhoods rather than diverse downtown areas where the interests of tenants, vendors, street people, and other users are often implicated. In fact, all of the cases that I have discovered to date challenging the validity of neighborhood zoning districts have been brought by landowners.²⁶⁴ As noted earlier, the fact that special assessment districts have frequently confronted legal challenges from both landowners and nonlandowners, whereas neighborhood zoning districts have primarily been assailed only by landowners, strongly suggests that the former present greater cause for concern than the latter.²⁶⁵

In conclusion, insofar as special assessment districts exercise coercive regulatory powers that have the potential to dramatically impact the rights of landowners and nonlandowners within their jurisdiction, they cannot be subject to any less constitutional scrutiny than neighborhood zoning districts.

C. *Spillovers and Comprehensive Planning*

There is one more way in which neighborhood zoning districts may be distinguished from special assessment districts. The doctrine and scholarship imply that one concern with neighborhood control of zoning is its potential to impose negative spillover impacts on neighboring areas and disrupt comprehensive land use planning on a citywide basis. While this is a valid concern, it is not a meaningful way of distinguishing special assessment districts from neighborhood zoning districts because the former are just as likely as the latter to cause harmful spillovers and impair comprehensive planning. Indeed, special assessment districts may be *more* likely to create these problems.

The concern about spillovers is evident in existing scholarship about neighborhood zoning control. As discussed previously, Robert Ellickson and George Liebmann have proposed the creation of neighborhood or block-

unconvincing in at least one major respect. Like Ellickson, he stresses that BIDs do not “regulate.” *Id.* at 442. However, as just discussed, BIDs certainly exercise as much regulatory power as neighborhood zoning districts do.

As discussed in Section III.B, *supra*, the water districts in *Salyer* and *Ball* and the special assessment districts in *Bolen* also had substantial impacts on nonlandowners.

²⁶⁴ See cases cited *supra* note 240.

²⁶⁵ See *supra* subsections III.B.1–2.

level improvement districts that would bring the advantages of BID governance to residential or other neighborhoods outside the downtown areas where BIDs traditionally functioned.²⁶⁶ However, both Ellickson and Liebmann reject the idea of allocating anything more than token zoning authority to these neighborhood groups. Liebmann would permit neighborhood associations to *waive* applicable zoning restrictions, but rejects neighborhood power to *impose* zoning restrictions “because of the external effects that can result from them.”²⁶⁷ Ellickson likewise endorses the ability of block-front groups to waive otherwise applicable restrictions where “spillover effects are limited,” but not where doing so would impose “neighborhood-wide negative externalities.”²⁶⁸

Although neither Ellickson nor Liebmann expands on his reasons for objecting to neighborhood zoning control, the concern appears to be that if a neighborhood has unfettered ability to control its own land use, it can enact land use policies with little regard for the impact of its policies on neighboring areas or on the region as a whole. Many neighborhood groups, for example, will reflexively fall back upon NIMBY impulses and simply exclude unwanted land uses that may be in great demand on a citywide or regional basis. Suppose that a city has a desperate need for more affordable housing and that a developer proposes to site a low-income housing project in a particular neighborhood. If the neighborhood has the power to approve or disapprove new affordable housing projects, and if the landowners within the neighborhood determine that the affordable housing project will potentially diminish their own property values or quality of life, they will likely reject the project despite the citywide need for affordable housing. Doing so will then place pressure on neighboring areas to approve a site for the housing project, but if each neighborhood has the independent power to approve its own land uses, the housing project may find no suitable location anywhere in the city.²⁶⁹

Neighborhood zoning control can also be problematic when neighborhoods seek to *include* new uses instead of *excluding* them. If a neighborhood permits development at too rapid a pace, for example, it may place enormous

²⁶⁶ See *supra* notes 132-34 and accompanying text.

²⁶⁷ Liebmann, *supra* note 12, at 362; see also Merrill, *supra* note 56, at 303 (favoring neighborhood land use powers where the impacts are locally confined, but not where they have regional impacts).

²⁶⁸ Ellickson, *supra* note 2, at 98-99.

²⁶⁹ See *supra* notes 198-200 and accompanying text (discussing the difficulty of finding appropriate sites for LULUs because of neighborhood opposition).

strain on the city's infrastructure or school system.²⁷⁰ In short, the structure of the neighborhood zoning district, which empowers landowners to make land use decisions based on how a particular new neighborhood entrant will affect their own property values, practically assures that each neighborhood will consider its own interests alone and ignore the citywide impacts of its zoning decisions.

This concern with external impacts may implicitly underlie the *Roberge* doctrine as well. As I have noted previously, one of the many curiosities surrounding the *Roberge* line, and the *Roberge* decision in particular, is that it followed closely on the heels of the epochal *Euclid* decision of two years earlier, which broadly upheld the constitutionality of local zoning.²⁷¹ However, it is possible to distinguish *Roberge* from *Euclid*. The *Euclid* court placed substantial weight on the "comprehensive zoning plan" adopted by the village of Euclid, Ohio, for the rational development of the village as a whole.²⁷² Although the respondent, Ambler Realty, objected that Euclid's limitations on industrial development would divert such development to neighboring communities, the Court rebutted this argument by noting that the village had not banned industrial development entirely, but merely directed it to appropriate areas within the community where it would not disturb residential uses.²⁷³ The Court also issued an important caveat that if, in some future case, a municipality acted in such a way as to harm "the general public interest," the Court might intervene.²⁷⁴ *Roberge* may have

²⁷⁰ William Fischel has criticized Robert Nelson's proposal to create permanent neighborhood zoning districts on this very ground. Fischel argues that disaggregating the zoning power from other municipal functions will cause zoning decisions to be made without consideration of their impacts on these other functions. He provides an instructive example from New Hampshire: a municipal zoning ordinance effectively prevents any children of school age from residing in a section of town from which access to the local schools is extremely costly. If the district controlled its own zoning, Fischel argues, it would lift that zoning restriction without regard to whether doing so would inflict a burden on the community as a whole. See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood,"* 7 GEO. MASON L. REV. 881, 899-901 (1999); see also David L. Callies, et al., *Ramapo Looking Forward: Gated Communities, Covenants, and Concerns*, 35 URB. LAW. 177, 197 (2003) ("[Any] privatized 'zoning' effort itself results in uncoordinated land use planning of the area. . . . Air quality, property values, environmental preservation, efficient public services, and well-located schools all are better coordinated by a more regional government responsible for the region's public services." (footnote omitted)).

²⁷¹ See *supra* notes 83-84 and accompanying text.

²⁷² *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379 (1926); see also *id.* at 379-83 (describing at length the village's detailed development plan).

²⁷³ See *id.* at 389-90 ("[Euclid's] governing authorities . . . have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines.").

²⁷⁴ *Id.* at 390.

been just such a case. In *Roberge*, there could be no assurance, as there was in *Euclid*, that the city of Seattle had comprehensively planned its land use needs and ensured an appropriate place for all uses because the city had delegated portions of its land use power to landowners without providing any standards to guide the exercise of that power. Absent standards, landowners were free to base their zoning decisions on “caprice” or other “selfish reasons.”²⁷⁵ In other words, landowners could make decisions without regard to the welfare of surrounding areas or the city as a whole.

Neither the jurisprudence nor the commentary on neighborhood control of zoning addresses the possibility that special assessment districts or BIDs may similarly generate externalities or impair comprehensive planning. At first blush, indeed, it may appear as though one neighborhood’s decision to upgrade its sewer lines or provide itself with supplemental sanitation or security services cannot possibly impose any burden on neighboring areas, impair any municipal planning objectives, or strain city infrastructure—to the contrary, special assessment districts promise only to *improve* such infrastructure. However, as this Section shows, special assessment districts can create just as much havoc with municipal planning schemes and impose just as serious externalities on surrounding areas as neighborhood zoning districts are thought to do. Moreover, while it is possible that neighborhood zoning districts will increase the incidence of sloppy and haphazard land use planning, the reverse scenario is also plausible: neighborhood control of zoning may actually alleviate some of the haphazardness that exists in our current system of land use control. In short, neighborhood zoning districts may once again produce sounder public policy outcomes than special assessment districts.

1. The Neighborhood Zoning District

Taking neighborhood zoning first, I should start by puncturing the myth that the current system of land use planning in this country in any way conforms to the *Euclidean* ideal of comprehensive planning. For a variety of reasons, the number of incorporated general-purpose municipalities (i.e., municipalities empowered to utilize the zoning power) has exploded in the years since *Euclid* was decided.²⁷⁶ Most metropolitan regions today are comprised of several dozen municipalities, many of which are small suburban

²⁷⁵ Washington *ex rel.* Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 122 (1928).

²⁷⁶ See Briffault, *supra* note 3, at 356-82 (noting the increasing number of small suburban municipalities and discussing some of the causes of that phenomenon).

communities no larger than a neighborhood.²⁷⁷ The proliferation of small incorporated municipalities has generated virulent competition for tax revenue and a concomitant “fiscalization” of land use, in which each municipality regulates land use in order to maximize contributions to the municipal fisc rather than in accordance with some comprehensive land use plan for the harmonious development of the community.²⁷⁸ Despite *Euclid*, courts have largely accepted this practice, rarely requiring that municipalities’ land use policies comply with anything resembling the comprehensive zoning plan in the *Euclid* case. For example, where *Euclid* was careful to emphasize that the village of Euclid was *not* entirely precluding industrial use,²⁷⁹ in the years since *Euclid*, courts have endorsed innovations such as “exclusionary” zoning in which unwanted land uses such as industry or affordable housing are simply excluded from an entire city, either de facto or de jure, without requiring that municipalities consider the impacts of such exclusionary policies on the surrounding region.²⁸⁰ Furthermore, courts have recognized and apparently accepted that cities use zoning for their own selfish, fiscal purposes—essentially, to bring in land uses and improvements that will enhance property values and the local tax base while excluding land uses that do the opposite.²⁸¹ With few exceptions, courts

²⁷⁷ See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 77 (1990) (noting that “in most metropolitan areas, there are dozens of independent municipalities” and that “[m]ore than three-quarters of all municipalities have fewer than 5,000 inhabitants”).

²⁷⁸ See Schwartz, *supra* note 208, at 198-204 (discussing the “fiscalization” of land use and its implications for cities). Although municipal land use authority is formally subject to control by the state, in practice states almost never interfere in municipal land use decisions and, to the contrary, consistently act to enable municipal autonomy. See Briffault, *supra* note 277, at 59, 64 (arguing that state legislative involvement in local affairs reveals “a deep commitment to strong decision-making roles for local governments, protection of local communities from outside interference, reluctance to displace local choices and unwillingness to address the social and economic differences among localities”).

²⁷⁹ *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 390 (1926).

²⁸⁰ See, e.g., *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 254-58, 270-71 (1977) (upholding the city’s exclusion of a low-income housing project against an equal protection challenge where the city was zoned primarily for single-family homes and only 27 residents in a city of 64,000 were black because there was insufficient evidence of racially discriminatory motivation for the exclusion); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 2-3, 9 (1974) (approving a zoning ordinance barring all uses other than owner-occupied single-family residences anywhere within the municipal borders); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 64 A.2d 347, 351 (N.J. 1949) (approving a zoning ordinance barring nonresidential uses and noting the availability of suitable land for industrial use elsewhere in the region).

²⁸¹ See, e.g., *Arlington Heights*, 429 U.S. at 258, 270 (accepting the city’s asserted rationale that its refusal to change its zoning requirements to permit affordable housing was based on existing residents’ “reliance” on existing zoning and the related concern that rezoning would cause a decline in property values).

have simply ignored *Euclid's* caveat to protect the "general public interest."²⁸² As a result, siting unwanted land uses such as affordable housing has become a major problem nationwide.²⁸³

On the surface, delegating zoning power to neighborhood groups would exacerbate this trend. Given that the disturbing, beggar-thy-neighbor approach prevalent in current land use planning has largely been the result of the fragmentation of land use authority, it could hardly help matters to introduce even more fragmentation by dramatically increasing the number of regulatory entities privileged to engage in exclusionary policies. Or could it?

Unlike the incorporated suburbs that ring our urban centers, neighborhoods would receive their zoning powers from, and ultimately be accountable to, the city government that empowered them. Where states have few incentives to supervise municipal zoning practices, zoning is a major source of power and revenue for cities. Thus, they will have tremendous incentives to closely monitor neighborhood zoning to ensure that neighborhoods do not unduly burden other areas of the city with externalities or impair citywide planning objectives. The relevant empirical studies, discussed previously, establish that where cities have delegated some zoning authority to neighborhood groups, they have not been shy about asserting themselves when other city priorities are at stake.²⁸⁴

Cities can assert their supervisory control over neighborhood zoning districts in many ways. They may delegate only certain zoning powers to neighborhoods, such as the power to regulate particular land uses or the power to waive but not impose restrictions. Alternatively, they may delegate only to certain neighborhoods, such as homogeneously residential or lightly developed areas.²⁸⁵ They could also give neighborhoods an initiatory

²⁸² The major exception is *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (N.J. 1975), which struck down an exclusionary zoning ordinance and rejected fiscal concerns as a valid basis for exclusionary zoning practices, citing *Euclid's* "general public interest" caveat. *Id.* at 726, 731. And that holding faced considerable resistance. See *S. Burlington Cnty. NAACP v. Township of Mt. Laurel*, 456 A.2d 390, 410 (N.J. 1983) (noting that nearly a decade later, Mt. Laurel's zoning remained "blatantly exclusionary" and that Mt. Laurel was "not alone"). New Jersey Governor Chris Christie recently referred to the original *Mount Laurel* decision as "an abomination." See ChrisChristieVideos, *Chris Christie—Mt. Laurel Decision is an ABOMINATION*, YOUTUBE (Sept. 16, 2011), <http://www.youtube.com/watch?v=MWRSpKkoQnc>; Nancy Solomon, *Uncertain Fate for Decision That Paved the Way for Affordable Housing in NJ*, WNYC (May 7, 2012), <http://www.wnyc.org/articles/new-jersey-news/2012/may/07/affordable>.

²⁸³ See *supra* notes 198-200 and accompanying text.

²⁸⁴ See BERRY ET AL., *supra* note 8, at 142-44, 298 (finding that individual neighborhood groups are generally unable to impede large projects important to a city's economic future).

²⁸⁵ The delegation schemes in *Roberge*, *Cusack*, and *Eubank*, of course did precisely this, delegating narrowly tailored land use powers to specific neighborhoods. See *supra* Section II.A.

power subject to an override by the city council,²⁸⁶ or include sunset provisions that require reauthorization of the zoning power after a certain period of time. Finally, of course, municipalities can always repeal a delegation of power at any time, as neighborhoods have no vested right to control their own zoning.²⁸⁷ In effect, a scheme of neighborhood zoning power under loose city control would resemble a form of regional or metropolitan government about which scholars have fantasized for decades.²⁸⁸

Indeed, such a scheme could actually help reverse the current pattern of fragmented land use planning. The delegation of some limited land use powers to neighborhoods may discourage landowners from fleeing the city for incorporated suburbs where they can exercise the zoning power with total impunity. Historically, many home and business owners left the city for the suburbs because, among other things, in the suburbs they could much more easily control their immediate environment through zoning.²⁸⁹

²⁸⁶ See, e.g., *Tippett v. City of Hernando*, 780 So.2d 649, 650-52 (Miss. Ct. App. 2000) (describing a law requiring a supermajority of the municipality's legislators to ratify any zoning change being protested by those near the proposed change); *Eadie v. Town Bd.*, 854 N.E.2d 464, 467 (N.Y. 2006) (upholding a statute requiring a supermajority vote of the town board to approve certain zoning changes after a written protest by a certain percentage of landowners in a designated proximity to the proposed change).

²⁸⁷ See *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 733 (N.Y. 1951) ("[P]ersons who own property in a particular zone or use district enjoy no vested right to that classification if the public interest demands otherwise."); see also, e.g., *Grund v. Jefferson County*, 277 So.2d 334, 338 (Ala. 1973) (stating that property owners have no vested right in the zoning classification of their property); *Spiker v. City of Lakewood*, 603 P.2d 130, 133 (Colo. 1979) (en banc) (same); *McGee v. City of Cocoa*, 168 So. 2d 766, 769 (Fla. Dist. Ct. App. 1964) (same); *Norbeck Vill. Joint Venture v. Montgomery Cnty. Council*, 254 A.2d 700, 705 (Md. 1969) (same); *Navin v. Town of Exeter*, 339 A.2d 12, 14 (N.H. 1975) (same); *Gray v. Trustees*, 313 N.E.2d 366, 369 (Ohio 1974) (same); *Buhler v. Racine County*, 146 N.W.2d 403, 408 (Wis. 1966) (same).

²⁸⁸ See *Briffault*, *supra* note 2, at 526-28 (considering "sublocal structures" within cities to be "something akin to a metropolitan political structure," and noting that the spillover effects of sublocal structures are more limited than those of localities because the former are subject to control by a locality whereas the latter are not). Scholars have long dreamed of unifying the patchwork of local government structures under some form of regional government that can minimize harmful externalities and interlocal inequalities, but regional government has largely failed to materialize because of opposition from vested interests in the existing system of local government, most prominently suburban dwellers who are loathe to lose autonomy over their schools, land use, and taxing powers. See, e.g., *Cashin*, *supra* note 2, at 2015-27 (discussing barriers to regionalism).

²⁸⁹ See MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* 4, 35-39 (1976) ("Most suburban jurisdictions . . . have relatively homogeneous populations, which makes it easier to secure consensus on exclusionary policies than is commonly the case in larger and more heterogeneous cities."). The ability of neighborhood organizations to combat flight to the suburbs was recognized as early as the 1930s. In 1935, Herbert Nelson, the Executive Secretary of the National Association of Real Estate Boards advocated for the creation of urban "Neighborhood Improvement Districts," stating that "the flight to the suburbs which we have witnessed during the past ten or fifteen years . . . was caused . . . by the desire of people to preserve the home environment."

If cities were empowered to import some suburban-style zoning control, it might stem the impulse to flee the city. While urban landowners still would not have total control over their own zoning, they would at least have *some* control. And that fact, along with the substantial costs involved in selling their homes at depressed values, leaving behind relationships, forfeiting social capital to put down roots somewhere new, and giving up the amenities of urban living could help tilt the balance in deciding whether to move.²⁹⁰

Thus, neighborhood zoning districts cannot be dismissed on the grounds that they—more so than incorporated municipalities—impede comprehensive planning or impose overly burdensome externalities on neighboring communities.

2. The Special Assessment District

Conversely, special assessment districts can have severe impacts on urban planning objectives, and may create substantial spillover effects. An increase in development, business activity, or investment in one area of town will likely increase traffic, noise, and pressure on infrastructure in surrounding neighborhoods, while simultaneously siphoning off business and investment from those areas.²⁹¹ Moreover, if the BID or special assessment district is successful in its mission to increase property values, higher rents will likely result, which may displace both residential and commercial tenants who then must find rental units elsewhere in the region.²⁹² Likewise, BIDs' efforts to make their jurisdictions attractive to tourists may "displace crime

Marc A. Weiss & John T. Metzger, *The American Real Estate Industry and the Origins of Neighborhood Conservation*, in PROCEEDINGS OF THE FIFTH NATIONAL CONFERENCE ON AMERICAN PLANNING HISTORY 753, 758 (Laurence C. Gerckens ed., 1994) (citation omitted).

²⁹⁰ Robert Nelson further argues that neighborhood control of zoning can actually solve the LULU problem by enabling neighborhood groups to receive compensation for permitting LULUs into their neighborhoods. See Nelson, *supra* note 30, at 846 (noting that it might be more efficient "to allow the [advocate of the LULU] to negotiate with the neighbors living nearby, rather than issuing an absolute prohibition on . . . zoning grounds"). As Nelson acknowledges, however, this solution would require courts to permit neighborhoods to expressly sell zoning rights, something courts have been reluctant to do. *Id.* at 835, 848-49. Nevertheless, this is another potential advantage of neighborhood zoning control.

²⁹¹ See Briffault, *supra* note 6, at 456 ("BID marketing and development programs may draw customers and investment away from other areas of the city."). Sociologist Nathan Glazer has similarly argued that New York City's zoning laws, which permitted and indeed encouraged massive density in the borough of Manhattan, caused the "withering of major subordinate business centers in the Bronx and Brooklyn" and the loss of urban amenities in areas outside the city's dense core. NATHAN GLAZER, FROM A CAUSE TO A STYLE 238 (2007).

²⁹² See *supra* notes 168-69 and accompanying text.

and social problems onto adjacent communities.”²⁹³ Finally, BIDs have been known to use their substantial lobbying power to push for zoning changes, such as the prohibition of adult businesses, which then must be absorbed by other neighborhoods.²⁹⁴

BIDs and special assessment districts can also create a qualitatively different, but perhaps more significant, spillover effect by causing intralocal inequalities in the provision of services that can erode a city’s social fabric. Empowering territorially demarcated jurisdictions to finance their own infrastructure and services has an inherent tendency to balkanize the urban environment into enclaves that reinforce, among other things, class, income, and racial divisions. BIDs and special assessment districts are part of a “get what you pay for” model of municipal financing, in which the quantity and quality of services each neighborhood receives are based entirely on its ability to pay.²⁹⁵ The result is that wealthy neighborhoods that can afford the added burden of assessments will voluntarily assume that burden in order to finance and obtain highly desirable services, while poor neighborhoods may decline to approve an assessment—even for services they desperately need—if they decide the assessment is too costly.²⁹⁶ While services financed by assessments are theoretically supposed to be supplemental, cities have strong incentives to reduce their expenditures by “outsourcing” the provision of municipal services to special assessment districts.²⁹⁷ As a result, where special assessments are a major source of municipal financing—such as in the Sunbelt states, where constitutional limits or extreme political hostility often block tax increases—large inequalities persist between rich, white neighborhoods and poor, minority neighborhoods.²⁹⁸ Such inequalities can, of course, breed resentment as poor neighborhoods endure

²⁹³ Briffault, *supra* note 6, at 456. *But see* Philip J. Cook & John MacDonald, *Public Safety Through Private Action: An Economic Assessment of BIDs*, 121 *ECON J.* 445, 458 (2011) (finding that “BIDs have no meaningful effect on crime in nearby areas”).

²⁹⁴ *See supra* note 165 and accompanying text.

²⁹⁵ *See Reynolds, supra* note 5, at 432-33.

²⁹⁶ *See Briffault, supra* note 2, at 528-29; Reynolds, *supra* note 5, at 433-34 (acknowledging “the troubling implications” of a system that “explicitly limit[s] access to municipal services on the basis of ability to pay”).

²⁹⁷ *See supra* note 216; *see also Reynolds, supra* note 5, at 433 (“If those who can pay for a better level of services are content, the pressure to enhance service across the municipality is generally reduced.”).

²⁹⁸ A troubling example of this trend was implicated in *Hadnott v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala. 1970). As a result of a local government practice by which street pavings were provided only upon a petition of landowners willing to pay a special assessment to finance it, ninety-seven percent of white residents lived on paved streets, whereas only sixty-five percent of black residents did. *Id.* at 970. Because there was no evidence of racially discriminatory intent, the court found that the scheme did not offend the Federal Equal Protection Clause. *Id.*

substandard services while nearby wealthy neighborhoods lavish themselves with improvements. Two prominent scholars have even speculated that one underlying cause of Los Angeles's Rodney King riots in the summer of 1992 was the city's use of a geographically targeted financing mechanism to shower downtown Los Angeles with millions of dollars in redevelopment money while neglecting adjacent minority neighborhoods.²⁹⁹

In sum, special assessment districts may be just as troublesome for advocates of comprehensive planning, and just as likely to cause undesirable spillovers as neighborhood zoning districts.

CONCLUSION: THE NEIGHBORHOOD AND THE SUBURB

The purpose of this paper has not been to join the chorus of BID critics,³⁰⁰ but rather to highlight some heretofore unappreciated virtues of the neighborhood zoning district, and to demonstrate that courts and commentators have seriously erred in their inconsistent treatment of these two devices. Within appropriate limits, both the neighborhood zoning district and the BID/special assessment district can be powerful tools for helping cities survive and prosper during a time of great interlocal competition, in which small suburban communities have the advantage of nearly unchecked land use authority. There is a role for the courts in delineating when a delegation of power to the neighborhood level is appropriate, but the courts must eschew facile distinctions between the neighborhood zoning district and the special assessment district, and instead focus on a series of ad hoc factors suggested by the foregoing analysis. First, does the entity exercise coercive regulatory power, either directly or indirectly, and how far does the power encroach upon the ability of both landowners and nonlandowners to use and access land? Second, does the entity exercise a function or functions about which serious intra-group disagreement is likely? Third, is the area governed by the entity sufficiently heterogeneous in terms of land uses, demographics, or other interests so as to engender disagreements among members, and yet insufficiently heterogeneous as to permit vigorous vote-trading? Fourth, is the entity a one-shot deal or does it exercise power on an ongoing basis? Fifth, is the entity likely to generate negative externalities,

²⁹⁹ See DENNIS R. JUDD & TODD SWANSTROM, CITY POLITICS: PRIVATE POWER AND PUBLIC POLICY 388-89 (4th ed. 2004) (discussing the use of "tax-increment financing").

³⁰⁰ For critical assessments of the BID, see, for example, Frug, *supra* note 14; Garodnick, *supra* note 170; and Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 1, 7-18 (2003) (explaining that BIDs result in unevenness in the quality of life among neighborhoods and raise issues regarding who should govern the BID and to what extent the franchise may be limited).

impair comprehensive planning, or promote intralocal inequality and balkanization? Finally, and perhaps most importantly, is the entity meaningfully constrained by a large, diverse governmental body that can counteract the threat of exploitation or other welfare-reducing actions by the entity? The main objective of this inquiry, of course, is to ensure that there are sufficient safeguards against abuses of power by neighborhood districts.

This last observation, however, leads to another quandary, with which this Article concludes. I noted previously that while courts are highly skeptical of neighborhood zoning control, they afford substantial deference to the exercise of the zoning power by incorporated municipalities.³⁰¹ Most incorporated municipalities today, however, are small suburbs no larger than neighborhoods.³⁰² What can explain why courts so eagerly defer to neighborhood-sized municipalities but not to actual neighborhoods? Is there some reason to think that municipalities perform better than neighborhoods on the list of ad hoc factors set forth in the previous paragraph, such that greater deference is warranted? Quite the contrary. In fact, virtually all of the potential checks on abuse of power listed above are absent or significantly reduced when the land use authority is exercised by incorporated municipalities.

Consider an ironic epilogue to the *Roberge* trio. In the 1976 case *City of Eastlake v. Forest City Enterprises*, a developer proposed to site an apartment building in Eastlake, Ohio, a suburb of Cleveland with a population of approximately 20,000.³⁰³ Shortly thereafter, the voters of Eastlake amended their city charter to provide that all zoning changes must be approved by a referendum of city voters.³⁰⁴ Although *Eubank* and *Roberge* drew into question the validity of delegating the zoning power to a voter referendum, the Supreme Court upheld the charter amendment, distinguishing *Eubank* and *Roberge* on the grounds that the challenged ordinances in those cases delegated power to a “narrow segment of the community, not to the people at large.”³⁰⁵ The referendum at issue in *Eastlake* was “far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right . . . [to decide] what serves the public interest.”³⁰⁶ For

301 See *supra* note 277.

302 See *supra* note 3.

303 426 U.S. 668, 670 (1976); *id.* at 694 (Stevens, J., dissenting).

304 *Id.* at 670 (majority opinion).

305 *Id.* at 677-78.

306 *Id.* at 678 (quoting *S. Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291, 294 (9th Cir. 1970)).

the Court, then, there was a fundamental difference between a mere neighborhood and “the city itself.”

By almost any of the metrics we have considered so far, however, the referendum at issue in *Eastlake* should be far more troubling than the schemes in either *Roberge* or *Eubank*. The referendum provisions in *Roberge* and *Eubank* conferred very limited powers on neighborhood groups to cast a one-shot vote on particular land use questions, limiting the possibility of intra-group disagreement and exploitation.³⁰⁷ By contrast, the *Eastlake* charter amendment subjected all zoning changes in the city to a referendum by city voters, thus increasing opportunities for exploitation. Moreover, in *Roberge* and *Eubank*, there was, at least in principle, some opportunity for opponents of the delegation in question to prevent the delegation by logrolling in the city council prior to the ordinance. In *Eastlake*, by contrast, there was never any opportunity for the aggrieved developer to attempt logrolling because the zoning-referendum mechanism was itself adopted by a one-shot voter initiative during which, of course, vote-trading would have been impossible.

Moreover, while the record did not reflect how diverse the city of Eastlake was, it is far more likely that a few dozen homeowners in a homogeneously zoned neighborhood would share common views about a proposal to site a group home in their neighborhood (*Roberge*) than that a city of 20,000 would share common views about the entire range of zoning matters that regularly come before a typical city (*Eastlake*). Finally, because Eastlake’s referendum scheme was clearly intended to exclude an affordable housing project from the city, it raises all the concerns about negative spillovers, impairment of regional planning objectives, siting of locally unwanted land uses, and interlocal inequality that we have canvassed previously. In *Roberge*, by contrast, Seattle’s law would have enabled neighborhood groups only to *permit* group homes that were otherwise barred by a municipal zoning ordinance, not to exclude them.³⁰⁸ Ironically, then, the schemes at issue in *Eubank* and *Roberge* provided far greater procedural protections against the abuse of power than the scheme in *Eastlake*. Why, then, is the Court so much more skeptical of a neighborhood referendum than a referendum conducted by “the city itself”?³⁰⁹

³⁰⁷ See *supra* notes 68-71 & 76-78 and accompanying text.

³⁰⁸ See *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 117-18 (1928) (describing a zoning scheme under which a philanthropic home for children or the elderly would not typically be permitted in a residential district, but prohibition could be overridden with the consent of the owners of two thirds of the property within 400 feet of the proposed home).

³⁰⁹ See *supra* text accompanying note 306.

Frank Michelman's perceptive reading of *Eastlake* provides a possible answer. According to Michelman, *Eastlake's* apparently casual distinction between a "neighborhood preference" and the "public interest" implicated in a citywide referendum suggests that *Eastlake* rejects the entire public choice model we have considered so far, with its depictions of sordid logrolling and self-seeking interest groups.³¹⁰ Rather, *Eastlake* appears to favor a "public interest" model, in which a civic-minded public deliberates in platonic fashion on important city affairs.³¹¹ Michelman argues that the *Eastlake* Court's distinction of *Eubank* and *Roberge* expresses, albeit somewhat crudely, the belief that the political realm is not a mere extension of the private market, in which self-interested groups haggle for their slice of the pie.³¹² Rather, there is

a strong and clear differentiation of the special role one plays *as citizen* from one's normal, everyday pursuits as private individual and, relatedly, . . . a careful construction of special formal or ceremonial contexts designed to place the individual in the special citizen's role—to force that role on the individual by cultural means—on those special occasions when political as distinguished from normally self-regarding private action is in progress.³¹³

According to Michelman, *Eastlake* should be read to mean that a neighborhood zoning referendum, in which an "immediately interested person" participates in a "one-time blockfront decision," does not create the necessary background conditions to awaken in the individual the "special citizen's motivational mode of sympathy and responsibility for all equally."³¹⁴ When, by contrast, the referendum is placed before the entire city, "which maintains a continuing salience in [the voter's] consciousness of political life,"³¹⁵ the appropriate signal is sent to each voter that the time has come for public-minded political action rather than "normally self-regarding private action."³¹⁶ From this perspective, interestingly, an entity that exercises zoning power on an ongoing basis is *more* legitimate than the "one-shot

³¹⁰ See Michelman, *supra* note 61, at 182-83 (explaining that *Eastlake* arguably adopted a public interest model based on the view that "there is nothing crucially objectionable about letting decisions be made by a process such as a referendum vote offering no opportunity for vote-trading, because the object of the process is supposed to be communal definition of aims").

³¹¹ *Id.*

³¹² See *id.* (suggesting that the Court in *Eastlake* adopted Rousseau's view that when individuals act politically, they act "on behalf of and with regard to one another, as well as themselves, as persons worthy of a full and equal measure of respect").

³¹³ *Id.* at 184.

³¹⁴ *Id.*

³¹⁵ *Id.* at 185.

³¹⁶ *Id.* at 184.

deal” referenda involved in *Eubank* and *Roberge*—precisely the opposite of what the public-choice analysis to this point has suggested.

Michelman’s exegesis works well as an attempt to divine the meaning behind *Eastlake*’s cryptic opinion. It does not work at all—nor is it intended—as a normative defense of local government autonomy. *Eastlake*’s blatantly exclusionary referendum scheme cannot realistically be described as public-minded political action. It is instead a fairly typical instance of a suburban municipality acting selfishly to protect its own wealth by excluding a land use project that threatens to increase the local tax burden and lower property values. As we have seen, this sort of self-regarding action by autonomous incorporated municipalities has bedeviled efforts to site locally undesirable but regionally necessary land uses, such as affordable housing. Nor can we give much credence to the argument that *Eastlake*, unlike the one-shot constructs in *Eubank* and *Roberge*, is an entity that “maintains a continuing salience in [the voter’s] consciousness of political life.”³¹⁷ Many suburbs are themselves nothing more than constructs created in order to accomplish particular, self-regarding goals. It is commonplace for areas to incorporate for purely economic reasons, such as controlling their own tax base or land use.³¹⁸ Indeed, there are numerous instances of suburban areas incorporating “defensively” for the sole purpose of defeating a proposed land use siting or annexation, or to seize control of a revenue-generating entity.³¹⁹ States have long abandoned the notion that a group must constitute a “community” in any meaningful sense in order to incorporate as a municipality.³²⁰

Thus, the juridical distinction between municipal–land use control and neighborhood–land use control turns out to be just as baseless as the distinction between special assessment districts and neighborhood zoning districts. There is no reason, in law or public policy, to fetishize the incorporated suburb as a forum for enlightened land use decisionmaking while deriding the neighborhood as parochial and self-regarding. To the extent neighborhood control of zoning raises basic concerns about democratic accountability, majoritarian exploitation, spillover impacts, intralocal

³¹⁷ *Id.* at 185.

³¹⁸ See Briffault, *supra* note 212, at 1141-42 (“Local boundary lines have often been drawn in order to take advantage of the opportunity local government law provides incorporated communities to control local land use and to escape from the fiscal burdens of the surrounding metropolitan region.”).

³¹⁹ See Schragger, *supra* note 212, at 1849 (providing numerous examples of “defensive” incorporations, such as incorporating to “avoid being annexed to a less-affluent area” or to prevent the construction of an additional airport runway).

³²⁰ See Briffault, *supra* note 277, at 75-76 (explaining that courts liberally sustain municipal incorporations without regard to whether the area to be incorporated represents a “community of interest”).

inequality, and the like, courts can address those concerns by looking to the ad hoc factors articulated herein, rather than through a blanket condemnation of neighborhood zoning. A close examination of those factors should reveal, more often than not, that neighborhood control of zoning under city supervision offers many advantages over our current system of highly fragmented land use authority, in which incorporated municipalities have the freedom to enact policies that serve local interests at the expense of regional needs.