

# Redirecting Direct Democracy: Non-Essential Spending as Political Speech

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# REDIRECTING DIRECT DEMOCRACY: NON-ESSENTIAL SPENDING AS POLITICAL SPEECH

STEPHANIE R. HOFFER\*

*Direct voting on taxes and spending have created an imbalance between direct democracy and representative democracy at local levels of government. Overreach by voters, unable to engage in debate and compromise, can force representatives into defensive and suboptimal decision-making, resulting in either underproduction or overproduction of certain public goods. As a consequence, some scholars have called for extreme limitation, or even abolition, of direct democracy in tax and spending decisions. This need not be the solution. Empirical studies of human behavior suggest that channeling direct democratic decision-making would produce results superior to those of limitation or abolition. Building a bridge between representative and direct democratic processes, even with regard to relatively inconsequential subject matters, would provide representative government with valuable information about constituent attitudes and preferences while fostering constituent cooperation in the provision of public goods. Specifically, this Article proposes preservation of existing direct democratic mechanisms while permitting constituents to opt out of payments for particular non-essential public goods chosen by the representative government on the basis of established criteria. Such a system would lessen the likelihood of overt tax revolt by giving a voice to all constituents, even those who decline to proactively engage in political speech, satisfying libertarian preferences of*

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\* Assistant Professor, The Ohio State University Moritz College of Law. Many thanks to the multitude of friends and colleagues who have taken time to talk with me about this project, not the least of which are Carolyn Jones, Jeffrey Kwall, Paul Caron, Brian Galle, Andrew Koppelman, Charlotte Crane, Ilan Benshalom, Nancy Staudt, Kenworthy Bilz, Tonja Jacobi, Abe Wickelgren, Dale Oesterle, Nathan Richman, Samuel Brunson, Michael Solimine, Paul Stancil, and Seth Lytle. Special thanks also go to participants in the Northwestern Colloquium on Advanced Topics in Taxation, the Washburn Tax Symposium, the Junior Tax Scholars Conference, the 2010 Big Ten Untenured Conference, as well as the faculty workshops at the University of Toledo College of Law and the University of Cincinnati College of Law. Finally, thank you to Kelly Savel for her wonderful research assistance.

*some while creating feedback on shared cooperation among others.*

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## I. INTRODUCTION

The provision of essential public goods such as roads, schools, and emergency services is unquestionably within the authority of local governments.<sup>1</sup> The public mandate for these goods is widely recognized, and their basic availability at the local level is non-negotiable. It is not surprising, then, that elected representatives raise revenue for essential goods through mandatory, broad-based taxes such as sales, income, and real property taxes.<sup>2</sup> Provision of these goods is unlikely to induce constituent revolt because constituents' aggregate preferences for them are likely to be closely aligned with elected representatives' preferences, if not in quality, then at least in kind. The same alignment may not hold true, however, for the provision of non-essential public goods, which are nonetheless frequently financed with mandatory broad-based taxes. Furthermore, using revenue from broad-based taxes to provide these

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1. See DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 19 (6th ed. 2006) (describing various forms of local government and noting that municipalities “dominate local government expenditure on highways, police and fire protection, parking, libraries, housing and urban redevelopment, and sewerage and sanitation”).

2. See *id.* at 295, 337, 349, 363 (describing property taxes, income taxes, use charges, sales taxes, and lotteries as ways in which municipalities raise revenue).

goods may increase the potential for constituent revolt through voter enactment of limitations on government tax and spending powers. Consequently, a representative government's choice to provide non-essential public goods creates an opportunity to address the sometimes volatile relationship between those governments and their constituents.

Addressing this relationship is both necessary and timely in light of state and local revenue shortfalls arising in the wake of the Great Recession.<sup>3</sup> Beginning with the recession of the 1970s and continuing through today, direct voting on taxes and spending has created an imbalance between direct democracy and representative democracy at the local level. Overreach by voters, unable to engage in debate and compromise, can force representatives into defensive and suboptimal decision-making, resulting in either underproduction or overproduction of certain public goods. As a consequence, some scholars have called for extreme limitation, or even abolition, of direct democracy in tax and spending decisions.<sup>4</sup> This need not be the solution. Empirical studies of human behavior suggest that channeling direct democratic decision-making would produce results superior to those of limitation or abolition.<sup>5</sup> Building a bridge between representative and direct democratic processes, even with regard to relatively inconsequential matters, would generate information about constituent preferences while fostering constituent cooperation in the provision of public goods. This Article proposes preservation of existing direct democratic mechanisms while permitting constituents to opt out of payments for particular non-essential public goods chosen by the representative government. Doing so would lessen the likelihood of direct democratic revolt by giving voice to all constituents, even those who decline to proactively engage in political speech. In addition, it would foster demonstrated cooperation among some constituents, a condition that behavioral science has shown to be contagious.<sup>6</sup>

In support of this proposal, Part II of the Article will describe the

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3. See Michael Booth, *Loss of City Services: Springs Lays Bare Its Budget Woes in Painful Cuts*, DENVER POST, Jan. 31, 2010, at 1A (discussing local government cuts to basic services due to revenue shortfalls); Paul Krugman, Op-Ed., *America Goes Dark*, N.Y. TIMES, Aug. 9, 2010, at A19 (same).

4. See *infra* Part II.C.

5. See *infra* Parts II.D, V.E.

6. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 616 (2000) [hereinafter Kahan, *Gentle Nudges*].

current imbalance between direct and representative democratic decision-making on tax and spending issues by local government.<sup>7</sup> Specifically, it will argue that current forms of democratic decision-making should be preserved as an important check on representative government, but that constituents' impulse to overreach through the use of existing direct democratic mechanisms could be more constructively channeled through increased interaction between the representative and direct democratic processes. Part III will argue that local governments could accomplish this goal by selecting certain recurring non-capital, non-essential expenses and allowing constituents to opt out of paying their share. This new form of direct democracy could take as its starting point an opt-out tax employed by religious congregations in Germany, which allows constituents to exit on a rolling basis rather than requiring a one-time vote.<sup>8</sup> An opt-out is preferable to an opt-in, I argue, because in the absence of bureaucratic barriers, constituents who are unable to overcome stickiness of the default option generally will not have strong preferences about the expenses up for debate. This lack of strong preferences justifies a presumption in favor of the representative government. For that reason, an opt-out is preferable to an opt-in. In Part IV, the Article identifies potential problems and proposes structural solutions for them, focusing particularly on the criticism that proportional decision-making by the populace produces results that are not consonant with public choice. Part V describes benefits arising from the model, including increased consensus among constituents, and Part VI concludes this Article.

## II. IMBALANCE IN DIRECT AND REPRESENTATIVE DEMOCRACY AND TAXES

### A. *Why Should We Care About Decisions Made by Local Governments?*

Although decision-making by one locality may seem to have little

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7. In this context, "direct democracy" refers to political decision-making processes, such as the ballot initiative and the referendum, that are used by constituents to directly affect outcomes. Dale A. Oesterle, *Ballot Measures: Initiatives and Referendums*, ELECTION LAW @ MORITZ (Nov. 10, 2004), [http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections\\_direct02.html](http://moritzlaw.osu.edu/electionlaw/ebook/part7/elections_direct02.html). In contrast, as used in this Article, "representative democracy" refers to governance by elected representatives. *See id.*

8. Stephanie R. Hoffer, *Caesar as God's Banker: Using Germany's Church Tax as an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 WASH. U. GLOBAL STUD. L. REV. 595, 604–06 (2010).

effect on the country as a whole, and therefore may seem to be of little consequence, the aggregate impact of local governments is impressive. The political magnitude of money raised, borrowed, and spent by local governments cannot be overstated. Nonetheless, the question of whether and how representative governments should share their decision-making power with constituents has not yet been fully answered.<sup>9</sup> Although the so-called tax revolt of the 1970s produced a rich literature on the propriety of California's tax-limiting Proposition 13 and similar pronouncements, scholars of direct democracy and taxes have primarily focused on ballot-box voting by constituents.<sup>10</sup> A second form of direct democracy—proportionate decision-making—has generated very little discussion.<sup>11</sup> I seek to fill this gap by introducing a new element to the direct democracy tax debate: an opt-out system of funding for selected non-essential public goods that will allow constituents to collaborate with the representative government and engage in political speech through proportionate decision-making.

Before discussing the proposal in earnest, it is useful to consider some general information about local governments and their spending habits. The United States has a jaw-dropping array of local government institutions. Counties, cities, school districts, fire departments, utilities, and countless other special purpose districts are permitted to levy taxes and issue bonds.<sup>12</sup> The 2002 census counted more than eighty-seven

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9. Although many articles address the question of direct democratic decision-making, few have squarely addressed the great potential for interrelationship between the direct democratic process and the representative process. For a useful foray into this area, see Kirk J. Stark, *The Right to Vote on Taxes*, 96 NW. U. L. REV. 191 (2001).

10. See ISAAC WILLIAM MARTIN, *THE PERMANENT TAX REVOLT, HOW PROPERTY TAX TRANSFORMED AMERICAN POLITICS* 14 (2008) (noting that popular referendum was a watershed moment in tax politics); Stark, *supra* note 9, at 192 n.7 ("Prop 13 has spawned an enormous literature."). For two examples of this, see William A. Fischel, *Did John Serrano Vote for Proposition 13? A Reply to Stark and Zasloff's "Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?"*, 51 UCLA L. REV. 887 (2004); and Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801 (2003).

11. For two articles discussing proportional tax voting, see Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387 (1998); and Nancy C. Staudt, *Taxation Without Representation*, 55 TAX L. REV. 555 (2002).

12. For instance, in addition to counties and municipalities, the State of New York has public authorities for parks, highways, bridges, tunnels, markets, public utilities, ports, parking, science and technology, health care, and local government assistance. See N.Y. PUB. AUTH. LAW §§ 150–471, 525–734, 825–893, 1000–1348, 1350–1399, 1400–1621, 3001–3040, 3100–3109 (Consol. 2010). And this does not include the usual plethora of fire, water, and

thousand such entities.<sup>13</sup> These entities spent in excess of \$2.3 trillion in 2004, which was approximately 19% of the U.S. GDP.<sup>14</sup> The enormity of this expense justifies a deeper inquiry into the direct and representative democratic processes through which localities raise and spend revenue. This task is made difficult by the practically non-existent definition of “local government” and the variety of entities that this loose term encompasses. I readily acknowledge that not all local government entities can, or should, adopt an opt-out system to finance certain non-essential goods;<sup>15</sup> however, the sheer enormity of the task makes it impossible to address each form of entity individually. Consequently, I will use the term “local government” to refer to those entities with broadly defined general responsibilities, such as municipalities and counties.

Local governments usually raise revenue through a combination of taxation, fee-for-use charges, and borrowing.<sup>16</sup> Taxes are generally thought of as costs imposed on all taxpayers within a local government’s jurisdiction for purposes of covering the government’s expenses.<sup>17</sup> They are imposed without regard to the particular benefit received by any individual payor, and instead are regarded as contributions to the general welfare of all.<sup>18</sup> Taxes may take a variety of forms, but property and sales taxes are most common at the local level.<sup>19</sup> In addition, a few states allow local governments to levy income taxes.<sup>20</sup> Local

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school districts that work side by side with most municipalities. See MANDELKER ET AL., *supra* note 1, at 17–22 (describing a variety of local, non-municipal government entities).

13. U.S. CENSUS BUREAU, THE 2008 STATISTICAL ABSTRACT 261 (2008), available at <http://www.census.gov/compendia/statab/2008/2008edition.html>; see also Akash Deep & Robert Lawrence, *Stabilizing State and Local Budgets: A Proposal for Tax-Base Insurance 7* (The Hamilton Project Discussion Paper No. 2008-1), available at [http://www.brookings.edu/~media/Files/rc/papers/2008/06\\_tax\\_base\\_lawrence/06\\_tax\\_base\\_lawrence.pdf](http://www.brookings.edu/~media/Files/rc/papers/2008/06_tax_base_lawrence/06_tax_base_lawrence.pdf).

14. See Deep & Lawrence, *supra* note 13, at 6.

15. For instance, it is not clear that government entities with narrowly defined missions will have non-essential expenses eligible for inclusion in the proposed funding structure. Furthermore, use of the structure by a multitude of entities with overlapping geographical jurisdictions may result both in constituent confusion and voter fatigue.

16. See MANDELKER ET AL., *supra* note 1, at 256–57 (describing local finance as a combination of taxes and borrowing).

17. Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the “Get What You Pay For” Model of Local Government*, 56 FLA. L. REV. 373, 379 (2004).

18. *Id.*

19. *Id.* at 379–80.

20. *Id.* at 380. For instance, as your author is painfully aware, both Columbus, Ohio, and



governments may also charge fees or special assessments for specific benefits provided to individual constituents.<sup>21</sup> For example, bus fare, dog licenses, and charges for water, sewer, and garbage disposal are all revenue generating activities that are not thought to be taxes but which are, nonetheless, an increasingly important component of local public finance.<sup>22</sup>

Most scholars who study public finance at the local level credit a rise of fee usage by local governments to state restrictions on the local taxing power.<sup>23</sup> Over the past three decades, state statutory and constitutional restrictions on local tax and spending decisions have become more commonplace and, interestingly, many such provisions found their genesis in the direct democratic process itself.<sup>24</sup> California's Proposition 13 is a generally acknowledged progenitor of these measures,<sup>25</sup> and in light of my recommendation that states permit local governments to use direct democracy in a proportional manner, a brief discussion of its passage and broader effect is warranted. The subject has been extensively covered elsewhere, so this overview will not be comprehensive.<sup>26</sup> Rather, it is intended to highlight one way in which direct democracy comes to the fore in tax and spending decisions: through the voter initiative process.

Popularly hailed as the beginning of a nationwide property tax revolt, California's Proposition 13 is one of the most discussed direct democratic tax decisions of the past century.<sup>27</sup> As such, it is

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New York City, New York, have income taxes at the local level.

21. *Id.* at 381.

22. *Id.* Prevented by voters from raising taxes, local governments have made increasing use of fees and assessments, which has given rise to criticism. Professor Laurie Reynolds observes that local governments' greater reliance on fees may "have a privatizing effect on government services." *Id.* at 380; *see also* Clayton P. Gillette, *Fiscal Home Rule*, 86 DENV. U. L. REV. 1241, 1244 (2009) (noting that limiting the taxing power of home-rule cities forces them to rely on other instruments of funding, which "has a more subtle and potentially more notorious consequence of instantiating a particularly limited view of the proper role of cities").

23. *See* Gillette, *supra* note 22, at 1253 (stating that studies claim tax caps shift local government toward greater use of fees); Reynolds, *supra* note 17, at 392–93 (noting local governments increasingly resort to fees because fees are not subject to tax caps).

24. *See* Stark, *supra* note 9, at 192–93.

25. *See id.* at 192; Mildred Wigfall Robinson, *Difficulties in Achieving Coherent State and Local Fiscal Policy at the Intersection of Direct Democracy and Republicanism: The Property Tax as a Case in Point*, 35 U. MICH. J.L. REF. 511, 532 (2002).

26. Stark, *supra* note 9, at 192 n.7 ("Prop 13 has spawned an enormous literature.").

27. *See* MARTIN, *supra* note 10, at 14 (noting that popular referendum was a watershed

unquestionably relevant to the appropriate role of direct democratic processes in tax decision-making. Rather than serve as a model for the process, I assert that Proposition 13 and its progeny created an imbalance between direct and representative democracy that may force local representatives to make suboptimal decisions, either underfunding necessary public goods, or seeking to supply these goods through accounting subterfuge.<sup>28</sup> I further argue that correcting the balance of direct and representative democracy could prevent future constituent overreach through the direct democratic process.<sup>29</sup> The question is particularly timely, with representative governments and constituents currently in tension with one another as both groups seek to recover from ongoing financial strain.<sup>30</sup>

The state constitutional amendment approved by Proposition 13, which specifies that local property tax rates must “not exceed One percent (1%) of the full cash value of such property,” resulted from citizens’ dissatisfaction with modernization of California’s antiquated property tax regime.<sup>31</sup> In the years immediately preceding Proposition 13, California and other states began to eradicate a practice called fractional assessment.<sup>32</sup> Although not explicitly permitted by law, local tax assessors were known to assess properties at a fraction of their true value.<sup>33</sup> Because property taxes are the product of the local tax rate and property value, fractional assessment reduced the tax liability of those whose property was undervalued by an assessor.<sup>34</sup> As one might imagine, this practice placed an undue amount of discretion in the hands

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moment in tax politics); Robinson, *supra* note 25, at 533 (“Proposition 13’s passage ignited a conflagration.”); Stark, *supra* note 9, at 192 n.7 (“Prop 13 has spawned an enormous literature.”).

28. For instance, localities that are subject to capital spending restrictions may seek to provide public goods by leasing them rather than actually purchasing them, circumventing the capital spending restriction.

29. Or, at the very least, it could stem constituent discontent arising from the inability to selectively locate, *a la* Tiebout, in a jurisdiction where the level of public goods matches constituents’ preferences. For a brief discussion of Tiebout sorting, see *infra* Part V.D.

30. See Michael Cooper, *More Gloom Lies Ahead for Cities, Report Says*, N.Y. TIMES, Sept. 27, 2011, at A10 (discussing that cities must cut spending as a result of lower property tax revenues and less aid from states).

31. CAL. CONST. art. XIII A §§ 1–7; see also MARTIN, *supra* note 10, at 10–15.

32. MARTIN, *supra* note 10, at 12; see also Robinson, *supra* note 25, at 523–25 (discussing how fairer assessment increased taxes which, in turn, increased taxpayer complaints).

33. See MARTIN, *supra* note 10, at 7.

34. *Id.* at 6–15.

of assessors, who were generally elected officials.<sup>35</sup> On the tax books, then, influential families and campaign contributors may have appeared to reside in a modest home, while those with less social or economic clout notionally lived large.<sup>36</sup> According to at least one scholar, fractional assessment of property values was the single largest tax subsidy of the post-war era—ten times greater than the home mortgage interest deduction.<sup>37</sup>

As a matter of equity, fractional assessment was a disaster, and the push for social justice in the 1960s eventually resulted in sweeping amendments to the system.<sup>38</sup> California created a central administration with standardized assessment procedures, and as a consequence, the property values used to calculate local taxes rose precipitously.<sup>39</sup> Although standardization furthered fairness by equalizing the taxation of similarly situated property holders within a locality, it also shocked the citizenry, who responded in an unprecedented way.<sup>40</sup> Studies have shown that Proposition 13 protestors came from all walks of life and from both sides of the political aisle.<sup>41</sup> The Proposition 13 tax protest was different from conservative anti-tax movements today, mainly because it was a bipartisan uprising.<sup>42</sup>

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35. *Id.* at 7.

36. *Id.* at 12–13.

37. *Id.* at 9.

38. *Id.* at 12.

39. *Id.* at 12–13. Prior to the amendment, most people paid tax on only a portion of the value of their property, which provided insulation for market shocks. This was particularly important in California, where wartime and postwar construction sent property values skyward. *Id.*

40. See Robinson, *supra* note 25, at 530 (noting that the U.S. Supreme Court “characterized Proposition 13 as . . . possibly ‘improvident’” (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 17 (1992)); Stark, *supra* note 9, at 199 (explaining that Proposition 13 was “radical” in nature, and it is “not surprising that almost everyone writing about Proposition 13 has described it as a ‘revolt’”).

41. See MARTIN, *supra* note 10, at 3.

42. See *id.* Today’s movement is more one-sided. See Brian Montopoli, *Tea Party Supporters: Who They Are and What They Believe*, CBS NEWS (Apr. 14, 2010), [http://www.cbsnews.com/8301-503544\\_162-20002529-503544.html](http://www.cbsnews.com/8301-503544_162-20002529-503544.html). A *New York Times* and CBS news poll showed that among Tea Party supporters 54% considered themselves Republicans, but 66% stated that they always or usually voted Republican, while 73% of Tea Party backers consider their political philosophy to be somewhat or very conservative. *Id.*; CNN Polling Ctr., *Who Are the Tea Party Activists*, CNN OPINION RES. CORP. (Feb. 17, 2010), <http://i2.cdn.turner.com/cnn/2010/images/02/17/rel4b.pdf> (showing polling data explaining that more than three fourths of tea party activists consider themselves conservatives, and 87% would vote for Republican candidates in their own district if there

Scholars almost universally agree that Proposition 13 was the first domino to fall in citizens' direct democratic bid to seize control of local finance.<sup>43</sup> Immediately afterward, a wave of states voted on tax and spending limits in what commentators have termed "tax revolts."<sup>44</sup> As a result, a number of state constitutions now contain express limitations on the tax and spending powers of local governments.<sup>45</sup> Professor Stark has noted that these restrictions tend to fall into two broad categories: (1) direct measures that limit the tax rate, tax base, or spending decisions, and (2) procedural measures such as those that require a popular vote or supermajority approval requirements for new taxes or increased rates.<sup>46</sup>

Although the efficacy and advisability of direct democratic tax and spending restrictions necessarily vary on the basis of local government and constituent composition, the eventual scholarly consensus has been qualified disapproval.<sup>47</sup> Rather than join those who approve or disapprove of the voter-imposed limitations, I instead suggest that guiding direct democratic tax decision-making is a better solution than either relying on it or undermining it. This is because, with guidance, voter involvement can create a constructive environment that provides the representative government with information on voter preferences and fosters constituent cooperation in the provision of public goods.<sup>48</sup>

#### *B. What Is Wrong with Direct Democratic Tax Restrictions?*

To best understand how to usefully employ direct democratic decision-making in the local tax arena, we must understand both the flaws that it seeks to correct and the structural limitations imposed by its

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were no Tea Party-endorsed candidate).

43. For example, see Robinson, *supra* note 25, at 532 ("Proposition 13 set off a chain reaction.").

44. Stark, *supra* note 9, at 191–92 (noting that Colorado, Michigan, Missouri, Montana, and Washington all have voted in favor of constitutional amendments requiring local governments to seek approval through popular vote on new and increased taxes); *see also* Robinson, *supra* note 25, at 532–33.

45. *See* Stark, *supra* note 9, at 191–92.

46. *Id.* at 193.

47. *See, e.g.,* Gillette, *supra* note 22, at 1252–53 (noting that while constraints on the taxing power can, in theory, be corrective, in reality they are "a rather blunt instrument that can have perverse effects"); Robinson, *supra* note 25, at 518 (arguing that "unmonitored ballot box fiscal activity has gone too far," and that such restrictions have a "potentially crippling effect" on the ability of local government to organize its finances).

48. *See infra* Part III.

current form. One means of doing so is to look more closely at the narrative of Proposition 13 to the extent that it serves as a representative example. It is clear that Proposition 13 was a direct voter response to bad decisions made by local governments. Local governments made up of elected officials failed to effectively limit the discretion wielded by tax assessors, who were also elected officials. This resulted not only in patronage but also in generally regressive effective rates of property taxation.<sup>49</sup> Also, when this problem was corrected through state centralization, local governments made up of elected officials failed to adjust property tax rates downward in response to an increase in assessed property values.<sup>50</sup>

Although the first of these mistakes was, perhaps, openly and notoriously a part of the representative democratic process, the second, which led to the tax revolt, was seemingly a malfunction of the same process. In other words, elected officials' sudden insistence on collecting the full rate of property tax on the full value of constituents' homes and businesses was not anticipated by the constituents who voted for the decision-making representatives.<sup>51</sup> Rather, it was outside the scope of predictable local government action. Put otherwise, the actions of elected officials were not, speaking colloquially, representative of constituents' preferences, nor were they the result of a deliberative debate that weighed constituents' preferences in a politically created balance. State intervention, then, contributed to a failure of the local representative process. In a libertarian-leaning society, it is natural that constituents responded to tone-deaf representative governments by reiterating their preferences directly, outside of the representative process.<sup>52</sup>

A lack of symmetry between constituents' preferences and the actual outcomes produced by representative democracy is not necessarily

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49. See MARTIN, *supra* note 10, at 6–15.

50. See *id.* at 12–14.

51. See *id.*

52. See Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 435–36 (1998) (noting that direct democracy causes citizens to believe that they have a voice in governance); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47, 48 (1995) (arguing that ballot initiative provides a political outlet for citizens who are dissatisfied with their representative government); Ethan J. Leib, *Can Direct Democracy Be Made Deliberative?*, 54 BUFF. L. REV. 903, 905 (2006) (stating that direct democracy persists because representative government is “often too remote from the people”).

troubling. In fact, the same result is common at all levels of government in the United States.<sup>53</sup> Furthermore, it is not troubling that representative governments produce unexpected outcomes under unexpected circumstances. However, a radical deviation from the expected course of governance, such as California local governments' failure to adjust tax rates in response to a drastic state-mandated widening of the tax base, may fall beyond the scope of actions and omissions implicitly approved by constituents. It is possible to claim that Proposition 13 arose as a direct result of constituents' perception that local governments were grabbing assets in a way that exceeded not the formal, but the *implicit* scope of representatives' authority. In response, voters made the scope of their implicit grant of authority explicit through the enactment of express limitations on the representative government.

If we accept this version of events, it becomes clear that the balance of representative and direct democracy in tax decision-making should be delineated in terms of appropriate local government functions. Assume for a moment a pure form of representative democracy where officials are elected by constituents to act on their behalf in local governance. In this scenario, local government officials are agents of sorts. They are empowered by constituents to make decisions on the constituents' behalf on matters delegated to them.<sup>54</sup> This delegation occurs not only

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53. Constituents commonly complain that government has failed to represent their interests. See, e.g., Cathleen Decker, *Unhappy but Not About to Change*, L.A. TIMES, July 18, 2010, at A33 (citing that approval rates for California state legislators were at 16%, and 22% for the governor); Steve Kraske et al., *In Missouri and Kansas, Wrath Runs High, but Voters Are Likely to Be Few Tuesday*, KAN. CITY STAR, Aug. 1, 2010, at A1 (citing nationwide high levels of discontent of Americans, as evidenced by only 21% approval of the job Congress is doing, and only 33% believing that America is headed in the right direction); Megan Thee-Brenan & Marina Stefan, *"The System Is Broken": More from a Poll of Tea Party Backers*, N.Y. TIMES, Apr. 18, 2010, at N14 ("They call themselves my representatives, but basically they don't represent me. They're forever saying things like we need to reach across the aisle. Well, I don't want you to reach across the aisle. The other side wants to control my life, overtax me and spend in insane ways." (quoting a truck driver)); Kate Zernike & Megan Thee-Brenan, *Discontent's Demography: Who Backs the Tea Party*, N.Y. TIMES, Apr. 15, 2010, at A1 (noting that activists argue that recent healthcare overhaul and government spending demonstrate that their opinions are not being represented in Washington).

54. See *Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976) ("[A]ll power derives from the people, who can delegate it to representative instruments which they create."). For examples of state constitutions granting local governments such power, see CAL. CONST. art. XI, §§ 3–4 (stating that counties or cities have the power to adopt their own charters providing for the type of local governing body and other elected officials); CAL. CONST. art.

through governing documents such as the state constitution, city charter, or state statutes, but also through the collective expectations of the electorate.<sup>55</sup> In the following Parts, I will refer to this delegation of authority through constituents' collective expectations as an implicit delegation.

*C. Is Voter Control an Effective Political Check or a Power Grab?*

In states where direct democracy exists, implicit delegation of authority by constituents may serve as a very real limitation on the representative government.<sup>56</sup> This is because actions of a representative democratic government that fall beyond the scope of constituents' implicit delegation of authority may increase the risk of constituent revolt. It is reasonable to surmise that constituents perceive voting as a means of making their voices heard on the range of local governance issues. However, this is rarely the case, since constituents' votes for candidates do little to reveal their preferences on individual matters.<sup>57</sup> As a result, actions of the representative government may have little to do with constituent preferences. If the local government action or

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XI, § 7 (stating that a county or city can enforce "all local, police, sanitary, and other ordinances and regulations not in conflict with [state] general laws"); N.Y. CONST. art. IX, §§ 1-2 (stating that local governments are empowered to elect representatives who in turn can adopt local laws as long as they are not in conflict with state general or special laws); OHIO CONST. art. X, §§ 2-3 (stating that counties and townships have township trustees which are permitted to collect local taxes and have charters which designate the form of government and determine in what areas counties may have exclusive authority as long as that power is permitted under the Constitution and laws of the state); and OHIO CONST. art. XVIII, §§ 3, 7 (explaining that municipalities have similar powers to counties and townships in that they have the authority to adopt their own charters and adopt local laws as long as not in conflict with state general laws).

55. See *supra* text accompanying notes 52, 54. For additional examples of explicit statutory delegations of power, see 53 PA. CONS. STAT. (West 2009). This title grants a wide variety of powers to municipalities, including, among other things, the power to undertake school district projects, 53 PA. CONS. STAT. § 5606, acquire land and water rights, *id.* § 5615, and provide administrative services to business improvement districts, *id.* § 5404.

56. For a disturbing example, consider California's Proposition 8. This controversial ballot proposition amended the California Constitution to ban gay marriage, which was formerly available in some California cities, most notably San Francisco. See CALIFORNIA ATT'Y GEN., OFFICIAL VOTER INFORMATION GUIDE 128 (2008), available at <http://www.voterguide.sos.ca.gov/past/2008/general/text-proposed-laws/text-of-proposed-laws.pdf#prop8> (containing Proposition 8's official language).

57. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1514 (1990) (arguing that voters' choice of candidates does not reveal their preferences on individual issues).

inaction surpasses that which could have been anticipated by constituents, the government acts without implicit authorization of its constituents, even if it acts with explicit statutory or constitutional authorization. Constituents may believe that representatives are either unable to perceive their implicit delegation of authority,<sup>58</sup> or that representatives are simply ignoring the limits of that delegation.<sup>59</sup> As a consequence, where the cost of an implicitly unauthorized action is high, constituents may resort to means other than the representative democratic process, such as complaint, protest, or, more forcefully, a ballot initiative formally limiting the scope of local government.<sup>60</sup> In this

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58. See Tracy M. Gordon, *Bargaining in the Shadow of the Ballot Box: Causes and Consequences of Local Voter Initiatives*, 141 PUB. CHOICE 31, 33 (2009) (noting that empirical evidence demonstrates initiatives are employed more frequently in larger, more diverse jurisdictions, a finding consistent with explanations of direct democracy arising from “legislative uncertainty about voter preferences”); Eule, *supra* note 57, at 1504, 1521 (stating notion that “legislative enactments represent majority will” is a “fiction” and, later, stating that it is “fanciful” to equate preferences of representatives with preferences of their constituents).

59. There are a number of explanations for why representatives may not act in accordance with constituents’ wishes. Because representatives face only binary elections, a constituent’s vote for a representative is not a guarantee that the representative will act in accordance with that particular constituent’s desire on a given issue. See Gillette, *supra* note 22, at 1252. Voters may retain representatives that have done a good job in some things but not in others, so long as government runs smoothly. *Id.* Furthermore, local elections may be less competitive, so the electoral check may be less effective at this level. *Id.* As a result, electoral politics do not ensure a truly representative government. Worse yet, dominant interest groups may possess sufficient power to set the legislative and political agendas so that voters have only a limited set of choices, few or none of which reflect their preferences. See Arthur Denzau et al., *Spending Limitations, Agenda Control and Voters’ Expectations*, 32 NAT’L TAX J. 189, 189 (Supp. 1979). Finally, and more cynically, representatives may respond to perverse incentives, such as the contrary interests of wealthy campaign donors. Leib, *supra* note 52, at 905.

60. See Collins & Oesterle, *supra* note 52, at 48 (arguing that direct democracy provides political outlet for citizens who are dissatisfied with representative government); Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 278 (2004) (noting that some view initiatives and referenda as causes of poor representative government but that this view fails to recognize that the resurgence of direct democracy was a direct result of public distrust and disgust of representative government); Gordon, *supra* note 58, at 33 (stating that initiatives are employed more frequently in jurisdictions where diversity of political attributes and lack of stability in population make it difficult for representative government to discern wishes of the median voter); John G. Matsusaka, *Direct Democracy Works*, 19 J. ECON. PERSPECTIVES, 185, 192 (2005) (explaining that direct democracy affects policy by allowing public to “override decisions of unfaithful elected officials”); John G. Matsusaka, *The Eclipse of Legislatures: Direct Democracy in the 21st Century*, 124 PUB. CHOICE 157, 162 (2005) (arguing that legislatures are being replaced by the public in making laws on important social issues in part because of a decline in confidence of legislatures).



scenario, we might characterize the resulting ballot initiative as a direct democratic check on representative democracy.<sup>61</sup> Less charitably, we could characterize it as a collective power grab by constituents in the political majority to prevent redistribution of assets through the provision of public goods or direct grants to those in the political minority.<sup>62</sup>

Direct democracy that functions as a power grab rather than a check is particularly troubling from a normative standpoint. Just as representative democratic local governments can overstep their boundaries by seizing private interests, direct democracy may allow private citizens to overstep their boundaries by seizing public interests.<sup>63</sup> This happens, at the very least, when direct-democratically enacted tax

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61. See Gillette, *supra* note 22, at 1252 (noting that electoral politics alone may be insufficient to prevent representative government from acting in contravention to constituent wishes); Leib, *supra* note 52, at 905 (arguing that direct democracy allows citizens to correct for legislators' response to perverse incentives such as the need to amass campaign contributions).

62. See Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294 (2007) (stating that direct democracy is "used to disadvantage minorities"); Clark, *supra* note 52, at 434 (explaining that due to uneven voter turnout and influence of special interests, direct democracy does not necessarily produce a result preferred by constituents); see also THE FEDERALIST NO. 51, at 288 (Alexander Hamilton) (E.H. Scott ed., 1898) ("If a majority be united by a common interest, the rights of the minority will be insecure."); Gillette, *supra* note 22, at 1245 (stating that "disparate treatment of taxes and fees implies a distrustful view of redistribut[ion]" at the local level); Gordon, *supra* note 58, at 32 (noting that empirical data demonstrates "that states where the initiative is available have spent less and relied less on taxes"); Richard Hasen, *Assessing California's Hybrid Democracy*, 97 CALIF. L. REV. 1501, 1502-03 (2009) (book review) (stating that direct democracy is "too blunt").

63. See, e.g., Booth, *supra* note 3 (discussing a failed property tax levy that resulted in police and fire department cuts of more than \$5.5 million, and how the city turned off street lights in an effort to reduce its electric bill, and remove trash cans from city parks in a further effort to conserve limited funds); Krugman, *supra* note 3 ("Colorado Springs has made headlines with its desperate attempt to save money by turning off a third of its streetlights, but similar things are either happening or being contemplated across the nation, from Philadelphia to Fresno."); Karen Kucher et al., *Brownout May Have Had Role in Tot's Death*, SAN DIEGO UNION-TRIB., July 21, 2010, <http://www.utsandiego.com/news/2010/jul/21/fire-dept-blames-brownouts-toddler-death/> (discussing how funding cuts to fire department contributed to death of boy and failure to meet national emergency response time standards). But see David N. Figlio & Arthur O'Sullivan, *The Local Response to Tax Limitation Measures: Do Local Governments Manipulate Voters to Increase Revenues?*, 44 J.L. & ECON. 233, 233 (2001) (stating that cities subject to statewide tax limitations may manipulate spending to encourage positive tax voting by making visible cuts to services while preserving spending at the administrative level); Gillette, *supra* note 22, at 1253 (stating that broad restrictions on cities' fiscal authority can have perverse effects on spending, including visible service cuts intended to induce favorable tax voting).

restrictions impinge on the representative government's provision of essential public goods agreed upon through deliberation and debate.<sup>64</sup>

Additional arguments against the use of direct democracy in tax decisions and other areas of governance are numerous. For instance, Professor Robinson has asserted that, “[b]y its very nature, ballot box revenue-collection and budgeting cannot be informed by coherent tax or fiscal policy.”<sup>65</sup> This is mainly a result of procedural defects in the direct democratic process.<sup>66</sup> Critics of direct democracy argue that initiatives are often poorly drafted<sup>67</sup> and are seldom understood by constituents.<sup>68</sup> In addition, the process is subject to capture by well-funded interest groups even when their objectives deviate from those of the median voter.<sup>69</sup> Furthermore, because voter participation may be quite low,

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64. See Clark, *supra* note 52, at 463 (noting that representative government requires “balancing, blending, and reconciling the sometimes conflicting desires” of various constituents into a coherent plan of governance).

65. Robinson, *supra* note 25, at 518. This is because the direct democratic process makes it nearly impossible for voters to “consider and accommodate competing principles in the fiscal lawmaking process.” *Id.* at 543. Furthermore, the initiative process is less deliberative than the usual means through which a statute or regulation is created and enforced. See *id.* at 546–47; see also Leo P. Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOY. U. CHI. L.J. 297, 312 (2009) (“[T]he public seems largely ignorant of how taxes work.”).

66. See Collins & Oesterle, *supra* note 52, *passim*.

67. See Chemerinsky, *supra* note 62, at 297–98 (stating initiatives are poorly drafted because the usual checks on legislative drafting, such as committee participation and review, are absent); Collins & Oesterle, *supra* note 52, at 77 (discussing that initiatives can be poorly drafted because they are created by partisans, sometimes in secret); Leib, *supra* note 52, at 908 (stating poor drafting may be deliberate in an effort to mislead voters).

68. See Chemerinsky, *supra* note 62, at 299–300 (arguing as a result of voters' lack of information on the purpose and function of local initiatives, the process lacks the element of deliberative debate needed for informed decision-making); Collins & Oesterle, *supra* note 52, at 76 (drafting may be intentionally complex to confuse voters); Eule, *supra* note 57, at 1516 (“Considering the complexity and obtuseness of some measures, it’s a wonder anyone knows what he or she is voting on.”); Shawn P. Flaherty, “Dollars, CPI, and Voter Empowerment”: *Public Act 94-976 and Its Impact on Local Government Tax Referenda*, 27 N. ILL. U. L. REV. 377, 387 (2007) (showing surveys of voter comfort with initiatives and referenda reveal that many voters either needed more information or had difficulty reading and comprehending the ballot); Elizabeth Garrett & Mathew D. McCubbins, *When Voters Make Laws: How Direct Democracy Is Shaping American Cities*, PUB. WORKS MGMT. & POL’Y, July 2008, at 39, 47 (2008) (discussing exit poll of voters in San Diego revealing that a majority were unsure of contents of ballot propositions and approximately half who answered factual questions about the propositions gave incorrect responses); Michael S. Kang, *Democratizing Direct Democracy: Restoring Voter Competence Through Heuristic Cues and “Disclosure Plus,”* 50 UCLA L. REV. 1141, 1145–46 (2003) (noting that surveys of voters demonstrate that many do not understand the nature of the ballot measures on which they are voting).

69. See Chemerinsky, *supra* note 62, at 298 (noting that anyone with sufficient funding

particularly in local elections, a very small number of voters may drive the decision-making process.<sup>70</sup> Alternatively, a majority of voters may use the process to push through a political position targeted at a then-disfavored group such as sexual, religious, or racial minorities.<sup>71</sup> Finally, because voters have used the direct democratic process to limit local governments' ability to raise revenue, and because the amount of services provided by local governments is directly tied to the amount of revenue they can generate, direct democratic tax decision-making also has the power to impinge on the essential functions of local government.<sup>72</sup>

Despite these difficulties, very few commentators have called for the

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can avoid checks inherent in the legislative process by simply placing an issue on the ballot); Collins & Oesterle, *supra* note 52, at 92 (noting that the common criticism of direct democracy is "that money unduly corrupts the initiative process"); Denzau et al., *supra* note 59, at 189 (arguing that powerful interest groups may capture the political agenda so as to present voters with only limited choices, few or none of which reflect median voters' preferences); Hasen, *supra* note 62, at 1511 (discussing polling data from California indicating that voters "are concerned about the role of money" in the initiative process); Kang, *supra* note 68, at 1147 (stating excessive campaign spending can influence the election result); Leib, *supra* note 52, at 906–07 (arguing individuals or groups with more funding are able to control the debate).

70. See Clark, *supra* note 52, at 434 (stating that uneven voter turn-out may engender results that obscure the popular will); Garrett & McCubbins, *supra* note 68, at 42 (voter turnout can be extremely low in local elections); Leib, *supra* note 52, at 909–10 (explaining that "empirical evidence also reveals that those who vote in ballot-measures elections are older, more educated, richer, and more ideological than the general population," and thus are not representative); see also Levmore, *supra* note 11, at 391–92 (noting that low voter turnout for conventional voting may be a reason to favor proportional-tax voting).

71. See *Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (finding unconstitutional direct democratic amendment of the Colorado Constitution forbidding government from extending legal protection to gay persons); Chemerinsky, *supra* note 62, at 294–97 (arguing because direct democracy lacks the checks and balances present in representative government, ballot initiatives such as the recent Michigan civil rights initiative, may be used to disadvantage minorities); Oesterle, *supra* note 7 (showing that in 2004 eleven states approved measures blocking same sex marriage). For an unfortunate example of this phenomenon in reverse, see Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 19 (1997) (noting that unlike western states, southern states avoided the use of direct democracy when adopting their post-Civil War constitutions in an effort to disenfranchise recently freed African Americans). For an international example of direct democracy employed in a discriminatory fashion, see Nick Cumming-Bruce, *Swiss Ban on Minaret Building Meets Widespread Criticism*, N.Y. TIMES, Dec. 1, 2009, at A15 (discussing popular Swiss referendum banning construction of minarets characterized as Islamophobic).

72. See *supra* note 64 and accompanying text.

abolition of direct democracy in tax decision-making.<sup>73</sup> This is because it provides a necessary and useful check on representative democracy.<sup>74</sup> What is needed, then, is a means of usefully channeling, rather than eliminating, direct democracy. In other words, the ability of a political majority to seize power from the representatives—who are supposed to protect the interests of the political minority—necessitates creation of a check on the direct democratic check.

Commentators have called for a number of restraints on the use of direct democracy in tax decision-making, the bulk of which are beyond the scope of this Article. Suggestions include, among others, amending state constitutions to limit the use of direct democracy in tax and spending decisions, limiting voter input on those decisions to referenda originating with the legislature, offering multiple combinations of tax and spending choices on ballots to allow for more deliberative decisions, and changing the final product of the initiative process into instructions to the legislature rather than a constitutional amendment.<sup>75</sup> Although each of these proposals could certainly have the effect of preventing direct democratic incursion on essential governmental functions, all but one of them—offering multiple funding levels on ballots—would create inorganic strictures on direct democracy’s ability to function as a check on representative democracy.<sup>76</sup> Naturally, any rigid measure designed to

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73. Robinson, *supra* note 25, at 559 (noting that “[r]epeal would be, at a minimum, politically unpopular”).

74. *Id.* (arguing that properly structured initiatives “could serve as an important safety valve and could be a very useful conduit for public opinion”).

75. *Id.* at 562–65.

76. In addition, there are a multitude of non-tax specific proposals for improvement of the direct democratic process, some of which I will draw upon in later parts of the Article. For examples, see Clark, *supra* note 52, at 471 (noting a recommendation to account for voter prioritization of ballot issues through (a) “cumulative plebiscitary voting” where “each voter would be allotted a number of votes equal to the number of initiatives,” which the voter may distribute among the initiatives according to both priority and preference, and (b) multi-issue ballot usage where voters may choose between various plausible combinations of government action); Collins & Oesterle, *supra* note 52, at 107–13 (recommending addressing procedural flaws by requiring use of indirect initiative where citizens first approach the legislature, instituting word limits and a single-subject rule, requiring a longer qualifying period, and treating laws resulting from initiatives the same as statutes passed by the legislature); Kang, *supra* note 68, at 1143 (discussing a recommendation to address lack of citizen understanding and competence by providing ready access to “heuristic cues,” such as public endorsement by prominent figures); Leib, *supra* note 52, at 915–16 (discussing recommendation to introduce an element of deliberative debate to direct democracy through creation of a new “popular branch” of government comprised of citizens who are required to serve for a limited time similar to jurors and who debate and produce recommendations on issues); Glen Staszewski,

protect the tax and spending process from popular intrusion will shift power from constituents to elected representatives, giving representatives more latitude to act beyond the scope of the authority implicitly delegated to them. In other words, the two decision-making processes exist in balance with one another. Unless placed in a collaborative relationship, one will always lose power when the other one gains. Our goal, then, should not be a one-size-fits-all solution, but rather a means of creating the appropriate equilibrium within individual localities.

Short of an omnipotent oracle to pronounce when direct democracy is and is not appropriate, we cannot create a locality-specific equilibrium through rules-based restrictions on direct democracy. For this reason, I do not suggest any additional inorganic limitation of representative or direct democratic processes in public finance. Rather, as described more fully below, I propose retention of the existing direct democratic and representative processes and the addition of one new piece: creation of specific opportunities for the exercise of direct democracy in local government spending decisions. Stated more precisely, citizens should be permitted to opt out of paying for certain narrowly defined, non-essential expenditures such as local fireworks or movies in the park. Of course, these opportunities to voice an opinion on spending cannot fully alleviate the threat of direct democratic usurpation of local governments' power to provide the essential goods and services. In fact, they may seem unimportant at first blush. But giving voters a greater decision-making role in non-essential spending has the potential to increase civic participation and buy-in while decreasing the likelihood that constituents will seek blunderbuss all-or-nothing solutions to local tax and spending concerns.

#### *D. Why Might Constituent–Government Collaboration Be Beneficial?*

Ample evidence supports the assertion that localities may benefit by allowing constituents to take a role in decision-making on tax and spending issues. Although the traditional model of collective action supposes self-interested individuals who will not contribute to the

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*The Bait-and-Switch in Direct Democracy*, 2006 WIS. L. REV. 17, 56 (stating recommendation to apply structural safeguards applicable to federal agency actions, such as notice and comment hearings and court review using the arbitrary and capricious standard, to direct democratic actions).

collective good if they can instead free-ride,<sup>77</sup> behavioral science has proven otherwise.<sup>78</sup> It is now generally accepted that when asked to contribute to public goods, people will behave cooperatively if they believe that others are doing the same.<sup>79</sup> Likewise, if people believe that others are shirking, they will retaliate in kind.<sup>80</sup> In fact, researchers have posited that this response to others' level of cooperation is stronger than an individual's motivation to maximize wealth.<sup>81</sup> As Professor Kahan has noted, "In sum, individuals behave like the amoral calculators posited by the conventional theory *only* when they believe that others are cheaters; if they believe that others are morally motivated to comply, they reciprocate by complying in turn, whether or not they believe they could profitably evade."<sup>82</sup>

So effectual is the influence of observed cooperation that "collective behavior is susceptible to multiple, self-sustaining equilibria depending on the beliefs individuals form about the likely behavior of others."<sup>83</sup> In other words, when one person cooperates in response to another, her action may foster the cooperation of a third person, and so on. This may have an observable effect of social influence,<sup>84</sup> which may affect political decision-making.<sup>85</sup> For instance, a bandwagon effect may influence a constituent to back a winning candidate or cause, or aversion to acting against popular opinion could prevent a constituent from choosing an unpopular candidate or cause.<sup>86</sup> Studies of why people obey the law

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77. See, e.g., MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 1–2 (1965).

78. See Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333, 333 (2001) [hereinafter Kahan, *Trust*] ("[A]s a wealth of empirical social science evidence now makes clear, Olson's *Logic* is false.").

79. *Id.* at 334.

80. *Id.*

81. *Id.* at 335.

82. *Id.* at 341–42.

83. *Id.* at 339.

84. See Kahan, *Gentle Nudges*, *supra* note 6, at 615–16 ("When an individual perceives that a relatively large group of like-situated people are engaging in a certain form of behavior, she is more likely to engage in the that behavior, too; this increases the size of the group, inducing even more individuals [to join the group] . . ."). "Social influence" can be defined as the tendency of individuals to conform their conduct to the conduct of others. Dan Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 352 (1997) [hereinafter Kahan, *Social Influence*].

85. Kahan, *Social Influence*, *supra* note 84, at 353.

86. *Id.*

have produced similar results.<sup>87</sup> As noted by Professor Lederman, survey data consistently show that people who report compliance with tax laws believe that other taxpayers are also in compliance, while those who report non-compliance believe that other taxpayers also cheat.<sup>88</sup> This effect may be the strongest when social influence arises through an individual's observation of reference groups, which are groups of people with whom the individual identifies or with whom she aspires to be identified.<sup>89</sup> Research has shown that not only are people likely to adopt the norms of their reference groups,<sup>90</sup> but "they support or oppose particular regulations as a way to express solidarity with their groups."<sup>91</sup> In fact, this can happen even if an individual has no more information about a particular group than the results of a simple opinion poll.<sup>92</sup>

The research described above, if generalizable, suggests that allowing constituents to take a role in decision-making and allowing them to access aggregate information about others' decisions could create a more cooperative local environment as well as imbue certain spending decisions with more legitimacy.<sup>93</sup> Indeed, research on criminal punishment has demonstrated that by relaxing its monopoly in favor of community involvement, the government can achieve greater legitimacy

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87. *See id.* at 354.

88. Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1469 (2003).

89. *See* Richard G. Hall et al., *The Effect of Reference Groups, Opinion Polls, and Attitude Polarization on Attitude Formation and Change*, 7 POL. PSYCHOL. 309, 310 (1986). "Reference group" can be described as a group to which an individual relates and compares himself. *Id.*

90. *Id.* at 319.

91. Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in 50 THE PSYCHOLOGY OF LEARNING AND MOTIVATION 101, 122 (Daniel M. Bartels et al. eds., 2009).

92. Hall et al., *supra* note 89, at 320.

93. *See* Kenworthy Bilz, *The Puzzle of Delegated Revenge*, 87 B.U. L. REV. 1059, 1106–10 (arguing that because the acts of one's own group members can imbue state actions with legitimacy, community involvement in governance can foster a perception of legitimacy); Kahan, *Social Influence*, *supra* note 84, at 352–53 (stating that individuals are more likely to cooperate when they believe that others are cooperating); *see also* Levmore, *supra* note 11, at 406 (noting that moving away from mandatory tax toward voluntary contribution may develop constituents' commitment to a cause); Susan Cleary Morse, *Using Salience and Influence to Narrow the Tax Gap*, 40 LOY. U. CHI. L.J. 483, 525 (2009) (suggesting that federal pro-tax messages could be made more salient by allowing taxpayers to earmark a portion of taxes for public goods that they support).

of action in the eyes of constituents.<sup>94</sup> The same should be true of local government's monopoly over tax and spending decisions. Facilitating constituent choice in areas of non-essential spending should increase constituent satisfaction with the results of such spending. Furthermore, overall constituent support for non-essential spending should foster cooperation on the part of individual constituents, thereby increasing civic buy-in. In the alternative, if the bulk of constituents are unsupportive of non-essential spending, the representative government will be unable to engage in some portion of it. In either case, the chance of tax revolt is lessened.

### III. PROPOSAL FOR OPT-OUT FINANCING OF NON-ESSENTIAL GOVERNMENT EXPENDITURES

In the second part of this Article, I have suggested that the current balance of representative and direct democracy in local tax and spending decisions is suboptimal, primarily because direct democracy may over-correct for the excesses of representative democracy and because current forms of direct democracy operate on an all-or-nothing basis. Over-correction may be a result of constituents' views that, although representative local governments have acted within the letter of the law, their actions have fallen beyond the boundaries of constituents' implicit delegation of authority to representatives.<sup>95</sup> Because tax law does not abide by the rules of physics, constituent reactions to perceived excesses are neither equal nor opposite. Instead, they have historically resulted in explicit delineations of the representative government's authority that may regain the excess and then some.<sup>96</sup> As such, direct democratic limitations and subsequent

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94. See Bilz, *supra* note 93, at 1110.

95. See discussion *supra* Part II.

96. See, e.g., CAL. CONST. art. XIII A–D (requiring that all taxes, including special and general, no matter who they are imposed on, must be approved by voters prior to taking effect); COLO. CONST. art. X, § 20(4)(a) (new amendment mandating that there must be voter approval for “any new tax, tax rate increase . . . or a tax policy change directly causing a net tax revenue”); MICH. CONST. art. IX, §§ 25, 31 (limiting local property taxes and prohibiting local government from imposing any new tax or increasing the rate of any existing tax without approval from a majority of voters in that locality); MO. CONST. art. X, § 22 (requiring voter approval for any increased or new local taxes); see also Bert Waisanen, *State Tax and Expenditure Limits—2008*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/default.aspx?tabid=12633> (last visited Jan. 23, 2012) (noting that voters in Colorado approved suspending the restrictive limits of the amendment for five years by allowing the state to retain all revenues, and citing a Washington state initiative requiring



voter refusal to approve tax levies have the potential to impede local governments' ability to carry out essential functions.<sup>97</sup>

Despite these perceived flaws, I do not propose that states place additional restrictions on the direct democratic process. In my view, the threat of direct democracy serves as an important check on local representative governments. Rather, I suggest that local governments create additional, targeted direct democratic processes that allow constituents to express preferences about some non-essential governmental spending as described below.<sup>98</sup>

Specifically, I propose that local representative governments identify specific items of non-essential spending within the constraints set forth below and separate them from the remainder of the budget. Constituents would be permitted to opt out of paying for identified expenses. By opting out or continuing to pay, constituents could individually voice and register preferences about the acceptable delegation of discretionary spending power to the local government. An opt-out is preferable to an opt-in, I argue, because constituents who cannot be bothered to opt out generally will not have strong preferences about the expenses up for debate. These constituents' lack of strong preferences justifies a presumption in favor of the representative government. I further propose basing the mechanism for this process on an existing opt-out system of public finance. In the paragraphs that follow, I will describe a German tax system that could serve as a model for proportionate direct democratic decision-making through an opt-out process, describe important ways in which my proposed model differs from the existing German tax, set forth perceived benefits of the model, and address potential criticisms.

#### *A. The German Church Tax as a Form of Local Tax*

Germany, as strange as it may seem, allows some religious

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voter approval if state revenue measures result in expenditure above the statutorily provided expenditure limit).

97. See *supra* text accompanying note 64.

98. As described in detail below, I view non-essential governmental spending as spending that is not mandated by state or federal statute, that does not relate to a good or service that is provided primarily by the local government, and that may fall beyond the aggregate implicit expectations of constituents about the scope of representative government given the circumstances in which the spending decision was made. See *infra* Part III.C.

congregations to tax their congregants.<sup>99</sup> A vestige of the Middle Ages, this system is nominally religious in nature but shares many attributes with local taxation in the United States.<sup>100</sup> As a result, it makes an intriguing model for innovative public finance.<sup>101</sup> Members of religious congregations are automatically enrolled in the congregation's taxing jurisdiction, and taxes chosen by the congregation may be enforced by the state at the congregation's request.<sup>102</sup> In many cases, congregations have chosen an income tax that is collected through state wage withholding and then remitted back to the taxing organization.<sup>103</sup> Congregations often use the collected funds to provide goods and services to the general public, regardless of religious affiliation.<sup>104</sup> These services, which are equally available to members and non-members in most cases, include kindergartens, recreation centers, schools, nursing homes, and hospitals, among other things.<sup>105</sup>

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99. See WEIMARER REICHsverfassung art. 137, [GRUNDGESETZ] [GG] [CONSTITUTION] art. 140 (Ger.); GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND art. 137, 140 [GRUNDGESETZ] [GG] [BASIC LAW], Aug. 11, 1919 (Ger.).

100. See Hoffer, *supra* note 8, at 635–37.

101. See *id.* at 636–37.

102. See, e.g., Kirchensteuergesetz des Bundeslandes Berlin [KiStG] [Berlin Church Tax Act], Apr. 2, 2009, GVBL. Berlin at 23, § 3(1); Kirchensteuergesetz des Bundeslandes Sachsen [SächsKiStG] [Saxony Church Tax Act], Mar. 14, 2002, SächsGVBL. at 82, last amended by Gesetz, Apr. 3, 2009, SächsGVBL. at 153, § 4(1); Kirchensteuergesetz des Bundeslandes Bayern [Bay KirStG] [Church Tax Act of the Federal State of Bavaria], Dec. 22, 2008, Bay. GVBL. at 973, § 4.

103. See KiStG, *supra* note 102, § 1(2) (stating that administration of the tax is the obligation of the tax-entitled religious community unless otherwise provided by law). Enforcement of the taxes under the statute will be self-administered by the tax-entitled religious community, according to the Verwaltungs-Vollstreckungsgesetz [VwVG] [Administration and Enforcement Act], Apr. 27, 1953, BGBl. I at 157, last amended by Gesetz, July 29, 2009, BGBl. I at 2258; see also Bay KirStG, *supra* note 102, § 17(1) (stating that levies must be administered by the religious organization, which may request the State Ministry of Finance to assume the collection function); Gerhard Robbers, *State and Church in Germany*, in STATE AND CHURCH IN THE EUROPEAN UNION 57, 69 (Gerhard Robbers ed., 1996) [hereinafter Robbers, *State and Church*].

104. See Robbers, *State and Church*, *supra* note 103, at 63 (noting churches provide charitable works, the absence of which would vitiate the constitution's guarantee of a social state); see also Christina Sticht, *The Role of the Churches in Germany*, GOETHE-INST. (May 2004), <http://www.goethe.de/ges/phi/dos/rkd/en2012816.htm>.

105. Gerhard Robbers, *Minority Churches in Germany*, in EUROPEAN CONSORTIUM FOR CHURCH–STATE RESEARCH, THE LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION 153, 163 (1993) [hereinafter Robbers, *Minority Churches*]; Jens Petersen, *The Church Tax in Germany: A Short Information*, <http://www.steuer-forum-kirche.de/church-tax.pdf> (last visited Jan. 25, 2012).

Strikingly, the tax which helps to pay for these items is completely avoidable if one is willing to disavow religious affiliation or to switch to a congregation that does not levy the tax.<sup>106</sup> This is easily accomplished by filing simple paperwork.<sup>107</sup> Given the relative ease of the opt-out process, one might expect relatively few people to remain enrolled in the tax, particularly since only 22% of Germans are religiously active.<sup>108</sup> But the participation rate is surprisingly high.<sup>109</sup> Nearly two-thirds of all German citizens are official members of tax-levying congregations.<sup>110</sup> Given the secular nature of German society, one plausible explanation for the high retention rate is public willingness to support local provision of public goods by religious organizations also functioning as secular quasi-governmental institutions.<sup>111</sup>

Although categorizing a religious organization as quasi-governmental would be blasphemous in the United States, Germany's constitution, which provides that there shall be no state church, requires German states to grant "public law corporation" status to any requesting religious organization if it meets certain legal requirements.<sup>112</sup> In addition to the power to levy a tax, status as a public law corporation confers a number of other important rights upon religious organizations, including the right to employ clergy and other administrators as civil servants in the military, hospitals, universities, and other public

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106. For instance, see SächsKiStG, *supra* note 102, § 2 (defining church tax obligors as all natural persons who are members of the taxing church), and § 3 (stating that to withdraw from church membership, taxpayers must follow either the individual procedure of the taxing church or file an official affidavit with a local government office).

107. *Id.*

108. See Sticht, *supra* note 104.

109. *Id.*

110. *Id.*

111. See Hoffer, *supra* note 8, at 626.

112. The organization's composition and number of members ensure permanency. See WEIMARAR REICHsverfassung art. 137; GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND art. 140 [GRUNDGESETZ] [GG] [BASIC LAW], Aug. 11, 1919 (Ger.). In addition, a religious organization must show that it is not hostile to the constitutional order or to fundamental rights. See *Der Religionsgemeinschaft der Zeugen Jehovas in Deutschland e. V., vertreten durch das Präsidium*, 2 BvR 1500 (1997); see also *Germany: International Religious Freedom Report 2008*, U.S. STATE DEPT (2008), <http://www.state.gov/g/drl/rls/irf/2008/71382.htm>; Thilo Marauhn, *Status, Rights, and Obligations of Religious Communities in a Human Rights Context: A European Perspective*, 34 *ISR. L. REV.* 600, 631–32 (2000). This rule is intended to safeguard the limited government-religious corporation partnership envisioned by the constitution. Marauhn, *supra*, at 631–32.

facilities.<sup>113</sup> In addition, religious organizations that qualify as public law corporations are exempt from bankruptcy laws, the corporate income tax, gift tax, and inheritance taxes.<sup>114</sup> Representatives of religious organizations with public law corporation status also have the right to participate on public boards, such as the supervisory boards of public and private broadcasting stations, as well as boards that review films and literature for public suitability.<sup>115</sup> Religious organizations may also draft ordinances applicable to their members.<sup>116</sup> These internal legal systems, “which operate in parallel to the public laws,” can be striking in their complexity, and decisions rendered within them fall outside of the jurisdiction of Germany’s public courts.<sup>117</sup> Taken as a whole, these rights suggest that religious organizations qualifying as public law corporations should be viewed as quasi-governmental in nature, often functioning in a manner similar to local government agencies here at home.<sup>118</sup>

Like local governments, public law corporations have the power to tax their constituents.<sup>119</sup> Congregations most often choose income as their tax base. In all of the German states, the tax is levied at a uniform rate—8% or 9% of the church member’s federal income tax liability—and usually collected by the state through wage withholding and then returned to the churches.<sup>120</sup> This results in an effective rate of roughly

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113. See Robbers, *Minority Churches*, *supra* note 105, at 159.

114. See Körperschaftsteuergesetz [KStG] [Corporate Tax Act], Aug. 31, 1976, RGBL. I, repromulgated Oct. 15, 2002 BGBL. I at 4144, last amended by Gesetz, Apr. 8, 2010 BGBL. I at 386, § 5(1)(9); Erbschaftssteuer- und Schenkungsteuergesetz [ErbStG] [German Inheritance Tax Code] § 13(1)(16); Abgabenordnung [AO] [Inheritance and Gift Tax Act], Apr. 17, 1974, repromulgated Feb. 27, 2007 BGBL. I at 378, last amended by Gesetz, Dec. 22, 2009 BGBL. I at 3950, § 13(1)(6); Abgabenordnung [AO], Mar. 16, 1976, repromulgated Oct. 1, 2002 BGBL. I at 3866, §§ 51–68 (describing some of the qualifications that organizations must meet to obtain exempt status).

115. Robbers, *Minority Churches*, *supra* note 105, at 169.

116. See Robbers, *State and Church*, *supra* note 103, at 64.

117. *Id.*

118. Interestingly, state-sponsored churches and churches as local governments persisted in the original thirteen states far past the date of our nationhood. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1457–58 (2004). In fact, religious establishment persisted in Massachusetts until 1833. *Id.*

119. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND art. 140 [GRUNDGESETZ] [GG] [BASIC LAW], Aug. 11, 1919 (Ger.).

120. This rate is determined by a conference of the taxing organizations. SächsKiStG, *supra* note 102, § 10(2). If the organizations cannot agree to a rate, the state finance administration must determine a rate. *Id.*; Robbers, *State and Church*, *supra* note 103, at 69.

3% to 4% of the member's income.<sup>121</sup> Like state and local taxes in the United States, German church taxes are deductible against income for purposes of calculating the federal income tax.<sup>122</sup>

When viewed in this light, the resemblance between religious organizations that qualify as public law corporations and local governments is striking. In addition to possessing many quasi-governmental rights, public law corporations use a significant portion of the money raised through church taxes and governmental grants to fund schools, hospitals, recreational centers, and other social services.<sup>123</sup> In other words, public law corporations share not only in the rights of local governments, but also in their duties. It is this similarity that is most relevant to my proposal. Germany has, in essence, created local tax and spending jurisdictions that depend not solely on geography, but also on the affiliation preferences of constituents. Participation in these sectarian local jurisdictions is voluntary, and although the jurisdictions provide more public than private goods, they remain funded and viable.<sup>124</sup> If we believe claims that Germans are more sectarian than secular as a group, the continued payment of church taxes by so many of them is a truly interesting phenomenon and indicates that despite the perceived threat of free-riders, an opt-out system of financing public goods is possible.<sup>125</sup> Finally, it is worth noting that failure of an opt-out system to raise revenue is not a failure of the system. Even if the

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Furthermore, the tax may be enforced by the state. See KiStG, *supra* note 102, § 1(2) (noting that administration of the tax is the obligation of the tax-entitled religious community); KiStG, *supra*, § 11 (noting that enforcement of the taxes under the statute will be self-administered by the tax-entitled religious community according to the Administration and Enforcement Statute of April 27, 1953); SächsKiStG, *supra* note 102, §§ 9–10. The state retains an administrative fee of 4% to 5% of the amount collected. See Robbers, *Minority Churches*, *supra* note 105, at 164.

121. If one assumes an individual income tax rate of approximately 40% and a church tax rate of 8%, the effective rate is approximately 3.2% of income. For an excellent discussion of the German income tax, see Walter Schwidetzky & Rolf Eicke, *Income Taxation in the United States and Germany: The Rugged Individualist Meets the Social Activist*, 27 J. TAX'N INV. 3 (2011).

122. See Einkommensteuergesetz [EStG] Oct. 8, 2009 BGBL. I at 3366, 3862, last amended by Gesetz, Dec. 20, 2011 BGBL. I at 2592, § 10(1)(4). Furthermore, contributions to churches made in excess of church tax liability are deductible under EStG § 10(b)(1) so long as the deduction does not exceed 5% of the donor's income. *Id.* § 10(b)(1).

123. Petersen, *supra* note 105; Sticht, *supra* note 104.

124. Indeed, nearly two-thirds of German citizens participate in the church tax system. See *supra* text accompanying note 110.

125. See Hoffer, *supra* note 8, at 603–04, 636–37.

German result does not obtain in a non-religious context in the United States, lack of constituent participation and funding nonetheless generates information about the preferred scope of representative spending.

It bears repeating that the model must be secular.<sup>126</sup> I say this not only because a sectarian version would violate the First Amendment, but also because the designation of religion as a denominator of tax jurisdiction would obscure constituents' preferences about the scope of representative democratic spending power. Under the current German system, individuals who support taxation for the provision of public goods must also choose membership in a religious organization that provides those goods.<sup>127</sup> Individuals having a preference for the former position but not the latter are faced with two unsatisfactory choices: they can participate in the tax and join the taxing congregation, or they can fail to participate in the tax and avoid joining the congregation. Neither of these options expresses the individual's true preference for the reach of local government spending.<sup>128</sup> By disaggregating participation and religious affiliation, adoption of a secular opt-out model to fund some non-essential spending would provide a wider range of expressive options to constituents.

*B. Would Lack of Religious Impetus Destroy the Value of a Secular Model?*

Some may argue that once heaven and hell are removed from the taxing equation, any secular attempt to create an opt-out system will fail as a necessary consequence of free-riding. This is simply not the case. Germany's high church tax participation rate, when viewed in juxtaposition to its low religious participation rate, demonstrates that when faced with an avoidable tax, some people will choose to pay rather than avoid.<sup>129</sup> Why do I care about this? It suggests the possibility that if given the opportunity to make direct decisions about the scope of local government spending power, constituents may be expected to consider the merits of the question, rather than simply to avoid any cost to

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126. In addition to its normative undesirability, a religious model is prohibited by the First Amendment.

127. See Hoffer, *supra* note 8, at 636.

128. See *id.* For this reason, I suggest in a prior work that German states create non-religious affiliation groups that correspond to religious ones. *Id.*

129. *Id.* at 603–04.

themselves on the basis of self-calculation and the plausibility of free-riding.<sup>130</sup> In other words, I argue that we should trust constituents, at least to the limited extent described in this proposal, to consider factors that are normatively relevant to the scope of representative local government's non-essential spending power when making direct democratic decisions to either expand or limit that power.

Empirical evidence on the use of ballot initiatives in the United States supports the position that constituents' choices are grounded on considerations that extend beyond simple cost avoidance.<sup>131</sup> Professor Matsusaka has examined fiscal effects of voter initiatives of the twentieth century and found that constituent access to the initiative process does not have a systematic effect on government size or expenditure.<sup>132</sup> Rather, the combined expenditure of state and local governments with an initiative process was higher than that of those without it during the first half of the twentieth century, and it was lower during the latter half.<sup>133</sup> Based on these data, it is possible to surmise that during the first half of the century, representatives were less responsive to constituent preferences for increased spending, whereas during the latter half of the century, following drastic expansion of government during war years, representatives were less responsive to constituent preferences for reduced spending.<sup>134</sup> The resulting constituent response reveals, in turn, that voters are concerned with more than simply lowering their own tax liabilities. These results are not consistent with the frequent assumption that voters will act self-interestedly, avoiding any cost possible and free-riding if given the choice.

Instead, the lack of any systematic effect described by Matsusaka's data suggests that constituents weigh more than simple cost avoidance when making direct democratic decisions about taxes and spending.<sup>135</sup>

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130. See Kahan, *Trust*, *supra* note 78, at 333–35 (discussing how individuals behave in a cooperative rather than a self-calculating fashion when they believe that others do the same, and empirical evidence suggests that this response is stronger than the personal drive to maximize material wealth). This is not to say that free-riders will not surface; they will. But they do not seem to have been an overwhelming impediment in Germany.

131. John G. Matsusaka, *Fiscal Effects of the Voter Initiative in the First Half of the Twentieth Century*, 43 J.L. & ECON. 619, 641 (2000).

132. *Id.* at 622.

133. *Id.*

134. *Id.* at 641.

135. *Id.*

To confirm this position, Matsusaka examined initiatives raised in California, North Dakota, and Oregon, which are the three most frequent users of the direct democratic process in the United States.<sup>136</sup> More often than not, voters in these states used the initiative process to increase government spending rather than to reduce it.<sup>137</sup> Furthermore, several attempts to limit taxes and spending were defeated in these states.<sup>138</sup> These results support the assertion that “the initiative’s main effect is to bring fiscal policy more in line with the electorate’s preferences.”<sup>139</sup> Once again, the results do not depict voters as simple-minded cost-avoiders.

Matsusaka also found that state and local expenditures were more decentralized in jurisdictions with the initiative process than in those without it.<sup>140</sup> In states with the initiative process, spending was more likely to occur at the local level than at the state level.<sup>141</sup> This observation supports the assertion that constituents generally prefer fewer spending decisions at the state level and more at the local level.<sup>142</sup>

Constituent desire for local input in spending decisions, coupled with the observation that constituents consider factors other than cost avoidance during the direct democratic process, lend credence to the use of the German church tax as a base model for constituent input on spending decisions in United States local governments. As noted earlier, the German system is an imperfect example of opt-out finance as a direct democratic institution; it relies on religious affiliation as a denomination of tax jurisdiction, which impedes constituents’ expression of preferences.<sup>143</sup> Consequently, the first step in creating a domestic model of opt-out public finance is to identify a neutral denominator of jurisdiction. Since the model is meant for local governments that primarily provide geographically-bound goods and services, geography is the clearest, most rational denominator of jurisdiction, and I will

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136. *Id.* at 639–40.

137. *Id.* During the period of the study, twenty-one initiatives increased spending and eleven reduced it. *Id.*

138. *Id.* at 640.

139. *Id.* at 641.

140. *Id.* at 622.

141. *Id.*

142. *Id.* at 636.

143. *See supra* Part III.A.



adopt it here.<sup>144</sup> Second, the model must suggest appropriate subject matter for submission to the direct democratic decision-making process. Third, the model must describe the decision-making process. Finally, it must also identify possible choices of revenue base. The appropriate subject matter, decision-making process, and revenue base will vary according to the unique features and constituents of each locality. Consequently, I do not attempt to create a rigid structure that accounts for all aspects of local governance; rather, I hope to provide a useful set of observations that may be adapted to fit multiple circumstances.

*C. Creating an Opt-Out System of Political Speech: Which Spending Decisions Are Most Appropriate for Direct Democracy?*

As noted earlier, in order to provide constituents with an opportunity to constructively participate in local tax and spending decisions, I propose that localities create packages of non-essential spending that constituents legally could refuse to support for any reason, including the desire to free-ride. Like the church tax system in Germany, constituents would automatically be enrolled on the basis of chosen jurisdictional characteristics, such as place of residence or place of work. Constituents could then exercise a right to opt out of the putative charges if they preferred. In addition to rendering other benefits described below, this system would provide constituents with a means of directly participating in local governance without impinging upon essential governmental functions. Furthermore, because constituents would have a defined format for making their preferences known, the likelihood of more intrusive direct democratic participation would be lessened, while direct democracy would nonetheless remain a potential check on the representative democratic process.<sup>145</sup>

1. Which Spending Is Appropriate?

Only certain kinds of spending are appropriate for inclusion in an opt-out form of direct democracy; namely, some excessive spending on essential government functions and some spending on non-essential government functions. This assertion necessitates delineation of which

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144. Furthermore, failure to adopt a geographical model for the provision of public goods results in an unworkable libertarian utopia if taken to its logical conclusion. Allowing an unbridled opt-out, untethered by geography, would essentially create a fee-for-services model of government.

145. See *infra* Part III.C.4.

local government functions are essential and which are non-essential. To my great dismay, defining the term, “essential government function,” is an academic minefield. As the Supreme Court has recognized, not only are most feasible definitions laden with political judgments, but the definition also must vary according to local government purpose, geography, constituent demography, and constituent preferences.<sup>146</sup> Given the variance among local governments, it would be irresponsible to attempt to impart universal meaning or produce a static list of supposedly indispensable activities.<sup>147</sup> For instance, a bright-line delineation between traditional government functions as essential and traditionally private pursuits as non-essential is not possible in light of public–private sector joint ventures, shifting norms, and local variance.

In fact, in its effort to delineate the power of the federal government to tax and regulate the activities of state governments, the Supreme Court has moved away from drawing a sharp distinction between governmental activities and those of private business because the purportedly bright line between them is “too entangled in expediency to serve as a dependable legal criterion.”<sup>148</sup> As a consequence, any federal attempt at creating a static definition of “essential governmental function” “inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes.”<sup>149</sup> Rather, as Justice Black wrote in *Helvering v. Gerhardt*, the identity of essential and non-essential functions is determined mainly by constituents themselves.<sup>150</sup> He observed:

There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions. Many governmental functions of today have at some time in the past been non-governmental. The genius of our

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146. See *Garcia v. San Antonio Transit Auth.*, 469 U.S. 528, 546–47 (1985) (holding that because governments must respond to constituent demands and because these demands change over time, federal courts should not employ a bright-line test to determine whether a particular function is essential).

147. See *id.*

148. *New York v. United States*, 326 U.S. 572, 580 (1946).

149. *Garcia*, 469 U.S. at 546. The Court added that a fixed standard must lead to “inconsistent results at the same time that it disserves principles of democratic self-governance, and it breeds inconsistency precisely because it is divorced from those principles.” *Id.* at 547.

150. *Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring).

government provides that, within the sphere of constitutional action, the people—acting not through the courts but through their elected legislative representatives—have the power to determine as conditions demand, what services and functions the public welfare requires.<sup>151</sup>

For purposes of our proposal, then, it is important to recognize that local governments engage in a gradient of activities. Some of them are more important than others in various times and places, and their importance must be gauged on the local level in light of state and federal mandates.<sup>152</sup> As a consequence, “essential” eludes a fixed definition for us just as it has for the Supreme Court. The opposite side of the coin, “non-essential,” is similarly indefinite. Consequently, I use the word “non-essential” to refer not to some static academic standard or list, but rather, to describe spending that is neither essential nor strictly within the explicit and implicit authority delegated to representatives by their constituents.<sup>153</sup> In other words, “non-essential” will function as the flip side of a flexibly defined “essential,” meant to account for the variations in local government engendered by our federal system.

As a starting point for our definition, let us assume that all state and federal statutory mandates imposed upon localities are essential government functions.<sup>154</sup> Although they may not fit within our colloquial understanding of what is “essential,” these obligations are the result of superior governmental power, and subjecting them to direct democratic approval at the local level makes little sense.<sup>155</sup> I propose

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151. *Id.*

152. *See id.* at 427.

153. Professor Reynolds has also adopted this approach, albeit less explicitly. She convincingly argues that funding goods and services important to the “general welfare” through the widespread use of fees is inappropriate. Reynolds, *supra* note 17, at 387–88. She adds that local government’s use of fees should be restrained by “commonly accepted values about the government’s obligation to provide essential services and deeply held convictions about the public benefit of those services.” *Id.* at 388.

154. For one example of a federal mandate affecting a municipality, see Jeremy Olshan, *\$27 Million to Change NYC Signs from All-Caps*, N.Y. POST, Sept. 30, 2010, [http://www.nypost.com/p/news/local/bronx/million\\_kuj8X4Z2VoiVhXnCymfkvM](http://www.nypost.com/p/news/local/bronx/million_kuj8X4Z2VoiVhXnCymfkvM) (stating that, for safety reasons, federal guidelines require city to change street names on signs from all capital letters to capital and lower case letters).

155. “Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be

two criteria for determining whether remaining government functions are essential and therefore not eligible for approval or disapproval in an opt-out form of direct democracy. First, an essential government function is one that is provided primarily by the government. Although private providers may exist, the bulk of citizens depend upon the government for the particular good or service in question. For instance, although some citizens may hire private security, most rely on the police. As a result, the police function falls within the first criterion of my definition.

The first criterion cannot be the only criterion though. If it were, anything that the government chose to co-opt would become an essential government function.<sup>156</sup> Consequently, I propose a second criterion. At the local level, an essential government function also must be one that is protected or provided for (although not necessarily mandated) by state or federal statute. For instance, the provision of schools, roads, and a police force are generally mandated and regulated by state law. In contrast, a local government may be the region's sole provider of sundaes at the local bandstand, but lack of a related state statutory provision removes this function from the essential function category. I rely on state statutes from superior legislative bodies and predominant provisions by local government as indicia of both necessity and overall public will for the provision of public goods and services.<sup>157</sup> It bears repeating that public will is far from irrelevant as a criterion for determining whether a government function is essential. As I have

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entrusted to them. . . . The number, nature and duration of the powers conferred upon [them] . . . rests in the absolute discretion of the State." *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). Federal and state governmental supremacy has a direct impact on the scope of action required of or permitted to municipal governments. See MANDELKER ET AL., *supra* note 1, at 26, 33 (stating state legislatures have plenary powers to act unless limited by the federal or state constitution, whereas the power of local governments are not plenary but instead are "delegated by the state").

156. Of course, it is possible to argue that rather than government co-option of private functions, the true danger to constituents is private co-option of governmental function. I do not believe this to be a viable argument in the context of direct democracy. While it is possible for the government to seize a private function without the express consent of its constituents, the reverse is not true. The presence of significant private provision of a formerly public good or service requires consent by a requisite number of people required for economic viability. This is not to suggest that local government should or should not continue to provide a good or service that is also privately provided; rather, it should no longer be viewed as "essential."

157. This is because the state statutes come into being through a deliberative process of debate and compromise by officials who are elected by the broader public.

described above, if one believes that direct democratic incursion on governmental functions is more likely to occur when representatives have imposed high costs on constituents while also acting outside of the bounds of constituent expectations, the determination of whether a spending item falls within the authority implicitly delegated to representatives by constituents is important.

In essence, my proposal would create a mechanism through which representatives could ask constituents for broader boundaries of spending authority. The proposal would apply to two categories of spending: (1) excessive spending on essential functions, and (2) all spending on selected non-essential functions. For an example of the first category, consider once again the local police force.<sup>158</sup> Most people agree that providing a police force is a core activity of local government, and indeed, it meets both criteria of my definition of essential governmental function.<sup>159</sup> But is all spending related to this function necessarily essential government spending? Here, the consensus breaks down. For example, in most parts of the country, most people will agree that providing the police force with cars is a necessary expense, but should those cars be unmitigated jalopies? Used Ford Crown Royals? New Bentleys? The example demonstrates that it is possible to have non-essential government spending on an essential governmental function. These kinds of spending would be appropriate for inclusion in an opt-out system, provided that they meet the other criteria described below. Of course, a similar inquiry into the nature of spending is not necessary for non-essential government functions. For purposes of this proposal, all spending on a non-essential government function is non-

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158. Even famous libertarian Robert Nozick believed that the police force was essential for the protection of private rights in property. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 149–55 (1974) (explaining that the state requires minimal police force and other minimal powers to secure private property rights).

159. See, e.g., Booth, *supra* note 3 (stating that the city will soon be without many services citizens consider basic, including a cut of more than \$5.5 million in police and firefighting that will result in many vacant positions); see also Keith Eddings, *Car Thefts Skyrocket in Lawrence After Police Layoffs*, EAGLE TRIB. (N. Andover, Mass.), Aug. 15, 2010, at B3 (noting citizens have complained that cutting officers is the wrong move in this economy because people may try to take advantage of the shortage); Nicholas J.C. Pistor, *East St. Louis Cuts Include Almost Third of Police Force*, ST. LOUIS POST-DISPATCH (Jul. 31, 2010, 12:25 AM), [http://www.stltoday.com/news/local/crime-and-courts/east-st-louis-cuts-include-almost-third-of-police-force/article\\_328f01fc-6e92-55fc-89c2-4794e0c5a575.html](http://www.stltoday.com/news/local/crime-and-courts/east-st-louis-cuts-include-almost-third-of-police-force/article_328f01fc-6e92-55fc-89c2-4794e0c5a575.html) (discussing that the city faced a loss of nearly a third of its police force and that citizens are concerned for public safety considering the area's high crime rate).

essential spending.

## 2. Why Do Constituents' Expectations Matter?

As described in Part IV below, I propose delegating decision-making authority over certain “non-essential spending” to constituents.<sup>160</sup> This raises a new question: why should we care about constituents' expectations of their representative government? After all, state statutes grant broad powers to local governments, and one may argue that the election process weeds out tone-deaf representatives who act in unexpected ways.<sup>161</sup> However, this argument assumes that local constituencies have adequate information about the actions of individual representatives and that they will voluntarily participate in local elections. In most municipal and county elections, these assumptions simply are not true.<sup>162</sup> Rather, most constituents have relatively little input in local elections, and most representatives have relatively little information about the preferences of their constituents.<sup>163</sup>

Lack of information on both sides of the local government equation is troubling.<sup>164</sup> In the aggregate, constituents' expectations of representatives are directly relevant to the scope of local government spending.<sup>165</sup> This is true for two reasons. First, it is constituents

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160. For purposes of this proposal, I define “non-essential spending” as spending on items that are provided primarily by the local government and which is either mandated by state or federal statute or is clearly within constituents' expectations. *See supra* Part III.C.1.

161. *But see* Gillette, *supra* note 22, at 1252 (discussing how local elections are less competitive and representatives face only binary voting, so electoral politics alone may be insufficient to prevent representative government from acting in contravention of constituent preferences).

162. *See id.*; Garrett & McCubbins, *supra* note 68, at 47 (noting example of local voters who often lacked the requisite information to make decisions consistent with their own interests); Gillette, *supra* note 22, at 1252 (discussing how local elections are less competitive and representatives face only binary voting, so electoral politics alone may be insufficient to prevent representative government from acting in contravention of constituent preferences).

163. *See* Gordon, *supra* note 58, at 33 (stating that empirical analysis supports assertion that representatives' uncertainty about voter preferences increases with increasing size of the jurisdiction, increasing number of unaffiliated voters, and decreasing residential stability); Brian D. Galle, *The Role of Charity in a Federal System* 26–27 (Fla. St. Univ. C.L., Pub. L. Res. Paper No. 394, 2011), available at [papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1473107](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1473107) (arguing that lobbying will affect whose voices are heard by representatives and how representatives choose to distribute resources).

164. *See* Kang, *supra* note 68, at 1143 (stating that voters are commonly criticized as ignorant and not competent to make choices in their own best interest).

165. *See* Reynolds, *supra* note 17, at 387–88 (arguing that choice between use of tax revenues or fees per service as means of funding government-provided goods should be

themselves who imbue the representative process with legitimacy. Elected officials, if they truly represent constituents, must stand in the constituents' stead when they act in an official capacity, even during the process of debate and compromise. The scope and legitimacy of that action necessarily depends on the consent of the governed.<sup>166</sup> Perhaps a formalist view of the situation would insist that expectations do not matter because the constituents have consented, de facto, to the exercise of any local government power granted by state statute or constitution. After all, they control the creation of such powers through other democratic processes such as the election of state representatives or exercise of the initiative power.<sup>167</sup> This argument fails, however, because it ignores the unique features of individual localities. A spending decision that is fully legitimate in light of the expectations of one city's constituents may be completely illegitimate in light of the expectations of another city's constituents even though both decisions may be permissible uses of local government funds under state law.<sup>168</sup> Notice that the distinction between these two instances of spending is not a clearly defined line; rather, it is a gradient of acceptability. Employing my proposal would cover some of the distance necessary to determine the boundaries of that gradient.

The relevance of constituent preferences to the available gradient of representative spending decisions is best demonstrated by example. For instance, Ohio law provides that municipalities may provide funding and other assistance to park districts.<sup>169</sup> Almost no one would question the

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determined with reference to "commonly accepted values about the government's obligation to provide essential services and deeply held convictions about the public benefit of those services").

166. See *Eastlake v. Forest City Enters.*, 426 U.S. 668, 672 (1976) ("[A]ll power derives from the people, who can delegate it to representative instruments which they create."); see also THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed . . .").

167. See MANDELKER ET AL., *supra* note 1, at 26 (stating that the scope of local government power is determined solely by delegation of state constitution or legislative grant).

168. For instance, it is perfectly reasonable for the City of Chicago to expand its system of public transit, whereas such a decision would not be reasonable in my hometown of Berlin Heights, Ohio, which had a population of roughly 700 people in the 2010 U.S. Census. See *Profile of General Population and Housing Characteristics: Berlin Heights Village, Ohio*, U.S. CENSUS BUR., [http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC\\_10\\_DP\\_DPDP1&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_DP_DPDP1&prodType=table) (last visited Mar. 5, 2012).

169. OHIO REV. CODE ANN. § 715.211 (LexisNexis 2008).

authority of a representative local government to fund a reasonably sized park, lawn care, landscaping, and even athletic fields. But what about, for example, a zoo? A zoo is most certainly a park, but the legitimacy of a local government's decision to fund a zoo will depend on constituent preferences despite the fact that the decision is sanctioned by state statute. When voting for representatives, the electorate of a small rural city would never contemplate the founding of a zoo as being within the scope of their representatives' authority at the time of election, whereas the electorate of a larger city could foresee the possibility of such a decision and therefore could take it into account when choosing representatives. It would be a heroic stretch to say that representatives of both cities are authorized by their constituents to fund a zoo simply because state law permits it.

Next, consider a city's choice to fund the zoo's acquisition of a rare and endangered animal, such as a panda bear. The enormous expense of acquiring the animal and creating a suitable habitat and plan of maintenance might exceed even the expected range of activity for representatives in a large city. Even though representatives who made this choice would be acting within the bounds of their statutory authority, two things are very likely to be true. First, acquisition of a panda bear, while related to an essential government function, the provision of parks, is almost certainly a non-essential expense. Second, while representatives may consider the acquisition of a panda bear advantageous to the city, they will not know constituents' aggregate preferences about the use of tax dollars to fund such an acquisition because the purchase was unexpected at the time of election and therefore not subject to debate by constituents. Unless representatives ask constituents directly about the expense, their purchase will represent a sheer guess at the scope of their authority to spend public money on a non-essential item. That is not to say that purchase of the bear is bad or will produce disutility, only that it is so far beyond the expected course of government action that it could not be described as representative in the colloquial sense.<sup>170</sup>

I provide this example not as a demonstration of which expenses

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170. One can imagine a number of other examples; perhaps a Magna Charta for the local library, Audis for the police force, and a golf course designed by the now-infamous Tiger Woods. Each of these expenses falls within the scope of activities permitted by the state constitutional and statutory grants of municipal power. It is clear, however, that these expenditures are not essential.



should be included in a system of opt-out public finance, but rather to highlight the fact that constituent preferences are directly relevant to the legitimacy of a particular local expenditure, even if that expenditure is unquestionably legal in light of the state constitution and statutes. If a particular government expenditure cannot be anticipated by constituents as a response to the circumstances that generated the government's choice, we might question whether the expenditure falls within the authority delegated by constituents to their representatives. If not, the expenditure may be appropriate for a direct democratic decision-making process. Since this is the case, I conclude that aggregate constituent preferences regarding the bounds of representative authority should be considered when determining whether a particular expenditure is non-essential and therefore appropriate for the opt-out form of direct democracy described in this Article.

Of course, my position is subject to criticism. It would not be entirely misguided to argue that the representative democratic process is theoretically self-correcting; speaking proverbially, voters can kick the bums out.<sup>171</sup> Furthermore, it is clear that aggregate constituent preferences should be ignored if they would impinge on essential government functions.<sup>172</sup> Neither point detracts from the vitality of my proposal. It is possible for successive administrations of elected officials to systematically flout constituents' implicit expectations about the scope of local government, particularly in areas where constituents have insufficient or incorrect information, or where constituent participation in local elections is low.<sup>173</sup> The passage of Proposition 13 and many other direct democratic limitations on government's taxing power may suggest that where taxes and spending are involved, representative democratic processes have historically turned a blind eye to constituents' preferences. Furthermore, it is entirely possible that representatives wish to respect, but do not know, constituent

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171. *But see* Gillette, *supra* note 22, at 1252 (arguing that local elections are less competitive, making the electoral check on representatives less effective); Leib, *supra* note 52, at 905 (noting that representatives have perverse incentive to pander to interests of wealthy campaign donors).

172. *See* Reynolds, *supra* note 17, at 387–88 (asserting the importance of protecting essential services that are important to the general welfare).

173. *See supra* Part II.

preferences regarding the bounds of government authority.<sup>174</sup> The opt-out mechanism envisioned by my proposal relieves pressure on the constituent–representative relationship in either instance.

### 3. Who Should Have the Power to Designate Non-Essential Expenses for Inclusion in an Opt-Out System: Government, Constituents, or State?

#### *a. Local Government Possesses Sufficient Information*

My proposal, that local governments allow constituents to make direct choices about certain items of non-essential spending, is intended to foster a new balance between representative and direct democratic decisions in local government spending. Specifically, allowing constituents to directly address spending decisions that fall at or beyond the boundaries of constituents' implicit delegation of power to representatives will lessen the likelihood of a power grab by constituents through ballot initiative or similar processes.<sup>175</sup> In other words, this proposal should apply only to non-essential spending, as it is described above. Allowing constituents to directly influence decisions about reasonable spending for essential government functions would jeopardize the processes of deliberation, planning, and compromise that protect political minorities from the tyranny of the majority.<sup>176</sup> As a consequence, I cannot emphasize strongly enough that only those items of spending that will not jeopardize citizens' access to essential government services and protections should be subjected to the proposed decision-making process.<sup>177</sup>

As described above, for purposes of this proposal, an expense is essential when it is reasonable in amount, reasonably related to a governmental function that is elucidated by state statute, and primarily provided by the local government.<sup>178</sup> An expense is clearly non-essential

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174. See Levmore, *supra* note 11, at 427 (delegation of decision-making authority on government spending may be desirable when constituents have knowledge superior to that of the legislative body).

175. See *infra* Part IV.B.

176. See Chemerinsky, *supra* note 62, at 294, 299–300 (arguing that ballot initiatives may be used to disadvantage minorities, and unlike legislation, they provide no opportunity for deliberation and compromise).

177. See Reynolds, *supra* note 17, at 387–88 (asserting the importance of protecting essential services that are important to the general welfare).

178. See *supra* Part III.C.1.

when it does not meet this definition and falls outside of the authority delegated by constituents to their representatives either explicitly or implicitly.<sup>179</sup> In other words, if a particular government expenditure cannot be anticipated by constituents as a response to the circumstances surrounding the local government's choice, representatives should question whether the expenditure falls within their delegated authority. In such a case, representatives may seek constituent input through the direct democratic decision-making process. For instance, no one would question a representative local government's decision to collect residents' yard waste.<sup>180</sup> This activity encourages sanitary conditions and increases property value at little cost to taxpayers. To take it one step further, few people would object to a local government's decision to purchase wood chippers for the purpose of turning yard waste into mulch. This decision is a logical corollary to the collection of yard waste. But how would residents react to a costly expenditure for dump trucks used to deliver the resulting mulch to any resident for free? Constituents' reactions to this gradient of spending will vary by locality. While not as outrageous as our prior example, the small town zoo, the cost of delivering free mulch is not likely to be essential and may be appropriate to include a group of expenses for direct democratic approval. In the absence of an omniscient and communicative third party, representatives themselves are in the best position to observe local preferences and decide which expenses may be non-essential.<sup>181</sup>

*b. Constituents Have Insufficient Information*

Although it may appear suboptimal to trust this decision to the body whose judgment constituents have historically distrusted, a second option—letting constituents designate non-essential spending—makes

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179. See *supra* Part III.C.1.

180. See Mark Ferenchik, *Yard Waste a Community Effort: Even if City Service Returns, Residents Plan to Continue Sharing Burden of Disposal*, COLUMBUS DISPATCH (Mar. 25, 2009), [http://www.dispatch.com/content/stories/local/2009/03/25/leafbags.ART\\_ART\\_03-25-09\\_B1\\_L1DBIMV.html](http://www.dispatch.com/content/stories/local/2009/03/25/leafbags.ART_ART_03-25-09_B1_L1DBIMV.html) (stating that more than 1000 residents called the city to complain after the service was halted); Robert Vitale, *Columbus Will Resume Collecting Yard Waste: Council Approval Means Pickup Will Start in Mid-April*, COLUMBUS DISPATCH, Feb. 23, 2010, at B1 (noting that yard waste collection resumed after revocation of service was deemed the most unpopular budget cut of 2009).

181. See Robert A. Mikos, *The Populist Safeguards of Federalism*, 68 OHIO ST. L.J. 1669, 1673–74 (2007) (arguing that smaller governments can provide legislation that more closely fits the preferences of constituents).

even less sense. First, representatives can aggregate information on the preferences of constituents in a way that is not possible for constituents themselves.<sup>182</sup> Although representatives may not know constituents' views on a particular expenditure (free delivery of mulch, for instance), the lack of knowledge itself is an important piece of information indicating that a particular expenditure may be a good fit for opt-out financing. In contrast, allowing constituents to designate expenditures subject to direct democratic decision-making would expand the very tendency that this proposal seeks to cabin, the tendency to interfere with essential government functions. Finally, even if we disregard the first two assertions, lack of effective coordination would prevent constituents from designating non-essential spending. In essence, constituents would have to vote on what to vote on. The process simply would be too unwieldy to enact.

*c. State Government Has Insufficient Information, Resources, and Flexibility*

A third option for designating non-essential expenditures eligible for inclusion in an opt-out system—allowing states to choose them—raises similar problems. It is unlikely that the state will possess adequate information to make informed choices about local non-essential spending.<sup>183</sup> If the state acts statutorily to create a one-size-fits-all package of non-essential spending eligible for inclusion in an opt-out system, the designated items will only mesh with local constituent preferences if the state is largely homogenous. Furthermore, these provisions, once statutorily enshrined, will be unlikely to change in response to changes in localities and may become quickly outdated.<sup>184</sup> Finally, it is not feasible for most states to address the issue individually for each locality; the work load simply would be too great. As a result, lodging designatory power at the state level makes no more sense than granting it to constituents. The representative governments of

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182. See *Jones v. Bates*, 127 F.3d 839, 860 (9th Cir. 1997) (observing that the public “lacks the ability to collect and to study information that is utilized routinely by legislative bodies”), *rev'd en banc*, *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997).

183. See *Gillette*, *supra* note 22, at 1255 (explaining that state actions regarding local tax and spending decisions may be “lumpy and sticky,” made in response to the interests of state legislators rather than local constituents, and may interfere with the local government’s function “without producing any offsetting benefit”).

184. *Id.*

individual localities are best situated to choose which expenses to include in an opt-out system.

#### 4. Structuring Direct Democracy to Best Reveal Preferences

A workable opt-out structure must address criticisms of the use of direct democracy, and particularly its use for proportionate decision-making in public finance. Most of these concerns, which are fully described in Part IV, can be alleviated by creating a structure similar to the German church tax that allows constituents to weigh in at any time, with full information about both the proposed spending and the actions of other constituents.<sup>185</sup> Therefore, I propose that local representative governments, after identifying suitable proposed expenses, automatically enroll constituents as contributors to those expenses subject to the participation base discussion below. Constituents, who would then be “voluntary taxpayers,” to employ an oxymoron, could opt out of their contributions by filing a signed writing with the appropriate authority.<sup>186</sup> As I discuss below, the proportional aspect of this system would necessitate further consideration of the expenses chosen for inclusion, but it would provide a more complete picture of constituents’ delegation of non-essential spending power to representatives.<sup>187</sup> In addition, it would provide constituents with a novel outlet for political speech. In the paragraphs that follow, I outline criticisms of direct democratic decision-making in public finance found in the existing literature and explain how the structure of my proposed system avoids many of these pitfalls.

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185. German churches levy a tax against their members that is generally collected through wage withholding. See Hoffer, *supra* note 8, at 603–05 (describing German church tax laws and customs). Members can avoid this tax by renouncing membership in the taxing congregation, which they are permitted to do for any reason and at any time. *Id.* at 605. Church membership rolls are not disclosed to the public. See *id.* at 603.

186. I would include signed electronic writings in this category, although use of the internet has not yet been approved for voting. I presume that the legality of an internet opt-out would vary from state to state.

187. For a discussion of which expenses are appropriate for inclusion, see *supra* Part III.C.

#### IV. CRITICISMS AND THE STRUCTURAL SOLUTIONS THAT ADDRESS THEM

##### A. *Tyranny of the Majority*

One important criticism of direct democracy is that its reliance on majority rule runs roughshod over concerns of the political minority, which are better provided for by the deliberation and compromise process of representative democracy.<sup>188</sup> For instance, in direct democracy, one can imagine a large number of citizens without wealth supporting high taxes to extract money from a wealthy few. Conversely, one could imagine a large number of wealthy citizens supporting low taxes to avoid redistribution to those who are less wealthy.<sup>189</sup> In either situation, the political minority has little power over its own destiny, despite the use of democratic processes meant to afford each citizen an equal voice.<sup>190</sup> This is problematic, particularly in the second scenario, where direct democratic opposition to taxes could impede the provision of essential government functions to citizens who are unable to purchase substitutes like private security or schools.<sup>191</sup>

My proposal addresses this problem in three ways. First, it applies only to non-essential spending, which protects constituents who are unable to provide private substitutes for that spending. Second, as Professor Stark has suggested, majority rule can be limited by permitting the representative democratic government to put boundaries on the direct democratic process.<sup>192</sup> For instance, a referendum created

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188. See Chemerinsky, *supra* note 62, at 294 (arguing that ballot initiatives may be used to disadvantage minorities); Stark, *supra* note 9, at 208 (“Majorities misbehave, and there is reason to institutionalize procedures to limit such mischief.”).

189. See Gillette, *supra* note 22, at 1245 (stating that “disparate treatment of taxes and fees implies a distrustful view of redistribut[ion]” at the municipal level); Reynolds, *supra* note 17, at 375 (“[A]ffluent, homogeneous enclaves are able to capture the wealth within their borders and tax it only to serve the needs of their similarly situated neighbors.”).

190. See Clark, *supra* note 52, at 442 (indicating that voting systems are means to allow people to participate in crafting the government, and no one voter should have more influence than any other voter).

191. See Chemerinsky, *supra* note 62, at 294 (arguing that ballot issues may be used to disadvantage minorities); Burton A. Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 171, 185 (Edmund S. Phelps ed., 1975) (stating that at higher levels of income, constituents supplement or substitute public goods with private ones, such as home and business security systems, home trash compactors, and electronic air filters to provide a cleaner environment).

192. Stark, *supra* note 9, at 209 (in a referendum, direct democracy essentially acts as a

by the legislature is far more likely to be the product of deliberation and compromise than a ballot initiative instigated by an interest group or voters.<sup>193</sup> My proposal adopts this strategy by allowing representatives to identify non-essential spending that will be included in the opt-out package. Third, and importantly, the opt-out system is not an all-or-nothing proposition. Rather, it allows for proportional decision-making, which provides voters in the political minority with direct and meaningful input.<sup>194</sup>

*B. Proportional Decision-Making Is Not Indicative of Public Choice*

A second potential critique of the opt-out system is that its financial result may not be indicative of public choice. On the subject of proportional tax voting, Professor Levmore has observed that although a particular constituent can control whether or not he contributes to a given expenditure, he has no say in the overall level of funding raised for a particular item.<sup>195</sup> As a result, a constituent's contribution can produce the constituent's preferred level of funding only by accident.<sup>196</sup> For instance, assume that a representative local government decides to seek constituent approval for the cost of landscaping a park that is currently a wild meadow. The cost of fully landscaping the park will be \$100,000, and the locality has 10,000 constituents. Each constituent will be charged \$10 unless he or she opts out of the payment. Now assume that 60% of the residents would prefer no landscaping. The remaining 40% are in favor of granting representatives full authority to make the \$100,000 expenditure. Out of these, 10% are in favor of any level of landscaping, but the remainder are in favor of landscaping only if the

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“democratic filter over and above that offered by the representative processes”).

193. See *Jones v. Bates*, 127 F.3d 839, 860 (9th Cir. 1997) (observing that the public “lacks the ability to collect and to study information that is utilized routinely by legislative bodies”), *rev'd en banc*, *Bates v. Jones*, 131 F.3d 843 (9th Cir. 1997); see also Robinson, *supra* note 25, at 543 (indicating that “legislative fiscal policy-making . . . is an iterative process,” yet it is not easy for constituents to consider the cumulative effect of a series of ballot initiatives).

194. See Levmore, *supra* note 11, at 398–99 (noting that proportional voting seemingly provides a policy result that is proportionate to constituents' enthusiasm, although it may impose external costs not inherent in traditional voting where a minority funds a project that is not favored by the majority).

195. See *id.* at 394–95 (noting that the check-off for federal election campaign funding found on federal income tax return forms could only produce the public's preferred amount of funding by accident since no single voter has information about any other voter's actions).

196. *Id.* at 394 (noting that without knowledge of other voters' choices, a constituent may inadvertently overfund a particular item against her preference).

full \$100,000 is committed to the project.

In the scenario above, a simple opt-out system produces a highly flawed result. If 60% of constituents who prefer the unlandscaped meadow opt out of the \$10 payment, the resulting \$40,000 of revenue may still permit the government to landscape the park, leaving these constituents dissatisfied. Furthermore, the 30% of constituents who wanted \$100,000 of landscaping are also dissatisfied, even though they contributed to the cause. They view the project as underfunded and therefore substandard. In the end, only 10% of constituents are happy with the result of proportional tax voting in this example.<sup>197</sup>

This conundrum may be addressed by refining the role of the representative government in the proposal. In the example above, the representative government has forwarded a fixed-budget capital project for approval. While I certainly do not discourage seeking other forms of voter input on this kind of project, capital expenditures are not ideal for an opt-out funding format for two reasons. First, partial completion of a capital project is never satisfactory, but a representative government can never obtain anything more than partial funding through opt-out financing. Second, capital undertakings require voter approval at a specific point in time. The project must be approved at the outset, which means that each constituent must cast his or her vote without any information about what others have done.<sup>198</sup> As a result, the example produces a nonsensical outcome.

The problems identified above can be avoided by narrowing the kinds of spending subjected to the opt-out regime and by increasing representative government input in the choices presented to voters. First, representatives should identify spending that is recurring rather than capital in nature. Second, the identified spending should also fall into the “more is better” category. For instance, rather than subjecting the cost of park development to the opt-out process, representatives could choose the cost of showing outdoor movies in the park. This is clearly a non-essential expense that, depending upon the locality, may fall outside of the usual scope of governmental spending authority.<sup>199</sup>

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197. Another example may be the construction of a public monument that would inspire some but offend many others.

198. See Levmore, *supra* note 11, at 394–95 (noting that without knowledge of other constituents’ actions, constituents can only vote in favor of their preferred funding level by accident).

199. In other words, one can imagine some residents asking why the local government is



Furthermore, most people would agree that, within a reasonable range, it is better to have more movies than fewer.

### 1. Setting a Floor and a Ceiling

In addition to choosing appropriate expenses for inclusion in the opt-out system, the representative government must play an additional role in my proposal: determining the acceptable range of revenue necessary to fund the non-essential item. It is possible to identify a plethora of more-is-better spending that might be undertaken by local governments. Pancake breakfasts, free trees on Arbor Day, cooking classes, the provision of sports equipment, evening concerts, and many other things initially seem better in bulk. However, upon closer examination, this is not necessarily the case. Let us return for a moment to movies in the park. Assume that a representative local government forwards movies in the park as an item of non-essential spending to be approved through the opt-out system. If all but a few constituents opt out, perhaps the locality will screen one movie but will not be authorized to show more. If all constituents remain enrolled rather than opting out, the government may raise more money than is practical. Does this mean that the representative government should show double features every night? Surely not.

Because it is possible for constituents in an opt-out system to under or oversubscribe to a particular discretionary expense, the representative local government should choose a pre-set spending limit and spending floor.<sup>200</sup> These levels, above which the funded activity is a nuisance, and below which it is futile, should be presented to constituents along with a description of the activity in which the locality seeks to engage. When funds are raised above or below these limits, they should be remitted to constituents or applied to constituents' other liabilities to the representative government.

### 2. Replacing a Fixed Voting Date with a Rolling Opt-Out

Placing a pre-set ceiling and floor on discretionary spending does not completely solve the problem described in our park example above.

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wasting their tax dollars on a free showing of *Jersey Girl*.

200. See Levmore, *supra* note 11, at 394–95 (noting that unless constituents are fully informed of others' actions, they can only reach an appropriate level of funding inadvertently). This problem is cured in the opt-out system described here because constituents can choose to participate or not on a rolling basis.

Although set points inform constituents of the range of funding with which a project will go forward, a pre-set range may not correspond with any individual constituent's preferred range. For instance, imagine a constituent who would prefer between two and four outdoor movies but who has an intense preference against a fifth movie or more. Now, imagine that this constituent's representative local government has designated a range of funding that would provide between four and six outdoor movies. If all constituents have only one opportunity to either remain enrolled or opt out, our imaginary constituent will not know which choice will result in four movies rather than six. However, if constituents are permitted to make their decisions on a rolling basis, our imaginary subject can wait to see what others do before making her own decision.

A rolling opt-out also allows constituents to respond to changes in circumstance, whereas a single vote taken on a fixed date would not. This means, of course, that local governments could not rely on future funding for expenses included in the opt-out system and would be unable to budget for them. I do not find this troubling, since the expenses that I have identified as appropriate fall into the "want" rather than the "need" category and are not capital in nature. By setting a floor and ceiling and by allowing a rolling opt-out, localities can avoid the nonsensical outcome reached in the park example above. Furthermore, this additional input from the representative government will ensure that revenue collected through the opt-out system is plausibly linked to the actual preferences of constituents.

### 3. Choice of Participation Base

Having narrowed the range of expenses eligible for inclusion in an opt-out system, it becomes necessary to ask who will bear the burden of those expenses. Two specific questions must be answered. First, should participation in the opt-out system include individuals who reside outside of a local government's taxing jurisdiction but work within it? And second, should participation in the opt-out system be confined to constituents who pay taxes, or should it be extended more broadly? For the reasons explained below, localities should answer both questions by including as many participants as possible.

#### *a. Should Participation Be Confined to Residents of the Charging Jurisdiction?*

One frequent criticism of direct democracy in the tax and spending

context is that it allows residents of one locality to shift a tax burden that is rightfully theirs to residents of another locality who have no right to vote on the increase.<sup>201</sup> For instance, rationally acting residents who live in a central city that serves as a hub for commuters should always vote in favor of increased income taxes on wages earned within the city limits.<sup>202</sup> The amount of revenue collected from non-residents will exceed that collected from residents, leaving the city with a net gain. Furthermore, because non-residents do not vote for representatives of the city government, they have no say in how the city uses those funds. The same situation may arise with respect to sales taxes that will affect shoppers from neighboring localities, or property taxes that will be levied on vacation homes.<sup>203</sup>

The examples above assume that the relationship between commuters and residents of the central city is rationally adversarial. Theoretically, commuters want to use the resources of the city without contributing to them. Conversely, city dwellers want to extract resources from commuters. But this may not always be the case. Because commuters use and enjoy the central city for work, it is entirely reasonable to make the opposite assumption: that commuters want to contribute resources for the betterment of the central city, and that city dwellers will use additional resources in a way that makes the city attractive to both commuters and residents. An opt-out system applicable to both residents and commuters permits this non-adversarial relationship to develop by allowing both groups to contribute jointly to non-essential spending that will benefit both groups. In addition, use of the opt-out system addresses a small portion of commuters' disenfranchisement in tax voting by allowing them to express their

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201. Stark, *supra* note 9, at 195 (noting that the "chief distinguishing feature" of local taxation is that some taxpayers will be unable to participate in the democratic decision-making process by reason of their residence in another locality).

202. Even delegates at the federal constitutional convention were concerned that direct democratic voting by a low-wealth majority would threaten the individual property interests of the high-wealth minority. See Eule, *supra* note 57, at 1542.

203. See Stark, *supra* note 9, at 195 (noting that individuals' mobility between local jurisdictions, and their resulting inability to participate in tax decisions that affect them, "highlights the weakness of the referendum as a yardstick of taxpayer consent"); see also Denzau et al., *supra* note 59, at 198 (stating that economic modeling suggests that voters may support spending limitations at one level of government if they perceive that doing so will export that burden to another level of government).

preferences alongside those of residents.<sup>204</sup> Commuters who are troubled by the fact that they are not permitted to participate in representative government elections, or by any other aspect of the opt-out charge, can simply and legally refuse to pay. For these reasons, localities should err on the side of inclusion rather than exclusion.

*b. Should Participation in the Opt-Out System Be Confined to Taxpayers, or Should It Include All Constituents?*

Localities adopting the opt-out system face a second question of inclusion: whether to bill all constituents or limit liability solely to those who already pay a recognized form of tax. Traditional tax policy considerations of equity, efficiency, and simplicity initially suggest that the opt-out system should apply only to taxpayers. These individuals have already been allocated a portion of the public burden on the basis of sufficient property ownership, consumption, or income, and piggybacking the opt-out system on current tax collection mechanisms is likely to save government time and resources. However, such efficiencies produce a poor result in this context because they disenfranchise would-be voters who are not taxpayers.<sup>205</sup> Because the opt-out system should be envisioned as a means of political speech rather than a means of raising revenue, considerations of equal voice must trump the tax policy analysis.

Of course, it may be argued (though not by me) that disenfranchisement in this context is a superficial problem. If local governments confine the opt-out system to non-essential spending, failure to make the proposed expenditure will not result in failure to provide the government's usual goods and services. Rather, a mass opt-out by uncooperative taxpayers will merely prevent the local government from providing "bonus" goods and services. Because essential services and other services ordinarily provided by the

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204. Here I note a potential inconsistency in the theoretical underpinnings of my proposal. If using opt-out financing allows constituents (meaning "residents") to better express their preferences regarding the scope of representatives' non-essential spending, injection of non-residents into the system will distort the desired outcome. I resolve this matter by asserting that, in the scenario described above, both commuters and residents are "constituents" of the representative government. Both groups contribute funds to the representative government, and the government must consider both groups when making decisions about infrastructure, taxes, spending, and other considerations.

205. Staudt, *supra* note 11, at 566–67; *see also* Levmore, *supra* note 11, at 388 (noting that where only taxpayers are permitted to vote, "[s]uffrage is restricted").

government would not be disrupted, the expectations of non-taxpaying residents would be protected. In addition, because funds collected through the opt-out system are as much like voluntary charitable contributions as they are like taxes, it is not normatively clear that the entire constituency should have a say in their eventual use.

A much stronger argument exists, however, for making the inclusion of constituents as broad as possible.<sup>206</sup> If we view the opt-out system not as a means of raising revenue, but rather as a means of constituent speech, the preferences of constituents who are not traditional taxpayers should be valued on equal footing.<sup>207</sup> Professor Staudt makes this point in regard to a familiar federal tax option: the voluntary election to contribute to federal campaign financing.<sup>208</sup> She notes that the election serves as a mechanism of political expression but is nonetheless afforded only to taxpayers.<sup>209</sup> Because the election is equivalent to the right to vote on how to spend federal revenue, she argues that it should be extended to all individuals regardless of taxpayer or non-taxpayer status.<sup>210</sup> By analogy, the same holds true for the opt-out system.

Of course, one might argue that governments should not ask low income constituents for money. But in an opt-out system, basic concerns of distributive justice are vitiated.<sup>211</sup> The inclusion of low-

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206. See Clark, *supra* note 52, at 437 (“No one can or should have more input than anyone else.”).

207. See Staudt, *supra* note 11, at 556–57 (arguing that special rights afforded to taxpayers at the federal level are equivalent to voting rights and should be afforded to all individuals, not just taxpayers). In fact, it is unconstitutional to tie voting rights to tax payments. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668 (1966). The Court, in finding Virginia’s poll tax unconstitutional, wrote,

[W]e must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored.

*Id.* (citations omitted).

208. Staudt, *supra* note 11, at 565–66; see also Levmore, *supra* note 11, at 388 (noting that where only taxpayers are permitted to vote, “[s]uffrage is restricted”). For a general description of the federal election campaign check-off, see Levmore, *supra*, at 388–91.

209. Staudt, *supra* note 11, at 566.

210. *Id.* at 556–57.

211. A tax is regressive when lower income taxpayers share a greater percentage of the burden than high-income taxpayers. Flat fees are regressive because they comprise a greater proportion of the income or wealth of taxpayers at the lower end of the economic spectrum.

income constituents cannot result in an undue financial burden because they can opt out of payment. Furthermore, failure to give non-taxpayers the option to participate could be interpreted as both patronizing and paternalistic: patronizing because the representative government seems not to value non-taxpayer input on the non-essential spending proposal, and paternalistic because it suggests that government cannot trust these constituents to make decisions in their own best interest.

Although there are dangers to automatic inclusion, it is preferable to exclusion. Assume, for instance, that Constituent A is a low-income retiree who is a resident of Locality B. Locality B has designated free tai chi lessons as an opt-out item. Although Constituent A is not a taxpayer, she favors free lessons and would like to contribute to their establishment. If she, and others in her position, are not included in the opt-out system, her only means of expressing a preference is by making an unsolicited, voluntary contribution. This, however, is unlikely to happen. First, Constituent A may not learn of the opt-out item if she is not enrolled in the system. As a result of her lack of knowledge, she will be barred from expressing a preference even if she could do so legally. Second, even if Constituent A learns of the opt-out item and intends to contribute, she must also know of the mechanism for making a voluntary contribution, if one exists. Given the often opaque nature of local government, contributing may be difficult at best, and only the most persistent non-taxpayers will express a preference. Third, establishing a parallel system to process voluntary contributions is likely to be an inefficient use of local government resources. As a result, it is preferable to include all constituents in the opt-out system.

Some may argue that the initial inclusion of all constituents could result in a regressive outcome if constituents at very low levels of income remain enrolled for reasons other than preference.<sup>212</sup> For instance, handicapped or illiterate constituents may face barriers when

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*See* RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 358–59 (5th ed. 1989).

212. For a corollary, consider consumer protection laws that shield individuals from transactions where they are simply unable to protect their own interests. *See* OHIO REV. CODE ANN. § 1345.03(B)(1) (LexisNexis 2006) (stating that “knowingly [taking] advantage of the inability of the consumer reasonably to protect the consumer’s interests because of the consumer’s physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement” is an unconscionable consumer trade practice).

interacting with government.<sup>213</sup> If the process of opting out is too onerous, these constituents, who are more likely to have less wealth, will contribute to non-essential government spending in contravention to their preferences when constituents who are not similarly disadvantaged will not be forced to do so.<sup>214</sup>

I find this argument unpersuasive for three reasons. First, it is patronizing to assume that entire groups of people will be overwhelmed by interaction with the government. It is far more likely that particular individuals will encounter difficulty rather than entire groups. As a result, individual solutions are preferable to group exclusion. Second, to the extent that entire groups *do* encounter difficulty, simple procedural solutions exist. For instance, if we assume that most constituents over the age of ninety will encounter difficulty because they are less mobile or internet facile, a locality could provide them with targeted assistance, such as large-print, postage-paid mailers.<sup>215</sup> Finally, exclusion of some groups on the basis of their assumed lack of functionality may result in disingenuous disregard for the preferences of constituents in those groups. Furthermore, exclusion of these constituents, even if benevolently motivated, may be perceived by them as malicious, resulting in additional pressure on the constituent–representative relationship. Inclusion of all constituents is, therefore, preferable.

#### 4. Form of the Charge

Having concluded that the greatest possible number of participants should be included in an opt-out system, it becomes necessary to determine what form the opt-out charge should take. Because it addresses the transfer of funds from constituents to the local government, this consideration is analogous to the determination of an appropriate tax base.<sup>216</sup> Like the decision of which expenses to include in the opt-out system, this choice will depend, to some extent, on the individual circumstances and laws applicable to a particular locality.<sup>217</sup>

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213. *See id.*

214. *See id.*

215. For additional discussion on disenfranchisement of the elderly, see Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109 (2003).

216. For a discussion of tax base, see MUSGRAVE & MUSGRAVE, *supra* note 211, at 328–30.

217. For instance, many state constitutions prevent cities within those states from

As a preliminary matter, it is possible to dismiss levies against property as an inappropriate form of the opt-out charge in most localities. First, if property ownership were employed as a basis for calculating the charge, all non-owners would be excluded from the system, which is objectionable on disenfranchisement grounds.<sup>218</sup> Second, levies as a percentage of sales may be dismissed on grounds of administrative infeasibility. The opt-out charge would be identified with particular individuals, and it is not currently practical for localities to track sales taxes paid by particular individuals.<sup>219</sup> Furthermore, even if tracking individual sales became administratively feasible in the future, the use of a levy against sales would make the amount of the opt-out charge dependent upon the individual payor's purchases. As a result, the amount of the payment would depend on a factor unrelated to constituent preference. Neither would it correlate to the amount of the non-essential expense forwarded for approval by the representative government.

Attaching the opt-out charge to an income tax would be a better option administratively, if not substantively. For instance, the German system levies a charge at the rate of 8% or 9% of an individual's federal income tax liability.<sup>220</sup> Pegging the opt-out charge to federal income tax liability accomplishes two goals in Germany. First, it creates economies of scale in collection.<sup>221</sup> Because the church tax is automatically withheld from a taxpayer's wages in many cases, religious organizations are able to piggyback on the state's existing collection mechanisms.<sup>222</sup> This

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levying an income tax. In such cases, calculation of the opt-out charge could not be tied to income.

218. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668–70 (1966) (holding that tying votes to wealth violates the federal Equal Protection Clause).

219. Of course, technological development will change the face of tax information reporting in the future. See Jay A. Soled, *Call for the Gradual Phase-Out of All Paper Tax Information Statements*, 10 FLA. TAX REV. 345, 348 (2010) (“[A]ccurate and timely tax information should be delivered electronically, supplanting our anachronistic delivery system of paper tax information statements.”).

220. See Hoffer, *supra* note 8, at 604. This rate is determined by a conference of the taxing organizations. SächsKiStG, *supra* note 102, § 10(2). If the organizations cannot agree to a rate, the state finance administration must determine a rate. *Id.*; Robbers, *State and Church*, *supra* note 103, at 69.

221. The state retains an administrative fee of 4% to 5% of the amount collected, which is far less than it would cost the organizations to conduct collections themselves. See Robbers, *Minority Churches*, *supra* note 105, at 164.

222. See Bay KirStG, *supra* note 102, § 17(1) (stating levies must be administered by the religious organization, which may request the State Ministry of Finance to assume the



significantly lowers administrative costs of the tax. Second, by calculating the church tax as a percentage of federal tax liability, the German system incorporates federal adjustments to tax.<sup>223</sup> Assuming that these adjustments promote important public objectives, duplicating them through adoption of tax liability as the opt-out base would further those objectives.<sup>224</sup>

There is a glaring problem with using income as a measure of opt-out liability. As discussed above, doing so will disenfranchise low-income constituents who pay no tax. Furthermore, pegging an opt-out charge to the income tax is not possible for local governments that do not levy such a tax.<sup>225</sup> Doing so is also unlikely to generate an amount of revenue that corresponds in any way to the anticipated non-essential government expense. Finally, an income tax base would devalue the contribution of those who earn little income and would completely disenfranchise those who pay no tax.<sup>226</sup>

Although the appropriate choice of contribution base will vary according to the circumstances and laws of a given locality, we have arrived by process of elimination at a flat charge per constituent. Importantly, a flat charge is inclusive of all constituents, and it affords each constituent equal weight in political speech. A flat charge may also be tied directly to the anticipated amount of the non-essential expense. For instance, if each movie in the park will cost \$200, and representatives determine that the project should move forward if at least twenty constituents support it, the flat opt-out charge should be \$10. This kind of calculation would be nearly impossible with an income, sales, or property-based charge.

As usual, a flat charge is not without problems. Because a flat charge could not be withheld from wages in the way that an income-based charge could be, it may be more expensive to administer. Second,

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collection function); *see also* Robbers, *State and Church*, *supra* note 103, at 69.

223. *See* Hoffer, *supra* note 8, at 604–05.

224. I do not assert that a particular set of concerns exists in both systems, but practically speaking, since both systems involve public finance, it is probably the case. For instance, the concern of a family's ability to pay versus a single person's ability to pay may arise in both cases.

225. Not all cities levy a local income tax. *See* HENRY J. RAIMONDO, *ECONOMICS OF STATE AND LOCAL GOVERNMENT* 171, 186 (1992) (stating that income tax in most states is imposed by state government and local income tax levies are usually made by large counties or cities).

226. In effect, this would set up a pay-to-play system.

a flat charge is subject to attack on the distributive justice front. If each participating constituent pays \$10 to fund movies in the park, the charge will be a lesser percentage of a wealthy person's resources than of a poorer person's resources, making it regressive. In a mandatory funding structure, this discrepancy would be troubling. I argue, however, regressivity is mitigated by constituents' ability to opt out of some or all of the charge. Consequently, I conclude that although it is not perfect, a flat charge is the best contribution base for use in an opt-out system.

#### V. BENEFITS OF ADOPTING AN OPT-OUT SYSTEM

Having outlined my proposal for the use of an opt-out system to finance certain non-essential local government expenses, I now address why constituents' expression of preference for the scope of representatives' spending authority should be tied to constituents' contributions toward certain items of non-essential spending. In other words, why not ask constituents to simply vote yes or no on any given issue of spending? Although doing so may be appropriate in some circumstances, the opt-out model offers benefits not available through a simple vote. In addition to addressing strong critiques of direct democracy—that direct democracy encourages tyranny of the majority and allows residents to export their tax burden to other localities—tying preference expression to actual dollars fosters democratic debate even where most constituents do not speak in the traditional sense.

In addition to creating a de facto debate, using an opt-out system as a complement to existing forms of direct democracy could result in a number of other benefits. First, it satisfies constituents' normative intuitions about the libertarian nature of local government<sup>227</sup> while sheltering the ability of representative government to provide essential goods and services. In addition, it confers legitimacy on the items of spending that would be most subject to question by constituents.<sup>228</sup> Together, these benefits should quell the tendency of constituents to overreach through use of other direct democratic processes such as the

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227. See Stark, *supra* note 9, at 194; see also Levmore, *supra* note 11, at 406 (arguing that tax voting allows constituents to voice an opinion on government's choice of cause-based spending).

228. See, e.g., Levmore, *supra* note 11, at 406 (explaining that constituents may tolerate a greater level of redistributive spending if they can help government choose the beneficiaries of that spending).

ballot initiative.<sup>229</sup> Second, use of an opt-out system would place local governments on equal footing with charitable organizations in areas where the functions of these two groups most strongly overlap.<sup>230</sup> Under favorable conditions, governmental restraint in use of the taxing power to fund certain non-essential spending might result in an efficient allocation of resources between these two groups. Third, an opt-out system has the potential to encourage deliberation among constituents by providing a steady stream of information about the preferences of other constituents and representative government over time. It also would provide a mild form of non-geographical Tiebout sorting,<sup>231</sup> allowing constituents to either provide or avoid supporting the provision of public goods without relocating to another locality. Finally, widespread use of an opt-out system has the potential to change constituents' assumptions about one another. Namely, successful funding of non-essential goods solely through the consent of constituents would go some distance toward dispelling the traditional anti-tax American stereotype that currently dominates popular culture and academic literature.<sup>232</sup> Perhaps it is simply not the case that Americans are not civically minded. Contradiction of the unsupported stereotype by actual facts has the potential to change the tenor of political debate and constituent decision-making at the state and local levels.

#### A. *Creating a Non-Verbal Dialogue*

An important benefit of the opt-out system is the creation of a non-verbal democratic dialogue among constituents. Direct democracy is often criticized on the grounds that constituents must vote without the benefit of deliberation that would have resulted from the representative

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229. See Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 BUFF. L. REV. 819, 879 (2002) (stating that alienation and distrust of government lead to increased resort to direct democracy).

230. Cf. Galle, *supra* note 163, at 36 (“[T]he argument that charity fills in where government cannot has been oversold.”); David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 TAX L. REV. 221, 262 (2009) (explaining that government budgets are large and ranges of public goals are vast, and therefore, government cannot provide the same focus on fit and quality).

231. For a brief discussion of Tiebout sorting, see *infra* Part V.D.

232. For a discussion of the prevailing stereotype of Americans being opposed to taxation, see *infra* Part V.F.

democratic process.<sup>233</sup> In addition, constituents must vote without the benefit of fully knowing the preferences of their fellows.<sup>234</sup>

Using an opt-out system to finance certain non-essential expenses addresses these concerns somewhat. In a system that automatically registers the response or non-response of every constituent, all constituents must express some preference, either de facto or otherwise. Unlike a traditional voting process, it is not possible to remain silent in an opt-out system. This is because a dollar amount is attached to either opting out or remaining enrolled in the system. In an ordinary direct democratic vote, a constituent may remain silent by simply avoiding the polls. In contrast, an opt-out system requires each constituent to pay or not.<sup>235</sup> In other words, dedication or removal of funds from the cause is tantamount to political speech or, to put the matter more crassly, money talks.

Of course, a choice to opt out or remain enrolled in the system is not *perfectly* expressive, and either choice could mean a number of things. Lack of perfect expressiveness is not, however, a cause for concern. First, although the information provided by the opt-out system is not rich in detail, the system creates a strong form of constituent expression that is clearly and unquestionably cognizable to representatives. Unlike verbal or written speech, which may or may not be heard, payment or non-payment of money directly affects the course of action available to representatives. This conveys information about the constituents' implicit delegation of non-essential spending authority to representatives, even if the reason for the scope of that delegation is opaque. Consider a constituent's choice to opt out. Perhaps the constituent favors an item of non-essential spending but simply cannot afford to contribute to it, or alternatively, the constituent objects to the project itself, whether or not it is affordable to the constituent. The objection could be substantive (the constituent does not like movies in the park), or it could be political (the constituent does not think that the government's role includes movies in the park). These three meanings are vastly different, but all of them lead us to conclude that the

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233. Robinson, *supra* note 25, at 546 (noting that deliberation in legislative enactment is the reason for "reliability of and judicial respect for" the representative democratic process).

234. Levmore, *supra* note 11, at 394–95.

235. Indeed, Professor Staudt makes a similar point with regard to taxpayers' federal Form 1040 check-the-box election to dedicate funds toward election campaign contributions. See Staudt, *supra* note 11, at 565–66.

constituent objects to the non-essential spending at issue and that he does not authorize the representative government to use his dollars to engage in it.<sup>236</sup>

Likewise, a constituent's continued enrollment in the system could have disparate meanings. Among other things, continued enrollment could mean that a constituent approves the proposed spending, neither approves nor opposes the proposed spending, opposes the proposed spending but remains enrolled out of a sense of moral obligation, or opposes the proposed spending but is either unaware of or unable to exercise the opt out.<sup>237</sup>

In the second instance, where a constituent neither approves nor opposes the proposed spending, the constituent cannot be said to care about the scope of the representative government's authority with regard to the spending. In essence, the constituent remains enrolled in the opt-out system as a result of the stickiness of the default option. Although this inertia does not truly express a preference on the particular item of spending in question, it is expressive in another way. By failing to opt out, constituents who neither approve nor oppose non-essential spending express the view that the debate is unimportant. If that is true, and if a constituent contributes funds despite her apathy, the opt-out system should make a presumption in favor of granting discretionary spending authority to the representative government, which has presumably arrived at the item through a process of debate and compromise.

In the third instance, where a constituent opposes a particular non-essential expense but feels morally obligated to contribute, the response should be treated, once again, as a grant of discretionary spending authority to the representative government. In fact, this situation is not so different from the imposition of actual taxes. Where a constituent remains enrolled in the system with little interest in the actual project at hand, he has made a decision to contribute to the general welfare of the community through the creation of public goods regardless of whether he will use them. As a result, we should not be troubled by the fact that the constituent's response does not reflect his own preference about a

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236. If the constituent objects to non-essential spending on grounds that he cannot afford it, he may, of course, be willing to authorize the representative government to spend other people's dollars on the project.

237. As mentioned earlier, instances in which a constituent would prefer to opt out, but is somehow prevented from doing so, can be minimized through procedural protections.

particular project. His continued participation indicates his preference about the scope of the representative government's authority.<sup>238</sup>

In a transparent opt-out system, where constituents are able to see the responses of others (although not necessarily match those responses with the identities of others), a series of non-verbal communications automatically arises on the topic of the proposed expenditure. Unlike a traditional direct democratic vote, every constituent is a participant, and if the system allows a rolling opt-out, each constituent can express his or her preference while armed with sufficient knowledge of the choices of others. Furthermore, because funds are attached to the choice to opt out or remain enrolled, each constituent's expression of preference has a direct impact on the success of the collective endeavor and directly affects the course of action taken by the representative government.

### B. Averting the Tax Revolt

Providing even a minor outlet for some pressure inherent in the constituent–representative government relationship has the potential to produce more reasoned constituent voting on levy requests and may even avert further tax revolt. Although some may view “[t]he tax revolt” primarily as a problem of the 1970s,<sup>239</sup> there is no reason to conclude that direct democratic incursion into state and local spending decisions is no longer a threat.<sup>240</sup> Constituents have the ability to block needed rate increases. In addition, nothing prevents constituents and interest groups from using the initiative and referendum processes to impose new limitations on representative governments.<sup>241</sup> As a result, it

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238. In fact, it could be argued that such a response is, in fact, a stronger grant of authority than one from a constituent who favors the project.

239. See David Lowery, *The Attitudinal Consequences of the Tax Revolt*, 4 POL. BEHAV. 333, 333 (1982) (referring to “[t]he tax revolt” as a single event that “swept across the United States” after the passage of California’s Proposition 13).

240. See Kornhauser, *supra* note 229, at 929 (noting that as a country, the United States must “maintain the delicate balance between healthy and self-destructive tax protest [because t]he current debate has shown no such balance or moderation”). In fact, Lowery’s empirical study concluded that voters remained as dissatisfied after the tax revolt as they had been before it. See Lowery, *supra* note 239, at 342.

241. In fact, a number of tax and spending limitations appeared on the ballot in fall 2010. See, e.g., Tim Hoover, *The Colorado Vote Amendments 60, 61; Proposition 101 “Ugly Three” Appear Headed for a Big Loss*, DENVER POST, Nov. 3, 2010, at B1 (discussing the voters’ rejection of Amendment 61, which would have “prohibited the state from any kind of borrowing and limited local governments to borrowing only for ten years”); *Ballot Questions Ready for June*, MORNING SENTINEL (Waterville, Me.) (Apr. 15, 2010), <http://>

is in the best interest of representative governments to understand the phenomenon of tax revolt and to find means to address it. Using an opt-out system to provide constituents with some level of input on discretionary spending decisions may be one such means.

To know whether this is true, or even desirable, we must first understand potential causes of tax revolt. Scholars have posited a number of causes, none of which are mutually exclusive, and four general categories have emerged.<sup>242</sup> First, it is possible that some constituents favor direct democratic limitation of tax and spending because they perceive state and local government as unnecessarily large in scope.<sup>243</sup> Research has shown this to be a strong influence in tax revolts.<sup>244</sup> Indeed, one relevant study has shown that beliefs about the appropriate size of government play a strong role in tax revolt.<sup>245</sup> In such instances, a vote in favor of revolt is an attempt to limit that size.<sup>246</sup> Second, some constituents may favor tax revolt because they perceive the state or local government as wasteful.<sup>247</sup> In these cases, a vote for limiting the government's tax or spending power is not necessarily an attempt to limit the size of government; rather, it is an attempt to force greater government efficiency.<sup>248</sup> Third, some constituents may favor direct democratic limitations of tax and spending simply because they are worried about their "personal finances" or "the economy in general."<sup>249</sup> Finally, some constituents may be disenchanted with state

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[www.onlinesentinel.com/news/ballot-questions-ready-for-june\\_2010-04-14.html](http://www.onlinesentinel.com/news/ballot-questions-ready-for-june_2010-04-14.html) (discussing Maine's then-upcoming vote on Question 1: "Do you want to reject the new law that lowers Maine's income tax and replaces that revenue by making changes to the sales tax?"); Colin Sullivan, *Calif's Little-Noticed Prop 26 Squeaks Through in Dead of Night*, N.Y. TIMES (Nov. 3, 2010), <http://www.nytimes.com/gwire/2010/11/03/03greenwire-califs-little-noticed-prop-26-squeaks-through-59912.html> (discussing California voters' adoption of Proposition 26, which changed the definition of environmental fees).

242. See Lowery, *supra* note 239, at 334–36 (aggregating and categorizing numerous academic theories on the cause of tax revolt).

243. *Id.* at 334.

244. Kornhauser, *supra* note 229, at 912 (stating that research showed "'the central issue in the tax revolt was how much government should be doing, not so much whether it was doing it well or badly'" (emphasis omitted) (quoting DAVID O. SEARS & JACK CITRIN, *TAX REVOLT* 187 (1982))).

245. *Id.* (describing an empirical study on the causes of tax revolt).

246. See Lowery, *supra* note 239, at 334 (theorizing tax revolt was aimed at trimming "a bloated government").

247. *Id.* at 335.

248. *Id.*

249. *Id.*

and local government overall.<sup>250</sup> These voters are not necessarily concerned with the specifics of government's scope or efficiency.<sup>251</sup> Instead, they are voicing non-specific dissatisfaction through a readily available channel.<sup>252</sup>

Constituents who are prone to vote in favor of tax and spending limitations as a result of the categories above could voice similar positions through an opt-out system. Admittedly, the practical effect of acting through the opt-out system may be of a lesser magnitude. Refusing to contribute to movies in the park, for instance, is much different from acting in concert with others to enact a strict property tax limitation. Nonetheless, it is not clear that all constituents require a strict property tax limitation in order to achieve psychic satisfaction from their actions. For instance, empirical studies of Costa Rican politics have shown that constituents dissatisfied with national government seek participation at the local level before turning to protest.<sup>253</sup> This indicates that if given the choice between a less drastic and a more drastic political act, constituents may choose the less drastic option. This is particularly true in light of the time and resources required to initiate most direct democratic processes.<sup>254</sup> An opt-out system would provide one means of less drastic action, functioning as a form of pressure valve.

### C. Improved Allocation of Resources

An additional benefit of using an opt-out system for the provision of certain non-essential public goods lies in its potential to create a more reasoned allocation of resources between local governments and charitable organizations. The appropriate acquisition and allocation of privately held property for use in the provision of public goods is a topic that has received extensive consideration in academic literature.<sup>255</sup> To date, most scholars have assumed that government is an insufficient provider of public goods and that its function must be supplemented by

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250. *Id.* at 336.

251. *Id.*

252. *Id.*

253. See John A. Booth & Mitchell A. Seligson, *Political Legitimacy and Participation in Costa Rica: Evidence of Arena Shopping*, 58 POL. RES. Q. 537, 547 (2005).

254. See *supra* text accompanying note 69 (citing expense as a factor in ballot initiatives).

255. See Galle, *supra* note 163, at 2; Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416–20 (1956); Weisbrod, *supra* note 191, at 185.



charitable or private providers.<sup>256</sup> Myriad theories exist to support nearly innumerable variations of a normatively desirable allocation scheme,<sup>257</sup> but few of them have focused on the interplay between charitable organizations and local governments.<sup>258</sup> Rather, the debate has focused on the propriety of federal tax subsidization of charitable organizations or private providers of public goods.<sup>259</sup>

Despite the assertions of many scholars that government is a suboptimal provider of public goods, it is far from certain that charitable organizations or other private providers are categorically superior.<sup>260</sup> In other words, there is no clear reason to favor allocation to charitable organizations over government in every instance. However, the converse is also true; it is not clear that government is a superior provider of public goods.<sup>261</sup> As Professor Galle has written, both governments and charitable organizations may have substantial advantages but also may be subject to substantial flaws.<sup>262</sup> For instance, in most cases the government possesses significant advantages of scale and scope<sup>263</sup> and is able to provide a wide variety of public goods and services.<sup>264</sup> In addition, decisions made by the government are the result of deliberation and compromise, whereas decisions made by charitable organizations may result from the interests of a very small group of

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256. See Galle, *supra* note 163, at 2 (noting that prevailing theory for justification of tax subsidization of charitable organizations is market failure); Anup Malani & Eric A. Posner, *The Case for For-Profit Charities*, 93 VA. L. REV. 2017, 2022–23 (2007) (arguing for subsidization of for-profit firms engaged in the provision of public goods).

257. See Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 518–28 (2010) (cataloging theories that justify the exemption of charitable organizations' income from taxation).

258. See Galle, *supra* note 163, at 13.

259. See Fleischer, *supra* note 257, at 518–28; Malani & Posner, *supra* note 256, at 2020–21 (summarizing subsidy theories and suggesting that none justify coupling tax benefits with not-for-profit status).

260. See Galle, *supra* note 163, at 5 (stating that it is possible “that many of government’s putative flaws are equally true of charity”).

261. See *id.*

262. See *id.* at 36–49 (arguing that multiple factors affect the relevant balance between provision of public goods by charitable organizations or by the government and that no single factor is dispositive).

263. For example, the government may effectively integrate education with children’s public health, but doing so would be far more difficult for a charitable organization. See *id.* at 72 (government has advantages of scale and scope).

264. See *id.* at 4.

people.<sup>265</sup> Furthermore, elected officials may be scrutinized more heavily by the public than managers of charitable organizations, resulting in actions more consonant with constituents' expectations.<sup>266</sup> Finally, in some locations, competition among local governments may result in a more efficient provision of goods and services, or, in combination with Tiebout sorting, a more constituent-appropriate mix.<sup>267</sup>

Charities, however, are not without strengths, and governments are not without weaknesses. As a result, there are some instances in which charitable organizations may be better providers of public goods and services than the government.<sup>268</sup> For example, charitable organizations may have better access to information than the government.<sup>269</sup> In addition, they may be better situated to recruit talented employees and volunteers.<sup>270</sup> Furthermore, because they are not beholden to the median voter, lobbyists, or strong political backers, charitable organizations may increase diversity of public goods and be more responsive to minority preferences for more or different goods.<sup>271</sup> Finally, donors to charitable organizations may receive the benefit of a “warm glow,” or personal satisfaction from donating that may not arise from the duty to pay taxes.<sup>272</sup>

Whether one or more of the characteristics described above inures to any particular local government or charitable organization is a pure question of fact. As such, the answer must necessarily vary among organizations along a number of variables, including constituent demography, geographic scope, and the ability of constituents to exert influence over either local governments or charitable organizations. As a consequence, any blanket determination of the appropriate allocation of resources among local governments and charitable organizations must rely on a set of generalized assumptions that will hold true for no locality whatsoever. Although useful for generating a set of

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265. *See id.* at 41 (noting that the nonprofit sector lacks a cross-organizational mechanism for “debating conflicts and coordinating priorities”).

266. *See id.* at 46.

267. For a brief description of Tiebout's theory, see *infra* Part V.D.

268. *See Galle, supra* note 163, at 4–5 (noting that commentators have cited ability to attract talent and gather information as relative strengths of charities versus government).

269. *See id.*

270. *See id.*

271. *Id.* at 10–11.

272. *See* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 526–27 (1990).

considerations to be used at the local level, broader academic theories of allocation, and their necessary assumptions, break down when viewed in light of individual circumstances faced by constituents in any given time or place. In other words, scholars simply do not have sufficient information to describe an ideal allocation in light of the United States' federal structure. The desirability of any given allocation will depend heavily on factors, the weight and presence of which may be judged only by those close to the entities in question.

In this regard, an opt-out system of funding certain non-essential goods would delegate a portion of the decision-making process about allocation among local governments and charitable organizations to constituents. Rather than invoke its mandatory taxing power to fund a specific public good or service, local government would leave the allocation decision to constituents. These constituents could choose to fund the good or service through the government or to divert their resources elsewhere, either to provide the same or different public goods through charitable organizations, or to private consumption or saving. In any of these cases, the representative government would receive valuable input about constituents' views on government provision of the service.

Again, it is worth noting that constituent input would be non-specific (i.e., the representative government would not learn the specific reasons why constituents do or do not favor government provision of the good). But the actual channeling of dollars by constituents either to charitable organizations or to private consumption or saving would nonetheless speak to the breadth of the representative government's role in areas where it overlaps with that of charitable organizations. This construct has the benefit of allowing constituents to individually consider factors important to them, including those set forth in academic literature on the allocation of funds between governments and charitable organizations. Because constituents are more likely to have adequate information about factors affecting ideal allocation between the two types of institutions at the local level, their participation may result in a more normatively desirable allocation than a formulaic or generalized academic approach.

Facilitating constituent choice has additional benefits. For instance, it would level the playing field between governmental and charitable providers of public goods in areas where they overlap. Whereas, the government may invoke its mandatory taxing power, and therefore has a competitive advantage in the marketplace of funding, charitable

organizations may not do so. This disparity is problematic because it may allow local government to force government provision of an inferior version of the good when charitable organizations may be better positioned to provide a superior version. Allowing constituents to select a favored provider through an opt-out system would provide equal opportunity for competition between charitable organizations and the government. In other words, equal competition between local government and charitable organizations is desirable as an alternative to “crowd out,” where the provision of low quality goods by the government may discourage some donors from contributing to charitable organizations that would provide a higher-quality version of the same goods.<sup>273</sup> In addition, preserving the option of government provision allows constituents to take advantage of the government’s ability to provide economies of scale and scope if they exist in a particular locality.<sup>274</sup> Furthermore, allowing constituents to voluntarily participate in funding a particular good through the government would extend the phenomena of warm glow or pure altruism beyond the borders of charitable contribution and would minimize the mental costs of compulsory taxation, allowing more constituents to enjoy psychic benefits not readily available in the absence of an opt out.<sup>275</sup>

To summarize, I do not suggest that an opt-out system could or should take the place of charitable giving, or that charity should supplant government provision of public goods. Rather, I emphasize the point raised both here and in Professor Galle’s work that larger theories regarding the optimal provision of public goods often fail to account for variations in the capability of local government and the needs of the local populace.<sup>276</sup> Although it is not a complete cure, the

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273. See Galle, *supra* note 163, at 55, 67–68 (describing crowd-out and observing that if a constituent in this circumstance makes the unlikely decision to both pay tax and donate to a charitable organization that provides the same good, she has effectively paid twice).

274. *Id.* at 3, 67–68, 72 (government has massive advantages of scale and fundraising).

275. *Id.* at 67 (offering warm glow as a partial justification for federal subsidization of charitable organizations); Schizer, *supra* note 230, at 225–26, 230 (arguing that facilitation of voluntary contributions may increase altruism and “warm glow,” as well as minimize the welfare costs associated with compulsory taxation).

276. Professor Galle has argued that subsidization of charitable organizations is necessary or desirable where a charitable organization’s mission is multi-jurisdictional. Galle, *supra* note 163, at 5–6, 86–87. Subsidization may also be desirable when the local government is of limited effectiveness resulting from reduced competition as a result of constituents’ high moving costs or lack of information about rival jurisdictions, or from excess inter-jurisdictional competition that prevents local governments from providing public goods. *Id.*

opt-out system goes some distance toward addressing this concern. It moves toward recognition that where local governments and charitable organizations assume overlapping functions, equal competition for funds could produce a result that more closely aligns with constituent knowledge and preferences.

#### *D. Creating Non-Geographical Tiebout Sorting*

Another benefit of the opt-out system is its potential to create a limited form of non-geographical Tiebout sorting. In *A Pure Theory of Local Expenditures*, economist Charles Tiebout famously wrote that local voters are like consumers who shop for communities that best suit their preferences.<sup>277</sup> According to the theory, “[m]oving or failing to move replaces the usual market test of willingness to buy a good and reveals the consumer-voter’s demand for public goods.”<sup>278</sup> As a result, the provision of public goods by local governments should reflect the preferences of constituents.<sup>279</sup> If this were the case, there would be no need for an opt-out system or any other gauge of voter preference. Tiebout, however, relied on a set of highly improbably assumptions, including assumptions that constituents are fully mobile, have full knowledge about their choices, and have a large number of heterogeneous communities from which to choose.<sup>280</sup> These premises are highly unrealistic, and as Tiebout himself recognized, “[c]onsumer-voters do not have perfect knowledge and set preferences, nor are they perfectly mobile.”<sup>281</sup>

Subsequent empirical studies have confirmed that Tiebout’s analogy and assumptions do not hold in real life.<sup>282</sup> For instance, research has shown that the presence of multiple jurisdictions is not sufficient to ensure competition among them.<sup>283</sup> Furthermore, individuals within

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at 4–6. I do not seek to challenge this argument; rather, I note that constituents themselves are in the best position to determine whether these conditions exist.

277. Tiebout, *supra* note 255, at 418 (1956).

278. *Id.* at 420.

279. *Id.* at 416.

280. *Id.* at 419. One critic has called the assumptions “so patently unrealistic as to verge on outrageous.” See Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 AM. ECON. REV. 93, 93 (1981).

281. See Tiebout, *supra* note 255, at 423.

282. See Oates, *supra* note 280, at 94–95 (cataloging empirical work tending to disprove Tiebout’s assumptions).

283. *Id.* at 94.

jurisdictions show too much variation in preferences for local services to support Tiebout's position.<sup>284</sup> In addition, there seems to be very little correlation between the amounts paid by taxpayers and goods and services actually received by them, which suggests that consumers' shopping behavior is not fully analogous to constituents choosing a locality in which to live.<sup>285</sup> Indeed, commentators have suggested that constituents may, instead, be choosing or rejecting one another rather than the package of goods and services offered by the representative government.<sup>286</sup>

None of this is to say that Tiebout was full of bunk. Clearly, some people move from one community to another as a result of dissatisfaction with the level of public goods provided or the level of taxes charged by the representative government. But it is equally clear that constituent migration cannot be viewed as an accurate gauge of constituents' aggregate preferences. Nonetheless, it may be possible to allow constituents to behave like consumers through a mechanism other than full geographic relocation. Local governments' adoption of an opt-out system could compensate, in some small regard, for constituents' lack of mobility, choice, and cross-jurisdictional knowledge. Constituents presented with an opportunity to either participate or not while remaining within their current geographic location need not worry about mobility issues such as continued access to employment and their preferred peer group. In addition, they need not be concerned with the fact that their cross-jurisdictional choices may be constrained by uniformity across local governments. In fact, because constituents' choices are entirely personal and intra-jurisdictional, they do not need information about outside jurisdictions to effectively express a preference. In this way, an opt-out system enables constituents to voice a preference, as envisioned by Tiebout, but without actually relocating.

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284. *Id.*

285. *Id.* at 94–95.

286. *See id.* at 95 (arguing that individuals who comprise a community are just as important to community outcomes as capital input); Lee Anne Fennell, *Beyond Exit and Voice: User Participation in the Production of Local Public Goods*, 80 TEX. L. REV. 1, 28–29 (2001) (stating that where the quality of locally provided goods, such as public safety and education, relies upon user input, constituents seek out pools of users whose input will improve the provision of those goods).

*E. Increased Civic Participation Through Quiet Deliberation*

Yet another possible benefit of the opt-out system is its potential to increase civic participation and to engender a quiet deliberation among constituents about the role of representative government in the provision of non-essential public goods. A rich literature on deliberative democracy suggests that, if given politically neutral information and time to discuss it, constituents are willing to consider that information, including the viewpoints of others, which may lead them to reconsider their entrenched views.<sup>287</sup> The opt-out system may provide a form of deliberation in which constituents are provided with information on the views of others, as well as information about the representative government's proposed spending. Although the discursive format is not as strong as, say, a New England town meeting, the opt-out system's provision of information coupled with time for consideration would allow constituents to make fully informed choices. Because these choices would not be one-and-done votes, they would contribute to a running non-verbal exchange on the subject with potential for creating verbal exchange as well. The result could be a more thoughtful outcome than would be produced by a simple one-off vote on a particular spending issue. Furthermore, this novel form of involvement may increase civic participation in other areas.

Research on increased direct democratic involvement has gained ground in political science over the last decade.<sup>288</sup> Scholars have noted the potential for participatory models of government to strengthen relationships between constituents and representative government, to "build public trust in the government," and to give the representative government access to new sources of information and ideas.<sup>289</sup> And these suggested benefits are not merely speculative; recent empirical studies provide evidence of their existence.<sup>290</sup> For instance, research has

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287. For articles elucidating this point, see Hiro N. Aragaki, *Deliberative Democracy as Dispute Resolution? Conflict, Interests, and Reasons*, 24 OHIO ST. J. ON DISP. RESOL. 407 (2009); and Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 395 (2009). See generally Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359 (2002).

288. For articles elucidating this point, see generally Caroline J. Tolbert et al., *Enhancing Civic Engagement: The Effect of Direct Democracy on Political Participation and Knowledge*, 3 ST. POL. & POL'Y Q. 23, 24 (2003) (cataloging arguments regarding direct democracy's effect on civic involvement).

289. *Id.*

290. *Id.* at 24-27 (providing an overview of several empirical studies on the subject).

confirmed that the use of direct democracy by states increases their voter turnout, even in unpopular midterm elections.<sup>291</sup> Research also confirms “that states with the initiative process have larger and more diverse interest group systems than states without the process.”<sup>292</sup> In addition, and perhaps more importantly, a state’s use of initiatives produces “a more politically self-confident and engaged electorate.”<sup>293</sup> Finally, empirical evidence supports the broader assertion that the use of direct democratic processes strengthens civic engagement overall.<sup>294</sup>

In light of the this evidence, it is not unrealistic to think that the use of an opt-out system to provide information and funding for certain non-essential spending could produce similar benefits at the local level, even if they are smaller in scale and scope. Indeed, experience from participatory local budgeting processes in Brazilian cities suggests that this might, indeed, be the case.<sup>295</sup> Although the Brazilian processes are more robust and openly deliberative than the opt-out system, they nonetheless provide a useful vantage point from which to consider the potential civic benefits of direct democratic decision-making on matters of local spending. In at least 103 Brazilian municipalities, constituents engage in regional meetings to set policy priorities and in neighborhood meetings to rank these priorities and then select specific projects for funding.<sup>296</sup> Next, constituents elect delegates to present the results of their deliberative process, which include a budget proposal, to the city council for its consideration and adoption.<sup>297</sup> Studies of this process have shown that it develops and sustains non-elite political activism in cities where it is employed.<sup>298</sup> Furthermore, it has curtailed political patronage and altered the political culture by enabling constituents to make specific requests for public goods.<sup>299</sup> Researchers have found significant

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291. *Id.* at 25, 34.

292. *Id.* at 26.

293. *Id.* at 27.

294. *Id.* at 35.

295. See William R. Nylen, *Testing the Empowerment Thesis: The Participatory Budget in Belo Horizonte and Betim, Brazil*, 34 COMP. POL. 127, 127 (2002) (describing participatory budgeting in Brazil and its effect on civic participation); Brian Wampler & Leonardo Avritzer, *Civil Society and New Institutions in Democratic Brazil*, 36 COMP. POL. 291, 291–92, 299 (2004) (same).

296. See Nylen, *supra* note 295, at 127; Wampler & Avritzer, *supra* note 295, at 299–300.

297. Nylen, *supra* note 295, at 127; Wampler & Avritzer, *supra* note 295, at 300.

298. See Nylen, *supra* note 295, at 140–41.

299. Wampler & Avritzer, *supra* note 295, at 305–06.



spill-over of constituent participation into other social and political organizations, including notable increases in neighborhood associations and municipal councils.<sup>300</sup> Finally, although data suggest that participatory budgeting in Brazil has done little to sustain political involvement of those who previously showed no interest in politics, it has provided an effective avenue of participation and lasting ancillary effects for those constituents who have at least some interest in local political outcomes.<sup>301</sup>

Clearly, the opt-out system is not as deliberative as the Brazilian process, but it may nonetheless produce similar benefits, even if it does so to a lesser degree. Like Brazilian participatory budgeting, an opt-out system allows constituents to voice an opinion on government spending outside of the representative or initiative processes, even if those constituents are not particularly politically active or part of the political elite. In addition, it allows individual constituents to compare their opinion to those of their peers or to attempt to influence their peers. It also empowers them, albeit in a lesser way than the Brazilian system, to exert some control over representative government's spending priorities. As a consequence, it may result in stronger civic participation among constituents, as is suggested by empirical literature on both the Brazilian process and on direct democratic processes used in the United States. The combination of evidence from Brazil and from the states presents a strong case for adoption of an opt-out system at the local level as a form of beneficial constituent expression—one with the potential to increase civic participation and the perceived legitimacy of some local government spending.

#### *F. Challenging a Pernicious Stereotype*

In addition to civic buy-in, local governments that adopt an opt-out system may receive a related benefit: weakening of the anti-tax American stereotype. The opt-out system, because it would allow us to openly challenge our ingrained conception of the tax opposition of our fellow citizens, has the potential to change local communities for the better while producing positive externalities in the form of better political discourse and decision-making among constituents at the state and federal levels.

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300. See Nylén, *supra* note 295, at 133–34.

301. *Id.* at 140.

As described in Part II, it is generally accepted that when asked to contribute to a store of public goods, people will behave cooperatively if they believe that others are doing the same.<sup>302</sup> Likewise, if people believe that others are shirking, they will retaliate by withholding cooperation.<sup>303</sup> Furthermore, when one person cooperates in response to another, her action may foster the cooperation of a third person, and so on.<sup>304</sup> In light of these research results, the typical depiction of Americans—as characteristically opposed to taxation and the provision of public goods—is especially troubling. If the results described above are generalizable, a particular constituent may vote against a tax levy or a spending item not because she is opposed to it, but because she believes that her neighbor is opposed to it.

I posit that our anti-tax stereotype is sufficiently prevalent to affect individuals' views on cooperation, and prevailing research suggests it contributes to a deleterious result. One need not consult political vitriol to show that we, as a society, generally accept the premise that we are against tax and public distribution. Scholars have written that most people are generally anti-tax and that anti-tax sentiment is “an intrinsic aspect of American patriotism and national character.”<sup>305</sup> They have concluded that “tax laws seem capable of engendering nearly universal anger”; that “[f]or most Americans, any tax is a bad tax”; and that “perhaps the only thing that truly unites all Americans is a common perception of the Internal Revenue Service . . . as [an] enemy.”<sup>306</sup> With such sweeping language, it is not difficult to see why constituents may hold negative views about others' willingness to cooperate. But if these statements are true, why do local tax measures sometimes pass? If Americans are truly and rationally self-interested, why do they donate to charitable causes? Although there may be a variety of answers to these questions, it simply cannot be the case that our entire society, or

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302. See Kahan, *Trust*, *supra* note 78, at 333–34 (describing empirical research on the subject).

303. *Id.*

304. *Id.* at 339.

305. Kornhauser, *supra* note 229, at 824–26.

306. Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 157–58 (1996). Professor Leo Martinez has seconded a portion of this sentiment, noting the amount of negative media coverage and political speech devoted to tax law and referring to the progressive income tax as “an unpopular foe.” Leo P. Martinez, *Tax Legislation and Democratic Discourse: The Rhetoric of Revenue and Politics*, 4 NEV. L.J. 510, 510–12 (2004).

even a large portion of it, fits within the prevailing anti-tax stereotype.

In localities where the opt-out system succeeded in producing provision of a public good, constituents would be faced with a challenge to the anti-tax stereotype and instead would be presented with a positive model for cooperation. This change in available information may convince some people to abandon the stereotype for a more nuanced view of others' attitudes about tax and spending. Although the stereotype may persist nationally, information produced locally by an opt-out production of public goods should be more salient than information from broader sources because it relates to a constituent reference group.<sup>307</sup> In addition, the information, which will relate to designated items of non-essential spending, will be more specific than media coverage of general anti-tax sentiment. It will relate directly to the scope of local government and to individual constituents' willingness to participate. In that sense, it will be more analogous to experiments demonstrating individuals' willingness to reciprocally cooperate.<sup>308</sup> Ideally, this should both increase constituents' trust in one another and make them less likely to make assumptions based on the anti-tax stereotype.

It is reasonable to posit that the cognitive benefit of challenging our anti-tax stereotype would spill over into other areas of direct democratic decision-making on taxes and spending. If constituents are willing to cooperate with others to provide funds for non-essential spending that they favor, they should also be willing to cooperate with others to provide funds for essential spending that they favor. In other words, constituents who work without the hindrance of an anti-tax stereotype should be more likely to consider tax and spending items on their merits in light of the willingness of others to do the same. In contrast, those burdened by the stereotypical perception that all Americans are anti-tax may refuse to consider tax and spending issues on their merits due to a misperception about their neighbors' willingness to cooperate. If this is true, local governments' adoption of an opt-out system could have the potential to change political discourse and decision-making substantively and for the better.

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307. For a discussion of the influence of reference groups, see *supra* Part II.D and the accompanying footnotes.

308. See Kahan, *Trust*, *supra* note 78, at 333–34 (describing empirical research on the subject).

## VI. CONCLUSION

Direct democracy, both demonized and lionized, has been a controversial means of tax and expenditure decision-making since the early 1900s.<sup>309</sup> Scholars have characterized it as a needed political check on representative government and as an unjust means of implementing tyranny of the majority or of special interests.<sup>310</sup> In fact, this dichotomy is false; the outcome of direct democratic action need not be one or the other. The drastic polarization of electoral results, and hence normative characterizations, may stem from the one time, all-or-nothing nature of existing initiative and referendum processes.<sup>311</sup> Reimagining these processes in light of behavioral science's challenge to classical economic theories may preserve the efficacy of direct democracy as a political check on tax and spending while reducing constituents' tendency to overreach on specific issues as a means of expressing general dissatisfaction with the representative government.<sup>312</sup>

The opt-out process of decision-making proposed in this Article is one such reimagining. Rather than function in the all-or-nothing manner of existing direct democratic voting procedures, an opt-out system would allow voters to register proportional support over an extended timeline. Specifically, local representative governments would choose to submit certain recurring non-capital, non-essential expenditures to proportional decision-making by constituents.<sup>313</sup> All constituents would be presumed to support these expenditures unless they officially refused to pay. Constituents could choose to opt out of payment at any time and for any reason.<sup>314</sup> Allowing constituents the option of participating or withdrawing would create an inescapable form of political speech.<sup>315</sup> Although not as consequential as decisions about essential spending, the ensuing result would provide information to representative governments about constituents' perceptions of

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309. See generally Persily, *supra* note 71.

310. See *supra* Part II.C.

311. See *supra* Part V.B; Levmore, *supra* note 11, at 398 (noting that proportional tax voting allows the process to reach a result that corresponds proportionally to constituent enthusiasm).

312. See *supra* Part V.B.

313. See *supra* Part III.C.

314. See *supra* Part III.C.

315. See *supra* Part V.A.

governments' permissible scope and role.<sup>316</sup> In addition, an opt-out system would provide individual constituents with an important outlet for economically meaningful expression, as well as information about others' preferences.<sup>317</sup> Such a system has the potential to reduce tension in the constituent–representative government relationship by simultaneously creating a pressure valve for general constituent dissatisfaction and a means of constituent–representative government collaboration.<sup>318</sup>

Old economic theories based on the storied rational actor predict that the opt-out system would fail as both a gauge of political will and as a means of raising revenue.<sup>319</sup> Individuals acting self-interestedly would choose to opt out, free-riding on the contributions of others.<sup>320</sup> As a result, the level of funding provided by an opt-out system would be minimal and would not reflect constituent preference. But prevalence of the self-interested rational actor has been disproven by behavioral science. In his place stands a constituent who gauges choices by not only personal preference, but also by reference to other constituents' beliefs and actions.<sup>321</sup> These empirical findings, debunking the myth of the rational actor's prevalence, are confirmed by natural experiments on public goods decision-making in both Germany and Brazil.<sup>322</sup> As a result, the opt-out process of decision-making by constituents need not be an academic fairy tale. If structured properly, it could provide a useful avenue of political expression and an important source of information for constituents.

As discussed more thoroughly above, providing this additional means of political expression, which creates new information, could produce a number of direct and ancillary benefits for local governments. First, by providing an outlet for general dissatisfaction, an opt-out process may reduce the likelihood of tax revolt.<sup>323</sup> Stated more precisely, allowing a less drastic means of expression may spur more reasoned,

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316. *See supra* Part V.A.

317. *See supra* Part V.A.

318. *See supra* Part V.A.

319. *See supra* Part II.D.

320. *See supra* Part II.D.

321. *See supra* Part II.D.

322. *See supra* Parts III.A, V.E (discussing the German church tax and public budgeting, respectively).

323. *See supra* Part V.B.

issue-specific voting by constituents on larger issues. Second, implementing an opt-out process for the provision of some public goods would level the playing field for charitable providers by allowing them to compete for funds otherwise claimed by local government's taxing power.<sup>324</sup> Third, the opt-out process would create a limited form of non-geographical Tiebout sorting, allowing constituents who are constrained in their ability to relocate to nonetheless shop for public goods to some extent.<sup>325</sup> Finally, the opt-out process of decision-making has the potential to increase civic participation among constituents while simultaneously replacing a prevalent stereotype—that of the anti-tax American—with real and relevant information about individual constituents' peer groups.<sup>326</sup> If recent behavioral research is generalizable, constituent access to this information has the potential to change voting patterns. Instead of voting against any provision of goods as a result of the perception that other constituents will not cooperate, individuals may instead consider such questions on their merits.<sup>327</sup> Viewed in this light, the opt-out process is a small change with big potential—the potential to improve democracy at the local level.

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324. *See supra* Part V.C.

325. *See supra* Part V.D.

326. *See supra* Part V.E.

327. *See supra* Part V.F.