NEIGHBORHOOD EMPOWERMENT AND THE FUTURE OF THE CITY

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Forthcoming in THE UNIVERSITY OF PENNSYLVANIA LAW REVIEW

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

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

This article argues that there is a serious inconsistency in a jurisprudence that treats BIDs and special assessment districts as unproblematic while prohibiting neighborhood zoning districts. As I demonstrate, these devices are in fact conceptually identical. Both the neighborhood zoning district and the special assessment/BID are designed to enable large, diverse cities to capture

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some of the governance advantages of small, homogenous suburbs by providing landowners with the direct ability to manage local externalities. This article attempts to make sense of the disparate treatment accorded these devices by examining several grounds upon which they could potentially be distinguished. I find, however, that special assessment districts/BIDs actually raise far more troubling public policy concerns than neighborhood zoning districts. I conclude that courts should broadly defer to municipal delegations of power to sublocal groups, so that cities can work out their own strategies for surviving in an era of intense inter-local competition.

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I. INTRODUCTION

Some species evade predators by mimicking other creatures, but only one survives by imitating its own predator: the city. It is by now a familiar story that jobs and people have fled the cities and flocked to the suburbs over the past half century. Suburbs have been more attractive than central cities as sites for

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1 The population of suburban communities doubled between 1950 and 1970, comprising 83 percent of the nation’s total growth during that period, while American cities suffered, for the first time in their history, a net loss of population.
settlement and investment at least in part because their relatively smaller size and homogeneous population have enabled suburbs to ensure that landowners’ tax expenditures are concentrated on their own needs rather than subjected to the redistributive claims of a variety of citywide interest groups. \(^2\) Suburbs also enjoy a free hand in using the zoning power to protect their tax base and landowners’ property values by excluding undesirable uses without interference by other stakeholders – like real estate developers – with divergent demands. \(^3\)

In recent decades, however, cities have experienced something of a renaissance, which many thinkers attribute to city officials’ realization that in order to entice and retain investment in the face of suburban competition, they must somehow provide the benefits that size and homogeneity afford the suburbs. \(^4\) Thus, for example, many cities enable neighborhood groups to self-finance their own improvements and services through a “special assessment” or the related “business improvement district” (BID). These mechanisms typically work by enabling a percentage of landowners within a territorially-bounded district to petition the city for the imposition of a mandatory charge upon all property in the district in order to fund desired amenities for the area. \(^5\) Likewise, some municipalities have attempted to give neighborhoods the authority directly to exclude undesirable land uses, such as by enfranchising landowners within a geographically defined area to vote on the applicability of specific zoning restrictions within that area. \(^6\) For ease of reference, I call this device a


\(^3\) See, e.g., FISCHER, supra note __, at 15–16 (arguing that homeowners are the dominant faction in small, suburban communities and use zoning controls to protect their own wealth; developers are largely “supplicants”); Richard Briffault, Our Localism: Part II – Localism and Legal Theory, 90 COLUM. L. REV. 346, 372-73 (1990) (in larger cities, neighborhood groups cannot control their own zoning because they must share power with other interests, but smaller suburbs, which are frequently just incorporated neighborhoods, can zone to protect the neighborhood’s interests).

\(^4\) See, e.g., Richard Schragger, Does Governance Matter? The Case of Business Improvement Districts and the Urban Resurgence, 3 DREXEL. L. REV. 49 (2010) (surveying and critiquing literature attributing urban resurgence to efforts by city officials’ to entice mobile sources of revenue from other cities and suburbs).


\(^6\) See, e.g., State of Washington ex rel. Seattle Title & Trust Co. v. Roberge, 278 U.S. 116 (1928) (requiring consent of majority of landowners within 400 feet of proposed group home), Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (requiring consent of majority of landowners within 400 feet of proposed billboard); Eubank v. City of Richmond; 226 U.S. 137 (1912) (delegating power to blockfront landowners to establish uniform setback lines).
“neighborhood zoning district.” The special assessment district and the neighborhood zoning district are both, fundamentally, efforts to import into the city the most attractive features of suburban governance by devolving power to the smaller scale of the neighborhood, homogenizing the voting public through the restriction of the franchise to landowners, and insulating the group’s power from the politicking and vote-trading prevalent at the citywide level.

Herein, however, lies the problem that this article seeks to resolve: although neighborhood zoning districts and special assessment districts are functionally correlative mechanisms through which cities confront suburban competition, courts and scholars treat them as though they are entirely distinct, resulting in doctrinal confusion, a lack of clarity in the scholarship, and immense practical implications for cities. While courts have routinely upheld the special assessment and the BID against constitutional challenges, the majority of courts have also held that the neighborhood zoning district is an unconstitutional delegation of municipal land use power. The courts make no effort to reconcile the two lines, and indeed seem unaware that there may even be a relationship between them. Scholars, too, have endorsed the special assessment and BID while balking at the idea of conferring zoning powers on neighborhood groups, without acknowledging the deep continuities between these two devices. Major consequences for urban policy have ensued. Cities’ inability to confer zoning power on neighborhood groups has caused significant disenchantment with city government, in some cases even sparking campaigns for secession from the city. At the same time, spurred by courts’ permissive attitude, cities have increasingly resorted to BIDs as a default option to deal with virtually any urban problem, despite the fact that BIDs often cause troubling inequalities between wealthy and poor neighborhoods in the provision of city services.

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7 See infra text accompanying notes __.
8 See Ellickson, supra note __, at 98-99; George W. Liebmann, Devolution of Power to Community and Block Associations, 25 URB. LAW. 335, 346-47 (1993). Robert Nelson, the rare scholar who has actually advocated for neighborhood zoning control, does not discuss any of the applicable precedent holding that the delegation of zoning authority to neighborhood groups is unconstitutional, nor does he directly compare neighborhood zoning districts with special assessment districts, as this article does. See Robert H. Nelson, Private Neighborhoods and the Transformation of Local Government 403-408 (2005) (discussing several lines of potentially applicable precedent but ignoring delegation cases); infra text accompanying notes __.
9 In New York, the borough of Staten Island petitioned to secede after the United States Supreme Court held that New York City’s “one borough, one vote” method for electing members of its zoning and budget authority violated the constitutionally mandated “one person, one vote” formula and ordered the city to reconstitute the authority, thus diluting Staten Island’s voice in land use matters. See Richard Briffault, Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemma of Local Self-Determination, 92 COLUM L. REV. 775 (1992). Across the continent, when the city of Los Angeles revised its 75-year-old city charter in 1999 and decided against a hotly debated proposal to devolve land use powers to neighborhood councils, homeowners in the vast adherent suburb of the San Fernando Valley were so incensed that they, too, initiated a campaign for secession. See Raphael Sonenshein, The City at Stake: Seccession, Reform and the Battle for Los Angeles (2004).
10 See Gerald E. Frug, The Seductions of Form, 3 DREXEL L. REV. 11, 17 (2010) (lamenting that the “almost automatic answer when one seeks to create an organization to improve neighborhood life” is “Let’s create a BID;” asserting that BID is simply not applicable to the wide array of urban challenges and that “we need more options”); Reynolds, supra note __, at 433-34 (describing problem of intra-local service inequalities with BIDs and special assessment districts).
This article argues that the judicial proclivity to uphold special assessment districts and BIDs while invalidating neighborhood zoning districts is doctrinally illogical and indefensible as a matter of public policy. Indeed, because neither the jurisprudence nor the scholarly literature acknowledges any connection between these two devices, no one to date has undertaken to defend the disparate treatment accorded them. For purposes of this article, I read the doctrine and literature broadly in an effort to divine a basis for distinguishing neighborhood zoning districts from special assessment districts. On this broad reading, it appears that courts and scholars see the special assessment and BID as essentially voluntary efforts by neighborhood landowners to provide themselves with supplemental services, while they view zoning as the coercive regulation of land use.11 In addition, courts and commentators seem to be concerned that if neighborhoods are empowered to zone land, they will use it in such a way as to impose undesired impacts on surrounding areas, such as siting a noxious waste facility near the border of an adjacent neighborhood.12 By contrast, special assessment districts merely provide one neighborhood with desired supplemental municipal services, and therefore have no such negative impacts on neighboring areas.13

As this article demonstrates, however, these arguments are all seriously flawed. Initially, I show that special assessments are just as coercive and just as likely to impose undesirable spillover impacts as neighborhood zoning districts are. Beyond that, special assessment districts often present far more troubling public policy concerns than neighborhood zoning districts. Specifically, special assessment districts present the classic Madisonian concern about a locally dominant majority’s ability to exploit a locally vulnerable minority, whereas neighborhood zoning districts are less likely to raise this concern. The article does not argue, however, that courts should simply reverse the current simplistic approach and declare that all neighborhood zoning districts are valid and all special assessments districts are infirm. Rather, it proposes that the courts evaluate the validity of any particular delegation by considering a set of ad hoc factors that assess the extent to which the delegation creates a risk of majoritarian exploitation.

In addition to proposing a new approach to the delegation question, the broader purpose of this article is to re-examine the legal status of the neighborhood and particularly the relationship between neighborhoods and municipalities. This article is part of a larger project in which I explore the question of why courts have granted incorporated municipalities a privileged stature that they deny to unincorporated neighborhoods, notwithstanding that many municipalities are themselves little more than glorified neighborhoods.

11 See infra text accompanying notes __.
12 See infra text accompanying notes __.
13 See infra text accompanying notes __.
Here, the judicial skepticism toward neighborhood control of zoning contrasts sharply with a long tradition in which courts have broadly deferred to land use determinations by municipalities. As before, this distinction seems tenuous as a legal matter and almost backwards as a matter of public policy. A scheme in which neighborhood groups enjoy some limited powers under the oversight of a larger municipal authority could be a far superior system of local government than our existing one, in which scores of autonomous suburbs each have carte blanche to make their own land use and fiscal policies without any regard for their neighbors or the general welfare of the region. Such a scheme would also, incidentally, enable cities to compete on a more level footing with incorporated suburban communities.

Part II provides some background on the special assessment district and the neighborhood zoning district, revealing the ways in which these devices are functionally symmetrical. Part III then chronicles the wholly divergent paths courts have taken in analyzing special assessment districts and neighborhood zoning districts. Part IV examines several possible means of reconciling the two doctrinal lines, but concludes by only deepening the mystery: by all accounts, neighborhood zoning districts appear to be sounder public policy and less legally troubling than special assessment districts. This part then sets forth some analytical tools that courts should use to determine on an ad hoc basis when a delegation of power to a neighborhood group raises red flags. Finally, Part V broadens the inquiry to the question of neighborhood empowerment more generally. It concludes that there is little justification for a jurisprudence that grants incorporated municipalities such an elevated normative position while narrowly construing neighborhood power.

II. MANAGING LOCAL EXTERNALITIES BY DEVOLVING POWER TO LANDOWNERS

A. Neighbors and Externalities

The aim of this Part is to show that neighborhood zoning districts and special assessment districts are, at their core, symmetrical mechanisms for dealing with local “externalities.” A pair of simple examples will illustrate the basic externality problem. If my neighbor maintains a carefully manicured front lawn, I enjoy for free the aesthetic benefits of her activity. If, by contrast, my neighbor covers her lawn with junk and debris to express her opposition to mass consumer culture, it becomes a blight on the entire neighborhood. Both of these activities are called externalities (a “positive” and “negative” externality, respectively)\(^\text{(14)}\)


\(^{15}\) On “positive” and “negative” externalities, see SHEPSLE, supra note __, at 325.
because, in either case, the impact of my neighbor’s activity on my property is irrelevant to her decision whether or not to undertake the activity. In the first example, although I benefit from my neighbor’s landscaping, she is unable to seek payment from me for the benefits I have obtained. As a result, if it proves unprofitable to my neighbor to continue tending her lawn, she may cease doing so even if I and many other neighbors derive substantial benefits from it. Likewise, in the second example, although I am grievously harmed by my neighbor’s junkyard-cum-political statement, she is immune to the costs it imposes on me absent nuisance liability, which rarely covers aesthetic harms. She will continue to foul our collective landscape with little regard for my well-being as long as doing so is beneficial to herself.

While homeowners understandably treasure their aesthetic environment, there is often more at stake than just appearances. Studies consistently demonstrate that just about any change in the character of one’s neighborhood can have a quantifiable impact – either positive or negative – on property values in the area. William Fischel details the extent of this “capitalization” phenomenon: traffic congestion, high crime rates, large public housing projects, and localized air pollution have been shown to decrease property values, while growth controls, high-quality local schools, and having homeowners rather than renters as neighbors have demonstrably increased home values. Property owners – homeowners in particular – are therefore keenly interested in any neighborhood change, as for many individuals the home is, by a considerable margin, the most valuable asset they own.

For these reasons, neighborhoods prize the ability to bring in positive externalities, that is, improvements and land uses that they believe will increase property values and enhance community quality of life, and to keep out negative externalities, or land uses that they believe will decrease property values, increase traffic and noise, and diminish community quality of life. In order to do this, however, they must somehow “internalize” the costs of those impacts by enabling landowners who generate positive externalities like the hypothetical well-maintained lawn to obtain compensation for this beneficial activity from their benefitted neighbors, and forcing those who generate negative externalities such as the junk-strewn lawn to absorb the cost that their deleterious activity imposes on their neighbors. Over the last few decades, the deed-restricted

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16 This problem is the central concern of Richard Musgrave’s classic work on public finance, RICHARD MUSGRAVE, THE THEORY OF PUBLIC FINANCE (1959). As Musgrave puts it, “Establishment of an expensive store may increase real estate values in the neighborhood, even though the store cannot collect for the services thus rendered. A railroad into new territory may lead to gains in economic development that greatly exceed the profits to the particular railroad. Since the market permits a price to be charged for only a part of the services rendered, the development may be unprofitable from the private, but profitable from the public, point of view.” See id. at 7.

17 On negative externalities, see, e.g., DUKEMINIER ET AL., supra note __, at 46-50.

18 See FISCHEL, supra note __, at 45-46; see also ELICKSON, supra note __, at 92 (provision of local “public goods” such as street lights or improved security will cause property values in the area to rise).

19 See FISCHEL, supra note __, at 8-12.

20 The former question – how to make benefitted parties pay their fair share for the receipt of benefits that are
homeowner’s association has soared in popularity precisely because it has the ability to protect property values and community quality of life by effectively performing both of these functions – charging mandatory assessments on all homeowners for the provision of positive amenities such as swimming pools, tennis courts, and gardens (financed by mandatory assessments on all homeowners,) and strictly regulating the use of land to prevent negative externalities.21

For many neighborhoods, however, the homeowners’ association is unavailable. In older neighborhoods that were developed without deed restrictions binding each parcel of land to a homeowners’ association, retroactively creating one is nearly impossible because of the difficulty in obtaining unanimous agreement among all homeowners in a neighborhood to be bound to a homeowners’ association. Economic theory postulates that obtaining unanimity in this situation among any group larger than a few landowners is very difficult because individual landowners will each have incentives to “hold out” from the agreement.22 For example, if a sufficient number of neighborhood residents are willing to pay for the maintenance of my next-door neighbor’s front lawn, then I may continue to enjoy the presence of the nice lawn next door without having to pay. Similarly, if a sufficient number of my neighbors are willing to place restrictions on their land to prevent unkempt yards, then I may benefit from the assurance that my neighbors’ lawns will remain pristine while keeping my own lot free of restrictions. The specter of this rogue “holdout” or “free rider” will deter otherwise agreeable landowners from joining the association out of fear that they will be forced to pay for a benefit that others obtain for free. Given the choice, most individuals will opt not to join the homeowners’ association, even if it means that everyone in the neighborhood continues to suffer because of the inability to manage local externalities. This quandary can only be overcome, according to the orthodox economic view, by coercing unanimity through some sort of regulatory scheme.23

The typical regulatory scheme used to overcome this collective action nonrivalrous and non-excludable – is one of the central inquiries in public finance. See generally MUSGRAVE, supra note __. The latter question – how to make the generator of negative externalities consider the costs imposed on others – is one of the central problems in land use control. See, e.g., WILLIAM FISCHER, THE ECONOMICS OF ZONING LAWS 234-37 (1985).

21 See, e.g., NELSON, supra note __, at 46 (detailing increasing popularity of homeowners’ associations); id. at 52-55 (describing “covenants, conditions and restrictions” through which homeowners’ associations regulate land use); id. at 73-77 (describing “public” services provided by homeowners’ associations).

22 See, e.g., Robert H. Nelson, Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods, 7 GEO. MASON L. REV. 827, 828 (1999) (noting that creation of homeowners’ association in established neighborhoods is impossible because of “major problems with holdouts and other high transactions costs”); Ellickson, supra note __, at 79, 107 (“When relevant owners and residents are heterogeneous and more numerous than a dozen or two, their efforts at voluntary coordination are likely to be beset by significant free rider problems.”).

23 See, e.g., Nelson, supra note __, at 828 (proposing to overcome holdout problem through a mechanism by which homeowners’ association can be created by less than unanimous consent, essentially coercing dissenting landowners to join); Ellickson, supra note __ at 93 (proposing to overcome free-rider problem through block-level improvement district in which all benefitted owners would be required to pay assessments, regardless of consent).
problem is a combination of zoning, by which the municipality simply dictates the permissible land uses in each neighborhood regardless of the consent of particular landowners (in order to address the negative externality problem), and *ad valorem* taxation, by which the municipality levies a charge on landowners in proportion to the assessed value of their property in order to pay for the benefits all municipal residents receive, again without the consent of the assessed (this addresses the positive externality problem). As the introduction pointed out, this scheme has worked well for landowners in small, incorporated suburbs, where zoning can ensure a fairly homogenous landowning population with uniform service needs. Landowners have been far less satisfied with the governance of large cities, in which their clout is diminished by a more diverse population and a variety of strong pressure groups who make divergent demands upon municipal government. City officials, seeking to stave off flight by tax-paying landowners to adjacent suburbs, have therefore attempted to placate landowners by conferring upon them the direct power to approve neighborhood change, freeing them from the need to press their case at city hall. Of most significance for present purposes, cities have devised two complementary devices that appear ideally tailored to satisfy landowners’ desires: with the neighborhood zoning district, landowners can directly manage negative local externalities; with the special assessment district, they can directly manage positive local externalities.

**B. The Neighborhood Zoning District**

The most common type of neighborhood zoning district works as follows: any landowner desiring to use his or her land in a designated manner (say, she wishes to operate a nightclub or tavern) must obtain the consent of the owners of some percentage of the land within a certain radius from the proposed land use. Frequently, the land use or uses subject to the jurisdiction of the zoning district will be something that is considered a Locally Undesirable Land Use (LULU) – that is, a land use with the potential to impose significant negative externalities, such as increased noise or traffic congestion, or decreased property values, on the surrounding area. This type of zoning device is a “one-shot deal.”

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24 See MUSGRAVE, supra note __, at 9-10 (on taxing as traditional means of financing public goods); Nelson, supra note __, at 840-41; 844-45 (explaining how zoning is used in existing neighborhoods to coercively overcome the holdout/free rider problem).

25 See Ellickson, supra note __ at 89 (noting that with increasing size, cities are more vulnerable to influence by “rent-seeking groups such as political machines, municipal unions, public works lobbies, and downtown business interests”); Briffault, supra note __ at 506 (cities’ greater diversity vis-à-vis suburbs likely to cause “greater heterogeneity of preferences” and higher degree of dissatisfaction among city residents)


neighborhood zoning district casts a one-time vote on one proposed development and then ceases to perform any further functions (unless another land use subject to the referendum provision is proposed for the same site).

Although the one-shot deal has been most common, in principle the neighborhood zoning district could be constructed as a continuing governmental entity. Robert Nelson, for example, has proposed that landowners within a particular sub-municipal territory should be permitted to create, by petition, a “Neighborhood Association for an Established Neighborhood (NASSEN).” Once the NASSEN is created, landowners within the NASSEN’s territorial jurisdiction would have the power to vote on any proposed zoning changes within the district. Nelson’s scheme does not appear to have been widely adopted, although there are examples in which cities have attempted to delegate continuing zoning powers to defined neighborhood groups.

C. The Special Assessment District

The special assessment district is in many ways merely the converse of the neighborhood zoning district. A municipality provides an improvement that confers a “special benefit” on property in the vicinity, then assesses the benefitted property owners for the cost of the improvement. Thus, for example, if a sewer line servicing a residential development of fifty homes needs repair, the municipality could perform the repair and then assess the fifty homeowners for the cost. Traditionally, the special assessment was a one-shot deal. The city would assess a one-time charge to finance a one-time physical improvement. Furthermore, the traditional special assessment usually provided improvements that were placed on or abutting the benefitted land – such as streets or sewers. In modern times, however, the special assessment has had much broader applicability. For example, the assessment may finance the provision of positive externalities such as sanitation or security services that generally benefit the assessed area, or the erection of an improvement such as a rail station that promises to increase economic activity or property values in the area. In addition, the modern special assessment district may not necessarily be a one-shot deal, but could be an ongoing operation that assesses a regular

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

See NELSON, supra note __, at 259-314.

See, e.g., Schultz v. Milne, 849 F. Supp. 708 (N.D. Cal. 1994) (neighborhood review board empowered to approve all new zoning changes); Rispo Investment Co. v. Seven Hills, 629 N.E.2d 3 (Ct. App. Ohio 1993) (all zoning changes subjected to approval by voters in the relevant electoral ward).

For a general discussion of the special assessment, see, for example, Reynolds, supra note __, at 397-402.

See id.

See id.

See id. at 399-400.
charge against landowners for provision of a continuing service.\textsuperscript{35} One widely used modern incarnation of the special assessment district, usually known as a “business improvement district” (BID) requires assessed landowners to pay a recurring charge to an association, which then uses the funds to perform a wide array of ongoing services for the benefit of the assessed landowners.\textsuperscript{36} Several scholars have proposed expanding the BID concept to allow virtually any neighborhood or block-front group to create, by petition of a percentage of landowners, an improvement district that is empowered to levy assessments on neighborhood residents in order to provide collective amenities on an ongoing basis.\textsuperscript{37} The neighborhood or blockfront improvement district appears to have gained popularity in recent years.\textsuperscript{38}

A special assessment or BID may be imposed on the benefitted landowners by the city without the consent of the landowners, but the more common course is for a percentage of the benefitted landowners to petition the city to create the assessment district.\textsuperscript{39} Even where such a petition is not formally required, it is rare for a city to create such a district without the approval of a significant percentage of the assessed landowners.\textsuperscript{40} In many cases, the city’s decision to create a special assessment district is subject to a referendum by a percentage of the landowners to be assessed (usually a majority or supermajority).\textsuperscript{41} In cases where the special assessment district operates on an ongoing basis, like a BID, a board of directors is either elected or appointed to manage the budget and operations of the district. If the board is elected, landowners typically have either an exclusive franchise or the overwhelming majority of the voting power.\textsuperscript{42} Even when the board is appointed, it tends to be dominated by landowners.\textsuperscript{43} For purposes of this paper, I ignore the less common variety of special assessment district in which the city simply imposes the assessment without the consent of assessed landowners.

\textbf{D. Capitalization, Coercion and the Public Choice Regulatory Model}

The preceding sketch points out some of the ways in which the neighborhood zoning district and the special assessment district are conceptually symmetrical. First, both devices provide landowners with the direct ability to manage local externalities. Neighborhood zoning districts permit a percentage of neighboring

\textsuperscript{35} See id.
\textsuperscript{36} See generally Briffault, supra note \textsuperscript{33} (providing exhaustive discussion of the BID).
\textsuperscript{37} See generally Ellickson, supra note \textsuperscript{33}; Liebmann, supra note \textsuperscript{33}.
\textsuperscript{38} See Richard Briffault, The Business Improvement District Comes of Age, 3 DREXEL L. REV. 19, 21-22 (2010) (noting wide variety of Philadelphia BIDs outside downtown in many different kinds of neighborhoods, including low-income, minority neighborhoods).
\textsuperscript{39} See Reynolds, supra note \textsuperscript{33}, at 404.
\textsuperscript{40} See id.; Briffault, supra note \textsuperscript{33}, at 369; 381-84.
\textsuperscript{41} See Briffault, supra note \textsuperscript{33}, at 379.
\textsuperscript{42} See id. at 409-14.
\textsuperscript{43} See id.
landowners to keep out (or be paid for allowing in) an undesirable new entrant that presumptively causes them disproportionate harm as a result of its proximity; special assessment districts permit a percentage of neighboring landowners to bring in (if they pay) a desirable new entrant that presumptively brings them disproportionate benefits as a result of its proximity. Second, both devices enable large, diverse cities to capture some of the governance advantages of small, homogenous suburbs. Devolving direct power over some land use change to landowners within proximity to the change is a means of circumventing the interest-group conflict prevalent in a diverse city by homogenizing the voting population and thereby ensuring a general consistency of preferences.

The assumption that restricting the franchise to proximate landowners will in fact achieve a uniform set of preferences rests implicitly on the theory of capitalization – that the positive or negative impacts of neighborhood change will be reflected in the property values of those landowners whose land is closest to the proposed change. If all proximate landowners stand collectively to gain or to lose from a proposed new entrant to the neighborhood, they are likely to share similar views on whether or not to welcome that new entrant. Capitalization also provides a normative basis for limiting the franchise to proximate landowners. Although tenants, employees, visitors, mobile business interests or others may have a stake in how the neighborhood manages change, capitalization posits that none of these groups are affected as acutely as the landowners, whose property values will be directly impacted for better or for worse by the change. Both the special assessment district and the neighborhood zoning district rely implicitly on capitalization to rationalize confining the franchise to landowners on the grounds that landowners have a disproportionate degree of interest in proximate land use changes.

The most critical similarity between neighborhood zoning districts and special assessment districts, however, is that both devices have a strongly coercive component. Unanimity is rarely required either for the zoning district

44 See Thomas W. Merrill, Direct Voting by Property Owners, 77 U. Chi. L. Rev. 275, 294 (“Limiting the franchise to owners … is likely to select a pool of voters who have a strong incentive to inform themselves about any issue that will have a significant impact on property values.”).

45 Those who advocate the delegation of power to property owners in situations where capitalization is involved rebut the objection that confining the franchise to landowners is undemocratic by noting that delegation solely to landowners is appropriate in circumstances where landowners are disproportionately interested. See, e.g., Ellickson, supra note __, at 90-95 (responding to “hyper-egalitarian” criticism of landowner voting). This same logic informs the Supreme Court’s jurisprudence exempting certain “special purpose” municipal entities from the one person/one vote rule of Reynolds v. Sims, 377 U.S. 533 (1964). See infra text accompanying notes __.

46 On the special assessment district, see, for example, Kessler v. Grand Central Dist. Mgmt. Assoc., 158 F.3d 92, 108 (2d Cir. 1997) (“The principal economic benefit from [the BID’s] activities…plainly accrues to the property owners, who will enjoy an increase in the value of their property.”); Ellickson, supra note __, at 92-93 (property owners should be given exclusive franchise in “block-level institution” charged with providing localized public goods, because landowners are the primary beneficiaries via capitalization). On the neighborhood zoning district, see, for example, Davis v. Blount Cty. Beer Bd. 621 S.W.2d 149, 152 (Tenn. 1981) (upholding ordinance conditioning approval of a tavern on consent by proximate landowners, reasoning: “[i]t has been recognized that the … the existence of [a LULU] in close proximity to the property of others may adversely affect the value of their property.”).
to approve or disapprove a land use, or for the special assessment district to approve or disapprove an assessment. Rather, the owners of some percentage (usually a majority or supermajority) of the land within the district have the power to impose their will on the remaining landowners. As I have stressed, orthodox economic theory considers this coercive element to be absolutely essential in overcoming the collective action problem that besets the management of local externalities – without coercion, individual landowners will be enticed to hold out or take a free ride on the efforts of their neighbors.47

Ultimately, both the neighborhood zoning district and the special assessment district obtain their legitimacy from a “public choice” model of local government. Under this model, virtually all goods and services are ideally provided by a free market in which individuals transact based on their ability and willingness to pay rather than by a state using coercive and redistributive regulation.48 State coercion is legitimate only to the extent that it is necessary to overcome a structural incapacity of the market to satisfy individual preferences.49 The state, in other words, is merely a continuation of the market by other means.50 It exists solely in order to enable individuals to safeguard their individual economic self-interest where the market fails to do so. In the case of the neighborhood zoning district and special assessment district, the public choice model would consider government coercion of dissenting landowners a legitimate form of market substitution because collective action problems (of either the holdout or free-rider variety) frustrate the economic interests of all the neighborhood landowners by making it impossible for them to internalize the costs of local externalities.51 By the same token, public choice theory would rationalize the restriction of the franchise to landowners on the grounds that, per capitalization theory, the only reason government coercion is justified at all is in order to protect the landowners whose property values are bedeviled by externality problems.52

Despite the shared public choice underpinnings of these two devices, however, courts have gone in two divergent directions in assessing the legality of the special assessment district and the neighborhood zoning district. In both groups of cases, courts have implicitly accepted the capitalization premise that

47 See See, e.g., Nelson, supra note __, at 828 (proposing to overcome holdout problem through a mechanism by which homeowners’ association can be created by less than unanimous consent, essentially coercing dissenting landowners to join); Ellickson, supra note __ at 93 (proposing to overcome free-rider problem through block-level improvement district in which all benefitted owners would be required to pay assessments, regardless of consent); id. at 107 (acknowledging that the BLID proposal involves coercion of dissenting landowners to overcome free-rider problem); Briffault, supra note __, at 394 (“The coercive assessment is essential to the BID.”).
49 See id. at 155-57.
50 See id. at 148 (Under public choice model, “[t]he legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange.”).
51 See id. at 156 (discussing how problem of “transaction costs,” specifically “free-loaders” and “hold-outs,” legitimizes state coercion under “market-failure” view of public choice theory).
52 See id. at 155 (purpose of coercion is to internalize externalities where voluntary negotiations are likely to fail).
landowners are disproportionately interested in land use changes or new improvements in their neighborhoods. Similarly, courts appear to acknowledge that both devices follow a certain “public choice” logic by enabling proximate landowners to protect the value of their own property. The courts follow these premises, however, to diametrically opposed conclusions. The majority of court decisions hold neighborhood zoning districts to be constitutionally infirm because of the likelihood that landowners will make decisions based on their own self-interest. By contrast, almost all courts uphold the constitutionality of special assessment districts in which landowners enjoy a disproportionate voice on the grounds that the landowners are those most interested.

This inconsistency has persevered in the jurisprudence, unresolved and un-commented upon, because the courts have developed two entirely distinct sets of doctrine to analyze these two devices. Neighborhood zoning districts are scrutinized under a sclerotic “delegation” doctrine that looks skeptically when evidently self-interested parties are given the reins of coercive regulation. Special assessment districts, by contrast, are analyzed under a more generous doctrine that recognizes the practical need for municipalities to indulge the interests of the property owners who pay the city’s bills. In short, it appears that the cases dealing with the neighborhood zoning district reject the public choice model entirely, whereas the cases dealing with the special assessment district accept it. These two doctrinal lines seem to exist in parallel juridical universes, neither one acknowledging the other or recognizing their obvious incompatibility.

III. PUBLIC CHOICE AND THE JURISPRUDENCE OF NEIGHBORHOOD EMPOWERMENT

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

The fate of neighborhood zoning districts was set by a cryptic series of Supreme Court decisions from the early part of the twentieth century. Zoning was first introduced into American cities in the late 19th century under the dual pressures of urbanization and industrialization. An exploding urban population and the intensification of land development for commercial and industrial purposes necessarily entailed a sharp increase in land use conflicts.\(^5\) Of particular concern to city leaders was that the introduction of so many new, high-intensity land uses threatened to destabilize property values in existing neighborhoods with relatively uniform, low-intensity land use patterns (such as single-family residential districts,) because potential investors would surely be

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wary of purchasing a plot of land that accrued a significant portion of its value from the low-intensity homogeneity of the neighborhood in which it was situated absent some assurance that the neighborhood would remain homogenous, particularly during an era when neighborhoods were rapidly changing with the constant introduction of ever more intense land uses.\textsuperscript{54} To address this problem, the city of Chicago pioneered the earliest form of zoning ordinance: the “blockfront consent” scheme. In 1887, Chicago enacted an ordinance that prohibited any new livery stable within 75 feet of any residential area unless the owners of all property within 600 feet consented in writing.\textsuperscript{55} The scheme was upheld by the Illinois Supreme Court in the case of City of Chicago v. Stratton,\textsuperscript{56} which reasoned that “[i]n matters of local concern, the parties immediately interested may fairly be supposed to be more competent to judge of their needs than any central authority.”\textsuperscript{57} Stratton thus appears consistent with the public choice logic that “immediately interested” parties should be permitted to determine their own “needs.”

However, Stratton was cast into serious doubt by the United States Supreme Court’s 1912 decision in Eubank v. City of Richmond.\textsuperscript{58} There, the Supreme Court held that a zoning ordinance enacted by the city of Richmond, Virginia permitting the owners of two-thirds of the property abutting any street to establish a setback line for buildings on the street was an unconstitutional delegation of power. The Court reasoned that the ordinance permitted “one set of property owners to control the property rights of others”\textsuperscript{59} without providing any standards by which such control should be exercised.\textsuperscript{60} Absent any standards, property owners could exercise that power “solely for their own interest, or even capriciously.”\textsuperscript{61} In rejecting landowners’ “own interest” as a decisionmaking standard, Eubank apparently repudiated the underlying public choice premise of the neighborhood zoning district.

Stratton was distinguishable from Eubank in that the ordinance at issue in Stratton did not permit landowners to establish a land use regulation, but simply to waive an otherwise applicable restriction. In a later case also involving the city of Chicago, Thomas Cusack Co. v. City of Chicago,\textsuperscript{62} the Supreme Court seemingly salvaged Stratton. The Court upheld a municipal ordinance prohibiting the erection of a billboard in any predominantly residential district without the consent of owners of a majority of the frontage on the street where the billboard was to be erected. The Court distinguished Eubank by noting that

\textsuperscript{54} See Bosselman, supra note __, at 565-69 (describing concerns that led to city of Chicago’s earliest zoning law).
\textsuperscript{55} See id. at 569-71.
\textsuperscript{56} City of Chicago v. Stratton, 44 N.E. 853, 855 (Ill. 1896).
\textsuperscript{57} Id. at 855.
\textsuperscript{58} 226 U.S. 137 (1912).
\textsuperscript{59} Id. at 145.
\textsuperscript{60} Id. at 144-45.
\textsuperscript{61} Id. at 145.
\textsuperscript{62} 242 U.S. 526 (1917).
the Richmond ordinance had empowered neighbors to impose restrictions, whereas the Chicago ordinance under review empowered neighbors only to lift an otherwise applicable restriction. 63

The distinction between a valid waiver and an invalid imposition, tenuous from the beginning, was apparently abolished in the last of the Supreme Court’s cases on neighborhood zoning districts, the 1928 case of State of Washington ex rel. Seattle Title & Trust Co. v. Roberge. 64 There, the Court invalidated an ordinance that prohibited the construction of certain types of group homes in areas zoned for single-family residences, but allowed this prohibition to be lifted with the consent of the owners of two-thirds of the property within four hundred feet of the proposed location of the group home. Although the case more closely resembled Cusack than Eubank, the Court followed Eubank in reasoning that the ordinance amounted to a standardless delegation – it conferred power on one group of property owners to prevent others from using their land without providing any standards to guide or constrain their discretion. These property owners “are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily, and may subject [the plaintiff] to their will or caprice.” 65 Like Eubank, then, Roberge rejected the public choice premise that landowners should be able to withhold consent for “selfish” reasons such as protecting the value of their property. The Roberge Court distinguished Cusack on the grounds that billboards – at issue in Cusack – were inherently offensive nuisances, whereas the record did not establish the per se offensiveness of group homes. 66

Making sense of this trio of cases has proven beyond the capacity of even the most capable scholars. 67 While Eubank and Cusack can perhaps be reconciled, Roberge’s distinction of Cusack cannot withstand scrutiny. If Roberge is read to mean that cities lack the power to prohibit group homes in single-family neighborhoods because group homes are not inherently offensive, then Roberge is plainly inconsistent with the Supreme Court’s landmark ruling in Euclid v. Ambler Realty Co., 68 decided just two years earlier. In Euclid, the Supreme Court made clear that zoning authority was not limited to restraining nuisances but could be used broadly to protect the character of existing neighborhoods. 69 If, on the other hand, Roberge’s concern was not with the city’s power to prohibit the use in question ab initio, but rather with the validity of a neighborhood plebiscite on whether to waive the prohibition, the Court’s

63 See id. at 531.
64 278 U.S. 116 (1928).
65 Id. at 122.
66 See id.
67 Frank Michelman undertook an exhaustive analysis of the three cases, and ultimately concluded that the three cases cannot be reconciled. See Michelman, supra note __, at 164-87. I discuss Michelman’s analysis further infra at text accompanying notes __.
69 Id. at 388.
distinction of \emph{Cusack} is still inexplicable. It seems far more sensible for a city to give neighbors a vote on whether to waive a land use prohibition where the offensiveness of the use to be prohibited is debatable (as in \emph{Roberge}) than where the use is indisputably offensive (as in \emph{Cusack}). Indeed, the city would likely derogate its duty to protect the public health, safety and welfare if it permitted some landowners to impose a plainly noxious use on their objecting neighbors.

Not surprisingly, courts and commentators have struggled to make sense of the doctrine emerging from the \emph{Eubank-Cusack-Roberge} line. The majority of courts cite \emph{Roberge} and \emph{Eubank} as providing the applicable rule that direct delegation of the zoning power to neighborhood groups is prohibited, and either ignore or distinguish \emph{Cusack}.\footnote{\textit{See} Cary v. City of Rapid City, 559 N.W.2d 891 (S.D. 1997) (invalidating neighbor consent provision under authority of \emph{Eubank} and \emph{Roberge}); Schulz v. Milne, 849 F. Supp. 708 (N.D. Cal. 1994) (holding that plaintiff stated a claim for unlawful delegation of zoning power to neighborhood review board on the authority of \emph{Eubank} and \emph{Roberge}); Emmett McLoughlin Realty, Inc. v. Pima County, 58 P.3d 39 (Ariz. 2002) (citing all three cases and holding that ordinance conditioning zoning changes on approval of affected landowner was an invalid delegation); Shannon v. City of Forsyth, 666 P.2d 750 (Mont. 1982) (invalidating neighbor consent provision under authority of \emph{Eubank} and \emph{Roberge}); American Chariot v. City of Memphis, 164 S.W.3d 600 (Ct. App. Tenn. 2004) (invalidating landowner consent provision, distinguishing \emph{Cusack}); Williams v. Whitten, 451 S.W.2d 535 (Tex. App. 1970) (invalidating neighbor consent provision under authority of \emph{Roberge}); County of Fairfax v. Fleet Indus. Park Ltd. P'ty, 410 S.E. 2d 669 (Va. 1991) (invalidating neighbor consent provision under authority of \emph{Eubank}); Town of Westbrook v. Kilburn, 300 A.2d 523 (Vt. 1973) (invalidating consent provision as standardless delegation without citing \emph{Eubank} or \emph{Roberge}); cf. General Electric Co. v. New York State Dep’t of Labor, 936 F.2d 1448, 1455 (2d Cir. 1991) (“\emph{Eubank} and \emph{Roberge} remain good law today.”).} A minority of courts cite \emph{Cusack} and uphold such provisions, and likewise either distinguish or ignore \emph{Eubank} and \emph{Roberge}.\footnote{\textit{See} Nikolaus v. City of Omaha, 2009 WL 529226 (D. Neb. 2009) (upholding neighborhood “waiver” provision under \emph{Cusack}, not citing \emph{Roberge} or \emph{Eubank}); Coffey v. County of Otero, 743 N.W.2d 632 (Neb. 2008) (upholding neighborhood “waiver” provision under \emph{Cusack}, distinguishing \emph{Eubank} and ignoring \emph{Roberge}); Rispo Inv. Co. v. City of Seven Hills, 629 N.E.2d 3 (Ohio App. 1993) (upholding neighborhood consent provision, distinguishing \emph{Eubank} and \emph{Roberge}); Davis v. Blount Cty. Beer Bd. 621 S.W.2d 149 (Tenn. 1981) (upholding consent provision under \emph{Cusack}); cf. Hornstein v. Barry, 560 A.2d 530 (D.C. 1989) (en banc) (upholding provision conditioning conversion of apartment building to condominiums on consent of majority of existing tenants, relying on \emph{Cusack} and distinguishing \emph{Roberge}); but cf. id. at 540 (Ferren, J. dissenting) (arguing that \emph{Roberge} rather than \emph{Cusack} is the applicable rule); id. at 542-43 (Reilly, J. dissenting) (same).} Neither group of decisions makes a convincing case for unifying the doctrine in this area.\footnote{\textit{See} Michelman, \textit{supra} note __, at 164-87; infra text accompanying notes __.} Scholars have fared little better. Frank Michelman, one of the most distinguished local government scholars, undertook an extensive examination of the three cases (discussed in greater detail below,) and ultimately concluded that they simply could not be reconciled.\footnote{Fortunately, for purposes of this paper, I need not sort out the doctrinal mess these precedents have created. My concern}
here is how, if at all, we can reconcile the courts’ generally skeptical attitude toward neighborhood zoning districts with the permissive approach to special assessment districts. Cusack may prove relevant for this discussion later, but for the present I focus on Eubank, Roberge, and their progeny.

If we take the reasoning of Roberge and Eubank at face value, the trouble with neighborhood zoning districts is their public choice foundation—that landowners are permitted to exercise regulatory power in accordance with their own selfish interests rather than some conception of the public good. If that is a legitimate concern, it should also raise doubts about the validity of the special assessment district, which likewise limits the franchise to proximate landowners on the theory that their property is disproportionately affected by the district’s activities. Nevertheless, the special assessment district has managed to evade the scrutiny of the Roberge doctrine, because courts use an entirely distinct doctrinal framework to assess that device, a framework in which the self-interest of the enfranchised landowners is considered a point in favor of the district’s validity.

B. Special Assessments, Business Improvement Districts, and the One Person, One Vote Rule

The special assessment is of older vintage than zoning, having been used since before the Civil War as a means of financing municipal improvements. Traditionally, special assessment doctrine has been the province of the state courts. Beginning in the 1970s, however, federal courts entered the fray. In Avery v. Midland County, the Supreme Court held that local governments with “general governmental powers over an entire geographic area” were required to apportion voting power in accordance with the principle of “one person, one vote” articulated in the landmark decision of Reynolds v. Sims. The Avery Court left open the possibility that the rule might not apply to “a special-purpose unit of government assigned the performance of functions affecting definable groups of constituents more than other constituents.” Avery thus seemed to acknowledge that, contrary to Roberge and Eubank, circumstances might exist in which it would be legitimate for government to delegate power to individuals deemed disproportionately interested in the subject-matter of government

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75 Toward the close of the nineteenth century, the United States Supreme Court briefly intervened in special assessment law to require that special assessments be supported by a fairly exacting calculation of the special benefits received by each landowner, see Norwood v. Baker, 172 U.S. 269 (1898), but just a few years later the Court reversed itself and held that courts should broadly defer to legislative judgments about benefit, which it deemed “a matter of forecast and estimate.” See Louisville & Nash R.R. v. Barber Asphalt Paving Co., 197 U.S. 30 (1905). From that time until the emergence of the one person, one vote jurisprudence in the 1970s, the federal courts largely ceded the development of special assessment law to state courts.
78 Id. at 483-84.
regulation.

The Supreme Court subsequently found that Avery’s exception was indeed applicable in two cases, \textit{Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.} \textsuperscript{79} and \textit{Ball v. James}. In both cases, the Court evidently accepted the very public choice premise that Eubank and Roberge rejected – they affirmed that government can constitutionally confer regulatory power on presumptively self-interested landowners in proportion to their presumed degree of interest. In \textit{Salyer} and \textit{Ball}, plaintiffs challenged the voting structure of “special purpose” municipal districts. Special purpose districts are similar to special assessment districts in that they are typically financed, at least in part, by assessments on benefitted landowners; they differ in that special purpose districts are created directly by the state as an autonomously functioning local governmental body rather than a subdivision of a general-purpose municipality. \textsuperscript{81} The districts in \textit{Salyer} and \textit{Ball} were water storage districts that imposed mandatory assessments on landowners who received water from the districts. The size of the assessment was based on the benefit each parcel of land was deemed to receive, and voting rights for the directors of the water districts were allocated based on either the assessed valuation of the land (in \textit{Salyer}) or the acreage of land owned (in \textit{Ball}). The voting schemes in the two cases were challenged for violating the one person, one vote rule, but the Court held that Avery was inapplicable. In both cases, the Court held that the water districts served only the limited purpose of providing water and disproportionately impacted the landowners who paid the assessments and whose land received the benefit of water provision. The Court reached this conclusion notwithstanding the fact that the water district in \textit{Ball} included almost half the population of the state of Arizona, including the entire Phoenix metropolitan region, and that it generated and sold electric power in addition to its water management functions, thus making the district a significant factor in the overall development of an arid region. The Court found that the district did not administer “such normal functions of government as the maintenance of streets, the operations of schools, or sanitation, health or welfare services.” \textsuperscript{82} Furthermore, the weighted voting structure was legitimate because there was a “disproportionate relationship” between the district’s functions and the landowners within the district empowered to vote. Weighting votes based on the acreage of land owned was reasonable “since that number reasonably reflects the relative risks they incurred as landowners and the distribution of the benefits and the burdens of the District’s water operations.” \textsuperscript{83}

\textsuperscript{79} 410 U.S. 719 (1973).
\textsuperscript{80} 451 U.S. 355 (1981).
\textsuperscript{82} 451 U.S. at 366.
\textsuperscript{83} Id. at 371.
Salyer and Ball thus stand for the proposition that it is constitutionally permissible, and indeed eminently reasonable, for government to delegate regulatory power to landowners deemed to have a disproportionate economic interest in the subject-matter of the regulation, at least where two predicates are satisfied. First, the entity must serve a “special limited purpose” rather than a general governmental purpose; and second, it must disproportionately affect a distinct class of constituents. After Ball, it has been left to state and lower federal courts to sort out the knotty analytical problem of how exactly to distinguish “limited purpose” from “general purpose” municipalities, and how to determine when one group of constituents is so disproportionately affected by the operations of a governmental entity as to justify departure from the constitutional standard. A large body of doctrine has developed attempting to interpret and apply Salyer and Ball. For purposes of this paper, two decisions are particularly relevant because they apply the Salyer-Ball line to, respectively, a traditional special assessment district and a business improvement district. In doing so, these decisions expressly use public choice reasoning to legitimize the regulatory mechanisms in question.

In Southern California Rapid Transit Dist. v. Bolen, an agency created by the state of California for the purpose of financing and constructing a rapid transit system in southern California was empowered to recoup some of the costs for the project by creating “special benefit assessment districts” surrounding proposed rail stations. Landowners within the assessment district would pay a charge based on the amount of property owned. The agency voted to create several benefits districts after determining that the landowners to be assessed would experience tangible benefits such as enhanced property values from the introduction of rail stations near their property. The law provided, however, that the creation of a district be subjected to a referendum of the affected landowners if the owners of at least 25 percent of the assessed value of real property within a proposed district requested it. Only landowners subject to the assessment were eligible to vote, and voting was weighted based on the amount of property owned. The Court held that this voting scheme was constitutional under the Salyer-Ball line. First, the special assessment districts did not exercise any “general governmental powers” but were “little more than formalistic, geographically defined perimeters whose raison d’etre is to serve as a conceptual medium for the recognition of economic benefits conferred and the imposition of a corresponding fiscal burden.” Second, the assessment districts disproportionately affected the enfranchised landowners because “it is they

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84 1 Cal.4th 654 (1992).
85  See id. at 660.
86  See id.
87  See id. at 662.
88  See id. at 660.
89  See id.
90  Id. at 669.
landowners] who will most directly feel both the beneficial economic effects of the transit station locations and bear the financial burden of the annual assessments.\footnote{Id. at 674.}

\textit{Kessler v. Grand Central Dist. Mgmt. Assoc.}\footnote{158 F.3d 92 (2d Cir. 1997).} raised the constitutionality of a BID established by the city of New York in the area surrounding the historic Grand Central terminal. Under city law, all property owners within the territory of the Grand Central District Management Association (GCDMA) were required to pay annual assessments to the GCDMA, which would then use the funds to perform services within the district such as maintenance, security, street signage, and the like.\footnote{Id. at 94-96.} The stated purpose of the GCDMA was to promote business activity within the district for the benefit of the assessed property owners.\footnote{See id. at 94, 104} The President of the GCDMA openly described himself as “a paid employee only of property owners.”\footnote{See id. at 104-107.} The city law provided that voting for the GCDMA board of directors was to be weighted based on property ownership. Specifically, the enabling statute required that property owners elect a majority of the board.\footnote{See id. at 108.} Citing \textit{Salyer} and \textit{Ball}, the court found the GCDMA exempt from the one person, one vote standard. The court held that the district had the limited purpose of promoting business within the area, performed a narrow set of functions, lacked regulatory authority, and was subject to substantial governmental oversight.\footnote{See Kessler, 158 F.3d at 116 (Weinstein, J., dissenting).} Furthermore, the GCDMA’s operation had a substantially greater effect on the assessed property owners than others. “The principal economic benefit from GCDMA’s activities…plainly accrues to the property owners, who will enjoy an increase in the value of their property.”\footnote{Id. at 108.}

Both \textit{Kessler} and \textit{Bolen} explicitly rely on capitalization theory as a public choice justification for the weighted voting structure of the district in question. The fact that landowners stood to benefit economically from the district’s activities legitimized their exercise of disproportionate political power, whereas in \textit{Roberge} and \textit{Eubank}, that very fact rendered the neighborhood zoning district unconstitutional.

\section*{C. Unifying the Doctrine?}

\textit{Kessler} and \textit{Bolen}, like most decisions in the \textit{Salyer-Ball} line, make no mention of the parallel \textit{Eubank-Roberge} line, occasionally dropping a reference to “delegation” but taking the matter no further. Likewise, few of the cases in
the *Eubank-Roberge* line ever mention the *Salyer-Ball* doctrine. This is curious. If the delegation doctrine articulated in *Eubank* and *Roberge* had been applied to the assessment districts at issue in either *Bolen* or *Kessler*, the court would surely have been more skeptical of the selective enfranchisement of transparently selfinterested landowners to make decisions affecting their neighbors. Conversely, if the neighborhood zoning districts invalidated in *Eubank* and *Roberge* were to be considered under the *Salyer-Ball* line, there is good reason to suppose that they would withstand scrutiny. Like the special assessment districts in *Bolen*, neighborhood zoning districts are “little more than formalistic, geographically defined perimeters” designed to serve as “conceptual mediums” for the recognition of a distinct economic impact. And just as the property owners in *Kessler* were disproportionately affected because they could expect to “enjoy an increase in the value of their property” from the enhanced services of the GCDMA, capitalization theory likewise predicts that landowners within a neighborhood zoning district can expect a diminution in the value of their property if they cannot exclude an unwanted land use.99

On its face, then, there is an unresolved contradiction in the jurisprudence. And, as William James said, “when you meet a contradiction, you must make a distinction.”100 The courts, unfortunately, have never articulated what that distinction may be. Law review commentators have done little better. For example, both Robert Ellickson and George Liebmann have written glowingly of BIDs, even advocating for the expansion of their use to urban neighborhoods outside of downtown areas.101 Ellickson, for example, endorses the BID on the grounds that it enables landowners to circumvent the inefficient “rent-seeking” of big city government and directly provide themselves with desired local amenities.102 He further argues that restricting the franchise to landowners is sensible because, given the capitalization literature, landowners are clearly disproportionately affected by the introduction of new local improvements.103 This very logic, of course, would also support neighborhood zoning control. However, both Ellickson and Liebmann recoil at the prospect of conferring zoning powers on neighborhood groups.104 Neither scholar provides more than a cursory explanation of how they can meaningfully distinguish neighborhood zoning districts from BIDs. Robert Nelson, the rare scholar who has actually advocated for neighborhood zoning control, has simply ignored the *Roberge* line entirely.105

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99 Likewise, the distinction between “general purpose” and “special purpose” governmental entities provides little help in distinguishing neighborhood zoning districts from special assessment districts. I address the general/special distinction in more detail infra in text accompanying notes ___.
101 See Ellickson, *supra* note __; Liebmann, *supra* note __.
102 See Ellickson, *supra* note __, at 89-90.
103 See id. at 92-95.
104 See id. at 98-99; Liebmann, *supra* note __, at 346-47; 362.
105 See NELSON, *supra* note __, at 403-408 (discussing the Avery line as potentially applicable precedent while ignoring the Roberge line).
In the following Part, I look beneath the surface of both the doctrine and commentary in an attempt to discern whether there is a meaningful distinction between neighborhood zoning districts and special assessment districts that may explain the contradiction. Ultimately, I conclude that there is no sound way of distinguishing these devices. Indeed, if there is any valid distinction, it is that neighborhood control of zoning is far less troublesome as a matter of public policy than the special assessment district.

IV. PUBLIC POLICY AND NEIGHBORHOOD EMPOWERMENT

A. “Regulation” or “Supplemental Services”?

On a close reading, the caselaw and literature implicitly differentiate neighborhood zoning districts from special assessment districts on the grounds that the former are empowered to regulate private conduct – that is, to dictate permissible uses of privately owned land – while the latter merely provide supplemental municipal services like additional garbage collections or street-sweeping. For example, where the Eubank Court observed that the Richmond zoning ordinance empowered one set of owners to determine “the kind of use which another set of owners may make of their property,”\(^\text{106}\) the Ball Court stressed that the Salt River district “cannot enact any laws governing the conduct of citizens”\(^\text{107}\) and that it “does not and cannot control the use to which the landowners who are entitled to the water choose to put it.”\(^\text{108}\) Similarly, the Kessler court emphasized that the GCDMA “has no authority to enact or enforce any laws governing the conduct of persons present in the district,”\(^\text{109}\) or any other regulatory authority. Implicitly, then, the courts may be making the entirely sensible point that an entity that engages in coercive regulation should be subject to stricter constitutional constraints than one that merely provides services in a non-coercive way.

Commentators have also stressed the distinction between the regulatory powers of zoning authorities and the service-providing powers of special assessment districts. For example, in an official report describing California’s special purpose districts, the state Senate Local Government Committee claimed that “general purpose” municipalities (i.e., cities that exercise the zoning power) are distinct from “special purpose” municipalities (such as water districts) because the former are empowered to “regulate private behavior,” whereas the latter have only the power to “‘do things,’ like building public works projects such as parks and sewers.”\(^\text{110}\) Similarly, in his proposal to create “block level

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\(^{106}\) Eubank, 226 U.S. at 143.

\(^{107}\) Ball, 451 U.S. at 366.

\(^{108}\) Id. at 367-68.

\(^{109}\) Kessler, 158 F.3d at 104.

\(^{110}\) California State Senate Local Gov’t Committee, What’s So Special About Special Districts?: A
improvement districts” inspired by BIDs, Robert Ellickson distinguishes the “supplementary” services he would authorize those districts to provide, such as sanitation or capital improvements, from “regulatory powers,” such as neighborhood zoning.\(^{111}\)

This apparent distinction fails, however, because in fact special assessment districts do regulate just as surely as neighborhood zoning districts do. While it is true that the primary function of the special assessment district is to provide services, that function would be impossible to carry out if the district did not also possess one critical “regulatory” power: the ability to *coerce* all landowners within its territorial jurisdiction to pay a mandatory assessment in order to defray the cost of the service provided, regardless of whether any particular landowner desires the service or not. As discussed previously, and as Ellickson himself acknowledges, the element of coercion is essential to the success of the special assessment district, as it is to the neighborhood zoning district, in order to overcome the collective action problem that entices landowners to attempt a free ride.\(^{112}\)

Although both special assessment districts and neighborhood zoning districts are predicated on coercive regulation, a skeptic might nevertheless argue that a mere requirement to pay money is not nearly as onerous an encroachment upon one’s property rights as the deprivation of a landowner’s ability to determine the appropriate use of his or her land. However, a special assessment is not simply a requirement to pay money. The imprimatur of government authority makes it far more potent: the special assessment is a *lien* on one’s land, meaning that it runs with the land (binds subsequent purchasers), and if unpaid can result in foreclosure.\(^{113}\) In many states, a delinquent special assessment lien becomes a personal liability of the landowner, which may be satisfied from the landowner’s wages or other assets.\(^{114}\)

At common law, indeed, courts considered an *affirmative* burden upon one’s land, such as a covenant to pay money, a far more severe restraint on land ownership than a *negative* restriction on the use of land. Until modern times, courts refused to enforce affirmative covenants against successors who had not expressly contracted for such an obligation, while freely enforcing negative servitudes against subsequent purchasers with notice.\(^{115}\) In the courts’ view, a negative restriction limits a landowner’s potential investment loss to the value of

\(^{111}\) *See* Ellickson, *supra* note __, at 96-99. In his landmark article on BIDs, Richard Briffault also states that BIDs do not “regulate.” *See* Briffault, *supra* note __, at 408-409.

\(^{112}\) *See* Ellickson, *supra* note __ at 93 (proposing to overcome free-rider problem through block-level improvement district in which all benefitted owners would be required to pay assessments, regardless of consent); id. at 107 (acknowledging that the BLID proposal involves coercion of dissenting landowners to overcome free-rider problem); Briffault, *supra* note __, at 394 (“The coercive assessment is essential to the BID.”).

\(^{113}\) *See*, e.g., OSBORNE M. REYNOLDS, LOCAL GOVERNMENT LAW § 99 (2d ed. 2001); Briffault, *supra* note __, at 393.

\(^{114}\) *See* REYNOLDS, *supra* note __, at § 99.

\(^{115}\) *See* DUKEMINIER ET AL., *supra* note __, at 873, 895.
the land itself. The landowner can simply walk away from the property if it turns out to be an unwise investment. An affirmative obligation, by contrast, continues even if the land becomes worthless, putting all the landowner’s assets at risk.  

116 Although affirmative covenants that run with the land are now generally enforceable, courts remain wary about affirmative obligations and frequently refuse to enforce affirmative covenants they perceive as overly burdensome.  

Judicial intuitions about the burdens of affirmative obligations are frequently confirmed in the special assessment context. In fact, the vast majority of lawsuits concerning special assessment districts are brought by assessed landowners complaining either about the size of their assessment or the fact that they have been included in the assessment district at all.  

117 Although special assessments tend to be relatively small compared to property taxes, landowners often complain that they are excessive when added to the existing burden of mortgage payments, homeowners’ association fees, homeowners’ insurance, and property taxes – the latter of which figure to grow even larger if the special assessment district fulfills its promise to increase property values.  

In addition to the unwanted financial burden, many landowners feel that they receive no real benefit from a special assessment that has been forced on them for the benefit of others. For example, a homeowner may be assessed for a new sewer system even though she has a perfectly serviceable septic tank.  

118 A business owner who has recently invested in an expensive security system might oppose paying for additional security services.  

Worse, a special assessment may force a landowner to pay for services that actually harm her personal interests. A homeowner may be charged an assessment for road improvements that threaten to flood her own property.  

119 The purveyor of an adult business may pay mandatory assessments to a BID, only to find that the BID is using the assessed funds on a lobbying campaign to make adult businesses illegal in the district.  

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116 See id. A particularly chilling case is Pocono Springs Civic Assoc. v. MacKenzie, 667 A.2d 233 (Penn. 1995). In that case, the appellants bought property within a homeowners’ association that proved to be incapable of development because the lot did not meet township sewage requirements. The appellants attempted several times without success to relinquish the property by sale, abandonment, and foreclosure. The court held that, as the title owners, the appellants remained personally liable for the annual homeowners’ association assessments even though their land had become worthless.

117 See, e.g., Neponsit Property Owners’ Assoc. v. Emigrant Industrial Savings Bank, 15 N.E.2d 793 (N.Y. 1938) (holding that affirmative covenant obligating owners to pay annual assessment to homeowners’ association runs with the land and binds subsequent purchasers with notice).

118 See DUKEMINIER ET AL., supra note __, at 873-74.

119 See Briffault, supra note __, at 375.

120 See id. at 384-85.


122 Cf. Briffault, supra note __, at 384-85 (1999) (noting that some landowners may “already be providing the supplemental sanitation and security services that the BID would offer”).

123 See Heron Marquez Estrada & Joy Powell, Project Productions a Street Fight, MINN.-ST. PAUL STAR TRIBUNE, Mar. 5, 2011.

124 See Briffault, supra note __, at 407 (many BIDs lobby city governments “for new laws or the enforcement of existing laws against … shops that sell pornography”); id. at 427.
There is no doubt that many zoning restrictions are often just as onerous, if not more so, than special assessments. A landowner aggrieved by an abusive zoning law, however, at least has the opportunity to seek judicial relief through the federal takings, due process, equal protection, freedom of speech or free exercise of religion clauses, as well as state law doctrines like nonconforming use or vested rights. While many property rights advocates have complained about the ineffectiveness of these doctrines, they nevertheless provide far more protection for landowners than courts are willing to offer those protesting special assessments. In the special assessment context, courts defer very broadly to determinations about which landowners should be subject to a special assessment and how much each landowner should be assessed. Federal courts have long abandoned any solicitude for landowners complaining about assessments.

Thus, insofar as special assessment districts exercise coercive regulatory powers that have the potential to dramatically impact the rights of landowners within their jurisdiction, they are little different from neighborhood zoning districts. We must consider some other ways in which these devices may be distinguishable.

B. The Risk of Majoritarian Exploitation

Whenever power is delegated from a higher to a lower level of government, it raises a concern, expressed most famously in Madison’s Federalist No. 10, that a locally dominant faction may exploit a vulnerable minority. In their innovative article Land Assembly Districts, Michael Heller and Rick Hills use Madison’s framework to argue that both neighborhood zoning districts and business improvement districts present a risk of majoritarian exploitation. They further argue that both the Roberge line and the Salyer-Ball line can be explained by reference to Madison’s argument in Federalist No. 10. Thus, this section considers whether the problem of majoritarian exploitation can shed any light on the judicial distinction between neighborhood zoning districts and special assessment districts. I conclude that special assessment districts are likely to be more susceptible to majoritarian exploitation than neighborhood zoning districts, and are thus more deserving of close judicial scrutiny.

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125 For an overview of landowners’ major avenues for challenging zoning ordinances, see Robert C. Ellickson & Vicki L. Been, Land Use Controls 125-232 (2005).
127 See Reynolds, supra note __, at § 99.
129 See The Federalist No. 10 (James Madison).
130 See Heller & Hills, supra note __, at 1512-26
1. **FEDERALIST No. 10 and Neighborhood Homogeneity**

As Heller and Hills recapitulate Madison’s argument, a large, diverse polity such as a big city is likely to feature a wide variety of pressure groups who forge shifting governing coalitions through logrolling (i.e., trading votes with other pressure groups,) enabling each group to exert some influence but none to dominate. As the size of the polity shrinks, however, the number of interest groups also shrinks, thereby making vote-trading difficult and permitting a stable majority to consistently impose its views on a more vulnerable minority. This problem may be avoided, however, if the entity is narrowly drawn to ensure that the entire population has fairly uniform interests. Indeed, the public choice view of local government holds that a homogenous governing entity will be far more efficient than a heterogeneous one because it can directly effect the unanimous will of the public rather than become mired in the inefficiencies that attend vote-trading, such as conflict, bureaucracy, pork-barrel spending, and redistribution.

This Madisonian/public choice perspective proves helpful for the present analysis because it is consistent with both the *Roberge* line and the *Salyer-Ball* line. As Heller and Hills note, the *Roberge* and *Eubank* decisions express a Madisonian apprehension that one group of landowners may selfishly exploit another group to further its own parochial interests. Likewise, the distinction drawn in the *Salyer-Ball* cases between a general-purpose governmental entity that broadly affects the public at large and a special-purpose entity that performs a narrow function disproportionately affecting certain constituents may reflect a similar public choice logic. In short, an entity composed of a heterogeneous constituency and performing a wide range of functions as to which there may be a divergence of interests is more likely to pose a risk of majoritarian domination than an entity composed of a generally homogenous population and performing only a narrow function as to which there is unlikely to be strong disagreement; as such, the *Salyer-Ball* line subjects the former sort of entity to a stricter constitutional standard than the latter. Accordingly, Heller and Hills conclude that to the extent a governmental entity is able to homogenize interests within the jurisdiction so as to minimize the risk of majoritarian exploitation, the more likely it is to survive scrutiny under both the *Roberge* and the *Salyer-Ball* doctrines.

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131 See id. at 1499.
132 See, e.g., NELSON, supra note __, at 392-94 (asserting that homogeneity fosters efficiency whereas heterogeneity fosters conflict and redistribution); Michelman, supra note __, at 194 (“There is a good economic argument to the effect that the efficiency of a majoritarian fiscal regime is maximized when homogeneity of preferences among the citizenry is also maximized…”).
133 See Heller & Hills, supra note __, at 1499-1500.
134 See id. at 1503-1504
135 See id. at 1500-1505.
a. The Neighborhood Zoning District

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

the opportunities for intra-group exploitation are high in a neighborhood composed of different-sized structures serving different functions. The possibility that residential owners would burden commercial structures with onerous restrictions is matched only by the possibility that commercial owners would burden residential owners with noxious uses. Even among residential owners, the owners of large and small buildings would have persistently different interests that would invite intra-neighborhood squabbling.\[136\]

Heller and Hills direct this criticism specifically at the scheme proposed by Robert Nelson. Nelson’s scheme, we recall, would enable a group of landowners within a neighborhood to petition for the creation of a neighborhood association, which would then exercise a full complement of zoning powers on an ongoing basis over the entire neighborhood. As I address further below, Heller and Hills’ critique has some validity with respect to Nelson’s scheme; however, it is totally inapplicable to the neighborhood consent schemes involved in the Roberge trio, for three reasons. First, Heller and Hills concede that the “intra-group exploitation” concern is mitigated wherever neighborhood control is limited to a “one-shot deal” in which the neighborhood is “not responsible for the ongoing management of different land uses.”\[137\] The one-shot deal, while making vote-trading impossible, will also necessarily limit the ability of a dominant faction to exploit a minority to a single instance. As we recall, the neighborhood consent schemes involved in the Eubank-Cusack-Roberge cases were, in fact, one-shot deals. Second, the districts at issue in those three cases all had a fairly limited purpose. They did not have general zoning powers, but jurisdiction only to resolve one discrete issue – to set building lines in Eubank, to authorize the construction of a billboard in Cusack, to site a group home in Roberge. This limited authority likewise would reduce opportunities for conflict among landowners. Third and finally, Heller and Hills’ critique presumes a neighborhood that is relatively diverse in terms of land uses – a mix of commercial and residential uses or, at least, a mix of large and small residential buildings. In Roberge, however, the power to approve a group home was

\[136\] Id. at 1521.
\[137\] Id.
delegated only to landowners within districts zoned for single-family homes.\footnote{7} Given the capitalization literature and homeowners’ well-documented concern with property values, it is at least plausible that single-family homeowners would have generally uniform interests in excluding group homes. Thus, the neighborhood consent scheme at issue in \textit{Roberge} is seemingly one that public choice theorists would heartily endorse.

b. The Special Assessment District

Ironically, under the criteria just considered, all of the special assessment schemes that we have reviewed – and that the courts have upheld – would be problematic. The special-purpose districts in \textit{Salyer}, \textit{Ball}, and \textit{Kessler} were not one-shot deals, but entities with ongoing governmental powers. The BID in \textit{Kessler} performed a wide range of functions such as sanitation, security, and lobbying city government, not the relatively limited set of functions involved in the \textit{Roberge} trio.\footnote{139} Finally, the districts at issue in \textit{Ball}, \textit{Kessler}, and \textit{Bolen} all operated in highly diverse metropolitan areas with a variety of land uses and demographics, while limiting the franchise to a small subset of that diverse population.

This combination of factors makes intra-group conflict and exploitation almost unavoidable. This is especially true in the BID context because the basic function of the BID is to manage public spaces, such as urban downtown areas, that are regularly used by a wide variety of individuals with greatly diverse expectations as to the appropriate use of those spaces.\footnote{140} I single out the BID here briefly because it is perhaps the most widely used and controversial device cities have employed in recent years to devolve power upon neighborhood groups.\footnote{141} With regard to the BID, exploitation can occur along at least three axes: among property owners; between property owners and tenants; and between property owners and other users of the space, such as street entertainers, vendors, or the homeless.

First, where there is a diversity of land uses, disagreement among landowners is likely to occur – as early as the initial formation of the BID. The owners of large office buildings may feel that the BID is superfluous if they are “already [] providing the supplemental sanitation and security services that the BID would offer,”\footnote{142} while small business owners may see the mandatory assessments as added burdens on top of already excessive property taxes.\footnote{143}
landowners who have little concern about making the area attractive for consumers may not care to pay for services intended to beautify the neighborhood, while residential landowners “may be unable to pass on the BID’s costs to tenants or customers.” Once the BID is in operation, disagreements may arise over its philosophy and priorities. For example, as Richard Briffault notes, there may be tensions between owners of mainstream businesses who seek a clean-cut, tourist-friendly image for the district and owners of bars, nightclubs or adult entertainment establishments who desire to cultivate a more free-wheeling environment. BIDs may even lobby city hall for zoning changes that would make presently existing uses such as adult entertainment establishments unlawful within the district. Heller and Hills conclude, accordingly, that the diverse interests of landowners within BIDs “make for contentious neighborhood politics and result in poor governance.” They are not entities of which Madison or the public choice theorists would be proud.

BIDs also create potential tensions between landowners as a class and the tenants who are typically disenfranchised. Tenants stand to be dramatically affected by the operation of the BID, often in very different ways from landowners. As the raison d’etre of the BID is to raise property values for the benefit of property owners, an attendant result may be dramatic rent increases for tenants as well as a general gentrification of the area. Higher rents can lead, in turn, to the displacement of “stores that serve poor and working class customers” by “more upscale shops.” Tenants who are not forced out by higher rents will nevertheless have different priorities with regard to the expenditure of BID funds than landowners do. For instance, while business owners may want to deploy a maximum number of security personnel during the daytime when tourists flock downtown, residential tenants may prefer more security during the evenings, when they return home from work.

Finally, BIDs’ efforts to improve urban neighborhoods often have impacts on

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144 See id. at 385.
145 Id. at 416.
146 See id. at 416.
147 See MICHAEL WARNER, THE TROUBLE WITH NORMAL 161 (1999) (discussing Times Square BID’s efforts to rezone the area to prohibit adult uses).
148 Heller & Hills, supra note __, at 1500.
149 See Briffault, supra note __, at 457 (BID governance presents the “classic Madisonian possibility of tyranny by a majority faction”).
150 See Richard Scharagger, The Limits of Localism, 100 Mich. L. Rev. 371, 448 (2001) (“Certainly the BID’s construction of sidewalks and other public accommodations and its provision of private security forces, social outreach services, and sanitation services altered the daily lives of the people who lived there, arguably more so than the daily lives of the often absentee property owners.”); Briffault, supra note __, at 436 (“BID policing strategies, social service programs, street maintenance and repairs and economic development activities can have a direct impact on district residents and the quality of life in the district.”).
151 See Briffault, supra note __, at 474-75.
users of the space who may be unwelcome to the BID. Street entertainers and food trucks, for example, threaten both to compete with downtown businesses for customers and to detract from the carefully constructed, tourist-friendly environment BIDs set out to create. As to the homeless, there is an inherent tension between the needs of the homeless to use public spaces for the performance of essential life functions and the BIDs’ mission to make public spaces attractive for customers. Several BIDs have been accused of using strong-arm tactics to harass the homeless and force them to leave the area. While many of these allegations have turned out to be unfounded, and there are those who believe that BIDs have provided many positive services for the homeless, the core interests of the BID and those of the homeless are at best difficult to reconcile. Since the landowners have most of the voting power in the BID and the homeless have none, the prospects for intra-group exploitation are strong.

If BIDs present the Madisonian problem of majority exploitation rather starkly, the problem is nevertheless present on a smaller scale in the governance of special purpose districts and single-shot special assessment districts, such as the one involved in Bolen. Special purpose districts, even if limited to issues such as water storage, may affect landowners in rather different ways. As the dissent in Salyer noted, water districts may create flooding risks that impact landowners adjacent to navigable waterways far more than others. With regard to a case like Bolen, the introduction of an improvement such as a rail station into a diverse urban neighborhood may give rise to conflict between landowners with divergent interests. For example, while owners of residential or commercial property might favor a new rail station, owners of industrial property could be leery that a new rail station would increase residential use in the area, perhaps resulting in nuisance lawsuits against them or requests for rezonings by new residents. Tenants would also be dramatically impacted by increased property values (leading to higher rents), as well as increased noise and foot traffic, change in the community character, and aesthetic changes.
In many cases, then, the neighborhood zoning district will present a lesser risk of intra-group exploitation than will the special assessment district. This contrast should not be too sharply drawn, however. To the extent that special assessment districts or BIDs operate in more homogenous neighborhoods, the risk of majoritarian exploitation may be limited. For instance, a modern trend, much hailed by Ellickson and Liebmann, is for the BID concept to be extended outside the downtown area to residential neighborhoods.\textsuperscript{159} If such neighborhoods are relatively uniform in character, residents may have fairly consistent interests in bringing in desirable amenities that will increase property values. Outsiders, including peddlers, entertainers, the homeless and others, arguably have a weaker interest in accessing and exercising control over the character of these residential areas than they do over downtown areas that are also important public spaces. By the same token, neighborhood zoning districts may present a serious risk of exploitation if, as in Nelson’s scheme, a fairly heterogeneous group of urban landowners is given ongoing control over a wide range of zoning functions within the neighborhood. As Heller and Hills note, commercial, industrial and residential landowners may be at odds over what sorts of uses are permissible.\textsuperscript{160} In addition, tenants may oppose the introduction of land uses that threaten to diminish their quality of life while enriching their landlords; conversely, they may favor the introduction of land uses that bring down their rents, which landlords would oppose for the same reason.\textsuperscript{161}

The salient point here, however, is that the validity of both neighborhood zoning districts and special assessment districts should be based purely on the inquiry of whether majoritarian exploitation is likely. In making this determination, we cannot automatically assume that the answer will always be yes for zoning districts and no for special assessment districts. Rather, either device may or may not be cause for concern depending on how we answer the following questions: is the district a one-shot deal or an ongoing enterprise? Is the district generally homogenous or heterogeneous in land uses and demographics? Does the district serve a limited function as to which intra-group disagreement is unlikely, or does it perform functions that are likely to breed disagreement among stakeholders? These questions can only be answered \textit{ad hoc} based on the circumstances of each particular delegation, rather than by categorically distinguishing neighborhood zoning districts from special assessment districts.

\textit{Rapid Transit Financing: Use of the Special Assessment, 29 Stan. L. Rev. 795, 809-10 (1977)).

\textsuperscript{159} See Briffault, supra note __, at 21-22 (noting wide variety of Philadelphia BIDs outside downtown in many different kinds of neighborhoods, including low-income, minority neighborhoods).

\textsuperscript{160} See Heller & Hills, supra note __, at 1521.

\textsuperscript{161} For a similar critique, see, for example, M. Paige Ammons, \textit{Private Governance For All: A Desirable Outcome or a Cause for Concern?}, 9 NYU J. LEGIS. & PUB. POL’Y 503, 511-515 (2005-2006) (criticizing Nelson’s proposal on the grounds that low-income communities would be susceptible to invasion of LULUs that could diminish quality of life or, conversely, gentrification that could force them to exit the neighborhood).
2. Preventing Majoritarian Exploitation through Logrolling

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

For Heller and Hills, the problem with neighborhood empowerment is that shrinking the size of the polity and truncating the number of pressure groups makes vote trading impossible and thereby enables a dominant faction to emerge. This Madisonian problem can be alleviated, we have seen, if the polity in question is sufficiently homogenous that all stakeholders share relatively uniform interests. The problem can also be alleviated, however, in precisely the opposite direction: by increasing the size and heterogeneity of the polity. In short, even if a particular group is vulnerable to exploitation by a dominant faction at the neighborhood level, this is no cause for concern if the neighborhood group is subject to oversight by an entity that is sufficiently large and heterogeneous to permit the locally disadvantaged group to seek effective relief from the exploitative designs of the locally dominant faction through logrolling. Indeed, a scheme of decentralization to local groups under the loose oversight of a larger, more diverse authority is just the sort of federalist structure that Madison envisioned.

In an incisive analysis of the Eubank-Cusack-Roberge trilogy, Frank Michelman asserts that the divergent results in those cases may be explained in precisely this fashion. According to Michelman, the Court’s rulings in the three cases rests implicitly on the principle that the judiciary should defer to a delegation of power where the party presumptively disabled by the delegation had a fair chance of dissuading the larger delegating authority from devolving the power in the first instance, but not otherwise. For Michelman, this implicit test reflects a Madisonian or Dahlian vision of coalitions that form and re-form from issue to issue, of legislators exchanging support here for support there in an ever-shifting alignment of interest groups, making plausible an expectation that over the long run everyone would enjoy a net balance of political gains in excess of losses. According to Michelman, the Court may have upheld the delegation in Cusack

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162 See supra text accompanying notes __.
163 See Michelman, supra note __, at 172-74.
164 See id.
165 Id. at 173.
(requiring neighbor consent to site a billboard within certain precincts) on the implicit grounds that the billboard industry, whose interests were adversely affected by the delegation, was “almost certainly a self-conscious and very possibly a formally organized interest-group” and therefore “would have had a fair chance to fight their battle, to protect their interest, to engage effectively in political horsetrade, at the city council level.”\(^{166}\) By contrast, the interests harmed in *Eubank* (which gave blockfront owners the power to establish setback lines) had “no comparable log-rolling opportunity” for “it is hard to imagine an anti-setback lobby mobilizing to oppose the [setback ordinance…]”\(^{167}\) Likewise, sponsors of group homes for the elderly or young children (the land use subjected to neighborhood referenda in *Roberge*) “may seem less certain to have been an organized or organizeable interest group capable of effective lobbying at the city-council level.”\(^{168}\) Thus, the delegation in *Cusack* survived scrutiny whereas the delegations in *Eubank* and *Roberge* did not.

Michelman’s analysis proves useful in analyzing the *Salyer-Ball* line as well. The water districts in both *Salyer* and *Ball* were ultimately subject to control by the state, and the *Ball* court noted that the plaintiffs disenfranchised by the Salt River District were still qualified voters in the state of Arizona and so retained the ability to influence their legislators, who “have the power to change the district.”\(^{169}\) In *Kessler*, the court likewise stressed that the city of New York exercised substantial supervisory authority over the Grand Central DMA.\(^{170}\)

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

a. The Neighborhood Zoning District

To begin with neighborhood control of zoning, Michelman’s analysis of the *Roberge* trio correctly suggests that the relative lobbying power of interested groups will often be a highly fact-sensitive inquiry. Nevertheless, we can start

\(^{166}\) Id. at 172.

\(^{167}\) Id.

\(^{168}\) Id. at 174 n.93.

\(^{169}\) 451 U.S. at 371 n.20.

\(^{170}\) *See Kessler*, 158 F.3d at 104-107.
with some general observations. On one hand, advocates of many locally unwanted land uses (LULUs) face a political environment that is clearly stacked against them. Studies consistently demonstrate that finding suitable locations for LULUs is exceedingly difficult because the benefits of these uses are diffused citywide while their costs are concentrated on the proximate neighbors. The neighbors who stand to be harmed by the introduction of a LULU enjoy considerable lobbying advantages over those members of the general public who favor the LULU, because the neighborhood group’s relatively small size, geographic concentration and intense level of interest in the matter make it much easier for the group to organize to oppose the LULU than it is for the general public, which is larger and more geographically dispersed and whose members individually are far less intensely interested than the proximate neighbors, to organize in favor of the LULU siting.

On the other hand, neighborhood groups are by no means always successful in influencing city hall. If they were, there would be no demand for neighborhood control of zoning. In truth, many LULUs have at least one very powerful, well-organized interest group in their corner: developers. LULUs such as billboards, gas stations, nightclubs, and the like can of course be very profitable, so developers have strong incentives to ensure that zoning laws liberally permit such uses. Furthermore, developers often have a number of advantages over the homeowners’ groups that oppose unwanted new developments. Because developers are usually, after all, in the business of development, they tend to be “repeat players” at city hall, which enables them to cultivate relationships with city officials and learn the often-esoteric workings of city government. Development professionals maintain a variety of professional organizations such as the Urban Land Institute through which they can aggregate knowledge and resources in order to more effectively lobby legislatures. The development industry is supported by a matrix of ancillary interests who profit from development, including the media, the transportation industry, construction unions, and financiers. Finally, developers often have deep pockets into which they frequently reach.

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172 See *MICHAEL O’HARE, ET AL., FACILITY SITING AND PUBLIC OPPOSITION* 70 (1983) (“People who think a new facility will leave them much worse off than they would be without it are strongly induced to take action against it; people who each have a little bit to gain from its completion are only weakly motivated to support it. When the losers are few in number and known to each other, they also have the ability to act, while a large number of beneficiaries cannot easily organize themselves to take action.”); cf. MANCUR OLSEN, *THE LOGIC OF COLLECTIVE ACTION* (1965) (postulating that small groups of intensely interested individuals can more effectively organize as interest groups than large groups whose members are each less intensely interested).


174 See generally *LOGAN & MOLOTCH*, supra note __, at 62-85.

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

Perhaps most important of all, cities are predisposed to look favorably upon new development that promises to contribute to municipal tax bases that have been ravaged by interlocal competition, drying up of state and federal subsidies, urban disinvestment, and tax revolts. Cities are in a seemingly constant state of fiscal crisis that requires them to approve new development that may compensate for a diminished tax base. This gives developers yet another advantage in the fight for influence at city hall.

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

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176 See, e.g., LOGAN & MOLOTCHE, supra note __, at 134 (urban residents are “naturally disorganized,” whereas business elites are “naturally organized”); NORMAN I. FAINTSEIN & SUSAN S. FAINTSEIN, RESTRUCTURING THE CITY: THE POLITICAL ECONOMY OF URBAN REDEVELOPMENT 274 (1986) (describing neighborhoods groups as “vulnerable to cooptation, highly disaggregated, leadership-dominated and episodic in intensity,” concludes that “they will never be formulators of state policy but can only react to it”); Tracy M. Gordon, Bargaining in the Shadow of the Ballot Box: Causes and Consequences of Local Voter Initiatives, 141 PUB. CHOICE 31, 33–34 (2009) (describing some difficulties homeowners may face vis-à-vis traditional interest groups in organizing to influence city government).

177 See MIKE DAVIS, CITY OF QUARTZ 209-10 (1990) (noting Marx’s remark that French peasantry was “a sack of potatoes,” argues that homeowners who oppose growth are “basically peasant potatoes whose ‘natural’ scale of protest is disaggregated NIMBYism”).


180 See FISCHEL, supra note __, at 15–16.
organizational advantages may give them the edge.  

Another important factor, hinted at in Michelman’s analysis, is whether the LULU in question offers a net contribution to or a net drain on the local tax base. Tax-rich uses such as nightclubs, shopping centers, or waste facilities, will likely enjoy a more favorable reception at city hall than tax-draining uses such as low income housing or group homes. The empirical evidence lends some support to this notion. In a prominent study of five cities that had conferred some degree of land use authority on neighborhood groups, the authors concluded that cities tended to defer to neighborhoods on most land use matters except where the development in question was a significant source of revenue. The latter were nearly always approved regardless of neighborhood opposition. According to the authors, “when jobs and revenue are at stake, city hall will do everything to make sure the project is approved.”

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

b. The Special Assessment District

Ironically, these same factors – cities’ fiscal concerns and the influence of developers – mean that cities will be very unlikely to closely monitor the activities of special assessment districts and BIDs, and therefore that courts should apply greater scrutiny to the activities of these entities than neighborhood zoning districts. If cities have incentives to ensure that revenue-generating projects get approved despite neighborhood opposition, they have even greater incentives to outsource the provision and financing of municipal functions like security, maintenance, and the like to quasi-privatized entities who can relieve the city of the need to finance such services. Likewise, the influential development interests who are often disadvantaged by the devolution of zoning power to neighborhood groups are likely to be strong advocates of special assessment districts and BIDs, which promise to boost the value of their property and increase economic activity in the area.

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181 See ELICKSON & BEEN, supra note ___ at 306.
183 Id. at 144.
184 See Kessler, 158 F.3d at 131 (Weinstein, J., dissenting) (“BIDs decrease both the need and the incentive for the city to expand or maintain the general municipal services it provides to the city as a whole.”); Briffault, supra note ___, at 425.
185 See id.
I initially focus here again on BIDs before returning to consider other types of special assessment districts. The primary advocates of many BIDs are highly influential, well-organized downtown business interests. These business interests may be some of the wealthiest landowners in the city, and “because of their prominence, they have greater access to elected officials and significant opportunity to influence them.”\textsuperscript{186} Daniel Garodnick provides one chilling example of BIDs’ influence on city policy. From 1992 to 1993, New York City fired hundreds of sanitation workers and drastically reduced its street-cleaning schedule as part of an austerity measure during a fiscal crunch. Because BIDs picked up the slack in wealthier areas of the city, “no pressure [was] coming from the city’s most influential citizens, and the former street-cleaning schedule was never restored.”\textsuperscript{187}

The very act of creating a BID takes a massive amount of resources and organizational capacity.\textsuperscript{188} Once created, the BID has the capacity to forge its constituent landowners into an even more potent lobbying force. The assessments that BIDs collect from landowners may be used not only to provide services, but to press for district prerogatives at city hall.\textsuperscript{189} In other words, when cities delegate to BIDs the ability to collect mandatory assessments from all neighborhood landowners, they thereby enable BIDs to exert continuing influence over city officials. And BIDs have not been shy about flexing their muscle. They lobby forcefully for new laws and the enforcement of existing laws to advance their interests, such as legislation targeting street vendors, adult businesses, and the homeless.\textsuperscript{190}

Consider, by contrast, the lobbying power of those who may be disadvantaged by the creation or operation of a BID. As detailed previously, those most likely to be harmed are 1) landowners who dissented from the decision to create the district and are forced to pay the assessment against their will; 2) disenfranchised residential or commercial tenants; 3) unwanted visitors such as street vendors, beggars, or the homeless; and 4) members of the general public, who may have interests in the use of public space that diverge from those of the BID. We can surmise that as a general matter, none of these groups will be able to match the organizational and resource advantages of the BID and its boosters. The dissenting landowners who opposed the creation of the district may be influential business leaders, but by definition they will be in the losing minority within the business community. Tenants as a class are typically difficult to organize because they tend to be more transient and have less of a financial

\textsuperscript{186} Garodnick, supra note __, at 1763.
\textsuperscript{188} See Briffault, supra note __, at 383 (“The creation of a BID usually requires proponents to invest considerable time, energy, and funds.”).
\textsuperscript{189} See id. at 441.
\textsuperscript{190} See id. at 406, 427-28.
stake than landowners. 191 Individuals such as street peddlers, beggars, and the homeless are likely to lack the organizational capacity, professional connections, resources, profit motive, or congruence of interest to effectively lobby city hall against the geographically concentrated, homogenously interested, amply financed, highly motivated and well organized business concerns that support BIDs. Likewise, compared to BID proponents, members of the public at large are likely to be far too diffused, heterogeneous, and disorganized, and far too weakly interested in access to public space, to fight effectively against the BID.

As a result of all the foregoing, although most state laws provide for city oversight of BIDs, in practice BIDs have a considerable degree of autonomy. City governments exercise little supervision over BIDs’ day to day affairs. 192 While there have been some instances in which city governments have reined in BIDs, particularly a dispute of unknown provenance between the Giuliani administration in New York City and the Grand Central Partnership (or GCP, the operating entity of the Grand Central DMA involved in Kessler) in 1998, there is considerable evidence that the GCP nevertheless exercises a substantial degree of independence. 193 At a minimum, then, there is reason to be leery that cities will exercise close oversight of BIDs. 194

If I have singled out BIDs for criticism here, a word should also be said about the special-purpose districts involved in Salyer and Ball and the single-shot special assessment district in Bolen as well. Special purpose districts, though created at the state level rather than the municipal level, raise many of the same exploitation concerns as do BIDs. The creation of a special purpose district, like the creation of a BID, requires organization and a huge expenditure of resources. 195 Special districts most often come into being, like BIDs, as the result of pressure from well organized developers and other business interests looking to finance infrastructure and services needed for growth. 196 These groups are able to circumvent opposition to the creation of special-purpose districts by strategically drawing the district boundaries and limiting the district

192 See Briffault, supra note __, at 410 (“The city government is likely to leave the BID’s day-to-day operations to the [district managing association.]”).
193 See id. at 439-442; 456-57; Garodnick, supra note __, at 1757-59.
194 In his definitive article on BIDs, Richard Briffault argues that BIDs lack real autonomy and should not be subject to the one person, one vote rule, although he acknowledges that the question is a close one. See Briffault, supra note __, at 438-444. Briffault’s argument is subtle, but unconvincing in at least one major respect. Like Ellickson, he stresses that BIDs do not “regulate.” See id. at 438, 442. However, as discussed supra at text accompanying notes __, BIDs certainly exercise as much regulatory power as neighborhood zoning districts do. At the least, where the formation of a BID requires the consent of a majority or supermajority of the local landowners, the landowners have the direct authority to veto an important means — for many cities, they only viable means — of financing municipal services. In any event, Briffault’s reasons for arguing that BIDs should be exempt from the one person, one vote rule — they exercise limited authority, are subject to “close control by a higher-level democratic government,” and promote experimentation with local political structures, see id. at 444 — would likely also to apply to neighborhood zoning districts.
195 See BURNS, supra note __, at 16-22; 75-108 (describing collective action problems involved in creation of special-purpose districts).
196 See id. at 23-43.
functions to a specialized purpose that the public perceives as technical and apolitical.\textsuperscript{197} As a result, opposition to special-purpose districts is likely to be weak and disorganized. A case like \textit{Bolen} presents many of the same problems on a smaller scale. Bringing high-speed rail to downtown Los Angeles was obviously a priority for L.A.’s business and political elite, while principally antagonizing the relatively less powerful owners of industrial property and residential or commercial tenants.

Thus, in many cases, neighborhood zoning districts contain greater structural protections against intra-group exploitation than BIDs or special assessment districts. As before, however, this point should not be stated too unequivocally. If the district in question is a “one-shot deal,” it is less likely to form an organized interest group than a district that is empowered to act on an ongoing basis. Furthermore, where in the context of neighborhood zoning much depends on the characteristics of the LULU and its advocates, in the context of the special assessment much depends on the character of the district that is empowered. For example, improvement districts located outside the downtown areas, such as in residential neighborhoods, may be less likely to draw support from well-heeled downtown interests, and will also less strongly implicate the concerns of the homeless or the public at large in access to public space. Thus, in any particular case an \textit{ad hoc} inquiry will be necessary to determine whether a group disadvantaged by a delegation of power has sufficient influence at the citywide level to mitigate fears of majoritarian exploitation.

\textbf{C. Spillovers & Comprehensive Planning}

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

The concern about spillovers is evident in existing scholarship about neighborhood zoning control. As discussed previously, Robert Ellickson and George Liebmann have proposed the creation of neighborhood or block-level improvement districts that would bring the advantages of BID governance to residential or other neighborhoods outside the downtown areas where BIDs

\textsuperscript{197} See \textit{Foster}, supra note \_\_, at 103-104.
traditionally functioned. However, both Ellickson and Liebmann reject more than token zoning authority for neighborhood groups. Ellickson endorses blockfront ability to waive otherwise applicable restrictions where “spillover effects are limited,” but not where doing so would impose “neighborhood-wide negative externalities.” Liebmann would permit neighborhood associations to waive applicable zoning restrictions, but rejects neighborhood power to impose zoning restrictions “because of the external effects that can result from them.”

Although neither Ellickson nor Liebmann expand on their meaning here, their concern appears to be that if a neighborhood has unfettered ability to control its own land use, it can enact land use policies with little regard for the impact of its policies on neighboring areas or on the region as a whole. Many neighborhood groups, for example, will reflexively resort to “Not in my backyard” (NIMBY) sentiments and simply exclude unwanted land uses that may be in great demand on a citywide or regional basis. Suppose that a city has a desperate need for more affordable housing and that a developer proposes to site a low-income housing project in a particular neighborhood, but the neighborhood has the power to approve or disapprove new affordable housing projects. If the landowners within the neighborhood determine that the affordable housing project will potentially diminish their own property values or quality of life, they will likely reject the project despite the citywide need for affordable housing. Doing so will then place pressure on neighboring areas to approve a site for the housing project, but if each neighborhood has the independent power to approve its own land uses, the housing project may find no suitable location anywhere in the city.

Neighborhood zoning control can also be problematic when neighborhoods seek to include new uses instead of excluding them. If a neighborhood permits development at too rapid a pace, it may place enormous strain on the city’s infrastructure or school system. In short, the structure of the neighborhood zoning district, which empowers landowners to make land use decisions based

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198 See supra text accompanying notes __.
199 See Ellickson, supra note __, at 98-99.
200 See supra text accompanying notes __ (discussing difficulty finding appropriate sites for LULUs because of neighborhood opposition).
201 William Fischel has criticized Robert Nelson’s proposal to create permanent neighborhood zoning districts, see supra text accompanying notes __, on this very ground. Fischel argues that disaggregating the zoning power from other municipal functions will cause zoning decisions to be made without consideration of their impacts on these other functions. He provides an instructive hypothetical: a municipal zoning ordinance effectively prevents any children of school age from residing in a section of town from which access to the local schools is extremely costly. If the district controlled its own zoning, Fischel argues, it would be able to lift that zoning restriction without regard to the burden doing so would inflict on the community as a whole. See William A. Fischel, Voting, Risk Aversion and the NIMBY Syndrome: A Comment on Robert Nelson’s “Privatizing the Neighborhood,” 7 GEO. MASON L. REV. 881, 899-901 (1999); see also FISCHEL, supra note __, at 1-3; 36-38; David L. Callies, et al., Ramapo Looking Forward: Gated Communities, Covenants and Concerns, 35 URB. LAW. 177, 197 (2003) (“[Any] privatized ‘zoning’ effort itself results in uncoordinated land use planning of the area. One result may well be cumulative traffic impacts for all neighboring communities. Air quality, property values, environmental preservation, efficient public services, and well-located schools all are better coordinated by a more regional government responsible for the region’s public services.”).
on how a particular new neighborhood entrant will affect their own property values, practically assures that each neighborhood will consider its own benefit alone and ignore the citywide impacts of its zoning decisions.

This concern with external impacts may implicitly underlie the *Roberge* doctrine as well. As I have noted previously, one of the many curiosities surrounding the *Roberge* line, and the *Roberge* decision in particular, is the fact that it followed closely on the heels of the epochal *Euclid* decision of two years earlier, which broadly upheld the constitutionality of local zoning. However, it is possible to distinguish *Roberge* from *Euclid*. The *Euclid* court placed substantial weight on the “comprehensive zoning plan” adopted by the village of Euclid, Ohio, for the rational development of the village as a whole. Although the appellee, Ambler Realty Co., objected that Euclid’s limitations on industrial development would divert such development to neighboring communities, the Court rebutted this argument by noting that the village had not banned industrial development entirely, but merely directed it to appropriate areas within the community where it would not disturb residential uses. The Court also issued an important caveat that if, in some future case, a municipality acted in such a way as to harm “the general public interest,” the Court might intervene. *Roberge* may have been just such a case. In *Roberge*, there could be no assurance, as there was in *Euclid*, that the city of Seattle had comprehensively planned its land use needs and ensured an appropriate place for all uses because the city had delegated portions of its land use power to landowners without providing any standards to guide their exercise of the power. Absent standards, landowners were free to base their zoning decisions on “caprice,” “taste” or other “selfish reasons.” In other words, landowners could make decisions without regard to the welfare of surrounding areas or the city as a whole.

Neither the jurisprudence nor the commentary on neighborhood control of zoning address the possibility that special assessment districts or BIDs may similarly generate externalities or impair comprehensive planning. At first blush, indeed, it may appear as though one neighborhood’s decision to upgrade its sewer lines or provide itself with supplemental sanitation or security services cannot possibly impose any burden on neighboring areas, impair any municipal planning objectives, or strain city infrastructure – to the contrary, special assessment districts promise only to improve such infrastructure. However, as this section shows, special assessment districts can create just as much havoc with municipal planning schemes, and impose just as serious externalities on

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203 See supra text accompanying notes __.
204 See *Euclid*, 272 U.S. at 379-383; see also id. at 394 (“The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports.”).
205 See id. at 389-90.
206 Id. at 390.
207 *Roberge*, 278 U.S. at 122.
208 *Eubank*, 226 U.S. at 144.
209 *Roberge*, 278 U.S. at 122.
surrounding areas, as neighborhood zoning districts are thought to do. Moreover, while it is possible that neighborhood zoning districts will increase the incidence of sloppy and haphazard land use planning, it is just as likely that the reverse will be the case: neighborhood control of zoning may actually alleviate some of the haphazardness that exists in our current system of land use control. In short, neighborhood zoning districts may once again prove to be sounder public policy than special assessment districts.

1. The Neighborhood Zoning District

Taking neighborhood zoning first, I should start by puncturing the myth that the current system of land use planning in this country in any way conforms to the Euclidean ideal of comprehensiveness. For a variety of reasons, the number of incorporated general-purpose municipalities (i.e., municipalities empowered to utilize the zoning power) has exploded in the years since \textit{Euclid} was decided.\textsuperscript{210} Most metropolitan regions today are comprised of several dozen municipalities, many of which are small suburban communities no larger than a neighborhood.\textsuperscript{211} The proliferation of small incorporated municipalities has generated a virulent competition for tax revenue and a concomitant “fiscalization” of land use, in which each municipality exercises the land use power based on its anticipated contribution to the municipal tax base rather than on sound land use planning principles.\textsuperscript{212} Although in principle, municipal land use authority is subject to control by the state, in practice states almost never interfere in municipal land use decisions and, to the contrary, consistently act to enable it.\textsuperscript{213} The result is a zero-sum game in which every municipality zones for its own interest, without considering the regional welfare. Despite \textit{Euclid}, courts have largely accepted this practice, rarely requiring that municipalities’ land use policies comply with anything resembling the comprehensive zoning plan in the \textit{Euclid} case. For example, where \textit{Euclid} was careful to emphasize that the village was \textit{not} entirely precluding industrial use and that municipal zoning must take account of “the general public interest,”\textsuperscript{214} in the years since \textit{Euclid} courts have endorsed innovations such as “exclusionary” zoning in which unwanted land uses such as industry or affordable housing are simply excluded from an entire city, either \textit{de facto} or \textit{de jure}, without requiring that municipalities consider the impacts of such exclusionary policies on the surrounding region.\textsuperscript{215} Furthermore, courts have recognized and apparently

\textsuperscript{210} See Briffault, supra note \_, at 356-382 (discussing causes for the proliferation of incorporated municipalities).


\textsuperscript{212} See Schwartz, supra note \_, at 184–86, 198–202 (discussing the “fiscalization” of land use).

\textsuperscript{213} See Briffault, supra note \_, at 64-72 (discussing state acquiescence in local land use control).

\textsuperscript{214} See \textit{Euclid}, 272 U.S. at 390.

\textsuperscript{215} See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (upholding city’s refusal to grant a zoning change to permit development of low-income housing, although city was zoned primarily for
accepted that cities use zoning for their own selfish, fiscal purposes – essentially, to bring in land uses and improvements that will enhance property values and the local tax base while excluding land uses that do the reverse.216 With few exceptions, courts have simply ignored Euclid’s caveat to protect the “general public interest.”217 As a result, siting unwanted land uses such as affordable housing has become a major problem nationwide.218

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

Unlike the incorporated suburbs that ring our urban centers, neighborhoods would receive their zoning powers from, and ultimately be accountable to, the city government that empowered them. Where states have few incentives to supervise municipal zoning practices, zoning is a major source of power and revenue for cities, so they will have tremendous incentives to closely monitor neighborhood zoning to ensure that neighborhoods do not unduly burden other areas of the city with externalities or impair citywide planning objectives. The relevant empirical studies, discussed previously, establish that where cities have delegated some zoning authority to neighborhood groups, they have not been shy about asserting themselves when other city priorities were at stake.219

There are many ways in which cities can assert their supervisory control over neighborhood zoning districts. They may choose to delegate only certain zoning powers to neighborhoods (such as the power to regulate particular land uses, or the power to waive but not impose restrictions), or they may delegate such power only to certain neighborhoods, such as homogenously residential or lightly developed areas.220 They may give neighborhoods only initiatory power subject to an override by the city council.221 They may include “sunset provisions” that

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

217 The major exception is S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 726 (N.J. 1975), which struck down an exclusionary zoning ordinance and rejected fiscal concerns as a valid basis for exclusionary zoning practices, citing Euclid’s “general public interest” caveat.

218 See supra text accompanying notes.

219 See Berry et al., supra note __, at 140-50, 298.

220 The delegation schemes in Roberge, Cusack and Eubank of course did precisely this, delegating narrowly tailored land use powers to specific neighborhoods.

221 See, e.g., Eadie v. Town Board of the Town of N. Greenbush, 854 N.E.2d 464 (N.Y. 2006) (upholding provision requiring supermajority of town council to approve zoning change after written protest by a percentage of landowners in designated proximity to the proposed change); Tippett v. City of Hernando, 780 So.2d 649 (Miss. Ct. App. 2000) (upholding similar law).
require re-authorization of zoning power after a certain period of time. Finally, of course, municipalities can repeal the delegation at any time, as neighborhoods have no vested right to control their own zoning. In effect, a scheme of neighborhood zoning power under loose city control would be similar to a form of regional or metropolitan government that scholars have fantasized about for decades. Thus, neighborhood zoning districts cannot be dismissed on the grounds that they – more so than incorporated municipalities – impede comprehensive planning or impose overly burdensome externalities on neighboring communities.

2. The Special Assessment District

Conversely, special assessment districts can have severe impacts on urban planning objectives, and may create substantial spillover effects. An increase in development, business activity, or investment in one area of town will likely increase traffic, noise, and pressure on infrastructure in surrounding neighborhoods as well, while siphoning business and investment from neighboring areas towards itself. Moreover, if the BID or special assessment district is successful in its mission to increase property values, a likely result is higher rents, which may displace both residential and commercial tenants who then must be housed elsewhere in the region. Likewise, BID efforts to make their jurisdictions attractive to tourists may result in the displacement of crime, homelessness or other social problems to adjacent areas. Finally, BIDs have been known to use their substantial lobbying power with city hall to push for zoning changes, such as the prohibition of adult businesses, which then must be absorbed by other neighborhoods.

A qualitatively different, but perhaps more significant form of spillover impact is the role of BIDs and special assessment districts in promoting intra-local inequalities in service provision between city neighborhoods, which

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222 See Briffault, supra note __, at 526-28 (considering “sublocal structures” within cities to be “something akin to a metropolitan political structure,” and noting that spillover impacts of sublocal structures are more limited than those of localities because the former are subject to control by a locality whereas latter are not). Scholars have long dreamed of unifying the patchwork of local government structures under some form of regional government that can minimize harmful externalities and interlocal inequalities, but with few exceptions regional government has failed to materialize because of opposition from vested interests in the existing system of local government, most prominently suburban dwellers who are loathe to lose autonomy over their schools, land use, and taxing powers. See, e.g. Cashin, supra note __, at 2015-2033 (discussing barriers to regionalism).

223 See Briffault, supra note __, at 456. Sociologist Nathan Glazer has similarly argued that New York City’s zoning laws, which permitted and indeed encouraged massive density in the borough of Manhattan, caused the “withering of major subordinate business centers in Brooklyn and the Bronx,” and the loss of urban amenities in areas outside the dense core. See NATHAN GLAZER, FROM A CAUSE TO A STYLE: MODERNIST ARCHITECTURE’S ENCOUNTER WITH THE AMERICAN CITY 237-43 (2007).

224 See supra text accompanying notes __.


226 See supra text accompanying notes __.
contributes to the general erosion of the city’s social fabric. The empowerment of territorially-demarcated jurisdictions to finance their own infrastructure and services has an inherent tendency to create and perpetuate service inequalities among neighborhoods, and to sever the urban environment into balkanized enclaves that codify class, income, and racial divisions. BIDs and special assessments are part of a “pay for what you get” model of municipal financing, in which the quantity and quality of services each neighborhood receives is based entirely on its ability to pay.227 The result is that wealthy neighborhoods who can afford the added burden of assessments will voluntarily assume that burden in order to obtain the highly desirable services the assessments finance, while poor neighborhoods may decline to approve an assessment even for services they desperately need if they decide the assessment is too costly.228 While services financed by assessments are theoretically supposed to be supplemental, cities have strong incentives to “outsource” the provision of municipal services to special assessment districts and correspondingly reduce their expenditures on city services.229 As a result, where special assessments are a major source of municipal financing – such as in sunbelt states where there are either constitutional limits on or extreme political hostility toward tax increases — there are large inequalities between rich and poor, white and minority neighborhoods.230 These inequalities can, of course, breed resentment. Poor neighborhoods seethe as they endure substandard services while nearby wealthy neighborhoods lavish themselves with improvements. Some prominent scholars have even speculated that one underlying cause of Los Angeles’s Rodney King riots in the summer of 1992 was the city’s use of geographically-targeted financing techniques to shower downtown L.A. with millions of dollars in redevelopment money while neglecting adjacent minority neighborhoods.231

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

V. CONCLUSION: The NEIGHBORHOOD AND THE SUBURB

227 See Reynolds, supra note __, at 433 (describing “pay for what you get” model).
228 See Briffault, supra note __, at 528-29 (describing problem of intra-local service inequalities); Reynolds, supra note __, at 433-34.
229 See Kessler, 158 F.3d at 131 (Weinstein, J., dissenting) (“BIDs decrease both the need and the incentive for the city to expand or maintain the general municipal services it provides to the city as a whole.”); Reynolds, supra note __, at 433; Briffault, supra note __, at 425.
230 A troubling example of this trend was implicated in Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970). As a result of a local government practice by which street pavings were provided only upon a petition of landowners willing to pay a special assessment to finance it, 97% of white residents lived on paved streets, whereas only 65% of black residents did. Because there was no evidence of racially discriminatory intent, the court found that the scheme did not offend the federal equal protection clause. See id. at 970.
The purpose of this paper has not been to join the chorus of BID critics, but rather to highlight some heretofore unappreciated virtues of the neighborhood zoning district, and to demonstrate that courts and commentators have seriously erred in their inconsistent treatment of these two devices. Within appropriate limits, both the neighborhood zoning district and the BID/special assessment district can be powerful tools for helping cities survive and prosper during a time of great inter-local competition, in which small suburban communities have the advantage of nearly unchecked power to control their local environments. There is a role for the courts in delineating when a delegation of power to the neighborhood level is appropriate, but the courts must eschew facile distinctions between the neighborhood zoning district and the special assessment district, and instead focus on a series of ad hoc factors suggested by the foregoing analysis: 1) does the entity exercise coercive regulatory power, and if so, how far does the power encroach upon private property rights; 2) does the entity exercise a function or functions about which serious intra-group disagreement is likely? 3) Is the area governed by the entity sufficiently heterogeneous in terms of land uses, demographics or other interests that there are likely to be disagreements among members, and yet insufficiently heterogeneous to permit vigorous vote-trading? 4) Is the entity a one-shot deal or does it exercise power on an ongoing basis? 5) Is the entity likely to generate negative externalities, impair comprehensive planning, or promote intra-local inequality and balkanization?; and perhaps most importantly 6) Is the entity meaningfully constrained by a large, diverse governmental body that can counteract the exploitative or welfare-reducing tendencies of the entity? The main objective of this inquiry, of course, is to ensure that there are sufficient safeguards against neighborhood abuse of power so that judicial deference is warranted. The ad hoc factors outlined here suggest that there are many potential checks against neighborhood abuses of power.

This last observation, however, leads to another quandary, with which the paper concludes. I noted previously that courts give substantial deference to the exercise of the zoning power by incorporated municipalities, notwithstanding that most incorporated municipalities today are small suburbs no larger than neighborhoods. This trend contrasts sharply with the courts’ restrictive attitude toward neighborhood zoning control, captured in the Roberge trio. Why this difference? Is there some reason to think that municipalities perform better than neighborhoods on the list of ad hoc factors set forth in the previous paragraph, such that greater deference is warranted? Quite the contrary. In fact, virtually all of the potential checks on abuse of power listed above are absent or significantly reduced when the land use authority is exercised by incorporated municipalities.

232 For critical assessments of the BID, see, e.g., Frug, supra note __; Garodnick, supra note __; Audrey McFarlane, Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space, 4 STAN. AGORA 5 (2003).

233 See Briffault, supra note __, at 77 (three-quarters of municipalities have fewer than 5,000 residents).
municipalities.

Consider an ironic epilogue to the Roberge trio. In the 1976 case City of Eastlake v. Forest City Enterprises, a developer proposed to site an apartment building in Eastlake, Ohio, a suburb of Cleveland with a population of approximately 20,000. Shortly thereafter, the voters of Eastlake amended their city charter to provide that all zoning changes be approved by a referendum of city voters. The developer challenged the charter amendment, citing the authority of Eubank and Roberge for the proposition that voter referenda on zoning changes were unconstitutional. The Court nevertheless upheld the charter amendment, and distinguished Eubank and Roberge by noting that the challenged ordinances in those cases delegated power to a “narrow segment of the community, not to the people at large.” The referendum at issue in Eastlake was “far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters – an exercise by the voters of their traditional right … to [decide] what serves the public interest.”

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

There is more. While the record did not reflect how diverse the city of Eastlake was, it is far more likely that a few dozen homeowners in a homogenously zoned neighborhood would share common interests in the inclusion or exclusion of a group home proposed to be sited in their neighborhood (Roberge) than that a city of 20,000 would share uniform views on the entire range of zoning matters that regularly come before a typical city (Eastlake). In addition, because Eastlake’s referendum scheme was clearly

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235 Id. at 677.
236 Id. at 678 (quoting Southern Alameda Spanish Speaking Org. v. Union City, Cal., 424 F.2d 291, 294 (9th Cir. 1970).
237 See supra text accompanying notes __.
238 See supra text accompanying notes __.
intended to exclude an affordable housing project from the city, it raises all the concerns about negative spillovers, impairment of regional planning objectives, siting of locally unwanted land uses, and interlocal inequality that we have canvassed previously. In Roberge, by contrast, Seattle’s law would have enabled neighborhood groups only to permit group homes that were otherwise barred by a municipal zoning ordinance, not to exclude them.239 Ironically, then, the schemes at issue in Eubank and Roberge provided far greater procedural protections against abuse of power than the scheme in Eastlake. Why, then, is the Court so much more skeptical of a neighborhood referendum than a referendum conducted by “the city itself?”

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

a strong and clear differentiation of the special role one plays as citizen from one’s normal, everyday pursuits as private individual and, relatedly, [ ] a careful construction of special formal or ceremonial contexts designed to place the individual in the special citizen’s role – to force that role on the individual by cultural means – on those special occasions when political as distinguished from normal self-regarding private action is in progress.”240

According to Michelman, Eastlake should be read to mean that a neighborhood zoning referendum, in which an “immediately interested person” participates in a “one-time blockfront decision,” does not create the necessary background conditions to awaken in the individual the “special citizen’s motivational mode of sympathy and responsibility for all equally.”241 When, by contrast, the referendum is placed before the entire city, “which maintains a continuing salience in [the voter’s] consciousness of political life,”242 the appropriate signal

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239 See Roberge, 278 U.S. at 118.
240 Michelman, supra note __, at 184.
241 Id.
242 Id. at 185.
is sent to each voter that the time has come for public-minded political action rather than “normal self-regarding private action.” From this perspective, interestingly, an entity that exercises zoning power on an ongoing basis is more legitimate than the “one-shot deal” type of referendum involved in *Eubank* and *Roberge*, precisely the opposite of what the public choice analysis to this point has suggested.

Michelman’s exegesis works well as an attempt to divine the meaning behind *Eastlake*’s cryptic opinion. It does not work at all – nor is it intended to – as a normative defense of local government autonomy. Eastlake’s blatantly exclusionary referendum scheme cannot realistically be described as “public-minded political action.” It is instead a fairly typical instance of a suburban municipality acting selfishly to protect its own wealth by excluding a land use project that threatens to increase the local tax burden and lower property values. As we have seen, this sort of self-regarding action by autonomous incorporated municipalities has bedeviled efforts to site locally undesirable but regionally necessary land uses such as affordable housing. Nor can we give much credence to the argument that Eastlake, unlike the single-shot constructs in *Eubank* and *Roberge*, is an entity that “maintains a continuing salience in [the voter’s] consciousness of political life.” Many suburbs are themselves nothing more than constructs created in order to accomplish particular, self-regarding goals. There are, for example, numerous instances of suburban areas incorporating “defensively” solely in order to defeat a proposed land use siting or annexation, or to seize control of a revenue-generating entity.\(^\text{243}\) States have long abandoned the notion that a group must constitute a “community” in any meaningful sense in order to incorporate as a municipality.\(^\text{244}\)

Thus, the juridical distinction between municipal land use control and neighborhood land use control turns out to be just as baseless as the distinction between special assessment districts and neighborhood zoning districts. There is no reason, in law or public policy, to fetishize the incorporated suburb as a forum for enlightened land use decisionmaking while deriding the neighborhood as parochial and self-regarding. To the extent neighborhood control of zoning raises basic concerns about democratic accountability, majoritarian exploitation, spillover impacts, intra-local inequality and the like, courts can address those concerns by looking to the *ad hoc* factors articulated herein, rather than through a blanket condemnation of neighborhood zoning. A close examination of those factors should reveal, more often than not, that neighborhood control of zoning under city supervision offers many advantages over our current system of highly fragmented land use authority, in which incorporated municipalities have the


\(^{244}\) See Briffault, supra note __, at 75-76 (courts liberally sustain municipal incorporations without regard to whether the area to be incorporated represents a “community of interest”).
freedom to enact policies that serve local interests at the expense of regional needs.