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THE RIGHT TO VOTE ON TAXES

*Kirk J. Stark**

The taxpayer revolution has indeed been born without
an analytical blueprint or even an analytical map.

Geoffrey Brennan & James Buchanan (1980)¹

INTRODUCTION

One cannot study American history for long before noticing the conspicuous role of tax revolts. Time and again Americans have turned mutinous against taxes—the Boston Tea Party, the Whiskey Rebellion, the Depression-era tax strikes.² “Tax revolts,” as one commentator put it, “are as American as 1776.”³

This spirit of tax rebellion is once again taking hold. In a handful of states across the country, a new taxpayer movement is quietly underway. Over the past two decades, voters in several states have gone to the polls demanding a more direct role in local tax decision-making. As a result of a 1996 initiative, for example, the California Constitution now requires local governments to secure voter approval before any new or increased tax may take effect.⁴ Several other states have either considered or adopted similar

* Acting Professor, UCLA School of Law. I would like to thank William Klein, Gillian Lester, Ed McCaffery, Deborah Schenk, Kenneth Karst, Sharon Dolovich, Michael Asimow, Jonathan Zasloff, Daniel Bussel, Ann Carlson, Eric Talley, Carole Goldberg, Mitu Gulati, Clarissa Potter, Mike Heilbroner, Robert Goldstein, Clyde Spillenger and participants in the Georgetown Tax Policy Workshop for their helpful comments on previous drafts of this article. As always, Mei-lan and Olivia deserve special mention for their understanding and support. Finally, I owe a special debt of gratitude to my late colleague, Gary Schwartz, who generously shared with me his wisdom and insights regarding the field of local government law and policy.

¹ GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* 189 (1980).

² See David T. Beito, *Tax Revolts in American History*, 4 *HUMANE STUD. REV.* 1 (1986-87) (“The United States owes its birth to a tax revolt.”). *But see* Malcolm Gladwell, *Tea and Sympathy: The Truth About American Taxpayers*, *NEW YORKER*, Apr. 19, 1999, at 94 (arguing that the Boston Tea Party controversy arose out of a reduction in British import duties). On the Whiskey Rebellion, see THOMAS P. SLAUGHTER, *THE WHISKEY REBELLION: FRONTIER EPILOGUE TO THE AMERICAN REVOLUTION* (1986). On the Depression-era tax strikes (with an emphasis on Chicago), see DAVID T. BEITO, *TAXPAYERS IN REVOLT: TAX RESISTANCE DURING THE DEPRESSION* (1989).

³ Joseph D. Reid, Jr., *Tax Revolts in Historical Perspective*, 32 *NAT’L TAX J.* 67, 69 (1979).

⁴ CAL. CONST. art. XIII A, § 4 (requiring voter approval for “special taxes”); art. XIII D (requiring voter approval for “general taxes”).

provisions for local taxes.⁵ Additional tax voting initiatives are on the horizon.⁶

In most of these jurisdictions, interest in popular control of taxation can be traced to reforms brought about by the tax limitation movement of the mid-1970s. California's recent emphasis on tax voting has its roots in Proposition 13 ("Prop 13"), the famous property-tax-cutting initiative approved by voters in June 1978.⁷ Prop 13 marked a watershed moment in the evolution of American attitudes toward government and taxation.⁸ The controversial initiative not only inspired similar measures in other states,⁹ but also served as a local precursor to the tax-cutting Reagan revolution that dominated the national political scene throughout the 1980s.¹⁰ As Michael Graetz explains, "this nation has known very few days that have turned American tax politics upside down, but June 6, 1978 was one of those days."¹¹

If Prop 13 was a fiscal earthquake felt throughout the country, then California's local public sector was its epicenter. The initiative rocked the state's system of local public finance, transforming the way cities, counties, and school districts are funded. By limiting access to the property tax, Prop 13 pushed local governments to find new ways of raising money, which they often did through aggressive legal arguments and creative financial engineering. These fiscal machinations spawned litigation over what was and was not subject to the new constitutional limits. Eventually, Prop 13's defenders responded by proposing new initiatives to ensure direct voter control over local tax decisions. In November 1996, California voters adopted Proposition 218—the self-styled "Right to Vote on Taxes Act."¹² As with

⁵ Voters in Colorado, Michigan, Missouri, Montana, and Washington have adopted similar provisions, though the state supreme courts in the latter two states later rejected the initiatives as unconstitutional based on single-subject challenges. Anti-tax activists in Arizona and Oregon have also pursued tax voting initiatives. *See infra* subpart I.C.

⁶ For example, new tax voting initiatives are underway in the states of Washington and Florida. *See infra* Part II.

⁷ CAL. CONST. art. XIII A. Prop 13 has spawned an enormous literature. For a recent analysis, see ARTHUR O'SULLIVAN ET AL., PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 (1995); MICHAEL A. SHIRES, JOHN ELLWOOD & MARY SPRAGUE, HAS PROPOSITION 13 DELIVERED? THE CHANGING TAX BURDEN IN CALIFORNIA (1998).

⁸ In addition, commentators often cite Prop 13 as inaugurating a new era of direct democracy across the country, having an impact well beyond the tax area. *See, e.g.,* Sherman Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 468 (1998).

⁹ *See* Richard Briffault, *Distrust of Democracy*, 63 TEX. L. REV. 1347, 1369 (1985) ("Proposition 13 was followed by a multitude of tax and expenditure limitations propositions on ballots throughout the nation.")

¹⁰ C. EUGENE STEUERLE, THE TAX DECADE: HOW TAXES CAME TO DOMINATE THE PUBLIC AGENDA (1992) (discussing tax policy during 1980s).

¹¹ MICHAEL J. GRAETZ, THE DECLINE (AND FALL?) OF THE INCOME TAX 52 (1997); *see also* WILLIAM FISCHER, THE HOMEVOTER HYPOTHESIS (forthcoming 2001) (Oct. 2000 manuscript at 4-7, on file with author), available at <http://www.lincolnst.edu/workpap/fischel2.html>.

¹² CALIFORNIA LEAGUE OF CITIES, UNDERSTANDING PROPOSITION 218 (1997) (comprehensive

similar initiatives in other states, Prop 218 promised greater “taxpayer protection” by “limiting the methods by which local governments exact revenue from taxpayers without their consent.”¹³

This Article explores the recent upsurge in tax voting¹⁴ and investigates the broader question of what role a right to vote on taxes might play within a fiscal constitution designed to limit the taxing powers of local governments. My analysis departs from traditional methods of examining direct democracy. Most scholars interested in popular lawmaking proceed from the assumption that either the people themselves or their representatives will make political decisions—the question they address is which approach is preferable. Indeed, a rich and valuable literature as old as democracy itself has developed around the debate over which form of decision-making is truer to basic democratic principles. While some discussion of that literature will be necessary to set the stage for my own analysis, my aim is not to analyze whether direct democracy is superior to representative government or *vice versa*. Rather, I intend to examine voter approval requirements as a type of constitutional device that might be deployed by a hypothetical constitutional architect charged with designing rules and institutions to limit the taxing powers of local government.

Modern state constitutions contain a broad array of tax and expenditure limits (“TEs”) that constrain the fiscal exaction powers of local governments.¹⁵ These constitutional provisions have proliferated in the past quarter century, fundamentally altering the nature of local governance, yet little scholarly attention has been devoted to the question of how TEs should be designed. Broadly speaking, TEs fall into two basic categories: (1) *direct limitations*, such as tax rate limits, tax base constraints, and expenditure caps, and (2) *procedural limitations*, such as super-majority rules or voter approval requirements. All TEs limit the fiscal discretion of elected officials, yet the voter approval device serves a quite different function than direct limitations. Unlike a maximum rate or a base constraint, the effect of

analysis of Prop 218).

¹³ Proposition 218: Text of Proposed Law, § 2, at <http://vote96.ss.ca.gov/BP/218text.htm>, reprinted as WEST’S ANN. CAL. CONST. art. XIII C, § 1 (Historical Notes) (2000 Supp.); see also Howard Jarvis Taxpayers Ass’n, Statement of Drafters’ Intent, Right to Vote on Taxes Act (Jan. 1997), available at http://www.hjta.org/content/ARC000025A_Prop218.htm.

¹⁴ I use the term “tax voting” here as shorthand for local referendums on new or increased taxes. There has been some discussion in the economics literature of the new emphasis on direct democracy in local public finance. See, e.g., Steven M. Sheffrin, *The Future of the Property Tax: A Political Economy Perspective*, in THE FUTURE OF STATE TAXATION 128 (David Brunori ed., 1998); see also Kim Reuben & Therese McGuire, *Tax and Bond Referenda in California and Illinois*, 12 STATE TAX NOTES 1181 (1997).

¹⁵ “TEL” is now commonly used in the legal and economics literature to refer to “tax and expenditure limits.” E.g., John J. Kirlin, *The Impact of Fiscal Limits on Governance*, 25 HASTINGS CONST. L.Q. 197, 200 (1998) (using the term to describe various fiscal limits on local taxes in California); see also Mark Skidmore, *Tax and Expenditure Limitations and the Fiscal Relationships Between State and Local Governments*, 99 PUB. CHOICE 77 (1999).

the voter approval device is contingent upon the fiscal preferences of the community's median voter.¹⁶ As a result, the referendum is less reliable as a taxpayer protection device; at the same time, however, it is more respectful of majoritarian preferences and local autonomy.

I argue that these differences have significance for the types of taxes to which voter approval requirements should apply. *If* it is assumed that some sort of constitutional limit must apply to all types of local taxes (a big if), then the case for direct voting on taxes is most compelling where there is substantial correspondence between the population burdened by the tax and those who are empowered to vote in the jurisdiction. Thus, assuming universal resident suffrage, the voter approval device may be more appropriate for property taxes than for hotel taxes; more suitable for a residence-based income tax than a source-based sales tax. These insights, if accurate, have important implications for constitutional design in those states that have adopted TELs. At a minimum, the analysis suggests that California's system—restricting property taxes with direct limitations and requiring voter approval for a variety of miscellaneous nonproperty taxes—is exactly backwards.

This Article is organized as follows: Part I offers a brief history of the rise of direct democracy in local fiscal decision-making, using California's experience as an illustration of how the demand for tax voting is a product of the property tax revolt of the mid-1970s. Part II then examines the arguments advanced in support of tax voting and attempts to situate those arguments within a broader philosophical and normative framework. As we shall see, the right to vote on taxes movement draws normative sustenance from two competing philosophical perspectives. On the one hand, tax voting appeals to a populist instinct. Recalling Rousseau and Jefferson, it evokes the image of plebiscitary procedures such as the Greek *polis* and the New England town meeting.¹⁷ At the same time, however, the right to vote on taxes is rooted in a libertarian concern for limiting government and protecting taxpayers from a revenue-maximizing leviathan.¹⁸ Here, tax voting relies on the political philosophy of Locke and Nozick and economists working in the tradition of voluntary exchange theory.¹⁹ These theories

¹⁶ I use "median voter" here and throughout the Article as a shorthand reference for majority rule. For a discussion of the median voter theorem, see Randall G. Holcombe, *Median Voter Theorem*, THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY 236-38 (Joseph J. Cordes et al. eds., 1999).

¹⁷ See THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM & RECALL 38-40 (1989) (discussing Rousseau and Jefferson as forerunners of modern-day advocates of direct democracy).

¹⁸ BRENNAN & BUCHANAN, *supra* note 1, at 13-33 (modeling government as a revenue-maximizing leviathan); see also Wallace Oates, *Searching for Leviathan: An Empirical Study*, 75 AM. ECON. REV. 748 (1985) (presenting and analyzing empirical data concerning Brennan and Buchanan's hypothesis).

¹⁹ JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (1974). Voluntary exchange theory (sometimes referred to as "fiscal exchange theory") has its origins in the work of 19th-century European economists such as Knut Wicksell. See, e.g., KNUT WICKSELL, *A New Principle of Just Taxation*

lend support to tax voting's central campaign mantra—*taxpayers* should have a right to vote on the taxes they are asked to pay.

Part III turns from the abstractions of philosophy to the details of local taxation and multi-unit public finance. The chief distinguishing feature of taxation at the local level is the possibility that tax burdens imposed by one unit of government may fall on individuals not entitled to participate in that community's decision-making process. Importantly, however, the extent of these fiscal externalities varies depending upon the types of taxes that local governments are permitted to use. Through an examination of the resident-voter's tax price for a variety of common local levies, Part III highlights those features of the local tax base resulting in a divergence between those who vote on taxes and those who pay them. That divergence arises not only from the distribution of the tax burden within a community, but also from the exporting of burdens to persons outside of the community. Because of the existence of multiple jurisdictions and the mobility of consumers and factors among them, some portion of locally imposed taxes may be shifted to nonresidents who are generally not entitled to vote.²⁰ This possibility highlights the weaknesses of the referendum as a yardstick of taxpayer consent.

Through a series of illustrations, Part III demonstrates how the referendum's consent value depends upon the type of tax under consideration and the precise design features of the tax. This analysis suggests a division of labor for alternative tax limitation devices—if a state chooses to limit the taxing power of local governments, voter approval requirements may be more suitable for residence-based taxes (or their equivalents), while alternative limitations may be more appropriate for those taxes with incidence effects that are less certain or more dispersed. It also suggests a link between the right to vote on taxes and an emerging literature in public finance economics concerning the optimal assignment of taxing authority in federalist economies.²¹

Finally, Part IV responds to the argument that voter approval requirements are normatively unappealing and therefore should be rejected altogether. Anticipating criticisms from those who object to any type of restriction on the government's taxing power, I offer an alternative defense

(1896), reprinted in CLASSICS IN THE THEORY OF PUBLIC FINANCE 72 (Richard A. Musgrave and Alan T. Peacock eds., 1958). The most prominent contemporary adherent of the Wicksellian philosophy of voluntary exchange is James Buchanan. See BRENNAN & BUCHANAN, *supra* note 1, at 6-8. For a recent discussion, see Bernd Hansjurgens, *The Influence of Knut Wicksell on Richard Musgrave and James Buchanan*, 103 PUB. CHOICE 95 (2000) who quotes Buchanan: "In any overall evaluation of the history of fiscal thought, Wicksell alone commands the heights of genius," *id.* at 97.

²⁰ This observation is subject to an important caveat concerning the ability of local governments to export their tax burdens to nonresidents. The same features of the multi-jurisdictional setting that make tax exporting possible—the movement of people and capital across borders—also limit a jurisdiction's taxing capacity. I discuss these issues in subpart III.C *infra*.

²¹ See *infra* subpart III.E.

of tax voting that takes the idea beyond the libertarian justifications described above.²² Drawing from recent political and economic theory, I argue that involving voters directly in local tax decisions may help improve tax morale, increase popular respect for local fiscal outcomes, and stimulate public debate regarding the allocation of local tax burdens. Under this view, the central purpose of tax voting would not be to protect taxpayers but rather to promote community deliberation regarding the question: *How shall we tax ourselves?* Again, however, the case for tax voting depends crucially on the structure of the local tax base. If tax voting is to serve these alternative functions, then states should generally favor residence-based taxes over alternative revenue sources for local governments.

I. THE EMERGING RIGHT TO VOTE ON TAXES

Direct democracy as a form of state and local fiscal decision-making is not new. Many state constitutions require voter approval before state or local bonds may be issued,²³ and state law not infrequently requires the approval of the local electorate as a condition for overriding property tax limits or levying certain local option taxes.²⁴ In recent years, however, the degree of direct voter involvement in fiscal matters has expanded greatly, especially at the local level. Voters in several states have either adopted or considered laws requiring direct voter approval for all new or increased local taxes.²⁵ Additional initiatives are in process.²⁶ Yet few states have had as much experience with tax voting as California—the birthplace of the modern tax revolt. In subpart A below, I examine the origins of California's tax revolt, which began with the adoption of Prop 13 in June 1978. Subpart B discusses the state's most recent initiative, Proposition 218—the Right to Vote on Taxes Act. Subpart C then offers a brief overview of other states' experiences with the right to vote on taxes.

²² In this regard, my project has some parallels to the political interpretive methodology described by Ed McCaffery. See Edward J. McCaffery, *Tax's Empire*, 85 GEO. L.J. 71, 87 (1996) (“[O]ur actual practices are important sources of workable ideals: we should look to them and attempt to read them ‘in their best lights.’”).

²³ See ROBERT S. AMDURSKY & CLAYTON P. GILLETTE, *MUNICIPAL DEBT FINANCE LAW: THEORY AND PRACTICE* § 2.4 (1992); A. JAMES HEINS, *CONSTITUTIONAL RESTRICTIONS AGAINST STATE DEBT* 9-12 (1963).

²⁴ See Fiscal Discipline Project, *Property Tax Levy Limits—Summary Profile*, available at <http://www.colorado.edu/Economics/taxpolicy/states/tax-limitations/levy-limits.html> (restricted access website, last visited May 16, 2000) (on file with author) (listing states with override provisions). On voter approval for local option taxes, see NATIONAL CONFERENCE OF STATE LEGISLATURES, *CRITICAL ISSUES IN STATE-LOCAL FISCAL POLICY—A GUIDE TO LOCAL OPTION TAXES* 18 (1997).

²⁵ See discussion *infra* subpart I.C.

²⁶ Anti-tax activists in Washington are in the process of gathering signatures for “Initiative 252—The Right to Vote on Taxes.” See <http://www.mrsc.org/focus/righttovote.htm> (last visited Nov. 1, 2001). In Florida, the “Home Rule Committee” has filed a petition for an initiative to be titled “Voter Control of City Taxes.” See <http://election.dos.state.fl.us/initiatives/fulltext/2782-1.htm> (last visited Dec. 3, 2001).

A. Origins of the Property Tax Revolt—California's Prop 13

In deciding whether and how to constrain a government's taxing authority, several fundamental questions of constitutional design must be addressed: How much protection should a constitution provide from the government's fiscal exaction powers? Why are such protections needed? How will they be enforced? Nowhere have these issues been so thoroughly played out as in California. The modern era of direct democracy in local fiscal decision-making has its origins in Prop 13.²⁷

Prop 13 was an extraordinary political event in American history by any measure, a "modern Boston Tea Party," according to the *New York Times*.²⁸ The reasons for its stunning success are still being debated.²⁹ The conventional explanation puts most of the blame on the dramatic increase in housing prices during the first half of the 1970s.³⁰ Because California's property tax was, at the time, based on the market value of property, the surge in inflation translated automatically into higher assessed valuations.³¹ The common-sense reaction to a swelling tax base, one might assume, would be to lower the applicable tax *rate* in order to prevent tax bills from soaring. For a variety of complicated reasons, however, local governments failed to do this.³² As a result, during the period from the late 1960s to the mid-1970s, the typical property tax bill for the California homeowner escalated sharply.³³

Popular discontent with the already disfavored tax began to mount, and a movement for property tax relief gained momentum.³⁴ The state legislature, which could have responded to these developments by providing such relief, instead found itself splintered by disagreement over the form that tax

²⁷ CAL. CONST. art. XIII A (Proposition 13, as amended).

²⁸ Robert Lindsey, *California Tax Revolt: Lesson for Legislators*, N.Y. TIMES, June 12, 1978, at B10.

²⁹ Economist William Fischel argues that the California Supreme Court's school finance decisions in *Serrano v. Priest* "caused" Prop 13. William A. Fischel, *Did Serrano Cause Proposition 13?*, 42 NAT'L TAX J. 465 (1989) [hereinafter Fischel, *Did Serrano Cause Proposition 13?*]; William A. Fischel, *How Serrano Caused Proposition 13*, 12 J.L. & POL. 607 (1996). Fischel's thesis is the subject of another project I am currently working on. See Kirk J. Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Reexamining the Role of School Finance Reform* (unpublished manuscript, on file with author).

³⁰ See, e.g., DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* 21-23 (1983).

³¹ *Id.* at 22 ("[T]he property tax bill on a home purchased in Los Angeles for \$45,000 in 1973, when the average selling price was \$39,600, would have risen from \$1,160 in 1973-74 to \$2,070 in 1976-77, an increase of 80 percent over three years.").

³² Commentators have expressed puzzlement over local governments' failure to reduce rates as property values rose. See, e.g., Fischel, *Did Serrano Cause Proposition 13?*, *supra* note 29, at 466-67; see also William Oakland, *Proposition 13: Genesis and Consequences*, 32 NAT'L TAX J. 387 (1979).

³³ SEARS & CITRIN, *supra* note 30, at 28.

³⁴ See GLENN W. FISHER, *THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA* (1996) (detailing history of American discontent with the property tax).

relief should take.³⁵ The Senate, in particular, seemed incapable of coming to a consensus on how to address the problem.³⁶ In combination with a general disillusionment with government spawned by Watergate and the Vietnam War, the rift in Sacramento fueled the belief that radical reform was warranted. Howard Jarvis, a longtime opponent of government spending and ardent champion of lower taxes, organized a campaign to rein in property taxes and limit the perceived local government excess.³⁷ Assisted by a critical differential in partisan turnout, Jarvis's famous Prop 13 passed with sixty-six percent voter approval on June 6, 1978.

Prop 13's main target was the local property tax. In addition to rolling taxes back to 1975-76 levels, the initiative set a maximum rate of one percent for all taxable real property and redefined the tax base to permit reassessment only upon sale.³⁸ The immediate effect of these provisions was to reduce annual property tax receipts by more than half, from \$10.2 billion in fiscal year 1977-78 to \$4.9 billion in 1978-79.³⁹ But the revenue loss was only part of the story. Equally important was the manner in which Prop 13 transformed the state's system of local public finance and the role of the property tax within it. Today, with one narrowly crafted exception, the state constitution prohibits local communities from altering the property tax.⁴⁰ Even if a community's citizens unanimously agreed on raising property taxes, they would not be able to do so because of Prop 13's limitations. Most important, Prop 13 gave the state legislature the authority to allocate property tax revenues among local governments.⁴¹ Thus, while nominally imposed by local governments, California's property tax today is, de facto, a statewide tax combined with a complex system of intergovernmental grants.⁴²

³⁵ See DAVID R. DOERR, CALIFORNIA'S TAX MACHINE: A HISTORY OF TAXING AND SPENDING IN THE GOLDEN STATE 133-137 (2000) (describing various unsuccessful property tax relief bills introduced during the 1977 legislative term).

³⁶ *Id.*; see also Stark & Zasloff, *supra* note 29.

³⁷ Jarvis's role in Prop 13's passage is recounted in Daniel A. Smith, *Howard Jarvis, Populist Entrepreneur: Reevaluating the Causes of Proposition 13*, 23 SOC. SCI. HIST. 173, 187-201 (1999) (describing Jarvis's organizational efforts); see also HOWARD JARVIS, I'M MAD AS HELL (1979) (autobiography describing efforts in organizing campaign for Prop 13).

³⁸ See CAL. CONST. art. XIII A, §§ 1(a), 2(a). Prop 13's "acquisition value" provision has been the subject of litigation because of the disparities in tax liabilities that it generates for properties of comparable value. In 1992, the U.S. Supreme Court rejected a plaintiff's contention that the acquisition value system violated her federal equal protection rights. *Nordlinger v. Hahn*, 505 U.S. 1 (1992).

³⁹ See DOERR, *supra* note 35, at 344.

⁴⁰ Localities may exceed the 1% limit for the purpose of issuing general obligation bonds which will be used to finance the acquisition or improvement of real estate. CAL. CONST. art. XIII A § (1)(b). Local bonds must be approved by a two-thirds vote. *Id.* In November, 2000, California voters approved an initiative lowering the voter approval threshold requirement for school facility bonds to fifty-five percent. *Id.* § 1(b)(3).

⁴¹ *Id.* § 1(a) (requiring that property tax revenues shall be "apportioned according to law to the districts within the counties" (emphasis added)).

⁴² See O'SULLIVAN ET AL., *supra* note 7, at 99-102. These "grants" take the form of each local gov-

Given the radical nature of these changes, it is not surprising that almost everyone writing about Prop 13 has described it as a “revolt,” a term that evokes images of a popular uprising. The leading scholars on Prop 13 have reinforced this view—titles such as *The Tax Revolt*, *Revolt of the Haves*, and *California and the American Tax Revolt* populate the literature.⁴³ Yet now that more than two decades have passed, it may be more useful to think of Prop 13 as merely the first draft of the state’s “fiscal constitution.”⁴⁴ Unlike the revolt perspective, this approach emphasizes the incompleteness of Prop 13 itself and focuses on how post-1978 developments have generated a patchwork of constitutional rules and fiscal institutions designed to limit the taxing powers of local governments.⁴⁵ The contours of this fiscal constitution have been shaped and reshaped by an ongoing evolutionary process driven by institutional actors with competing interests, including anti-tax activists, the courts, the state legislature and local governments.

The evolutionary dynamic at work here can be described in straightforward terms. By cutting property tax revenues by more than half, Prop 13 placed a severe fiscal constraint on local governments. To satisfy continuing public service demands, local officials have relied on creative legal interpretations and innovative financial engineering in order to raise revenue without (arguably) running afoul of the constitutional restrictions.⁴⁶ Taxpayer advocacy groups—most notably the Howard Jarvis Taxpayers Association—have opposed these actions and challenged local governments through litigation in state court.⁴⁷ In interpreting Prop 13, the courts have

ernment’s share of property tax receipts, the amount of which is determined by a complex statutory formula set forth in state legislation known as “A.B. 8.” See 1979 Cal. Stat. 282. Allocations are subject to annual modification by the state legislature, a fact evidenced most recently in the controversy over the Education Revenue Augmentation Fund (ERAF) diversions during the recession of the early-1990s. For a general discussion, see Legislative Analyst’s Office, *Reversing the Property Tax Shifts* (Apr. 2, 1996), available at <http://www.lao.ca.gov/pb040296.html>.

⁴³ See, e.g., SEARS & CITRIN, *supra* note 30; ROBERT KUTTNER, *REVOLT OF THE HAVES: TAX REBELLIONS AND HARD TIMES* (1980); ALVIN RABUSHKA & PAULINE RYAN, *THE TAX REVOLT* (1982); PAUL RICHTER, *CALIFORNIA AND THE AMERICAN TAX REVOLT: PROPOSITION 13 FIVE YEARS LATER* (Terry Schwadron ed., 1984).

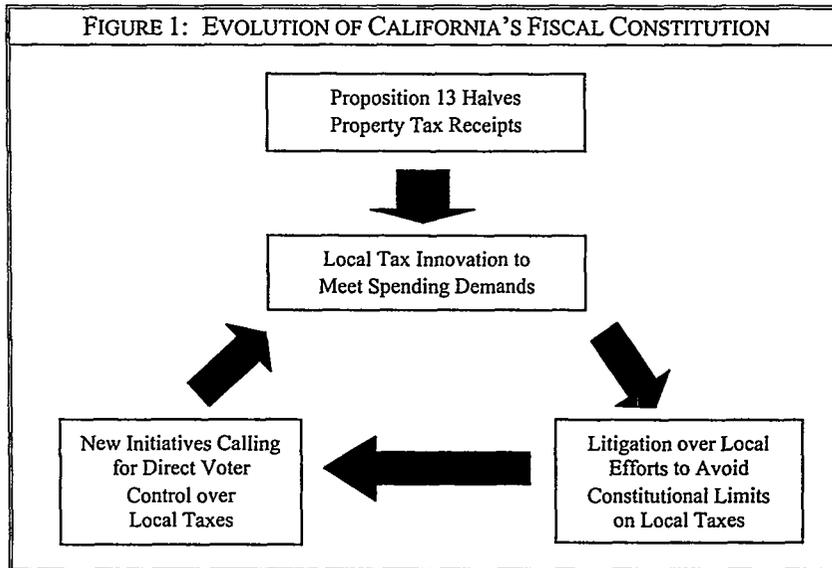
⁴⁴ Other authors have used this term to refer to constitutional rules and institutions that govern fiscal decision-making. See Kenneth Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977); see also Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CAL. L. REV. 595 (1988).

⁴⁵ See SHEFFRIN, *Future of the Property Tax*, *supra* note 14, at 137-140 (offering similar description).

⁴⁶ See JEFFREY CHAPMAN, *PROPOSITION 13: SOME UNINTENDED CONSEQUENCES 15-20* (1998) (discussing the growth of arcane finance techniques in the years since Proposition 13 was adopted). For a description of one particularly interesting technique, the creation of so-called “Mello-Roos” districts, see WILLIAM FULTON, *GUIDE TO CALIFORNIA PLANNING* (1999), noting that “over time . . . the cities of Southern California learned how to work the angles,” *id.* at 282-84.

⁴⁷ For a discussion, see Joseph T. Henke & Miles A. Woodlief, *The Effect of Proposition 13 Court Decisions on California Local Government Revenue Sources*, 22 U.S.F. L. REV. 251 (1988). The How-

generally sided with local governments, upholding their efforts to avoid the constitutional limitations.⁴⁸ Having failed in the courts, the Jarvis organization has responded with additional initiatives calling for greater transparency in the local tax setting process. Figure 1 illustrates the basic dynamic driving the evolution of California's fiscal constitution.



The precise effects of this evolutionary process can be seen most clearly in the step-by-step legal developments leading up to California's Right to Vote on Taxes Act. In one of its lesser-known provisions, section 4, Prop 13 provided that "[c]ities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose *special taxes* on such district . . ."⁴⁹ At the time Prop 13 was adopted, few people focused on section 4. Its importance only came to be known as local governments began to implement Prop 13. Protective of their fiscal autonomy, local officials interpreted the provision narrowly, contending that the term "special tax" should mean any tax earmarked for special purposes.

If accepted by the courts, this narrow interpretation of section 4 would leave local governments free to enact taxes without a popular vote. Not surprisingly, tax limitation proponents opposed this view, contending instead that the term special tax should be interpreted broadly as any tax other than the property tax. In 1982, at the height of the controversial Rose Bird

ard Jarvis Taxpayers Association continues to play a very active role in policing local government fiscal behavior. A list of the organization's current activities can be found on its website. See <http://www.hjta.org/> (last visited October 18, 2001).

⁴⁸ *Id.*; see also DOERR, *supra* note 35.

⁴⁹ CAL. CONST. art. XIII A § 4 (emphasis added).

era,⁵⁰ the California Supreme Court sided with local governments, ruling that the term special tax means taxes that are designated for a specific appropriations purpose.⁵¹

The Court's decision opened the door for local governments to adopt general taxes without voter approval by simply refusing to specify an appropriations purpose for the tax. The Jarvis campaign responded with another initiative in 1986. Proposition 62, a statutory initiative, reiterated Prop 13's two-thirds voter approval requirement for special taxes and imposed a simple majority voter approval requirement for non-earmarked, or "general," taxes.⁵² Because Prop 62 was a statutory initiative, however, it did not apply to California's charter cities, whose taxing authority is protected by the state constitution.⁵³ Moreover, there was some question, even as to general law cities, regarding whether or not Prop 62's voter approval rules amounted to an unconstitutional referendum.⁵⁴ Once again, local governments interpreted the initiative in a manner to protect their fiscal autonomy. Once again, litigation ensued over the proper scope of the measure.⁵⁵ And once again, the Jarvis organization proposed an initiative to be presented to California voters.

B. From the Tax Revolt to the Right to Vote on Taxes

Proposition 218, the Right to Vote on Taxes Act, addressed many of the issues left unsettled by the controversy over Proposition 62.⁵⁶ Appear-

⁵⁰ See BERNARD L. HYINK & DAVID H. PROVOST, *POLITICS AND GOVERNMENT IN CALIFORNIA* 136 (14th ed. 1998) ("Rose Bird's tenure on the Court was marked by controversy and indicating that her liberal positions on various subjects, most notably the death penalty, contributed substantially to her recall in 1986.").

⁵¹ *San Francisco v. Farrell*, 648 P.2d 935, 940 (Cal. 1982) (construing the term "special taxes" to mean "taxes which are levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes."). In commenting on *Farrell*, Howard Jarvis noted, "I don't see how a kindergarten child could have misread [Prop 13]. We'll have to give [the court] a forced remedial reading course." Carlsen, *1984 Initiative—Jarvis, Gann Try to Fix Up Prop. 13*, S.F. CHRON., Sept. 1, 1982, at 7, cited in Henke & Woodlief, *supra* note 47, at 268.

⁵² DOERR, *supra* note 35, at 433-434 (describing history of Proposition 62).

⁵³ CAL. CONST. art. XI, § 5 (home rule provisions). For a discussion of the differences between charter cities and general law cities, see CAL. STATE LEGISLATURE, SENATE LOCAL GOV'T COMM., *TAILOR-MADE GOVERNMENT: A CITIZEN'S GUIDE TO CALIFORNIA'S CHARTER CITIES AND COUNTIES* (Feb. 1998). It was also unclear whether Prop 62 would apply to taxes imposed by special districts. See *L.A. County Transp. Comm'n v. Richmond*, 643 P.2d 941 (Cal. 1982).

⁵⁴ Prior to Prop 218, there was some question as to whether Prop 62's voter approval requirement constituted an unconstitutional referendum within the meaning of California Constitution Article II, Section 9(a). See, e.g., *City of Woodlake v. Logan*, 282 Cal. Rptr. 27 (Cal. Ct. App. 1991); *City of Westminster v. County of Orange*, 251 Cal. Rptr. 511 (Cal. Ct. App. 1988).

⁵⁵ See *Santa Clara County Local Transp. Auth. v. Guardino*, 902 P.2d 225 (Cal. 1995) (upholding the constitutionality of Proposition 62).

⁵⁶ Similar initiatives failed in 1984 and 1990. Proposition 36 (1984) would have required two-thirds majority approval before any local tax could take effect. Proposition 136 (1990), the Taxpayer's Right to Vote Amendment, would have required a simple majority for some taxes and a two-thirds majority

ing on the state ballot in November 1996 alongside several other high-profile initiatives,⁵⁷ this new constitutional amendment passed with the approval of fifty-seven percent of California voters.⁵⁸ Prop 218 fundamentally altered the state's fiscal landscape, leading one commentator to label the initiative as "probably the single most important development in local public finance in California since the passage of Prop 13."⁵⁹ Most important for present purposes, Prop 218 "constitutionalized" the requirement that general taxes are subject to a simple-majority voter approval requirement.⁶⁰ Thus, more than twenty years after Prop 13's adoption, the California Constitution now requires that *all* types of taxes, whether special or general and whether imposed by charter cities or general law cities or districts or counties or any other local agency, must be approved by the voters prior to taking effect.⁶¹

Prop 218 inaugurated a new era of direct democracy in California tax politics, a fact confirmed by recent data on local tax elections. As Figure 2 below illustrates, in 1994, two years before the initiative passed, there were 22 city tax measures on local ballots throughout the entire state. In 1998, two years after the Right to Vote on Taxes Act passed, there were 112 tax measures on city ballots, an increase of more than five hundred percent.⁶²

While very few Californians are familiar with the foregoing history (or are even aware that they may have once voted on Proposition 218), it cannot have escaped their notice that the number of local tax questions they are called upon to decide has exploded in the past few years.⁶³ Labeled alpha-

for other taxes. For a discussion, see DOERR, *supra* note 35, at 433.

⁵⁷ Also appearing on the November 1996 ballot were Proposition 209, the controversial initiative banning affirmative action in California, and Proposition 215, an initiative permitting the medical use of marijuana in the state. See CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 5, 1996), *available at* <http://vote96.ss.ca.gov/Vote96/html/BP/home.htm>.

⁵⁸ Prop 218 passed by a 56.6% to 43.4% vote. These data are set forth along with additional data on the 1996 ballot initiatives, at <http://Vote96.ss.ca.gov/Vote96/html/vote/prop/prop-218.961218083528.html> (last visited Nov. 1, 2001). Note that 62% of San Francisco County voters *opposed* Prop 218. Thus, a community whose majority preferred not to impose voter approval requirements on itself is nonetheless obliged to do so. *Id.*

⁵⁹ Sheffrin, *supra* note 14, at 137. Prop 218 added new voting procedures for assessments and "property-related fees." CAL. CONST. art. XIII D. Anti-tax activists have interpreted the term "property-related fee" broadly to include regulatory fees such as the slum-inspection fee imposed on landlords by the City of Los Angeles to fund the city's inspection program for substandard housing. In a recent decision, the California Supreme Court has upheld the city's slum-inspection fee against this challenge. *Apartment Ass'n of L.A. County, Inc. v. City of L.A.*, 14 P.3d 930 (Cal. 2001).

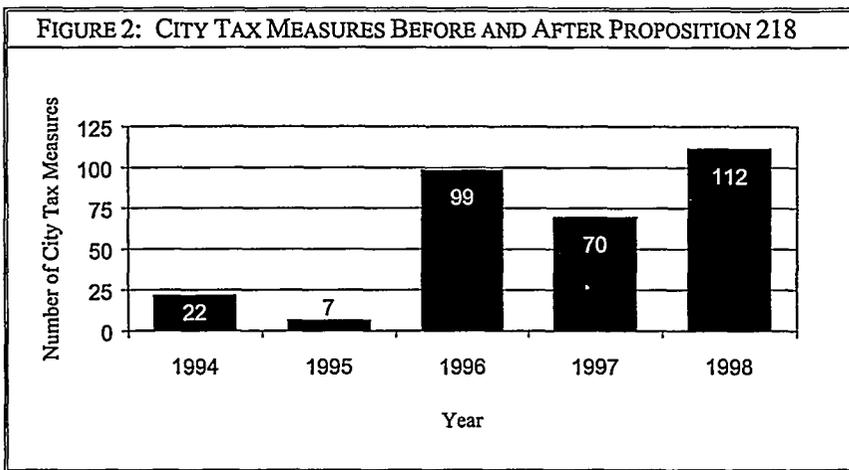
⁶⁰ As noted earlier, this change was necessary in order for the voter approval requirement to apply to charter cities such as Los Angeles and San Francisco.

⁶¹ CAL. CONST. arts. XIII A-D.

⁶² INST. FOR SOC. RESEARCH, CAL. STATE UNIV., SACRAMENTO, CALIFORNIA COUNTY, CITY AND SCHOOL DISTRICT ELECTION OUTCOMES: ELECTIONS, CITY OFFICES AND BALLOT MEASURES (1994-1998 editions) (on file with author) [hereinafter CALIFORNIA BALLOT MEASURES].

⁶³ A November 2000 initiative would have increased the number of local tax measures by treating many local fees as taxes requiring voter approval. See Steven A. Capps, *Tax Measure Gets Ballot Spot:*

betically, these local tax measures are now a regular feature on local ballots, appearing as “Measure A” or “Measure B” and so on. Not uncommonly, voters are asked about several proposed local taxes at a single election. In November 1997, for example, voters in the city of Azusa, just outside of Los Angeles, considered Measures F, G, H, I, and J, concerning five separate local tax questions.⁶⁴ Data on the success rate of city tax measures reveal somewhat mixed results. For example, of the 112 tax measures appearing on municipal ballots in 1998, 52% failed and 48% passed, indicating that more often than not voters have rejected proposed tax increases.⁶⁵



C. The Rise of Tax Voting in Other States

California is not alone in its new emphasis on direct voter involvement in local tax decision-making. The right to vote on taxes has emerged as an important issue of constitutional reform in several other states as well. These initiatives have come in two stages. Immediately following California’s adoption of Prop 13, several other states adopted tax limitation initiatives, some of which incorporated voter approval requirements for local taxes similar to Prop 13’s section 4. In November 1978, for example, Michigan voters approved the “Headlee Amendment,” a measure that is often cited as part of the Prop 13 wave of tax-cutting initiatives.⁶⁶ Like Prop

Initiative Would Reclassify Some Fees, SACRAMENTO BEE, June 21, 2000, at A1; see also Two-Thirds Vote Preservation Act of 2000, at http://vote2000.ss.ca.gov/VoterGuide/text/text_proposed_law_37.htm (text of initiative filed with the California Secretary of State). The initiative failed. Russell Clemings, *Election 2000 After the Counting*, SACRAMENTO BEE, Nov. 9, 2000, at AA1.

⁶⁴ See CALIFORNIA BALLOT MEASURES (1997), *supra* note 62, at 12.

⁶⁵ See CALIFORNIA BALLOT MEASURES (1998), *supra* note 62, at 21-39.

⁶⁶ See, e.g., *Durant v. State Bd. of Educ.*, 381 N.W.2d 662 (Mich. 1985) (describing origins and purpose of Michigan’s Headlee Amendment).

13, Headlee amended the state constitution to limit local property taxes and to prohibit local governments from “levying any tax . . . or from increasing the rate of an existing tax . . . without the approval of a majority of the qualified electors of that unit of Local Government voting thereon.”⁶⁷ Two years later, in November 1980, Missouri voters adopted the Hancock Amendment, which likewise required voter approval for any new or increased local taxes.⁶⁸ The Hancock Amendment has been the subject of continuing controversy since its adoption more than two decades ago; as in California, anti-tax activists in Missouri have pursued additional initiatives in an effort to close perceived loopholes in the original measure.⁶⁹

A new wave of tax voting initiatives has taken hold in several Western states within the past decade. In 1992, Colorado voters approved Amendment 1, also known as the Taxpayer Bill of Rights or TABOR.⁷⁰ Championed by Douglas Bruce, the “Howard Jarvis of the Rockies,” Colorado’s TABOR Amendment requires voter approval for “any new tax, tax rate increase . . . or a tax policy change directly causing a net tax revenue gain to any district.”⁷¹ In the eight years since TABOR’s passage, voters in Colorado’s municipalities have been asked to cast their ballots on hundreds of local tax measures.⁷² Voters in Montana adopted a similar provision via initiative in November 1998. Amendment CI-75 would have required voter approval for all new and increased taxes imposed by local governments.⁷³ In 1999, however, the Montana Supreme Court declared the initiative

⁶⁷ MICH. CONST. art. IX, § 31; See Cynthia B. Falhaber, “No New Taxes:” Article 9, Section 31 of the Michigan Constitution Twenty Years After Adoption, 46 WAYNE L. REV. 211 (2000).

⁶⁸ See MO. CONST. art. 10, § 22 (1999); see also Batty v. Metro. St. Louis Sewer Dist., 867 S.W.2d 217 (Mo. 1993) (describing history of Hancock Amendment); Joanne L. Graham, *Toward a Workable Definition of “Tax, License or Fees”: Local Governments in Missouri and the Hancock Amendment*, 62 UMKC L. REV. 821 (1994) (discussing scope of Hancock Amendment’s voter approval requirement).

⁶⁹ Hancock II, an initiative proposed in 1994, failed at the polls following an all-out campaign against it by state lawmakers. See Will Sentel, *Hancock II Shot Down; Vote Goes 2-1 Against It*, KAN. CITY STAR, Nov. 9, 1994, at A1.

⁷⁰ For a general discussion, see Tom Brown, *Constitutional Tax and Expenditure Limitation in Colorado: The Impact on Municipal Governments*, PUB. BUDGETING & FIN., Fall 2000, at 29.

⁷¹ COLO. CONST. art. X, § 20(4)(a). TABOR is a comprehensive tax/revenue limitation regime that applies to both state and local governments. The right to vote on taxes is only one component of the overall regime that it created. For a detailed discussion, see COLO. MUN. LEAGUE, *TABOR: A GUIDE TO THE TAXPAYER’S BILL OF RIGHTS* (1999). TABOR requires voter approval for six categories of revenue increases, including any “tax policy change directly causing a net tax revenue gain to any district.” See *id.* at 70-71 (quoting TABOR § 4(a)); see also John Sanko, ‘92 Election Was Fiscal Face Lift: Voters’ Approval of TABOR Changed Government, THE ROCKY MOUNTAIN NEWS, Aug. 3, 1999, at 14A.

⁷² See COLO. MUN. LEAGUE, 14TH ANNUAL REPORT, *FINANCIAL CONDITION OF COLORADO MUNICIPALITIES 118-24* (2000) (listing local ballot measures from 1993-1999).

⁷³ Amendment CI-75, which would have added a new Section 17 to the Montana State Constitution, provided that “[n]o new tax or tax increase may be enacted unless first approved by a majority of the electors voting on the measure in the geographic area subject to the tax.” *Marshall v. Montana ex rel. Cooney*, 975 P.2d 325, 327 (Mont. 1999) (quoting relevant language from amendment).

amendment to be unconstitutional because it violated the rule requiring a separate vote on each constitutional amendment.⁷⁴

Most recently, in November 1999, voters in the State of Washington adopted a tax voting proposal titled Initiative-695 ("I-695"). I-695, dubbed "Prop. 13 of the North" by the *Wall Street Journal*,⁷⁵ drew most of its ballot box appeal from its reduction of the state's unpopular car tax, but it also contained a provision requiring voter approval for any state or local government tax or fee increase.⁷⁶ Like Montana's CI-75, I-695 was declared unconstitutional by the state's supreme court on the grounds that it violated the single-subject rule.⁷⁷ Tax voting advocates are in the process of preparing a new initiative which, according to the most recent accounts, could appear on the ballot as early as November 2001.⁷⁸ Finally, Oregon, Arizona, and Florida have recently flirted with the possibility of adopting a California-style right to vote on taxes.⁷⁹

As these developments suggest, the right to vote on taxes has begun to emerge as a prominent issue of constitutional reform in several states.⁸⁰ The likelihood that this trend will continue is increased by other developments of a more general nature. First, recent polls have indicated that Americans want a more direct role in addressing matters of public concern.⁸¹ For a variety of reasons, it seems likely that taxation will be high on

⁷⁴ See *id.*; Beth Britton, *CI-75 Overturned by Supreme Court*, MONT. KAIMIN, Feb. 25, 1999, at 1.

⁷⁵ Editorial, *Prop. 13 of the North*, WALL ST. J., Oct. 12, 1999, at A22.

⁷⁶ Gregg Herrington, *I-695: The Lesser-Known Other Half*, COLUMBIAN (Vancouver, Wash.), Oct. 20, 1999, at A1; David Postman, *Beyond Car Tabs: I-695's Impact—How Measure Could Transform Our Lives*, SEATTLE TIMES, Aug. 16, 1999, at A1.

⁷⁷ *Amalgamated Transit Union Local 587 v. State*, 11 P.3d 762 (Wash. 2000).

⁷⁸ Michael Heywood, *Tim Eyman Knows Best—Just Ask Him*, COLUMBIAN (Vancouver, Wash.), Jan. 5, 2001, at C9. Eyman recently filed a new "Right to Vote on Taxes" initiative with the Washington Secretary of State. See Washington Secretary of State, Initiatives & Referendums, Initiative 747, at http://www.secstate.wa.gov/inits/people_2001.asp.

⁷⁹ See James Mayer, *Initiative Would Require Voter Approval of Tax, Fee Hikes*, 18 ST. TAX NOTES 808 (2000); see also David Brunori, *The Politics of State Taxation: Record Number of Tax Initiatives Likely on November Ballots*, 18 ST. TAX NOTES 2093 (2000). Arizona was also scheduled to have a right to vote on taxes initiative on the November 2000 ballot, but the Arizona Supreme Court refused to let it appear on the ballot. See Kathleen Ingle et al, *Justices Bar Tax Initiative*, ARIZ. REPUBLIC, Sept. 1, 2000, at A1; see also *Biddulph v. Mortham*, 89 F.3d 1491 (11th Cir. 1996) (describing efforts of anti-tax activist Dave Biddulph to put initiative on Florida ballot requiring voter approval for all new taxes).

⁸⁰ See Dean Stansel, *Missouri's Hancock II Amendment: The Case for Real Reform*, in BRIEFING PAPERS No. 20, at 1, 8 (Cato Inst. 1994) (noting that voter approval requirements are "increasingly popular; they have recently been adopted by several other states and will be on the ballot in many more this year and in the years to come").

⁸¹ See Kevin Merida, *Americans Want a Direct Say in Political Decision-Making, Pollsters Find*, WASH. POST, Apr. 24, 1994, at A19; see also Edward L. Lascher Jr., Michael G. Hagen & Steven A. Rochlin, *Gun Behind the Door? Ballot Initiatives, State Policies and Public Opinion*, 58 J. POL. 760, 760 (1996) ("Opinion polls show widespread support for the principles of direct democracy . . .") (citing studies by Cronin, Jost, and Magleby).

the list of topics over which voters will demand more control.⁸² Second, a devolution of governmental responsibilities to lower levels of government may portend increasing fiscal burdens at the local level.⁸³ If an increase in local tax burdens accompanies the downward shift of responsibilities, the perceived need for direct voter control over local budgeting could become even more acute. Finally, the recent success of tax voting initiatives in several states is itself likely to accelerate the trend toward greater direct fiscal democracy. The politics of taxation in any one state, today more than ever, seem to influence the fiscal choices made by other states. Initiative activists—especially those who focus on tax issues, such as Colorado’s Douglas Bruce and Oregon’s Bill Sizemore—seem to learn from each other’s successes, suggesting that initiatives may appear in other states as well.⁸⁴

II. PHILOSOPHICAL ORIGINS OF THE RIGHT TO VOTE ON TAXES

The right to vote on taxes may be viewed as a “second generation” tax limitation initiative. The first generation of initiatives took aim at the property tax, incorporating specific limits on both the rate and base of the property tax. As local governments have maneuvered around these limits, anti-tax activists have responded with blanket voter approval requirements for all local tax increases. The fact that voters have endorsed these initiatives may be interpreted in a variety of ways. One view is to say that popular enthusiasm for tax voting reflects a “smaller government at all costs” sentiment and that the right to vote on taxes is no different than any other obstacle that might be placed in the path of higher taxes. Under this view, the idea of requiring voter approval for tax increases is normatively indistinguishable from a rule, say, requiring taxes to be paid in Guatemalan Quetzales, which might be valued on the theory that the hassle of currency conversion will make taxation more cumbersome and annoying.

An alternative interpretation, more compelling in my view, is that the idea of voting on taxes is rooted in certain normative intuitions that American voters have about direct democracy, distributive justice, and the proper scope of the government’s taxing power.⁸⁵ In this Part, I explore these

⁸² See David Brunori, *The Politics of State Taxation: Initiatives, Referendums Are Here to Stay*, 16 ST. TAX NOTES 1635, 1636 (1999) (“Taxes have been one of the dominant policy areas in the initiatives-and-referendums field.”).

⁸³ See James Alm & Rebecca Neumann, *The Vanishing Taxpayer? Globalization and the Future of State/Local Government Finance*, in PROCEEDINGS OF NATIONAL TAX ASSOCIATION, 92ND ANNUAL CONFERENCE ON TAXATION 114 (2000); Keith Watson & Steven D. Gold, *The Other Side of Devolution: Shifting Relationships Between State and Local Governments*, at The Urban Institute, <http://newfederalism.urban.org/html/other.htm> (last visited October 15, 2001).

⁸⁴ This process is aided by national organizations such as Americans for Tax Reform and the National Taxpayers Union, which serve as a clearinghouse for information on these measures and assist local anti-tax activists in coordinating their activities. Through newsletters and national conferences, they facilitate a cross-jurisdictional learning process.

⁸⁵ I am not suggesting that these normative intuitions are unassailable or somehow especially de-

normative intuitions by offering a more complete account of the basic philosophical presuppositions underlying the right to vote on taxes. Put differently, what normative theory animates recent efforts to give local voters a right to vote on tax increases proposed by their political representatives? I begin with a brief description of the principal arguments that have been offered on behalf of direct democracy more generally.

A. Direct Democracy and the "Consent of the Governed"

One starting point in unpacking the normative case for a right to vote on taxes is to consider traditional arguments that have been offered in favor of plebiscitary democracy.⁸⁶ Among those, the most common normative claim is that direct democracy confers additional legitimacy to the lawmaking process because it ensures that legislation will more accurately reflect the will of the people. As referendum theorists David Butler and Austin Ranney explain, the "main argument for referendums consists of two basic propositions: (1) all political decisions should be as legitimate as possible, and (2) the highest degree of legitimacy is achieved by decisions made by the direct, unmediated vote of the people."⁸⁷ Under Butler and Ranney's formulation, "popular decisions made by referendums have a legitimacy that indirect decisions by elected representatives cannot match."⁸⁸

Why is referendum voting thought to enhance the legitimacy of political outcomes? The normal line of reasoning focuses on the alleged defects of representative government. Granting decision-making authority to political agents is an indirect, filtered method of aggregating the individual preferences of community members.⁸⁹ It opens up the possibility that representatives will base their decisions on factors other than the preferences of their constituencies.⁹⁰ If the desired objective of democracy is to ensure

serving of deference just because they are widely held. I do believe, however, that policy makers should be attentive to these normative intuitions, if only because ignoring them is likely to be counterproductive, especially in those jurisdictions where voters have the initiative power and can therefore restructure decision-making institutions to their liking through direct constitutional amendment.

⁸⁶ For a general summary of the arguments for and against direct democracy, see CRONIN, *supra* note 17, at 224-32.

⁸⁷ David Butler & Austin Ranney, *Theory, in REFERENDUMS: A COMPARATIVE STUDY OF PRACTICE AND THEORY* 23, 24 (David Butler & Austin Ranney eds., 1978).

⁸⁸ David Butler & Austin Ranney, *Theory, in REFERENDUMS AROUND THE WORLD* 11, 15 (David Butler & Austin Ranney eds., 1994).

⁸⁹ Of course, many of those "filters" are in place by design. See Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *Yale L.J.* 1503, 1522-30 (1990) (discussing various constitutional "filters" on majority will).

⁹⁰ One example is the familiar complaint that political representatives are subject to capture by special interest groups. But any variety of other factors might lead representatives to ignore their constituency's preferences. For example, politicians commonly have ambitions for other elected positions beyond the one they currently hold. In such instances, the representative may legislate in such a manner as to appeal to the preferences of his future constituency, rather than those who elected him. This is not an issue with respect to direct democracy.

that public policies reflect the preferences of the people, why not ask the people themselves what they want?⁹¹ Permitting a direct line between majority preference and public policy outcomes minimizes the influence of special interest groups and unresponsive political representatives.⁹² As this formulation suggests, the referendum serves a *consent* function. Arguments in favor of the referendum implicitly assume that the normative legitimacy of governmental policies derives from the consent of the majority, and the best way to secure that consent is to hold a popular vote.

These are not uncontroversial propositions. As a threshold matter, it is not obvious that the will of the majority should be the sole objective of democratic governance.⁹³ Many structural features of American government (for example, separation of powers and judicial review) have the effect of limiting the influence of raw majorities and were designed, at least in part, for that very purpose.⁹⁴ Majorities misbehave, and there is reason to institutionalize procedures to limit such mischief. Thus, the fact direct democracy might produce outcomes more reflective of the popular will is not necessarily a mark in its favor. Moreover, even if one believes that democratic legitimacy requires each government decision to reflect the popular will, it is not clear that holding a referendum is the most effective means of divining the popular will.⁹⁵ Through logrolling and other forms of compromise, representative institutions may capture the intensity of individuals' preferences more effectively than the up-or-down votes of direct democracy.⁹⁶ Finally, one may properly question whether direct democracy offers the same degree of deliberation as representative processes.⁹⁷ In an ideal legislative set-

⁹¹ See Brian Beedham, *Full Democracy*, *ECONOMIST*, Dec. 21, 1996, at 3 ("If democracy means rule by the people, democracy by referendum is a great deal closer to the original idea than the every-few-years voting which is all that most countries have."); see also Clark, *supra* note 8, at 434 (criticizing the argument that initiatives and referenda strengthen the voice of the people).

⁹² See CRONIN, *supra* note 17, at 46-48. Some have argued that direct democracy may be more susceptible to special interest capture than representative government. See ELISABETH R. GERBER, *THE POPULIST PARADOX: INTEREST GROUP INFLUENCE AND THE PROMISE OF DIRECT LEGISLATION* (2000); see also Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. REV.* 505 (1982) (presenting data that one-sided campaign spending to defeat propositions is generally effective and advocating reforms to counter its effects).

⁹³ See Frank I. Michelman, "Protecting the People from Themselves," or How Direct Can Democracy Be?, 45 *UCLA L. REV.* 1717 (1998) (discussing difficulties of equating democracy with majority rule).

⁹⁴ As Julian Eule once put it, "[t]he gap between the will of the majority and the voice of the legislature, it turns out, is there by constitutional design." Eule, *supra* note 89, at 1514.

⁹⁵ *Id.* For a useful discussion of the philosophical issues relating to legitimacy and consent, see Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127, 142 (1987).

⁹⁶ See Butler & Ranney, *supra* note 87, at 17; Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 *WASH. L. REV.* 1, 25 (1978) (discussing how this political dynamic harms minority interests); Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 182 (1978).

⁹⁷ Eule, *supra* note 89, at 1520.

ting, political representatives will (hopefully) engage in face-to-face dialogue and confront one another's reasons for pursuing particular policies. Given the sheer number of people involved, it may be difficult for direct democracy to replicate these deliberative qualities.

Some of these criticisms may be overstated, or at least misdirected. It is important to bear in mind the precise function that the referendum serves in the legislative process. Unlike the initiative, the referendum merely empowers the majority to block legislation that does not meet with its approval.⁹⁸ In Julian Eule's terms, the referendum is a form of *complementary* direct democracy, whereas the initiative is of the *substitutive* variety.⁹⁹ In effect, the referendum offers an additional democratic filter over and above that offered by representative processes.¹⁰⁰ It does not by itself empower majorities to commit excesses against everyone else. Rather, it serves a defensive function, and to that extent the risks of majoritarian excess are to some degree mitigated.¹⁰¹

The argument that referendums fail to register the intensity of preferences may also be overstated. While the vote itself may not take account of the intensity of voters' preferences, the legislative process that precedes it is not subject to the same criticism.¹⁰² There is no obvious reason why the logrolling and compromise that one normally associates with legislative decision-making would cease simply because the question must be referred to the voters for their approval.¹⁰³ In fact, it seems likely that these methods of gauging preference intensity will continue to play a role in determining which issues make it to the voting stage, as well as in formulating the questions that do ultimately find their way on to the ballot.¹⁰⁴ Finally, the refer-

⁹⁸ *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 673 (1976) (defining the referendum as "a means for direct political participation, allowing the people the final decision, amounting to a veto power, over enactments of representative bodies"); see also Eule, *supra* note 89, at 1508-13 (discussing differences between initiatives and referendums).

⁹⁹ *Id.* at 1510.

¹⁰⁰ See Eule, *supra* note 89, at 1574 ("When voters ratify the legislative choice . . . [t]he statutory product reflects extraordinary consensus. A filtered legislative result has received popular endorsement. Supporters of participatory democracy and representative government can join hands to celebrate the result.").

¹⁰¹ Of course, one might also view the majority's ability to *block* legislation via referendum as a form of majoritarian tyranny.

¹⁰² Clayton Gillette suggests that ballot voting does gauge intensity because those who care deeply about an issue will be sure to vote on it, while others may simply stay home or "drop-off" without voting on the specific question. See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 967-71 (1988).

¹⁰³ State constitutions sometimes constrain the use of the *initiative* via a single-subject rule, see, e.g., CAL. CONST. art. II, § 8(d), though some have questioned the effectiveness of such provisions, see Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 957-63 (1983).

¹⁰⁴ See Clark, *supra* note 8, at 472 ("When a measure has been referred to a popular vote by the legislature, at least the referral itself has been subject to the priority-measuring representative process."). But see *id.* at 480 (arguing that the possibility of majority veto via plebiscite might inhibit legislative

endum might actually augment public deliberation. Legislative assemblies are not the only fora at which public debate occurs. Requiring a popular vote on matters of public policy could actually heighten public interest in the question presented, triggering valuable public debates in classrooms, in workplaces, or around the dinner table.¹⁰⁵ These popular debates might then feed back into the legislative process, informing and perhaps invigorating the deliberations of political representatives.

As this brief discussion suggests, the referendum's contribution to democratic governance presents several complex questions, many of which turn on empirical assumptions regarding voter behavior. It is not my intention to resolve these difficult issues in this Article. Rather, my point is simply to suggest that these traditional arguments in favor of popular lawmaking may account for some of tax voting's normative appeal. The urge for popular self-governance runs deep in the American political psyche, a fact that has not been lost on advocates of the right to vote on taxes. Moreover, this popular support for direct democracy is not without basis. Plausible arguments support the view that the referendum device promotes legislative outcomes that are more in line with the popular will than what representative democracy can deliver. Thus, at its core, direct democracy's legitimacy claim rests on a claim that it goes to greater lengths to ensure that legislative outcomes reflect the consent of the governed.

At the same time, however, the right to vote on taxes speaks to normative intuitions that go beyond a simple affection for direct democracy. After all, tax voting initiatives do not guarantee satisfaction of majoritarian preferences in all circumstances. Rather, they apply only insofar as government officials wish to raise taxes. In each of the states discussed above, political representatives are free to reduce taxes (and thereby withdraw funding for local public services) without voter approval. This suggests that the idea of voting on taxes arises out of more than just a generic preference for popular lawmaking. A more complete account of tax voting's normative appeal requires further explanation for why plebiscitary procedures seem especially attractive when it comes to increasing taxes. That explanation is rooted in a libertarian conception of government and the proper scope of its taxing power.

B. Libertarianism and the Principle of "Taxpayer Consent"

The term "libertarianism" means different things to different people, but it typically evokes the idea of a strong philosophical and political commitment to private property, laissez-faire economics, and freedom from government interference.¹⁰⁶ Because of its emphasis on individual liberty,

deals via logrolling).

¹⁰⁵ See Gillette, *supra* note 102, at 630.

¹⁰⁶ See WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY* 95-159 (1990) (providing an overview of libertarian philosophy).

the principle of consent figures prominently in libertarian philosophy.¹⁰⁷ The libertarian defends private market freedoms (to expand the domain of activities subject to individual consent) and believes in minimizing the role of government in society (to limit the domain of activities characterized by a lack of consent). According to the familiar libertarian maxim, individuals should be free to do what they choose, provided that their behavior does not harm or otherwise interfere with the freedom of others.¹⁰⁸

Given these philosophical presuppositions, it is not surprising that the libertarian perspective has figured prominently in debates concerning taxation.¹⁰⁹ As Richard Epstein explains:

Taxation is the power to coerce other individuals to surrender their property *without* their consent. In a world—a Lockean world—in which liberty is regarded as a good and coercion an evil, then taxation authorizes the sovereign to commit acts of aggression against the very citizens it is supposed to protect.¹¹⁰

Like Epstein, most libertarians view the government's power to tax with suspicion.¹¹¹ Indeed, many believe that taxation is a form of theft.¹¹² Consider Robert Nozick's discussion of libertarianism's implications for the taxing power.¹¹³ Working from a Lockean conception of natural rights, Nozick contends that "a line (or hyper-plane) circumscribes an area in moral space around an individual. . . . [T]his line is determined by an individual's natural rights, which limit the action of others."¹¹⁴ Among these rights is the right to private property, including the right to the fruits of one's own labor or property with which one has mixed one's labor.¹¹⁵ Ac-

¹⁰⁷ JAN NARVESON, *THE LIBERTARIAN IDEA* 165 (1988) ("[O]ur sole basic duty is to refrain from utilizing the fundamental resources of others without their consent.")

¹⁰⁸ *See id.* (describing the "basic idea" of libertarianism as a person's right to use her fundamental personal resources however she sees fit, provided that she does not violate the similar right of any other person); *see also* DAVID BOAZ, *LIBERTARIANISM: A PRIMER* (1997) ("Libertarianism is the view that each person has the right to live his life in any way he chooses so long as he respects the equal rights of others.")

¹⁰⁹ *See, e.g.*, Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 *CHAP. L. REV.* 157, 159-81 (1999) (describing libertarian arguments in favor of proportionate income tax).

¹¹⁰ Richard A. Epstein, *Taxation in a Lockean World*, 4 *SOC. PHIL. & POL'Y*, 49, 49 (1986).

¹¹¹ *See* STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 420 (1990) ("[M]any libertarians argue that taxation is morally and politically legitimate only to support minimal functions of the state such as police protection and national defense.")

¹¹² *See* J.R. Kears, *Do Entitlements Imply That Taxation Is Theft?*, 7 *PHIL. & PUB. AFF.* 74 (1977) (challenging the idea of taxation as theft).

¹¹³ NOZICK, *supra* note 19; *see* JONATHAN WOLFF & ROBERT NOZICK, *PROPERTY, JUSTICE AND THE MINIMAL STATE* 88-92 (1991) (describing Nozick's objections to redistributive taxation).

¹¹⁴ NOZICK, *supra* note 19, at 57.

¹¹⁵ Nozick's interpretation of Locke's theory of private property is not shared by all philosophers. *See, e.g.*, Seana Shiffrin, *Lockean Arguments for Private Intellectual Property*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 138, 143-54 (Stephen Munzer ed., 2001) (emphasizing Locke's theory of common ownership and arguing that Locke endorsed a narrower conception of private

cordingly, “the state may not use its coercive apparatus for the purpose of getting some citizens to aid others.”¹¹⁶

In what is perhaps the most famous line from his book *Anarchy, State and Utopia*, Nozick asserts that “[t]axation of earnings from labor is on a par with forced labor.”¹¹⁷ As he later explains,

Seizing the results of someone’s labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you.¹¹⁸

While Nozick’s equation of taxation and slavery is no doubt jarring, its prominent position in mainstream American political dialogue seems firmly established.¹¹⁹ It doesn’t take a C-SPAN junkie to note how frequently American politicians pledge allegiance to the idea of protecting the taxpayer’s private property, often in terms strikingly similar to the libertarian analysis of Nozick, Epstein, and others. For example, in what has become something of an annual event, members of Congress stand on the floor of the U.S. Senate and House of Representatives every spring and proclaim Tax Freedom Day—the day on which, if the government took one hundred percent of your paycheck starting on January 1, you’d finally stop paying taxes and keep your earnings to yourself.¹²⁰ Other examples abound.

The right to vote on taxes taps into this popular sympathy for the libertarian perspective. It appeals to the libertarian emphasis on consent by promising to give taxpayers themselves the final say on whether or not new taxes will be imposed.¹²¹ This comes across clearly in the campaign rhetoric and official ballot arguments presented on behalf of the right to vote on taxes. In each of the states discussed above, tax voting was marketed as a

property than many commentators believe).

¹¹⁶ NOZICK, *supra* note 19, at ix.

¹¹⁷ *Id.* at 169.

¹¹⁸ *Id.* at 172.

¹¹⁹ This sentiment pervades American culture. For an interesting analysis of anti-tax themes in Laura Ingalls Wilder’s *Little House on the Prairie* books, see Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653, 673-79 (1998).

¹²⁰ The Washington, D.C. based Tax Foundation calculates the date each year. The concept of a “tax freedom day” apparently has its origins in a reference made to a “Personal Independence Day” in a book by Milton and Rose Friedman. See MILTON & ROSE FRIEDMAN, *FREE TO CHOOSE* (1980) (suggesting a new national holiday marking the day “when we stop working to pay the expenses of government . . . and start working to pay for the items we severally and individually choose in the light of our own needs and desires”), *cited in* WOLFF, *supra* note 113, at 91.

¹²¹ Various commentators have noted the American voter’s sympathy for the libertarian perspective. See, e.g., Kenneth Arrow, *Some Ordinalist-Utilitarian Notes on Rawls’s Theory of Justice*, 70 J. PHIL. 245, 248 (1973) (explaining difficulty in convincing students that the proposition “that an individual is entitled to what he creates is not self-evident”); Fried, *supra* note 109, at 226 (noting that Nozick’s work “taps into intuitions about distributive justice that are widely shared in this society”).

means of protecting taxpayers from the government's fiscal intrusions.¹²² Thus, in California, advocates of the Right to Vote on Taxes Act explained that “taxpayers have no right to vote on these tax increases and others like them unless Proposition 218 passes!”¹²³ and that “Proposition 218 simply gives taxpayers the right to vote on taxes.”¹²⁴ Its advocates claim a need to limit “the methods by which local governments exact revenue from taxpayers without their consent.”¹²⁵ Similar references to the idea of taxpayer protection and taxpayer consent have appeared on behalf of tax voting initiatives in the other states discussed above.¹²⁶

Putting the idea of taxpayer consent on the table as a principle of fiscal decision-making raises a host of practical and legal difficulties. To begin, there is the obvious but important point that requiring voter approval for tax increases will not provide the sort of airtight taxpayer consent that the libertarian perspective seems to demand. A society wanting such absolute assurance would need to require the unanimous approval of all citizens before any new or increased tax may take effect.¹²⁷ Knut Wicksell made this point over a century ago when he wrote that “unanimity and fully voluntary consent in the making of decisions provide the only certain and palpable guarantee against injustice in tax distribution.”¹²⁸ As Wicksell saw it, “[t]he whole discussion on tax justice remains suspended in mid-air so long as

¹²² In Colorado, for example, voter approval for local tax increases was packaged explicitly as part of a *Taxpayer Bill of Rights*. See *supra* text accompanying notes 70–72. Washington's upcoming “Right to Vote on Taxes” Initiative similarly emphasizes the need to “obtain prior permission from taxpayers” before adopting tax increases. Initiative 252—The Right to Vote on Taxes, section 5, at <http://www.mrsc.org/focus/righttovote.htm> (last visited Nov. 1, 2001).

¹²³ *Argument in Favor of Proposition 218*, in STATE OF CALIFORNIA, OFFICIAL BALLOT PAMPHLET (Nov. 5, 1996), available at <http://vote96.ss.ca.gov/Vote96/html/BP/218yesarg.htm>.

¹²⁴ *Rebuttal to Argument Against Proposition 218*, in STATE OF CALIFORNIA, OFFICIAL BALLOT PAMPHLET (Nov. 5, 1996), available at <http://vote96.ss.ca.gov/Vote96/html/BP/218norbt.htm> (emphasis added); see also *Proposition 218: Text of Proposed Law § 2*, in OFFICIAL BALLOT PAMPHLET, *supra*, available at <http://vote96.ss.ca.gov/Vote96/html/BP/218text.htm> (noting that the measure “protects taxpayers by limiting the methods by which local governments exact revenue from taxpayers without their consent”); *id.* § 5 (courts should construe Prop 218 to effectuate its purposes of “enhancing taxpayer consent”).

¹²⁵ See Howard Jarvis Taxpayers Ass'n, Statement of Drafters' Intent, Right to Vote on Taxes Act (Jan. 1997), available at http://www.hjta.org/content/ARC000025A_Prop218.htm (emphasis added).

¹²⁶ This includes Oregon (the “Taxpayer Protection Initiative”) and Arizona (the “Taxpayer Protection Act”). See David Brunori, *Record Number of Tax Initiatives Likely on November Ballots*, 18 ST. TAX NOTES 2093 (2000).

¹²⁷ A unanimity rule ensures that all collective actions will represent Pareto improvements. Because every member of society has the power to veto any proposed legislation, no policy will be adopted unless it improves the position of at least one person and fails to harm all others. See WICKSELL, *supra* note 19, at 72–118; see also Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1531 (1982) [hereinafter Ellickson, *Cities and Homeowners*] (crediting Wicksell for the insight that “only a unanimity rule assures that a collective choice will result in a Pareto-superior outcome”); DENNIS MUELLER, PUBLIC CHOICE II, at 43–49 (1989) (describing Wicksell's “new principle” of taxation).

¹²⁸ WICKSELL, *supra* note 19, at 90.

these conditions are not satisfied at least approximately.”¹²⁹ Despite Wicksell’s advocacy, the unanimity rule is almost never observed in practice and seems unlikely to gain acceptance as a satisfactory mode of governance anytime soon. In a world of transaction costs and free-rider problems, a unanimity requirement would likely stymie the adoption of any collective policies, including wealth-maximizing legislation that might further libertarian objectives. As a result, most commentators (including Wicksell himself) have rejected unanimity as unrealistic, undesirable, or both.¹³⁰

Any decision rule short of unanimity is second-best from the libertarian perspective, opening up the possibility that winning coalitions will exploit losing minorities.¹³¹ To limit the scope of such majoritarian redistribution, a society may choose to restrict the franchise to those who actually pay taxes.¹³² For example, a community deciding whether or not to impose a property tax might allow only those who are statutorily liable for the tax to cast a ballot in the property tax referendum.¹³³ The community might also allocate a greater percentage of the voting power to those persons who will bear a disproportionate share of the tax burden. Historically, many American states and localities followed such a system.¹³⁴ In addition, this is essentially the approach used today in the context of special assessment and business improvement districts, two increasingly common methods of financing local infrastructure projects.¹³⁵

¹²⁹ *Id.*

¹³⁰ In Buchanan and Tullock’s framework, a unanimity rule might minimize external costs but it would also likely have unacceptably high decision-making costs. See JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 43-46 (1962); see also BRENNAN & BUCHANAN, *supra* note 1, at 6-8 (citing costs of unanimity and low likelihood that any rational person would endorse it).

¹³¹ See MUELLER, *supra* note 127, at 58-63 (discussing majority rule and redistribution).

¹³² James M. Buchanan, *The Political Economy of Franchise in the Welfare State*, in CAPITALISM AND FREEDOM: PROBLEMS AND PROSPECTS 61 (Richard T. Selden ed., 1975) (discussing model of fiscal decision-making in which voting franchise is limited to “those who are actual or potential contributors or donors in the income transfer system”).

¹³³ A related approach would be to restrict the franchise to property owners. Ellickson argues for such an approach in the context of his proposed “block improvement districts” on the theory that the benefits and costs of BLID activities are likely to be capitalized into property values. See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); see also Ellickson, *Cities and Homeowners*, *supra* note 127, at 1558-63 (arguing for a liberalization of constitutional rules restricting ability of local governments to limit franchise to property owners). For an alternative perspective, see Frank Michelman, *Universal Resident Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982).

¹³⁴ Sean Wilentz, *Property and Power: Suffrage Reform in the United States, 1787-1860*, in VOTING AND THE SPIRIT OF AMERICAN DEMOCRACY: ESSAYS ON THE HISTORY OF VOTING AND VOTING RIGHTS IN AMERICA 31, 32 (Donald W. Rogers ed., 1990); see also Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (discussing suffrage limitations imposed on the poor or people who did not own property).

¹³⁵ See, e.g., *S. Cal. Rapid Transit Dist. v. Bolen*, 822 P.2d 875 (Cal. 1992) (describing voting procedures relating to assessment district financing). In the provisions relating to assessments, California’s Prop 218 limits the franchise to property owners and weights those votes according to each contributor’s share of the total assessment. See CAL. CONST. art. XIID. These provisions have been the subject of some controversy. See Ken Ellingwood & Richard Winton, *Local Fee Races Discard Idea of*

Restricting the franchise to taxpayers may be defended under a variety of theories. For example, James Buchanan has argued that by restricting the franchise to taxpayers, communities are more likely to engage in a Pareto-optimal level of income redistribution.¹³⁶ Under Buchanan's reasoning, income redistribution may be viewed as a public good insofar as the utility functions of donors and beneficiaries exhibit interdependence.¹³⁷ Thus, it may be appropriate to collectivize the redistributive function in order to avoid the free-rider problems normally associated with public goods.¹³⁸ In allocating free voting power for the purpose of deciding on such redistribution, however, it is necessary to exclude potential beneficiaries. "Those persons to whom income transfers are to be made," Buchanan explains, "cannot be allowed to participate in the collective decision concerning the extent of this transfer itself since their own private interest will, of course, be unidirectional."¹³⁹ Where net beneficiaries are excluded, Buchanan contends, political outcomes are more likely to resemble "genuinely voluntary transfers."¹⁴⁰

The libertarian perspective on tax voting seems to imply a similar conclusion: to the extent that the tax referendum is intended to serve as an expression of the *taxpayers'* willingness to support the proposed levy, extending the franchise to nontaxpayers seems only to frustrate that purpose. Put differently, the "taxpayer consent value" of a vote of the local electorate is diluted to the extent that nontaxpayers are permitted to participate in local referendums. Thus, to the extent that the aim of holding a tax referendum is to gauge taxpayer consent, it would appear that a taxpayer-restricted franchise would be a more effective means of achieving that goal than universal suffrage.

While perhaps consistent with libertarian principles, any effort to limit the franchise to taxpayers is likely to offend the constitutional principle of

I Person, I Vote, L.A. TIMES, June 16, 1997, at A1. For a description of business improvement districts (as well as Prop 218's assessment provisions), see Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365 (1999).

¹³⁶ See Buchanan, *supra* note 132, at 53. Buchanan's conclusions are generally limited to those situations where an effective rule of unanimity prevails in the "donor club." If a decision rule of less than unanimity applies, then the likelihood of Pareto superior outcomes is diminished. Still, given the exclusion of the income transfer recipients, Buchanan concludes that "it seems plausible to treat observed political outcomes as indirect surrogates for something akin to genuinely voluntary transfers." *Id.* at 61.

¹³⁷ *Id.*

¹³⁸ Public goods are those goods with respect to which consumption is nonrivalrous (that is, one person's consumption of the good does not deplete another person's consumption) and exclusion is impossible (that is, once the good is produced, it is impossible to exclude anyone from enjoying it). For a discussion, see RICHARD A. MUSGRAVE & PEGGY B. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 42-45 (5th ed. 1989).

¹³⁹ Buchanan, *supra* note 132, at 53.

¹⁴⁰ *Id.*

one-person, one-vote.¹⁴¹ According to a line of Supreme Court cases dating back to the early 1960s, state and local governments are constitutionally prohibited (in the absence of a compelling interest) from adopting voting schemes that impair the equal vote of any otherwise qualifying voter.¹⁴² Thus, a state may neither exclude nontaxpayers from the franchise nor vary the weight of any resident's vote according to the amount of her tax payment.¹⁴³ The general effect of the Supreme Court's activity in this area has been to solidify a principle of universal resident suffrage in state and local elections, including elections held for the purpose of voting on tax referendums. As a result, just as unanimity was ruled out on practical grounds, the idea of restricting the franchise to taxpayers is effectively off-limits for constitutional reasons.

These practical and legal realities suggest that it may be appropriate, as Buchanan suggests, to view the institutions of majoritarian democracy and one-person, one-vote as "quasipermanent constitutional parameters" and to shift the emphasis away from the allocation of voting power to the distribution of tax shares.¹⁴⁴ Focusing on the distribution of tax shares prompts a series of questions similar to those raised by a taxpayer-restricted franchise. Holding the decision-making structure constant, what is the tax structure that is most likely to serve the objective of taxpayer consent? Or put differently, how will the composition of the tax base influence the ability of the local tax referendum to serve as a yardstick of taxpayer consent? I address these questions in detail below.

III. THE LOCAL REFERENDUM AS A YARDSTICK OF TAXPAYER CONSENT

If taxpayer consent is the animating principle behind the right to vote

¹⁴¹ The precedential vitality of the one-person, one-vote principle was recently reaffirmed in the Court's controversial holding in *Bush v. Gore*. *Bush v. Gore*, 531 U.S. 98, 104-105 (2000) (noting that a state may not "value one person's vote over that of another").

¹⁴² *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Avery v. Midland County*, 390 U.S. 474 (1968); *Reynolds v. Sims*, 377 U.S. 533 (1964). *But see Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (finding that one-person, one-vote principle does not apply to special districts whose activities are likely to disproportionately affect the enfranchised class); *see also S. California Rapid Transit Dist. v. Bolen*, 822 P.2d 875 (Cal. 1992) (applying *Salyer Land* principle to property-based voting scheme in special assessment financing district). For a useful discussion of these cases and their effect on local governance, see Richard Briffault, *Who Rules at Home? One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339 (1993).

¹⁴³ These holdings are consistent with the view that voting should be valued for purposes other than just the aggregation of preferences. Kenneth Karst articulates such a view:

Voting is not just an instrument for achieving power or status and not just an expression of political preferences; it is an assertion of belonging to a political community. . . . Voting is the preeminent symbol of participation in the society as a respected member, and equality in the voting process is a crucial affirmation of the equal worth of citizens.

KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 93 (1989).

¹⁴⁴ James M. Buchanan, *The Political Efficiency of General Taxation*, 46 NAT'L TAX J. 401, 403 (1993).

on taxes, then it is necessary to determine the extent to which the local referendum is likely to measure that consent. Just as changing the allocation of voting power can make the electorate more or less attentive to taxpayer concerns, so too can variations in the distribution of the tax burden affect the usefulness of the tax referendum as a yardstick of taxpayer consent.¹⁴⁵ While it is always difficult to generalize, intuition suggests that if the allocation of voting shares diverges greatly from the allocation of tax shares, the referendum's reliability as an indicator of taxpayer consent diminishes. This is *not* to suggest that it is therefore always pointless to require voter approval for taxes imposed by local governments; putting taxes to a popular vote may serve other normative goals, such as promoting political participation for its own sake.¹⁴⁶ However, if taxpayer consent is an important objective of the right to vote on taxes, it seems we should care about the extent to which the referendum is capable of serving this function. A better understanding of these issues may lead us to reassess the right to vote on taxes or perhaps tailor its use to those circumstances where it is most likely to serve its intended function.

In this Part, I examine how the design features of various local taxes may either advance or frustrate the referendum's ability to gauge taxpayer consent. In making this assessment, it will be useful to think of local tax referendums as exhibiting varying degrees of "taxpayer-regardingness." Depending upon the tax being voted on and its precise design features, some tax referendums will exhibit a high level of taxpayer-regardingness, while others will exhibit lower levels. The economic concept of "tax price" will help to make this point.¹⁴⁷

A. Tax Price as a Measure of Taxpayer-Regardingness

Economists use the term tax price to refer to "the payment required of a consumer for an extra unit of a public good."¹⁴⁸ In theory, each individual in society has a unique tax price—sometimes referred to as a "Lindahl tax price"—that represents the amount she is willing to pay for a level of public

¹⁴⁵ For a similar argument, see Buchanan, *supra* note 144, at 401 (arguing that "political efficiency" requires generality in the tax treatment of individual voters).

¹⁴⁶ This view is associated with writers such as Benjamin Barber and Carole Pateman. See BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984); CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 22-44 (1970). As Held explains, these authors aim for a "participatory society" which "nurtures a concern for collective problems and contributes to the formation of a knowledgeable citizenry capable of taking a sustained interest in the governing process." DAVID HELD, *MODELS OF DEMOCRACY* 271 (1996).

¹⁴⁷ See Walter Hettich, *Tax Price*, in *THE ENCYCLOPEDIA OF TAXATION AND TAX POLICY* 391-92 (Joseph J. Cordes et al. eds., 1999) (describing tax price as "[a] concept developed in analogy to price as observed in private markets").

¹⁴⁸ *Id.* at 391; see also JOSEPH E. STIGLITZ, *ECONOMICS OF THE PUBLIC SECTOR* 133, 152 (2d ed. 1988) (describing concept of tax price).

goods on which everyone can agree.¹⁴⁹ If individuals could be counted on to truthfully reveal their Lindahl tax prices, it would be possible to achieve an optimal provision of public goods.¹⁵⁰ In effect, a public goods provision paid for by Lindahl taxes achieves the libertarian nirvana; public sector outcomes mimic the effects of a perfectly competitive private market.¹⁵¹ For present purposes, I want to use the tax price concept in a slightly different and somewhat more descriptive sense—namely, as a reference to the cost to an individual of increasing her per capita share of local public spending by one dollar. Thus, in a closed economy with uniform (per capita) taxation, the tax price for each person would be 1, which is to say that a \$1 increase in that resident's per capita share of spending will cost her \$1.¹⁵² Where an individual owns a less than per capita share of the tax base, she faces a tax price of less than 1, while someone with a larger than per capita share of the tax base faces a tax price greater than 1.¹⁵³

The tax price concept has certain obvious limitations. Knowing a particular voter's tax price does not necessarily tell us whether she would favor raising taxes for some new project. It ignores both the consumer surplus and the deadweight loss associated with the tax-financed provision of public goods. For example, to say that increasing per capita spending on public libraries by \$1 will cost Zora 80¢ is not, of course, to say that Zora will necessarily support a new library tax. Zora may value her \$1 share of increased library spending at only 60¢. Nevertheless, the tax price concept is a useful analytical tool in gauging the taxpayer-regardingness of the local electorate. It offers a rough estimate of the extent to which local resident-voters are likely to internalize costs imposed on the taxpaying community. Where a community's median voter faces a low tax price, the referendum is

¹⁴⁹ The "Lindahl tax" is named for Erik Lindahl. Erik Lindahl, *Just Taxation—A Positive Solution* (1919), reprinted in *CLASSICS IN THE THEORY OF PUBLIC FINANCE* 168 (Richard A. Musgrave & Alan T. Peacock eds., 1958). For a discussion of Lindahl tax shares, see Fried, *supra* note 109, at 169-72. See also JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 278-81 (1988).

¹⁵⁰ The difficulty, of course, is that individuals have the incentive to misrepresent their true preferences. Public choice theorists have proposed various complicated voting schemes designed to induce consumers to reveal their true preferences. Under the Groves-Ledyard mechanism, for example, voters are presented with alternative tax-service packages and then asked to bid on these packages with dollars. Each bidder's ultimate tax share is figured by adding the tax specified in the equilibrium package, plus a separate tax the amount of which will depend on whether or not the individual's bid was decisive in the outcome. For a discussion, see MUELLER, *supra* note 127, at 123-48; see also Fried, *supra* note 109, at 171.

¹⁵¹ Fried, *supra* note 109, at 170.

¹⁵² See RONALD C. FISHER, *STATE AND LOCAL PUBLIC FINANCE* 371 (1996). Thus, in a community of 10 individuals with an aggregate tax base of \$100,000, if individual *i* owns \$8,000 of the tax base, his tax price is .80. That is to say, for each additional \$1 in local public goods and services, individual *i* faces an additional local tax burden of 80¢.

¹⁵³ Note that the same individual, contributing the exact same amount in taxes, could face a substantially higher tax price in a different community. Thus, an individual's tax price depends not only on the absolute amounts she contributes to her local government, but also on her relative position in the community.

likely to exhibit a low level of taxpayer-regardingness, while the opposite would be true where the median voter faces a higher tax price.

The local resident-voter's tax price varies along two principal dimensions. First, as mentioned above, an individual's tax price will vary depending upon whether she contributes more or less in taxes than her pro rata share of the community's aggregate tax burden. Second, an individual's tax price is reduced to the extent that the local tax burden is exported to nonresidents. In general, this may happen in one of two ways: (1) some portion of the tax burden may be shifted vertically to higher levels of government through deductions, credits, or other such mechanisms, and (2) nonresidents may account for some portion of the tax base that a local government is entitled to tax under state law.¹⁵⁴ The influence of these factors on the median voter's tax price depends upon a variety of factors, including most significantly the type of tax under consideration. Thus, we may view alternative tax instruments as situated at different points along a spectrum. At one end of the spectrum are those taxes with respect to which the community's median voter faces a low tax price, while at the other end are those taxes with respect to which the taxpayer faces a high tax price.¹⁵⁵ Two concrete examples will help to illustrate the extremes.

B. The Tax Voting Spectrum—Coal Taxes to Poll Taxes

1. *Coal Taxes.*—In the field of state taxation, one of the most controversial issues has been the states' authority to impose taxes on the extraction of natural resources.¹⁵⁶ The reasons for the controversy are not hard to

¹⁵⁴ The following equation illustrates the influence of these factors algebraically:

$$t_i = \left[\frac{N \cdot B_i (1 - S)}{B_r} \right] \frac{B_r}{B}$$

where t_i equals individual i 's tax price; N equals the jurisdiction's population; B_i equals i 's share of the tax base; and B equals the community's aggregate tax base, B_r equals the local residents' portion of the aggregate tax base and S equals the subsidy to i from deductions and credits offered by higher levels of government. See FISHER, *supra* note 151, at 371. Assume that N is 10, B_i is \$8,000, B_r is \$60,000 and B is \$100,000, S is .25. In that case, individual i faces a tax price of .60. If B_r is \$60,000 and B is \$120,000, however, i 's tax price is reduced to .50. In other words, an increase in local spending by \$1 will cost resident i 50¢. As this example suggests, an increase in the nonresidential component of the local tax base reduces the tax price faced by local residents. In effect, local public spending is subsidized where S and $(B - B_r)$ are greater than zero.

¹⁵⁵ Empirical data suggest taxpayer voting behavior is influenced by a reduction in tax price. In one study, Douglas Holtz-Eakin and Harvey Rosen showed that changes in tax prices resulting from federal income tax deductibility influenced the demand for local public goods in several localities. Where the tax price was lowered as a result of federal deductibility, local residents had a greater demand for public goods (and a correspondingly greater willingness to tax) than in those jurisdictions that did not enjoy the deduction-induced reduction in tax price. Douglas Holtz-Eakin & Harvey S. Rosen, *Tax Deductibility and Municipal Budget Structure*, in FISCAL FEDERALISM: QUANTITATIVE STUDIES 107 (Douglas Holtz-Eakin & Harvey S. Rosen eds., 1988).

¹⁵⁶ Several states have imposed such taxes and their authority to do so has been the subject of con-

see. Whenever a jurisdiction enjoys market dominance in a natural resource or commodity, it has a strong incentive to fund local expenditures from taxes on those items. The concern, of course, is that states with resources in high demand will shift the cost of government to outsiders. *Commonwealth Edison v. Montana* is a case in point.¹⁵⁷ Recognizing its preferred position as a source of low-sulfur coal, Montana enacted a "coal severance tax" on companies engaged in the extraction of low-sulfur coal.¹⁵⁸ *Commonwealth Edison* and other companies challenged the tax on constitutional grounds, but in a 6-3 opinion the U.S. Supreme Court upheld the state's authority to impose the tax.¹⁵⁹

Working from the *Commonwealth Edison* facts, assume hypothetically that the City of Covina contains all of the world's coal and that there are no substitutes for it in the production of energy.¹⁶⁰ Under this exaggerated version of the facts, Covina in effect joins the coal producer in its position as a natural resource monopolist and thus has a strong incentive to fund its public services from coal taxes.¹⁶¹ Depending upon the nature of the market for coal, the burden of such taxes will be borne by consumers (through higher prices) and/or local coal producers (through lower profits or loss of market share). In either case, the median voter's tax price is likely to be quite low. In extreme cases, an increase in local spending funded out of such taxes may cost local residents very little.

The desirability of such taxes as a matter of tax policy depends crucially on one's perspective. From a strictly Covinian point of view, the coal tax is an ideal method of raising revenue. The reasons are not hard to see. As George Zodrow noted in his recent study of the state-level income and sales taxes, "exportability is generally viewed by state policymakers as highly desirable, since it allows state residents to enjoy public services at a

stitutional challenges under the dormant commerce clause. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981). A useful collection of essays on this topic can be found in *FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES* (Charles E. McLure, Jr. & Peter Mieszkowski eds., 1983).

¹⁵⁷ *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981).

¹⁵⁸ *Commonwealth Edison*, 453 U.S. at 612-13. At the time of the *Commonwealth Edison* litigation, the states of Montana and Wyoming together accounted for nearly 70% of all U.S. reserves of low-sulfur coal. *Id.* at 638 n.1.

¹⁵⁹ In dissent, Justice Blackmun questioned the state's authority to so aggressively export the cost of financing its public services, expressing sympathy with the characterization of Montana's coal severance tax as "OPEC-like revenue maximization." *Id.* at 643 (Blackmun, J., dissenting).

¹⁶⁰ This assumption is, of course, extreme. The idea is to assume a product the demand for which is perfectly inelastic. Where there are no substitutes for a particular good, the addition of a tax will have no impact on the aggregate demand for the good. The elasticity of demand for the taxed good is one of the principal factors that determines the extent to which a jurisdiction is able to export a tax burden to nonresidents. See Walter Hellerstein, *Selected Issues in State Business Taxation*, 39 VAND. L. REV. 1033, 1044-45 (1986).

¹⁶¹ See Charles E. McLure, Jr., *Tax Exporting and the Commerce Clause*, in *FISCAL FEDERALISM AND THE TAXATION OF NATURAL RESOURCES* 169-92 (Charles E. McLure, Jr. & Peter Mieszkowski eds., 1983).

lower effective cost.¹⁶² Given a choice of tax instruments, the welfare-maximizing local decisionmaker should be expected to make maximum use of exportable taxes. On the other hand, if one takes the perspective of society as a whole, exportable taxes naturally get much less favorable marks. For example, Charles McLure, a prominent scholar of fiscal federalism, recently opined that “[t]ax exporting . . . is generally undesirable. It is unfair. It undermines the accountability of government, and it may induce overexpansion of the public sector.”¹⁶³ However one comes out on the desirability of permitting local governments to use exportable taxes, it seems clear that they are not well suited to promoting a constitutional policy of *taxpayer* consent through *voter* approval. Thus, the coal severance tax may be viewed as occupying that end of the spectrum representing taxes where the referendum offers little or no information regarding taxpayer consent.

2. *Poll Taxes.*—At the other end of the spectrum is a per capita head tax falling exclusively on local residents. The best-known example of such a tax is the “poll tax” adopted in England, Wales, and Scotland in the late 1980s and early 1990s.¹⁶⁴ The British poll tax was designed precisely for the purpose of manipulating the tax price that local residents faced in local fiscal decision-making.¹⁶⁵ Under the previous system of local finance in the UK, termed “the rates,” approximately half of all adults paid no local council taxes at all.¹⁶⁶ Moreover, the “non-domestic rates,” a term used to refer to the portion of the local tax burden imposed on owners of commercial and industrial property, accounted for a substantial portion of many local budgets.¹⁶⁷ Following an extensive study of local taxation published in 1986,¹⁶⁸ officials in the Thatcher government recommended overhauling the rates-based system of local finance.¹⁶⁹

Under the Tory approach, all adult residents of a community would pay a “community charge” of the same amount. It was precisely this feature of the poll tax that made it appealing to the Thatcher government and

¹⁶² GEORGE R. ZODROW, *STATE SALES AND INCOME TAXES: AN ECONOMIC ANALYSIS* 12 (1999).

¹⁶³ Charles E. McLure, Jr., *The Tax Assignment Problem: Conceptual and Administrative Considerations in Achieving Subnational Fiscal Autonomy* (1999), at http://www1.worldbank.org/wbiop/decentralization/Topic06_Printer.htm.

¹⁶⁴ See Peter Smith, *Lessons from the British Poll Tax Disaster*, NAT'L TAX J., Dec. 1991, at 421. The British “poll tax” should not be confused with taxes imposed by many American states in an effort to disenfranchise blacks. Such taxes were held unconstitutional. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966) (indicating that right to vote in state elections may not be conditioned on the payment of a poll tax). As to federal elections, see U.S. CONST. amend. XXIV.

¹⁶⁵ John Turro, *The Second Battle of Britain: The Poll Tax*, 47 TAX NOTES 261, 262 (Apr. 16, 1990).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ DEP'T OF THE ENV'T (UK), *GREEN PAPER: PAYING FOR LOCAL GOVERNMENT*, Cmnd. 9714 (1986).

¹⁶⁹ *Id.* at 5-7.

various economists.¹⁷⁰ By aligning the allocation of tax shares and voting shares, they argued, the poll tax created proper incentives for local residents to economize on local spending. Knowing that an increase in local spending would trigger an increase in their local taxes, local residents would increase spending only if the value of new programs exceeded the marginal cost they would face in increasing local taxes.¹⁷¹ Whatever its merits in theory, in practice the poll tax turned out to be a colossal political failure. While few taxes are ever popular, the poll tax's unpopularity reached new and remarkable levels, presumably due to its severe regressivity. Its introduction sparked riots throughout the country and led to substantial noncompliance—the popular revolt against the tax is now listed on the internet as one of the “Top Anarchist Events of the Twentieth Century.”¹⁷² The poll tax was repealed not long after it was enacted, and it is now widely viewed as one of the principal factors that led to the downfall of the Thatcher government.¹⁷³

In making reference to these two types of taxes, I do not mean to suggest that one is normatively superior to the other or that states should necessarily avoid or embrace either type of tax, though certainly a strong case can be made against both taxes. Rather, the point is to highlight the very different information revealed by holding a referendum vote on coal taxes versus poll taxes. The constitutional architect hoping to use the referendum device as a measure of the taxpayers' willingness to support proposed taxes will find her objectives frustrated if the tax assignment options for local governments are limited to coal severance taxes of the sort described above. Where individuals not entitled to vote bear all or part of the proposed tax burden, the taxpayer consent justification for referring the question to local voters is substantially weakened. What an affirmative vote on such taxes indicates is not taxpayer consent but rather a willingness on the part of the community's residents to fund local public services with a tax on nonresidents. By contrast, when a majority of residents approves a per capita head tax through a direct vote, they speak for a majority of those who would bear

¹⁷⁰ Like any tax, a head tax has an “income effect” in that it reduces the income of the taxpayer by the amount of the tax; its efficiency derives from its lack of “substitution effects.” See Daniel Shaviro, *Some Observations Concerning Multi-Jurisdictional Tax Competition* 6 (NYU Law School Public Law & Legal Theory, Working Paper No. 13, 2000) (“[L]ump sum tax, such as a uniform head tax, that is invariant to all taxpayer decisions achieves the nirvana, from a tax efficiency standpoint, of leaving incentives unchanged.”).

¹⁷¹ On this argument, poll tax advocates were giving the tax too much credit. In effect, the argument implies that the British poll tax was the economic equivalent of a Lindahl tax share, which of course it was not.

¹⁷² <http://www.infoshop.org/news5/century.html> (Jan. 2, 2000) (listing “poll tax riots” as number eleven out of a list of top twenty “anarchist events” of the century).

¹⁷³ Timothy Besley et al., *Fiscal Anarchy in the UK: Modeling Poll Tax Noncompliance*, 64 J. PUB. ECON. 137 (1997); Smith, *supra* note 164, at 422 (noting that the poll tax disaster “was almost certainly the principal reason for the challenge to Margaret Thatcher's leadership of the party in November 1990 and her replacement by John Major”).

the economic burden of the proposed levy.

What these differences suggest is that the referendum's usefulness as a yardstick of taxpayer consent depends upon the tax under consideration. What is needed, therefore, is a better understanding of how the mechanics of alternative local tax bases might advance or frustrate the normative claims underpinning the right to vote on taxes. Before addressing those issues, however, a few caveats are in order.

C. Caveats—Exit, Capitalization, and Tax Climate

Nothing in the foregoing analysis should be interpreted as indicating that local residents have *no* interest in the tax burdens that they impose upon nonresidents. In considering any type of local tax, local residents may be concerned about the tax's effect on economic activity within the community. More specifically, assuming factor and consumer mobility and interjurisdictional competition, local residents may be concerned that nonresident taxpayers will shift their economic activity to competing jurisdictions, depleting the local tax base and causing local property values to fall.¹⁷⁴ In effect, the prospect of adverse capitalization effects serves as a sort of Pigouvian tax, leading local residents (or at least property owners) to internalize the potential costs of their behavior on nonresident taxpayers.¹⁷⁵ To gauge the value of local-resident voting on such taxes, two questions must be answered. First, to what extent will local taxation of nonresidents induce such adverse local effects? Second, to what extent do local residents *perceive* that taxes imposed on nonresidents will induce such effects?

With respect to the first question, it should be noted that the answer turns largely on the period of time under consideration (short-term versus long-term) and the ease with which nonresident consumers and owners of factors may escape the tax by shifting their activity to other jurisdictions.¹⁷⁶ For example, assume that a local government contains within its borders several gas stations that are located very close to the exit ramp of a busy interstate highway and thus used primarily by nonresident drivers. If the community's residents decide to impose a new ten percent gas tax in the hopes of generating local revenues at the expense of nonresidents, it is possible that the tax will induce nonresident consumers to purchase their gas elsewhere, or induce the gas station owners to relocate to other, lower-tax jurisdictions.

¹⁷⁴ Economic models that view tax exporting as efficient specifically assume that local governments act with the understanding that resident welfare will ultimately be reduced as a consequence of taxes imposed on nonresidents. See, e.g., Richard Krelove, *Efficient Tax Exporting*, 25 CANADIAN J. ECON. 145 (1992). For a helpful discussion of Krelove's model, see Robert Inman & Dan Rubinfeld, *Designing Tax Policy in Federalist Economies: An Overview*, J. PUB. ECON. 307, 322-25 (1996).

¹⁷⁵ For a discussion of Pigouvian taxes, see HAL R. VARIAN, *INTERMEDIATE MICROECONOMICS: A MODERN APPROACH* 556-57 (3d ed. 1993).

¹⁷⁶ For a general discussion of tax exporting, see Walter Hellerstein, *Selected Issues in State Business Taxation*, 39 VAND. L. REV. 1033, 1044-45 (1986).

The extent to which a local gas tax will induce these effects depends on a variety of complex and interrelated factors. If the demand for gas from these particular locations is less than perfectly elastic, the gas station owner may be able to shift some portion of the tax cost forward to consumers. This might be the case, for example, if the gas station is located near an international airport (the last opportunity for those returning rental cars to fill up their tanks) and is located in the only area zoned for gas stations within a several mile radius. However, if consumers have other options and can easily substitute away from the highly-taxed gas, it is less likely that the owner will be able to pass along the cost to consumers. In this situation, the tax will reduce the owner's profits, perhaps encouraging her to move her business elsewhere. Will she decide to relocate to escape the tax? Again, it depends. Moving is costly, perhaps even costly enough to outweigh the increased cost of the tax. Even if the gas station operator chose to relocate, however, it is not clear that she would be able to escape the burden of the tax. If she owns the property on which the gas station sits, the market price that she can command by selling it to someone else should reflect the associated tax.¹⁷⁷ In other words, the exit option is simply unavailable for immobile land. But even without the capitalization effect, it is not clear that moving would free her from the tax. Empirical studies suggest that local governments often engage in tax mimicking behavior; thus, there is reason to believe that the adoption of a gas tax by community X might soon prompt community Y to follow suit.¹⁷⁸ If tax mimicking is pervasive, the taxpayer's exit options are curtailed, making it more likely that the taxpayer will stay put and that the burden of the new tax will stick.

As this brief discussion suggests, the economic effects of taxing non-residents are uncertain and depend largely upon the dynamics of the particular market into which the tax is introduced. Even if those effects were certain, however, it is not self-evident that local residents would take them into account in voting on local tax referendums. Put differently, the question is not so much whether a tax on nonresidents will produce adverse local effects, but rather whether local residents *perceive* that the tax will have such effects.¹⁷⁹ After all, in terms of the potential effect on the local resi-

¹⁷⁷ This capitalization effect illustrates the point that in some sense all local taxes are borne locally, but not in the sense of falling on local residents, rather in the sense of falling on local landowners. This assumes that the property is zoned for use as a gas station. If the property could be put to some other use, the tax would not necessarily be capitalized into the value of the property.

¹⁷⁸ A small literature in local public finance provides empirical support for such "tax mimicking." Helen F. Ladd, *Mimicking of Local Tax Burdens Among Neighboring Counties*, 20 PUB. FIN. Q. 450, 464 (1992), reprinted in HELEN F. LADD, *THE CHALLENGE OF FISCAL DISPARITIES FOR STATE AND LOCAL GOVERNMENTS: THE SELECTED ESSAYS OF HELEN F. LADD* 163, 177 (1999) ("This study provides support for the view that local tax decisions in one jurisdiction are influenced by the tax burdens in neighboring jurisdictions.").

¹⁷⁹ The broader issue of taxpayer perceptions is receiving more and more attention in tax scholarship, as cognitive psychology gains ground in tax just as it has in other fields of law. See, e.g., Edward J. McCaffery, *Cognitive Theory and Tax*, 41 UCLA L. REV. 1861 (1994); Edward J. McCaffery & Jona-

dent's voting behavior, an unperceived burden is indistinguishable from no burden at all. A study by economist Helen Ladd offers some insight into how local voters perceive the burden imposed by taxing nonresidents.¹⁸⁰ Ladd examined school tax referendums in the Boston metropolitan area in an effort to determine the extent to which local voters perceived a local burden by taxing commercial and industrial property. Ladd found a significant positive relationship between levels of spending and the nonresidential share of the local property tax base.¹⁸¹ Ladd's findings are consistent with the common-sense intuition that voters are less likely to perceive a burden upon themselves when the tax is not being paid by them directly.¹⁸² This suggests that the local resident-voters may not completely internalize the cost of taxes imposed upon businesses or nonresident individuals. As the nonresidential component of the property tax base increases, therefore, we should expect the taxpayer consent value of the local tax referendum to decline. The next subpart considers the specific design features of various local taxes that give rise to this result.

D. Design Features Reducing the Resident-Voter's Tax Price

The most common taxes used by local governments in the United States are property, sales, and income taxes. Of the three, the most significant is the property tax. According to the most recent census data, local governments collected \$200 billion in property taxes, \$43 billion in general sales taxes, and \$13 billion in personal income taxes.¹⁸³ Each of these taxes has certain design features that reduce the tax price faced by the median voter.

than Baron, Perspective and Framing in the Evaluation of Tax Policies, USC Olin Research Paper No. 00-18 (Sept. 28, 2000), available at <http://www.hss.caltech.edu/CSLP/tax1c.pdf>; see also STEFAN TRAUB, FRAMING EFFECTS IN TAXATION: AN EMPIRICAL STUDY USING THE GERMAN INCOME TAX SCHEDULE (1999).

¹⁸⁰ Helen F. Ladd, *Local Education Expenditures, Fiscal Capacity, and the Composition of the Property Tax Base*, 28 NAT'L TAX J. 145 (1975).

¹⁸¹ *Id.*; see also FISHER, *supra* note 152, at 373 ("[T]he existence of commercial and industrial property does reduce individual's perceived tax prices and contribute to higher selected tax rates and expenditures but that voters do not perceived commercial and industrial property taxes as completely 'free.'").

¹⁸² Voter preferences for indirect taxes are consistent with cognitive psychology literature, which suggests that "an individual suffers more disutility from having to pay something that she thinks she owns than from failing to receive an equivalent amount in the first place." McCaffery, *Cognitive Theory of Tax*, *supra* note 179, at 1886.

¹⁸³ U.S. Dep't of Census, *United States State & Local Government Finances by Level of Government: 1995-96*, available at <http://www.census.gov/govs/estimate/96stlus.txt> (last visited February 24, 2001). These figures mask important regional variations. For example, the property tax plays an especially dominant role in the Northeastern states. Local income taxes are, for the most part, fairly rare in the United States, but they figure prominently in local budgets in Ohio and Pennsylvania, as well as several major urban centers. The sales tax has no discernible regional pattern, though in states that have curtailed reliance on the property tax in the wake of the 1970s tax revolt, it has recently become a very significant source of local revenue. *Id.*

1. *Property Taxes.*—In many ways, the property tax stands out as a perfect candidate for a right to vote on taxes.¹⁸⁴ Local residents almost always have some sort of ownership interest in taxable real property. Homeowners pay the property tax directly, and renters (under reasonable incidence assumptions) pay the property tax indirectly in the form of increased rents paid to their landlords.¹⁸⁵ Thus, it would appear that the property tax referendum is a classic instance of a community deciding whether or not to tax themselves. On closer inspection, however, several features of the local property tax have the effect of diminishing the referendum's taxpayer consent value.

First, because property is generally taxed according to its physical situs, rather than the residence of its owner, some portion of the local property tax base may consist of property owned by nonresidents. There is nothing inherently wrong with local governments taxing such property. Its presence in the taxing jurisdiction imposes certain costs on local governments, usually in the form of property-related services such as police and fire protection and refuse collection. Local governments should have the authority to tax these nonresidents in order to recoup the costs of the services provided to them. Less clear is the extent to which nonresident property owners should be taxed to pay for services provided to local residents. This issue has been a point of controversy in resort communities where vacation homes account for a substantial portion of the property tax base.¹⁸⁶ In the Adirondack village of Speculator, for example, summer homes account for approximately forty percent of the school district's local tax base.¹⁸⁷ Nonresident property owners have complained in recent years that local residents have abused their taxing authority by imposing property taxes on summer homeowners well in excess of the value of public services they consume.¹⁸⁸

Whether or not owners of second or summer homes should contribute to the cost of local schools is a difficult question. For present purposes, what matters is not the answer to that question, but rather the antecedent tax assignment decision that gave rise to the issue. Permitting local govern-

¹⁸⁴ Of the three principal local taxes, the property tax is the only one with respect to which voters have substantial referendum experience. See FISHER, *supra* note 152, at 370.

¹⁸⁵ Because renters bear the incidence of the property tax indirectly (if they bear it at all) they may not perceive the burden as readily as those who pay it directly. See WALLACE OATES, *LOCAL PROPERTY TAXATION: AN ASSESSMENT* (1999).

¹⁸⁶ See Amitai Etzioni, *Summer-Share Citizenship?*, N.Y. TIMES, June 1, 2000, at A29 ("Summer residents from the Hamptons to the Rockies are raising their voices in protest over being required to pay high taxes in their vacation getaways while being denied the right to vote in local elections.").

¹⁸⁷ See Blaine Harden, *Summer Residents Want Year-Round Voice*, N.Y. TIMES, May 30, 2000, at A1.

¹⁸⁸ A lawsuit is pending that challenges the exclusion from the local franchise of nonresident owners of property in the jurisdiction. See Robert Dill, Jr. v. Lake Pleasant Cent. Sch. Dist., No. 99-CV-1610 (N.D.N.Y. Nov. 22, 1999).

ments to tax all property located within their boundaries, including property owned by nonresidents, necessarily alters the local resident's calculus in the decision to tax. As the nonresidents' portion of the tax base increases, the local resident's tax price is reduced and the value of the referendum as a measure of taxpayer consent is diminished.¹⁸⁹ As an initial observation, therefore, it would seem that the inclusion of property owned by nonresidents has the general effect of reducing the taxpayer-regardingness of local property tax referendums.

The presence of commercial and industrial property in the local property tax base has a similar effect.¹⁹⁰ Unless property tax burdens imposed on such property are borne by local residents, the presence of commercial and industrial property in the tax base will again reduce the local residents' tax price. While caution is advisable in drawing conclusions about tax incidence,¹⁹¹ a brief discussion will at least highlight the forces at work. To simplify, we may assume that the tax burden on owners of local commercial and industrial property may be either shifted forward to consumers in the form of higher prices, or shifted backward to the owners of various factors of production (land, labor, capital) in the form of a reduced return. But determining which group suffers the burden (consumers versus factor owners) is only part of the analysis. One must also determine the composition (residents versus nonresidents) of that burdened group. Thus, if the tax is shifted entirely forward to consumers, further inquiry would be required to determine whether or not the firm sells predominantly to residents or nonresidents. Alternatively, if the tax is shifted backwards to owners of capital or wage earners, then we need to know the extent to which these groups consist of local residents. Again, the point is not to determine with absolute certainty who bears the burden, but rather to emphasize that the inclusion of commercial and industrial property in the local tax base weakens the tax referendum's role as a yardstick of taxpayer consent.

Finally, property tax burdens also migrate up and out to higher levels of government, both through statutory mechanisms of property tax relief offered by state governments and through the federal income tax deduction

¹⁸⁹ See I.R.C. § 164 (1986). The deduction for state and local taxes is the subject of another project I am currently working on. See Kirk J. Stark, *Fiscal Federalism and the Deduction for Local Taxes* (manuscript, on file with author). While there is a substantial literature (in both law and economics) on the federal income tax deduction for state and local taxes, few have addressed the effects of state-level property tax relief mechanisms. One exception is Ronald Fisher. See FISHER, *supra* note 152, at 374-76.

¹⁹⁰ The extent of commercial and industrial property within communities varies widely. In Colorado, the portion of commercial and industrial property in local tax bases range from a low of 1.2% in Bow Mar to a high of 98.8% in Lakeside. COLO. MUN. LEAGUE, 2000 FINANCIAL CONDITION OF COLORADO MUNICIPALITIES 8 (2000).

¹⁹¹ Most economists assume that the burden of the residential component of the property tax—at least in the short run—falls on the owner-occupants of the property at the time the tax is imposed. See DICK NETZER, *ECONOMICS OF THE PROPERTY TAX* 45-46 (1966).

available under section 164 of the Internal Revenue Code.¹⁹² Both of these mechanisms have the effect of reducing the tax price faced by local resident-voters. State-level relief is likely to reduce the marginal tax cost of both high and low income individuals, through income tax deductions for the former and circuit-breaker credits for the latter.¹⁹³ By contrast, the federal income tax deduction for property taxes is usually claimed exclusively by those with higher incomes.¹⁹⁴ In combination with the other factors described above, these credits and deductions work to ensure that the local decision to tax is not simply a question of a community deciding to tax itself. In actuality, the decision to raise local property taxes triggers a host of new economic burdens on persons other than those entitled to vote in local elections, substantially complicating the claim that the local referendum serves as a meaningful measure of the willingness of the burdened population to support the tax.

2. *Income Taxes*.—The income tax (or, more commonly at the local level, the wage tax) presents issues similar to those discussed above.¹⁹⁵ Local income taxes may be imposed on *residents* of the taxing jurisdiction, on *workers* within the taxing jurisdiction, or on *both* residents and workers.¹⁹⁶

¹⁹² See I.R.C. § 164 (1986). The deduction for state and local taxes is the subject of another project I am currently working on. See Stark, *supra* note 189. While there is a substantial literature (in both law and economics) on the federal income tax deduction for state and local taxes, few have addressed the effects of state-level property tax relief mechanisms. One exception is Ronald Fisher. See FISHER, *supra* note 152, at 374-76.

¹⁹³ I.R.C. § 164 (1986). For a discussion of property tax relief mechanisms, see Michael E. Bell & John H. Bowman, *Property Taxes*, in LOCAL GOVERNMENT FINANCE: CONCEPTS AND PRACTICES 85, 105-109 (John E. Petersen & Dennis R. Strachota eds., 1991).

¹⁹⁴ It is interesting to note that, for the tax year 1999, 72% of the revenue lost to state and local income and property tax deductions was attributable to taxpayers earning in excess of \$100,000. See JOINT COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2000-2004, at 27 tbl.3 (1999).

¹⁹⁵ The local income tax is an important source of revenue in a handful of states and large cities. According to a 1995 ACIR report, more than 4,000 localities in 11 states levied local income taxes. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, I SIGNIFICANT FEATURES OF FISCAL FEDERALISM: BUDGET PROCESSES AND TAX SYSTEMS, 70 tbl.20 (1995). For data concerning the use of local income taxes, see Table 5, *Percent Distribution of Municipal Government Revenue by Source and State: 1991-92*, 1992 CENSUS OF GOVERNMENTS, VOLUME 4, GOVERNMENT FINANCES, NUMBER 4, FINANCES OF MUNICIPAL AND TOWNSHIP GOVERNMENTS.

¹⁹⁶ The Ohio Supreme Court has ruled that an individual may be subject to municipal income taxes *both* in her place of residence and her place of work. See *Thompson v. City of Cincinnati*, 208 N.E.2d 747, 752 (Ohio 1965). An employee who lives in one jurisdiction but works in another incurs primary income tax liability where she works. If her home jurisdiction also imposes an income tax, she must pay that tax as well; in determining the total amount owed, however, she is generally entitled to a credit for taxes paid to the municipality where she works. The effect of this dual-liability-with-credit regime is to replicate the effects of a source-based tax (meaning that income is taxed where it is earned), while also permitting localities to tax the income of their residents that is earned in jurisdictions that do not impose an income tax. Pennsylvania follows the opposite approach. See Koleman S. Strumpf, *Government Credibility and Policy Choice: Evidence from the Pennsylvania Earned Income Tax*, 80 J. PUB. ECON. 141, 145 (2001).

Ohio offers an interesting illustration of this important threshold design choice. In the Buckeye State, both school districts and municipalities may impose income taxes, but the design features of the tax for the two types of jurisdictions are quite different. While municipalities are authorized to tax both residents and employees, school districts may only tax the income of those who reside in the district.¹⁹⁷ Thus, an individual who resides in Shaker Heights (a suburb of Cleveland) but works in Cleveland will owe a school district income tax only to the Shaker Heights School District. She may also owe the city of Cleveland an income tax on amounts earned within the city's boundaries. The reasons for the two separate approaches are not entirely clear. The most likely explanation is that Ohio lawmakers believed that cities incur greater costs (in terms of infrastructure, for example) as a result of the daily entrance of nonresident workers into their jurisdictions.¹⁹⁸ By contrast, school districts typically provide services only to residents of the district.

The two types of local income taxes once again highlight the importance of design considerations in thinking about a right to vote on taxes. If the purpose of holding a tax referendum is to protect taxpayers or to measure taxpayer consent, then a residence-based income tax is much more likely to serve that objective than a source-based (that is, according to where income is earned) tax. Holding a popular vote on a source-based local wage tax, by contrast, is not likely to give much information at all about taxpayer consent. Nor is it likely to serve any sort of taxpayer protection objective. Consider, for example, the local income tax referendum recently held in Dayton, Ohio. In a special election held in May 2000, Dayton voters were asked whether or not to extend the city's existing income tax for an additional six years. A whopping ninety-four percent of local voters approved the levy.¹⁹⁹ But the outcome is less astonishing when it is considered that approximately two thirds of the \$110 million collected annually by the Dayton income tax comes from nonresidents. As is true in most local elections, nonresidents were not entitled to vote on the extension of the tax.²⁰⁰

¹⁹⁷ See Introduction to the State of Ohio, Local Income Tax and School District Income Tax Directory, at <http://www.state.oh.us/das/dhr/inctxint.html> (last visited Nov. 2, 2001).

¹⁹⁸ This is the most common argument for local source-based wage taxes at the local level. A commuter tax can compensate cities for the infrastructure and service costs that commuters incur; the tax is easily administrable because the city can simply impose a withholding requirement on employers operating within city limits.

¹⁹⁹ See Jim Bebbington, *Dayton's Income Tax Renewal Approved by Voters*, DAYTON DAILY NEWS, May 3, 2000, at 1A.

²⁰⁰ Jim Bebbington, *Voters Decide Tuesday on a 6-Year Renewal*, DAYTON DAILY NEWS, May 1, 2000, at 1B (noting that two thirds of Dayton's income tax revenues come from nonresidents). Commuters complain that the system smacks of taxation without representation. In late 2000, they sought to redress the situation with a statewide ballot initiative. See, e.g., Brett Thurman, *Not All Taxes Are Voted on by Those Who Pay Them*, DAYTON DAILY NEWS, Apr. 17, 2000, at 3C. The "Ohio Tea Party" proposed amending the state constitution to prohibit municipalities from imposing income taxes on persons

3. *Sales Taxes*.—Finally, consider the local sales tax. While most American shoppers are familiar with the *state* sales tax, what is perhaps less understood is that the sales tax is also an important source of *local* revenue in many jurisdictions.²⁰¹ Importantly, the retail sales tax is a *source-based* consumption tax, meaning that it imposed at the point of purchase, rather than according to the consumer's residence or point of consumption.²⁰² This "situs rule," as it is sometimes called, complicates the claim that a tax referendum on local sales tax increases will measure taxpayer consent.²⁰³ The reason is that some portion of the tax may be paid either by nonresident consumers who purchase taxable goods or services in the taxing jurisdiction, or retailers who are (for reasons similar to the discussion offered above regarding property taxes) unable to pass along the costs to their consumers.

The question of which of these two groups bears the burden of the retail sales tax has been the subject of considerable academic controversy. Empirical evidence on the incidence of the local sales tax is limited and seems to have generated little academic consensus. In one recent study, economists Timothy Besley and Harvey Rosen showed that the extent to which retailers are able to shift the burden varies greatly depending upon the commodity being taxed.²⁰⁴ Examining retail sales data from 1982 to

other than their own residents but failed to secure enough signatures to get the issue on the ballot. Information on this proposed Ohio initiative can be found at <http://www.ohioteaparty.com>. See also Alison Grant & Joe Frolik, *Tax Revolt Brewing: Ohio Tea Party Referendum Would Block Cities from Taxing Commuters; Cleveland Would Lose \$200 Million*, CLEVELAND PLAIN DEALER, Jan. 14, 2000, at 1A, available at 2000 WL 5128816.

²⁰¹ In many states (e.g., California and Colorado), the sales tax is a more significant source of municipal revenue than the property tax. For a discussion of the history of the sales tax, see RICHARD POMP & OLIVER OLDMAN, STATE AND LOCAL TAXATION 6-2 to 6-3 (2000). More than 6,500 localities in 31 states rely on local sales taxes. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, I SIGNIFICANT FEATURES OF FISCAL FEDERALISM: BUDGET PROCESSES AND TAX SYSTEMS, 95-96 (tbl.27) (1995). Reliance on the local sales tax is significant in Louisiana and Washington, where it accounts for 48% and 31% of local own-source tax revenues, respectively. Other notable users of the local sales tax are Alabama (54% of total own-source local taxes), Arizona (53%), Colorado (64%), Missouri (30%), New Mexico (59%) and South Dakota (60%). Table 5, *Percent Distribution of Municipal Government Revenue by Source and State: 1991-92*, 1992 CENSUS OF GOVERNMENTS, VOLUME 4, GOVERNMENT FINANCES, NUMBER 4, FINANCES OF MUNICIPAL AND TOWNSHIP GOVERNMENTS.

²⁰² Many have complained that this "situs rule" induces localities to compete for retail activity, especially big box retailers such as Wal-Mart and Home Depot. For a fascinating account of one California county's experience with this issue, see William Fulton, *Sales Tax Canyon*, in THE RELUCTANT METROPOLIS (1996) (describing sales tax competition in Ventura County among the cities of Camarillo, Ventura and Oxnard for big-box retailers and auto dealerships).

²⁰³ A residence-based retail sales tax, while possible, could present complex administrative issues. For example, a Beverly Hills businessperson traveling to Sacramento would need to keep track of her taxable retail sales consummated in Sacramento in order to tally up the total sales tax due to Beverly Hills at the end of each year. On the other hand, local governments could probably piggy-back on alternative consumption taxes, such as the Nunn-Domenici Unlimited Savings Allowance Tax, S. 722, 104th Cong. § 201 (1995), without as many administrative difficulties.

²⁰⁴ See TIMOTHY J. BESLEY & HARVEY S. ROSEN, SALES TAXES AND PRICES: AN EMPIRICAL ANALYSIS, 26 (NBER Working Paper Series, No. 6667, 1998).

1990 for twelve specific commodities in 155 cities, Besley and Rosen found that sales taxes are generally reflected in the price of the commodity at retail. Interestingly, however, they also found that in some instances the sales tax may even be *overshifted*, resulting in higher retail prices than the amount of the tax.²⁰⁵ Where sales taxes are shifted (or overshifted) to consumers, the degree of tax exporting that will occur depends upon consumer mobility and the dispersion of retail activity.

The possibility of sales tax exporting is perhaps most obvious in the case of tourism. For example, it seems likely that some portion of the aggregate sales tax burden in Beverly Hills, California falls on persons other than residents of Beverly Hills.²⁰⁶ Such tourism-related sales tax exporting is significant for Beverly Hills and for vacation destinations like Florida²⁰⁷ and Las Vegas,²⁰⁸ but these are special situations. More commonly, local sales taxes will be exported simply by virtue of the fact that individuals do not always spend their retail dollars in the same cities and towns in which they live.²⁰⁹ For example, residents of Beverly Hills and West Hollywood probably shop at the Beverly Center, which is located within the city of Los Angeles. In other words, the source-based design of the sales tax (along with the dispersion of retail activity and the reality of consumer mobility) works to sever the link between taxation and residence. The effects of this design choice can be seen in the voter behavior in sales tax referendums.

Consider Vermont, where several local referendums were recently held on the question of whether to introduce a local sales tax. In response to a complete overhaul of that state's school finance system, the Vermont state legislature gave certain communities the option of adopting a local sales tax to replace property tax revenues that would be diverted to a statewide equalization pool. Interestingly, only one city, Manchester, voted to adopt the tax. Out of context, one might interpret the outcome as evidence of Manchester's special commitment to the importance of high-quality local public services. Only the people of Manchester, one might assume, have the political wherewithal to make the hard decision to tax themselves. Closer inspection reveals an alternative explanation. Unlike the fourteen other communities where sales tax referendums were held, Manchester is home to one of New England's most popular outlet malls.²¹⁰ Thus, it would

²⁰⁵ *Id.* But see James M. Poterba, *Retail Price Reactions to Changes in State and Local Sales Taxes*, 49 NAT'L TAX J. 165 (1996) (finding little evidence of overshifting of sales tax).

²⁰⁶ See BEVERLY HILLS, CAL., MUNICIPAL CODE § 3-1.103 (2000).

²⁰⁷ Florida derives 67% of its state tax receipts from sales and use taxes. Office of Research & Analysis, Florida Department of Revenue, Validated Tax Receipt Data for Fiscal Year 2001 (Sept. 14, 2001), at <http://www.myflorida.com/dor/tables/f2fy0001.html>.

²⁰⁸ Brendan Riley, *Nevada's Sales Tax Revenue Jumps*, LAS VEGAS REVIEW-JOURNAL, Mar. 18, 1999, available at http://www.lvrj.com/lvrj_home/1999/Mar-18-Thu-1999/business/10818644.html.

²⁰⁹ Moreover, items that individuals are most likely to purchase in their own localities, such as groceries, are generally exempt from the retail sales tax.

²¹⁰ See Pamela Lanier's Family Travel, Outlet Shopping—Northern New England, at

appear that the Manchester vote may have been less an expression of that community's extraordinary willingness to tax itself and more a product of the fact that the median voter faced (or at least perceived that she faced) a low tax price.

As was the case with the income tax, design considerations are crucial in considering the extent to which the sales tax will be borne by nonresidents. Perhaps even more significant than cross-border shopping described above is the fact that much of the sales tax burden is paid by businesses on their intermediate purchases.²¹¹ Sales tax theorists have decried this aspect of the American retail sales tax because of its theoretical impurities. If one were to construct an ideal retail sales tax (to the extent that there could be such a thing), it would apply only to goods and services sold *at retail*.²¹² This means allowing a comprehensive "sale-for-resale" exemption under which all intermediate business purchases would be excluded from the tax base. In practice, however, this is rarely the case. Most states have significantly narrowed the sale-for-resale exception,²¹³ subjecting a wide variety of business purchases to the retail sales tax.²¹⁴ One empirical study, for example, found that as much as sixty-five percent of the Louisiana sales tax consists of taxes paid by businesses on their intermediate purchases.²¹⁵ Because local sales taxes typically piggyback on the state sales tax base, localities also tax intermediate business purchases.

The inclusion of business inputs in the local sales tax base fundamentally affects the distributive consequences of increasing local sales taxes,

http://www.familytravelguides.com/articles/newengland/North_New_England/outlet.html (last visited Nov. 2, 2001) (listing Manchester, Vermont as a destination that a "truly dedicated outlet shopper will want to head for").

²¹¹ For a discussion, see POMP & OLDMAN, *supra* note 201, at 6-20 to 6-22.

²¹² *Id.* at 20 ("A normative sales tax would exempt all goods and services used in producing consumer goods and services (business inputs) and all goods and services related to investment activities."); see Charles E. McLure, Jr., *Rethinking State and Local Reliance on the Retail Sales Tax: Should We Fix the Sales Tax or Discard It?*, 2000 BYU L. REV. 77, 83 (noting that an ideal retail sales tax "would exempt all purchases by businesses, capital goods, goods for resale, fuels and utilities, office supplies, or whatever").

²¹³ A sales tax system that distinguishes between different types of purchasers (business versus nonbusiness) may be more difficult to administer than one that does not make such distinctions. Moreover, a system that allows for a comprehensive sale-for-resale exception could be more susceptible to abuse; businesspersons may make personal purchases under the guise of business purchases. See Raymond J. Ring, Jr., *The Proportion of Consumers' and Producers' Goods in the General Sales Tax*, 42 NAT'L TAX J. 167 (1989).

²¹⁴ See, e.g., *Sta-Ru Corp. v. Mahin*, 356 N.E.2d 67, 69 (Ill. 1976) (characterizing sale of plastic cups and containers to Dairy Queen Brazier as a taxable retail sale). The narrowing of the sale-for-resale exemption results in a phenomenon known as "pyramiding," whereby the ultimate retail tax is imposed upon a base that includes an amount of tax already paid at an earlier stage. POMP & OLDMAN, *supra* note 201, at 6-20.

²¹⁵ See Ring, *supra* note 213, at 171 tbl.1. Ring estimates that the producer portion of the general sales tax is as high as 65% in Louisiana and Wyoming and as low as 20% in Virginia. Ring's estimate of the national average is 41%.

making it less likely that local residents will bear the economic burden of the tax they are being asked to vote on. Consider, for example, the office supplies, furniture, and computer equipment purchased from Office Depot by a large law firm operating in downtown Los Angeles.²¹⁶ Who pays this tax? Office Depot? The law firm's partners? The firm's clients? The firm's associates and other employees? In raising these questions, I do not mean to suggest that there are easy answers; rather, I mean to emphasize the complications introduced when we consider more precisely how tax design and structure affects the tax price faced by the community's median voter. The sales tax base could be manipulated to eliminate the tax price effects of taxing intermediate business purchases. The fact that most states have not done this is a policy choice that is in tension with the constitutional policy of using the tax referendum as a taxpayer protection and consent device.

E. Optimal Tax Assignment and the Right to Vote on Taxes

The discussion above suggests that certain design features of the most common local taxes leave substantial opportunity for local taxes to be imposed on nonresidents. The inclusion of nonresidential property in the local property tax base, the taxation of income according to source rather than residence, sales tax exporting, and the narrowing of the sale-for-resale exemption—all of these features of the existing local tax structure undermine the claim that a local referendum will measure *taxpayer* consent, as advocates of these referendums suggest. But these observations really just beg the question: What sort of tax structure for local government would advance the constitutional policy of using the referendum device as a measure of taxpayer consent? One source for guidance in answering this question is an emerging literature in public finance economics concerning the optimal allocation of taxing authority in federalist economies. As Richard Musgrave has explained, this literature addresses the fundamental normative questions of fiscal federalism: "*Who should tax, where, and what?*"²¹⁷

Taking efficiency as the principal objective, various economists have addressed Musgrave's question. In an influential paper published in 1983, for example, economist Roger Gordon offered a systematic examination of the inefficiencies that may arise from decentralized tax decision-making.²¹⁸

²¹⁶ If the firm wanted to avoid paying such a sales tax, it might consider purchasing its supplies from the Quill Corporation, which has no physical nexus with California and therefore is not required to withhold the sales/use tax that the firm owes. See *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

²¹⁷ MUSGRAVE & MUSGRAVE, *supra* note 138, at 2-19 (emphasis added).

²¹⁸ Roger H. Gordon, *An Optimal Taxation Approach to Fiscal Federalism*, 98 Q.J. ECON. 567 (1983). Gordon's paper is the seminal treatment of the tax assignment question from an efficiency perspective. The article appears in the first chapter of a new text edited by Wallace Oates consisting of the leading essays in the field. See WALLACE E. OATES, *THE ECONOMICS OF FISCAL FEDERALISM AND LOCAL FINANCE* (1998). Gordon attempts to isolate the problems created by decentralization per se. His analysis may be contrasted with the well-known Tiebout Hypothesis, which holds that an efficient provision of local public goods is possible under certain severe assumptions. See Charles M. Tiebout, *A*

Gordon's analysis proceeds from the assumption that households and factors are mobile across jurisdictional boundaries and that local governments are permitted to set their own tax policies.²¹⁹ In addition, Gordon's model assumes that governments are myopic and thus fail to consider the potentially adverse effects (to themselves) of imposing excessive taxes on non-residents.²²⁰ In effect, Gordon's analysis suggests that when local voters face a low tax price (either because of nonresident ownership of taxable factors or nonresident consumption of taxable goods and services), they will overuse certain taxes in the same manner as I have suggested above. Importantly, this spillover effect arises not only from the existence of cross-jurisdictional activity but also as a result of the *types of taxes* available to local governments. Thus, the externalities can be minimized through a manipulation of the types of taxes assigned to lower levels of government.²²¹ More specifically, Gordon's analysis suggests that local governments should be restricted to taxing factors of production (for example, labor) according to their owners' places of residence (rather than where they are used) and goods according to where they are consumed (rather than where they are purchased)—that is, residence-based taxes.²²²

Adherence to the tax assignment prescriptions flowing from optimal tax analysis would strengthen the tax referendum's capacity as a yardstick of taxpayer consent.²²³ As a general rule, local referendums on residence-based taxes are more likely to measure the willingness of the taxpayers as a group than will referendums on source-based taxes. Similarly, it would seem that the residential property tax, while not strictly a *residence*-based tax, might also be a good candidate for the right to vote on taxes. The reasons for this conclusion are straightforward—where the voting franchise is

Pure Theory of Local Public Expenditures, 64 J. POL. ECON. 416 (1956). The Tiebout model assumes no interjurisdictional externalities. By contrast, Gordon's analysis emphasizes the externalities associated with local fiscal decision-making.

²¹⁹ Gordon, *supra* note 218, at 568.

²²⁰ *Id.* at 580 ("Propositions 1 and 2 together provide a formal characterization of the reasons why decentralized decision-making itself can lead to a less efficient (equitable) outcome. This arises because one community's decisions affects in many ways the utility levels of residents of other communities, yet these effects are ignored in the decision-making.").

²²¹ *Id.* at 581.

²²² *Id.* In a more recent paper, Robert Inman and Daniel Rubinfeld extend Gordon's analysis to consider how tax assignment policies influence the problem of fiscal externalities. Robert P. Inman & Daniel L. Rubinfeld, *Designing Tax Policy in Federalist Economies: An Overview*, 60 J. PUB. ECON. 307 (1996). Like Gordon, Inman and Rubinfeld argue that employing residence-based principles in the design of local taxes "moves a significant way towards tax efficiency in decentralized public economies." *Id.* at 318-19.

²²³ In addition to Gordon, Inman, and Rubinfeld, other authors who have endorsed residence-based taxation for local governments include Ronald McKinnon and Thomas Nechyba, see Ronald McKinnon & Thomas Nechyba, *Competition in Federal Systems: The Role of Political and Financial Constraints*, in *THE NEW FEDERALISM: CAN THE STATES BE TRUSTED?* 3, 15-19, 47-52 (John A. Ferejohn & Barry R. Weingast eds., 1997), and Wallace E. Oates, see Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1126 (1999).

allocated on the basis of residence, the referendum is most likely to measure taxpayer consent if tax shares are also allocated on the basis of residence.

This analysis suggests that a move toward residence-based local taxation would be appropriate for those states that have adopted a right to vote on taxes. Interestingly, however, voters in those states where tax voting initiatives have succeeded are today more likely to be asked for their approval on miscellaneous nonproperty taxes and other source-based taxes. The reason for this incongruity lies in the history of the tax limitation movement. California is the clearest case. Residence-based taxation is almost unheard of among local California governments. The state government preempts local use of the income tax and, as noted above, Prop. 13 effectively converted the property tax from a local tax to a statewide tax. Consequently, California local governments today rely on a mix of miscellaneous nonproperty taxes.²²⁴ Among these, the most significant are business license taxes, utility users taxes, and transient occupancy (hotel) taxes.²²⁵ Data on the outcomes of local referendums concerning these three taxes are revealing. Of all municipal tax referendums considered in 1998, for example, more than half concerned these three taxes.²²⁶ In those three categories, voters approved twenty-four percent of utility users taxes, sixty percent of transient occupancy taxes, and sixty-seven percent of business license taxes.²²⁷ These data confirm earlier empirical findings that voters generally prefer taxes that will be paid by businesses and tourists over taxes that they themselves will pay directly.²²⁸ They also suggest that the right to vote on taxes, as currently structured, cannot plausibly be interpreted as advancing a taxpayer consent function. Where a community's residents vote to increase business license taxes or hotel taxes, it is problematic to conclude that the outcome reflects a firm willingness on the part of the taxpaying community to support the levy.

Put differently, to the extent that one accepts the referendum's justification as a device for gauging the consent of taxpayers themselves before

²²⁴ See 1979 Cal. Stat. 1785 (codified at CAL. GOV'T CODE §§ 50075-50077 (West 2001)).

²²⁵ The business license tax is a tax imposed upon the privilege of operating a business within the jurisdiction. It is usually based on the business's gross receipts, though some jurisdictions authorize an alternative calculation based on the payroll. The utility users tax is a sales tax of sorts—it applies at varying percentages to the consumption of gas, electricity, water, phone service and cable television service. The hotel tax applies to the privilege of occupying a hotel or motel within a jurisdiction. For a discussion see ELIZABETH G. HILL, CALIFORNIA'S TAX SYSTEM: A PRIMER 57 (2001). Recent empirical studies have documented the growth of these taxes in the years since Proposition 13. See MICHAEL A. SHIRES, PATTERNS IN CALIFORNIA GOVERNMENT REVENUES SINCE PROPOSITION 13, at 46 (1999) (noting that "[b]usiness license taxes, franchise taxes, real property transfer taxes and transient lodging taxes have risen some 454 percent [from 1978 to 1995]").

²²⁶ See CALIFORNIA BALLOT MEASURES (1998), *supra* note 62. Periodically, cities and counties are also called upon to vote on local sales taxes, usually in the context of some special local add-on to the existing state and local sales taxes, the rate of which is fixed by statute.

²²⁷ *Id.*

²²⁸ For similar data relating to earlier years, see Reuben & McGuire, *supra* note 14.

the imposition of new or increased taxes, one must be sensitive to the fact that local residents are often asked to vote on taxes that fall upon nonresidents. This logic suggests a division of labor for alternative tax limitation devices: *If* a state chooses to limit the taxing power of local governments, voter approval requirements may be more suitable for residence-based taxes (or their equivalents), while alternative limitations may be more appropriate for those taxes with incidence effects that are less certain or more dispersed. Thus, to extend this analysis to the case of California, voter approval requirements would seem to be more suitable for the local property tax, or at least for the residential component of the property tax. By contrast, the direct constitutional limitations currently applied to the property tax might be more suitable for local business taxes, hotel taxes, and perhaps the nonresidential component of the property tax. With respect to each of these tax instruments, the *taxpayer*, understood in the broadest sense as the individual most likely to suffer the economic burden of the proposed levy, is the least likely to have her interests reflected in local referendum outcomes.

A similar analysis might be employed in Colorado, where municipal reliance on the local property tax has diminished substantially over the past quarter century.²²⁹ Under Colorado's *Taxpayer Bill of Rights*, local voters are commonly asked to cast their ballots on local sales taxes, lodging taxes, and so on.²³⁰ A tax voting regime guided by the principles of the optimal tax assignment literature might restrict these sources of revenue for local governments and put alternative taxes on the local ballot instead. Following Gordon's analysis, it might be appropriate to assign residence-based taxes, such as the income tax, to local governments. For the same reasons that referendums on a residential property tax are more likely to serve the intended function of taxpayer consent, local voting on residence-based local income taxes would serve that function. In short, to the extent that the right to vote on taxes embraces the idea that taxpayers themselves should decide the level of local tax burdens, the aim should be to structure the local tax base in accordance with residence principles.

IV. BEYOND TAXPAYER CONSENT: AN ALTERNATIVE DEFENSE OF TAX VOTING

To this point in the analysis, my aim has been to show that tax voting is unlikely to advance the libertarian principle of taxpayer consent unless there is some meaningful correspondence between those who vote on taxes

²²⁹ See COLO. MUN. LEAGUE, 1995 MUNICIPAL TAXES: THE CHARACTERISTICS AND RATES OF THE MOST COMMON TAXES LEVIED BY COLORADO MUNICIPALITIES 19 (1995) (showing by chart that property taxes, as a percentage of total municipal tax revenues, have declined from 36% in 1972 to 18% in 1993). By contrast, the general sales and use tax accounted for 68.6% of municipal tax revenues in 1993. *Id.*

²³⁰ See COLO. MUN. LEAGUE, 14TH ANNUAL REPORT, FINANCIAL CONDITION OF COLORADO MUNICIPALITIES 107-134 (2000) (listing local ballot measures from 1993 to 1999).

and those who pay them. Accordingly, I have argued that voter approval requirements may be more suitable for residence-based taxes or other taxes the economic burden of which falls predominantly on local residents. As the median voter's tax price declines, however, the usefulness of the referendum device as a yardstick of taxpayer consent diminishes. Yet the foregoing analysis leaves open an important normative question: even if the local tax structure could be reformulated in the manner suggested, *should* states adopt voter approval requirements for all new or increased taxes? Put differently, are there compelling normative arguments beyond raw libertarianism that might justify adopting a right to vote on taxes?

In this Part, I offer a preliminary response to these questions by highlighting a possible ancillary benefit of the right to vote on taxes that has not, in my view, received adequate attention. My purpose here is to identify a potential virtue in direct fiscal democracy that transcends the normative arguments suggested by libertarianism. Drawing from recent political theory concerning "deliberative democracy," I argue that the right to vote on taxes holds potential as a procedural institution that may, in certain circumstances, stimulate greater public deliberation regarding the allocation of local tax burdens. Under this view, the aim of popular voting on taxes would be not simply to maximize the role of taxpayer consent in local fiscal decision-making, but also to improve tax morale, increase popular respect for local fiscal outcomes, and provoke community dialogue regarding how best to allocate local tax burdens. Understanding why and how a more participatory decision-making regime might serve these ends requires a brief overview of deliberative democracy and its potential relevance in the local tax setting.

A. Deliberative Democracy as a Normative Ideal

In recent years, considerable academic attention has been focused on the idea of deliberative democracy.²³¹ While opinions diverge over the precise meaning of that term,²³² most authors writing on the subject seem to have in mind something similar to the definition offered by political theorist Joshua Cohen. As Cohen explains, "[t]he notion of a deliberative democracy is rooted in the intuitive ideal of a democratic association in which the justification of the terms and conditions of association proceeds through public argument and reasoning among equal citizens."²³³ As this definition

²³¹ See Frederick Schauer, *Discourse and Its Discontents*, 72 NOTRE DAME L. REV. 1309, 1313 (1997) ("Discourse is in the air.").

²³² Michael Saward, *Direct and Deliberative Democracy 2* (draft paper presented for conference on "Deliberating About Deliberative Democracy," University of Texas at Austin, Feb. 4-6, 2000, on file with author) ("That deliberative democracy comes in many shapes is an understatement.").

²³³ Joshua Cohen, *Deliberation and Democratic Legitimacy*, in DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS 67, 72 (James Bohman & William Rehg eds., 1997); see also Bernard Manin, *On Legitimacy and Political Deliberation*, 15 POL. THEORY 338, 345 (1987) (defining "deliberation" as "the process of the formation of the will, the particular moment that precedes choice, and

suggests, deliberative democrats subscribe to a normative conception of political legitimacy very different from the libertarian perspective discussed above. Under the deliberative model, “basic institutions [are] legitimate insofar as they establish the framework for free public deliberation.”²³⁴ Whereas libertarian theorists value democratic institutions for the protection that they offer individuals’ interests, deliberative democrats place dialogue and discussion at center stage. They reject the idea that politics is simply about aggregating preferences or protecting individuals’ pre-political interests.²³⁵ Instead, they emphasize the influence of political dialogue on the formation of individual preferences.

As a theoretical construct, deliberative democracy posits a set of procedural conditions that are necessary to ensure an ideal state of “free public deliberation.”²³⁶ Actual institutions can then be tested against this regulative ideal as a means of measuring their legitimacy. On a prescriptive level, the deliberative democrat is concerned more with the *process* of lawmaking than its substantive outcome. The deliberative model brings to mind institutional arrangements that encourage civic engagement with important questions of public policy. Like advocates of direct democracy, deliberative democrats emphasize the importance of institutional design to their normative objectives. For the deliberative democrat, however, institutional design should aim for more than just an assurance that majority will is expressed in legislative outcomes. Consider what John Dewey once said on the subject:

Majority rule, just as majority rule, is as foolish as its critics charge it with being. But it never is *merely* majority rule. . . . “The means by which a majority comes to be a majority is the more important thing”: antecedent debates,

in which the individual ponders different solutions before settling for one of them”).

²³⁴ James Bohman & William Rehg, *Introduction* to *DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* ix, ix (James Bohman & William Rehg eds., 1997) (“[L]egitimate lawmaking issues from the public deliberation of citizens.”); Manin, *supra* note 233, at 351-52 (“[T]he source of legitimacy is not the predetermined will of individuals, but rather the process of its formation, that is, deliberation itself. . . . We must, therefore, challenge the fundamental conclusion of Rousseau, Sieyes, and Rawls: a legitimate decision does not represent the *will* of all, but is one that results from the *deliberation of all*.”); JAMES BOHMAN, *PUBLIC DELIBERATION 2* (1996) (“The call for more deliberation is . . . a demand for a more rational political order in which decision making at least involves the public use of reason. According to this position, the legitimacy of decisions must be determined by the critical judgment of free and equal citizens.”).

²³⁵ BOHMAN, *supra* note 234, at 5 (“All deliberative models of democratic legitimacy are strongly normative in the particular sense that they all reject the reduction of politics and decision making to instrumental and strategic rationality.”).

²³⁶ This is a reference to the “ideal speech situation” posited by German political philosopher Jurgen Habermas. See LESLIE A. HOWE, *ON HABERMAS* 18-38 (2000) (discussing Habermas’s theory of communicative action); see also JURGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); Cass R. Sunstein, *Democracy Isn’t What You Think*, N.Y. TIMES BOOK REV., Aug. 18, 1996, at 29. (“In the ideal speech situation, all participants have equal power, attempt to reach understanding, do not act manipulatively or strategically, and understand their obligation to offer reasons.”).

modification of views to meet the opinions of minorities

The essential need, in other words, is the improvement of the methods and conditions of debate, discussion and persuasion. That is *the* problem of the public.²³⁷

Echoing Dewey, legal scholars working in the civic republican tradition have expressed similar concerns for “the improvement of the methods and conditions of debate.”²³⁸ Thus, Frank Michelman has called for a “highly participatory form of politics, [that] involv[es] citizens directly in dialogue and discussion,”²³⁹ while Cass Sunstein has emphasized the need “to design political institutions that promote discussion and debate among the citizenry.”²⁴⁰

To be sure, deliberative democracy is not without its critics. In addition to those who dispute the normative priority of deliberation over other democratic values, there are those who believe that the process of deliberation, while theoretically valuable, is unlikely to be as free and open in practice as the deliberative model seems to suggest.²⁴¹ Yet another criticism of deliberative democracy is that its advocates hold too rosy a view of human nature.²⁴² As James Gardner argues, for example, deliberative democracy seems to assume that “citizens will be generous, open-minded and self-sacrificing.”²⁴³ The idea underpinning deliberative democracy is that citizens will engage in an open, rational dialogue to resolve political differ-

²³⁷ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 207-208 (1927) (quoting politician Samuel J. Tilden).

²³⁸ *Id.*

²³⁹ Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4, 19 (1986). For a theory of democracy that brings together the ideas of deliberative democracy and participation, see BARBER, *supra* note 148, at 25 (advocating a “strong democracy,” the aim of which is “to associate democracy with a civic culture nearer to the themes of *participation, citizenship, and political activity* that are democracy’s central virtues” (emphasis added)).

²⁴⁰ Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1549 (1988). For a discussion of the role of participation in arguments for deliberative democracy, see Note, *Civic Republican Administrative Theory: Bureaucrats as Deliberative Democrats*, 107 HARV. L. REV. 1401 (1994).

²⁴¹ Some critics have argued that advocates of deliberative democracy have given insufficient attention to the “deliberative inequalities.” JAMES BOHMAN, *PUBLIC DELIBERATION: PLURALISM, COMPLEXITY AND DEMOCRACY* 107-49 (1996) (discussing deliberative inequalities); see also Iris Marion Young, *Communication and the Other: Beyond Deliberative Democracy*, in *DEMOCRACY AND DIFFERENCE: CONTESTING THE BOUNDARIES OF THE POLITICAL* (Seyla Benhabib ed., 1996); Iris Marion Young, *Activist Challenges to Deliberative Democracy*, in *POLITICAL THEORY 1* (forthcoming 2002) (“[T]he design and enactment of deliberative processes today is biased in favor of those with structural and political economic power.”).

²⁴² AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996) (“Deliberative democracy is more idealistic than other conceptions because it demands more than democratic politics normally delivers.”).

²⁴³ James A. Gardner, *Shut Up and Vote: A Critique of Deliberative Democracy and the Life of Talk*, 63 TENN. L. REV. 421, 447 (1996).

ences.²⁴⁴ Yet surely this is not always the case. If citizens are “uncooperative and obstructionist,” as Gardner contends they will be,²⁴⁵ an emphasis on deliberation may actually reduce the likelihood of collective political action by placing too much weight on the values of cooperation and consensus.²⁴⁶ Finally, even assuming deliberative democracy can overcome these criticisms, one might argue that the plebiscitary procedures are unlikely to be as deliberative as representative decision-making might be.²⁴⁷ Critics of direct democracy claim that referendum voting is “episodic and unreflective” and therefore unlikely to stimulate meaningful community-wide deliberation.²⁴⁸ This problem is exacerbated by a problem of economy. As Michael Walzer notes, “[d]eliberation is not an activity for the demos. . . . 100 million of them, or even 1 million or 100,000 can’t plausibly ‘reason together.’”²⁴⁹

These criticisms are the subject of ongoing debate within the literature on deliberative democracy and I make no pretense of resolving them here. I do, however, want suggest that there may be more deliberative potential to the right to vote on taxes than first meets the eye and that further, deeper exploration is therefore warranted. To understand why, one must first consider the potentially significant connection between taxation and deliberative democracy. Neither tax scholars nor political theorists have fully explored this relationship, but certainly tax has an important role to play in the deliberative project. It is hard to imagine a public policy issue more suitable for community deliberation, especially at the local level. It is through the act of taxation that individuals most explicitly call upon each other to sacrifice personal well-being in pursuit of a larger public good. Tax forces a reassessment of several fundamental questions. To ask how tax burdens should be allocated is to ask who should be asked to sacrifice and why. Tax focuses attention on fortunes and asks whether or not they are deserved. It highlights misfortunes and asks whether they should be remedied. Tax invites conflict; arguments over taxation have always been, and will likely continue to be, among the most contentious issues taken up by any democracy.

²⁴⁴ See Miriam Galston, *Taking Aristotle Seriously: Republican-Oriented Legal Theory and the Moral Foundation of Deliberative Democracy*, 82 CAL. L. REV. 331, 362 (1994) (noting that deliberative democracy “presupposes that people will listen fairly, participate honestly, and be open to persuasion (where appropriate) by the power of opposing arguments”).

²⁴⁵ Gardner, *supra* note 243, at 447 (citing a “parallel critique” offered by Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1655-57 (1988)).

²⁴⁶ *Id.*

²⁴⁷ BOHMAN, *supra* note 241, at 245 (1996) (criticizing referendum’s capacity to stimulate deliberation).

²⁴⁸ *Id.*

²⁴⁹ Michael Walzer, *Deliberation, and What Else?*, in DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT 58, 68 (Stephen Macedo ed., 1999).

At the same time, “[d]ialogues about the burdens of taxation can be community-building exercises, drawing on notions of mutual obligation and shared sacrifice.”²⁵⁰ If tax triggers an unusual degree of dissension, it also holds unusual promise for people to engage one another in debate—formal or informal, public or private, informed or ill-informed—over the manner in which a community divides its resources. As Richard Musgrave has noted, tax “as much as any other democratic institution occupies the middle ground between anarchy and absolute rule. It provides the forum on which interest groups and ideologies may clash without resort to the barricades, and on which compromise and cooperation may be sought.”²⁵¹ In other words, tax is an important vehicle through which democratic deliberation can and should take place. In considering local democratic reforms, therefore, we should be especially receptive to those institutions, procedures or mechanisms that tend to generate public deliberation regarding the allocation of local tax burdens.

The right to vote on taxes could be one such reform. Though its origins and philosophical presuppositions are quite distinct, the right to vote on taxes holds promise as a platform for invigorated deliberative politics at the local level. It seems clear, however, that simply requiring voter approval for new or increased taxes is unlikely to ignite substantive democratic dialogue regarding the allocation of tax burdens. Moreover, just as local voting on different types of taxes might exhibit different levels of taxpayer-regardingness, so too will the tax structure influence the extent to which a right to vote on taxes is likely to stimulate public debate. What we need, then, is a better understanding of the relationship between participation and deliberation in local fiscal decision-making.

B. Participatory Fiscal Democracy—Two Illustrations

To illustrate tax voting’s deliberative potential, it will be useful to make reference to two concrete examples. Neither of these examples is directly relevant to voting in a large, urban metropolis; but each has a certain heuristic value in helping to illuminate tax voting’s promise as a mechanism for stimulating public deliberation.

The first is the New England town meeting. The town meeting is frequently mentioned in debates over direct democracy, but the actual operation of such meetings has rarely been the subject of serious academic

²⁵⁰ See Lior Jacob Strahilevitz, *The Uneasy Case for Devolution of the Individual Income Tax*, 85 IOWA L. REV. 907, 935 (2000) (“The decision about who should bear the burden of government taxation is a fundamental act of community self-definition.”); see also WALTER HETTICH & STANLEY L. WINER, *DEMOCRATIC CHOICE AND TAXATION: A THEORETICAL AND EMPIRICAL ANALYSIS* 1 (1999) (“How a society employs taxation reveals much about the relation between its citizens and the state, and thus defines an important part of the nation’s character.”).

²⁵¹ Richard A. Musgrave (1981), quoted in HETTICH & WEINER, *supra* note 250, at 1.

scrutiny.²⁵² One notable exception is a study undertaken by Jane Mansbridge, who described in detail the operations of the town meeting process in the town of “Selby,” Vermont.²⁵³ Mansbridge’s study is not an examination of tax decision-making per se. Still, debates over the local property tax figure prominently in her description of Selby town meeting deliberations.²⁵⁴ The second example is a recent school finance experiment undertaken in Pennsylvania. In mid-1998, the Pennsylvania legislature adopted “Act 50,”²⁵⁵ a sweeping reform of the state’s method of funding public schools.²⁵⁶ Act 50 authorized communities to swap out a local residence-based income tax for the property tax, subject to voter approval.²⁵⁷ This ambitious reform effort offers a blueprint for thinking about what sort of role direct democracy can and should play in the local tax setting. It also flags some concerns that will be relevant in implementing any right to vote on taxes.

1. *Tax Conflict in the Selby Town Meeting.*—Nowhere do tax conflict and tax deliberation come together more than in the New England town meeting. In her study of the operations of Selby town meetings, Jane Mansbridge describes how the conflicting interests of local residents helped to shape debates over the issue of whether to raise the local property tax for the town’s public schools. One of the most significant sources of conflict was between “old-timers” (who owned large amounts of land but generally had lower incomes) and “newcomers” (who had little direct property holdings but higher incomes).²⁵⁸ Importantly, the newcomers generally had more school-age children and thus were more likely to consume a greater share of town’s public services than the old-timers.²⁵⁹

The tax rift between Selby’s old-timers and newcomers set the stage for face-to-face conflict in annual meetings. Not surprisingly, old-timers held to a conservative view regarding the town’s activities. They resented

²⁵² JOSEPH F. ZIMMERMAN, *THE NEW ENGLAND TOWN MEETING: DEMOCRACY IN ACTION* xi (1999) (noting that “political scientists, with a few exceptions, have not studied this form of law-making”).

²⁵³ See JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980). “Selby” is a fictional name that Mansbridge gives to the Vermont town she studied.

²⁵⁴ Mansbridge develops the idea of “unitary democracy” as an alternative form of democratic decision-making. She defines unitary democracy as consensual, face-to-face democracy based on “common interest and equal respect.” *Id.* at 3. She contrasts it to “adversary democracy.” Importantly, Mansbridge is not necessarily “for” unitary democracy or “against” adversary democracy. She expresses considerable ambivalence about the unitary model.

²⁵⁵ Act of May 5, 1998, 1998 Pa. Legis. Serv. Act 1998-50 (West).

²⁵⁶ PENN STATE COLL. OF AGRIC. SCIENCES COOP. EXTENSION, *UNDERSTANDING SCHOOL TAX CHANGE UNDER ACT 50 OF 1998* (1998), available at <http://pubs.cas.psu.edu/FreePubs/ua326.html>.

²⁵⁷ *Id.*

²⁵⁸ MANSBRIDGE, *supra* note 253, at 89.

²⁵⁹ *Id.*

the newcomers' claims that more money was needed for new schools.²⁶⁰ On the other hand, the need for more school funding was apparent. Enrollments had increased dramatically in the prior three years and total school expenses had doubled during the same period.²⁶¹ The increase in school spending had already affected local property taxes. As Mansbridge explains, a farmer who had paid \$6.40 for every \$1,000 of property in 1967 was paying \$14.00 by 1970. Not surprisingly, the tax jump engendered resentment. One farmer complained that

construction workers from the interstate highway had picked Selby to live in because the town had no zoning, and they could live inexpensively on rented land in a trailer park, paying no direct property tax and sending their children free to the Selby school. . . . One fellow moved into Lyford's [Trailer Park] down there had *twelve* children!²⁶²

Despite these conflicts, the residents of Selby approved the new school budget with increased property taxes by a nearly unanimous vote. Commenting on the vote afterwards, the town's school director noted that "It was very gratifying. The parents came out, and we . . . got an overwhelming vote, and they raised the tax, and it was really a burden on everyone."²⁶³ What is especially intriguing about this quote is the juxtaposition of the following phrases: "*It was very gratifying . . . it was really a burden on everyone.*" Mansbridge elaborates on the irony of the school director's coupling of these two comments. In the quote she sensed an unusual combination of thankfulness for the outcome and sympathy for those who would bear the costs of the decision. She cites it as an example of how the *process of deliberation* can transform political perspectives, or of "what citizens in another era would have called 'reasoning together,' which includes coming to understand the needs of other people, as Selby's school director tried to do when he expressed concern for people on whom the school taxes would be a burden."²⁶⁴

Mansbridge's reference to the school director's comments points to one of the principal objectives of deliberative democracy. Advocates of the

²⁶⁰ As one farmer put it, "These people [the newcomers] think that money grows on bushes! Huh! Those bushes were winterkilled a long time ago! . . . We'll be driven right off our land by taxes!" *Id.* at 90.

²⁶¹ *Id.* at 53.

²⁶² *Id.* As described by the farmer, the Selby situation presents a classic example of what economists commonly describe as the "free-riding" of low-income households on the community's tax base. One common reaction to this situation is to adopt restrictive zoning ordinances to ensure that newcomers "pay their way." Some economists have suggested that the use of such "fiscal zoning" can convert the property tax into a market-type fee-for-service with efficiency qualities similar to those envisioned by the Tiebout model. This is commonly referred to as the "benefit view" of the property tax. For a discussion, see William A. Fischel, *Property Taxation and the Tiebout Model: Evidence for the Benefit View from Zoning and Voting*, 30 J. ECON. LITERATURE 171 (1992).

²⁶³ MANSBRIDGE, *supra* note 253, at 77.

²⁶⁴ *Id.* at 78.

deliberative model emphasize the transformative effect that deliberation can have on individual preferences. As Manin explains:

In the process of exchanging evidence related to proposed solutions, individuals discover information they did not previously have. They learn that a given choice will have a given consequence, and if these consequences contradict the original objective they may be led to alter that objective. . . .

There is no reason to suppose that individuals have from the first a complete set of preferences. . . . In the course of collective deliberation, the individual may . . . discover that the opinion he held at the outset was nothing more than prejudice and he may decide to change it.²⁶⁵

As this passage suggests, deliberative democracy aims to do more than simply register individual preferences; it seeks to reshape those preferences through an exchange of information and the creation of new information. It does this by obliging individuals to confront opposing views and to make new arguments. In addition, it encourages participants to present their own views in such a manner as to make them appealing to the public at large.²⁶⁶ It aims to produce in citizens an “enlarged mentality”²⁶⁷ about important issues of public policy.

In offering the New England town meeting as a model of deliberative fiscal decision-making, I do not mean to suggest that it is, in some abstract sense, an ideal form of democratic decision-making. There are undeniable drawbacks and limitations to the face-to-face exchange that takes place in the town meeting format.²⁶⁸ Mansbridge herself highlights many of these shortcomings, including the fact that many citizens find the setting too confrontational and intimidating to participate fully in the decision-making process.²⁶⁹ Moreover, it seems unlikely that the town meeting can be used in larger jurisdictions. Selby had a population of roughly 350 people of voting age.²⁷⁰ How could Los Angeles possibly replicate the deliberative qualities of the Selby town meeting? Needless to say, the town meeting is not a realistic decision-making option for many modern municipalities.

²⁶⁵ Manin, *supra* note 233, at 349-350.

²⁶⁶ BOHMAN, *supra* note 241, at 5 (“The deliberative process forces citizens to justify their decisions and opinions by appealing to common interests or by arguing in terms of reason that ‘all could accept’ in public debate.”); *see also* Selya Benhabib, *supra* note 241, at 71-72 (“This process of articulating good reasons in public forces the individual to think of what would count as a good reason for all others involved.”).

²⁶⁷ Benhabib, *supra* note 241, at 72 (citing Arendt and Kant).

²⁶⁸ *See* Michael Rabinder James, *Review of Ricardo Blaug, Democracy Real and Ideal*, CONSTELLATIONS, Sept. 2001, at 420, 422 (book review) (noting the “hidden forms of power” that often operate to influence legislative outcomes in the unitary model).

²⁶⁹ *See* Jane J. Mansbridge, *Town Meeting Democracy*, in DILEMMAS OF DEMOCRACY: READINGS IN AMERICAN GOVERNMENT 148, 155 (Peter Collier ed., 1976), *cited in* ZIMMERMAN, *supra* note 252, at 169.

²⁷⁰ *Id.* at 148.

My point is not that local tax politics should be decided by face-to-face deliberation. Instead, I emphasize three other elements of the Selby property tax controversy that *could* in fact be replicated by jurisdictions of a larger scale. First, the prospect of direct participation has the potential of *stimulating citizen interest* in the subject to be voted upon. The fact that one will be asked to express an official view (whether with your neighbors as witness or only at the ballot box) has the potential of stimulating thought and discussion on the question presented. By contrast, where matters are left to the discretion of elected officials, voters may not even be aware of the legislative issues being taken up. Putting local tax questions on the ballot has the potential of provoking community dialogue in the weeks leading up to the referendum. As noted by Swiss economist Bruno Frey, a firm believer in direct democracy's deliberative potential, "[r]eferenda stimulate *discussion* among citizens, and between politicians and voters."²⁷¹ Following Frey's reasoning, one might add that the prospect of a popular vote can stimulate debate in a variety of social venues—in classrooms, around the dinner table, in the workplace—regarding the important question of how local tax burdens should be distributed.

Second, debates over the property tax measure in Selby were shaped by a *broad civic awareness of the burdens and benefits created by the proposed tax increase and their differential allocation among various groups within the community*.²⁷² Mansbridge's account suggests that everyone seemed to understand that the old-timers, as the holders of the bulk of the community's property wealth, would bear a relatively larger share of the proposed tax burden. They also understood that the newcomers, with more children in the Selby schools, would be the principal beneficiaries of the increased school budget. These clear battle lines made deliberation possible by making it *relevant*. As William Schambra has written, "public involvement and therefore social obligation are achieved only when the citizen experiences, *in a concrete way*, the connection between private interest and public affairs."²⁷³ Schambra's comment highlights an important feature of

²⁷¹ Bruno S. Frey, *Direct Democracy: Politico-Economic Lessons from Swiss Experience*, AM. ECON. REV., May 1994, at 338, 339; see also Iris Bohnet & Bruno S. Frey, *Direct-Democratic Rules: The Role of Discussion*, 47 KYKLOS 341, 341 (1994) (arguing that "institutionalized communication opportunities enable individuals to privatize a decision, and to create and choose between new alternatives, thus extending an individual's possibility set").

²⁷² Advocates of the right to vote on taxes reject this perspective, viewing taxation as something that government does to people, rather than as something that citizens do to themselves. The image upon which it rests is that of the government sticking its hands into the pockets of private citizens. "But alas," as John Dewey once noted, "the public has no hands except those of individual human beings." DEWEY, *supra* note 237, at 82.

²⁷³ William A. Schambra, *From Self-Interest to Social Obligation: Local Communities v. the National Community*, in MEETING HUMAN NEEDS: TOWARD A NEW PUBLIC PHILOSOPHY 33, 45 (Jack A. Meyer ed., 1982) (quoting Alexis de Tocqueville: "If it is a question of taking a road past his property, he sees at once that this small public matter has a bearing on his greatest private interests, and there is no need to point out to him the close connection between his private profit and the general interest.").

the Selby property tax controversy; clarity in the allocation of tax burdens is an essential precondition for meaningful tax deliberation to take place. Where the distributive effects of proposed local tax burdens are uncertain, deliberation is frustrated because the stakes for any one individual are unclear. It also seems likely that deliberation will be less rigorous where the proposed tax burden is likely to fall on persons other than those entitled to vote. If deliberative democracy envisions a process of community dialogue among interested parties, then it would seem that meaningful debate is most likely where tax burdens are borne locally.

Finally, knowing who would be burdened and why also had the effect of prompting residents to consider alternative solutions. On this point, one particular aspect of Mansbridge's account deserves special mention. Recognizing that her family's tax contributions would likely exceed the benefits they would consume, one farmer's wife in Selby proposed a local income tax to replace the property tax.²⁷⁴ The option (which was not available under state law) was a logical one to propose. As she saw it, switching from a property tax to an income tax would more accurately reflect the value of the benefits that families were in fact receiving.²⁷⁵ The income tax proposal offers a nice illustration of what direct democracy *could* offer in the local tax setting. If state law had allowed Selby to consider an income tax, then citizens would have had the opportunity to confront more directly the fundamental questions of tax: the questions of who should be burdened and why; who should benefit and why; and most important, how to actually implement the answers to these questions once a collective judgment is made.

2. *Act 50 and the Choice of Local Tax Base.*—A contemporary example of what role direct democracy might play in the local tax setting can be seen in Pennsylvania's recent school finance reforms. Pennsylvania's Act 50 begins where the Selby town meeting left off. In an effort to give local communities the opportunity to reduce their reliance on the property tax, Act 50 authorized local voters to adopt a residence-based income tax to replace a portion of local property taxes and certain other "nuisance taxes" such as occupational privilege taxes and business license fees.²⁷⁶ In other words, Act 50 gave communities the opportunity to debate what Selby could not: whether the property tax should be replaced with a local income tax.

²⁷⁴ MANSBRIDGE, *supra* note 253, at 46. As a result, deliberation over the trade-offs involved in switching from a property tax to an income tax never got off the ground.

²⁷⁵ Political theorists going back at least to Hobbes have expressed a similar intuitive appeal for benefit taxation. See R.A. Musgrave, *A Brief History of Fiscal Doctrine*, in 1 HANDBOOK OF PUBLIC ECONOMICS 1, at 16-18 (Alan J. Auerbach & Martin Feldstein eds., 1985).

²⁷⁶ Act of May 5, 1998, § 9, 1998 Pa. Legis. Serv. Act 1998-50 (West); see also PENN STATE COLL. OF AGRIC. SCIENCES COOP. EXTENSION, UNDERSTANDING SCHOOL TAX CHANGE UNDER ACT 50 OF 1998 (1998), available at <http://pubs.cas.psu.edu/FreePubs/ua326.html>.

Intelligent consideration of such a shift requires detailed information about who is currently bearing the tax burden under the property tax and who would bear most of the burden under the income tax. To assist communities in addressing these questions, Penn State agricultural economist Timothy Kelsey has developed a series of training videos and information pamphlets geared toward giving local citizens the tools to engage in intelligent deliberation and to make reasoned decisions.²⁷⁷ Kelsey's program, titled *Local Taxes & Our Community*, is essentially a how-to course in deliberative democracy as it applies to questions of local taxation.²⁷⁸ Its central objective is to educate local citizens about the state's system of local taxes to make their fiscal deliberations more meaningful. "What communities need," as Kelsey explains, "is a clear way to identify who pays the local taxes, the impact of a particular tax on different taxpayers, who has the ability to pay, and who needs which municipal services."²⁷⁹

Like the income tax proposed by the farmer's wife in Selby, Tim Kelsey's training program offers a glimpse of direct democracy's deliberative potential in the local tax setting. What it envisions is a deliberative process that obliges citizens to face off over the central question of how local tax burdens should be allocated. One such process is underway in Lehigh County, Pennsylvania. There, a contingent of local farmers has been gathering signatures to put the tax shift on the local ballot for a popular vote.²⁸⁰ Citing rising property tax rates and the recent dip in market prices for crops, the farmers contend that local wage earners should bear a larger portion of the cost of the community's public schools.²⁸¹ Whether anything comes of their efforts remains to be seen, but the possibility of such battles is what makes deliberation possible. What the Lehigh farmers want, and what Act 50 invites them to debate, is a fundamental reassessment of a school financing arrangement that has persisted for years. Such a reassessment obliges community members to articulate their preferences, hear out the arguments of others and consider anew the allocation of local government burdens and benefits. As the Lehigh experience with Act 50 reveals, popular voting on local tax measures need not be concerned solely with the question of taxpayer consent. Among its potential by-products is a renewed emphasis on deliberative local democracy.

²⁷⁷ See Timothy W. Kelsey, *Local Taxes & Our Community*, at <http://cax.aers.psu.edu/LTOC/> (last visited Nov. 7, 2001).

²⁷⁸ See *id.*

²⁷⁹ Gary Abdullah, *Coping with Community Taxes*, PENN ST. AGRIC., Winter/Spring 2000, at 26, 27.

²⁸⁰ Dan Hartzell, *Farm Group Wants Relief from Tax on Property: Members Lobby School Boards to Use New State Law to Shift More Burden to Wages*, ALLENTOWN MORNING CALL, Feb. 17, 2001, at B6.

²⁸¹ *Id.*

C. *The Influence of Tax Structure on Fiscal Deliberation*

Could the right to vote on taxes play a role in bringing about more deliberative processes of local fiscal decision-making? Is there any reason to think that constitutional amendments such as California's Proposition 218 might bring cities like Los Angeles or Palo Alto closer to the experience of the Selby town meeting? It is easy to be skeptical in answering these questions. After all, there is little evidence from the past five years to suggest that California's "right to vote on taxes" initiative has sparked a renaissance in local deliberative politics. In most California cities, Prop 218 has had little more than a nuisance effect, spawning litigation over its scope and contributing to the "ballot fatigue" that voters feel when faced with ever longer lists of issues to decide on election day. The initiative's flat effect on local politics should perhaps come as no surprise, given that most local tax votes in California concern relatively marginal revenue sources, such as transient occupancy taxes, utility users taxes and business license taxes.

Ultimately, the key to unlocking tax voting's deliberative potential may lie in reforming the local tax structure along the lines suggested by the optimal tax assignment literature discussed above.²⁸² Recall that the key insight of that literature is the importance of having local governments rely primarily on *residence*-based taxes rather than *source*-based taxes.²⁸³ One potential by-product of relying on residence-based taxes is an increased level of political conflict over local tax policy and a corresponding increase in political participation and deliberation. To illustrate this point, it is necessary to emphasize the role of conflict in stimulating public deliberation. Political scientists have long recognized the relationship between conflict and political participation.²⁸⁴ While it is certainly not the only factor, intuition suggests that the degree of popular engagement in issues of public concern will vary depending upon the contentiousness of the underlying issue. Put differently, conflict breeds deliberation. Political theorist Benjamin Barber has developed this theme in elaborating his "strong democracy," which "acknowledges (and indeed uses) the centrality of conflict in the political process."²⁸⁵ Barber endorses democratic institutions that seek to "transform conflict into cooperation through citizen participation, public deliberation, and civic education."²⁸⁶ This link between conflict and deliberation is relevant to the right to vote on taxes insofar as one accepts that different types of taxes may generate different levels of com-

²⁸² See discussion *supra* subpart III.E and accompanying notes.

²⁸³ *Id.*

²⁸⁴ See J. Eric Oliver, *The Effects of Metropolitan Economic Segregation on Local Civic Participation*, 43 AM. J. POL. SCI. 186, 191 (1999) (discussing "conflict" models of civic participation).

²⁸⁵ BARBER, *supra* note 146, at 135.

²⁸⁶ *Id.*

munity conflict. For example, public deliberation over an admissions tax for entertainment facilities is likely to be quite different—less “deliberative,” we might predict—than arguments over whether to increase residential property taxes or local residents’ income taxes. Again, Schambra’s point about incentives for deliberation is relevant here: “public involvement and therefore social obligation are achieved only when the citizen experiences, *in a concrete way*, the connection between private interest and public affairs.”²⁸⁷

The relevant point here is that the concreteness of the citizen’s experience with local taxes is largely a function of the types of taxes that local governments are permitted to use. When making political choices relating to tax assignment and tax design, therefore, we should be attentive to the effect of those choices on the nature and quality of local democratic deliberation. Taxes that are paid directly by local residents may be more likely to stimulate citizen interest than those whose burden is felt indirectly. Thus, one important tax assignment principle underlying a deliberation-focused right to vote on taxes might be to increase reliance on taxes borne by voter-residents and reduce reliance on those taxes whose burden will likely be exported to non-residents or absorbed through higher prices. These need not be iron-clad principles of tax assignment; some taxes on non-residents and businesses may be necessary to account for benefits provided. On the other hand, relying on indirect or exportable taxes as a source of general revenue arguably fosters civic disengagement, a variation of what Kenneth Karst has called “avoidance of citizenship” in another context.²⁸⁸ Under this view, local revenue sources such as transient occupancy taxes and business license taxes get lower marks; reliance on such taxes frustrates the deliberative project, giving local residents too easy an answer to the difficult question of fiscal exchange.

What specific local taxes might be suitable to a deliberation-focused right to vote on taxes? One possibility is the local residence-based income tax. As noted above, Ohio and Pennsylvania make active use of the local income tax, but in most of the United States local governments make little or no use of the income tax.²⁸⁹ By contrast, in Europe and Asia the income tax is a very common source of revenue for local governments. This is especially true in Scandinavian countries, all of which rely heavily on income taxes as a source of local revenue. In Denmark, for example,²⁹⁰ the residence-based income tax makes up nearly ninety-two percent of local gov-

²⁸⁷ Schambra, *supra* note 273, at 45.

²⁸⁸ Kenneth Karst, *Local Discourse and the Social Issues*, 12 CARDOZO STUD. L. & LITERATURE 1, 1 (2000).

²⁸⁹ See *supra* section III.D.2.

²⁹⁰ Lars Soderstrom, *Fiscal Federalism: The Nordic Countries’ Style*, in PUBLIC FINANCE WITH SEVERAL LEVELS OF GOVERNMENT 37 (Rémy Prud’homme ed. 1991).

ernment tax revenues.²⁹¹ The percentage is even higher in Sweden and Finland.²⁹² Those states interested in pursuing a deliberation-focused right to vote on taxes might do well to follow the lead of these countries and rely on residence-based income taxes as a source of local government revenue. Given the directness of its burden as compared to many other types of taxes, the local income tax seems more likely to provoke robust community dialogue about the purpose of public projects and the allocation of local tax burdens.

Another possibility is the local property tax.²⁹³ A renewed emphasis on the residential property tax might bring about more meaningful citizen involvement in local public debates, provoking residents to think about their relationship to their communities. Given the traditional role of property tax referendums in American local public finance, it is ironic that the local governments in states adopting a right to vote on taxes have the least amount of discretion to change local property tax levels. California is the most extreme example, with constitutional limitations that shield the property tax almost completely from local revision.²⁹⁴ These limitations have pushed local governments to fund public programs from alternative tax sources, and that change has fundamentally altered the nature of local tax politics throughout the state. What the California experience teaches is that the local property tax is actually a very important local democratic institution; its substantially diminished role in local fiscal politics in the years since Prop 13 has stultified local tax deliberation, dampening the local democratic experience. The right to vote on taxes is unlikely to stimulate meaningful popular participation in local tax politics unless we move beyond these strictures.²⁹⁵ In this regard, it is interesting to note that the property tax is undergoing something of a renaissance in South Africa.²⁹⁶ California and other states that have substantially curtailed reliance on the local property tax might do well to follow Cape Town's lead.

²⁹¹ *Id.* at 41 (Table 4).

²⁹² *Id.*

²⁹³ For a recent and very useful discussion of the future of the local property tax in the United States, see David Brunori, *To Preserve Local Government, It's Time to Save the Property Tax*, 21 ST. TAX NOTES 813 (September 10, 2001).

²⁹⁴ See *supra* subpart I.A.

²⁹⁵ One possibility would be to tax nonresidential property on a uniform state-wide basis, returning the proceeds to localities via some sort of intergovernmental grant, and to permit localities, subject to majority voter approval, to impose or increase local property taxes on residential property. I have advocated such a proposal in earlier work. See Kirk J. Stark, *Rethinking Statewide Taxation of Nonresidential Property for Public Schools*, 102 YALE L.J. 805 (1992).

²⁹⁶ See Riel C.D. Franzsen, *Local Government and Property Tax Reform in South Africa*, LAND LINES, May 2000; Joan Youngman, *South Africa: Land Policy and Taxation in Transition*, LAND LINES, November 1997.

CONCLUSION

Like the many tax revolts that preceded it, the right to vote on taxes “has indeed been born without an analytical blueprint or even an analytical map.”²⁹⁷ There are no “founding fathers” to speak of; no “constitutional moments.”²⁹⁸ Tax voting initiatives in California and elsewhere have simply been layered on top of existing limitations, resulting in a fiscal constitution that can be understood only with an archaeologist’s appreciation of the currents and forces that shaped it. To say that this fiscal constitution is the product of historical accretion, however, is not to discount the role of human agency in its design or amendment. The constitutional architect still has a role to play, though one that is substantially constrained by the enduring pull of history.

In that spirit, I have attempted to interpret the right to vote on taxes for what it is—a product of the same anti-tax sentiment that gave rise to Proposition 13—and to suggest certain issues of structure and design that might be taken into account in any subsequent project of constitutional reform. More specifically, I have tried to highlight the difficulties involved in implementing a principle of taxpayer consent when the tax burdens created by local governments are unlikely to fall solely on local residents. As I have argued, questions of tax assignment and tax design are especially relevant to the right to vote on taxes. All tax limitations limit the fiscal discretion of locally elected representatives, but only the right to vote on taxes puts the ultimate taxing authority in the hands of community residents. Recognizing that these residents are likely to behave differently depending upon the nature of the tax they are called upon to consider, we should be open to reforms that could result in a more meaningful deployment of direct democracy in the local tax setting. A conscious manipulation of the tax base, along the lines that I have suggested above, might lead to a different sort of right to vote on taxes, one that respects the popular urge for direct democracy, but also encourages citizens to engage in meaningful reflection and deliberation regarding the allocation of local tax burdens.

²⁹⁷ BRENNAN & BUCHANAN, *supra* note 1, at 189.

²⁹⁸ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

