

**DEFINING A ROLE FOR DIRECT DEMOCRACY IN  
NON-ESSENTIAL GOVERNMENT SPENDING**

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INTRODUCTION

The task of raising revenue to provide public goods such as roads, schools, and emergency services is unquestionably within the authority of most representative local governments. The public mandate for these goods is unquestionable, and their basic availability at the local is non-negotiable. It makes sense, then, that local governments would choose to cover the cost of essential public goods and services through mandatory, broad-based taxes such as the sales tax, income tax and real property tax. In these cases, constituents' aggregate preferences for the provision of public goods will be closely aligned with the local government's actual provision of such goods, if not in extent, then at least in kind. As a result, paying for the goods with a mandatory tax levied through representative democratic processes is not conceptually troublesome. The same alignment of public and governmental interests does not always hold true, however, for local governments' provision of non-essential public goods, which are nonetheless frequently financed with mandatory broad-based taxes levied through a representative democratic process.

This paper questions whether representative democracy, standing alone, is a normatively desirable institution for generating revenue to support discretionary local government spending on certain non-essential public goods. It examines the existing balance of direct democratic and representative democratic decision making in local governments and concludes that it is not a balance at all, but rather, an imbalance. Although direct democracy in tax and spending decisions may function as an important check on representative democracy, to extent that direct democracy currently is employed in that context, it is an all-or-nothing proposition. Voters either accept a new tax or spending proposal, in which case it becomes law, or they do not, in which case it is never enacted and no revenue is raised. This construct leaves no room for proportional decision making on local tax or expenditure issues, and it provides only a limited, one-off opportunity for public input on local

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**\*\*DRAFT\*\***

spending decisions.

Although proportional decision making in taxation making has been criticized by some commentators as not indicative of public choice, there nonetheless are circumstances in which it would be appropriate and helpful, particularly in the context on ongoing non-essential, non-capital discretionary spending. In addition to its potential to facilitate the efficient provision of non-essential public goods, a proportional tax decision making process would, by its very existence, create a deliberative democratic debate over the role of representative government in providing such goods, versus the role of charitable organizations in doing the same. This paper will explore the desirability and viability of directly democratic system of proportional decision-making in the context of local taxation. Building upon my prior work, and using a unique opt-out tax levied in Germany as an example, I seek to show that some localities in the United States could benefit from use of such a process as a means of funding the provision of non-essential public goods, particularly where these goods are not within the local government's usual scope of activity or where they are more charitable than governmental in nature. This could be achieved by allowing taxpayers to opt out of their obligation to pay for appropriately identified non-essential expenses. If viable, the use of an opt-out system to engage in proportional decision making on certain government non-essential expenditures would alter the dialogue between residents and local governments, foster debate among residents themselves, and provide a more equitable and efficient allocation of resources.

### **I. Imbalance in direct and representative democracy and taxes**

The question of democracy's role in the enactment of local taxes is both weighty and underserved. Although the so-called tax revolt of the 1970s produced a rich literature on the propriety of California's Proposition 13 and similar pronouncements, scholars of direct democracy and taxes have primarily focused on ballot-box voting by constituents. A second form of direct democracy, proportionate decision making, has generated almost no positive discussion.<sup>1</sup> I seek to fill this gap by

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<sup>1</sup> Saul Levmore, in a lone paper, has spoken out against it.

**\*\*DRAFT\*\***

introducing a new element to the direct democracy tax debate: the use of proportionate decision making through an opt-out system of financing certain non-essential public goods.<sup>2</sup>

The importance of democratic processes in public finance cannot be overstated. The United States has a jaw-dropping array of local government institutions, such as counties, cities, school districts, fire departments, utilities, and countless other special purpose districts. The 2002 census counted more than eighty-seven thousand such entities.<sup>3</sup> They spent in excess of \$2.3 trillion in 2004, which was approximately nineteen percent of the United States GDP.<sup>4</sup> The enormity of this expense justifies a deeper inquiry into the direct and representative democratic processes by which localities raise and spend revenue, which is a task made difficult by the loosely defined role local government, and the variance of that role based on the entity, the circumstances in which it finds itself, and the political beliefs of its constituents. Because it is impossible to address them individually, I will refer to localities generally for purposes of my proposal. I readily acknowledge that not all localities can, or should, adopt an opt out system to finance certain non-essential goods. Many, however, will be properly situated to consider it.

Local governments usually raise revenue through a combination of taxation, fee-for-use charges, and borrowing. Taxes are generally thought of as costs imposed on all taxpayers within a local government's jurisdiction for purposes of covering the government's expenses.<sup>5</sup> They

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<sup>2</sup> Kornhauser and other tax revolt articles here.

<sup>3</sup> U.S. Census Bureau, 2008 Statistical Abstract, <http://www.census.gov/compendia/statab/2008edition.html>. See also Akash Deep and Robert Lawrence, *Stabilizing State and Local Budgets: A Proposal for Tax-Base Insurance*, The Hamilton Project, Discussion Paper 2008-1 (2008), [http://www.brookings.edu/papers/2008/06\\_tax\\_base\\_lawrence.aspx](http://www.brookings.edu/papers/2008/06_tax_base_lawrence.aspx).

<sup>4</sup> Akash Deep and Robert Lawrence, *Stabilizing State and Local Budgets: A Proposal for Tax-Base Insurance*, The Hamilton Project, Discussion Paper 2008-1 (2008), [http://www.brookings.edu/papers/2008/06\\_tax\\_base\\_lawrence.aspx](http://www.brookings.edu/papers/2008/06_tax_base_lawrence.aspx).

<sup>5</sup> Laurie Reynolds, *Taxes, Fees, Assessments, Dues, and the "Get What You Pay For" Model of Local Government*, 53 Fla. L. Rev. 373, 379 (2004). This, of course, is not the only definition of taxes; however, the fine distinctions that exist among various definitions are not relevant to our discussion, which focuses not tax per se, but rather, on the proper role of direct democracy in public finance. For a fuller discussion of what is or is not a tax, see \_\_\_\_\_.

**\*\*DRAFT\*\***

are imposed without regard to the particular benefit received by any individual payor, but rather, are regarded as contributions to the general welfare of all.<sup>6</sup> Taxes may take a variety of forms, but property and sales taxes are most common at the local level.<sup>7</sup> In addition, a few states allow local governments to levy income taxes.<sup>8</sup> Local governments may also charge fees or special assessments for specific benefits provided to individual constituents.<sup>9</sup> For example, bus fare, dog licenses, and charges for water, sewer, and garbage disposal are all revenue generating activities that are not thought to be taxes but which are, nonetheless, an important component of local public finance.<sup>10</sup>

The rising use of fees and assessments has given rise to criticism. Professor Laurie Reynolds has observed that local governments' greater reliance on fees may "have a privatizing effect on government services."<sup>11</sup> Furthermore, it also may cause constituents to view the government merely as a provider of privately rendered goods and services.<sup>12</sup> The instantiation of such a view among taxpayers would be pernicious because the "get what you pay for" mentality may produce widespread opposition to the use of general tax dollars for redistributive purposes and, more fundamentally, taxation efforts in general."<sup>13</sup> This view, which objects strongly to a payment-for-services model of government, has definite implications for the use of a proportional model of direct democracy in local taxation. If Professor Reynolds' assertion is correct, the use of goods provided through a proportional decision-making process should not be limited to those who voted in favor of funding the goods. Rather, if one accepts the premise that payment patterns influence public perception,

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<sup>6</sup> Reynolds at 379.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 379 - 380. For instance, as your author is painfully aware, both Columbus, Ohio and New York City have income taxes at the local level.

<sup>9</sup> *Id.* at 380.

<sup>10</sup> *Id.*

<sup>11</sup> Reynolds at 380.

<sup>12</sup> *Id.* Professor Reynolds notes that this view of government is undesirable in its consumer, rather than civic, orientation.

<sup>13</sup> Reynolds at 375. See also Gillette at 1244 (limiting the taxing power of home rule cities forces them to rely on other instruments of funding, which "has a more subtle and potentially more notorious consequence of instantiating a particularly limited view of the proper role of cities.")

**\*\*DRAFT\*\***

such goods should be true public goods, available to all.

Most scholars who study public finance at the local level credit the rise of fee usage by local governments to state restrictions on the local taxing power.<sup>14</sup> The genesis of many of these restrictions gives rise to a second interesting context in which to place proportional democratic decision making in local public finance. Over the past three decades, local tax and spending restrictions have become more commonplace and, interestingly, many such provisions found their genesis in the direct democratic process itself.<sup>15</sup> California's Proposition 13 is generally acknowledged progenitor of these measures,<sup>16</sup> and in light of my recommendation that states permit local governments to use direct democracy in a proportional manner, a brief discussion of its passage and broader effect is warranted. The subject has been extensively covered elsewhere, so this overview will not be comprehensive.<sup>17</sup> Rather, it is intended to highlight one way in which direct democracy comes to the fore in tax and spending decisions: through the voter initiative process.

Popularly hailed as the beginning of a nationwide property tax revolt, California's Proposition 13 is the most discussed direct democratic tax decision of the past century.<sup>18</sup> As such, it is unquestionably relevant to the appropriate role of the direct democratic process in tax decision making. Rather than serve as a model for the process, I assert that Proposition 13 and its progeny created an imbalance between direct and representative democracy, that this imbalance forces local representatives into inefficient, suboptimal decision-making. I further argue that correcting the balance of direct and representative democracy could prevent future constituent overreach through the direct democratic process.

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<sup>14</sup> Reynolds, Gillette and Stark.

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<sup>17</sup> Stark, Mildred Wigfall Robinson, and many others.

<sup>18</sup> See Isaac William Martin, *The Permanent Tax Revolt, How Property Tax Transformed American Politics*, pg. 14, Stanford University Press 2008 (popular referendum was a watershed moment in tax politics); Stark, 96 *Nw. U. L. Rev.* at 192, Fn. 7 ("Prop 13 has spawned an enormous literature."); . [other prop 13 articles here]; Wigfall Robinson at 533 ("Proposition 13's passage ignited a conflagration.").

**\*\*DRAFT\*\***

The state constitutional amendment approved by Proposition 13, which specifies that local property tax rates must not exceed one percent of the full cash value of subject property, resulted from citizens' dissatisfaction with modernization of California's antiquated tax regime.<sup>19</sup> In the years immediately preceding Proposition 13, California and other states began to eradicate a practice called fractional assessment.<sup>20</sup> Although not always permitted by law, local tax assessors were known to record properties at a fraction of their true value.<sup>21</sup> Because property taxes are the product of the local tax rate and property value, fractional assessment reduced the tax liability of those whose property was undervalued by the assessor.<sup>22</sup> As one might imagine, this practice, whether locally accepted or openly fraudulent (or both), placed an undue amount of discretion in the hands of assessors, who were generally elected officials.<sup>23</sup> On the books, then, influential families and campaign contributors may have resided in unplumbed hovels, while those with less social or economic clout notionally lived large.<sup>24</sup> According to at least one scholar, fractional assessment of property values was the single largest tax subsidy of the post-war era: ten times greater than the home mortgage interest deduction.<sup>25</sup>

As a redistributive matter, fractional assessment was a disaster, and the push for social justice in the 1960s eventually resulted in sweeping amendments to the system.<sup>26</sup> California created a central administration with standardized assessment procedures, and as a consequence, the property values used to calculate local taxes rose precipitously.<sup>27</sup> Although standardization furthered fairness, it also shocked the citizenry,

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<sup>19</sup> Cal. Const. Art. XIII A; Martin, Permanent Tax Revolt at 6 - 15.

<sup>20</sup> Martin, Wigfall Robinson, Stark.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Martin at 9.

<sup>26</sup> Martin at 12.

<sup>27</sup> Martin at 7. Prior to the amendment, most people paid tax on only a portion of the value of their property, which provided insulation for market shocks. This was particularly important in California, where wartime and postwar construction sent property values skyward. *Id.*

**\*\*DRAFT\*\***

who responded in an unprecedented way.<sup>28</sup> Studies have shown that the typical Proposition 13 protestors was average: voters came from all walks of life and from both sides of the political aisle.<sup>29</sup> The Proposition 13 tax protest was not the conservative movement that we might imagine today. It was truly a grassroots uprising.

Scholars almost universally agree that Proposition 13 was the first domino to fall in citizens' direct democratic bid to restrict local finance.<sup>30</sup> Immediately afterward, a wave of states voted on tax and spending limits, leading scholars to coin the term "tax revolt."<sup>31</sup> As a result, a number of state constitutions now contain express limitations on the tax and spending powers of local governments.<sup>32</sup> Professor Stark has noted that these restrictions tend to fall into two broad categories: direct measures that limit the tax rate, tax base or spending decisions; and procedural measures such as those that require a popular vote or supermajority approval requirements for new taxes or increased rates.<sup>33</sup> Although the efficacy and advisability of these restrictions necessarily must vary widely on the basis of local government and constituent composition, the general scholarly consensus on them has been disapproval.<sup>34</sup> Rather than add my voice to the many, I instead suggest that guiding direct democratic tax decision-making is a better solution than undermining it.

*A. What is wrong with direct democratic tax restrictions?*

To best understand how to usefully employ direct democratic decision-making in the local tax arena, we must first understand the representative democratic flaws that it was meant to correct, and why its current form is not the optimal form for that correction to take.

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<sup>28</sup> Martin, Robinson, Stark.

<sup>29</sup> Martin at 3.

<sup>30</sup> Martin, Robinson, Stark, others.

<sup>31</sup> Stark at 191 (noting that Colorado, Michigan, Missouri, Montana, and Washington all have voted in favor of constitutional amendments requiring local governments to seek approval through popular vote on new and increased taxes); Robinson at 532-33 ("Proposition 13 set off a chain reaction.").

<sup>32</sup> *Id.* [create current list of states and provisions].

<sup>33</sup> Stark at 193.

<sup>34</sup> Robinson at \_\_\_\_, Gillette at \_\_\_\_.

**\*\*DRAFT\*\***

It is clear that Proposition 13, when viewed in isolation, was a direct response to bad decisions made by local governments. First, local governments made up of elected officials failed to effectively limit the discretion wielded by tax assessors who were also elected officials. This resulted not only in patronage but also in generally regressive effective rates of property taxation.<sup>35</sup> Second, when this mismanagement was corrected through state centralization, local governments made up of elected officials failed to adjust property tax rates downward in response to an increase in assessed property values.<sup>36</sup> Although the first of these mistakes was, perhaps, openly and notoriously a part of the representative democratic process in localities, the second, which led to the tax revolt, likely was not. In other words, elected officials' sudden and perhaps unwitting insistence on collecting the full rate of property tax on the full value of constituents' homes and businesses was not anticipated by constituents at the time of the most recent election. Rather, it was outside the scope of predictable local government actions. In other words, the actions of elected officials were not representative of constituents' preferences, nor were they the result of a deliberative debate that weighed constituents' preferences and struck a balance. State intervention, then, created a failure of the local representative process. It is natural, then, that constituents sought channels other than representative democracy to voice those preferences.

From the standpoint of a democratic theorist, which I do not yet claim to be, the lack of symmetry between constituents' preferences and the actual outcomes produced by representative democracy is not troubling, and in fact, this result is common at all levels of government in the United States. Furthermore, it is not troubling that representative governments produce unexpected outcomes under exigent circumstances. However, a radical deviation from the expected course of governance, such as local governments' failure to adjust tax rates in response to a drastic state-generated widening of the tax base, may fall beyond the scope of actions and omissions implicitly approved by constituents. It is not laughable to claim that Proposition 13 arose as a direct result of constituents' perception of a local government asset grab and the resulting consensus that this asset grab was, or should be, beyond the scope of local

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<sup>35</sup> (Permanent Tax Revolt)

<sup>36</sup> *Id*

**\*\*DRAFT\*\***

government's power.

If we take this story to heart, it becomes clear that the balance of representative and democratic democracy in tax decision-making must be delineated in terms of appropriate local government functions. Assume for a moment a pure form of representative democracy where officials are elected by constituents to act on their behalf in local governance. In this scenario, local government officials are agents of sorts. They are empowered by constituents to make decisions on the constituents' behalf on matters delegated to them. I argue that this delegation occurs not only through governing documents such as the state constitution, city charter, or state statutes, but also through the collective expectations of the electorate. Where the actions of a representative democratic government fall beyond the scope of those implicit delegations by expectation, the risk of constituent revolt increases. In other words, constituents believe that by voting, they are making their voices heard on the range of expected issues generally presented to local government. Where the local government steps beyond the boundaries of those expected issues, it acts without the authorization of its constituents. Constituents then recognize that representatives are either unable to perceive the constituents' implicit delegation of authority to them, or that representatives are simply ignoring the limits of that delegation. As a consequence, where the cost of an implicitly unauthorized action is high, constituents may seek to be heard through means other than the representative democratic process, such as complaint, protest or, more forcefully, a ballot initiative formally limiting the scope of local government. In this scenario, we might characterize the resulting ballot initiative as a direct democratic check on representative democracy. Less charitably, we could characterize it as a collective power grab.

In the area of tax and spending, though, a power grab of this sort can be particularly troubling. Just as representative democratic local governments can overstep their boundaries by seizing private interests, direct democracy may allow private citizens to overstep their boundaries by seizing public ones. This happens when direct democratically enacted tax restrictions impinge on the representative government's provision of

**\*\*DRAFT\*\***

essential governmental functions.<sup>37</sup>

A version of this argument against the use of direct democracy in tax decisions is forwarded by Professor Robinson, who asserts that, “[b]y its very nature, ballot box revenue-collection and budgeting cannot be informed by coherent tax or fiscal policy.”<sup>38</sup> Furthermore, the direct democratic process does not allow for a wide range of participation and accountability and may easily go astray.<sup>39</sup> Because voter participation may be quite low, a very small number of voters may drive the decision-making process. Finally, because voters have used the direct democratic process to limit local governments’ ability to raise revenue, and because the amount of services provided by local governments is directly tied to the amount of revenue they can generate, direct democratic tax decision making has the power to impinge on the essential functions of local government.<sup>40</sup>

Despite these difficulties, very few commentators have called for the abolition of direct democracy in tax decision-making.<sup>41</sup> As Professor Robinson notes, this is because it provides a necessary and useful check on representative democracy.<sup>42</sup> What is needed, then, is a means of limiting, rather than eliminating, direct democracy.

Commentators have called for a number of checks on the use of direct democracy in tax decision-making, the bulk of which are beyond the

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<sup>37</sup> This, of course, assumes that local government has meaning independent of that granted by its current constituents.

<sup>38</sup> Robinson at 519. This is because the direct democratic process makes it nearly impossible for voters to “consider and accommodate competing principles in the fiscal lawmaking process.” Robinson at 543. Furthermore, the initiative process is less deliberative than the usual means through which a statute or regulation is created and enforced. Robinson at 546-47. A non-initiative process may allow for public hearings, legislative debate and compromise, and judiciary input. *Id.* Each of these points in the process provides a juncture at which constituents can hold representatives accountable for their actions. *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> [Examples from California and other states (police/fire cuts)]

<sup>41</sup> Robinson at 559 (noting that “[r]epeal would be, at a minimum, politically unpopular.”)

<sup>42</sup> Robinson at 559 (properly structured initiatives “could serve as a safety valve and could be a very useful conduit for public opinion.”).

**\*\*DRAFT\*\***

scope of this paper. Suggestions include amending state constitutions to limit the use of direct democracy in tax and spending decisions, limiting voter input on those decisions to referenda originating with the legislature, offering multiple combinations of tax and spending choices on ballots to allow for more deliberative decisions, and changing the final product of the initiative process into instructions to the legislature rather than a constitutional amendment.<sup>43</sup> Although each of these proposals could certainly have the effect of preventing direct democratic incursion on essential governmental functions, all but one of them —offering multiple funding choices on ballots—would create inorganic strictures on direct democracy’s ability to function as a check on representative democracy.

Naturally, any rigid measure designed to protect the tax and spending process from popular intrusion will shift power from constituents to elected representatives, giving representatives more latitude to act beyond the scope of the authority explicitly and implicitly delegated to them. Short of an omnipotent oracle to pronounce when direct democracy is and is not appropriate, no perfect rules-based restrictions of direct democracy exist. For this reason, I do not propose the institution of any inorganic limitations of representative or direct democratic processes in public finance. Rather, as described more fully below, I propose adding to the existing processes by defining specific opportunities for the exercise of direct democracy in local government spending decisions. These opportunities would be defined to include only certain non-essential government spending. Creating these opportunities will not alleviate the threat of direct democratic usurpation of local governments’ power to provide the essential goods and services; however, by giving voters a greater, more proportional voice in non-essential government spending, my proposal should increase civic participation and buy-in while decreasing the likelihood that constituents will seek blunderbuss all-or-nothing solutions to local tax and spending concerns.

## **II. Defining a Role for Voters in Local Spending Decisions**

In order to provide constituents with an opportunity to constructively participate in local tax and spending decisions, I propose

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<sup>43</sup> Robinson at 562 – 565.

**\*\*DRAFT\*\***

that localities create packages of non-essential spending that constituents could refuse to support if they chose. Like the church tax system in Germany, described below, constituents would automatically be enrolled on the basis of chosen jurisdictional characteristics, such as place of residence or place of work. Constituents could then exercise a right to opt out of the putative charge if they preferred. In addition to rendering other benefits described below, this system would provide constituents with a means of directly participating in local governance without impinging upon essential governmental functions. Furthermore, because constituents would have a defined format for making their preferences known, the likelihood of more intrusive direct democratic participation would be lessened, while direct democracy would nonetheless remain a potential check on the representative democratic process.

Naturally, my proposal raises the question of what, if any, local government spending is “non-essential.” Notice that this inquiry is related to, but not the same as, the question of which government functions are essential and which are not. For instance, consider a universally agreed-upon governmental function, provision of a police force.<sup>44</sup> Most people agree that providing a police force is a core activity of local government. For the time being, then, let us call this an essential government function. Is spending related to this function necessarily essential government spending? Here, the consensus breaks down. For example, in most parts of the country, most people will agree that providing the police force with cars is a necessary expense, but should those cars be unmitigated jalopies? Used Ford Crown Royals? New Bentleys? The example demonstrates that it is possible to have non-essential government spending on an essential governmental function.

The same inquiry into the nature of spending is not necessary for non-essential government activities. We can safely assume that spending on a non-essential government function is non-essential spending. Once again, this observation raises the great imponderable, essential government function. Note, however, that to determine whether a particular spending item is non-essential, and therefore within the bounds of my proposal, it is not important to draw a bright, omniscient line between governmental

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<sup>44</sup> Even famous libertarian Robert Nozick believed that the police force was essential for the protection of private rights in property. *See* Anarchy, State, and Utopia.

**\*\*DRAFT\*\***

functions that are essential and those that are not. In fact, a reasonable conclusion, given a wide range of preferences across geography and among constituencies, is that governments engage in a gradient of activities, some of which are more important than others to constituents in various times and places, and the importance of which must be gauged on the local level. As a consequence, I use the word “non-essential” here to refer not to some omniscient academic standard, but rather, to describe spending that is not strictly within the authority delegated to representatives by their constituents.

As I have described above, the determination of whether a spending falls within the authority implicitly delegated to representatives by constituents is important if one believes that direct democratic incursion on essential governmental functions is more likely to occur when representatives have imposed high costs on constituents while also acting outside of the bounds of this delegation. In essence, my proposal would create a mechanism through which representatives could ask constituents for broader boundaries of spending authority. The proposal would apply to two categories of spending: (1) excessive spending on activities that are within the normal bounds of government function (buying Bentleys for police officers), and (2) *any* spending on activities that without representatives’ implicitly delegated authority.

To determine whether spending falls within representatives’ implicit delegation of authority, I propose weighing three considerations: the tax exempt bond provisions of the Internal Revenue Code; authoritative state sources including the constitution, statutes and charter documents; and the implicit expectations of a majority of the representative’s constituents. I have included the first two items primarily because they influence the third. Furthermore, each of these sources provides a different view of representatives’ usual scope of activities. When all three are in agreement on the positive value of an activity, such as maintenance or roads, they create a strong description of government function. Reasonable expenses allocable to that function should not be considered non-essential. When the Internal Revenue Code, state sources, and implicit constituent expectations are not in agreement, constituents’ expectations should govern.

**\*\*DRAFT\*\***

A. Tax exempt bond law as a descriptor of representative democratic delegation

Although they are not a binding source of authority regarding the power vested in local governments, the tax exempt bond statutes of the Internal Revenue Code are useful descriptors of activities that are clearly within the local government's purview. Congressional consensus on this point is useful as a gauge of national opinion. Furthermore, this consensus shapes national opinion by enabling localities to engage successfully in the described activities, thereby normalizing them as a matter of public regard. Notably, the statutes do not help us define the outer boundaries of local government authority; rather, they list expenditures that Congress clearly views as appropriate for local governments to make. In other words, they rule out spending eligible for my proposal rather than rule it in.

All of the governmental activities described by the tax exempt bond statutes flow from a simple provision in section 103 of the Code: "gross income does not include interest on any State of local bond."<sup>45</sup> In other words, if a bond is one that meets with the Code's approval, its owner will not be taxed on the interest that she receives from it. However, if the bond is a "private activity bond" that is not a "qualified bond," the favorable tax treatment evaporates.<sup>46</sup> I propose that we view this statutory structure as a pronouncement of Congressional recognition of the accepted scope of local governance. In other words, one possible explanation for the private activity bond exception of section 103 is that the unfavorable spending is "private," not sufficiently governmental, and therefore not worthy of the tax benefit provided by the statute. If this is true, an examination of which bonds are worthy of the tax benefit and which are not should reveal some activities that are squarely within the federal understanding of local government function.<sup>47</sup>

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<sup>45</sup> 26 U.S.C. § 103(a) (2010).

<sup>46</sup> 26 U.S.C. § 103(b)(1) (2010).

<sup>47</sup> Another possible way of conceptualizing the statutory structure is that Congress intended to incentivize some activities of local governments, not necessarily because they are core local functions, but rather, because those activities alleviate a burden that is might otherwise be born by the federal government. This argument is not compelling in most instances when viewed in a historical context and against the backdrop of state constitutional provisions for home rule cities. However, some recent amendments to the

**\*\*DRAFT\*\***

Bonds are classified as private activity bonds when ten percent or more of the proceeds of a bond issue are devoted to any private business use and when payments of principal or interest on the bonds are secured by property or payments related to a private business use.<sup>48</sup> Private business use is defined as direct or indirect use in a trade or business carried on by someone other than a governmental unit.<sup>49</sup> Use by someone as a member of the general public, however, is disregarded for purposes of the test.<sup>50</sup> Governmental use is defined unhelpfully as “any use other than a private business use.”<sup>51</sup> If we accept the story of section 103 described above, one aspect of Congressional consensus becomes clear: local governments act outside of their scope of authority when they spend funds on purely private activities.

Defining private activity bonds is not the end of our inquiry. According to section 103, the federal tax benefit is denied only when two criteria are met: (1) the bond is a private activity bond as described above; and (2) the bond is not a “qualified bond.”<sup>52</sup> In other words, qualified bonds meet with Congressional approval, and, in the context of our story of section 103, provide us with additional information about the Congressional consensus on appropriate functions of local government. Qualified bonds must be issued for a one of the particular purposes listed in the statute.<sup>53</sup> The list includes, among other things, bonds for redevelopment, the support of charitable organizations, and the construction and maintenance of “exempt” facilities.<sup>54</sup> Exempt facilities eligible for tax exempt bond funding include airports, docks, mass

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tax exempt bond statutes indicate that Congress may increasing view incentivization as a legitimate use of the regime. For instance, some recent provisions have encouraged the use of green building and construction of high-speed rail between one city and another. *See* 26 U.S.C. § 142. These activities could conceivably be characterized as federal burdens, since they are actively discussed at the federal level.

<sup>48</sup> 26 U.S.C. § 141(a), (b) (2010).

<sup>49</sup> 26 U.S.C. § 141(b)(6) (2010).

<sup>50</sup> *Id.*

<sup>51</sup> 26 U.S.C. § 141(b)(7) (2010).

<sup>52</sup> 26 U.S.C. § 103(b) (2010).

<sup>53</sup> 26 U.S.C. § 141(e) (2010).

<sup>54</sup> *Id.* Some of the listed purposes were clearly intended for state, rather than local, governments, such as the issuance of bonds to fund student loans or home mortgages, as well as for high speed intercity rail.

**\*\*DRAFT\*\***

communications facilities, water and sewer facilities, waste disposal, utilities, residential rental projects, and schools among other things.<sup>55</sup> In our version of the tale, each of these items, from the federal perspective, falls squarely within the delegation of authority to local representatives, while purely private uses do not.

It is worth noting, once again, that the federal statutes do not grant or deny authority to local representatives. Rather, they are merely descriptive and are primarily useful as an indicator of federal consensus. Legally binding grants of local authority come from state sources, not federal ones. Therefore, in order to describe contours of the authority granted to local representatives, we also must consult state and local law.

#### B. State grants of authority to local representatives

A second factor to weigh in the determination of whether government spending is non-essential is whether that spending is related to an activity described by the state laws of local government. Like the federal tax exempt bond statutes, state laws generally describe activities that fall squarely within the purview of local representative government. Occasionally, they also deny certain powers to local government.<sup>56</sup> Unlike the federal tax exempt bond laws, state laws granting or withholding powers from local governments within the state's borders are authoritative and presumptively enforceable by the state judiciary.<sup>57</sup>

State laws, naturally, vary by state. Because a fifty jurisdiction survey is beyond the scope of this paper, let us take a representative example. I choose Ohio not only because it is my home state, but also because it falls squarely within the middle of the country longitudinally, politically, and in terms of its receipt of statehood.<sup>58</sup> Although other

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<sup>55</sup> 26 U.S.C. § 142(a) (2010)

<sup>56</sup> These denials of power are not relevant to my proposal and will not be discussed here. Although they create an outer boundary on permissible local government activity, spending related to them is not merely non-essential, it is actually illegal. For purposes of my proposal, I will assume that local governments do not engage in illegal spending and that

<sup>57</sup> This is not to suggest that a private right of action exists. Rather, I merely note that a state's laws are legally binding on localities that exists within the state's borders.

<sup>58</sup> Ohio, which was created in 1803, was the seventeenth state in the Union. Its large

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states' laws may vary in the details, this variation is not critical to my proposal. However, out of an abundance of caution, I note that a particular state's laws must be weighed when determining the scope of authority delegated to elected representatives in local governments of that particular state.

Ohio's constitution, which is rather spare on the subject of local government's scope, merely provides that "[m]unicipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."<sup>59</sup> The state's general laws provide greater detail. Chapter 715 of the Ohio Revised Code is wholly devoted to describing the general powers of municipal corporations, which are broad. It covers subjects as diverse as planting shade trees, maintaining water treatment facilities, and eliminating houses of ill repute.<sup>60</sup> Among other things, municipalities may create fire departments, provide light, power and heat, regulate use of the streets, construct jails, courthouses and libraries, and abate hazardous conditions.<sup>61</sup> The list of allowable activities is extensive. Representatives are given wide latitude to act in the best interests of their constituents. Like the tax exempt bond statutes, though, purely private activities are noticeably absent from the list.

Although this state statutory catalogue of activities gives some indication of the permissible scope of local government spending, it cannot be relied upon to set outer boundaries. This is because the statutes are a one-size-fits-all solution. Not every activity on the statutory roster will be appropriate in every location. In other words, the fact that representative government can engage in a particular act of spending does not mean that it should. Therefore, when determining which spending decisions representatives should forward to their constituents in an opt-out system of

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size and combination of rural and urban environments allows for a range of political opinions and, in its last two gubernatorial elections, it has chosen both a Republican and a Democrat.

<sup>59</sup> Ohio Constitution, Art. 18.03.

<sup>60</sup> Ohio Revised Code, Chapter 715. An obscure provision from the 1950s even permits the creation of a subway system for the transmittal of United States mail.

<sup>61</sup> *Id.*

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public finance, we must also consider the implicit expectations of the constituents themselves.

C. Constituents' preferences are relevant to the legitimacy of spending

Constituents' aggregate implicit expectations about the scope of representative democratic authority are directly relevant to whether local government spending falls within that authority. This is true for at least two reasons. First, it is the constituents themselves who imbue the process with legitimacy. Second, elected officials, if they are truly representing constituents, must stand in the constituents' stead when they act in an official capacity. The scope and legitimacy of that action necessarily depends on the consent of the governed.<sup>62</sup> A formalist view of the situation would insist that the constituents themselves have given consent to any legal action described by the state statutory grant of power which they, themselves, control through a second representative democratic process. This argument fails, however, because it ignores the unique features of individual localities. A spending decision that is fully legitimate in one locality may be completely illegitimate in another when viewed in light of aggregate constituent preferences, although both may be legal in light of the prevailing state laws.

Of course, it would not be misguided to argue that the representative democratic process is theoretically self-correcting when elected officials ignore aggregate preferences of constituents. Furthermore, it is clear that aggregate constituent preferences should be ignored if they would impinge on essential government functions. This does not detract from the vitality of my proposal. It is fully possible that successive administrations of elected officials could systematically flout constituents' implicit expectations about the scope of local government. The passage of Proposition 13 and many other direct democratic limitations on government's taxing power suggest that where taxes and spending are involved, representative democratic processes have historically turned a blind eye to constituents' preferences. Furthermore, it is entirely possible that representatives wish to respect, but do not know,

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<sup>62</sup> See The Declaration of Independence, available at <http://www.ushistory.org/declaration/>.

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constituent preferences regarding the bounds of government authority. The opt out mechanism relieves pressure on the constituent-representative relationship in either instance.

The relevance of constituent preferences to local government spending is best demonstrated by example. For instance, Ohio law provides that municipalities may provide funding and other assistance to park districts.<sup>63</sup> Almost no one would question the authority of a representative local government to fund a reasonably sized park, provide lawn care, landscaping, and even athletic fields. But what of a zoo? A zoo is most certainly a park, but the legitimacy of a local government's decision to fund a zoo will depend on constituent preferences despite the fact that the decision is sanctioned by state statute. The electorate of a small rural city, for instance, would never contemplate such a decision as being within the scope of their representatives' authority at the time of election, whereas the electorate of a larger city could foresee the possibility of such a decision and therefore could take it into account when choosing representatives. In such a case, it would be a heroic stretch to say that representatives of both cities are authorized by their constituents to fund a zoo, because voters in only one city contemplated the possibility when weighing representatives' candidacies.

Next, consider a city's choice to fund the zoo's acquisition of a rare and endangered animal, such as a panda bear. The enormous expense of acquiring the animal and creating a suitable habitat and plan of maintenance might exceed even the expected range of activity for representatives in a large city. Even though representatives who made this choice would be acting within the bounds of their statutory authority, two things are very likely to be true. First, acquisition of a panda bear, while related to an essential government function, the provision of parks, is certainly a non-essential expense. Second, while representatives may consider the acquisition of a panda bear advantageous to the city, they will not know constituents' aggregate preferences about the use of tax dollars to fund such an acquisition because the purchase was unexpected at the time of election and therefore not subject to debate by constituents. Unless representatives ask constituents directly about the expense, their

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<sup>63</sup> Ohio Rev. Code § 715.211 (2010).

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purchase represent a sheer guess at the scope of their authority to spend public money on a non-essential item. That is not to say that purchase of the bear is bad or will produce disutility, only that it is so far beyond the expected course of action that it could not be rightfully said to be representative.<sup>64</sup>

I provide this not as a demonstration of which expenses should be included in a system of opt-out public finance, but rather to highlight the fact that constituent preferences are directly relevant to the legitimacy of a particular local expenditure, even if that expenditure is unquestionably legal in light of the state constitution and statutes. If a particular government expenditure could not have been anticipated by constituents as a response to the circumstances that generated the government's choice, we might question whether the expenditure fell within the authority delegated by constituents to their representatives. If not, the expenditure could rightfully have been the subject of a direct democratic decision-making process. Consequently, I conclude that aggregate constituent preferences regarding the bounds of representative authority should be considered when determining whether a particular expenditure is non-essential and therefore eligible for inclusion in an opt-out system.

### **III. Proposal for opt-out financing of non-essential government expenditures**

In the first part of this paper, I have suggested that the current balance of representative and direct democracy in local tax and spending decisions may be suboptimal, primarily because direct democracy may over-correct for the excesses of representative democracy. This may be a result of constituents' views that although representative local

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<sup>64</sup> One can imagine a number of other examples; perhaps a Magna Carta for the local library, Audis for the police force, and a golf course designed by the now-infamous Tiger Woods. Each of these expenses fall within the scope of activities permitted by the state constitutional and statutory grants of municipal power. It is clear, however, that these expenditures are not essential. Rather, they are discretionary in nature and fall outside of the normal boundaries of most representative local governments' activities. Ordinary constituents would not perceive these purchases as a normal use of tax revenue. That is not to say that the use is impermissible, only that it is so far beyond the expected course of action that constituents should be consulted on the individual expenditures.

**\*\*DRAFT\*\***

governments have acted within the letter of the law, their actions have fallen beyond the boundaries of constituents' implicit delegation of authority to the representatives. Restrictions on local tax and spending decisions imposed through direct democracy, when viewed in light of this story, may be reactions to local government actions that were legally legitimate but normatively illegitimate. Because tax law does not abide by the rules of physics, constituent reactions to perceived excesses are neither equal nor opposite. Instead, they result in explicit delineations of the representative government's authority that may retake the excess tax levy and then some. As such, they have the potential to impede local governments' ability to carry out essential functions.

Despite these perceived flaws, I do not propose that states place additional restrictions on the direct democratic process. In my view, the threat of direct democracy serves as an important check on local representative governments. Rather, I suggest that local governments create more targeted direct democratic processes that allow constituents to express preferences about non-essential governmental spending. As described above, I view non-essential governmental spending as that which clearly falls beyond the aggregate implicit expectations of constituents about the scope of representative government given the circumstances in which the spending decision was made.

Specifically, I propose that local representative governments identify non-essential spending on the basis of perceived constituent preferences and separate them from the remainder of the budget. Then, the government should allow constituents to opt out of paying for them. In this manner, constituents could individually voice preferences about the acceptable delegation of discretionary spending power to the local government. I further propose basing the mechanism for this process on an existing opt-out system of public finance. In the paragraphs that follow, I will describe a German tax system that could serve as a model for financing discretionary government spending, describe the ways in which my proposal differs from this German model, set forth perceived benefits of the model and address potential criticisms of it.

*B. The German church tax as a form of local tax*

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Germany, as strange as it may seem, allows some religious congregations to tax their congregants. A vestige of the Middle Ages, this system is nominally religious in nature but shares many attributes with local taxation in the United States. As a result, it makes an intriguing model. In short, members of religious congregations are automatically enrolled in the congregation's taxing jurisdiction, and taxes chosen by the congregation may be enforced by the state. In many cases, congregations have chosen an income tax that is collected by through state wage withholding and then remitted back to the religious organizations. Congregations often use the collected funds to provide goods and services to the general public, regardless of religious affiliation. Interesting for our purposes, the tax is completely avoidable if one is willing to disavow her religious affiliation, or even to merely switch to a congregation that does not levy the tax. Despite Germany's increasing secularity – only twenty-two percent of Germans are religiously active – and despite an easy exit from congregations' taxing jurisdiction, the participation rate for the tax is quite high.<sup>65</sup> Nearly two-thirds of all German citizens are official members of tax-levying congregations.<sup>66</sup> What follows is a more detailed description of the system.

Although its roots reach back to the Holy Roman Empire, the first federal codification of Germany's church tax appeared after World War I in the constitution of the Weimar Republic.<sup>67</sup> The modern constitution, which provides that there shall be no state church in Germany, has adopted the Weimar provisions by reference.<sup>68</sup> They provide that a German state must grant "public law corporation" status to any requesting religious organization if the organization's constitution and number of members ensure permanency.<sup>69</sup> In addition, a religious organization must show that it is not hostile to the constitutional order or to fundamental rights.<sup>70</sup> Public law corporation status is no empty form: among other

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<sup>65</sup> Christina Sticht, *The Role of the Churches in Germany*, Goethe-Institut, available at <http://www.goethe.de/ges/phi/dos/rkd/en2012816.htm>.

<sup>66</sup> *Id.*

<sup>67</sup> See Weimarer Reichsverfassung Art. 137.

<sup>68</sup> Article 140 of the Grundgesetz provides that Article 137 of the Weimar constitution shall be incorporated by reference. Article 137 provides that there shall be no state church.

<sup>69</sup> *Id.*

<sup>70</sup> This rule is intended to safeguard the limited government/religious corporation

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things, it confers the capacity to levy taxes, which is clear indicator quasi-governmental standing.<sup>71</sup>

Status as a public law corporation confers a number of other important rights, including the right to employ clergy and other administrators as civil servants in the military, hospitals, universities and other public facilities. In addition, religious organizations that qualify as public law corporations are exempt from bankruptcy laws, the corporate income tax, gift tax and inheritance taxes.<sup>72</sup> In addition, representatives of religious organizations with public law corporation status have the right to participate on public boards, such as the supervisory boards of public and private broadcasting stations as well as boards that review films and literature for public suitability.<sup>73</sup> They may also draft ordinances applicable to their members for the governance of the organization.<sup>74</sup> These internal legal systems, “which operate in parallel with public laws,” can be striking in their complexity, and decisions rendered within them fall outside of the jurisdiction of Germany’s public courts.<sup>75</sup> Taken as a whole, these rights suggest that religious organizations that qualify as public law corporations may be viewed as governmental in nature, as alien as that concept may be to us.

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partnership envisioned by the constitution. See *Der Religionsgemeinschaft der Zeugen Jehovas in Deutschland e. V.*, vertreten durch das Präsidium, 2 BvR 1500 (1997). See also U.S. State Department, *Germany International Religious Freedom Report* (2008) available at <http://www.state.gov/g/drl/rls/irf/2008/71382.htm>; Thilo Marauhn, *Status, Rights, and Obligations of Religious Communities in a Human Rights Context: A European Perspective*, 34 *Isr. L. Rev.* 600, 632 (2000).

<sup>71</sup> *Id.*

<sup>72</sup> See *Korperschaftssteuergesetz (KStG) § 5(1)(9)* and *Erbschaftssteuergesetz (ErbStG) § 13(1)(16)*; *Abgabenordnung (AO) §§ 51 – 68* (describing qualifications that organizations must meet to obtain exempt status); Gerhard Robbers, *Minority Churches in Germany*, LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION; PROCEEDINGS OF THE MEETING THESSALONIKI 153, 159 (NOV. 19-20, 1993).

<sup>73</sup> Gerhard Robbers, *Minority Churches in Germany*, LEGAL STATUS OF RELIGIOUS MINORITIES IN THE COUNTRIES OF THE EUROPEAN UNION; PROCEEDINGS OF THE MEETING THESSALONIKI 153, 169 (NOV. 19-20, 1993).

<sup>74</sup> See Gerhard Robbers, *Church and State in the European Union* at 64.

<sup>75</sup> See Gerhard Robbers, *Church and State in the European Union* at 64.

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The two largest beneficiaries of public corporation status are the Catholic and Evangelical churches.<sup>76</sup> These groups, both of which levy the church tax, comprise roughly two thirds of Germany's citizenry. A number of smaller groups also qualify as public law corporations. For instance, Jewish synagogues, the Salvation Army, the Latter Day Saints and the German Humanist Association are all permitted to levy a church tax.<sup>77</sup> As a result, two-thirds of Germany's populace pays some form of the tax, even though the country, as a whole, is considered by many to be remarkably secular.<sup>78</sup>

Congregations most often choose income as their tax base. In all of the German states, the tax is levied at a uniform rate eight or nine percent of the church member's federal income tax liability, and it usually collected by the state through wage withholding and then returned to the churches.<sup>79</sup> This results in an effective rate of roughly three to four percent of the member's income.<sup>80</sup> Like state and local taxes in the United States, German church taxes are deductible against income for purposes of calculating the federal income tax.<sup>81</sup>

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<sup>76</sup> See Gerhardt Robbers, Church and State in the European Union at 57.

<sup>77</sup> See also Christine R. Barker, *Church and State Relationships in German "Public Benefit" Law*, 3 Intl. J. of Not-for-Profit L. \_\_, \_\_ (2000), available at [http://www.icnl.org/knowledge/ijnl/vol3iss2/art\\_1.htm](http://www.icnl.org/knowledge/ijnl/vol3iss2/art_1.htm).

<sup>78</sup> Christina Sticht, *The Role of Churches in Germany*, Goethe-Institut, available at <http://www.goethe.de/ges/phi/dos/rkd/en2012816.htm>.

<sup>79</sup> This rate is determined by a conference of the taxing organizations. Saxony Church Tax Act § 10(2). If the organizations cannot agree to a rate, the state finance administration must determine a rate. *Id.* See also Gerhard Robbers, *State and Church in Germany*, in STATE AND CHURCH IN THE EUROPEAN UNION 69 (Gerhard Robbers ed., 1996). Furthermore, the tax may be enforced by the state. See Berlin Statutes § 1(2) (administration of the tax is the obligation of the tax-entitled religious community), § 11 (enforcement of the taxes under the statute will be self-administered by the tax-entitled religious community according to the Administration and Enforcement Statute of April 27, 1953); Saxony Church Tax Act §§ 9 and 10. The state retains an administrative fee of four to five percent of the amount collected. See Gerhard Robbers, *Minority Churches in Germany* at 164.

<sup>80</sup> If one assumes an individual income tax rate of approximately 40% and a church tax rate of 8%, the effective rate is approximately 3.2% of income.

<sup>81</sup> See EStG § 10(1)(4). Furthermore, contributions to churches made in excess of church tax liability are deductible under EStG § 10(b)(1) so long as the deduction does not exceed five percent of the donor's income. **[insert data on tax collection following corresponding sentence.]**

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The resemblance between religious organizations that qualify as public law corporations and local governments is striking. In addition to possessing immunity from certain tax laws, the ability to classify some employees as civil servants, and the ability to tax their constituents, public law corporations use a significant portion of the money raised to fund schools, hospitals, recreational centers, and social services.<sup>82</sup> It is this similarity that is most relevant to my proposal. Germany has, in essence, created local taxing jurisdictions that depend not solely on geography, but also on the affiliation preferences of constituents. Participation in these sectarian local jurisdictions is voluntary, and although the jurisdictions provide more public than private goods, they remain funded and viable. If we believe that Germans are more sectarian than secular as a group, the continued payment of church taxes by so many of them is a truly interesting phenomenon and indicates that despite the perceived threat of free riders, an opt-out system of financing public goods may be possible in many jurisdictions.<sup>83</sup>

For our purposes, however, the model must be secular. I say this not only because a sectarian version would violate the First Amendment, but also because the designation of religion as a denominator of tax jurisdiction would obscure constituents' preferences about the scope of representative democratic spending power. Under the current German system, individuals who support taxation for the provision of certain public goods must also choose membership in the religious organization that provides those goods. Individuals having a preference for the former position but not the latter are faced with two unsatisfactory choices: they can participate in the tax and join a taxing congregation, or they can fail to participate in the tax and avoid joining a congregation. Neither of these options reveals the individual's true preference for the reach of local government spending.<sup>84</sup> By disaggregating participation and religious affiliation, adoption of an opt-out model to fund some non-essential

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<sup>82</sup> Christina Sticht, *The Role of the Churches in Germany*, Goethe-Institut, available at <http://www.goethe.de/ges/phi/dos/rkd/en2012816.htm>; Jens Peterson, *A Short Information on the Church Tax in Germany*, available at <http://www.steuer-forum-kirche.de/church-tax.pdf>.

<sup>83</sup> See Stephanie R. Hoffer, [citation here].

<sup>84</sup> See Stephanie R. Hoffer [citation here]. For this reason, I suggest in a prior work that German states create non-religious affiliation groups that correspond to religious ones.

**\*\*DRAFT\*\***

spending would provide a fuller range of expressive options to constituents of local governments.

### B. Creating a secular model

Germany's high church tax participation rate, when viewed in juxtaposition to its low religious participation rate, demonstrates that when faced with an avoidable tax, some people will choose to pay rather than avoid. Why do I care about this? It suggests the possibility that if given the opportunity to make direct decisions about the scope of local government spending power, constituents may be expected to consider the merits of the question, rather than simply to avoid any cost to themselves on the basis of self-calculation and the plausibility of free-riding.<sup>85</sup> In other words, I argue that we should trust constituents, at least to the limited extent described in this proposal, to consider factors that are normatively relevant to the scope of representative local government's non-essential spending power when making direct democratic decisions to either expand or limit that power.

As noted earlier, the German system is an imperfect example of opt-out finance as a direct democratic institution because it relies on religious affiliation as a denomination of tax jurisdiction. As previously described, this impedes constituents' expression of preferences. Consequently, the first step in creating a domestic model of opt-out public finance is to identify a neutral denominator of jurisdiction. Since the model is meant for local governments that primarily provide geographically-bound goods and services, geography is the clearest, most rational denominator of jurisdiction, and I will adopt it here. Second, the model must suggest appropriate subject matter for submission to the direct democratic decision-making process. Third, the model must describe the decision-making process. Finally, it must also identify possible choices of tax base. The appropriate subject matter, decision-making process, and tax base will vary according to the unique features and constituents of each locality. Consequently, I do not set out to create a rigid structure that accounts for all aspects of local governance; rather, I hope to provide a useful set of observations that may be adapted to fit multiple

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<sup>85</sup> This is not to say that free-riders will not surface; they will. But they do not seem to have been an overwhelming impediment in Germany.

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circumstances.

*i. Choosing appropriate expenses*

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

As noted above, I suggest that an expense is clearly non-essential when it falls outside of the authority delegated by constituents to their representatives.<sup>86</sup> If a particular government expenditure cannot be anticipated by constituents as a response to the circumstances surrounding the local government's choice, representatives should question whether the expenditure falls within their implicitly delegated authority. In such a case, representatives may seek constituent input through the direct democratic decision-making process. For instance, no one would question a representative local government's decision to collect residents' yard waste. This activity encourages sanitary conditions and increases property value at little cost to taxpayers. Likewise, only a few people would object to a local government's decision to purchase a wood chipper for the purpose of turning the collected yard waste into mulch. This decision is one logical corollary to the accumulation of collected waste. But how would residents react to a costly expenditure for dump trucks used to

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<sup>86</sup> See section \_\_ supra.

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deliver the resulting mulch to any resident for free? While not as outrageous as a small town zoo, the cost of delivering free mulch is not likely to be essential and could be included in a group of expenses for direct democratic approval.

In the absence of an omniscient and communicative third party, representatives themselves are in the best position to decide which expenses are essential and which may fall beyond their ordinary purview. Although it may appear suboptimal to trust this decision to the body whose judgment constituents have historically distrusted, a second option – letting constituents designate non-essential spending – makes even less sense. First, representatives can aggregate information on the preferences of constituents in a way that is not possible for constituents themselves. Although representatives may not know constituents' views on a particular expenditure (free delivery of mulch, for instance), the lack of knowledge itself is an important piece of information indicating that a particular expenditure may be a good fit for opt-out financing. Second, allowing constituents to designate which expenditures should be subject to direct democratic decision-making would expand the very power that this proposal seeks to cabin, the power to interfere with essential government functions. Finally, even if we disregard the first two assertions, lack of effective coordination would prevent constituents from designating non-essential spending. In essence, constituents would have to vote on what to include on the ballot. Even if this process were desirable, it would simply be too unwieldy to enact.

*ii. Structuring Direct Democracy to Best Reveal Preferences*

To create a workable structure for direct democratic decision-making on non-essential spending by representative local governments, it is important to address relevant criticisms of the use of direct democracy in public finance. Most of these concerns can be alleviated by creating a structure similar to the German church tax that allows constituents to weigh in at any time, with full information about both the proposed spending and the actions of other constituents. Therefore, I propose that representatively democratic local governments, after identifying suitable proposed expenses, automatically enroll constituents as contributors to those expenses subject to the tax base discussion below. Constituents,

**\*\*DRAFT\*\***

who would then be “voluntary taxpayers,” if you will briefly permit me the oxymoron, could opt out of their contributions by filing a signed writing with the appropriate authority.<sup>87</sup> As I discuss below, this system would necessitate further consideration of the expenses chosen for inclusion in the opt-out system, but it would provide the most complete picture of constituents’ delegation of non-essential spending power to representatives. In the paragraphs that follow, I outline criticisms of direct democratic decision-making in public finance found in the existing literature and explain how the structure of my proposed system avoids many of these pitfalls.

a. Tyranny of the majority

One important criticism of direct democracy is that its reliance on majority rule runs roughshod over concerns of the political minority, which are better provided for by the deliberation and compromise process of representative democracy.<sup>88</sup> In a local government where all spending decisions are governed by direct democracy, one can imagine a large number of citizens without wealth supporting high taxes to extract money from a wealthy few. Conversely, one could imagine a large number of wealthy citizens supporting low taxes to avoid redistribution to those who are less wealthy. In either situation, the political minority has no power over its own tax destiny, despite the institution of a democratic process meant to afford each citizen an equal voice. This is problematic, particularly in the second scenario, where direct democratic opposition to taxes could impede the provision of essential government functions to citizens who are unable to purchase substitutes for those essential functions.<sup>89</sup>

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<sup>87</sup> I would include signed electronic writings in this category, although use of the internet has not yet been approved for voting. I presume that the legality of an internet opt-out would vary from state to state.

<sup>88</sup> Stark at 16.

<sup>89</sup> See Burton A Weisbrod, *Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy*, in Altrusim, *Morality, and Economic Theory*, Russell Sage Foundation, Ed. Edmund S Phelps, 171, 185 (at higher levels of income, constituents supplement or substitute public goods with private ones, such as home and business security systems, home trash compactors, and electronic air filters to provide a cleaner environment.).

**\*\*DRAFT\*\***

My proposal addresses this problem in three ways. First, it applies only to non-essential spending, which protects constituents who are unable to provide private substitutes for that spending. Second, as Professor Stark has suggested, majority rule can be limited by permitting the representative democratic government to put boundaries on the direct democratic process.<sup>90</sup> For instance, a referendum created by the legislature is far more likely to be the product of deliberation and compromise than a ballot initiative instigated by voters. My proposal adopts this strategy by allowing representatives to identify non-essential spending that will be included in the opt-out package. Third, and importantly, the opt-out system is not an all-or-nothing proposition. Rather, it allows for proportional decision-making, which gives political minority voters direct and meaningful input.

b.      Proportional decision-making is not indicative of public choice

A second potential critique of my proposal is that the financial result may not be indicative of public choice. Professor Levmore, for instance, has noted that although a particular constituent can control whether or not he contributes to a given expenditure, he has no say in the overall level of funding raised for a particular item.<sup>91</sup> For instance, assume that a representative local government decides to seek constituent approval for the cost of landscaping a park that is currently a wild meadow. The cost of fully landscaping the park will be \$100,000, and the locality has 10,000 constituents. Each constituent will be charged \$10 unless he or she opts out of the payment. Now assume that sixty percent of the residents would prefer no landscaping. The remainder are in favor of granting representatives full authority to make the \$100,000 expenditure. Out of these, a portion are in favor of any level of landscaping, but the remainder are in favor of landscaping only if the full \$100,000 is committed to the project.

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<sup>90</sup> Stark at 209 (in a referendum, direct democracy essentially acts as a “democratic filter over and above that offered by the representative process.”).

<sup>91</sup> Saul Levmore, *Taxes as Ballots*, 65 U. Chi. L. R. 387, 395 (1998) (noting that the check-off for federal election campaign funding found on federal income tax return forms could only produce the public’s preferred amount of funding by accident since no single voter has information about any other voter’s actions).

**\*\*DRAFT\*\***

In the scenario above, a simple opt-out system produces a highly flawed result. If sixty percent of constituents who prefer the unlandscaped meadow opt out of the \$10 payment, the resulting \$40,000 revenue collection may still permit the government to landscape the park. However, this option will be satisfactory only to a portion of those constituents who choose not to opt out. Those who would prefer that the project proceed only on full funding will not be satisfied.

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

The problems identified above can be avoided by narrowing the kinds of spending subjected to the opt-out regime and by increasing representative government input in the choices presented to voters. Representatives should identify spending that is recurring rather than capital in nature. The identified spending should also fall into the “more is better” category. For instance, rather than subjecting the cost of park creation to the opt-out process, representatives could choose the cost of showing outdoor movies in the park. This is clearly a non-essential expense that, depending upon the locality, may fall outside of the usual scope of governmental spending authority.<sup>92</sup> Furthermore, most people would agree that, within a reasonable range, it is better to have more movies than fewer.

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<sup>92</sup> In other words, one can imagine some residents asking why the local government is wasting their tax dollars on a free showing of *The Birds*.

**\*\*DRAFT\*\***

This leads me to a second role that the representative government must play in my proposal: determining the acceptable range of revenue necessary to fund proposed non-essential item. It is possible to identify a plethora of more-is-better spending that might be undertaken by local governments. Pancake breakfasts, free trees on Arbor Day, cooking classes, the provision of sports equipment, evening concerts and many other things initially seem better in bulk. However, this is not necessarily the case. Let us return for a moment to movies in the park. Assume that a representative local government forwards movies in the park as an item of non-essential spending to be approved through the opt-out system. If all but a few constituents opt out, perhaps the locality will screen one movie but will not be authorized to show more. If all constituents remain enrolled rather than opting out, have they authorized the representative government to show double features every night? Surely not.<sup>93</sup>

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

Placing a preset ceiling and floor on discretionary spending does not completely solve the problem described in our park example above. Although set points inform constituents of the range of funding with which a project will go forward, a preset range may not correspond with any individual constituent's preferred range. For instance, imagine a constituent who would prefer between two and four outdoor movies but who has an intense preference against a fifth movie or more. Now, imagine that this constituent's representative local government has designated a range of funding that would provide between four and six outdoor movies. If all constituents voice their preferences at once, our imaginary subject will not know whether to opt out or remain in.

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**\*\*DRAFT\*\***

However, if constituents are permitted to make their decisions on a rolling basis, our imaginary subject can wait to see what others do before making her own decision.

As demonstrated by this example, requiring all constituents to make a simultaneous decision forces them to act on imperfect information. This is a second reason why representative local governments should choose discretionary expenses that are continuing rather than ones that are capital or fixed. If, similar to the German church tax, localities adopt an opt-out system that allows withdrawal at any time, constituents can act with full information. Furthermore, such a system will allow constituents to respond to changes in circumstance, whereas a single vote taken on a fixed date would not. This means, of course, that local governments could not rely on future funding for expenses included in the opt-out system and would be unable to budget for them. I do not find this troubling, since the expenses that I have identified as appropriate fall into the “want” rather than the “need” category and are not capital in nature. By setting a floor and ceiling, and by allowing a rolling opt-out, localities can avoid the nonsensical outcome reached in the park example above. Furthermore, this additional input from the representative government will ensure that revenue collected through the opt-out system is plausibly linked to the actual preferences of constituents.

c. Choice of tax base

Another criticism of direct democratic decision-making in public finance is that constituents voting on taxes may seek to shift the burden by approving taxes that will be imposed on people who reside outside of the taxing jurisdiction.<sup>94</sup> For instance, voters may approve a sales tax that will affect shoppers from neighboring localities, an income tax that will fall on workers who commute, or a property tax that will be levied on summer cottages.<sup>95</sup> Although my proposal avoids this dilemma by

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<sup>94</sup> Stark at 195 (noting that the “chief distinguishing feature” of local taxation is that some taxpayers will be unable to participate in the democratic decision-making process by reason of their residence in another locality).

<sup>95</sup> *Id.* (noting that individuals’ mobility between local jurisdictions, and their resulting inability to participate in tax decisions that affect them, “highlights the weakness of the referendum as a yardstick of taxpayer consent.”).

**\*\*DRAFT\*\***

allowing non-residents to opt out of any payment imposed upon them by the government of a locality where they do not reside, it raises a related problem of disenfranchisement. If a locality applies the opt-out system only to taxpayers, constituents who do not pay taxes will have no say on the government's authority to engage in the proposed non-essential spending.

It is arguable that this purported disenfranchisement is not as troubling as it first seems. First, if local governments confine the opt-out system to non-essential spending (meaning spending that is beyond the government's ordinary purview), failure to make the proposed expenditure will not result in failure to provide the government's usual goods and services. Rather, a mass opt-out will merely prevent the local government from providing bonus goods and services. Because essential services and other services ordinarily provided by the government would not be disrupted, the expectations of non-taxpaying residents would be protected. In addition, because funds collected through the opt-out system are as much like charitable contributions as they are like taxes, it is not clear that the entire constituency should have a say in their eventual use.

A stronger argument exists, however, for making the inclusion of constituents as broad as possible. If we view the opt out system not as a means of raising revenue for discretionary spending, but rather as a means of constituent approval of the scope of the representative government's discretionary spending power, the preferences of constituents who are not traditional taxpayers should be valued on equal footing. Furthermore, because the system allows potential payors to opt out, basic concerns of regressivity are vitiated. In other words, the inclusion of low-income constituents should not place an undue financial burden on them, since they can opt out of payment. Failing to present non-taxpayers with the option of participation, however, could be viewed as both patronizing and paternalistic: patronizing because the representative government does not value their input and paternalistic because it does trust non-taxpayers to make a decision that is in their financial best interest.

It is not difficult to see why inclusion is preferable to exclusion. Assume, for instance, that Constituent A is a low-income retiree who is a resident of Locality B. Locality B has designated free concerts in the park

**\*\*DRAFT\*\***

as an opt-out item. Although Constituent A is not a taxpayer, she favors concerts in the park and would like to contribute to their establishment. If she, and others in her position, are not included in the opt-out system, her only means of expressing a preference is by making an unsolicited voluntary contribution. This, however, is unlikely to happen. First, Constituent A may not learn of the opt out item if she is not enrolled in the system. As a result of her lack of knowledge, she will be barred de facto from expressing a preference even if she could do so legally. Second, even if Constituent A learns of the opt-out item and intends to contribute, she must also know of the mechanism for making a voluntary contribution, if one exists. Given the often opaque nature of local government, this task may be difficult at best, and only the most persistent non-taxpayers will express a preference. Third, establishing a parallel system to process voluntary contributions is likely to be an inefficient use of local government resources. As a result, it is preferable to include all constituents in the opt-out system.

Some may argue that the initial inclusion of all constituents could result in a regressive outcome if constituents at very low levels of income do not opt out for reasons other than preference. For instance, handicapped or illiterate constituents may face barriers when interacting with government bureaucracy. If the process of opting out is too onerous, these constituents, who are more likely to have less wealth, will contribute to non-essential government spending in contravention to their preferences when constituents who are not similarly disadvantaged will not be forced to do so. As a consequence, disadvantaged constituents conceivably could bear a disproportionate share of the cost of items included in an opt-out system.

I find this argument unpersuasive for three reasons. First, it is patronizing to assume that entire groups of people will be overwhelmed by interaction with the local government. It is far more likely that particular individuals will encounter difficulty rather than entire groups. If this is true, individual solutions are preferable to group exclusion. Second, to the extent that entire groups encounter difficulty, simple procedural solutions exist. For instance, if we assume that most constituents over the age of ninety will encounter difficulty because they are less mobile or internet facile, a locality could provide them with a some form of

**\*\*DRAFT\*\***

transactional aid. Finally, assumptions about groups' lack of functionality may be used as excuses to ignore the preferences of constituents in those groups. Furthermore, exclusion of these constituents, even if benevolently motivated, may be perceived by them as willful disregard on the part of the local government, which would put additional pressure on the constituent-representative relationship. Inclusion of all constituents is, therefore, preferable.

Having concluded that the greatest possible number of constituents should be included in an opt-out system, I next must determine what form the charge for non-essential spending should take. Because it addresses the transfer of funds from constituents to the local government, this consideration is analogous to the determination of an appropriate tax base. Like the decision of which expenses to include in the opt-out system, this choice will depend, to some extent, on the individual circumstances and laws applicable to a particular locality.<sup>96</sup>

As a preliminary matter, it is possible to cursorily dismiss levies against property as an inappropriate form of the opt-out charge in most localities. First, if property ownership were employed as a basis for calculating the charge, all non-owners would be excluded from the system. This would not be troubling in a community that is homogenous with regard to property ownership, but in a non-homogeneous community, most people would agree that such an exclusion is objectionable on disenfranchisement grounds. Second, levies against sales may be dismissed on grounds of administrative infeasibility. The opt-out charge would be identified with particular individuals, and it is not currently practical for localities to track the individual sales taxes paid by individuals. Furthermore, even if tracking individual sales became administratively feasible in the future, the use of a levy against sales would make the amount of the opt-out charge dependent upon the individual's payor's purchases. As a result, the amount of the payment would be unpredictable and likely would not correlate to the amount of the non-essential expense forwarded for approval by the representative government.

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<sup>96</sup> For instance, many state constitutions prevent cities within those states from levying an income tax. In such cases, calculation of the opt-out charge could not be tied to income.

**\*\*DRAFT\*\***

Attaching the opt-out charge to an income tax would be a better option administratively if not a substantively. For instance, the German system levies a charge at the rate of nine percent of an individual's federal income tax liability.<sup>97</sup> Pegging the opt-out charge to federal income tax liability accomplishes two goals in Germany. First, it creates economies of scale in collection. Because the church tax is automatically withheld from a taxpayer's wages in many cases, religious organizations are able to piggyback on the state's existing collection mechanisms. This significantly lowers administrative costs of the tax. Second, by calculating the church tax as a percentage of federal tax liability, the German system incorporates federal adjustments to tax. Assuming that these adjustments promote tax fairness or important public objectives, duplicating them through adoption of tax liability as the base of the opt-out charge should alleviate concerns of progressivity or public policy inherent in both systems.<sup>98</sup>

Despite the attractiveness of the idea, pegging an opt-out charge to the income tax is not possible for local governments that do not levy such a tax. Furthermore, doing so is unlikely to generate an amount of revenue that corresponds in any way to the anticipated non-essential government expense. Finally, as with a property tax based opt-out, an income tax based system would devalue the contribution of those who pay little tax and would completely disenfranchise those who pay no tax.<sup>99</sup>

Although the appropriate choice of base will vary according to the circumstances and laws of a given locality, I have arrived by process of elimination at a flat charge per constituent. Importantly, a flat charge is inclusive of all constituents, and it assumes that each constituent carries

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<sup>97</sup> See \_\_\_\_\_ (above). For example, a taxpayer who owed the federal government \$100 of income tax would also pay \$9 of church tax.

<sup>98</sup> I do not definitely assert that a particular set of concerns exists in both systems, but practically speaking, since both systems involve public finance, it is probably the case. For instance, the concern of a family's ability to pay versus a single person's ability to pay may arise in both cases. Deductions associated with dependents alleviate this concern at the federal level. If the opt-out charge is a percentage of federal liability, the difference in ability to pay is automatically accounted for in the second system as a result of its inclusion in the first.

<sup>99</sup> Stark at \_\_\_\_.

**\*\*DRAFT\*\***

equal weight when determining the scope of representatives' power to engage in non-essential spending that has been included in the opt-out package. A flat charge may also be tied directly to the anticipated non-essential expense. For instance, if each movie in the park will cost \$200, and representatives determine that the project should move forward if at least twenty constituents support it, the flat opt-out charge should be \$10. This kind of calculation would be nearly impossible with an income, sales, or property based charge.

A flat charge is not without problems. For instance, because a flat charge could not be withheld from wages in the way that an income based charge could be, the flat charge may be more expensive to administer. Second, a flat charge is subject to attack on the basis of regressivity. In other words, if each participating constituent pays \$10 to fund movies in the park, the charge will be a lesser percentage of a wealthy person's resources than of a poorer person's resources. In a mandatory funding structure, this discrepancy would be troubling. I argue, however, that the regressivity of my proposal is mitigated by constituents' ability to opt out of some or all of the charge. Consequently, I conclude that although it is not perfect, a flat charge is the best form of opt-out charge.

#### **IV.    Why Tie Votes to Dollars?**

Having outlined my proposal for the use of an opt-out system to finance certain non-essential local government expenses, I now address why constituents' expression of preference for the scope of representatives' spending authority should be tied to constituent's contribution toward certain items of non-essential spending. In addition to addressing a strong critique of direct democracy – that direct democracy allows residents to export their tax burden to other localities – tying preference expression to actual dollars spent fosters democratic debate even where most constituents do not speak in the traditional sense. In the paragraphs that follow, I will expand upon both points.

One frequent criticism of direct democracy in the tax and spending context is that it allows residents of one locality to shift a tax burden that is rightfully theirs to residents of another locality who have no right to

**\*\*DRAFT\*\***

vote on the increase.<sup>100</sup> For instance, residents who live in the center of a city that serves as a hub for commuter employees should always vote in favor of increased income taxes on wages earned within the city limits. The amount of revenue collected from non-residents will exceed that collected from residents, leaving the city with a net gain. Furthermore, because non-residents do not vote for representatives of the city government, they have no say in how the money extracted from them will be used.

The foundation of this criticism is that the relationship between commuters and residents of the central city is rationally adversarial. Commuters want to use the resources of the city without contributing to them, and city dwellers want to extract resources from commuters and use them for purposes most beneficial to city dwellers. But this may not always be the case. Because commuters use and enjoy the central city for work, it is entirely reasonable to make the opposite assumption: that commuters want to contribute resources for the betterment of the central city, and that city dwellers will use additional resources in a way that makes the city more vital for both commuters and residents in order to attract the former. An opt-out system applicable to both residents and commuters permits this non-adversarial relationship to develop by allowing both groups to contribute jointly to non-essential that will benefit both groups. In addition, use of the opt-out system addresses a small portion of commuters' disenfranchisement in tax voting by allowing them to express their preferences alongside those of residents.

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

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<sup>100</sup> Stark at 4.

**\*\*DRAFT\*\***

although commuters are not legal constituents of the representative government, it must nonetheless account for their preferences if not fully, then on a basic level, making them de facto constituents. If this is the case, including commuters in the opt-out system does not create theoretical dissonance within the proposal.

An additional, important benefit of the opt-out system is the creation of a democratic debate among constituents. Direct democracy is often criticized on the grounds that constituents must vote without the benefit of deliberation that would have resulted from the representative democratic process.<sup>101</sup> In addition, constituents must vote without the benefit of fully knowing the preferences of their fellows.<sup>102</sup> As a consequence, the result of direct democracy may be criticized as less than sound.

Using an opt-out system to finance certain non-essential expenses addresses these concerns to some extent. In a system that includes all constituents, all constituents must automatically express some preference. Unlike a traditional voting process, it is not possible to remain silent. This is because a dollar amount is attached to either opting out or remaining enrolled in the system. In an ordinary direct democratic vote, a constituent may remain silent by simply avoiding the polls. In an opt-out system, each constituent must unavoidably make some expressive manifestation by either paying or not. Because the opt-out structure creates a presumption in favor of paying, it is not possible to remain inexpressive by refusing to pay, just as one might refuse to vote.

Of course, a choice to opt out or remain enrolled in the system is not perfectly expressive, and either choice could mean a number of things. I assert, however, that the various meanings associated with either choice nonetheless either support or fail to support an implicit delegation of non-essential spending authority to representatives. Consider, for example, a constituent's choice to opt out. This choice could suggest that the constituent favors an item of non-essential spending but simply cannot afford to contribute to it, or alternatively, that the constituent objects to the project itself, whether or not it is affordable to the constituent. This objection could be substantive (the constituent does not like movies in the park), or it could be political (the constituent does not think that the

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<sup>101</sup> Wigfall Robinson at \_\_\_\_.

<sup>102</sup> Levmore at \_\_\_\_.

**\*\*DRAFT\*\***

government's role includes movies in the park). Although these three meanings are vastly different, all of them lead us to conclude that the constituent objects to the non-essential spending at issue and that he does not authorize the representative government to use his dollars to engage in it.<sup>103</sup>

Likewise, a constituent's continued enrollment in the system could have disparate meanings. Among other things, continued enrollment could mean that a constituent approves the proposed spending, neither approves nor opposes the proposed spending, opposes the proposed spending but remains enrolled out of a sense of moral obligation, or opposes the proposed spending but is either unaware of or unable to exercise the opt-out. As mentioned earlier, instances in which a constituent would prefer to opt out, but is somehow prevented from doing so, can be minimized through procedural protections. As a result, these false positives should be minimized in a properly functioning system, and I will not consider them here.

In the second instance, where a constituent neither approves nor opposes the proposed spending, the constituent cannot be said to care about the scope of the representative government's authority with regard to the spending. In essence, the constituent remains enrolled in the opt-out system as a result of the stickiness of the default option. Although this inertia does not truly express a preference on the particular item of spending in question, it is expressive in another way. By failing to opt out, constituents who neither approve nor oppose non-essential spending express the view that the

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<sup>103</sup> If the constituent objects to non-essential spending on grounds that he cannot afford it, he may, of course, be willing to authorize the representative government to spend other people's dollars on the project. In this case, we may be tempted to reject the results of the opt-out system as regressive. I argue, however, that we should resist that temptation. One constituent's preference to spend another constituent's money on public goods is not problematic if the proposed spending is an ordinary item within the representative government's implicit grant of authority. However, one constituent's vote to spend another constituent's money *is* problematic if the spending truly falls beyond the boundaries of all constituents' aggregate, implicit delegation of authority to the representative government. Because I assert that only these non-implicitly authorized items of spending should be included in an opt-out system, I am not concerned with any individual constituent's desire to spend another constituent's money on non-essential items the cost of which he cannot afford. This is because I draw a distinction between the use of public money for an existing public purpose in the first instance, and the donation of private money to a newly-designated public purpose in the second.

**\*\*DRAFT\*\***

debate is unimportant. If that is true, and if a constituent contributes funds despite her apathy, the opt out system should make a presumption in favor of granting discretionary spending authority to the representative government.

In the third instance, where a constituent opposes a particular non-essential expense but feels morally obligated to contribute, the response should be treated, once again, as a grant of discretionary spending authority to the representative government. In fact, this situation is not so different from the imposition of actual taxes. Where a constituent remains enrolled in the system with little interest in the actual project at hand, he has made a decision to contribute to the general welfare of the community through the creation of public goods regardless of whether he will use them. As a result, we should not be troubled by the fact that the constituent's response does not reflect his own preference about a particular project. Regardless of that fact, it indicates his preference about the scope of the representative government's authority.<sup>104</sup>

In a transparent opt-out system, where constituents are able to see the responses of others (although not necessarily match those responses with the identities of others), a series of communications automatically arise on the topic of the proposed expenditure. As described above, our imperfect ability to understand their specific meanings is not important to the question of whether the representative government should be permitted to engage in the particular spending at issue.<sup>105</sup> Unlike a traditional direct democratic vote, every constituent is a participant, and if the system allows a rolling opt-out, each constituent can express his or her preference with sufficient knowledge of the choices of others. Furthermore, because funds are attached to the choice to opt-out or remain enrolled, each constituent's expression of preference has a direct impact on the success of the collective endeavor.

## **V.      Benefits of the Opt-Out System**

In addition to creating a de facto debate, using an opt out system to fund

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<sup>104</sup> In fact, it could be argued that such a response is, in fact, a stronger grant of authority than one from a constituent who favors the project.

<sup>105</sup> This, of course, assumes that the system is functional and makes opting out feasible for the vast majority of the constituency.

**\*\*DRAFT\*\***

certain non-essential expenses could result in a number of other benefits. First, the system satisfies constituents' "normative intuitions" about the libertarian nature of local government<sup>106</sup> without destroying the ability of representative government to provide essential goods and services. Relatedly, it confers legitimacy on the items of spending that would be most subject to question by constituents. Together, these benefits should quell the tendency by constituents to overreach through use of other direct democratic processes such as the ballot initiative.<sup>107</sup> Second, use of an opt-out system would place local governments on equal footing with charitable organizations in areas where the functions of these two groups most strongly overlap.<sup>108</sup> Governmental restraint in use of the taxing power to fund certain non-essential spending should result in an efficient allocation of resources between these two groups. Finally, widespread use of an opt out system has the potential to change constituents' assumptions about one another. Namely, successful funding of non-essential goods solely through consent of constituents would go a long way toward dispelling the traditional anti-tax American stereotype that prevails in both our popular culture and academic literature.<sup>109</sup> Perhaps it is simply not the case that Americans are not civically minded. Contradiction of the unsupported stereotype by actual facts has the potential to change the tenor of political debate the state and local levels.

*(a) Averting tax revolt*

Allowing constituents to express preferences with regard to particular items of non-essential government spending should allay so called tax revolts in all but the most egregious of circumstances. This is because preference expression imbues non-essential expenses with legitimacy by clarifying their inclusion in the scope of the representative government's power. "Legitimacy," according to Professor Kornhauser, "justifies and transforms the power of government through a moral authority derived

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<sup>106</sup> Stark at \_\_\_\_.

<sup>107</sup> Marhorie E. Kornhauser, Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America, 50 Buff. L. Rev. 819, \_\_\_\_ (2002).

<sup>108</sup> Cf Brian Galle, Foundation or Empire? The Role of Charity in a Federal System (*forthcoming*). See also David M. Schizer, Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals, 62 Tax L. Rev. 221 (2009).

<sup>109</sup> See, for instance, Marjorie Kornhauser at 867, noting that "anti-government sentiment" is "the distinctive aspect of the American Creed."

**\*\*DRAFT\*\***

from the consent of both the governed and the governing . . . .”<sup>110</sup> As she notes, it rests principally on the beliefs and attitudes of constituents, and it is a powerful component of people’s acquiescence to government itself.<sup>111</sup> Legitimacy is easy in areas where constituents’ beliefs and attitudes are homogenous, because in these areas, results produced by representative government will closely correlate to the policy expectations of constituents. However, in areas where constituents possess divergent beliefs and attitudes, policy-oriented legitimacy may not be possible. As a consequence, in these cases it becomes necessary to focus on procedure as a source of legitimacy.<sup>112</sup>

In this vein, Professor Kornhauser asserts that for many Americans, representative democracy, as a procedure, is a conceptual second-best to well-functioning direct democracy.<sup>113</sup> In other words, representative democracy “works best when it most closely approximates direct democracy.”<sup>114</sup> If it is true that most constituents hold this belief, taxes may be envisioned as “an expression of the people’s will” that is granted by taxpayers to the representative government rather than a fee that is extracted by it.<sup>115</sup> When representative government steps beyond its implicit grant of authority, however, this characterization of taxes as expression breaks down. As with Proposition 13, when constituents feel that the government has seized something without constituents’ implicit consent, direct democratic revolt via ballot issue may result.

If Professor Kornhauser’s assertions are correct, use of an opt out system to finance non-essential spending may organically limit the number of voter-generated restrictions on local taxing power. This is because the opt out system allows the representative democracy to approximate the natural direct democratic result, both in terms of policy and procedure. The process itself, through which each constituent is called upon to express a preference, is likely to reveal a policy consensus, if one exists. The representative process, even if it reached a similar policy result, could

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<sup>110</sup> Kornhauser at 831.

<sup>111</sup> Kornhauser at 831-32.

<sup>112</sup> Kornhauser at 871.

<sup>113</sup> Kornhauser at 881.

<sup>114</sup> Kornhauser at 881.

<sup>115</sup> Kornhauser at 882.

**\*\*DRAFT\*\***

breed discontent on the part of policy losers who believe that, as a result of the process, their voices were not heard.<sup>116</sup> Furthermore, the opt out system would do these things without compromising the representative government's ability to function in all of its usual areas of responsibility. In essence, the representative government would operate through deliberation and compromise within a core area of agreement, leaving only certain marginal decisions to constituents. Nonetheless, if Professor Kornhauser's assertions are correct, leaving even a few decisions to constituents should increase perceived legitimacy of the local government as a whole.

*(b) Efficient allocation of resources*

Another benefit of adopting an opt-out system to finance certain non-essential spending may be an increasingly efficient allocation of resources between local governments and charitable organizations that provide non-essential public goods. The issue of how best to divide the provision of public goods between the government and the charitable sector is decades old and yet remains unsettled.<sup>117</sup> Scholars of a pure libertarian bent assert that the government should be minimal, leaving everything other than absolute essentials in private hands.<sup>118</sup> Yet others assert that charitable organizations should be delegated public money (and therefore public functions) according to the scope and nature of benefits provided.<sup>119</sup> Still others, including socialists, see a more expansive role for the government, leaving only a narrow range of activities within non-governmental organizations' purview.<sup>120</sup>

Many of these recommendations for resource allocation define the role of government and the role of charity normatively, on the basis of

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<sup>116</sup> For instance, they may conclude that the policy winners had more purchase within the local government as a result of socioeconomic status or some other divergent characteristic.

<sup>117</sup> For one recent example of juxtaposed viewpoints, see David M. Schizer, *Subsidizing Charitable Contributions: Incentives, Information, and the Private Pursuit of Public Goals*, 62 Tax L. Rev. 221 (2009) and Brian Galle, *Foundation or Empire? The Role of Charity in a Federal System* (forthcoming).

<sup>118</sup> Robert Nozick, *Anarchy, State, and Utopia* \_\_\_\_\_.

<sup>119</sup> [insert myriad of theories here, including Columbo]

<sup>120</sup> Galle and others.

**\*\*DRAFT\*\***

attributes perceived to be common to all governments and all charities. Although this approach has resulted in a number of valuable theoretical assessments of the interaction between governments and charities, almost none of them capable of individualization within particular localities. Any theory of the balance between charitable organizations and government that does not account for variance at the local level ignores a large swath of the charitable sector. Consider, for instance, the interaction between local government and soup kitchens operated by local charities. The functions of these two providers of public goods will probably overlap in any given locality. Of necessity, theories of resource allocation that purport to answer the question of how large or small this overlap should be, or whether allocation should skew toward the government or the charitable organization, operate in a vacuum without knowledge of the particular attributes of the local government and the local charity. Perhaps the government, as a service provider, is preferable on the basis of competence, economies of scale, religious neutrality, or any other number of factors. Or perhaps the charity is preferable. But preferable to whom?

Here, general theories of resource allocation lose some vitality. This is because those that purport to account for individual characteristics of charitable organizations must make assumptions about the importance and constancy of such characteristics across time and geography. However, if we are to discuss resource allocation at the local level, it makes little sense to assign weight to individual characteristics from an omniscient normative viewpoint. For instance, efficiency and competency, two attributes that have significant traction in the existing literature on resource allocation, vary widely across local governments and across charitable organizations. Furthermore, their importance to residents of any given locality will also vary. To the extent that a theory of resource allocation depends on static assumptions about such characteristics, its application will necessarily be flawed in any situation where reality varies from the assumptions.

I do not purport to solve the intractable dilemma of resource allocation between government and charity here. I do argue, however, that to the extent of its application, an opt-out method of financing non-essential public goods lessens the burden placed on certain resource allocation theories by forcing the local government into direct competition

**\*\*DRAFT\*\***

with charitable organizations for constituents' voluntary contributions. To understand why this is the case, consider a very simple closed example. Assume that Constituent has \$10,000 available to fund the provision of public goods. Eight thousand dollars of that amount is dedicated to taxes levied by Local Government. Now assume that both Local Government and Charity would use Constituent's \$2,000 to provide the same non-essential public good. Subject to constitutional and statutory restrictions, Local Government could levy an additional \$2,000 tax against Constituent, leaving nothing for Charity. This situation is only optimal if Local Government is a better provider of the good than Charity, based on whatever criteria are relevant. If those criteria favor Charity as the provider of the good, imposition of a tax destroys value and results in a sub-optimal allocation of resources.

Notice that the normatively desirable allocation of resources in this example depends on unspecified criteria. At first blush, this seems problematic given the observation that the relevance and constancy of criteria will vary with time and geography. However, the opt out model of financing certain non-essential goods partially addresses this problem by allowing constituents to make an assessment of local government's deservingness versus that of charitable organizations. Where the two are in competition for voluntary contributions, constituents who have limited funds for dedication to public use will make an allocation decision on the basis of criteria that are relevant to the constituent in both the time and place in which the decision is made. As a consequence of restraint in its invocation of the taxing power, and its use of the opt-out system, local government is placed on equal footing with charitable organizations in the marketplace for voluntary contributions, at least to the extent the particular public goods are included in the opt-out system. Constituents may make the best choice available on the basis of the criteria most important to them. The resulting allocation of resources would lend definition to the local government's scope of authority and would be specifically tailored for the particular locality at issue, partially alleviating the need to craft a one-size-fits-all theory of resource allocation.

*(c) Challenging an unsupported stereotype*

Adopting an opt-out system to finance certain non-essential public

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goods may lead to a final benefit: redefinition of the relationship between constituents and taxes. Given our rampant use of American anti-tax stereotypes in popular culture and scholarship, one might predict that any locality foolhardy enough to enact an opt-out system to finance certain non-essential goods would face a wave of immediate withdrawals from the system. I argue, with more faith than evidence, that this would not be the case. The old assumption that we, as a society, are averse to taxes (and therefore the provision of public goods) is merely that – an assumption. Use of an opt-out system has the potential to provide evidence to the contrary.

Proving the anti-tax assumption wrong could have a marked effect on the relationship between constituents and local government, as well constituents' regard of one another. Furthermore, to the extent that constituents currently believe that other constituents fit the anti-tax stereotype, and to the extent that this belief negatively skews constituents' own views of taxation and the provision of non-essential public goods, successful implementation of an opt-out system has the potential to reshape constituents' consideration of issues beyond the limited scope of non-essential spending. In other words, if constituents' belief in the anti-tax stereotype currently creates a presumption against government action, successful use of an opt-out system may reset that presumption to neutral. Furthermore, perception of a shared endeavor resulting from successful use of an opt-out system may increase a sense of community among constituents. For these, and the foregoing reasons, I recommend its use.

#### CONCLUSION

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