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An Economic Analysis of Direct Voter Participation in Zoning Change

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The decision of the Lincoln Institute of Land Policy to hold a conference on Economic Analysis in the Teaching of Land Use and Environmental Law presented a felicitous occasion to argue the general case for the application of welfare economics to the law of land use controls. The general argument will be supported with a specific application to a problem where the relevance of economic analysis is the subject of considerable debate. Zoning change mechanisms which permit direct voter participation at some stage of an administrative or legislative decision are the subject of my substantive "lesson." The application of economic analysis to consent ordinances and referenda was chosen because these topics have not traditionally been perceived, as has been nuisance law, as presenting important resource allocation problems. Thus, these topics offer an opportunity to extend the application of economic analysis from property rights assignment to more complex collective rights assignment situations. The topic was also chosen because the relevance of economic analysis to consent ordinances and referenda has recently been disputed if not denied.

The paper is broken into three parts. Part I discusses the interest of some land use scholars in economic analysis, as well as the reasons leading to the recent Harvard-Oxford counterattack against the law and economics movement generally. Part II argues for the application of economic analysis by illustrating the inadequacy of the use of conventional constitutional and administrative law doctrines as means of analyzing consent ordinances and referenda. Part III is the heart of the paper and presents a constructive, although tentative, argument for the use of economic analysis to explain and improve the zoning process. My basic thesis is that where the making of collective choices among competing land use allocations is of concern, welfare economics theory is a useful, and perhaps superior, starting point for the formation of legal rules.

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I.
WHY LAW AND ECONOMICS

In the past decade, economic reasoning has been a dominant intellectual influence on the younger generation of law teachers.[1] Even those who are repelled by the seemingly narrow calculus of interests which economic analysis takes into account have been forced to confront welfare economics. Those of us who have been attracted to economic analysis find that it offers a superior and coherent theoretical explanation of societal organization relevant to those areas of modern law which must deal with the messy problem of the proper role of public regulation of private choice when compared to alternative models of social control. The attraction of economics can perhaps be explained by an analogy between two famous classical compositions—Bach's Goldberg Variations and Mahler's last completed symphony, The Ninth—and two related areas of law—land finance and land use controls. Like land finance law, the Goldberg Variations are stately, sparkling, and innovative but always within a well-bounded context. The law of mortgages found its greatest expression in Glenn's great Victorian Treatise on the Law of Mortgages. Land use controls is more like Mahler's Ninth. The subject matter is intense but also banal, sometimes coherent and deeply moving, but at other times chaotic and undisciplined, always striving for something transcendent but not fully articulated. Like Mahler, contemporary legal scholarship was not adequate to address the important problems of societal organization and resource allocation raised by post World War II land use conflicts. Legal scholarship was either premised on the nihilistic and pop-Freudian theory of legal realism or the even more unfocused theory of liberal pragmatism which followed it. Much land use scholarship simply reflects the theory that the function of the legal system is only to remove "artificial" con-

1. *See* Posner, *Some Uses and Abuses of Economics in Law,* 46 U. CHI. L. REV. 281 (1979). The function and limits of economic analysis and law are the subject of some controversy. Professor Posner maintains that the primary role of economic analysis is positive or scientific and that its function is to explain behavior in the legal system. Legal behavior is in need of explanation and economic analysis is a powerful tool to this end. But there is also a need to develop new legal rules, and economic analysis can suggest the normative objective and form of these rules. This paper is equally concerned with both uses of law and economics, and like Professor Posner's work, cautions that the normative need not flow from the positive.

straints on public entities so that they will be free to do good. When public entities did not do good as many defined the term, for example by enacting zoning ordinances which substantially raised the cost of entry into suburban communities, the only answer legal scholarship could provide was a quick and simplistic constitutional fix to cure an obvious wrong. There was little serious effort to explain why cities behaved as they did or to evaluate systematically the impacts of their policies.

Economic analysis, as developed by pioneers such as Henry Manne, Richard Posner and Guido Calabresi, offered a simple, though not simplistic, model of human behavior. It provided both a positive theory to explain private and public behavior, and the basis for a normative theory against which legal rules could first be tested. The core notion of law and economics, that the neoclassical definition of efficiency is a positive standard by which alternative resource allocations can be compared, is an especially powerful one for lawyers. Cases are litigated both because of the situations of the parties involved and because of underlying conflicts within society. Lawyers interested in analyzing the underlying conflicts and speculating about the proper role of the legal system in resolving them, found economic analysis very attractive. It provided a universal starting point for the derivation of a model to test alternative resource allocations. Such a model was particularly welcome in land use, which deals with intense conflicts among alternative conceptions of property rights about which little consensus exists as to the substantive results which the legal system should promote. The law of land use controls is a patchy mixture of constitutional law and statutory construction with a thin base of common law or *ultra vires* notions. It is particularly sensitive to the character of the jurisdiction in which the conflict arises, and thus, no coherent core of general and widely accepted doctrine has emerged. Whatever concepts the courts purport to follow are so general as to be vacuous. At one time it was thought (or at least hoped) that the work of the planning profession could provide the necessary "grundnorms"[2] but this hope proved illusory. When one began to plumb what planners actually had to offer,

2. The term is usually translated from the German as "basic norms" and is associated with the Austrian-American scholar, Hans Kelsen. *See, e.g.*, Kelsen, *Professor Stone and the Pure Theory of Law*, 17 STAN. L. REV. 1128, 1140-51 (1965).

the answer was "very little." The critical scholarship of those interested in city planning such as Banfield,[3] Meyerson,[4] Wilson[5] and, later, Altshuler,[6] not only exposed the weaknesses of using the work of planners as a basis for a law of land use controls, but also raised important questions about the limits of public intervention in the private market; a question which much legal scholarship ignored. The stage was thus set for the emergence of the contemporary, positive and normative, law and economics movement.

The normative presumption of neo-classical welfare economics is that the efficient allocation of resources should be promoted unless there are substantial counter-considerations. There is an important question which is always interposed to an argument that efficiency promotion should be the primary objective of the law: Why should efficiency be ranked above all other competing, and seemingly more attractive values such as equity, justice, wealth redistribution and fairness? In land use controls, the answer is perhaps easier than it is for some other areas.

The subject of land use controls is the proper level of public regulation of the land development market, and the extent to which public should be substituted for private choice. There is a wide consensus among the players in the zoning game that the object of public regulation or direct public development *is* the enhancement of the efficient allocation of resources. The theories of justification for public regulation are generally based on crude theories of market failure and the need to correct these failures to induce efficiency where the unregulated market would not result in the net efficient allocation of resources. The widely shared perception that efficiency promotion is the objective makes it difficult to argue that if other values (for example, income redistribution) were ranked higher, land use regulation would be an effective method of accomplishing the objective. Thus, it seems plausible to rank efficiency as the primary goal of the legal system and to review the other values as constraints which may operate appropriately in limited instances.

My argument has both a substantive and pedagogical dimension. In teaching land use controls at several schools, I have found

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3. E. BANFIELD & J. WILSON, CITY POLITICS (1963).

4. Meyerson, *Building the Middle-Range Bridge for Comprehensive Planning,* 22 J. AM. INST. PLANNERS 58 (1956).

5. E. BANFIELD & J. WILSON, *supra* note 3.

6. A. ALTSHULER, THE CITY PLANNING PROCESS (1965).

that the consistent use of the goal of efficiency promotion as the standard to evaluate the cases, statutes, and reform suggestions is an effective method of teaching the course. The subject matter quickly exposes a number of important value conflicts, and there is a tendency on the part of students to express their preferences in an unfocused and inarticulate manner. If law and economics does nothing else, it forces students who wish to reject the lessons of welfare economics to organize their arguments to take into account more relevant considerations than they would without the constant focus on efficiency. In short, I use economic analysis pedagogically to shift the burden of proof to the students to dislodge efficiency as the desired standard.

The substantive dimension to the argument is that society has failed to appreciate the performance of the land development market. American cities and their suburbs may not have the compactness, charm and street life of many European cities, but the market here has performed well in meeting the demand for commercial and residential uses. If one accepts this premise, it would seem to follow that one ought to have a sound reason for any kind of public intervention in the market, especially for intervention which withdraws land from the market or substantially increases the cost of development. The adoption of efficiency promotion as the primary goal requires a tightly reasoned case for public intervention.

The case for public intervention in the real estate market rests on two rationales which ultimately merge. The first is the presence of external costs which are not minimized through private bargains. The second is the inability to organize a market, again because of high transaction costs, to provide public goods at a level for which a demand exists. From a purely analytical perspective, both the problems of externality control and public good provision can be the same. The elimination of a bad is the provision of a good.[7] The justification for regulations which eliminate bads and those which seek to provide goods is the same—the promotion of efficiency. However, it is useful to distinguish between the reduction of "negative" externalities and the provision of "positive" externalities (public goods). The case for public intervention may be very different depending on whether the problem is the need for the elimination of a "bad" or the provision of a "good."

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7. *See* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1199 (1967).

The distinction between "bads" and "goods" is a very controversial, but valid, one. Take, for example, the issue of the proper growth rate for a city. Are those who seek to restrict growth merely demanding that new development not cause "bads," such as increased congestion and potential pollution, or are growth control proponents asking for a "good," such as the provision of more open space and a high level of amenity in the community? The characterization of an activity is important because we have generally made a distinction between the prevention of a "bad" and the provision of a "good" in deciding who should bear the cost of implementing the regulatory decision. Thus, this section concludes with a suggested basis for distinction between "bads" and "goods." The third section of this paper will suggest some consequences this distinction has for the legal system, and will explain why many of the issues assumed to be efficiency issues may not be so at all.

Negative externalities or "bads" occur when one land use choice reduces the use and enjoyment of another. According to Coase's seminal aricle, *The Problem of Social Cost,*[8] if one party alleges that a proximate land use injures the party because of the creation of external costs, it is not proper to speak of one use causing injury to another. Rather, it is necessary to recognize that causation is joint since the alleged adverse impacts are the result of mutual incompatibilities between the two uses. Nevertheless, causal relationships must be established. The concept of negative externalities must be given normative content because the concept of externality as used in welfare economics is not self-defining for the law.

In the case of negative externalities, the law must decide who must bear what costs and why. To make the concept of a "bad" normative or operative,[9] it is necessary to distinguish between normal and abnormal background levels of interference with one's use and enjoyment of land. There is currently a lively debate as to whether these normal and abnormal background levels should be set by justice or by utilitarian criteria.[10] The better answer is that crude efficiency notions do and should play a substantial role in setting background levels and, thus, in assigning property

8. Coase, *The Problem of Social Cost,* 3 J. L. & ECON. 1 (1960).

9. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls,* 40 U. CHI. L. REV. 681, 729-31 (1973).

10. Epstein, *Nuisance Law: Corrective Justice and its Utilitarian Constraints,* 8 J. LEGAL STUD. 49 (1979).

rights whether by property or liability rules. Under justice or utilitarian theories, it is necessary to speak of one use causing negative externalities.

Not every disvalued impact from another's choice, land use or otherwise, can be classified as a negative externality for the simple reason that an impact free society would be a static society. Just as economists attempt to distinguish between Pareto and non-Pareto relevant externalities,[11] the law must decide which externalities are relevant (*e.g.*, a basis for some form of public intervention), and which are not. As the third section of this paper will illustrate, the focus on relevant externalities can lead to some important insights about the geographic scale of the problem and suggest alternative institutional responses.

Positive externalities are generally defined as third party benefits which accrue as a result of an action such as a land use choice. If the benefits cannot be captured through a market by the person providing the benefits, there is a danger that an efficient amount of the "good" will not be produced through the market. The failure of private collective action to furnish the "good" generally leads to a standard public goods justification for the public provision of the "good."[12] Not only does the market failure explanation provided by public goods theory provide a justification for public intervention, but economists have had useful things to say about the level and scale of public intervention, although it must be admitted that the application of many proposed models is ambiguous.

II.

THE LAW OF CONSENT ORDINANCES AND REFERENDA

All over the world, in the past two decades, neighborhood groups have demanded the right of self-determination over the pace and scale of land use change in their neighborhood or community as a whole.[13] In the United States, however, the concept of citizen self-determination and direct participation in land use decisions is at variance with the traditional theory of land use regulation. Zoning and other land use decisions are assumed to be either legislative or administrative acts undertaken by bodies elected

11. Bator, *The Anatomy of Market Failure*, 72 Q. J. ECON. 351 (1958).
12. M. OLSON, THE LOGIC OF COLLECTIVE ACTION (1965).
13. *See* G. LEFCOE, LAND DEVELOPMENT IN CROWDED PLACES, 11-38 (1979).

through the representative process or appointed by elected representatives. The criteria for the validity of an act is whether those who did the act have a legitimate claim to exercise the power, whether the act comports with constitutional or other self-imposed procedural limitations, and whether the act is consistent with whatever substantive standards the courts apply.

Zoning originated as a means of assigning public property rights in the status quo to existing users. There have long been two direct formal citizen participation change mechanisms in zoning. One is consent ordinances. The other is initiatives and referenda. These devices fell into disuse after World War II as courts viewed zoning as a legislative or administrative act carefully considered, with reliance on the expert advice of planners. With the loss of faith in experts and in the political process generally, it is not surprising that interest in direct voter participation has revived. However, the case law is ill-prepared to deal with the increased use of these techniques and to find alternative change accommodation devices which can balance the somewhat inconsistent goals of direct voter participation and efficiency promotion.

Consent ordinances and referenda and initiatives are conventionally analyzed as delegation of power cases. At one time, it was debatable whether or not a legislature could delegate to the statewide electorate the power to enact laws. Early cases struck down such delegations on the ground that direct citizen approval of laws was inconsistent with the concept of representative government. This view has, however, been repudiated.[14]

The cases upholding referenda and initiatives make two crucial assumptions, both of which present problems when applied to land use control decisions. First, it is assumed that the voters are all the voters in some appropriate political unit, such as an entire state or city. Second, it is assumed that the issues submitted to a vote will be of general applicability. The courts have been troubled by situations where the legislature has delegated the power to make law to non-traditional political voting units and the delegation has involved the right to make decisions which affect only the self-interest of the members of the voting unit. A distinction has, therefore, been drawn between general delegations to voters and delegations to private parties, although analytically both are simply the delegation, to some subunit of the public, of the power to make law.

14. L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, 52–53 (abr. student ed. 1965).

Consent ordinances and referenda and initiatives may be analytically classified as public or private delegations. Consent ordinances delegate to small groups of property owners the power to make laws directly affecting their self-interest, such as what uses will be permitted, under what conditions, in the immediate area of the group's jurisdiction. Referenda sometimes involve more general issues, such as how much and at what rate a community shall grow. They often involve matters of keen self-interest to a small geographical segment of the community. Referenda over low and moderate income housing projects fall into this category. The Supreme Court has expressed its concern over private delegations by framing the issue as one of due process; but the four important Supreme Court cases dealing with the issue have been unable to articulate a consistent rationale for the results and the Court's resolution of the cases remains troubling.

Courts attempting to draw a line between valid and invalid consent ordinances start from a distinction between two early Supreme Court cases. The first, *Eubank* v. *City of Richmond,*[15] held that an ordinance which allowed property owners in a designated area to establish a set-back line was an invalid delegation of power to private parties because there were no standards set to check the possible arbitrary exercise of power. *Thomas Cusack Co.* v. *City of Chicago,*[16] the second case, upheld an ordinance which prohibited billboards in residential areas, but allowed a majority of property owners on the block in which a billboard was proposed to waive the prohibitions. Both ordinances gave property owners affected by a proposed regulation the power to veto the regulation. The Supreme Court thought the distinction between the two cases was "plain":

> The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification.[17]

The distinction between an invalid "delegation of legislative power," which permits a majority of property owners to impose a restriction, and a valid "familiar provision affecting the enforcement of laws and ordinances," which merely allows the removal

15. 226 U.S. 137 (1912).
16. 242 U.S. 526 (1917).
17. *Id.* at 531.

of a previously imposed legislative restriction, is at best a difficult one to grasp. Whatever merit there was to the distinction was blurred twelve years later in the third of the Supreme Court's trio of zoning consent cases, *Washington ex rel Seattle Title Trust Co. v. Roberge.*[18] Philanthropic homes for the young or old were permitted in residential districts only if two thirds of the property owners within 400 feet of the proposed location consented to the proposed use. One could argue that this was *Cusack;* social service institutions were prohibited unless accepted by those most affected by the new use, but the court followed *Eubank* and held that the Seattle ordinance was unconstitutional. One could attempt to rationalize *Cusack* and *Roberge* by arguing that the recently decided foundation zoning case, *Euclid v. Ambler Realty Co*[19] changed the delegation analysis applicable to cases such as *Roberge.* In *Euclid,* Justice Sutherland grounded the city's power to segregate uses among different districts on their likely offensive character. *Roberge* can be seen as a case where the city failed to make the necessary "legislative determination that the proposed building would be inconsistent with public health, safety, morals or general welfare." The Court was concerned that without this finding there was a high risk that neighborhood consent would be withheld arbitrarily. *Cusack* was distinguished precisely on the ground that billboards "by reason of their nature are likely to be offensive." However, this distinction does not wash because zoning is largely a validation of widely shared social and cultural values. There are no objective criteria to determine which uses are objectionable and which are not. Any use may be disvalued in any given area and for this reason the delegation analysis ought to remain constant regardless of the use at issue. Courts must do more than simply make intuitive judgments about which uses are likely to be offensive and which are not.

The *Eubank, Cusack, Roberge* trilogy all involved the problem of the tyranny of the majority over a minority because the voting unit was so small. The same problem arises if the voting unit is larger, such as a municipality, if a single tract is subject to a referenda. For this reason, courts have increasingly held that the rezoning of a small tract is an adjudicative function, and thus the landowner is entitled to due process protections which preclude use of the referenda.[20] Due process considerations are weaker, however, when the ordinance involves municipality-wide issues.

18. 278 U.S. 116 (1928).
19. 272 U.S. 365 (1926).
20. Arnel Dev. Corp. v. City of Costa Mesa, 98 Cal. App. 3d 567, 159 Cal. Rptr. 592 (1979).

In *City of Eastlake v. Forest City Enterprises,*[21] the Supreme Court recently issued a highly simplistic opinion in which they held that city wide small lot rezoning referenda classified as legislative under Ohio law are constitutional. The Court reasoned that because all power derives from the people, "[a] referendum . . . cannot be characterized as a delegation of power."
Similarly, the California Supreme Court has held that the use of initiatives and referenda to enact growth management plans do not violate a landowner's right to due process.[22]

City of Eastlake has sparked a great deal of criticism, but no coherent theory of the proper method of making collective choices has emerged. Those who think that local government officials are either incompetent or corrupt support referenda as a means of cleansing the political process.[23] Those who have been influenced by a generation of studies on voter irrationality argue that the reformers are wrong.[24] Finally, those who want more low and moderate housing to be constructed assert, with little foundation, that landowners have a fundamental right to have zoning decisions made by representative bodies.[25] In short, the traditional legal analysis of consent ordinances and referenda yields little in the way of satisfying theory either to explain the cases or to suggest a coherent approach to the problem of deciding when direct neighborhood control over the entry of new land uses should be allowed.

III.
PUBLIC CHOICE APPLIED

Those of us who are interested in applying economic analysis to public allocation choices have been greatly influenced by Buchanan and Tullock's *The Calculus of Consent.*[26] This pioneering work has spawned the public choice school of policy analysis based on the premise that people behave no differently in making political choices from the way that they do in making more tradi-

21. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976).
22. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
23. *See* Comment, *The Initiative and Referendum's Use in Zoning,* 64 CALIF. L. REV. 74 (1976).
24. Gellman, *Zoning and the Referendum: Converging Powers, Conflicting Processes,* 6 N.Y.U. REV. L. & SOC. CHANGE 97 (1977), and Note, *The Proper Use of Referenda in Rezoning,* 29 STAN. L. REV. 819 (1977).
25. Sager, *Insular Majorities Unabated:* Warth v. Shelden, *and* City of Eastlake v. Forest City Enterprises, 91 HARV. L. REV. 1375 (1978).
26. J. BUCHANAN & G. TULLOCK, THE CALCULUS OF CONSENT (1962).

tional economic transactions (the purchase of a new shirt, for example). Public choice proponents must acknowledge that this premise is a bitter one to many, and recently, some of the best minds in the legal academic community have begun to deny the relevance of public choice analysis, except as an academic exercise, because of its explicit economic underpinnings.

Although public choice theory is designed to explain only why people engage in collective action through the political process and to suggest appropriate decision making units, many people are likely to be repulsed by it, believing that if we admit that people are entitled to individualized gains from collective action something is wrongfully being sold. In Dürrenmatt's *Der Besuch Der Alten Dame* (The Visit), a woman returns to the place of her birth as the richest woman in the world. Earlier in life, she had borne an illegitimate child and had lost her paternity suit when the father bribed two witnesses to say that she had slept with them, rather than with the father. She comes, like Medea, to seek revenge for the injustice, offering to give the town and its residents a billion dollars on one condition: "*Ich gebe euch eine Milliarde and kaufe mir dafür die Gerechtigkeit*" (I will give you a billion dollars and with it I will buy the law).[27] She requests the death of her ex-lover. When the mayor responds that one cannot buy the law, she silences the moral outrage at selling public rights by simply observing "*mann kann alles kaufen*" (one can buy everything). It is perhaps the need to reject the view that the political process is a market place that leads to a rejection of public choice theory. Nonetheless, I argue that public choice theory, properly understood, is a superior method of analyzing the consent ordinance and referenda problem.

Proponents of public choice theory argue that people participate in the political process to purchase public goods; goods that are not provided through the market, even though a demand for them exists. The inability of an investor to capture a substantial portion of the benefits of the investment results in a lack of incentive for private production of the good.

Zoning ordinances allow private property owners to capture the amenity level of an area through the recognition of public property rights. An individual chooses the highest ranked good or combination of goods as dictated by his own utility function. In

27. F. DÜRRENMATT, DER BESUCH DER ALTEN DAME, 53 (P.K. Nehermann ed.).

short, collective action is simply an exchange process—organized to compensate for the presence of transaction costs which would prohibit the production of certain goods through the market process—where it is logical to assume that the individual expects his resource position will be enhanced as a result of the trade. Thus, there is a *prima facie* case for arguing that the efficient allocation of resources ought to be the result of collective action except in situations where there is a clear consensus that non-efficiency reasons such as the redistribution of wealth are the purpose of the enterprise.

Another reason for the resistance to public choice theory is that it runs counter to the current fashion in jurisprudence. Public choice theory rejects the organic theory of the state, but many younger scholars have been influenced either by Marxism or the related thinking of 19th century Romantic German thinkers who saw the law and the state as the embodiment of the spirit of the people. This view rejects veneration of efficiency in favor of higher community values. For example, Professor Michelman has recently argued that the proper role of efficiency is limited to "a tie breaker lying at the bottom of a hierarchy of norms, a consideration to fall back on when no superior principles of justice, fairness, equality, reciprocity, altruism, or whatever, succeeds in ranking the competing claims of the parties."[28] It would lead me too far afield to probe the different meanings of economic analysis of the law or the truly large question which seems to engage many people today (as it should) of where Kant and Hegel actually lead us. For me these theories are troubling, and I approach the question of voter participation zoning from the assumption that the purpose of a zoning ordinance is to produce an efficient allocation of property rights, in a good that I will call an "amenity level," and that the best rule is the one that minimizes the risk of inefficiency by insuring that all legitimate property claims are considered in the efficiency calculus.

My analysis of this problem focuses first on the problem of small parcel zoning changes. Like all economic analysis, it starts from an *ideal*. A theory of rational market behavior posits that a unanimity rule is the most consistent with self-interest and, of course, the Pareto principle because only this rule "will insure that all external effects will be eliminated by collectivation."[29]

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28. *See* Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1047 (1979).

29. J. BUCHANAN & G. TULLOCK, *supra* note 21, at 89.

Under this rule, consent ordinances could be seen as neutral if the transaction costs of obtaining consent are small due to the size of the area. In effect, the new entrant is in the position of a person trying to establish a common plan of equitable servitudes. If, however, transaction costs are high and bribes are not permitted, then the courts which strike down consent ordinances as invalid delegations of power to private parties on due process grounds are on the correct track because it can be argued that the legislative process is a better method of insuring efficiency. This argument in turn is premised on the economic and other merits of the legislative process as an opportunity for bargains to be struck among competing parties.

A major benefit of the use of economic analysis is that it can reveal alternatives to the present solutions offered by the law and the courts which must choose among a limited class of rules and cannot devise institutional solutions. One such solution is proposed in Nicolaus Tideman's Ph.D. thesis written at the University of Chicago.[30] Professor Tideman studied the frequency and geographical location of zoning protests in small rezonings and special use applications in Skokie, Illinois. He found a correlation between proximity and protest; specifically that the probability of participation in a hearing declines by one half for every 79 feet. This led him to propose a system of voted compensation. "A person proposing a change in land use of a type thought to have significant direct effects would propose a constant of proportionality for the compensation function."[31] The scheme would be that the area would be defined as that area where the effects would be greater than 0.1 percent of the property value. Votes would be weighted by estimated effects and, if a majority approved, the change would be permitted. The beauty of the Tideman solution is that the appealing democratic idea of consent ordinances, in which people directly express their preferences, can be combined with efficiency promoting constraints to insure that voting schemes simply do not become an occasion for one group to shift the costs of amenity production to another group.

The recommendations of Tideman have recently been echoed in a much more general analysis. Robert Nelson concludes, as have many other scholars influenced by welfare economics, that a

30. T. Tideman, Three Approaches to Improving Urban Land Use (1969) (unpublished Ph.D. thesis).

31. *Id.* at 49.

zoning ordinance should be conceptualized explicitly as the recognition of collective property rights "administered by local legislatures acting virtually as trustees for neighborhood residents."[32] This perspective is a useful starting point to examine the concern about the poor performance of zoning in accommodating change demanded by the market. Most observers of the process have concluded that the fault lies with those in charge of the process. Until recently, many students of the administrative process adhered to the general theory that the remedy for widespread dissatisfaction with administrative regulation was to recruit better people rather than to examine the rationale for the regulation. This simplistic notion has now been rejected in the face of the evidence, and the focus on those governing the zoning process has been replaced with a more powerful structural explanation of the failure of the process. Nelson and others have argued that the poor performance of zoning results because zoning is only the *de facto* recognition of collective property rights, lacking the most important *de jure* characteristic of a property rights system—alienability. The lack of alienability "has created a major obstacle to necessary and desirable transitions in the type of basic land use in neighborhoods and communities and has frequently forced that transition eventually to occur through extralegal means."[33] The introduction of voting schemes with guaranteed compensation can cure the due process problems which exist when the power to control zoning change is delegated directly to neighborhood residents.

Professor Frank Michelman has recently criticized the public choice model both as a positive explanation of judicial behavior and as a normative method of collective decision making, but his criticism is not wholly convincing.[34] He prefers a community choice model to the public choice model. Community choice allows communities to define their values, unconstrained by efficiency requirements, through public debate and the electoral process. As Professor Michelman points out, the model has deep roots in Western political theory. The problem that I have with

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32. R. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION 19 (1977).

33. *See also* Fischel, *Externalities and Zoning*, 35 PUB. CHOICE 37 (1980).

34. *See* Michelman, *supra* note 23; *and* Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145 (1977–78). *See also* the chilling model of the new corporate city presented in Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980).

the model is that the smaller the decision making unit to which unconstrained community choice is applied, the greater is the risk that the community will not take into account the relevant costs of the decision. Tyranny of minorities and inefficiency are the two most obvious relevant costs which history suggests are likely to be ignored. The community choice model takes on greater force as the size of the decision-making unit increases, as constraints begin to operate which are consistent with the public choice model, though not required for a legitimate community choice decision.[35] Thus, the California Supreme Court opinion upholding the right of a community to adopt a growth management plan through the use of the initiative and referendum[36] is a harder case to criticize from a public choice standpoint than is *City of Eastlake,* which involved a small lot rezoning. The introduction of the possibility of nonefficiency principles, as one moves up the scale of decision making units, introduces a messy complication to my analysis, but it is the kind of complication with which the law must deal.

35. A. DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

36. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).