Silver Lining or Double-Edged Sword? Equipopulation Exceptions and Environmental Protection

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SILVER LINING OR DOUBLE-EDGED SWORD?
EQUIPOPULATION EXCEPTIONS AND
ENVIRONMENTAL PROTECTION

Michael Grynberg

I. INTRODUCTION ................................................................. 553
II. SPECIAL DISTRICTS AND ENVIRONMENTAL DANGER .............. 557
   A. One Person/One Vote and Its Progeny ............................... 557
      1. The Special District Exception – Salyer .......................... 559
      2. The Exception Expands – Ball ...................................... 561
      3. Problems in the Special District Precedents ..................... 562
   B. Environmental Dangers ................................................. 566
      1. Environmental Consequences of Special Districts ............. 566
      2. Environmental Risk in Favoring Economic Interests .......... 568
III. POTENTIAL BENEFITS OF THE SPECIAL DISTRICT
     EXCEPTION ........................................................................... 570
   A. Potential Pragmatic Benefits ........................................... 571
      1. Efficiency ................................................................. 571
      2. Bargaining .................................................................. 574
   B. Picking the “Green” Interest Group as the Ballot
      Beneficiary ......................................................................... 577
      1. Public Choice and Political Structures .............................. 577
      2. Picking the Right Party ............................................... 581
      3. As Applied in Cases ..................................................... 583
      4. Getting It Right .......................................................... 586
   C. New Government Structures .............................................. 587
      1. Free Market Environmentalism ....................................... 588
      2. Pinning the Vote on the Created Interest ....................... 588
IV. CONCLUSION ....................................................................... 591

I. INTRODUCTION

Legislators represent people, not trees or acres. – Reynolds

Structuring the political process is not a neutral endeavor.

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Pre-election determinations regarding ballot access and aggregation play an outsized role in electoral outcomes. Those who design the electoral system, therefore, have the opportunity to favor or disfavor specific viewpoints long after the task of devising an electoral structure is complete. The tools used to achieve these ends have faced legal fire from both voting rights proponents, those seeking to expand access to the political process, and those disadvantaged by any particular regime. Because certain voting schemes favor certain viewpoints, voting rights interests may clash with other political priorities in any given context.

This Note seeks to examine one aspect of the latent tension between voting rights and environmental concerns: the environmental threat posed by the "proprietary" exception to the "one person/one vote" principle, and the countervailing opportunity to use the exception to create governmental entities that possess an institutional bias in favor of environmental preservation. In the end, the threats posed by the use of the exception may outweigh any potential benefits. Be that as it may, the exception appears here to stay, and those whose views suffer at the hands of a prevailing constitutional regime may yet find opportunity in the status quo.

The Supreme Court established the one person/one vote rule in Reynolds v. Sims. The Court held that the Equal Protection Clause of the Fourteenth Amendment requires states to apportion their legislatures on a basis that gives each citizen's vote equivalent weight. The Court soon expanded the principle to

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1 See, e.g., Davis v. Bandemer, 478 U.S. 109 (1986) (holding that political gerrymandering could raise a justiciable question); Reynolds v. Sims, 377 U.S. 533 (1964) (holding malapportionment of state legislature an equal protection violation); Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding that redrawing city lines in manner to exclude African-American voters violated equal protection). Though adopting a broad definition of voting rights, I recognize that there is necessarily disagreement about what the "access expanding" decision is in any given context. The example around which this Note revolves, granting ballot access to all who meet age and residency requirements irrespective of property ownership, is, I hope, relatively uncontroversial.

2 This Note focuses upon institutional effects on environmental preservation. As with access expanding voting procedures, defining what is in the environmental interest is often an extremely contentious issue. For present purposes, the label is applied in a purely contextual manner—the environmental decision is the one in the given context that appears best able to pursue the goals of pollution minimization, common resource conservation, and biodiversity preservation.


4 See id. at 568.
elections of local government units and struck property ownership requirements for various local elections. In establishing these precedents, however, the Court noted that some governing bodies might exercise duties that are non-traditional and affect a specific group in a disproportionate manner. For such districts, an election under the one person/one vote principle may not be necessary.

This hint became explicit in Salyer Land Co. v. Tulare Water Dist. The Court concluded that a California water storage district, because of its limited purpose and disproportionate effect on landowners, could restrict its franchise to property owners within the district and weight votes based on the amount of property owned. This “proprietary” exception to the one person/one vote rule was expanded in Ball v. James. Ball also concerned a water-related special district that enjoyed limited government powers, in this case the ability to condemn land, issue tax-free bonds, and tax real property. Unlike Salyer, however, Ball’s water conservation district sent its water to urban as well as agricultural areas and also operated electricity generating facilities to meet the bulk of the district’s operating costs by selling power to state consumers. Despite these distinctions, the Court upheld the district’s property-based voting scheme, stating that the district did not exercise “normal” government functions and that the district’s primary purposes, its water functions, were narrow. Given these precedents, state and lower federal courts have also employed the proprietary model in a variety of cases ranging from water districts to the funding of public transportation systems.

For the environmentally minded, the proprietary exception

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8 See id.
10 See Salyer, 410 U.S. at 728, 734-35.
13 See id. at 360.
14 See id. at 365-66.
15 See id. at 366-67.
16 See infra notes 89-90 and accompanying text.
raises an immediate concern that the wealthy will have too much say in decisions that may adversely affect the environment. Indeed, *Salyer* arose due to district activities that led to the flooding of one of the plaintiffs’ land. 17 Especially troubling is the potential insulation of corporate interests from public accountability when the proprietary exception allows those interests to hold sway in environmentally sensitive areas. 18

Though the proprietary exception can be criticized on environmental grounds, the line of precedent exists nonetheless. Given the real threat of environmentally hostile institutions, the question is whether the proprietary exception presents potential benefits for those seeking to institutionalize environmental preservation. Three areas suggest themselves.

First, the ability to restrict the franchise to a specific class of voters may present certain practical opportunities in the creation of the special district that are independent of any divergence of interests between the enfranchised and excluded residents of that district. For example, if a water district is needed to preserve an aquifer but agricultural interests in the state legislature will block the body’s creation unless the franchise is allocated based on property, an environmentally minded individual may prefer a district on those terms over no district at all. Second, the ability to restrict the franchise may be beneficial to the environment if the vote can be restricted to a class that is more likely to have a greater interest in environmental protection. Electoral tailoring may prove especially useful in situations in which the obstacles to environmental protection predicted by public choice theory appear. Third, the proprietary exception expands the range of possible governmental structures, creating the prospect for innovation in the creation of entities with a structural bias in favor of environmental preservation.

This Note looks to both the practical and theoretical challenges to environmental legislation and regulation as well as past applications of the proprietary exception to evaluate the exception’s possibilities. Part II describes and examines the genesis of the proprietary exception in greater detail and discusses its inherent dangers to environmental preservation. Part

17 See *Salyer*, 410 U.S. at 737-38.
18 See *infra* notes 100-08 and accompanying text.
III analyzes the flip side of the coin. The exception presents "green" potential in three areas: use in spite of divergent interests between the franchised and disfranchised; use because of the divergence; and use to create the divergence. Section A of Part III disregards the interests of the group enfranchised by the special district to examine cases in which the exception gives environmental interests a bargaining chip with other interests or confers efficiency benefits. Using public choice theory's accounts of environmentalism's difficulties in the political process as a point of departure, Section B examines the exception's potential benefits in cases in which the enfranchised interest is also one that can be expected to have environmental goals closer to heart than the voting population in general. Section C explores the exception's potential flexibility, specifically the possibility of uniting the proprietary exception with certain strains of "free market" environmentalism. Both the command and control approach to environmental protection as well as the notion of preserving the environment through privatization have been attacked for ignoring the benefits of the opposing model. The proprietary exception to the one person/one vote rule offers one possibility for harmonizing these contrary approaches. Finally, this Note concludes with some thoughts on whether, for environmentalists, the game is worth the candle in light of potential moral costs of the using the exception.

II. SPECIAL DISTRICTS AND ENVIRONMENTAL DANGER

The enormity of the violation of our environmental ethics, represented by state and federal laws, is only increased when the ballot is restricted to or heavily weighted on behalf of the few who are important only because they are wealthy. – Associated Enterprises, Inc. v. Toltec Watershed Improvement District, 410 U.S. 743, 751 (1972) (Douglas, J., dissenting).

A. One Person/One Vote and Its Progeny

Despite an initial reluctance to enter the "political thicket," the Supreme Court recognized the justiciability of apportionment questions under the Fourteenth Amendment's Equal Protection Clause in Baker v. Carr. Initial apportionment cases

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19 See Colegrove v. Green, 328 U.S. 549, 556 (1946).
arose in situations in which district lines had not changed to conform with shifting population patterns. As a result, plaintiffs claimed that their votes were diluted in comparison with voters in less populous districts that elected an equal number of representatives. In *Reynolds v. Sims*, the Court upheld such a claim and declared that states violated the Equal Protection Clause when they failed to allocate seats in state legislatures on the basis of population.

The one person/one vote rule now extends beyond statewide elections to cover local governments. In *Avery v. Midland County*, the Court applied the equipopulation rule to the selection of county commissioners from single-member districts. The principle's scope expanded rapidly. Malapportionment was unacceptable even in comparatively unimportant districts, like those involving junior college trustees. The one person/one vote principle also struck at property-based qualifications for local elections involving school districts, general bond issues, and utility bond issues. In these cases, the Court found that though property owners may bear the costs of certain government actions, the governing body or the referendum's subject affected or would affect a large enough class to invoke the demands of one person/one vote.

In establishing these precedents, the Court hinted that states retained room to maneuver. In *Hadley v. Junior College District*, the Court declared that, as a general proposition, "whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to par-

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21 See, e.g., *id.* at 192.
22 In *Baker*, for example, population disparities meant that a vote in one county was effectively worth 19 times a ballot cast in another. *See id.* at 245 (Douglas, J., concurring).
24 *See id.* at 568.
26 *See id.* at 485-86.
28 See *Kramer v. Union School Dist.*, 395 U.S. 621 (1969). In *Kramer*, the Court accepted *arguendo* the possibility that limiting the franchise to the interested was constitutionally acceptable, but rejected the requirement that voters own or lease property in the district as not properly tailored given the strict scrutiny attendant on the election.
ticipate in that election." The Court, however, immediately limited the rule's effect. "It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds... might not be required." Hadley, which involved the election of junior college trustees, fell squarely within the scope of the equipopulation principle because of the government's traditional role in providing education. Soon, however, the Court would resolve the "inevitable clash between two traditional American values, equality and property ownership" in favor of proprietary exceptions to the one person/one vote rule.

1. The Special District Exception – Salyer

Hadley's hint of exceptions to the one person/one vote rule became doctrine three years later in Salyer Land Co. v. Tulare Water District and its companion case Associated Enters., Inc. v. Toltec Watershed Improvement Dist. Salyer involved a California water storage district that was responsible for acquiring, storing, and distributing water. The district allocated its property-based franchise using weighted votes that corresponded to the amount of land each person owned. Plaintiffs challenged the voting scheme on equal protection grounds.

Though limited in purpose, the district was not powerless. The district could plan and execute state-approved projects for water conservation and acquisition, fix proportional tolls based on services provided, condemn private property, and issue bonds. The Tulare district further enjoyed governmental immunity from suit and certain taxes. Enfranchised or not, district residents felt the effects of district decisions on flood con-
trol activities that could damage individual homes.\textsuperscript{43}

The Court concluded that the district’s limited purpose and disproportionate effect on landowners combined to free it from compliance with Reynolds’s constraints and strict scrutiny analysis.\textsuperscript{44} The Court viewed the water control functions as demonstrating that the district had “relatively limited authority.”\textsuperscript{45} Furthermore, the district, in which only seventy-seven persons resided on agricultural land,\textsuperscript{46} lacked typical municipal institutions and did not provide services like “schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body.”\textsuperscript{47} As for Tulare’s flood control functions, the Court dismissed their potential impact as merely “incidental” to the district’s primary water storage and distribution missions.\textsuperscript{48}

While not exercising “normal governmental” authority, the district disproportionately affected landowners.\textsuperscript{49} All costs assessed against district land were in proportion to the benefits received and, if delinquent, became liens on the land.\textsuperscript{50} “In short, there is no way that the economic burdens of district operations can fall on residents \textit{qua} residents.”\textsuperscript{51}

Having determined strict scrutiny inapplicable, the Court found that California could have rationally concluded that landowners would not have subjected their lands to the liens necessary to support the district unless they had a dominant voice in its operation.\textsuperscript{52}

Dissenting with two others, Justice Douglas took issue with the majority’s finding of limited impact, primarily focusing on the risk of flooding as a result of district activities.\textsuperscript{53} “As a non-landowning bachelor was held to be entitled to vote in matters affecting education, so all the prospective victims of mismanaged flood control projects should be entitled to vote in water district elections.”\textsuperscript{54}

\textsuperscript{43} See id. at 726.
\textsuperscript{44} See id. at 728.
\textsuperscript{45} Id.
\textsuperscript{46} See id. at 723.
\textsuperscript{47} Id. at 729.
\textsuperscript{48} See id. at 728-29 n.8.
\textsuperscript{49} Id. at 729.
\textsuperscript{50} See id. at 729.
\textsuperscript{51} Id.
\textsuperscript{52} See id. at 731.
\textsuperscript{53} See id. at 737-39 (Douglas, J., dissenting).
\textsuperscript{54} Id. at 739 (citation omitted). Douglas also decried the effective handing over of dis-
On the same day, the Court upheld a Wyoming watershed improvement district that conditioned voting on property ownership in the manner upheld by Salyer in Associated Enterprises, Inc. v. Toltec Watershed Improvement District.\textsuperscript{55} Douglas again issued a vigorous dissent, arguing that assessments issued on the property would not fall entirely on landowners since they could be passed on to lessees and tenants.\textsuperscript{56} Douglas also raised the issue of environmental protection by noting the district's ability to "destroy a river by damming it and so deprive a watershed of one of its salient environmental assets."\textsuperscript{57}

2. The Exception Expands – Ball

Given the Tulare district's sparse population, Salyer left some doubt as to the scope of the proprietary exception to the one person/one vote rule.\textsuperscript{58} In Ball v. James,\textsuperscript{59} however, the Court expanded the exception by applying it to a clash between urban and agricultural interests.

Ball concerned a challenge to the property-based voting scheme of the Salt River Project Agricultural Improvement and Power District (the "Salt River Project"), which stored and delivered untreated water to Arizona landowners.\textsuperscript{60} The district subsidized these operations by selling electricity to state consumers regardless of whether they were landowners.\textsuperscript{61} The district also exercised certain limited government powers, such as the ability to condemn land, issue tax-free bonds, and tax (through assessments) real property.\textsuperscript{62}

There appeared to be a good deal to distinguish the Salt River Project from the district involved in Salyer. For example, the water conservation district at issue in Ball sent much of its water to urban as well as agricultural areas and generated most

\textsuperscript{55} 410 U.S. 743 (1973) (per curiam).
\textsuperscript{56} See id. at 750 n.3 (Douglas, J., dissenting).
\textsuperscript{57} Id. at 749.
\textsuperscript{58} See Bruffault, supra note 11, at 366 ("Salyer left lower courts confused. Some interpreted the case expansively and permitted states to limit the franchise in a special district to landowners whenever landowner payments are the primary source of district revenues. Other courts read Salyer narrowly . . . . For these courts, Salyer concerned the supply of water to agricultural land, and Kramer still governed for special districts operating in urban areas or providing services for households rather than agriculture.").
\textsuperscript{60} See id. at 357.
\textsuperscript{61} See id.
\textsuperscript{62} See id. at 360.
of its income through the sale of electricity.\footnote{See id. at 365-66.} Indeed, dicta in \textit{Salyer} implied a district like that in \textit{Ball} would have to comply with the one person/one vote principle. The \textit{Salyer} Court distinguished \textit{Cipriano v. City of Houma},\footnote{395 U.S. 701 (1970).} in which the issuance of revenue bonds had to conform with the equipopulation principle, in part because “the operation of the utility systems affected virtually every resident of the city, not just the 40% of the registered voters who were also property taxpayers.”\footnote{\textit{Salyer} also listed the provision of utilities as a traditional governmental function.} \textit{Salyer} also listed the provision of utilities as a traditional governmental function.\footnote{\textit{Salyer}, 410 U.S. at 727.}

Despite these differences with \textit{Salyer}, the Court upheld the Salt River Project’s property-based voting scheme, stating that the district did not exercise “normal government” functions.\footnote{See id. at 729.} “The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services.”\footnote{\textit{Ball}, 451 U.S. at 366.}

Having deemed the government functions narrow, the Court found that the district’s water functions had a disproportionate impact on property owners because the district delivered water based solely upon land ownership and did not regulate its use.\footnote{\textit{Id.}} Providing electricity was dismissed as not being a “traditional” element of sovereignty, but rather one that was merely “incidental” to the district’s water-based purpose.\footnote{See id. at 367-68.} In the Court’s eyes, the Salt River Project was more business than government; its subjects, more consumers than citizens.\footnote{See id. at 368-69.}

3. \textit{Problems in the Special District Precedents}

Notwithstanding the risk of environmental damage attendant in giving economic interests dominion,\footnote{\textit{Id.} See id. at 370.} the exception to the equipopulation rule presents several doctrinal concerns as illustr-
trated by the Ball decision.

Writing for three other dissenters in Ball, Justice White squarely rejected the notion that the Salt River Project was akin to a private corporation. In addition to commenting on the government powers described above, White noted that the Arizona Constitution treated the district as a political subdivision and that its power functions received less regulatory oversight than would a private utility. White also attacked the finding of disproportionate impact. Noting that eighty-three percent of the water system costs had been financed with power revenues, White stated, "[u]nlike the situation in Salyer, the financial burden of supplying irrigation water has been shifted from the landowners to the consumers of electricity." The land used as the basis of franchise simply bore no strong relationship to the district's operations. Finally, White claimed that labeling the district's activities as not implicating traditional government powers is inconsistent with usual government operation.

Several commentators have expanded upon themes in White's dissent. First of all, there seems little distinction in importance between traditional government functions and those that do not evoke constitutional concern. The dubiousness of the disproportionate impact found by the Court in Ball is underscored by the fact that only twelve percent of the Salt River Project's debt was secured by liens on district lands and ninety-eight percent of the district's revenues came from electric consumers. This difficulty is exacerbated by the mixed urban/agricultural nature of the district, which makes the subsidization problem, noted by White, inherent to the district. Ninety percent of the district's 240,000 electric consumers in 1982 were residential. With multiple types of land come the possibility of

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74 See Ball, 451 U.S. at 377 (White, J., dissenting).
75 See id. at 377-79.
76 Id. at 383. "It is apparent in this case that landowning irrigators are getting a free ride at the expense of the users of electricity." Id. at 384.
77 See id. at 385.
78 "Supplying water for domestic and industrial uses is almost everywhere the responsibility of local government, and this function is intimately connected with sanitation and health." Id. at 386. Government is also frequently involved in the provision of electricity. See id.
79 In his concurrence, Justice Powell implicitly acknowledged many of these problems, observing that Ball to some extent called into question the reasoning in Kramer. See Ball, 451 U.S. at 373 n.2 (Powell, J., concurring).
80 De Young, supra note 35, at 420 (citing Stipulated Statement of Facts 37, Ball v. James, 451 U.S. 355 (1981)).
81 See id. at 445 (citing Stipulated Statement of Facts at 36).
multiple interests and potential cross-subsidies. Use of property qualifications is more suspicious when numerous interests are at play. The urban setting of Ball, for example, increased the likelihood that non-irrigators would pay a larger portion of district costs.

Commentators have also noted a more conceptual problem. Given the similarities between cases in which the proprietary exception has been applied and those in which it has not, principled distinctions between "normal" and special government functions and disproportionate and universal impacts are unavailable. The Court was aware of the difficulty. Concurring in Ball, Justice Powell noted that drawing the line between cases in which the effects of the governmental body are limited and those in which numerous parties are affected may be difficult. In Powell's view, however, state legislatures are better qualified than the courts to make the necessary judgment.

Since Ball, the Court has only considered the exception in Quinn v. Millsap, in which it rejected an attempt to use the water district cases to defend a property ownership requirement for appointment to a board responsible for the drafting of a county reorganization plan. The Court noted that, contrary to Ball, the board's mandate extended beyond land-related issues to affect all citizens of the area.

Despite its difficulties, the proprietary exception is now part

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81 See id. at 450.
82 See id. at 429.
83 As Briffault explains:

[W]hether a district's actions have a disproportionate impact on a landowner constituency will turn on whether disproportionate impact is viewed through a proprietary or a democratic lens; yet the presence or absence of a disproportionate impact on landowners is supposed to determine whether the proprietary or democratic framework is applied. The analysis is entirely circular.

Briffault, supra note 11, at 371. As for the government functions prong, "[t]here is no natural distinction between 'sanitation, health, or welfare services' and water and power." Id. at 375.
84 See Ball, 451 U.S. at 373 (Powell, J., concurring).
86 See id. at 109.
87 There are other exceptions to the equipopulation rule. Appointive bodies need not conform to the equipopulation rule. See generally Sailors v. Bd. of Educ. of Kent County, 387 U.S. 105 (1967). The Supreme Court has also upheld restrictions of the franchise to the jurisdiction's residents even if the government operates a service or exercises police power beyond its borders. See generally Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60 (1978). Courts also are more lenient on expansions of the franchise to those outside the
of the constitutional fabric.\textsuperscript{\textcircled{88}} One person/one vote need not be adhered to in situations in which the government entity is deemed to have a disproportionate impact on a specific group while not exercising traditional government functions. State and lower federal courts have employed the proprietary model to legitimate voting restrictions in a variety of cases with potential environmental implications. Courts have accepted its use to aid funding of public transportation systems and elect representatives to community development, irrigation, drainage, and business improvement districts.\textsuperscript{\textcircled{89}} The principles enunciated in jurisdiction than on contractions within it. See Briffault, \textit{supra} note 11, at 400. Though these deviations may also have impacts in the environmental context, this Note will restrict itself to the influence of the two-part limited function/disproportionate impact proprietary exception.

\textsuperscript{\textcircled{88}} The Constitution is not the only source of authority to strike down government structures that do not adhere to the equipopulation principle. Some have suggested using the Voting Rights Act to bring challenges to franchise restrictions that are not covered by the equipopulation rule. See generally Glenn P. Smith, \textit{Interest Exceptions to One-Resident, One-Vote: Better Results From the Voting Rights Act?}, 74 \textit{Tex. L. Rev.} 1153 (1996).

The Voting Rights Act had this effect in a case concerning the Edwards Aquifer in Texas in which environmental factors assumed center stage. Unrestricted drainage on the aquifer led to the endangerment of the blind salamander and a challenge under the Endangered Species Act by the Sierra Club. See Sierra Club v. Lujan, No. MO-91-CA-069, 1993 WL 151353 (W.D. Tex. Feb. 1, 1993). A federal district court ruled that an Endangered Species Act violation occurred. See \textit{id.} As a result, Texas had to establish a plan to conserve the aquifer, lest the federal court impose one. See R. Tim Hay, Comment, \textit{Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965}, 25 \textit{St. Mary's L.J.} 1449, 1464 (1994). Texas passed a law that replaced the aquifer's weak elected board with a stronger appointed body. See \textit{id.} at 1467. Though appointed bodies do not implicate one person/one vote, see generally \textit{Sailors}, 387 U.S. 105 (1967), the Justice Department refused to preclear the change in voting practice under section five of the Voting Rights Act because the switch to an appointed body could result in retrogression of minority voting power. See Hay, \textit{supra}, at 1455. A federal court supported the Department, holding that replacement of an elected body with an appointed one is a covered change under section five of the Voting Rights Act, and that Texas had the burden of proof to show the change was nondiscriminatory. See \textit{Texas v. United States}, 866 F. Supp. 20 (D.D.C. 1994). This approach, however, only applies to changes that may negatively affect the influence of minorities in the voting process. Attacks to the status quo would have to be brought under section two of the Act, which allows challenges to voting structures that deny or abridge the right to vote on the basis of race or color by affording racial minorities less opportunity to participate in the political process. See \textit{42 U.S.C. \S\ 1973} (1994). The Salt River Project survived such an effort in \textit{Smith v. Salt River Project Agricultural Improvement \& Power District}, 109 F.3d 586 (9th Cir. 1997).

Ball and Salyer have also been employed in contexts in which franchise is not based on property at all.\textsuperscript{90}

In addition to the problems discussed above, the proprietary exception poses special implications for environmental matters.

\textbf{B. Environmental Dangers}

\textit{1. Environmental Consequences of Special Districts}

The limited purpose exception allows state-sanctioned bodies that exercise "limited" functions with a disproportionate impact on a certain group to restrict their franchise in any manner that clears the low bar of rational review. Those wishing to employ the exception have a wide canvas on which to work. Special districts are numerous, with perhaps 30,000 in the United States,\textsuperscript{91} and non-school related districts tripling in number between 1942 and 1982.\textsuperscript{92} Water-related districts, the subject of both the Salyer and Ball precedents that established exceptions to the equipopulation rule, are quite common in the West. Indeed, public water districts are responsible for most of the irrigated acreage in seventeen Western states.\textsuperscript{93}

Property qualifications for voting in these districts are also prevalent.\textsuperscript{94} Though non-traditional, these governments may exert a tremendous environmental impact. An argument for finding governmental functions in Salyer, for example, was the district's responsibility for flooding one plaintiff's land.\textsuperscript{95} But environmental effects extend far beyond individualized complainants. Consider the following account of the Salt River Project at issue in Ball:

In the dry Southwest, water is the linchpin of the universe.
With water you can create charming cities, fields of agricul-

\textsuperscript{91} See Griffault, supra note 11, at 359.
\textsuperscript{92} See De Young, supra note 35, at 423.
\textsuperscript{93} See Barton H. Thompson, Jr., \textit{Institutional Perspectives on Water Policy and Markets}, 81 CAL. L. REV. 671, 693 (1993).
\textsuperscript{94} See De Young, supra note 35, at 424. Taken together, 61% of the irrigation districts in Arizona, California, and New Mexico that employ property qualifications for voting also weight votes based on the amount of property owned. See id. at 427.
\textsuperscript{95} Salyer, 410 U.S. at 737-38 (Douglas, J., dissenting).
tural plenty, thriving industry, or wild rivers that charge the spirit. But there’s not enough water to have all four. Who gets what is determined in a highly expensive, complex, and politicized fashion. And in central Arizona, that means the Salt River Project. An entity like the Salt River Project, which determines the price and availability of electricity, has the power of life and death. In Arizona in the summer, people without air conditioning die, just as surely as do people in Montana without winter heat. When the Salt River Project decides to encourage water conservation—or, conversely, subsidizes water use by making it artificially cheap—or decides to share the cost of a nuclear reactor forty miles upwind of Phoenix or builds a coal-fired generator whose pollution is accused of obscuring the Grand Canyon, it exercises more control over the Arizona environment than virtually any other player.96

At the same time, restricting the ballot to a vote weighted by acreage affects who runs the show, and this group often differs from the general public. For example, although the Salt River Project affects urban areas heavily, rural interests predominate on “a board of directors on which you see a lot of bolo ties.”97 Though the conflicting interests of the urban and agricultural populations need not be damaging to the environment,98 tensions arise if the interests of the benefited class diverge from those of the voting public at large in a manner with environmental consequences. These effects have not concerned the courts. Just as the Supreme Court has dismissed the incidental environmental effects of special districts as implicating one person/one vote, other courts have done so when the districts were created for environmental purposes.99

97 Id. at 195.
98 A general manager of the Salt River Project, for example, used his influence to discourage lawns in favor of desert landscaping. His “rule” in general was thought sufficiently benevolent that his approaching retirement was marked by the Phoenix “alternative” weekly with the headline, “IF THE HEAD OF THE SALT RIVER PROJECT DOESN’T KEEP PHOENIX SAFE FROM THE STORM, WHO WILL?” See id. at 194-95.
99 See Goldstein v. Mitchell, 494 N.E.2d 914, 920-21 (Ill. App. 1986), cert. denied, 112 Ill. 2d 574. Goldstein upheld a property qualification for voting in a drainage district “created primarily to manage erosion and flooding problems within the district.” Id. at 920. The court determined that the benefits would primarily accrue to landowners and added the following interesting analysis of Ball. “[T]he Ball court implied that even where flood control is an express purpose of a district, it is probably not enough to prohibit a voting classification.” Id. at 921.
2. Environmental Risk in Favoring Economic Interests

A general concern about special districts in the proprietary mold is the manner in which they may "circumvent direct popular control and facilitate the implementation of pro-business policies." Those with sufficient property to vote in a proprietary election scheme may possess different interests than those without such property. The existence of the exception therefore limits the ability to use the Constitution to challenge the entrenchment of economic interests. 101

This dynamic may lead to environmental harm, a fact not lost on the dissenters in the cases that established the proprietary exception. In Toltec, Justice Douglas noted that the exception to the equipopulation rule would exacerbate the potential environmental costs of certain enterprises.

Dams substitute a reservoir for a river and wipe out the varied life of a river course, including its wildlife, canoe waters, camping and picnic grounds, and nesting areas of birds. This reshaping of the face of the Nation may be disastrous, no matter who casts the ballots. The enormity of the violation of our environmental ethics, represented by state and federal laws, is only increased when the ballot is restricted to or heavily weighted on behalf of the few who are important only because they are wealthy. 102

The potential that wealthy landowners may effectively "capture" a property-based government structure and enact policies that pass costs onto the public at large is inherent to the special district model. 103 Basing the district on property also creates a more subtle effect. If environmental damage stems from property use, then the special district will have a more difficult time regulating environmental damage caused by that use. Any regulation of property use would amount to an exercise of tradi-

100 Briffault, supra note 11, at 383.
101 See id. at 384 ("The proprietary model both confirms the place of business-oriented concepts in the design and function of local governments and signals that federal constitutional law concerning the right to vote may not be able to provide a basis for challenging the state and local structures intended to strengthen the institutional role of business and limit direct popular control over local government decisions.").
103 The level of risk, however, is likely to be dependent on the political context at the time the district is created. In other words, the preferences of the new "voting class," at least at inception, are likely known or predictable by those deciding whether to allocate them power.
tional governmental power and therefore defeat the applicability of the proprietary exception.\textsuperscript{104} Erecting a structure whose voting scheme relies on the relative absence of police powers creates an obvious institutional bias against intervention. In the meantime, those on the outside have no political voice within the structure to otherwise hinder the harmful exercise of a property right.

Shielding special districts from the equipopulation rule poses a further danger. Considering that these districts have been exempted from the equipopulation principle at least in part because they in some ways resemble private entities more than governments,\textsuperscript{105} the potential for environmental damage is especially troubling. One of the classic problems in environmental law is the danger that private actors in the marketplace will overconsume public resources by engaging in transactions that fail to internalize the costs of depleting public goods like clean air or water.\textsuperscript{106} Government intervention is traditionally viewed as the force that corrects this tendency.\textsuperscript{107} Special districts, however, have the potential to pose the worst of both worlds. Insofar as they conform to the proprietary model, they will be prone to cause the sort of environmental damage often associated with the free market. Unlike private entities operating in the free market, however, they are cloaked in governmental authority, which may in many cases shield them from the corrective hand of government regulation.\textsuperscript{108}

To be sure, these dangers are real. Precedent, however, has established the constitutionality of the proprietary exception. Given

\textsuperscript{104} See Ball v. James, 451 U.S. 355, 366-68 (1981) (finding that since the Salt River Project could not govern citizen conduct nor regulate the use to which citizens put the delivered water, the project was not exercising police power that would have rendered the exception inapplicable); cf. Bjornestad v. Hulse, 281 Cal. Rptr. 548, 558 (Ct. App. 1991) (holding property-only voting scheme unconstitutional, noting “Sierra can still pass misdemeanor ordinances governing residential use of water and sewer services. This is in stark contrast to the district in Ball, which could not enact any laws governing the conduct of its citizens.”) (citations omitted).

\textsuperscript{105} See Ball, 451 U.S. at 368.

\textsuperscript{106} See, e.g., Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243 (1968).


\textsuperscript{108} For example, the Ball dissent pointed out that the electricity generating activities of the Salt River Project were not subject to the same regulation that a private entity would have been. See Ball, 451 U.S. at 379. Of course, the state that establishes the special district may similarly subject it to the same regulatory oversight that a private corporation would face. Ball demonstrates, however, that the potential remains for a structure to evolve in which oversight is not part of the mix.
III. POTENTIAL BENEFITS OF THE SPECIAL DISTRICT EXCEPTION

Our cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities. – *Ball v. James*, 451 U.S. 355, 373 (1980) (Powell, J., concurring).

Suppose a state legislature were to create a special purpose district. Is there any reason an environmentalist would want the district’s franchise to depart from one person/one vote? Although the existence of special district exceptions poses a certain inherent risk to environmentally friendly policies, experience with the exception and theoretical considerations suggest room to use the exception in a manner that favors environmental protection. Section A approaches the question from a pragmatic basis that is unconcerned with the interests of those favored by the equipopulation exception. The potential benefit lies in two areas: the prospect that the special district may operate more efficiently than a standard government entity while retaining some democratic benefits; and the availability of franchise restrictions as a bargaining chip that environmental interests may trade with other groups to secure the creation of an environmentally necessary entity. Using public choice theory’s accounts of environmentalism’s difficulties in the political process as a point of departure, Section B examines the potential use of the exception in cases where “propertied” interests may have more environmentally conscious goals than the resident population at large. Section C explores the possibility of combining the flexibility of the special district with certain strains of “free market” environmentalism to create institutions biased in favor of environmental protection. Both the command and control approach to environmental protection and the notion of preserving the environment by privatization have been attacked for ignoring the benefits of the opposing model. The proprietary exception to the one person/one vote rule offers one possibility for harmonizing the contrary approaches.
A. Potential Pragmatic Benefits

Irrespective of whom the franchise restriction favors, a special district may possess certain benefits for those seeking environmentally friendly institutions. These benefits may arise from efficiency gains deriving from the district’s “private” qualities. The benefit may also be the mere existence of the entity in the first place, secured by the ability of those favoring the district’s establishment to offer the franchise restriction as a bargaining chip in negotiation for its creation.

1. Efficiency

Because the districts that employ the proprietary exception may be dressed-up private enterprises, whatever efficiencies are inherent in private operation may accrue to the district’s operation. For the environmentally minded, a benefit results if the district’s purpose is consistent with environmental protection, as the legislative mandate may serve to direct the district’s attentions towards environmental, and not exclusively market, goals. Furthermore, the district’s governmental powers permit it to engage in activities that a private entity cannot. If established to perform a task consistent with environmental preservation, such powers further enhance the district’s potential environmental benefit.

Environmental law scholarship is replete with praise for the comparative efficiency of private bodies over government entities, and regulatory strategies that seek to harness market forces are increasingly in vogue. In a given context, an efficiency disparity may be the reason that the special district increases its involvement in public affairs. The Salt River Project’s outsize role in Arizona life is a case in point. As a former general manager of the project is described:

[He] first [began] to get his shadow government involved in public affairs in 1979 when he discovered, during massive floods, that regular governments had no idea what they

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were doing. It was at that point he discovered, as he put it, that the Salt River Project had "resources and expertise they could contribute to water and environmental management. These are public resources. And we will contribute them."\(^{110}\)

Because of its superior resources and expertise, the project has been able to deliberately influence environmentally significant behavior, such as whether people grow lawns or employ more ecologically sensitive desert landscaping approaches.\(^{111}\)

The efficiency benefit, therefore, conceives the special district as a potential tool when there is a genuine competence disparity between a government institution organized like a private entity and what the existing governing process could provide.\(^{112}\) If such a disparity exists, environmental interests may benefit if the power of a special district serves an environmentally friendly goal, such as water conservation or the prevention of soil erosion.

If truly the motivation of the district, the environmental end is further served by the special district's mixed character. First of all, such bodies may enjoy all the trappings of governmental power that the Supreme Court says do not implicate traditional government functions that would require a popular election in conformance with Reynolds and its progeny. As demonstrated in Salyer and Ball, a district could unite its private capacity for efficiency with the public power to levy assessments, condemn land, act as a utility, and enact policies with wide-ranging consequences without triggering the demands of one person/one vote.

Special districts also enjoy certain advantages over their universal franchise-dependent public counterparts. For example, special districts may possess a funding edge against local governments that face property tax limitations that a special district may avoid.\(^{113}\) Special districts similarly, as noted above, may evade the pressures associated with conforming to the governmental regulations with which private corporations must con-

\(^{110}\) Garreau, supra note 96, at 195.

\(^{111}\) See id.

\(^{112}\) And therefore a context in which a government that exercises traditional powers and is covered by one person/one vote would not be as helpful.

\(^{113}\) See Solvang Mun. Improvement Dist. v. Bd. of Supervisors of Santa Barbara County, 169 Cal. Rptr. 391, 396 (1980) (stating that special assessments levied on property within districts where the improvements funded benefit the particular real property are not subject to ad valorem tax limitations), cited in Brieffault, supra note 11, at 382.
tend, as did the Salt River Project in Ball.\textsuperscript{114}

Insulation from the political process may confer further benefits. A water district manager has greater license to steer water usage decisions of district residents if he/she need not face re-election from a fully enfranchised electorate, but rather is appointed by a board of corporate directors elected on the basis of property ownership. In such cases, the corporate quality of the elections effectively secures the benefits of appointing, rather than electing, policy makers.\textsuperscript{115}

These benefits come with strings. Political insulation may lead to staleness and decreased efficiency over time.\textsuperscript{116} Along similar lines, the success of any given management approach does not guarantee that future regimes will be as munificent, even with legislative direction. Returning to the Salt River Project, though one commentator praised a retiring manager for his contributions to Phoenix, he sounded a note of caution that stands as a reminder that the existence of enlightened despots does not transform despotism into a virtue. "His successor will presumably have at least as much impact . . . . One hopes he is equally enlightened. After all, remember who will pick him: a corporate board of directors elected on the basis of who owns how many acres of irrigated land."\textsuperscript{117} Finally, though perhaps not the concern of environmentalists \textit{qua} environmentalists, the headlong pursuit of efficiency may have the effect of impoverishing our political discourse.\textsuperscript{118}

This potential efficiency benefit therefore assumes a good


\textsuperscript{115} From an environmental perspective, the appointment approach has both adherents and detractors. \textit{Compare} STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION (1993) (endorsing a politically insulated elite to rationalize regulatory priorities), with David A. Dana, Setting Environmental Priorities: The Promise of a Bureaucratic Solution, 74 B.U. L. REV. 365 (1994) (warning that a politicized regulatory agenda may result that increases favoritism of business groups opposed to environmental regulation).

\textsuperscript{116} Consider the example of the metropolitan government of Seattle, which was struck down on equipopulation grounds in Cunningham v. Municipality of Metro. Seattle, 751 F. Supp. 885 (W.D. Wash. 1990). Though the federative government was credited with great environmental achievements, the insularity from partisan politics that allowed it to act eventually led to a "corporate culture" and perceived indifference to citizen concerns. See Danny Westneat, Metro Dies Today: 37 Years Spent Uniting Cities on Region's Woes, SEATTLE TIMES, Jan. 1, 1996, at A1, available in 1996 WL 3641673.

\textsuperscript{117} GARREAU, supra note 96, at 197.

\textsuperscript{118} As a federal district court noted in striking down a metropolitan government plan for violation of the one person/one vote principle, notwithstanding its effectiveness in solving environmental problems, "[t]hat the buses run on time cannot justify a dilution of any citizen's right to vote." Cunningham, 751 F. Supp. at 889.
deal, namely a public environmental purpose served by a special district in a manner that does not significantly implicate other environmental considerations. In such a context, the proprietary exception is only of use to environmentalists if the district’s mission conforms to an environmental end. This use of the exception is therefore only as good as the situation that produces it.

2. Bargaining

Another instrumental use of the proprietary exception emerges in contexts in which deviation from the one person/one vote rule may be used as a bargaining chip to negotiate for the district’s very existence. Like the efficiency rationale, the bargaining benefit assumes that the district’s purpose is inherently favorable to environmental protection. It also assumes that the interest that is “bought off” with ballot box benefits possesses the power to block the district’s creation in the first place. The bargaining rationale is limited by the specter of false bargaining by a holdout group that hopes to obtain political power for reasons that have nothing to do with environmental protection and does not actually have the power to block the district.

Salyer and Ball anticipated the proprietary exception’s bargaining benefit. In Salyer, the Court noted that California’s difficulty in undertaking water projects in certain areas necessitated turning to instrumentalities like water storage districts. The state, therefore, could reasonably have found that the landowners in the area would not have consented to the district, and subjected their lands to liens to finance it, without a “dominant voice in its control.” Similarly, in Ball, the parties stipulated that the Salt River Project may have been impossible without the special voice given landowners. Indeed, the consent of some minority may be necessary to secure the enactment of certain measures, particularly if the dynamic described

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119 Such an account naturally assumes a political process in the state legislature that has not been captured by interests opposed to the environmental goal in question.
121 Id. at 731.
122 See Ball v. James, 451 U.S. 355, 371 (1980). De Young notes that shareholders in the private predecessor of the project initially resisted becoming a district because of the resulting change in voting and taxation. The body requested and received changes to the law that harmonized the necessary rules. As a result, “[t]he private Association and the public District share identical boundaries, electoral divisions, constituencies, and purposes.” De Young, supra note 35, at 444.
by public choice theory is at play.\textsuperscript{123}

The Seattle area’s experience after a federal court struck down the apportionment scheme for the region’s Metropolitan government further demonstrates equipopulation deviation’s power as a bargaining chip. Metro, a federative government created to clean polluted Lake Washington, gradually expanded its mandate to run water pollution, sewage disposal, and public transportation programs.\textsuperscript{124} Despite its success, the government wielded sufficient power to be covered by the equipopulation principle and was deemed unconstitutional due to malapportionment.\textsuperscript{125}

Just as Metro’s success showed what was attainable when a federative model was available, the chaos that followed demonstrated what happens when equipopulation deviations were off the table. A judge ordered Metro to devise a new regional governance plan or face the prospect of a solution imposed by federal court.\textsuperscript{126} Negotiations to merge Metro into the county government at large bogged down amid city concerns about marginalization of local interests.\textsuperscript{127} One referendum failed and almost two years passed before voters finally approved a merger plan. The approval was largely credited to a federal judge’s ruling that failure to adopt a plan would lead to a county takeover anyway.\textsuperscript{128}

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\textsuperscript{123} See infra notes 137-49 and accompanying text. See also Peter L. Kahn, The Politics of Unregulation: Public Choice and Limits on Government, 75 CORNELL L. REV. 280, 284-85 (1990) (arguing that the dynamic described by public choice theory may lead to the prevention of government action by an interest group).


\textsuperscript{125} See id. at 890.

\textsuperscript{126} See Kathy George, No One Agrees on Who Should Control Metro: At Issue is How Best to Follow One-Person, One-Vote Principle, SEATTLE POST-INTELLIGENCER, July 8, 1992, at B2, available in 1992 WL 4808889.


\textsuperscript{128} See Kathy George, Metro-County Merger Gaining Approval, SEATTLE POST-INTELLIGENCER, Nov. 4, 1992, at A18, available in 1992 WL 4819153. Cities received the right for their officials to sit on committees that recommended countywide transit and growth management plans. See id. Some feared that the demise of the Metro structure would have negative consequences. As one of the founders commented, "I have no doubt King County can run the buses and the sewers as well as Metro did. . . . But remember that Metro solved problems that nobody was willing to solve and was able to do it because it was the only body able to bring everyone together." Danny Westneat, Metro Dies Today: 37 Years Spent Uniting Cities on Region's Woes, SEATTLE TIMES, Jan. 1, 1996, at A1, available in 1996 WL 3641673.
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Dissenting justices in the early equipopulation cases recognized the interest of locality representation. The federative model of local government is favored by many commentators as a structure that should be allowed to permit regions to address collective problems in a manner that respects existing political subdivisions. Furthermore, area towns often fear that they will be overwhelmed by the new, larger structure, a common concern regarding proposed regional governance plans. Without the availability of malapportionment as a bargaining chip, regional governments are less likely to secure the needed consent of component communities. As the Metro case suggests, the whole enterprise may fail as a result. When a federative model would benefit the environment, such failure has environmental consequences.

The Metro example highlights another dynamic at play when bargaining benefits are obtained: the benefit sought by the holdout party may be independent of the environmental concern at issue. The interests protected by the recalcitrant parties need not be at all tied to the district's purpose. If necessary to secure the benefits attendant on a special district, such concessions may well be warranted. The ability to bargain means, however, that the concession may not be necessary to secure the environmental benefit, and therefore merely gives interest groups a chance to seek special benefits in the political process.

The Edwards Aquifer experience is a case in point. After being told by a federal judge to devise a plan to conserve the aquifer lest he provide one, the Texas legislature voted to replace the aquifer's elected board with a more powerful appointed body. The appointed body gave greater proportional weight to agricultural

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130 See Briffault, supra note 11, at 412.
131 See id. at 404 ("Residents of smaller units may fear that their voices and their interests will be lost in a regional entity unless they are given extra representation.").
132 For this dynamic in the Metro case, see, e.g., Bob Lane, The Struggle for King County Unity: Demands Grow as Deadline Approaches, SEATTLE TIMES, Mar. 20, 1991, at B2, available in 1991 WL 4450016 ("Outwardly, negotiators are driven by the good-government view that governance in King County is fractured, the Metro Council is not accountable to voters while a larger County Council would be representative. Other factors are influencing negotiations, too: egos, political ambitions and the desire to protect long-held power.").
133 See supra note 88.
interests at the expense of a more populous urban county.\textsuperscript{135} After the change was deemed a violation of the Voting Rights Act, the legislature in turn created a powerful elected body that gave the most seats to the urban county despite the concerns of agricultural interests.\textsuperscript{136} In other words, the holdout interest could not have actually frustrated the creation of the environmentally necessary body, and the bargaining use of the proprietary exception only served political benefit seeking.

\textbf{B. Picking the “Green” Interest Group as the Ballot Beneficiary}

Whatever the benefits of using the proprietary exception when the interests of the benefited group are not at issue, the exception does the most work when the benefited party has interests that deviate from those of the resident population as a whole. In certain contexts the members of the benefited party may be expected to have environmental interests more at heart than their disenfranchised counterparts, enabling the proprietary exception to serve an environmentally useful purpose. As a result, should environmental interests find themselves in power, employing the exception may entrench the gains made by creating the special district. Public choice accounts of the difficulty of enacting environmentally protective legislation and regulation lend credence to this possibility. Both Salyer’s reasoning and the application of the proprietary exception in state courts further suggest the proprietary exception’s potential to be environmentally beneficial. Predictably enough, the exception is most effective when the “property” that forms the basis of the franchise benefits from environmentally friendly behavior. Given the record of certain propertyed classes as environmental actors, however, there is good reason to retain a healthy skepticism about the frequency with which such contexts arise.

\textbf{1. Public Choice and Political Structures}

The insights of public choice theory provide a theoretical explanation for how the proprietary exception may support environmental considerations. Public choice theory applies market analysis to the political process to explain how organized special interests may secure goods from the political process independent

\textsuperscript{135} See \textit{id.} at 1503-04.

of public concerns. Because environmental benefits tend to be diffuse and implementation of environmental legislation gives opposing interests an effective second bite at the apple, the dynamic described by public choice theory is a grim one for environmental interests. The proprietary exception would appear to offer a way out in certain contexts because it allows the restriction of the political playing field to interested parties. Used properly, such a restriction could ameliorate the problems described by public choice.

Numerous commentators have addressed the problems environmental interests face within the context of public choice theory. In the world of public choice, groups compete for goods from legislators, who are driven by a desire for reelection and seek to maximize their political support by tailoring the laws they make to please as many groups as they can while angering as few as possible. Under the public choice model, special interest groups enjoy an advantage over the "public interest" because their organizing costs are considerably lower than those of the public at large.

Environmentalists face a special challenge in the public choice context. While the benefits of environmental protection (for example, the clean air that results from shutting down a factory) are diffuse and only marginally beneficial to any given individual, the costs of securing the benefit (shutting down someone’s factory) are highly concentrated. Furthermore, the diffuseness of the benefited group invites free rider problems. As a result, those opposing environmental interests enjoy greater incentives to organize than the public at large and can do so more easily, leading to outcomes fa-

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139 See Macey, supra note 137, at 45-46.
140 See id. at 47-48. This dynamic is cross-cultural.

These insights predict that politically successful groups will tend to be small, relative to the size of the groups taxed to pay their subsidies. The small size not only helps to overcome free-rider effects, it also concentrates the benefits of legislative enactments so as to provide individuals with high incentives to press for legislative results. This prediction seems consistent with the evidence from the agricultural industries in different countries. Where agriculture is a small component of a country’s economy as in Japan, Israel, and the United States, it is heavily subsidized. But where agriculture is a large component of the country’s economy, as in Poland, China, Thailand, or Nigeria, it is heavily taxed.

Id. at 48.
voring polluters. Assuming the ability to match property with interests, discussed in greater detail below, use of the proprietary exception suggests itself as a potential mechanism by which the playing field could be shifted to favor environmental interests by enfranchising groups with environmental interests at heart.

Other commentators do not see the playing field described by public choice as so uneven.\footnote{See Daniel A. Farber, Politics and Procedure in Environmental Law, 8 J.L. ECON. & ORG. 59 (1992).} For one thing, political organizing costs may be high, but the marginal price of casting a vote is low, which should encourage votes for environmental policies if there is some gain to the voter on either a practical or an ideological level.\footnote{See Dwight R. Lee, Politics, Ideology, and the Power of Public Choice, 74 VA. L. REV. 191, 194-95 (1988) (noting that because chance of one’s vote making an actual difference is remote to the point of making voting costless, individuals may cast votes based on purely ideological considerations even if the practical effect of the voted policies would be economic harm to the voter).} Furthermore, some have observed the presence of “republican moments” when the self-interest around which public choice theory revolves yields to a more public-regarding mentality that favors the pursuit of public goods.\footnote{See Farber, supra note 141, at 66. As Farber describes these moments:}

Those propounding the bleak view have two fallbacks. First of all, republican moments pass;\footnote{See Farber, supra note 141, at 66. As Farber describes these moments:}

second, there is a difference between a law’s pas-

\footnote{The implication is that politics alternates between normal periods, in which public attention to an issue is weak, and extraordinary periods, in which the issue has high salience for the public. In those extraordinary periods when broad segments of the public are intensely involved with an issue, legislators find themselves in the spotlight, and their positions shift closer to those of the public at large. During republican moments, voters acquire information about legislative positions, but they also acquire information about the state of the world that may lead to a change in their own expressed preferences. These periods are likely to be attended by new legislative initiatives responding to this public demand, which is less likely than legislation passed in other periods to be responsive to the demands of conventional interest groups.}

\footnote{Id. Farber acknowledges this problem though disputing that the effect fades entirely. “[T]here is a continuum. Earth Day of 1970 represented a peak, but there have been lesser peaks of public pressure sparked by events such as Love Canal or Three Mile Island. In between these peaks, public pressure is lower, but not nonexistent.” Farber, supra note 141, at 67.}

\footnote{See Lee, supra note 142, at 197 (“The initial motivation for the legislation may have been dominated by ideological considerations, but narrow economic concerns motivate the special interest influence that does so much to determine its effect.”).}
sage and implementation. The same dynamic that hampers the creation of environmental legislation encourages those who lose in the political process to soften the blow in the regulatory arena. Indeed, given the low costs of casting a ballot, organized special interests will be much more inclined to focus efforts in this realm. Here, however, the cost of action to a member of the general public is higher than in the legislative context. While casting a ballot is relatively cost-free, the information gathering necessary to monitor a regulatory agency's implementation of a law is not. Environmental policy suffers as a result.

Environmental interests in the public choice context also face the danger that potential allies or disinterested parties will be "bought off." Since discrete environmental benefits are not widely apparent, either because the benefit is spread diffusely or because it is concentrated on a small group (such as a forest accessible only to wealthy backpackers), other interests may be recruited as opponents to obtaining the benefit. Scholarship on the problems of "ecojustice" reflect this difficulty. Disinterested third parties may tilt the playing field if anti-environmental interests appeal to them in a manner independent of the environmental issue in ques-

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146 As Lee comments:

[After an individual makes a costless expression of support for environmental protection at the polls, much remains to be done if the environment is to be protected adequately. It is unfortunately costly for an individual to express concern for environmental quality by lobbying for the most efficient environmental protection programs and by monitoring those who implement these programs. Predictably, there is little genuine public surveillance of environmental protection programs, and organized groups have significant latitude to influence environmental programs in ways that serve their private interests. This means, of course, that these programs are far less effective at protecting the environment than they could be.

Id. at 196-97.

147 See John Thomasiand, The Clean Air Act, the Electric Utilities, and the Coal Market (1982); Bureaucracy vs. Environment: The Environmental Costs of Bureaucratic Governance (John Baden & Richard L. Stroup eds., 1981); Lee, supra note 142, at 197 n.9 (citing Bruce A. Ackerman & William T. Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L.J. 1466, 1497-1511 (1980)); see also Macey, supra note 137, at 50 (observing that "we will get a lot of environmental legislation, but it not only will be less effective than it otherwise could be, it also will serve to benefit certain interest groups at the expense of others."). But see Farber, supra note 141, at 74-75 (explaining how environmental groups can foster proper regulatory implementation in a manner that also encourages their own growth).

In this case, the proprietary exception's capacity to exclude parties from the franchise suggests an environmentally beneficial use when efforts to buy off disinterested parties appear likely.

The proprietary exception, therefore, offers several potential benefits in the public choice context if a specific group of voters can be identified as likely to have environmental interests at heart. If those promoting such interests find themselves in a position of strength, whether due to a republican moment or to a victory arising from the vicissitudes of special interest combat, they may have a way to institutionalize their victory (assuming a special district is consistent with their goals). The potential benefits track the dilemmas outlined above. The playing field would be composed of groups that have, or are more likely to have, the requisite motivation public choice deems unlikely to be found in those benefiting from diffuse environmental goods. Environmental gains would result not only from picking the "right" group to wield power, but also from the removal of comparatively disinterested parties from the field, preempting attempts to buy them off.

With a framework in place to explain why the proprietary exception could provide relief from the problems described by public choice theory, the inquiry necessarily turns to whether there is reason to believe that it would do so in practice. Putting aside for the moment the dangers that one will not "get it right," the first question is whether the enterprise of picking environmentally minded groups to benefit from the exception is feasible.

2. Picking the Right Party

The discreteness of the special district's purpose increases the prospect of selecting a group likely to produce an "environmental" result not premised on any particular ideology. Groups differentiated on non-ideological grounds may possess views that will lead to differing environmental outcomes depending on which group is made the dominant voting interest in a special district. To return to the Salt River Project:

[A] panoply of interests exists in the District. A homeowner or small landowner might rationally prefer lower power rates in exchange for higher irrigation water rates. Farmers and ranchers in contrast might prefer to subsidize water costs with power revenues. The acreage based voting

149Lazarus offers several examples of this dynamic, including oil company executives trying to promote drilling the Arctic National Wildlife Refuge by appealing to presidents of black colleges and universities. See id. at 809.
system insures that the interests of one class of landowners, homeowners, will be subservient to the different interests of another class of landowners, farmers, and ranchers.\textsuperscript{150}

Obviously enough, environmentalists may prefer not to impose one person/one vote upon the Salt River Project if low power consumption creates greater environmental benefits (or, perhaps more accurately, imposes lower environmental costs) than non-subsidized water rates.

Allocating the franchise based on property may similarly affect the environmental impact of water districts that do not possess broad "incidental" powers like electricity generation. For example, many believe that the solution to environmental problems concerning water supply in the West involves the promotion of markets.\textsuperscript{151} In practice, water districts with property-based voting qualifications appear to be more likely to approve transfers and facilitate markets than those with general enfranchisement.\textsuperscript{152} Institutional voting structure, therefore, may affect a water district’s environmental impact.

More broadly, favoring propriety interests possibly has a net effect of favoring the wealthy. From an environmental perspective, doing so is not necessarily detrimental. A look to environmentalism’s detractors suggests that wealth and environmental concern are positively correlated.\textsuperscript{153} This tendency appears empiri-

\textsuperscript{150} De Young, supra note 35, at 449-50.


\textsuperscript{152} See Thompson, supra note 93, at 734. Though stating that, "[d]istrict boards elected by the popular vote of all local residents are also likely to be more opposed to external transfers, on average, than boards that are elected by small numbers of absentee farmers," \textit{id.}, Thompson then paradoxically notes that this does not mean that institutional forms dictate transfer policy. See \textit{id.} at 734 n.265. An inference of institutional influence is then immediately reinforced by his discussion of the California experience with authorizing external sales. "Most [external sales] have been governed by boards elected by local landowners and dominated by large corporate farms. California districts that permit all residents an equal vote, in contrast, have often expressed strong concerns over external transfers." \textit{id.} at 734.

\textsuperscript{153} See Farber, supra note 141, at 64 (noting that some see environmental legislation as rent seeking by consumers). "In this view, environmental statutes are primarily designed to serve the interest of upper-middle-class backpackers, who have an unusually high demand for environmental amenities." \textit{id.} (citing William Tucker, Environmentalism: The Newest Toryism, POLICY REVIEW 141-52 (Fall 1980)). See also Lazarus, supra note 148, at 788-89 (describing minority anger at environmentalists).

As one commentator described, environmentalists "would prefer more wilder-
cally in cross-cultural comparisons.\textsuperscript{154}

Finally, the environmental benefit appears strongest where the environmental "right thing" benefits the property that forms the basis of the proprietary exception. This relationship appears as a factor in cases involving the exception\textsuperscript{155} and is discussed in greater detail in Part III-C.

3. As Applied in Cases

The \textit{Salyer} decision reflects the notion that the proprietary model may be used to affect how votes are cast. In rejecting the argument that lessees in the district were as affected by the district as property owners, the Court relied in part on the divergence of interests between the two parties.\textsuperscript{156} The Court conceded that farmer lessees, as well as owners, wish to increase the availability of water in the district and that farmer lessees in fact may have to pay project costs passed on to them by owners.\textsuperscript{157} Because the Court decided that strict scrutiny did not apply, however, the question was whether the state could have had any rational purpose for distinguishing between owners and lessees.\textsuperscript{158} For the Court, the divergence of other possible inter-

\begin{quote}
\textit{Id.} (citations omitted). Insofar as this tendency is in tension with other social needs, the prospect of using the proprietary section in this context raises obvious concerns.
\end{quote}

\textsuperscript{156} See Green, Greener, Greenest, WASH. POST, Nov. 22, 1997, at A15 (publishing the results of a poll surveying environmental attitudes in 24 countries). When asked to choose between the statements "Protecting the environment should be given priority, even at the risk of slowing down economic growth" and "Economic growth should be given priority, even if the environment suffers to some extent," the greatest agreement with the former came from respondents in New Zealand, Canada, Switzerland, Australia, and the Netherlands. \textit{See id.} By contrast, the bottom five were Ukraine, Nigeria, Poland, Hungary, and Peru. \textit{See id.} Yet, save Nigeria, the people of these latter nations had at least an 80% rate of belief that their health was affected by environmental problems. \textit{See id.} None of the first five nations had responses at this level. \textit{See id.} For these respondents recreation interests loom larger; except the Netherlands, all of the nations favoring the environment over development were among the top six nations in claiming to spend "a lot" of recreation time in natural areas like parks. \textit{See id.} Nigeria, Ukraine, and Peru were all in the bottom five on this question. \textit{See id.}

\textsuperscript{157} See infra notes 161-74 and accompanying text.

\textsuperscript{158} See Salyer, 410 U.S. at 730-31.

\textsuperscript{159} See \textit{id.} at 731-32.

\textsuperscript{160} See \textit{id.} at 732. This raises skepticism anew of the Court's formalistic framing of the issue as whether the district's burdens could ever fall on "residents \textit{qua} residents." \textit{Id.} at
ests sufficed: "The system which permitted a lessee for a very short term to vote might easily lend itself to manipulation on the part of large landowners because of the ease with which such landowners could create short-term interests on the part of loyal employees." In other words, using property as a condition for allocating voting rights is justifiable because of its effects on the political process.

State experience with the Salyer/Ball precedents suggests further possibilities in electoral design. For example, the Montana Supreme Court adopted the short-term/long-term interest distinction to uphold a feeholder requirement for irrigation district commissioners. Perhaps the potential is best demonstrated by Southern California Rapid Transit District v. Bolen. Bolen involved California’s effort to use special funding districts to finance subway construction in Los Angeles. The Southern California Rapid Transit Authority (the “SCRTD”) established these districts around proposed rail stations to allow the expected financial beneficiaries of the stations to defray construction expenses. Assessments were to be levied solely on owners of commercial property, and these owners could hold a referendum on the assessment that would exclude the votes of residential property owners and those without property.

Denying the relevance of environmental considerations, the California Supreme Court upheld the voting scheme. Rather than looking to the powers of the SCRTD, the court focused upon the considerably narrower “powers” of the assessment districts, concluding the districts were “little more than formalistic, geographically defined perimeters whose raison d’être is to

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159 Id. at 732.

160 There may be restrictions imposed, however, on overly bold attempts to pick voters. In attacking the majority in Ball for allowing irrigators to use disenfranchisement to subsidize their activities at the expense of power consumers, Justice White noted that States cannot disenfranchise voters based on how they may vote. Ball, 451 U.S. at 384 n.8 (White, J., dissenting) (citing Carrington v. Rash, 380 U.S. 89, 94 (1965)).


163 See id. at 877.

164 See id. Votes would be allocated based on the assessed value of the burdened commercial property. Id.

165 See id. at 880. The dissent acknowledged the relevance of the issues that the majority denied were a factor. “Like the other members of this court, I am reluctant to accept a conclusion that might impede the construction of needed public facilities, and the need for a modern and efficient rapid transit system in the greater Los Angeles area cannot be denied.” Id. at 896 (Kennard, J., dissenting).
serve as the conceptual medium for the recognition of economic benefits conferred and the imposition of a corresponding fiscal burden.\textsuperscript{166} Given this definition of the districts' purpose, the court unsurprisingly determined that their functions lacked the general government powers necessary to trigger the requirements of one person/one vote.\textsuperscript{167} Similarly, the court held that the district satisfied the disproportionate impact prong, finding the economic burdens from the assessment fell primarily on the commercial property owners.\textsuperscript{168} The general impact of a rapid transit system was irrelevant: "Since the beneficial impact of the assessment districts on nonvoting residents is indistinguishable from the impact on residents of the Metro Rail service area outside of the benefit districts, that impact is insufficient to require extension of the franchise to the excluded class."\textsuperscript{169}

\textit{Bolen} highlights two potential results of using the proprietary exception based on the interests of the enfranchised. First, assuming that constructing a subway has environmental benefits, \textit{Bolen} suggests that outcomes can be biased in favor of environmental considerations when those considerations are tied to commercial benefits for the properties upon which the franchise is contingent. \textit{Bolen} arose when commercial property owners within the challenged district failed to gather enough support among other owners to force a referendum.\textsuperscript{170} This failure prompted the commercial owners to seek support from outside the class benefited by the district. They, therefore, initiated a challenge to the district's voting scheme. Given that the benefit received by the "environmental" interest in this case was purely economic in nature, shaping the electorate in this manner may

\textsuperscript{166} Id. at 883.
\textsuperscript{167} See id. at 884.
\textsuperscript{168} See id. at 886.
\textsuperscript{169} Id. The dissent challenged this logic, noting both the fact that the assessment costs would be passed to renters and the potential for a subway to fundamentally alter an area's character.

This increase in commercial activity will make the areas more attractive for certain kinds of high volume businesses (e.g., fast food outlets), and less attractive for other, more neighborhood-oriented businesses (e.g., laundromats). Inevitably, all residents of the benefit assessment area... will be affected in important ways by the change in the commercial environment resulting from the location of the transit station.

\textit{Id.} at 895 (Kennard, J., dissenting).
have favored environmental interests without necessarily favoring environmentalists.

Second, *Bolen* indicates the potential for electoral fine tuning on discrete questions, even when the body governing the process exercises the general government powers that implicate the one person/one vote requirement. The California Supreme Court permitted evasion of the requirement by allowing the fragmentation of government functions into their component parts.\(^{171}\) Although a tax referendum conducted by the SCRTD would have been subject to the equipopulation rule, the SCRTD was able to confine the question to the burdened parties by employing the special funding district.\(^{172}\) The court acknowledged that while the SCRTD exercises substantial governmental powers, "[the] SCRTD is not the governmental body implicated by the voting scheme at issue."\(^{173}\) The districts established by SCRTD, however, were seen by the court as little more than accounting fictions.\(^{174}\)

4. *Getting It Right*

The challenge of using the proprietary model to select an environmentally beneficial voting population is a question of fit. Is it possible to consistently and effectively tailor districts so as to produce environmentally beneficial results? One obvious danger lies in simple human fallibility. The crafting of the franchise may be flawed, and, as an unintended consequence, the wrong interest will be empowered.\(^{175}\) An ancillary danger is the

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\(^{171}\) See *Bolen*, 822 P.2d at 884.

\(^{172}\) See id.

\(^{173}\) id. Briffault also notes the implication of *Bolen* vis-à-vis the bond referendum that *City of Phoenix v. Koldziejski* required to be conducted under one person/one vote. See Briffault, supra note 11, at 380 ("It appears that *City of Phoenix* may be avoided by the creation of a local entity whose sole purpose is to conduct a referendum, although if a general purpose government had conducted that election, *City of Phoenix* would apply."). This fragmentation may involve the mere creation of the government entity. For example, in *State v. Frontier Acres Community Development District Pasco County*, 472 So. 2d 455 (Fla. 1985), the Florida Supreme Court held that property-based voting for a board of supervisors of a community development district did not violate the equipopulation principle. See id. at 457. The court noted, however, that the statute establishing the district would eventually provide for general elections. See id. at 457 n.*. In such a manner, key structural decisions regarding a special district could be made with a crafted electorate, decisions whose impact could linger when the district assumes general governmental powers and an electorate consisting of the full resident population.

\(^{174}\) See *Bolen*, 822 P.2d at 883.

\(^{175}\) Any context that would suggest favoring agricultural interests, for example, would face considerable rebuttal evidence and the risk of entrenching a flawed decision. "Although the environmental damage that agriculture causes is well-documented, farming
potential for further marginalization of minority interests, thus exacerbating ecojustice concerns.\(^{176}\)

One important question, however, must precede the creation of a special district: who has the property? The answer is not necessarily obvious when the special district is created. This raises a final, perhaps more speculative, potential environmental benefit of the proprietary exception: organizing special districts based on property rights owned by environmental interests and assigned at the creation of the district.

C. New Government Structures

Ball discusses the importance of diversity in available government structures. As Justice Powell commented in his concurrence, “[o]ur cases have recognized the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities.”\(^{177}\) Others have noted that a benefit of the proprietary exception is its creation of space in which states can maneuver “without directly flouting Avery’s extension of the political equality norm to local governments.”\(^{178}\) For environmentalists, the issue is whether the space afforded by the proprietary exception will create room for innovative environmentally protective institutions. One possible innovation would unite the potential efficiency benefits, described in Part III-A, with the ability to craft the electorate, discussed in Part III-B, by assigning the property right on which the franchise is based at the time the district is created.

The prospect of environmental innovation through the proprietary exception dovetails with the need, observed by several commentators, for experimentation in institutional frameworks to find structures that better foster environmental protection.\(^{179}\) Such experiments could include attempts to combine the benefits of various regulatory approaches.\(^{180}\) One combination that the proprietary exception could facilitate is the unification of the potential benefits of “free market environmentalism” and the need for con-

\(^{176}\) See Lazarus, supra note 148, at 812.

\(^{177}\) Ball, 451 U.S. at 373 (Powell, J., concurring).

\(^{178}\) Briffault, supra note 11, at 381.


continuing institutional involvement.

1. Free Market Environmentalism

Given the problems described by public choice theory, some commentators have suggested that the public sector misvalues public resources even more than market transactions do. Political decisions lead to resource consumption that favors immediate gratification despite the accumulation of future costs. A property rights regime, by contrast, holds owners accountable for future costs. For free market environmentalists, the solution to environmental dilemmas is therefore more market activity, achieved by assigning property rights to private parties who are then more inclined to conserve resources because of market incentives to preserve the value of their assets.

Free market environmentalism has been attacked on a variety of grounds. Of relevance here is the critique for ignoring the continuing necessity of public institutions. Whatever their shortcomings, these institutions retain several roles in environmental protection. First, public institutions may exert a positive force in shaping collective preferences vis-à-vis environmental preservation. Second, in certain contexts the market may prove unable to regulate external effects as efficiently as public structures, demonstrating the need for comparative institutional analysis instead of broad generalizations extolling the market's purported virtues. Third, public institutions manifest a greater variety of forms than free market environmentalists have acknowledged.

2. Pinning the Vote on the Created Interest

One of the problems in using the proprietary model to promote environmental interests is the potential difficulty in matching the burdened property with the environmental interest. One of the problems with free market environmentalism is its failure to appreciate the continued need for public institu-

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181 See supra notes 137-49 and accompanying text.
184 See, e.g., J.B. Ruhl, Essay, The Case of the Speluncean Polluters: Six Themes of Environmental Law, Policy, and Ethics, 27 ENVTL. L. 343 (1997); Freyfogle, supra note 151.
185 See Menell, supra note 107, at 495-96.
186 See id. at 498.
187 See id. at 506.
tional structures. The proprietary model could accommodate a hybrid: a structure that employs the proprietary framework in order to retain the benefits of public institutions while allocating rights in a manner that ensures the rights would be held by those driven by preservation, not accumulation, interests. Such a politically insulated entity could exercise limited government powers while exerting influence "incident" to its primary environmental preservation goal.

For several reasons, environmentalists may favor the hybrid model over creating a purely appointed body to carry out the same functions for several reasons. First, if the property interest is created in a resource needing conservation, granting the interest to a select group takes the property "off the market." Neither the political nor the economic marketplace can reach the property. The model therefore grants a measure of protection to environmental interests. At the same time, however, an institution biased in favor of environmental protection is in place to utilize government powers to aid the property holders in the protection and preservation of their interest. If necessary, the institution could also exert pressure on any interest holder seeking to act in an environmentally detrimental fashion. Most importantly, the governmental powers will be at the disposal of a group selected for its sensitivity to the district's environmental goal. The exercise of such governmental powers will be biased accordingly.

Second, the hybrid model would preserve the benefits that come from electing, rather than appointing, representatives to manage or govern the district. The problems with appointment are twofold. First is the danger of capture by anti-environmental interests, both of the appointing body (under a fully democratic election scheme) and of the appointed body itself. Second is the prospect of losing unique virtues that accompany voting. Elected bodies build communities and carry a legitimacy that appointed bodies lack. Though these benefits are, of course, diluted in the proprietary context, their significance remains for the parties with the franchise.

188 Labeling this a combination of the two approaches is not intended to argue that the free marketers would embrace the approach.
189 See Ball v. James, 451 U.S. 355, 370 (1981) (holding that a water district could operate an electric utility).
190 See supra note 115.
191 See Briffault, supra note 11, at 407.
Third, government creation of the property interest enhances the prospect that property and interests will be properly matched. Because property rights are allocated at the outset, the property on which the vote is based will be assigned to individuals or groups thought most likely to place a premium on environmental interests. Basing a district on existing property allocations is unlikely to result in as proper a fit.

Though there is no indication in case law of such efforts, the hybrid model appears feasible. Examples already exist of organic institutions spontaneously emerging and enduring to ensure the sustainability of common resources, and existing environmental organizations, like the Nature Conservancy, already use property rights to protect environmentally sensitive lands. For its part, the government has the ability to allocate seemingly ephemeral rights. For example, individual transferable quotas ("ITQs") have been employed to stem declines in the stocks of the Atlantic surf clam and ocean quahog fisheries. Acting under the Magnuson Act, the National Marine Fisheries Service allocated quotas — effectively property rights in a share of the total permissible harvest — to vessel operators based on various factors. The quota system, which allocates shares of a sustainable yearly harvest, appears to have brought stability and efficiency to what was a "tragic" surf clam commons.

But more could be done. Once assigned, these rights could be enhanced by government powers. For example, if a depleted fishery requires the construction of an artificial reef, a special district could be formed in which those owning ITQ harvest rights are charged with the pursuit of conservation measures and armed with certain trappings of governmental power (e.g., bond issuance, eminent domain) to accomplish the task.

Once one starts down such a path, interesting opportunities suggest themselves. Suppose a fish conservation district is established along a salmon run. Rights to vote are allocated to those possessing ITQs, which were granted to groups expected to place a premium on maintaining a sustainable yield from the

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192 Ostrom presents a checklist of common design principles for such institutions that include mechanisms for collective choice. See OSTROM, supra note 179, at 90.


194 See id. at 350.

195 See id. at 361.
salmon harvest. Perhaps the ITQ assignees would include some environmental organizations with no intention of exercising them. In any case, political control of the district would be in the hands of parties expected to act with environmental interests in mind. Suppose further that the district is assigned control of hydroelectric dams along the river. Assuming that the laws establishing the district would not allow ITQ holders to pursue excessive utility profits, cross-subsidization would favor projects promoting the river’s ecological health. The dynamic would be identical to that on display in the Salt River Project.196 The district would primarily benefit and burden a discrete group, ITQ holders, while exercising atypical government functions related to salmon preservation. Though exerting broad influence on electric consumers, the electricity functions would be merely “incidental” to the district’s environmental goals.197 Outcomes, therefore, would reflect an institutional bias in favor of environmental protection because property would have been assigned first to create and then to empower an environmentally minded electorate. Although the legislature could always reorder the district, the public choice dynamic that frustrates institution creation198 would now work in the environmentalists’ favor.

The remaining question is whether courts will allow such efforts to manipulate voter selection. Given that the existence of the proprietary exception rests in many ways upon inconsistent analysis,199 courts may pull back from the proprietary exception when it is employed for environmental rather than corporate goals.200 Use of the exception in the manner described above, however, is doctrinally, if not contextually, consistent with the Supreme Court precedent.

IV. Conclusion

Though exceptions to the one person/one vote principle enunciated in Reynolds could harm more than help the cause of environmentalism, deviations from the rule expand the canvas on which those attempting to craft institutional responses to en-

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196 See supra notes 58-84 and accompanying text.
197 See supra note 70 and accompanying text.
198 See Kahn, supra note 123, at 284-85.
199 See supra notes 73-84 and accompanying text.
200 Briffault notes the use of special districts to favor pro-business policies. See Briffault, supra note 11, at 383-84.
environmental challenges have to work.

The canvas is there, but should environmentalists try to paint? One final issue suggests caution. The environmental movement, for good or for ill, often casts itself as acting for the cause of morality as much as – or more than – for the cause of efficiency.\textsuperscript{201} Can such an ideal survive the promotion of disfranchisement? Many view the rise of environmental ethics as part of a tradition that steadily expanded the sphere of ethical consideration, first to all humans, then beyond to nature.\textsuperscript{202} What does it say of this tradition to advance the cause of nature by withdrawing the right to participate from those who disagree with, or are merely indifferent to, such goals? Can further expansion of the ethical sphere possibly profit from attacking past extensions?

There are, of course, no simple answers to these questions. As noted above, exceptions to the one person/one vote rule are prevalent and already work against environmental interests, leading to possible efforts simply to balance the scales. Furthermore, in given contexts the choice is not so stark. The disproportionate impact that forms the basis for the proprietary exception may be genuine, and the legislature retains authority to alter the voting scheme if the result is “immoral.” Finally, those who favor environmental policies for purely pragmatic reasons could ignore moral environmentalism. But cause for concern remains, particularly if the environmental movement is to be broadly based and inclusive.\textsuperscript{203}

The tension between purity and pragmatism is hardly unique to environmentalism; nor are incomplete resolutions to the tension. Purely pragmatic environmentalists should remember, however, that just as the proprietary exception can be turned to their use, it can easily be used to craft equally novel governmental institutions to be used against them.

\begin{footnotesize}
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\item \textsuperscript{201} See, e.g., RODERICK FRAZIER NASH, THE RIGHTS OF NATURE (1989).
\item \textsuperscript{202} See id. at 6-7.
\item \textsuperscript{203} Particularly relevant to these considerations is the tension between environmentalists and minority activists. See Lazarus, supra note 148, at 788-89.
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