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INTRODUCTION

It is a fundamental principle of our democratic society that the right to vote is enjoyed by citizens, not "trees or acres," "not farms or cities or economic interests."[1] So important is this fundamental interest that the Equal Protection Clause of the Fourteenth Amendment requires courts to examine with the utmost scrutiny the possible debasement of a citizen's right to vote.[2] Not only does the right to vote require guarantees of free and unimpaired access to the polls, but also that each eligible citizen's vote be counted with the same weight as every other's, irrespective of race, sex, creed, or even wealth.[3] The requirement of "one person, one vote" was instantiated in a line of United States Supreme Court jurisprudence that extended the principle to the most local level of governments and elections,[4] recognizing that no election is so unimportant as to justify the disenfranchisement or franchise

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1. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).
2. *See id.*
3. *See id.* at 562, 568.
4. *See* Avery v. Midland County, 390 U.S. 474, 484–85 (1968).

dilution of those who wish to lend their voice to the democratic process.[5]

The Court, however, recognized that there were limited circumstances in which the adaptability of democratic mechanisms to uniquely localized needs was necessary to provide for the functions of local governments and allowed escape from the strictures of the "one person, one vote" principle.[6] Professor Richard Briffault termed this model of local election the "proprietary" model because the Court cemented this model in an analogy to "the voting arrangements of a private corporation or a cooperative."[7]

The National Park Service (NPS) has proposed a rule change to modify the objection process for the nomination of historic districts to the National Register of Historic Places (National Register).[8] In addition to the existing majority landowner standard, this proposed rule would provide an alternative standard that values each property owner's vote to object to the listing of the proposed historic district based on the "land area" that they own within it.[9] Diluting smaller property owner's votes in this objection process would violate the guarantees of "one person, one vote" unless it could be found that elections for National Register historic districts were of the type that did not require its application.

However, the land-area voting scheme proposed by the NPS has fundamental differences to the kind of election that justified departure from "one person, one vote." Firstly, the foundation of the proprietary model rests on principles of federalism that promote adaptability in local government, and, as such, a federal agency utilizing this model runs counter to the core distinctions justifying its creation. Furthermore, the proposed rule invades spheres of

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5. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 55 (1970).

6. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 727–28 (1973) (quoting Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970)).

7. Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 365–66, 369–70 (1993). The Court explicitly justified the use of this model on an election for a local government body because it was "essentially a business enterpris[e]." *See* Ball v. James, 451 U.S. 355, 368 (1981).

8. *See* National Register of Historic Places, 84 Fed. Reg. 6996 (proposed Mar. 1, 2019) (to be codified at 36 C.F.R. pt. 60).

9. *See id.* at 6998.

traditional state sovereignty and potentially runs afoul of discrete federalism-based doctrines the Court has announced. Secondly, even if applying federal control over local elections in this manner is proper, the broad and egalitarian interests of the voters in National Register historic district elections do not meet the guidelines the Court has provided that make use of the proprietary model permissible. As such, these elections must remain on a substantially "one person, one vote" basis.

This Comment discusses the historical and regulatory background of National Register historic districts and how the proposed voting scheme would fit within the Court's "one person, one vote" jurisprudence. Part I examines the importance of historic districts as a historic preservation tool and the regulatory framework of the National Register. Part II discusses the jurisprudence that gave rise to the two models of local elections. Part III argues that, despite some differences in the voting process for National Register historic districts, they are, nonetheless actual elections; examines the federalism-based underpinnings of the proprietary model of local elections and its implications on this voting scheme; and further argues that these elections are entitled to "one person, one vote" protections. The conclusion of this Comment underscores these fundamental differences and demonstrates that the elections must adhere to the traditional democratic model.

I. THE NATIONAL REGISTER AND HISTORIC DISTRICTS

The National Register defines a historic district as a "geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of sites, buildings, structures, or objects united by past events or aesthetically by plan or physical development."[10] As of 2018, the National Register includes over ten thousand historic districts.[11] National Register historic districts, and historic districts in general, occupy a unique and important place in the historic preservation landscape, yet they are also complicated by the diverse interests of the property owners within the district. To account for these interests, the National

10. 36 C.F.R. § 60.3(d) (2019).

11. NORMAN TYLER, ILENE R. TYLER & TED J. LIGIBEL, HISTORIC PRESERVATION: AN INTRODUCTION TO ITS HISTORY, PRINCIPLES, AND PRACTICE 73 (3d ed. 2018).

Register regulations provide private property owners within the proposed historic district the opportunity to object to the listing in a local referendum.[12] The current regulations adhere closely to the "one person, one vote" principle and, as such, reflect popular ideals of democratic equality.[13]

A. *Importance of Historic Districts*

Historic districts are unique because they have not only the potential to preserve a place but also frame preservation on a neighborhood scale by establishing a *sense* of place as well. One of the most important aspects of understanding and appreciating history is context. Indeed, one of the factors when assessing the historical significance of a potential listing and its corresponding integrity is its setting.[14] While the setting and surroundings are certainly to be considered in a single property listing, in a historic district, the association of the constituent parts and the resulting unity of the historical narrative is paramount.[15] By widening the scope of historic preservation, historic districts emphasize the importance of urban and societal orientation that can be lost when focusing on a single resource.

Although the focus on distilling a certain historical period typifies many historic districts and necessitates the selection of a certain history over others, historic districts also represent a potential to incorporate broader historical narratives.[16] It is undeniable that urban landscapes continue to evolve, and while some historic districts pride themselves on representing high-style

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12. *See* 36 C.F.R. § 60.6(g) (2019).

13. *See* Thomas W. Merrill, *Direct Voting by Property Owners*, 77 U. CHI. L. REV. 275, 278–81 (2010) (noting that where local direct democracy decisions are made on a "one person, one vote" basis, the result has greater democratic legitimacy and fairness given that conflicting values inevitably result in winners and losers.).

14. TYLER ET AL., *supra* note 11, at 97. "Integrity" is the lens through which a nomination is viewed to determine whether the property is still capable of effectively conveying the historical significance that qualifies it for the National Register. *See infra* note 36.

15. *See* DAVID A. HAMER, HISTORY IN URBAN PLACES: THE HISTORIC DISTRICTS OF THE UNITED STATES 35 (1998).

16. *See id.* at 26. "Within a total city context, historic districts can preserve a sense of the architectural and historical continuum of the life of that city, even if one district viewed in isolation may appear to be confined artificially to just one era." *Id.*

architecture, historic districts can also encompass diverse resources that display a frenetic urban narrative.[17] In addition, as the field of historic preservation itself continues to shift focus to representing the full American experience, historic districts will undoubtedly play a role in interpreting overlooked resources.[18] Whether by conforming to existing aesthetics or by incorporating diverse buildings into the greater chronology of the city, historic districts are a unique catalyst and building block in the evolution of their urban setting.

Beyond their importance to aesthetic concerns and urban growth, historic districts can also provide a vehicle for effective city planning and cultivating social capital. Urban historic districts are singularly positioned to take advantage of state and federal tax incentive programs because they both encompass a variety of resources and often have the potential for mixed-use commercial redevelopment targeted by such programs.[19] Likewise, historic districts have the potential to benefit property values by appealing to those who appreciate a historic aesthetic or a more walkable neighborhood.[20] Above all, historic districts enable communities to breathe new life into entire neighborhoods through finding continuing uses for "vacant, unused, or underutilized historic buildings" by incentivizing new commercial developments and creating a renewed tax base.[21] Critics argue that the benefits of historic districts may not outweigh the costs, that historic preservation is used as a pretext to gentrify and exclude low-income residents, and that it blocks much needed development in urban areas, but the consensus remains that historic districts are

17. *See* Robin Elisabeth Datel, *Preservation and a Sense of Orientation for American Cities*, 75 GEOGRAPHICAL REV. 125, 128 (1985).

18. *See* Adam Lovelady, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts,* 40 URBAN LAW. 147, 149–51 (2008).

19. *See* Datel, *supra* note 17, at 132. The Federal Rehabilitation Tax Credit in particular requires that the property be income-producing. *See* TYLER ET AL., *supra* note 11, at 306.

20. *See* TYLER ET AL, *supra* note 11, at 302–03.

21. *Id.* at 302.

beneficial to the aesthetic, communal, and economic fabric of neighborhoods.[22]

The historic preservation profession has recognized the many benefits of historic districts and has increasingly moved toward preserving historic resources on a neighborhood scale.[23] Indeed, the historic district is arguably the marquee tool for achieving the goal of using "structures and objects of the past to establish the values of time and place" that catalyzed the modern preservation movement.[24] Although the most pronounced of these benefits result from local historic districts, with their stronger regulatory power,[25] the National Register and its nomination process provide for a uniform program that can help facilitate local historic districts' creation and provides for its own attendant benefits.[26]

B. *The National Register and the Nomination Process*

The National Register was created as part of the National Historic Preservation Act of 1966 (NHPA) and functions as a list of heretofore recognized historic resources.[27] It also provides a process to determine what is and what is not considered historically significant and therefore deserving of recognition and preservation.[28] Although the National Register is a federally funded program overseen by the NPS, it is largely administered by State Historic Preservation Officers (SHPO) in each state[29] and fits a model of "cooperative federalism."[30]

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22. *See* Alexander Kazam, *From Independence Hall to the Strip Mall: Applying Cost-Benefit Analysis to Historic Preservation*, 47 ENVTL. L. 429, 432–34 (2017).

23. *See* HAMER, *supra* note 15, at 136–39.

24. *See* Datel, *supra* note 17, at 125 (quoting UNITED STATES CONFERENCE OF MAYORS, WITH HERITAGE SO RICH 207 (1966)).

25. *See* Berman v. Parker, 348 U.S. 26, 32 (1954) (establishing that the regulation of aesthetics was permissible as part of a state's police power to promote the health, safety, and welfare of its communities).

26. *See* TYLER ET AL., *supra* note 11, at 144.

27. *See id.* at 70.

28. *See id.* at 70–71, 77–80, 95–97.

29. *See id.* at 77–78. On tribal land the program may be overseen by a Tribal Historic Preservation Officer or THPO. *See id.* at 79.

30. *See* ANTHONY J. BELLIA, JR., FEDERALISM 209–10 (2011). Cooperative federalism provides for state implementation of federal programs, subject to minimum federally-proscribed requirements. *Id.*

The NHPA and the establishment of the National Register represented a paradigm shift in how historic preservation functioned in the United States. Previous preservation efforts were largely led by volunteer organizations, and previous legislation protecting cultural resources was much more limited in scope.[31] The National Register sought a more holistic approach to expand the types of resources that could be recognized federally.[32] Indeed, the NHPA was the first federal act that allowed for the designation of historic districts.[33] In addition to the nationally significant properties already recognized under previous laws, the National Register also allowed for the inclusion of properties of state and local significance, opening the door for a more comprehensive and widespread program.[34] To be listed, however, a property must first go through the National Register's nomination process.

1. The Current Nomination Process

Any party may prepare a nomination for a property's inclusion on the National Register even without the owner's knowledge or consent.[35] In each state, the SHPO evaluates the nomination under the National Register criteria for historic significance and may officially nominate the property.[36] The SHPO is also responsible for overseeing the majority of the ensuing process.[37] Although the National Register originally did not require owner consent for a

31. *See* TYLER ET AL., *supra* note 11, at 37–40, 42, 50.

32. *See* BARRY MACKINTOSH, NATIONAL HISTORIC PRESERVATION ACT AND THE NATIONAL PARK SERVICE: A HISTORY 20–22 (1986).

33. TYLER ET AL., *supra* note 11, at 72–73. The National Register also encompasses "districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture." 36 C.F.R. § 60.1(a) (2019).

34. *See* MACKINTOSH, *supra* note 32, at 21.

35. *See id.* at 45, 48.

36. To be listed, all nominations must show historical significance through one or more of four criteria: (a) association with important events, (b) association with important persons, (c) architectural or artistic merit, or (d) potential to yield important information in prehistory or history. 36 C.F.R. § 60.4 (2019). In addition, a nomination is evaluated to determine whether the property can properly convey that historic significance through "integrity" of location, design, setting, materials, workmanship, feeling, and association. TYLER ET AL., *supra* note 11, at 97.

37. *See* TYLER ET AL., *supra* note 11, at 109–10.

property to be listed,[38] the NHPA and regulations now provide that the property owner must be notified and have the opportunity to object to the nomination.[39]

If a property owner objects to the nomination, then the property will be evaluated for eligibility for inclusion in the National Register, but will not be listed unless the objection is withdrawn.[40] For historic districts, a nomination will not be listed if the majority of the property owners within the proposed district object.[41] Each property owner has "one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district."[42] The one landowner, one vote election was selected because it was the "most reasonable and legally defensible" manner to consider property owner objections.[43]

Property owners are often concerned that the listing of their property on the National Register will result in a legal restriction placed upon their property, and therefore, object to the listing.[44] Listing on the National Register, however, does not automatically impose any restrictions on the property; the owner is still free to modify or even demolish their historic property.[45] Some states and

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38. MACKINTOSH, *supra* note 32, at 45.

39. *See* 54 U.S.C. § 302105(b) (2014); National Register of Historic Places, 36 C.F.R. § 60.6(c), (g) (2019). The SHPO will obtain a list of property owners to notify based on either the official land records or tax records. 36 C.F.R. § 60.6(c) (2019). Property owners who wish to object are required to submit a notarized statement to the SHPO certifying that they are the sole or partial property owner. *Id.* at § 60.6(g).

40. 36 C.F.R. § 60.6(s) (2019).

41. *Id.* at § 60.6(g). It is the responsibility of the SHPO to "ascertain" whether the majority of property owners have objected. *Id.*

42. *Id.*

43. National Register of Historic Places, 46 Fed. Reg. 56183, 56186 (Nov. 16, 1981).

44. *See* TYLER, *supra* note 11, at 110.

45. *See* 36 C.F.R. § 60.2(a) (2019). The listing of a property on, or a determination of eligibility for, the National Register does afford consideration of effects to the property stemming from federally funded or permitted undertakings through the Section 106 process of the NHPA, which could also potentially involve a reliance on private funds where the property owner himself seeks federal benefits. *See id.; see also* MACKINTOSH, *supra* note 32, at 45. Listing also disincentivizes the demolition of the property by making it

localities have set up complementary programs that result in a simultaneous listing on a state register,[46] which, in turn, may come with some property restrictions.[47] Yet, these decisions are made at the state and local level with greater opportunity for self-determination and do not implicate these restrictions on the National Register program. In essence, National Register status is an honorific that can come with considerable benefits to the property owners and communities in which those properties are located but carries no *per se* impairments on those property owners who do not support its preservation purpose.

Whether the property owner supports, objects, or remains silent on the nomination, if the SHPO determines that the property may be eligible, the nomination then proceeds to the accompanying state review board for further evaluation.[48] Once approved at the state level, the application is then sent to the Keeper of the National Register, under the auspices of the Secretary of the Interior, who reviews the application.[49] If the Keeper of the National Register agrees with the state review board, the nomination becomes officially listed on the National Register and is published in the Federal Register, or, if the property owner(s) object, there is only a determination of eligibility.[50] Under the proposed voting scheme, this objection process will largely remain the same, but by valuing each landowner's vote in proportion to the land area that they control, it brings into question the fundamental democratic equality of the election.

2. Proposed Land-Area Voting Scheme

The proposed regulatory changes to the National Register program were prompted in part by the 2016 amendments to the NHPA, but the land-area voting scheme was not related to the

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ineligible for certain tax benefits for demolishing historic buildings otherwise available but does not prevent the demolition itself. *See* § 60.2(c).

46. Sara C. Bronin & Ryan Rowberry, HISTORIC PRESERVATION LAW IN A NUTSHELL 66 (2d ed. 2018).

47. *See* TYLER ET AL., *supra* note 11, at 127–28.

48. *Id.* at 109. State review boards are comprised of experts in various professions including history, architectural history, historic architecture, archaeology, and other related disciplines. 36 C.F.R. § 60.3(o) (2019).

49. TYLER ET AL., *supra* note 11, at 109.

50. *Id.*

amendments.[51] In fact, the NHPA provision providing for landowner objection remained unchanged and provides *only* for objection by a "*majority* of the [property] owners."[52] Yet, in addition to the existing objection criteria, the proposed rule would allow for a nomination to be blocked on objection of "the owners of a majority of the land area."[53] Although the language does not explicitly value a property owner's vote based off the land area that they own, such is the natural consequence of the rule. If this rule were to be adopted, then those with the largest land holdings within the district could veto the National Register nomination over the majority of smaller landowners whose franchise has been diluted by the rule.[54]

The NPS contends that the land-area voting scheme will "further emphasize the rights of private property owners within a proposed historic district."[55] While this may be true for larger landowners, it is most certainly not true for their smaller neighbors. This rule would subordinate the rights of one private property owner under another. Furthermore, assuming (as is necessary because of the scant justifications given) that this change is meant to remedy unwanted listing where state law creates burdensome restrictions,[56] the provision would be over-inclusive because it

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51. National Register of Historic Places, 84 Fed. Reg. 6996 (proposed Mar. 1, 2019). There are other concerning proposed changes and potential administrative deficiencies within the proposed rule change that are outside of the scope of this Comment. *See generally* National Trust for Historic Preservation, *Comment Letter on National Park Service Proposed Rule for the National Register of Historic Places* (Apr. 30, 2019), https://www.regulations.gov/document?D=NPS-2019-0001-3286 [https://perma.cc/XJW4-U47Y] [hereinafter *National Trust Comment*].

52. 54 U.S.C. § 302105(b) (2014) (emphasis added).

53. National Register of Historic Places, 84 Fed. Reg. 6996, 7002 (proposed Mar. 1, 2019) (to be codified at 36 C.F.R. pt. 60(g)).

54. *See National Trust Comment*, *supra* note 51, at 5.

55. *Proposed Regulations on the Listing of Properties in the National Register of Historic Places*, NAT'L PARK SERV., https://www.nps.gov/subjects/historicpreservation/nhparegs2019.htm [https://perma.cc/ZHY3-9AA5] (last visited Nov. 15, 2019).

56. *See infra* note 151. The land-area voting scheme may also be justified on a general sense of fairness. It is only logical (as the argument would likely go) that the owners representing the majority of the land in a proposed historic district should govern the outcome, just as the overall majority of landowners could do, because they have more gross ownership or "shares" of the land (whether that be square feet, acres, etc.). The definition of "fairness," however,

provides a nationwide rule to a myriad of state contexts—even where such restrictions are absent. As a result, larger landowners would nevertheless be favored over their less-land-rich neighbors without the justifiable concerns over property restrictions. Because of the potential constitutional problems with the proposed voting scheme, it must be viewed with the Court's jurisprudence on limiting a citizen's franchise.

II. ONE PERSON, ONE VOTE

The Supreme Court first distilled the "one person, one vote" principle of the Equal Protection Clause of the Fourteenth Amendment in *Reynolds v. Sims*.[57] In its decision, the Court articulated that the right to vote must be enjoyed by all similarly situated citizens, and that vote must have substantially equal weight on the outcome of the election.[58] Furthermore, because the right to vote is "preservative of other basic civil and political rights,"

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can differ based on what proverbial yardstick is used, as will be seen in the differing results on application of the democratic or proprietary model. *See infra* Part II. Assuming that one adheres to the more specific ideal of "democratic fairness," the idea that those with greater relative wealth in the form of land can dictate the result over a majority of their individual neighbors is anything but fair—and is more akin to feudalism. *See* source cited *infra* note 151.

57. Reynolds v. Sims, 377 U.S. 533, 555 (1964). While *Reynolds* and its progeny exclusively apply the "one person, one vote" principle to state elections, it equally applies to the federal government through the guarantee of equal protection implicit in the Fifth Amendment of the United States' Constitution. *See* Bolling v. Sharpe, 347 U.S. 497, 498–99 (1954); *see also* Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 543 (1977) (demonstrating a general rule of congruence in the equal protection guarantees afforded by the Fifth and Fourteenth Amendments subject only to limited exceptions based on unique federal functions). Although there are other federal elections, namely those for United States Senate, that do not comport with the "one person, one vote" principle, *Reynolds* itself rejected the "so-called federal analogy" in state elections. *See Reynolds*, 377 U.S. at 574–76. The Court concluded that the unique historical concerns surrounding our nation's foundational compact and the state sovereignty concessions necessary to achieve it were a deviation from basic democratic principles of fairness. *Id.* As such, the "one person, one vote" principle is inapplicable to some federal elections not because they are federal, but because they are so described in the Constitution. *See id.* at 574.

58. *Id.* "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.* at 555.

the Court must strictly scrutinize any infringement of that right.[59] Therefore, to justify an unequal franchise, the government must demonstrate that it had a compelling interest in tailoring voting requirements and it narrowly tailored the election to achieve that end.[60] While the "one person, one vote" principle was first applied to malapportionment in state legislative districts for federal and state office, the Court soon applied the principle to the local context.[61]

A. *Local General-Purpose Governments and Elections*

Avery v. Midland County was the first case to extend the "one person, one vote" principle to local governments.[62] *Avery* reviewed the constitutionality of the voting system for the Midland County Commissioners Court, which was elected from single-member districts of vastly unequal population.[63] The Court found that in applying the "one person, one vote" principle, it was not relevant what functions were exercised; rather, the relevant factor was that the Commission had "authority to make a substantial number of decisions that affect all citizens."[64] However, while the "one person, one vote" principle applied to local governments with general powers, it left the door open for localities to "devis[e] mechanisms of local government suitable for local needs and efficient in solving local problems."[65] Yet, in the wake of *Avery*, it was unclear where

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59. *Id.* at 562.

60. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 627–28 (1969).

61. *See* Briffault, *supra* note 7, at 345–46.

62. *See* Avery v. Midland County, 390 U.S. 474, 479 (1968).

63. *Id*. at 475–76. The three rural districts had a combined population of 2,094 whereas the single urban district had a population of 67,906. *Id.*

64. *See id.* at 482–84. The argument that the "one person, one vote" principle applied only to sufficiently legislative bodies stemmed from *Sailors v. Board of Education*, where, while assuming *arguendo* that "one person, one vote" applied to local governments, the Court noted that the county board functioned in a more "administrative" than "legislative" capacity but stressed that the board positions were *appointed* by its constituent local boards rather than from a direct vote. 387 U.S. 105, 110 (1967). The Court in *Avery* opined that *Sailors* fit into the new local paradigm they had created, as an example of their sympathies to local innovation, yet discounted the argument that the Commissioners Court was "not sufficiently legislative." *See Avery*, 390 U.S. at 482, 485 (internal quotations omitted).

65. *See id.* at 485. The governmental powers that the Commissioners Court wielded included setting a tax rate, equalizing assessments, issuing

the proper context for such a "special-purpose unit of government" that justified departure from "one person, one vote," would emerge.[66]

The cases immediately following *Avery* further extended "one person, one vote" to special government units and elections that seemingly corresponded to only nominal general governmental powers, including elections for local bond referenda[67] and educational boards.[68] Nevertheless, because these elections had the potential to affect those who had been disenfranchised, the Court found that they contravened the "one person, one vote" principle.[69]

In *City of Phoenix v. Kolodziejski*, the Court examined a referendum to approve the issuance of general obligation bonds that excluded otherwise qualified voters who did not own real property.[70] The Court rejected that property owners bore a "special burden" and assumed that costs would inevitably be passed on to residents in the community.[71] Therefore, "[p]resumptively, when all citizens are affected in important ways by a governmental decision subject to a referendum, the Constitution does not permit weighted voting or the exclusion of otherwise qualified citizens from the franchise."[72] Due to the presumption against interference with a non-property owner's franchise and the lack of a convincing showing that property owners interests were sufficiently "different from the interests of non[-]property owners," the Court found the exclusion in violation of "one person, one vote."[73]

By extending "one person, one vote" to bond referenda, the Court rejected the idea that the principle applied only to

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bonds, and setting a budget for the allocation of the county's funds. *See id.* at 483.

66. *See id.* at 483–84.

67. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 212–13 (1970); Cipriano v. City of Houma, 395 U.S. 701, 702–03 (1969).

68. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 52–3 (1970); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 622 (1969).

69. *See, e.g.*, *City of Phoenix*, 399 U.S. at 215–18; *Kramer*, 395 U.S. at 630–31.

70. *City of Phoenix*, 399 U.S. at 205–06.

71. *See id.* at 208–12.

72. *See id.* at 209.

73. *See id.* at 212–13.

representative elections and, instead, held that it also governed direct democracy.[74] Furthermore, even if the outcome placed a direct pecuniary burden on a certain voting class, the secondary effects on public services and community-wide costs were sufficient to place the disfavored citizens on equal footing in the election.[75]

In *Kramer v. Union Free School District No. 15*, the Court reviewed an election process for local school district boards that excluded voters who did not own or lease real property within the district or did not have custody of a child enrolled in the local public schools.[76] While the Court reserved judgment on whether limiting franchise to those "primarily interested" was a compelling state interest, it held that the restriction improperly defined voter's interests and excluded those who were civically "interested" in local education.[77] This conceptualization did not rest only on pecuniary interests but allowed for a more subjective rationale of interest that included the voter's specific viewpoint on the outcome of the election.[78] Additionally, the Court elaborated that this exacting standard of scrutiny was triggered whenever the forum chose the democratic method, even where another method would be permissible.[79]

Although the Court did not narrowly define what type of mechanism would allow an election to differentiate the interests of voters, it did provide for a powerful statement on democracy as a tool for gauging community concern.[80] A democratic system does not allow for those who are indifferent to the issues implicated in a local election to have a greater say than those who are informed and passionate about the outcome without meeting a discerning standard.[81]

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74. *See id.* at 215 (Stewart, J., dissenting).
75. *See id.* at 209–11 (majority opinion).
76. *See Kramer*, 395 U.S. at 622.
77. *See id.* at 630–31.
78. *See id.* at 631.
79. *See id.* at 629. "[O]nce the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." *Id.* (quoting Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966)).
80. *See id.*
81. *See id.* at 633.

Likewise, in *Hadley v. Junior College District of Metropolitan Kansas City*, the Court invalidated the election scheme for a junior college district's six-member board of trustees based on districts of unequal population.[82] While not vested with the general powers exercised in *Avery*, the Court nevertheless found the board's powers broad enough to require adherence to the "one person, one vote" principle.[83] Because the election concerned education, which was a traditional local government function, it lent credence to the wide impact on excluded voters.[84] Furthermore, it was not permissible to limit strict scrutiny only to "important" elections because the fact that an election was the chosen method of decision-making is "a strong indication that the choice is an important one."[85]

Hadley provided a useful tool in the calculus of deciding whether the election required equal franchise power by looking to whether the governmental functions related to the election were novel or those that local governments of general powers typically exercise.[86] *Hadley* also underscored the importance of elections as a constitutionally protected method of decision-making that does not allow any stratification by attempting to determine which types of decisions were more important than others.[87]

Avery and the "one person, one vote" cases that immediately followed demonstrated that strict scrutiny was necessary not because of the "'*subject*' of the election, but because of the *fact* of an election."[88] Those cases presumed that the vote would affect all otherwise eligible voters in important ways, even where the burden of or primary interest in the election seemingly fell more heavily on those granted greater franchise.[89] While the trend following *Avery* seemed increasingly to extend the "one person, one vote" principle to special-purpose districts and elections, the Court also consistently acknowledged that it did not wish to place "roadblocks

82. Hadley v. Junior Coll. Dist., 397 U.S. 50, 51–52 (1970).
83. *See id.* at 53–54.
84. *See id.* at 56.
85. *See id.* at 55.
86. *See id.* at 56.
87. *See id.*at 55.
88. *See* Briffault, *supra* note 7, at 354 (quoting Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629 (1969)) (emphasis added).
89. *See id.* at 359.

in the path of innovation, experiment, and development" generally afforded local governments under the federal system.[90] Making good on this promise, the Court soon found occasion to explore a model of election for a business-like special purpose district that allowed escape from the strict scrutiny of "one person, one vote."

B. *Special Limited-Purpose Districts*

In *Salyer Land Company v. Tulare Lake Basin Water Storage District*, the Court found a district of "special limited purpose and . . . disproportionate effect" on a favored group that justified escape from the strictures of "one person, one vote."[91] The Court examined elections for the board of directors of a water storage district, where the franchise was restricted to landowners within the district and votes were apportioned according the assessed valuation of the land.[92] The water district financed and operated storage works within the district, which were assessed against the land therein in accordance with the benefits to be received, and tolls were charged for the use of the water.[93] The district offered no general public services, such as schools, transportation, utilities, or infrastructure, that would widely impact all residents of the district.[94] Therefore, because the "the benefits and burdens to each landowner . . . [were] in proportion to the assessed value of the land[,]" there was a rational basis for the state to value votes in this manner.[95]

By departing from strict scrutiny, which governed previous local voting cases, the Court created an entirely new model for local

90. *See* Avery v. Midland County, 390 U.S. 474, 485 (1968); *see also Hadley*, 397 U.S. 50, 59 ("[V]iable local governments may need many innovations, numerous combinations of old and new devices, [and] great flexibility in municipal arrangements to meet changing urban conditions.") (quoting Sailors v. Bd. of Educ., 387 U.S. 105, 110–11 (1967))).

91. Slayer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973).

92. *Id.* at 724–25.

93. *Id.* at 723–24, 729.

94. *Id.* at 728–29. However, the water district did have the power to employ workers, condemn private properties, and authorize both general obligation bonds (the kind extended "one person, one vote" protection in *City of Phoenix*) and interest-bearing warrants. *Id.* at 728 n.7. Furthermore, the water district engaged in flood control activities that had the potential to affect all residents, but the Court found this "incidental" to the "primary purpose" of water acquisition, storage, and distribution. *Id.* at 728 n.8.

95. *Id.* at 734.

elections justified by comparing voter franchise to shares in a private corporation.[96] This proprietary model of local election was not express, but instead outlined an emerging analysis that allowed the Court to create a unique carveout for local elections to exercise the kind of adaptability favored under the federal system.[97] The Court further expanded on the understanding of this new model for local elections in *Ball v. James*.[98]

In *Ball*, the Court reviewed another water district election for which votes were restricted to landowners, but, unlike in *Sayler*, this water district apportioned the franchise based on the acreage owned.[99] This water district had similar functions to the one in *Salyer*, though it encompassed a substantial amount of urban land and also sold hydroelectric power to hundreds of thousands of people.[100] Nevertheless, the Court found that the water district "simply does not exercise the sort of governmental powers that invoke the strict demands" of "one person, one vote."[101] Even though the district's electricity sales did widely effect all those within the district, the court found that this was not an exercise of a traditional government function necessitating "one person, one vote" because the power service was merely incidental to the primary purpose of the water district.[102] Instead, the Court viewed the water district as "essentially a business enterpris[e] . . . created by and chiefly benefitting a specific group of landowners."[103]

As an elaboration of the electoral model created in *Salyer*, *Ball* makes explicit the Court's reliance on designating the election as one for an essentially proprietary entity.[104] In *Ball*, the Court greatly expanded the scope of the proprietary model by allowing the initial formation and structure of the district to outweigh the wide

96. *See* Briffault, *supra* note 7, at 365.
97. *See id.* at 366, 381.
98. *See* Ball v. James, 451 U.S. 355, 357 (1981).
99. *Id.* at 359.
100. *Id.* at 357. While the water district in *Salyer* had only seventy-seven residents, the water district at issue in *Ball* included "almost half the population of the State." *Id.* at 365.
101. *Id.* at 366.
102. *See id.* at 368–69.
103. *Id.* at 368.
104. *See id.*

impact on excluded voters by the later assumed public utility function.[105] The Court noted that to secure the initial buy-in of larger landowners for the creation of the district, the investment risk required a proportional control of the water district, and the unequal franchise continued to be relevant to its primary function.[106]

Unfortunately, neither *Ball* nor *Salyer* clearly delineated the analysis by which this model of local election escaped from strict judicial scrutiny, leaving lower courts and scholars unsure of the legal framework by which to distinguish the democratic model from the proprietary model.[107] The two factors that the Court did provide in distinguishing the two models were (1) the disproportionate impact on those favored by the voting scheme and (2) the special limited purpose of the district.[108] Even in analyzing the traditional functions of the water district in *Ball*, the Court ignored its statement from *Salyer* that utilities are the type that require adherence to "one person, one vote."[109] Furthermore, rather than using these criteria to show a compelling need to tailor local elections,[110] as the Court could have done, it instead used them to justify a less discerning review, abandoning the presumptions of wide impact in *City of Phoenix* and broad conceptualization of citizen interest in *Kramer*.[111]

III. NATIONAL REGISTER ELECTIONS UNDER "ONE PERSON, ONE VOTE"

While National Register historic districts occupy a unique and important place in the federal government's historic preservation policy, it is not clear where and how the objection process for

105. *See id.* at 371.
106. *See id.*
107. *See* Briffault, *supra* note 7, at 370.
108. *See Ball*, 451 U.S. at 370.
109. *See id.* at 380 (White, J., dissenting) (quoting Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–29 (1973)).
110. The local voting cases leading up to *Salyer*, and their frequent invocation of the importance of innovation for local elections, suggest a willingness to declare a compelling government interest. *See supra* note 90 and accompanying text. When the time finally came, the court did not do so, but instead established these proprietary needs as a complete exception to strict scrutiny. *See Salyer*, 410 U.S. at 728.
111. *See* Briffault, *supra* note 7, at 362.

National Register historic districts fits into the "one person, one vote" paradigms established in the Supreme Court's decisions. Therefore, it is necessary to evaluate to what extent the objection process resembles the elections previously examined, both under the existing democratic and proprietary models, as well as certain fundamental differences due to the federal nature of the election involved here.

A. *National Register Historic District Objections Function as an Election*

Although there are clear differences in the impetus and procedure that make up the objection process for National Register historic districts from traditional local elections, the procedure is an election by its very nature. As recognized under the democratic model line of cases, where a democratic method is selected to render the underlying decision, certain constitutional voting protections and presumptions attach.[112] These protections cannot be ameliorated simply by an attempt to demonstrate that the decision is less important than more traditional representative elections—the fact that an election was chosen proves that the decision is an important one.[113] Furthermore, even if the decision to list a historic district on the National Register is an "administrative" one, the Court has disavowed such distinctions as being sufficient by themselves to justify a departure from "one person, one vote" protections.[114]

Neither is there any reason to view the manner in which the objection process for National Register historic districts is formulated as rendering the decision not an election, functionally or constitutionally. Indeed, the Federal Register that established the objection process explicitly referred to a property owner's

112. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 54–55 (1970); Kramer v. Union Free Sch. Dist., 395 U.S. 621, 629 (1969).

113. *See Hadley*, 397 U.S. at 55. The Court noted that the crafting of judicial standards to defining the relative importance of elections would be unfeasible, particularly considering that different values would render a "vital" election to one voter as "routine" to another. *Id.*

114. *See id.* at 55–56. The Court emphasized that governmental activities "cannot easily be classified in the neat categories favored by civics texts" and to quantify the purpose of elections was judicially "unmanageable." *Id.* (quoting Avery v. Midland County, 390 U.S. 474, 482 (1968)).

objection as a "vote,"[115] and the proposed rule continues to do so.[116] Furthermore, while the objection of the majority of the property owners within the proposed district functions as a veto to its listing, the procedure is nonetheless an election.[117] In *Eastlake v. Forest City Enterprises, Inc.*, the Court found that a referendum procedure allowing citizens to effectively veto zoning modifications was a valid election and "a classic demonstration of 'devotion to democracy.'"[118] Moreover, the Court has not distinguished referenda as constitutionally different under the "one person, one vote" principle.[119] Rather, as in representative elections, the constitutionally significant factor is whether "all citizens are affected in important ways" by the referendum.[120] While there has been a recognition that the "discrete" nature of a decision subject to a referendum will render some principles in representative elections of "limited importance," this merely results in potential "one person, one vote" violations being more easily identified.[121]

In evaluating the fairness of elections, the factual background and potential effects to the disenfranchised or diluted electorate will certainly be of paramount importance and thereby render some analogies less potent than others. However, with such a varied background of cases, lessons must be taken from wherever they apply. Instead, the fact that most distinguishes the voting process for National Register historic districts is that the make-up of the referendum does not come from a local decision, even though it is an election taking place at the local level.[122] Unlike every other case, this is a function of the federal government rather than a local

115. National Register of Historic Places, 46 Fed. Reg. 56183, 56186 (Nov. 16, 1981).

116. National Register of Historic Places, 84 Fed. Reg. 6996 (proposed Mar. 1, 2019) (to be codified at 36 C.F.R. pt. 60).

117. *See* Eastlake v. Forest City Enters., Inc., 426 U.S. 668, 673, 678–79 (1976).

118. *See id.* (quoting James v. Valtierra, 402 U.S. 137, 143 (1971)).

119. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970); Cipriano v. City of Houma, 395 U.S. 701, 705–06 (1969).

120. *City of Phoenix*, 399 U.S. at 209.

121. *See* Lockport v. Citizens for Cmty. Action at the Local Level, Inc., 430 U.S. 259, 266 (1976).

122. *See* 36 C.F.R. 60.6(b)–(d).

election tailored by local policy makers or through a state instrumentality.[123]

B. *Federal Use of the Proprietary Model Conflicts with Principles of Federalism*

Federalism is the very bedrock of our governmental system, yet federalism is an elusive concept in many ways. The Supreme Court has strongly recognized federalism but has often struggled to demarcate its enforcement on laws that bring state and federal powers into dispute.[124] This difficulty is particularly true for local governments—while federalism contemplates only realms of state and federal sovereignty, local governments must necessarily be situated *somewhere* in the overall conceptualization of stratified government structure.[125] In the Court's jurisprudence, this recognition is often implicit, yet it is undeniable.[126] Such is the case for the rationale that underpins the proprietary model because the Court's recognition of the need for such a model draws on federalist principles.[127]

Furthermore, the National Register itself is an exercise in federalism. A federal construct, the National Register program has largely been delegated to SHPOs in its administration, particularly with respect to the objection process.[128] This delegation is only natural because SHPOs and state review boards are more competent to make on-the-ground evaluations and oversee any objections because they have proximity to the physical and political landscape. As a result, officials at the state and local level largely deal with the practical implications and are the target of any debate or contention over the listing of the property on the National

123. *See id.*

124. *Compare* Nat'l League of Cities v. Usery, 426 U.S. 833, 854–55 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985) (limiting federal interference in spheres of traditional state government function), *with Garcia*, 469 U.S. at 550–52 (declaring federalism exists in the structure of our government itself and cannot be judicially enforced).

125. *See* Michael Q. Cannon, Comment, *The Dual-Faceted Federalism Framework and the Derivative Constitutional Status of Local Governments*, 2012 B.Y.U. L. REV. 1585, 1585 (2012).

126. *See id.* at 1585–86.

127. *See infra* Section III.C.

128. TYLER ET AL., *supra* note 11, at 77–78.

Register.[129] SHPOs may be held politically accountable to the ridicule that the program produces, despite their inability to deviate from a federally mandated framework. SHPOs are understandably concerned because the land-area voting scheme would depart from existing statutory language and obligate enforcement of a democratically unequal voting scheme.[130] Therefore, the proprietary model should be evaluated in terms of both its federalist justifications and its implications on the National Register program.

C. *The Proprietary Model's Creation Relied on Federalist Principles*

"One person, one vote" decisions, from the earliest extension of the principle to local elections in *Avery*, have repeatedly recognized the need for localities to have the ability to tailor functions of government to suit their peculiar needs.[131] While the Court never

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129. An example of this is the years-long controversy over the listing of the proposed Eastmoreland Historic District in Portland, Oregon. *See* Sophie Peel, *Eastmoreland Historic District Nomination Rejected by National Park Service, Again*, WILLIAMETTE WEEK (July 24, 2019), https://www.wweek.com/news/city/2019/07/24/eastmoreland-historic-district-nomination-rejected-by-national-parks-service-again/ [https://perma.cc/6HUT-8Z6B]. Due to uncertainty of how to count property owners within the proposed district, particularly after an effort by some objectors to split their properties into thousands of separate trusts that the Oregon SHPO initially counted as individual votes, the nomination has repeatedly ping-ponged between the SHPO and the NPS. *See infra* note 206. While it is dubious whether those trusts count as individual votes, or even whether they were validly created, *see infra* note 206, the result is that the Oregon SHPO is stuck between two highly partisan neighborhood groups at the local level and the NPS at the national level, *see* Sara Roth, *Eastmoreland residents who split homes into shares successfully halt historic district*, KGW (Apr. 25, 2018, 12:28 PM), https://www.kgw.com/article/news/local/editors-picks/eastmoreland-residents-who-split-homes-into-shares-successfully-halt-historic-district/283-545736598 [https://perma.cc/6DLK-DFQ5].

130. *See* TEX. HISTORICAL COMM'N, Comment Letter on National Park Service Proposed Rule for the National Register of Historic Places (Apr. 9, 2019), https://www.regulations.gov/document?D=NPS-2019-0001-3304 [hereinafter *Texas Commission Comment*]; NAT'L CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, Comment Letter on National Park Service Proposed Rule for the National Register of Historic Places 3 (Apr. 19, 2019), https://www.regulations.gov/document?D=NPS-2019-0001-0978 [https://perma.cc/3N69-3V7C] [hereinafter *NCSHPO Comment*].

131. *See*, *e.g.*, Avery v. Midland County, 390 U.S. 474, 485 (1968) ("The Constitution does not require a uniform straitjacket binding citizens in

explicitly referenced federalism, examining the proprietary model alongside the principles of federalism clearly illustrates that the local needs supported by the proprietary model correspond to the same benefits afforded to states and localities in our federal system.[132] These advantages include, among others, a "sensitivity to diverse needs," an "increase[d] opportunity for citizen involvement in democratic processes," and an "allowance for more innovation and experimentation in government."[133] All of these principles justify localities escaping from the strictures of the "one person, one vote" principle where there is a need to diversify, experiment, and favor a unique democratic process where singularly local issues are being resolved.

Yet with the proposed land-area voting scheme for National Register historic districts, it is not the local citizens acting to tailor the voting process to their needs and sensibilities; rather, it is a federal agency acting wholesale for the purported benefit of property owners in an incommensurable variety of local contexts. While such voting processes for local historic districts could potentially fit the proprietary model, particularly where the decision carries regulatory consequences,[134] this escape from the voting protections of "one person, one vote" was never meant to be a loophole for the federal government to avoid its own governing principle of "one person, one vote."[135]

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devising mechanisms of local government suitable for local needs and efficient in solving local problems."); Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970) (recognizing the potential for election of "certain functionaries whose duties are so far removed and so disproportionately affect different groups that a popular election in compliance with ["one person, one vote"] might not be required . . . .").

132. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491–1511 (1987)). Professor Briffault views the "proprietary" model as a "partial escape from the tension between political equality and federalism," allowing local governments to be considered business entities, but they must nonetheless be situated somewhere in the federal system. *See* Briffault, *supra* note 7, at 381.

133. *Gregory*, 501 U.S. at 458 (citing McConnell, *supra* note 132, at 1493).

134. *See Texas Commission Comment*, *supra* note 130, at 1 (noting that some municipalities allocate votes for establishing local historic districts on lot size).

135. Even in *Ball v. James*, where the proprietary model arguably reached its zenith, the Court made clear that it was only examining the applicability of

In addition, the Court's analysis also demonstrates a reliance on federalism concerns in crafting the democratic-proprietary paradigm in other ways, particularly in the education context, where the Court relied on the traditional governmental functions at issue as proof that the powers wielded by the elected entities were general in nature and widely affected all constituents.[136] In turn, the Court contrasted the fact that water districts did not engage in traditional governmental functions in crafting the proprietary model.[137] This type of analysis reflects a line of jurisprudence that endeavored to create spheres of state and federal power based on defining traditional government functions.[138] In the context of "one person, one vote," the exercise of traditional governmental functions ironically justifies federal interference rather than the protection of state power from that interference, as with other uses of this analysis.[139] However, the Court, relying on differentiating special-purpose districts based on traditional governmental functions, suggests the creation of a conceptual sub-state entity that, by its uniquely local and proprietary nature, justifies further insulation from federal control.[140] This result comports with the recognition that, while

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the "one person, one vote" principle to "*local* government bodies." 451 U.S. 355, 357 (1981) (emphasis added).

136. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970).

137. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–29 (1973) ("[The water district] provides no other general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body.").

138. *See* Nat'l League of Cities v. Usery, 426 U.S. 833, 852 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth. 469 U.S. 528 (1985) (invalidating the extension of federal minimum wage pursuant to the Commerce Clause to certain government positions because federalism guaranteed states freedom to "structure integral operations in areas of traditional governmental functions.").

139. *See id.* at 851–52.

140. *See* Cannon, *supra* note 125, at 1585, 1591–93, 1599–1600. Traditionally, local governments have been viewed as merely state instrumentalities, and not independent polities. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 177–78 (1907). However, in *Avery*, the Court rejected the argument that this theory justified a categorical exception of local governments from "one person, one vote," instead it recognized that they do enjoy a great deal of autonomy. *See* Avery v. Midland County, 390 U.S. 474, 481 (1968); *see also* Briffault, *supra* note 7, at 347–48. A return to this theory of local government does not fully explain the proprietary model, rather, it

the federal government is justified in invading state spheres to protect fundamental liberties to a great degree, the "Fourteenth Amendment does not override all principles of federalism."[141] While the Court has disavowed efforts to shape judicial review based on bright-line formulations of governmental or proprietary functions,[142] values of federalism are nevertheless relevant where federal law impinges on the exercise of state sovereignty.[143]

Fundamentally, the proprietary model rests on a need for states and localities to have the freedom necessary to craft political functions to address local needs and fit local predilections. In local special-purpose elections, the Court seems to acknowledge the importance of crafting additional voting requirements, which have been recognized as a legitimate component of state sovereignty,[144] despite such an action being rejected where it conflicts with the democratic model under the "one person, one vote" principle.[145] The Court made this exception for proprietary elections because, on examining of the peculiarities of a special-purpose district with disproportionate impact on certain voters, it recognized that the favored group is clearly not, in fact, similarly situated or as interested in the election as those who are excluded from an equal

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appears to endorse the existence of another, more locally unique and business-like, political subdivision. *See* Briffault, *supra* note 7, at 369.

141. *See* Gregory v. Ashcroft, 501 U.S. 452, 469 (1991) (examining a variety of contexts where deference is given to states in the exercise of "political-function[s].").

142. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550 (1985) ("[T]he principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself."). Although there are certainly competing theories of how federalism should be enforced, as a practical matter it proved too difficult for courts to define what is and what is not a traditional governmental function. *See* Briffault, *supra* note 7, at 381 n.166.

143. *See Gregory*, 501 U.S. at 458, 469.

144. *See* Pope v. Williams, 193 U.S. 621, 632 (1904) ("[T]he privilege to vote in a state is within the jurisdiction of the state itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution."); *see also* U.S. CONST. art. I § 4 ("The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.").

145. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 625–26, 633 (1969).

franchise.[146] By distinguishing elections in the proprietary model from those in the democratic model, the Court returns the power for states and localities to craft voting requirements to its full effect. Because the proprietary model rests on a sphere of sovereignty reserved to states,[147] the case for a federal exercise of the proprietary model is further undercut.

Even if the federal government can properly utilize the proprietary model, the Court has stated that the federal government can only invade an area of state sovereignty if Congress makes clear its intent to do so in a "plain statement."[148] However, the language of the statute unequivocally states that a historic district nomination will be blocked only by "a *majority* of the *owners* of privately owned properties within the district."[149] Therefore, the proposed land-area voting scheme is not even a permissible construction of an ambiguous provision, but, rather, a direct contradiction to the plain language of the statute. Such an invasion of state sovereignty where Congress did not authorize it clearly violates the "plain statement" rule.[150]

Furthermore, because the SHPOs would enforce this voting scheme against their own democratic principles, the proposed rule is arguably an impermissible commandeering of state officers to enforce a federal regulatory scheme.[151] Although federal grants largely fund SHPOs, a change to such an important mechanism as the nomination of historic districts would affect the fundamental character of the historic preservation program. This is particularly true considering the constitutional dimension of acting against the fundamental right to vote under the Equal Protection Clause. The ramifications and disapproval for administering such an undemocratic system will undoubtedly fall upon the SHPOs and allow the federal officers who devised it to escape them. As such,

146. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–29 (1973).

147. *See supra* Section III.B.

148. *See Gregory*, 501 U.S. at 460–61.

149. 54 U.S.C. § 302105 (b) (2019) (emphasis added).

150. *See Gregory*, 501 U.S. at 460–61.

151. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 575–80 (2012); *see also NCSPHO Comment*, *supra* note 130, at 3 ("[The land-area voting scheme] essentially affords a more significant voice to those possessing more wealth in the form of land—a rather feudal concept, and one that has been introduced with no justification.").

the proposed rule is especially capable of a coercive influence if the states are not given a legitimate voice.[152] Additionally, the administration of the land-area voting scheme is an unfunded mandate that would likely prove highly burdensome due to the difficulties in reliably measuring land area, even if the proposed rule or statute defined the term "land area" at all.[153] Considering the unwarranted and fundamental change to the voting scheme along with the administrative burdens it represents, the proposed rule can be fairly characterized as a coercion of the states.

When examining the rationale that created the proprietary model alongside accepted principles of federalism that the Court endorsed, it becomes clear that this model was contemplated only to apply to states and localities that tailor their democratic system to meet the peculiarities of local issues. Furthermore, to the extent that principles of federalism are determinative to the exercise of federal power in spheres of state sovereignty, there is evidence that a federal agency's use of the proprietary model is improper. Even when applying more concrete doctrines of federalism-based limitations, there is ample justification to hold the application of the land-area voting scheme as violative of our nation's federalist structure. However, it is not entirely clear that National Register historic district elections would fit the proprietary model at all if this use of federal power were permissible.

D. *Historic District Referenda Do Not Fit the Proprietary Model*

While the Court was not entirely clear in delineating the test to determine the line between the democratic and proprietary models, some lessons can be pulled from the existing jurisprudence. First, it must be determined whether the election involves general governmental powers or is only for a special limited purpose.[154]

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152. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 578 ("Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system.").

153. Advisory Council on Historic Preservation, *Comment Letter on National Park Service Proposed Rule for the National Register of Historic Places* 5 (Apr. 26, 2019), https://www.regulations.gov/document?D=NPS-2019-0001-1806 [https://perma.cc/CHC4-C2VT] [hereinafter *ACHP Comment*].

154. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728 (1973).

Some factors to consider are the scope of the decisions to be made[155] and whether the powers are those local governments traditionally exercise.[156] Second, it must be determined whether the election and its contingent benefits and burdens disproportionately impacts the favored voting class.[157] To justify diluting a group's voting rights, the voting scheme must overcome a presumption that all citizens are "affected in important ways"[158] and effectively apportion the franchise based on a valid representation of the interests of each group.[159] Whether the entity can be characterized as proprietary in nature is of particular importance.[160] Finally, if these factors favor an escape from the strict scrutiny of "one person, one vote," there must be a rational basis to show the unequal voting scheme does not "nonetheless amount . . . to invidious discrimination in violation of the Equal Protection Clause."[161]

While this test is certainly not perfect due to the inconsistent manner in which the Court has weighed different factors,[162] it is a workable formulation for applying the "one person, one vote" jurisprudence to the National Register historic district elections. Indeed, commentators have struggled to nail down an analytical framework that provides consistent guidance and, instead, have opted to compare and contrast individual cases.[163] Yet, the purpose of this Comment is not to critique the efficacy of this line of

155. Avery v. Midland County, 390 U.S. 474, 484 (1968).

156. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 56 (1970).

157. *See Salyer*, 410 U.S. at 728–29.

158. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970).

159. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969); *see also Salyer*, 410 U.S. at 734 ("[T]he benefits and burdens to each landowner . . . are in proportion to the assessed value of the land." (quoting Salyer v. Tulare Lake Basin Water Storage Dist., 342 F.Supp. 144, 146 (1972))).

160. Briffault, *supra* note 7, at 372.

161. *See* Town of Lockport v. Citizens for Cmty. Action at Local Level, Inc., 430 U.S. 259, 268 (1977).

162. *See* Joseph Seliga, *Democratic Solutions to Urban Problems*, 25 HAMLINE L. REV. 1, 13–14 (2001).

163. *See, e.g.*, *id.;* Briffault, *supra* note 7, at 370–73, 375–76. Professor Briffault posited that the disproportionate impact prong may be logically circular, as the competing interests that are favored in the franchise will necessarily depend on whether the vote is viewed from a democratic or proprietary lens. *See id.* at 370–71.

jurisprudence but to instead apply the available guideposts to a discrete voting scheme.

1. General Governmental Powers Versus Special Limited Purpose

It is self-evident that National Register historic districts do not exercise the kind of broad powers that the quintessential local city or county council would. The listing of a historic district will not result in the various decisions, such as taxation, contracting, and spending, that were at issue in *Avery*.[164] As with all referenda, the result of the election will be a single discrete decision. Facially, a National Register historic district seems to have only a special limited purpose. The Court has nevertheless recognized that such special purpose elections may have wide enough impact to require adherence to "one person, one vote."[165]

In the bond referenda cases, the Court noted that increased taxation would have wide impact both through direct government services and with respect to costs passed from landowners; furthermore, the disenfranchised also had a valid interest in the election's outcome.[166] While the economic impact of a National Register historic district listing is much harder to quantify than with taxation, studies show that creating a historic district can have a blanket impact on property values.[167] In fact, there is evidence that historic districts that do not impose property restrictions, like the National Register, have a greater net benefit even above the "conclusively" positive baseline land value increase.[168] Furthermore, the owners of properties that contribute to the historical significance of the district can accrue direct benefits in the form of federal tax incentives.[169] Although each

164. *See* Avery v. Midland County, 390 U.S. 474, 483–84 (1968); *see also* TYLER ET AL., *supra* note 11, at 71–72 (illustrating what listing on the National Register does and does not do).

165. *See* City of Phoenix v. Kolodziejski, 399 U.S. 204, 209 (1970); Cipriano v. City of Houma, 395 U.S. 701, 704 (1969).

166. *See Kolodziejski*, 399 U.S. at 210–11.

167. *See* Paul K. Asabere & Forrest E. Huffman, *Historic Districts and Land Values*, 6 J. REAL EST. RES. 1, 1 (1991); Donald A. Coffin, *The Impact of Historic Districts on Residential Property Values*, 15 E. ECON. J. 221, 221 (1989).

168. Asabere & Huffman, *supra* note 167, at 5–6.

169. *See* Ejulius Adorno, Note, *Historic Preservation: Incentivizing Companies Through Tax* Credits, 43 IOWA J. CORP. L. 143, 147–48 (2017) (focusing on the federal rehabilitation tax credit); Jess R. Phelps, *Preserving*

historic district is unique, there is no indication that these impacts would not widely affect all property owners within a historic district. Even where impacts are less defined, as other impacts of historic district listing may be, the exercise of a traditional government function can provide a guidepost.

The type of governmental power that underpins the creation of a historic district is most readily characterized as a land use or zoning function. While not among the traditional governmental functions enumerated in *Salyer*,[170] land use and zoning are functions vital to local governments of general power. In fact, in *Board of Estimate of City of New York v. Morris*, the Court applied the "one person, one vote" principle to the election of a governmental unit whose powers included land use and zoning[171] and even extended to designating local historic districts.[172] This application further suggests that zoning and land use fall within traditional government function, despite the Board of Estimate's powers being broad enough to determine that it wielded general governmental powers without needing to rely on the traditional functions to show wide-spread impact.[173]

Even when independently analyzed, zoning and land use decisions are undoubtedly the kind that have wide impact on the community. Indeed, there is an argument that the most important power vested in local governments is control over land use decisions, which is often reflected through the passionate discourse over how these decisions will affect the future of a community.[174] Zoning and land use decisions determine where citizens can live and own property, run their businesses, send their children to school, and even change the physical landscape of the community writ large. A wider level of impact can scarcely be contemplated.

Perpetuity?: Exploring the Challenges of Perpetual Preservation in an Ever-Changing World, 43 ENVTL. L. 941, 961–62 (2013) (discussing the requirements for the federal historic preservation easement tax deduction).

170. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 728–29 (1973).

171. *See* Bd. of Estimate of City of N.Y. v. Morris, 489 U.S. 688, 695–96 (1989).

172. *See* Penn. Cent. Transp. Co. v. City of New York, 438 U.S. 104, 111 (1978).

173. *See Morris,* 489 U.S. at 695–96, 702–03.

174. Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 301–02 (2002).

The decision to list a historic district on the National Register will not have the same impact as local district zoning and land use decisions. Nevertheless, that decision makes an important statement about the values that property owners within the proposed district hold, opens up an array of potential benefits to property values, gives access to federal tax incentives, and provides a template for further local decisions about the nature of the district itself.[175]

Despite indications of the wide impact from the decision to list a historic district and its similarities to a traditional government function, this factor may weigh more toward the election being for a special limited purpose. Even where the Court has relied on instances of a traditional government function to require "one person, one vote," the government entity often exercised additional broader powers.[176] Furthermore, the Court has most consistently used this analysis in the context of education[177] and overlooked seemingly vital government functions as incidental or non-traditional in other contexts,[178] indicating that education may be a special case.[179] To justify adopting the proprietary model, however, evidence must also illustrate that the dilution of the franchise corresponds to a disproportionate impact on the favored class of voters.

2. Disproportionate Impact

As the name of the proprietary model suggests, whether the function of the election can be fairly characterized as a business—with the favored voting group being entitled to a greater say over its operation because they act as shareholders who bear the costs of running the enterprise—is highly consequential. The importance of this distinction was explicit in *Ball's* exhortation that water

175. *See supra* Section I.A. and notes 167-69.

176. *See* Hadley v. Junior Coll. Dist., 397 U.S. 50, 53–54, 56 (1970).

177. *See, e.g.*, *id.* at 56. The Illinois Supreme Court continued to find the democratic model applicable to school boards even after the development of the proprietary model, relying once again on education as a "traditional and vital government function." Fumarolo v. Chi. Bd. of Educ., 566 N.E.2d 1283, 1296 (Ill. 1990).

178. *See* Ball v. James, 451 U.S. 355, 368 (1981).

179. *See* Briffault, *supra* note 7, at 356.

districts were "essentially . . . business enterprise[s]."[180] This distinction allowed a rebuttal of the presumption applied in previous "one person, one vote" cases under the democratic model that it was improper to exclude voters who also had valid interests in the outcome of the election, despite the decisional autonomy of water districts and the large number of affected residents in *Ball*.[181] The particularities of water district functions and the corresponding valuation of costs being associated directly with the size or value of the land owned within the district also gave sufficient grounds to find that the unequal voting scheme reflected the interests of each landowner in the relative weight of their voting power.[182] As a result, the associated pecuniary interests of each landowner gave more reliable criteria for weighing each voter's interests and thereby circumscribes *Kramer*'s delineation of "interest."[183]

Elections over the listing of a National Register historic district include none of these important distinctions. Certainly, a historic district cannot be characterized as a proprietary entity because property owners within the proposed district do not have a proportional pecuniary impact or interest based on their corresponding land holdings. For instance, the water district in *Ball* had an acreage-based taxing power and funded its operation through stock assessments, arguably requiring franchise power in proportion to those real-world consequences.[184] One may argue that the land area of the proposed historic district itself, when broken up among property owners, could act as the conceptual "shares." While it may be true that those with larger land might generally accrue greater land value benefits, those benefits would not be proportional to the overall land area but instead correlate to the property's characteristics, location, use, zoning, and other factors.[185] Furthermore, the Court has been clear in applying the proprietary model that these distinctions must nevertheless

180. *See Ball*, 451 U.S. at 368.

181. *See id.* at 369–70.

182. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729–30 (1973).

183. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 632 (1969).

184. *See Ball,* 451 U.S. at 359–60.

185. *See* Asabere & Huffman, *supra* note 167, at 3–5; Coffin, *supra* note 167, at 221–22.

correspond to the functions of the district itself.[186] Nowhere is there a function of National Register historic districts that would justify a valuation of votes based on land area. Indeed, "land area" is not a term within the authorizing statute or existing regulation.[187] In fact, its first introduction is in the proposed rule itself.[188]

Even accepting *arguendo* that property restrictions placed at the state or local levels are implicated on the National Register, they will not fall more heavily over one property owner than another based on the land area involved. The restrictions associated with local historic districts may limit demolition, construction, repair, and renovation subject to review by a local zoning board or historic district commission.[189] Such restrictions, while potentially very onerous to the non-preservation minded property owner, do not fall more heavily on property owners based on the relative size of their property. The most likely way in which these restrictions would fall more heavily on certain property owners is where the property itself was more historically significant or highly valued in the community, prompting greater scrutiny over the treatment of the property. Yet, the National Register itself does not even carry these burdens associated with locally designated historic districts.[190]

In fact, listing on the National Register is more fairly characterized as not carrying any constitutionally significant burdens on property owners at all. Although the research necessary to prove a property's historical significance often requires a paid professional, because any person can nominate a property, these costs do not necessarily even fall on the property owner, let alone each property owner within a proposed district. Furthermore, the few effects to property owners that can be characterized as

186. *See Ball,* 451 U.S. at 371 ("[T]he question [is] whether the effect of the entity's *operations* on [property owners is] disproportionately greater than the effect on those seeking the vote." (emphasis added)).

187. *See supra* notes 42, 52 and accompanying text.

188. *See ACHP Comment*, *supra* note 153, at 5.

189. Anika Singh Lemar, *Zoning as Taxidermy: Neighborhood Conservation Districts and the Regulation of Aesthetics*, 90 IND. L. J. 1525, 1582 (2015). The most widely regarded principles governing the treatment of historic properties come from the Secretary of Interior's Standards for Rehabilitation. 36 C.F.R. § 68.3(b).

190. *See supra* note 45–47 and accompanying discussion.

drawbacks are incidental at best.[191] In contrast, the benefits of listing on the National Register, as previously discussed, may be substantial and fall widely over all properties within the historic district.[192] However, there is no evidence that either these benefits or burdens—to the extent that they exist—fall more heavily on larger property owners in proportion with the size of their land.

Clearly, the disproportionate impact prong weighs strongly in favor of adherence to the "one person, one vote" principle to National Register historic district elections. Although these historic districts may likely be considered as having only a special limited purpose, these two factors, on the balance, weigh towards the land-area voting scheme being unconstitutional. That being said, because of the inconsistent application of these principles in the Court's jurisprudence, it is difficult to predict the outcome where the background is novel.[193] However, even if the proposed election scheme were to be permissible under the proprietary model, there is yet an argument that it bears no rational relation to the operation or aims of the National Register.

3. The Land-Area Voting Scheme Under Rational Basis

Once an election is found to fit the proprietary model, the unequal election scheme is valid so long as it is not "wholly irrelevant to the achievement of the regulation's objectives."[194] While the Court has always found a rational basis for justifying an unequal election where it has found a proper use of the proprietary model, it has also provided some basic guidelines to support a rational basis. One consistent justification is that allowing the dilution of some votes is grounded in the "realities" of the underlying government unit or controversy.[195] Additionally, the voting requirements must still provide a reasonable relationship to

191. *See supra* note 45 and accompanying text.

192. *See supra* notes 167–69 and accompanying text.

193. *See supra* notes 162–63 and accompanying text.

194. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 730 (1973) (quoting Kotch v. Bd. of River Port Pilot Comm'rs for Port of New Orleans, 330 U.S. 552, 556 (1947)).

195. *See* Town of Lockport v. Citizens for Cmty. Action at Local Level, Inc., 430 U.S. 259, 268–69 (1977); *Salyer*, 410 U.S. at 734, 268–69, 734 (1977).

the operations of the underlying governmental entity or decision to be made.[196]

In both *Salyer* and *Ball*, the manner in which the votes were weighted was based on how the costs were shared or the corresponding benefits received, allowing the Court to find a rational relationship to the voting scheme.[197] The unique challenges and needs of these water storage districts were the realities that justified the creation of the proprietary model.[198] However, no such realities exist with National Register historic districts. If any group understands the realities of running our nation's historic preservation program, it is the SHPOs. Yet, when this voting scheme was proposed, they were left baffled because it was "unclear what problem this rule change is attempting to solve" and there is "no justification" for smaller property owners' votes to be diluted as such.[199] This confusion provides further support that historic district listing does not, in fact, have any such burdens or benefits that would justify finding even a rational basis.

Furthermore, in *Ball*, the Court held that weighing the vote based on acreage bore a reasonable relationship to the *overall* operation of the water district.[200] Here, justifying the land-area voting scheme by "emphasiz[ing] the rights of private property owners within a proposed historic district"[201] has seemingly little relation to the underlying operation of the National Register itself. Instead, the concept that land area is the proper quotient for valuing and measuring the rights of property owners within the proposed district is arbitrary.[202] And, what are the "rights" that the land-area voting scheme are meant to "emphasize"? Under a property theory, the form of ownership with the most rights in its

196. *See* Ball v. James, 451 U.S. 355, 371 (1981).

197. *See id.*; *Salyer*, 410 U.S. at 734.

198. *See, e.g.*, *Ball*, 451 U.S. 371 (basing the holding on the "narrow" functions of the water district and its "relationship" to its "statutory objectives").

199. *See NCSHPO Comment*, *supra* note 130, at 3.

200. *See Ball*, 451 U.S. at 371.

201. *Proposed Regulations on the Listing of Properties in the National Register of Historic Places*, NAT'L PARK SERV., https://www.nps.gov/subjects/historicpreservation/nhparegs2019.htm [https://perma.cc/5AVX-N37A] (last visited Nov. 15, 2020).

202. *See ACHP Comment*, *supra* note 153, at 5.

proverbial "bundle of sticks" is fee simple.[203] Having a larger parcel of land does not grant the owner greater rights than a smaller neighbor, and it certainly does not grant him an entitlement to have an outsized voice over how that neighbor wishes to exercise his own rights.

By valuing a voter's interest based on land holdings, with seemingly little justification for doing so, the land-area voting scheme conflicts with the conceptualization of a voter's "interest" in an election under *Kramer*, even under a rational basis test.[204] *Kramer* defined interest in an election of community concern as being something personal to the voter, not necessarily defined only by pecuniary interest in the form of property ownership.[205] Only through reframing the government entity as a business enterprise could the Court narrow its definition of "interest" and thereby tie that interest to the conceptual "shares" each landowner held. Because the interest in the underlying proposed historic district can scarcely be characterized as a proprietary one, it is not rational to define a property owner's interest in the election in this manner. Instead, the land-area voting scheme allows for a large property owner who simply receives notice that his property is located in a proposed historic district and decides to object with a greater voice than a property owner who is informed about local history and wishes to celebrate and promote the community's heritage.

CONCLUSION

The land-area voting scheme proposed for the nomination of National Register historic district stands against our nation's fundamental principles of democracy. Such an election dilutes a citizen's fundamental interest in their right to vote, guaranteed under the "one person, one vote" principle of the Equal Protection Clause, by virtue of nothing more than their relative wealth in land holdings compared to their neighbors. Although the Supreme Court's jurisprudence allows some local elections to depart from the

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203. *See* Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1, 12 (2017).

204. *See* Kramer v. Union Free Sch. Dist., 395 U.S. 621, 631–33 (1969).

205. *See id.* at 632; *see also* Briffault, *supra* note 7, at 355 ("[T]he Court's use of the term 'interest' . . . suggests that the relevant interests were subjective states of mind, rather than objective ties to school board operations." (quoting *Kramer*, 395 U.S. at 630)).

protections of "one person, one vote" by virtue of the special limited purpose of the election and its disproportionate impact on the favored voters, that proprietary model of local government is not justified here. The proprietary model was not fashioned or contemplated as a means for the federal government to violate its own tenets. Instead, that model has its roots in principles of federalism that justify state and local governments taking actions that the federal government cannot. Furthermore, the use of the proprietary model here runs afoul of federalism-based doctrines on the division of state and federal power.

Even if federalism alone would not prohibit a federal agency's use of this model, the Court's jurisprudence suggests that historic district elections do not fit into the proprietary model and must be examined under the strict scrutiny generally provided when examining potential violation of the "one person, one vote" principle. Even under a rational basis test, a disconnect exists between the manner in which votes are apportioned and the operation of the National Register program itself—demonstrating that the dilution of the smaller property owner's franchise is not reasonably related to the justifications given.

While the existing one property owner, one vote election scheme is not perfect,[206] it represents the most reasonable process under the particular circumstance of National Register nominations. The voting qualifications to object require being a landowner within the proposed district; however, the franchise is still vested with the citizen—not the land itself—irrespective of the relative size of each property. The same cannot be said for the proposed land-area voting scheme, which flouts the foundational

206. One potential problem became clear in the 2017 proposal for the Eastmoreland Historic District in Portland, Oregon. The objecting property owners were able to defeat the listing, at least temporarily, by devising their landholdings into thousands of separate trusts. *See* Joy Beasley, *Memorandum on the Proposed Eastmoreland Historic District, Portland, Oregon*, NAT'L PARK SERV., 2 (July 18, 2019), https://www.oregon.gov/oprd/OH/Documents/NPS%20Return%20Letter%207.19.19.pdf [https://perma.cc/3ZFJ-YS48] (last visited Nov. 15, 2020). While the Oregon SHPO and Department of Justice determined that these trusts were valid for the purposes of the objection, the NPS disagreed, and there is still a significant question as to whether the trusts themselves were validly held, even if they could be considered individual owners under the regulation. *See id.* at 3–5.

principle in *Reynolds* that the right to vote is enjoyed by the *citizen*.[207]

Therefore, the proposed land-area voting scheme should be rejected as a violation of the Equal Protection Clause, and elections to determine the listing of historic districts to the National Register must remain on a "one person, one vote" basis.

207. *See* Reynolds v. Sims, 377 U.S. 533, 562 (1964).