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VOTING WITH YOUR HANDS: DIRECT DEMOCRACY IN ANNEXATION

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I. INTRODUCTION: MOTIVATIONS AND PROCEDURES FOR ANNEXATION

Municipal annexation receives a mixed reaction in the analysis of metropolitan organization.[1] Some commentators, such as David Rusk[2] or Laurie Reynolds,[3] view annexation as the savior of cities that could not otherwise expand in ways necessary for economic success. For these advocates of liberal municipal expansion, annexation promises to reduce ethnic and racial segregation, residential density, inefficiencies allegedly related to metropolitan fragmentation, and per capita costs of public services.[4] They similarly claim that annexation frustrates efforts by nonresidents to take advantage of municipal resources without paying a fair

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1. There were more than 75,000 annexations in the United States in the 1980s. *See* Jered B. Carr, *Whose Game Do We Play? Local Government Boundary Change and Metropolitan Governance*, *in* METROPOLITAN GOVERNANCE: CONFLICT, COMPETITION, AND COOPERATION 212, 216 (Richard C. Feiock ed., 2004).

2. DAVID RUSK, CITIES WITHOUT SUBURBS 108–10 (3d ed. 2003) (arguing that good municipal annexation laws are needed to improve a city's flexibility).

3. Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 250, 258–71 (1992) (arguing that involuntary annexation power is necessary for all municipal governments).

4. *See, e.g.*, Allen B. Brierly, *Annexation as a Form of Consolidation*, *in* CITY-COUNTY CONSOLIDATION AND ITS ALTERNATIVES 87, 90 (Jered B. Carr & Richard C. Feiock eds., 2004); JAMES C. CLINGERMAYER & RICHARD C. FEIOCK, INSTITUTIONAL CONSTRAINTS AND POLICY CHOICE: AN EXPLORATION OF LOCAL GOVERNANCE 95–97 (2001).

share for their upkeep[5] and enables central cities to increase local tax revenues and control land use at the urban fringe.[6]

Annexations that occur under these circumstances are likely to be described as necessary or appropriate for orderly municipal or regional development by those who favor them. Annexing municipalities and their constituents may portray the resources that they seek through annexation as being properly available to all residents of the region including both the annexing and annexed communities. They may also portray those who oppose annexation as motivated primarily by a desire to monopolize a resource to which they are not entitled or to avoid contributions to the metropolitan area commensurate with the benefits conferred by the central city.[7]

Of course, in any given situation the advocates of liberal annexation may be correct. Annexation may create surplus value for the annexing municipality, or for the region as a whole, even after taking into account the costs to the annexees. If both annexees and annexors would benefit from the annexation, the former would presumably agree to the procedure and might even initiate the effort. Annexees, however, are likely to oppose annexations that do not provide them with personal gains, notwithstanding that the metropolitan area benefits as a whole. In this Article, I refer to any annexation that generates net regional gains, even one that does so at the expense of annexees, as an annexation that advances regional welfare or that is beneficial. Nevertheless, involuntary annexations necessarily generate costs to annexees. The proposed annexees have, after all, voted with their feet to eschew municipal membership, at least for residence. Assuming a rather robust market for residents, that decision was presumably made by conscious choice, which will be frustrated by involuntary annexation. Thus, involuntary annexees who risk becoming unwilling residents of a municipality are likely to portray such annexations as opportunistic or strategic. These attributions reflect a concern that municipal annexation means land or tax grabs by municipalities that are more concerned with increasing revenues than with providing services to newcomers;[8] the diminution of preference satisfaction by coercing

5. *See, e.g.*, DAVID R. BERMAN, LOCAL GOVERNMENT AND THE STATES: AUTONOMY, POLITICS, AND POLICY 134–35 (2003).

6. *See* Note, *The Right to Vote in Municipal Annexations*, 88 HARV. L. REV. 1571, 1573 (1975).

7. *See, e.g.*, GARY J. MILLER, CITIES BY CONTRACT: THE POLITICS OF MUNICIPAL INCORPORATION 17–19 (1981); RUSK, *supra* note 2, at 5–20; Reynolds, *supra* note 3, at 250–54.

8. *See, e.g.*, Baldwin v. City of Winston-Salem, 710 F.2d 132, 134 (4th Cir. 1983), *cert. denied*, 464 U.S. 1012 (1983); JON C. TEAFORD, POST-SUBURBIA: GOVERNMENT AND POLITICS IN THE EDGE CITIES 60 (1997).

suburban residents to conform to urban lifestyles;[9] inefficiencies in service provision that result from the diminution of competitive local governments;[10] an unwanted homogeneity into kinds and levels of municipal service provision; and the reduced possibility of exit from the corruption or rent-seeking that is associated with urban government.[11] Indeed, there is some empirical support for the claim that city-county consolidation, the counterpart of annexation where an entire county merges with a city, is motivated by a desire to redistribute income from wealthy to less wealthy area residents.[12] Alternatively, annexation may reflect empire building by entrepreneurial city officials or efforts to dilute the voting power of minority groups.[13] Finally, proposed annexees might agree that annexation would confer benefits on municipal residents or their officials, but would fail to generate sufficient benefit to offset the costs the annexees must bear. Annexors, of course, may still prefer such annexations, notwithstanding that they do not improve regional welfare but only the conditions of preannexation residents. I refer to all such annexations as exploitative.

Presumably, a state would prefer to permit beneficial annexations, but prohibit exploitative ones. Ex ante, however, it is difficult to discern into which category a proposed annexation falls. Thus, state law does not distinguish between valid and invalid annexations by explicitly permitting the former and prohibiting the latter. Some states do direct courts to determine whether a proposed annexation is "reasonable" or some

9. This reaction is colorfully captured by a judge dissenting from a grant of annexation in *City of Jackson v. City of Ridgeland*:

> Many good citizens move to get out of the city. Many have lived outside all of their lives and have no desire to come into a city. . . . Many probably prefer the murmur of the pines, the hum of insects, the early evening call of the whippoorwills, to the sounds of the symphony or the opera, and choose the light of the moon, the beauty of the stars and the flight of the fireflies to theater and ballet. They prefer, perhaps, rabbits to switch blades, petunia to "pot," and mocking birds to sirens.

City of Jackson v. City of Ridgeland, 551 So. 2d 861, 869–70 (Miss. 1989) (Blass, J., dissenting). *See also* Vicki Been, *Comment on Professor Jerry Frug's* The Geography of Community, 48 STAN. L. REV. 1109, 1109–14 (1996).

10. On the efficiency-generating effects of multiple local governments within a metropolitan area, see Philip J. Grossman, Panayiotis Mavros, & Robert W. Wassmer, *Public Sector Technical Inefficiency in Large U.S. Cities*, 46 J. URB. ECON. 278, 297 (1999) (finding that the degree of technical inefficiency for large cities inversely varies with the number of cities and the average urban population in a metropolitan area).

11. *See, e.g.*, KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 148–51 (1985).

12. *See* John E. Filer & Lawrence W. Kenny, *Voter Reaction to City-County Consolidation Referenda*, 23 J. LAW & ECON. 179, 182–87, 189 (1980).

13. *See* CLINGERMAYER & FEIOCK, *supra* note 4, at 94; D. Andrew Austin, *Politics vs. Economics: Evidence from Municipal Annexation*, 45 J. URB. ECON. 501, 502 (1999).

equivalent, a conclusion that presumably would include beneficial annexations, but not exploitative ones.[14] These requirements, however, tend to look at a variety of factors without suggesting how to rank-order them or resolve conflicts among them.[15] Thus, they provide little guidance for discerning the exploitative from the beneficial. Other state laws tend to focus on criteria that, at best, serve as rough proxies for beneficial annexations. A few of these criteria are substantive. State contiguity requirements, for instance, constrain central cities from leapfrogging over a relatively undesirable area in order to annex relatively desirable ones.[16] Requirements of service provision preclude municipalities from annexing land that is inhospitable to municipal services and thus is unlikely to provide annexees with services sufficient to justify the tax increase they will suffer from becoming urban residents.[17] These mechanisms implicitly suggest that some external standard is appropriate to distinguish between those annexations that would satisfy regional desire for ordered growth and efficient service delivery and those annexations that are undertaken to arrogate land or tax base previously available exclusively to the annexee community.

Other limitations on annexation are procedural. In theory, one could imagine a variety of procedures to address involuntary annexation. The issue could be relegated to third parties, such as boundary commissions or courts.[18] If annexors and annexees are directly involved in the decisionmaking process, various procedures are plausible. Most obviously, annexors could be entitled to vote on the proposed annexation, or they could be represented by municipal officials alone. Annexees could vote or could be subject to unilateral annexation without explicit consent. Both annexors and annexees could be involved in the annexation decision, or the decision may be delegated to one of these groups alone.

Most states explicitly select among these procedures. In a 1993 report on local government structure and administration, the U.S. Advisory

14. *See, e.g.*, LA. REV. ST. ANN. § 33:172.A(1)(d)(iii) (West 2004); N.Y. GEN. MUN. LAW § 712 (McKinney 1999) (providing for a judicial determination of whether annexation is in the "over-all public interest"); VA. CODE ANN. § 15.2-3211 (Michie 2003).

15. *See, e.g.*, *In re* City of Jackson, 691 So. 2d 978, 980 (Miss. 1997).

16. *See, e.g.*, N.C. GEN. STAT. § 160A-36 (2004).

17. Gary Miller's study of the Lakewood Plan Cities in California indicates that the localities preferred incorporation to annexation by existing localities, notwithstanding that the latter had significant tax bases and ample public services, because annexation would require payment of higher property tax rates. *See* MILLER, *supra* note 7, at 16, 71–82.

18. *See, e.g.*, McNamara v. Office of Strategic & Long Range Planning, 628 N.W.2d 620, 623 (Minn. Ct. App. 2001).

Commission on Intergovernmental Relations ("ACIR") noted that forty-four states authorized municipal annexation by various processes.[19] These included city ordinance or resolution, referendum and majority approval in the area to be annexed, referendum and majority approval in the annexing municipality, approval of the county from which annexation is proposed, or some combination of these.[20] Fourteen states called for referendum and majority approval in the annexing city.[21] An exact accounting of the processes used for annexation, moreover, is more complicated than the ACIR report suggests.[22] Annexation procedures within a state may depend on the form of local government doing the annexing or being annexed, and some states frequently alter their annexation procedures. For instance, the ACIR report indicated that nineteen states required referendum and majority approval in the area to be annexed, but that number had dropped from twenty-three in 1978.[23]

The broad variety of annexation procedures is not surprising. The absence of a single ideal procedure that could accommodate all interests involved in the annexation suggests that different jurisdictions will resolve the inevitable conflicts among these parties differently. Annexors, annexees, and the remaining residents of the area from which annexation will occur all have a valid claim to representation in the annexation decision. Annexors will be concerned whether tax and fee revenues from the proposed annexation will be sufficient to offset the cost of providing municipal services to the new residents. Annexees may bear new tax burdens for urban services from which they receive insufficient benefit and that were not governmentally provided by the jurisdiction of which they were previously residents. Alternatively, they may be concerned that they will be required to utilize services, such as public schools, that were previously governed by the source jurisdiction's authority, rather than the annexor's, and will lose the opportunity to participate in the governance of a small autonomous jurisdiction. The source jurisdiction may face additional tax burdens if the annexed area provides a disproportionately high percentage of the tax base within that jurisdiction or if removal of the

19. U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 9 (1993) [hereinafter ACIR REPORT].

20. *Id.*

21. *Id*.

22. The detailed account in Frank S. Sengstock, *Annexation: A Solution to the Metropolitan Area Problem* 9–41 (1960), which has become the standard reference, is quite dated. Moreover, Sengstock treated as equivalent systems that vary in some respects, such as the majority necessary to annex successfully. *See, e.g.*, Jered B. Carr & Richard C. Feiock, *State Annexation "Constraints" and the Frequency of Municipal Annexation*, 54 POL. RES. Q. 459, 462 (2001).

23. ACIR REPORT, *supra* note 19, at 9, 24–25.

annexees adversely affects the area's political, economic, or ethnic composition. In theory, therefore, each of these groups could legitimately claim a voice in the annexation decision.

The difficulty arises in attempting to translate these effects into a decisionmaking mechanism that both recognizes the various interests of these groups, and simultaneously permits arrangement of local government boundaries in a manner that addresses regional welfare. There is no single, inexorable manner for balancing all of these competing interests. Indeed, notwithstanding the interests that residual residents from the source jurisdiction have in the outcome of an annexation, they are typically ignored in the voting process. Accordingly, and without diminishing the value of those interests, I concentrate here primarily on the more common procedures that require some form of voting among annexors and annexees to approve a proposed annexation.

Even within this area, there is no ideal way to calculate votes in a manner that resolves competing interests. Aggregating the votes of all affected individuals essentially delegates the decision to the electorate of the annexor, which will certainly outnumber the electorate of the annexees and may well outnumber the combined electorate of the annexees and the source jurisdiction. Thus, where there is significant division between the interests of annexors and annexees, vote aggregation will essentially amount to a right of unilateral annexation and will necessarily assign to annexors a veto power over the decision of others affected by the proposed annexation.

Allowing annexees the sole authority to vote, on the other hand, necessarily tolerates minority veto of majority preferences, given that annexors are likely to be more numerous and to have significant interests in the outcome of the annexation decision. That violation of a majoritarian norm in democratic politics seems dubious enough. More objectionably, minority veto invites strategic behavior on the part of annexees. Presumably, annexation will be desirable where it creates a regional surplus over existing arrangements. Minority veto induces proposed annexees to hold out for a disproportionately large share of that surplus. Allowing those remaining in the source jurisdiction to vote may have similar effects since they will not be governed by the resulting jurisdiction and thus have incentives to vote solely on the compensation they might obtain for "releasing" the annexees, rather than on any regional benefits that might

materialize as a consequence of the annexation.[24] These competing interests suggest that legislation adopted by any state to regulate annexation is likely to reflect the relative political power of the competing groups rather than any principle so inexorable as to receive universal acceptance or to be enshrined in a constitutional mandate.

The absence of an ideal procedure, therefore, does not mean that all plausible procedures will generate equal effects. Indeed, the procedures that a state adopts apparently affect the frequency, as well as the outcome, of annexation.[25] Most researchers have concluded, unsurprisingly, that granting municipalities a right of unilateral annexation increases the incidence of the practice.[26] Gaines Liner also concludes that municipalities that permit municipal determination of annexation and have a commission type of government have higher success rates in expanding corporate limits.[27] Jered Carr and Richard Feiock conclude that referendum requirements in either the annexor or the area to be annexed increases the likelihood of annexation activity, as do requirements for public hearings and county approval.[28] Dual referendums in the city and the area to be annexed, however, reduce the likelihood of successful annexation.[29] James Clingermayer and Richard Feiock conclude that provisions to initiate annexation proceedings by municipal action and petition have no effect on annexation rates, and provisions for unilateral city approval have a positive effect.[30] Requirements for a referendum in the area to be annexed, however, resulted in fewer annexations and lower numbers of annexed residents.[31] These results, which essentially imply that states that reduce decisionmaking authority for annexees in involuntary annexations experience more activity than states that require annexee consent, are also

24. While some states permit residents in the source jurisdiction to vote, the great majority do not. For a holding that residents of the source jurisdiction have no constitutional right to vote on the annexation, see St. Louis County v. City of Town & Country, 590 F. Supp. 731, 740 (E.D. Mo. 1984).

25. These studies also debate the proper way to classify annexation procedures. There is also some evidence that the structure of state law is a poor predictor of annexation. *See generally* Thomas D. Galloway & John Landis, *How Cities Expand: Does State Law Make a Difference?*, GROWTH & CHANGE, Oct. 1986, at 25. Thomas Galloway and John Landis, however, also conclude that popular determination decreases annexation. *Id.* at 42.

26. *See, e.g.*, Gaines H. Liner, *Annexation Rates and Institutional Constraints*, GROWTH & CHANGE, Fall 1990, at 80, 90.

27. *See* Gaines H. Liner & Rob Roy McGregor, *Institutions and the Market for Annexable Land*, GROWTH & CHANGE, Winter 1996, at 55 (1996). *See also* Gaines H. Liner, *Institutional Constraints and Annexation Activity in the U.S. in the 1970s*, 30 URB. STUD. 1371, 1379 (1993).

28. Carr & Feiock, *supra* note 22, at 466, 467 tbl.2.

29. *Id.*

30. CLINGERMAYER & FEIOCK, *supra* note 4, at 101–02.

31. *Id.*

supported by a more recent study by Jamie Palmer and Greg Lindsey that reclassifies annexation procedures through a more thorough analysis of state statutes and a more complex set of categories.[32]

It is less clear, however, whether annexation procedures affect not only the quantity of successful annexations, but also the quality of those annexations that do occur. The presence of both beneficial and exploitative annexations supports speculation that there is an optimal level of annexation; annexations up to that point benefit taxpayers as a group, but annexations subsequent to that point create inefficient municipal service provision.[33] That theoretical point seems obvious enough. Determining whether a given annexation exceeds that point, or whether a particular form for effecting annexation is more likely to foreclose annexations in excess of that point, however, is more complicated. For instance, Carr and Feiock found that municipal dominance in redistributive services reduced the likelihood of annexation.[34] That finding is consistent with the proposition that annexee resistance is predicated on narrow self-interest and unwillingness to contribute to the welfare of the urban area that they adjoin. One might infer that the tendency of elections to reduce annexation activity thus retards beneficial annexations because annexees will resist regionally desirable redistribution. But the same study revealed that municipal dominance in nonredistributive, benefit-based services, such as sewer and sanitation provision, also reduced the likelihood of annexations. That finding suggests that resistance to annexation might more benignly reflect heterogeneous preferences for local public goods, a concern that municipal benefits are not worth their tax price to the annexees, or a desire for small, autonomous governmental units. Annexation in the face of these explanations would be consistent with supraoptimal annexation and indicative of an exploitation. The difficult issue, therefore, is to determine whether annexation procedures exist that will tend to generate beneficial annexations and minimize exploitative ones.

It is plausible that additional research could help in addressing the frequency of regionally desirable annexations and thus indicate whether proposals for annexation tend to advance regional welfare. For instance, one might anticipate that involuntary annexees would resent being incorporated into a municipality against their will or would discover post-

32. *See* Jamie L. Palmer & Greg Lindsey, *Classifying State Approaches to Annexation*, 33 ST. & LOC. GOV'T REV. 60, 60 (2001).

33. *See* Gaines H. Liner & Rob Roy McGregor, *Optimal Annexation*, 34 APPLIED ECON. 1477, 1484 (2002).

34. Carr & Feiock, *supra* note 22, at 466.

annexation that the services they received were not worth the new tax price they were required to pay. Presumably, annexees who felt exploited would express resentment by voting against incumbents responsible for their inclusion. Thus, one might analyze whether residents in annexed tracts voted against incumbents in greater percentages than the municipal electorate at large in elections immediately following annexations. Annexee votes for incumbents at the same rates as long-term residents might indicate that the municipality conferred post-annexation benefits on annexees sufficient to offset their new tax costs, a result that the municipality presumably would have generated only if the annexation was beneficial. If pro-incumbent voting by annexees varied with annexation procedures, that might tell us something useful about the link between particular annexation procedures and the likelihood of a beneficial or exploitative annexation. Of course, annexed residents may still vote against incumbents who implemented a regionally desirable annexation that imposed net costs on the annexees. Such an annexation would not be exploitative. But if, in the face of that possibility, we found that annexed residents supported incumbents at the same rate as long-term residents, we could even more confidently conclude that annexation procedures constrained annexors and their officials from engaging in the level of exploitation that theory predicts might exist.

In the absence of such empirical data, however, the qualitative issue must be left to theory. In the remainder of this Article, I address this issue in the context of annexation elections by exploring the incentives of annexors and annexees to favor or disfavor annexation proposals. I assume that the objective of an annexation procedure is to permit those annexations that will generate net gains for the region but foreclose those that will exploit annexees. Initially, we might conclude that annexation elections of any sort are highly unlikely to achieve this objective. Since studies suggest that elections, especially those that involve annexee referendums, are a relatively conservative mechanism and generate fewer annexations than alternatives, the very adoption of such procedures might imply a concern that annexations are presumptively exploitative. Initially it appears this is even more the case in concurrent majority systems, which allow proposed annexations to proceed only if separately approved by annexees and annexors. Concurrent majorities therefore provide annexees with veto power and thus imply that the municipality's decision to add land or tax base is unlikely to internalize the value that annexees place on their separate community. Indeed, adoption of a concurrent majority system implies that the risk of exploitation exceeds the countervailing risk that annexees will strategically withhold approval for a regionally beneficial

annexation or will exercise their veto power to hold out for a disproportionate share of the subsequent surplus.

In what follows, however, I suggest that looking at annexation proposals purely as a contest between self-interested annexors and self-interested annexees presents too narrow a view of voting by annexors and annexees. The very possibility that annexation will generate a regional surplus suggests that elections should be perceived as a bargaining process in which municipalities propose annexation of a particular scope, annexees have an opportunity to accept or reject the proposed terms, and both have opportunities to amend their initial positions in light of the expected reaction of the other. Annexation proposals, in short, may vary in the exact boundaries of the area to be annexed, the individuals subject to annexation, the tax price that annexees will pay once they become city residents, and the services to which they will then be entitled. From this perspective, legal rules that permit unilateral annexation are less likely to strike optimal bargains because they are less likely to induce one set of actors to internalize fully the interests of others.[35] But the bargain analogy is also problematic for annexation elections. Explicit bargaining with multiple voters arguably increases both costs and the likelihood of hold outs. I suggest, however, that a system of direct democracy in the area to be annexed, combined with a concurrent majority requirement implicitly addresses these issues and ultimately provides a better balance of the competing interests of annexors and annexees than some alternatives.

I do not address constitutional issues here, although much of what I suggest may have constitutional implications. Constitutional restrictions on local government voting are somewhat complicated. *Avery v. Midland County* indicates that local governments must follow the "one person, one vote" mandate that applies to elections generally.[36] That doctrine is typically defended as a means to preserve majority rule within a jurisdiction and to prevent the dilution of votes. But the doctrine necessarily implies that the only relevant majority is the aggregate majority of all voters. One could imagine situations in which local governments have legitimate reasons supported by a rational relationship but not necessarily by a compelling state interest to favor one subset of citizens over another. In such cases, a majority of that subset should be sufficient to approve proposed action, as long as that subset itself was governed by a "one person, one vote" standard. *Salyer Land Co. v. Tulare Lake Basin*

35. I am interested here only in involuntary annexations and thus exclude unilateral procedures that permit annexees to petition for annexation without a vote of the annexors.

36. Avery v. Midland County, 390 U.S. 474, 476 (1968).

Water Storage District endorses that view with respect to special districts and other nongeneral purpose municipalities where property owners may exclusively hold the franchise because the burdens of the district fall disproportionately on that group.[37] But the same principle may occasionally spill over into issues that involve general purpose municipalities as well, and may do so in a manner that has implications for annexation elections.

The Supreme Court addressed just this issue with respect to concurrent majorities in *Town of Lockport v. Citizens for Community Action.*[38] In that case, voters challenged a New York law that required concurrent majorities of voters living within and outside city limits before a charter of a county embracing both sets of residents could be adopted.[39] The court upheld the concurrent majority system. First, it determined that the "one person, one vote" rule had been devised to ensure that voters had equal opportunities to select their representatives.[40] But that justification had less force in a "single-shot" referendum where "there is no need to assure that the voters' views will be adequately represented through their representatives in the legislature."[41] The existence of the single-issue referendum, the Court concluded, also permitted the state more readily to determine whether there existed a subgroup of voters whose interests would be disproportionately affected by the vote and thus determine whether their votes should be given special weight, as permitted in *Salyer*.[42] The Court then determined that the state could reasonably conclude that the interests of noncity residents in adopting a new county charter were sufficiently distinct from the interests of city residents to warrant the grant of veto power implicit in a concurrent majority scheme.[43] Counties would provide more services and regulation for noncity residents than for city residents. Perhaps most importantly for present purposes, the Court offered annexation referendums as the quintessential example of where distinct voter interests could justify a concurrent majority system. The Court stated:

37. Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719, 729 (1973). *See* Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments*, 60 U. CHI. L. REV. 339, 370–71 (1993).

38. Town of Lockport v. Citizens for Cmty. Action at the Local Level, Inc., 430 U.S. 259 (1977).

39. *Id.* at 260.

40. *Id.* at 265.

41. *Id*. at 266.

42. *Id.*

43. *See id.* 268–71.

> If that question were posed in the context of annexation proceedings, the fact that the residents of the annexing city and the residents of the area to be annexed formed sufficiently different constituencies with sufficiently different interests could be readily perceived. The fact of impending union alone would not so merge them into one community of interest as constitutionally to require that their votes be aggregated in any referendum to approve annexation.[44]

To conclude that concurrent majority referendums are constitutionally permissible for annexations, however, is not to say that they are appropriate in all circumstances. The question of propriety depends on whether concurrent majorities are more likely than alternatives to promote beneficial annexations and to retard exploitative ones. I now turn to that investigation.

II. THE INTERESTS OF THE PARTIES IN ANNEXATION

A. OFFICIALS AND VOTERS WITHIN THE MUNICIPALITY

Annexation procedures typically require the governing body of the annexing municipality to adopt an annexation ordinance, which may or may not be submitted to the electorate of the municipality.[45] In most jurisdictions, the proposal is also submitted to the electorate of the proposed area of annexation.[46] The concurrent majority system with which I am concerned involves any procedure that requires both municipal and annexee consent, regardless of whether the municipality acts through officials alone or through officials and its electorate.

Where the electorate of both annexors and annexees vote, it is at least technically plausible to decide the annexation question by an aggregate majority procedure. As I have indicated above, the significant numerical dominance that municipal residents are likely to enjoy essentially provides them with sole authority to decide the propriety of the annexation in such a system, regardless of the interests of the proposed annexees. Thus, I initially suggested that exploitation may be prevalent in aggregate voting

44. *Id*. at 271.

45. Palmer and Lindsey report that as of 1997, thirty-four states permitted municipalities to initiate annexation and fourteen required a referendum. *See* Palmer & Lindsey, *supra* note 32, at 68, 68 tbl.3.

46. Palmer and Lindsey report that twenty-eight jurisdictions require a referendum in the area to be annexed. *Id.* Only a few jurisdictions permit votes by the residents of the unincorporated area from which annexation occurs. *Id.* I omit that possibility in what follows, notwithstanding their discrete set of interests. *See supra* text accompanying notes 24–29.

systems, as in unilateral annexation jurisdictions, because current municipal residents would prefer more land or more tax base to less. To the extent that is true, that preference is likely to be reflected in the voting booth, notwithstanding the adverse effects on annexees.

On reflection, however, it is also plausible that plebiscitary procedures that enfranchise self-interested annexors may actually serve as a useful check on exploitative annexations. Municipal officials, as well as municipal residents, are likely to prefer additional land and tax base. Ideally, both publicly-interested municipal officials and the electorate will prefer annexation up to, but not beyond, the point at which additional annexation could reduce per capita expenditures within the municipality. Incorporating individuals who do not require public services in excess of their tax payments may permit the municipality to realize economies of scale that reduce costs to all residents. Beyond that point, however, it is likely that growth in population and land area generates administrative and service inefficiencies. Thus, annexation would be undesirable because tax prices paid by new residents, even by willing annexees, would not offset the related costs in municipal expenditures and inefficiency.[47]

Local government law doctrine coincidentally creates mechanisms that check tendencies to annex land that cannot generate net benefits, at least for the annexor. The equal service doctrine provides that all residents of a municipality are entitled to the same level of service for any local public good that the locality makes available to any of its residents.[48] The result is that the annexing municipality will have to incur expenditures to accommodate new residents. Indeed, one motivation for developers of rural land to seek annexation is the prospect of obtaining municipal services.

Annexation elections within the municipality would be desirable if the electorate is less likely to exceed the point of optimal annexation than are municipal officials acting alone. Local residents, of course, are unlikely to have access to information that permits them to determine when the point of optimal annexation has been exceeded. As taxpayers who will bear the consequences, both positive and negative, of annexation, however, they have incentives to consider those effects, even if they cannot define the point of optimality with pinpoint accuracy. Local officials, on the other hand, may have incentives to exceed systematically the point of optimal

47. *See* Liner & McGregor, *supra* note 33, at 1478.

48. *See, e.g.*, Veach v. City of Phoenix, 427 P.2d 335, 337 (Ariz. 1967). *See also* Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987) (book review) (discussing how the duty of equal service relates to local governments).

annexation. Local officials who desire to maximize either budgets or jurisdictional territory would prefer annexations beyond the optimal point.[49] They will enjoy the personal benefits of excessive annexation that create larger budgets and geographic dominance. But they will not personally bear the related costs. Instead, those costs will be born by taxpayers.[50] Nor will officials necessarily face electoral constraints from constituents. The electorate's relative inability to define the point of optimal annexation will reduce its ability to attribute subsequent municipal inefficiencies to annexation, and those inefficiencies that materialize as a direct result of excessive annexation are unlikely to be of a magnitude that will influence municipal voters in general elections. In a referendum on the single issue of annexation, however, the municipal electorate may be more likely to demand evidence that a proposed annexation will generate revenues that offset the costs of providing additional services.

To the extent that municipal residents are concerned about the dilution of voting power as a consequence of annexation, local officials face an additional constraint. Presumably those residents would systematically oppose annexations and thus serve to balance officials' tendencies toward excessive annexation. The implications here, however, are more complicated. To the extent that annexors fear the dilution of voting power that has historically been denied to municipal residents on the basis of invidious discrimination, it might be appropriate to provide those residents with a veto over the annexation decision.[51] But it is also plausible that annexors will eschew beneficial annexations in order to avoid dilution of voting power based solely on numerical interests rather than racial or ethnic ones. In that situation, there is no reason to believe that the preferences of the electorate are consistent with regional ones. Instead, their decisions may be based solely on a desire to retain control of the political process.

These constraints on annexations, moreover, do not affect annexors who would vote for annexations that are exploitative in that they return net benefits to the municipality, even though those benefits are outweighed by the adverse effects on annexees. Self-interested annexors still have no incentive to recognize any idiosyncratic or nonmonetizable benefits that

49. *Cf.* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 3 (1971) (noting that many people want to expand government's role in fighting poverty and helping the environment).

50. *See, e.g.*, Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 347–48 (2000).

51. *See, e.g.*, Leroy v. City of Houston, 831 F.2d 576, 580–83 (5th Cir. 1987), *cert. denied*, 486 U.S. 1008 (1988) (awarding attorneys' fees for a case in which plaintiffs obtained relief for resisting annexations that would dilute the voting power of minority residents).

annexees suffer as a consequence of becoming city residents. Yet, even in this setting, there exists some constraint on self-interested municipal activity. Here, however, municipal officials may be better situated than the municipal electorate to consider the interests of annexees, so direct elections would be superfluous or undesirable. The constraint emerges from the same claim that I suggested above could serve as a basis for empirical study of the beneficial and exploitative annexations. By definition, undesirable involuntary annexations will incorporate into the municipality a block of voters who will gain less in the way of municipal services than they lose in added tax burdens. Involuntary annexations will have this effect even if the burden on annexees is more than offset by the gains that the annexor attains through a broader tax base, stronger credit ratings, or a more socioeconomically balanced community.[52] Annexors, therefore, will have incentives to vote for annexations that return net benefits to the municipality, since only annexees bear net costs. Once the annexation occurs, the benefits that materialize will be diffused throughout the locality and will be difficult to attribute to an annexation, even to an annexation that ultimately generated them. The benefits of a stronger credit rating, for instance, will be realized in lower borrowing costs. Those savings will be realized, if at all, only in the future when the municipality enters the capital markets. Few residents will enjoy sufficient tax savings to attribute them to an event such as annexation. Thus, it is unlikely that preannexation residents will reward officials for initiating the annexation that caused those savings.

The higher tax burdens that annexed residents face, however, are likely to be salient to them as a group. They are likely to vote against municipal incumbents who caused their involuntary residence, even though regional conditions throughout the municipality have improved as a result. Thus, municipal officials who engage in strategic annexation are likely to face a concentrated opposition in future elections. This effect is likely to dilute their enthusiasm for involuntary annexations, even when those annexations promise to return net benefits to the annexor. It is, of course, unclear whether the budget- and territory-maximizing incentives that municipal officials face, and that may cause them to overvalue excessive annexations, outweigh the incentives related to concentrated oppositional voting blocs that would cause the same officials to undervalue beneficial annexations. Thus, ultimately we cannot rely on these incentives to sort desirable from undesirable annexations.

52. *See* Liner & McGregor, *supra* note 33, at 1477 (enumerating the benefits of annexation).

This interplay of incentives for elected officials and their constituents, however, does suggest that the initial image of annexors as systemically engaged in exploitative annexations is too simplistic. Annexors ideally have an interest in annexation only to the point that additional revenues from annexed areas are offset by increased service costs and administrative inefficiencies. It remains an open question whether the municipal electorate or their officials have an advantage in identifying that point or, more importantly, in pursuing an annexation that exceeds it.

B. ANNEXEE INTERESTS

Plebiscites in the annexation context may be more acceptable than decisionmaking by representatives if annexation elections are less susceptible to the downside risks associated with direct democracy generally. Measured by this standard, direct democratic mechanisms are plausible and perhaps necessary to gauge and register the interests of annexees. They are plausible because property proposed for annexation typically involves relatively few voters, numbering at most into the low thousands. Much of the critique of direct democracy focuses on the inability of the electorate to deliberate effectively as a group in a manner similar to a legislature composed of repeat players. The absence of a deliberative body presumably reduces exposure to conflicting views and the capacity for registering preferences through logrolling. Direct elections on annexation cannot solve the latter problem (though I will suggest below that there are other mechanisms that serve that goal), but do address the former. Because the proposed annexees tend to be small in number and live as neighbors in a relatively confined geographical area, they have opportunities for deliberative interaction with others who are similarly affected by the proposal.

Even if annexations reflect ideal conditions for direct democracy, annexation elections make sense only if there is reason to believe that potential annexees will, in fact, deliberate in a manner that considers the interests of annexors, at least to the extent that representatives would similarly avoid undue parochialism. The common concern about processes of direct democracy is that voters will, in fact, not deliberate. Rather, they will be apathetic to the issue that is the focal point of the plebiscite, so the question will necessarily be determined by voters who have intense interests that may be inconsistent with the preferences of constituents at large. Wholly apart from the issues of (1) whether elected representatives are similarly susceptible to the entreaties of those with idiosyncratically

intense interests[53] or (2) whether it is appropriate to allow issues to be decided by those most intensely interested in the outcome, the concern about capture of the electorate appears to have less credibility in the annexation context. The risk of capture should be significantly diluted where the plebiscite involves a matter of significant interest to a broad range of eligible voters and affects a matter in which free riding is difficult. Annexation seems to satisfy both criteria. Jurisdiction is likely to affect housing values to the extent that the value of local public goods and services are capitalized into housing prices. [54] Housing, moreover, is likely to represent a significant percentage of a homeowner's assets. Thus, as long as homeowners treat their homes as investments, as well as places to live, they have incentives to make decisions, including jurisdictional decisions, based on both current personal preferences and the expected preferences of anyone who might purchase their homes. Annexation decisions, in short, are likely to have personal consequences of sufficient magnitude that potential voters will incur the costs of examining the effects of jurisdictional change.

Moreover, the small number of individuals involved in proposed annexations reduces opportunities for free riding or incentives to defer to interests that may not be representative. As a result, annexees are likely to overcome the obstacles to collective action that might otherwise generate inertia. These incentives, moreover, are not one-sided. For some annexees, the comparison of personal costs and benefits may reinforce a desire to maintain residence in an autonomous jurisdiction that offers an alternative to urban living. For others, the same comparison may inspire a preference to be included within a municipality that is expected to attain high housing values at acceptable tax rates. Thus, we would anticipate that deliberation would not only be robust, but also broad-ranging so that annexees vetted the relative merits of the annexation proposal.

I have discovered only anecdotal information about participation in annexation elections, but the evidence that exists indicates very high voter turnout, supporting the thesis that annexation proposals generate intense reactions among the affected population.[55] As a result, the possibility of

53. *See, e.g.*, Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 971–72 (1988).

54. *See* WILLIAM FISCHEL, THE HOMEVOTER HYPOTHESIS 45–46 (2001); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 645–46 (2002) (book review).

55. *See, e.g.*, City of University Park, Texas, *City History*, *at* http://www.uptexas.org/index.cfm?FuseAction=page&PageID=000028 (last visited May 8, 2005) (describing how the annexation of University Park to the City of Dallas was rejected in the annexation election with one of largest voter turnouts in University Park history); Deschutes County, *Voter Turnout November 2,*

voter distortion that underlies much of the criticism of direct democracy (the possibility that a minority of intensely interested but nonrepresentative voters will dominate the election) is significantly diminished. Instead, choice of the jurisdiction of residence appears to trigger the conditions for deliberative conversation that led Thomas Jefferson to endorse the dissolution of counties into wards.[56]

Direct democracy in the annexation decision may also simply be a matter of necessity for the annexees. The key question in deciding the scope of direct democracy is whether, as compared to representative institutions, it generates socially superior decisions. But for annexees, the comparison is simply unavailable. Annexees (as opposed to those who live in an incorporated city that is being consolidated with another) frequently reside in one part of an unincorporated area, rather than in a discrete jurisdiction that is represented by another decisionmaking body. Thus, the only feasible alternative to self-representation through direct democratic procedures would be election of a person or body to represent annexees in negotiations with the municipality.

Antipathy to direct democracy also emerges from a concern that initiatives and referendums—the typical fare of direct democracy—require voters to focus on a single issue without an opportunity to determine how its resolution affects related issues that are not immediately before the electorate. An obvious example would be an initiative that affected a local school budget by requiring a minimum per pupil expenditure, and that necessarily reduced funding for other local public goods such as policing, fire fighting, and parks. Voters who face an opportunity to vote on one piece of the budget without simultaneously considering the effects of their vote on interconnected parts may skew the allocations that would be made if the entire budget were considered comprehensively. Legislators, on the other hand, can comprehensively consider the interactions among various

2004—General Election (on file with the Southern California Law Review) (reporting an 84.78 % turnout of county voters for the proposed November 2004 annexation); *Elder Voted To Town Board; Citizens Reject Annexation*, EMITTSBURGH DISPATCH, May 2003, *at* http://www.emmitsburgdispatch.com/2003/May/election.shtml (approximately twenty-two percent more votes cast in annexation election than in prior mayoral election; although these are annexor votes, not annexee votes); Sierra Club, *Model Successful Anti-sprawl Citizen-led Effort in Erie, Colorado*, *at* http://www.sierraclub.org/sprawl/resources/challenge/modelcampaign.asp (last visited May 8, 2005) (reporting a fifty percent voter turnout in a local annexation election). For additional evidence of the intense interest of residents of unincorporated areas in avoiding annexation to central cities, see, for example, TEAFORD, *supra* note 8, at 61–65.

56. *See* Letter from Thomas Jefferson to John Cartwright (June 5, 1824), *in* THOMAS JEFFERSON, POLITICAL WRITINGS 382, 385 (Joyce Oldham Appleby & Terence Ball eds., 1999).

pieces of legislation. For this reason, initiatives are often prohibited on budgetary issues.[57]

Annexation elections, however, are about a "single" issue only if that term is defined at a high level of generality. The decision about residence or about boundaries inherently entails a decision about a range of local public goods. Presumably, annexees will consider whether the package of local public goods that they already enjoy (including the amenities available as a result of living within an autonomous jurisdiction) at the tax price they are paying can be improved by integrating into a municipality that offers a different package of goods and services at a different tax price. Thus, the issue of annexation is "single" in much the same sense that a vote on a candidate for political office is on a "single" issue. Each candidate represents a package of positions, only some of which a given voter may share. Nevertheless, voters have the capacity to consider interactions and trade-offs among positions and thus to select a candidate who, on balance, will best represent the voters' interests. Similarly, the annexation decision represents a package that likely does not perfectly align with a resident's interests, but that still permits the voter to consider the interaction and trade-offs among various services rather than treat one service in isolation from all others.

Thus, many criticisms of direct democracy in other settings do not apply with equal force to annexees. But the upshot of permitting annexee voting is not that annexees will perfectly internalize regional interests in their votes. Even annexees who are willing to consider regional interests are likely to give disproportionate weight to their own interests. On the assumption that the initial decision to live outside municipal boundaries revealed that those interests augured against municipal membership, annexee voting is likely to reduce the amount of annexation, perhaps suboptimally. That is most likely to be the case where annexees exercise a veto power under a concurrent majority system. What is less clear is whether the risks of forestalling beneficial annexations as a consequence of annexee veto is greater than the risk of implementing exploitative annexations by registering annexee preferences within an aggregate majority that may not internalize annexee interests. The issue that remains is whether an electoral process can be devised that recognizes the various interests affected by the annexation decision.

57. Nevertheless, some recent California initiatives dedicate revenues in just these ways and thus seriously constrain budgetary decisions.

III. ANNEXATION AS BARGAIN

To this point, I have considered the incentives of annexors and annexees parametrically, so that neither actor considers the interest of the other. Once annexees have an opportunity to vote, however, a more dynamic analysis is possible. In this section, I assume, more realistically, that annexors and annexees will adjust their conduct in order to take account of each other's expected strategies. Under this assumption, each group (annexors and annexees) seeks to induce the other to act in a manner consistent with the first group's interests. In short, each party seeks to bargain with the other. The result, I suggest, may be an allocation of regional resources that is superior to what could be achieved through unilateral action alone.

Bargains, of course, exist against background default rules that assign entitlements to each party. Assigning a veto to potential annexees essentially confers on them an entitlement to remain within their own jurisdiction.[58] This entitlement, however, is not inalienable. Rather it is protected by a property rule that permits another who values that right more highly than the initial entitlement holder to purchase it in a voluntary exchange. Unlike an entitlement protected by a liability rule, however, the party who values the entitlement protected by a property rule *must* purchase it; that party cannot simply seize it on the condition that it is willing to pay the related damages to the entitlement holder.[59] Thus, initial assignment of the entitlement simply provides a means of initiating a bargain between the holder of the entitlement and those who would prefer to have it. In both situations, the ultimate objective may be to generate a situation in which the entitlement is ultimately held by the party who values it most highly. Both property rules and liability rules seek to create mechanisms in which the ultimate assignment of an entitlement involves a process that internalizes the costs and benefits suffered and enjoyed by each potential holder. But the initial allocation of the entitlement matters to that ultimate objective in a world in which transactions costs are positive and obstacles to agreement may interfere even with bargains that would be efficient in the absence of such costs. For instance, entitlement holders may misstate

58. In many jurisdictions, proposed annexees can exercise the equivalent of a veto by incorporating as a separate municipality. Since many states prevent one municipal corporation from annexing another, the effect of incorporation is to prevent the annexation in the same way that a mandatory vote would. For accounts of annexation battles that led to annexations, see FISCHEL, *supra* note 54, at 244–53; TEAFORD, *supra* note 8, at 61–65.

59. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1116–17 (1972).

their value in order to extract excess surplus from the party seeking a transfer; the parties may fail to agree on an appropriate division of the bargaining surplus; or, parties may misestimate the costs and benefits that the other party expects to incur as a consequence of the transfer and thus offer too little to induce agreement.[60] Where bargaining is costly, the choice of a property rule or a liability rule may determine the ease with which a transaction can correct an initial misallocation to a party that places a relatively low value on the entitlement. Presumably, this is the motivation that underlies takings law. Governments may be entitled to condemn private property that would return greater social value if dedicated to public uses. To ensure that condemnation occurs only when public use exceeds private use value, however, the property owner enjoys the protection of a liability rule that requires payment of just compensation. In the absence of a compensation requirement, government would take property for lower valued purposes. In the presence of a property rule, however, some entitlement holders might otherwise hold out for payments in excess of their true valuation. Protecting those holders with a property rule would presumably frustrate voluntary bargains where multiple parcels had to be assembled. Furthermore, such a rule would deny to the public property that it values more highly than current holders, but not as much as the artificially inflated holdout price.[61]

Initially, annexation may appear analogous to the analysis of takings. As I have noted above, the grant of a veto power to annexees can create the same holdout issues as those that affect desirable takings. Annexee votes permit a minority of those affected by the proposed annexation to obstruct a socially desirable annexation or to extract excess rents in ways that an aggregate majority would not. Thus, one might think that annexation, like takings, should be governed by a liability rule rather than a property rule. Such a conclusion would essentially provide municipalities with something close to a unilateral right of annexation.

Annexation, however, is not conditioned on the principles that underlie takings analysis and that serve to reduce (albeit highly imperfectly) the risk of excessive takings. In the latter, substantive restrictions, such as the "public use" requirement, impose some limitation on the use of the power of condemnation. As I noted at the outset, annexation statutes rarely contain similar substantive requirements. The

60. *See, e.g.*, Robert P. Inman & Daniel L. Rubinfeld, *Rethinking Federalism*, J. ECON. PERSP., Autumn 1997, at 43, 49.

61. *See, e.g.*, Brendan O'Flaherty, *Land Assembly and Urban Renewal*, 24 REGIONAL SCI. & URB. ECON. 287 (1994).

"just compensation" requirement in takings, at least in theory, constrains public officials from condemning land that will not return social benefits in excess of their costs.[62] Protecting annexees by a liability rule would tend to cause more serious problems of compensation than exist in the takings context. "Compensation" for annexation typically takes the form of providing additional services to the annexees. Conceivably, entitlement to jurisdictional autonomy could be protected by a right of additional compensation, but how would that compensation be measured? Unlike the takings context, where fair market value is typically seen as a rough, if undercompensatory, surrogate for damages, the loss of jurisdictional autonomy is unlikely to give rise to a ready basis for compensation. Indeed, given the provision of municipal services, it is plausible that market values for annexed property would actually increase post-annexation. That increase, however, presumably does not fully compensate annexees for the loss of the unique aspects of community life that led them to migrate to suburban jurisdictions in the first instance.

Perhaps most importantly, condemnees, although a distinct minority, have an intense interest in the outcome and thus incentives to contest a proposed taking both in court and, as residents of the jurisdiction, before the local decision maker. Proposed annexees may have equal incentives, but less opportunity to contest annexations, both because most jurisdictions offer fewer substantive standards by which to measure an acceptable annexation and because, as nonresidents, they will have more limited access to the local decision maker.

Since it is the existence of transactions costs that makes the initial entitlement matter in the first instance, the choice of rules ultimately may depend on whether annexors or annexees are better able to bargain for the entitlement initially misallocated to the other. From this perspective, annexors seem better able to purchase from proposed annexees the entitlement to retain jurisdictional autonomy, where doing so would increase regional welfare, than for the proposed annexees to purchase from annexors the entitlement to annex unilaterally where the proposed annexation was exploitative. If that is the case, we would be more likely to attain the optimal level of annexation by protecting the annexees with a property rule, rather than giving annexors either a property right to annex or protecting proposed annexees with only a liability rule, because doing so

62. Of course, there are numerous flaws in the theory, not the least of which is that public officials who decide whether to condemn property are paying compensation out of the public treasury, not out of personal funds, and thus have limited incentive to conduct an appropriate comparison of the costs and benefits of a proposed taking. *See* Levinson, *supra* note 50, at 348–57.

would be less likely to interfere with efficient bargains to reallocate the initial entitlement. Because annexees do not have preordained representatives, they will have difficulty coalescing to formulate a buyout proposal to offer a municipality with a unilateral right of annexation. Even if annexees could do so, insofar as they do not constitute a recognized jurisdiction with police and taxing powers, they would have difficulty enforcing against their members a commitment to raise and pay the funds necessary to purchase the annexation entitlement directly from the municipality.

The annexors, on the other hand, are represented by officials who can formulate a buyout proposal that can be presented to annexees. Indeed, the annexee vote on the annexation can be perceived as a response to just such an offer. Municipal officials similarly can enforce the terms of the proposal insofar as they possess taxing and police power to provide annexees with the services that implicitly become part of the bargain.

To speak of a bargain in this situation may initially appear somewhat anomalous. The very collective action difficulties that preclude annexees from coalescing to purchase an entitlement of unilateral annexation from the annexors should also frustrate explicit bargaining with the municipality. That limitation, however, does not necessarily preclude bargaining between annexors and annexees. Rather, it means that the municipality that seeks to attract annexees must anticipate the service and tax package that a majority of them would accept rather than enter express negotiations with multiple parties. The bargain, therefore, is implicit rather than explicit. The process of annexor proposal followed by annexee acceptance or rejection is thus more likely to deviate from an optimal bargain in which parties explicitly negotiate terms and tend to internalize the consequences of their agreement. Nevertheless, it may produce a process that is superior to both aggregate majorities and unilateral voting by either annexors or annexees.

To evaluate this possibility, consider the literature on concurrent majorities, of which the need to attain separate approval from annexors (either by the legislative body alone or with a vote of the municipal electorate) and the annexees serves as an example. The idea of a concurrent majority is typically linked to the writings of John C. Calhoun. In his *Disquisition on Government*, and more fully in his *Discourse on the Constitution and Government of the United States*, Calhoun defended the concept of concurrent majority as a mechanism that, on its face, seems wholly consistent with constitutional principles that protect permanent minorities. Calhoun was reacting to a concern, by now familiar, that a

numerical majority need pay no attention to the minority.[63] The case that raw majoritarianism would otherwise dominate seems somewhat simplified, especially when directed at legislatures in which factions may debate, trade votes, and reach compromises in order to build coalitions. In that context, disfavored minorities on one issue may be necessary to build a coalition on other issues. Minorities could thus engage in logrolling to attain acceptance of those parts of their agenda in which they are most intensely interested. But interests that are never necessary to create an aggregate majority constitute permanent minorities whose interests are consistently ignored in legislative politics. Only if they have a separate entitlement to accept or reject the proposals of the aggregate majority will the latter have an incentive to consider the minority's interest in the substance of legislation.

One of the primary benefits that Calhoun associated with a concurrent majority system, therefore, was its tendency to promote compromise rather than numerical dominance. Concurrent majority systems, for Calhoun, obligated government to attract the support of permanent minorities, and that obligation generated the kinds of compromise that nonpermanent minorities could otherwise attain through logrolling. The veto power of the minority that seems antidemocratic to some, therefore, becomes a strength to the extent that it controls tendencies toward absolutism and simply replaces alternative mechanisms by which minorities could register intensity of preferences. To the extent that the permanence or nonpermanence of a minority group is fortuitous, there seems no reason to believe that minority influence in logrolling is consistent with democratic governance, but minority influence through concurrent majority is not.

Seen in this light, a concurrent majority system expands on the protections that are available in a system of simple bicameral decisionmaking, in which two subparts of the same entity must simultaneously approve an action. A preference for bicameralism may best be explained as a means of avoiding agenda control or raising the costs to coalitions that can better organize in some contexts than others by making them obtain approval in multiple fora.[64] Concurrent majorities achieve similar results by separating out conflicting interests, thereby requiring those who support action to buy out those who object.

63. *See* JOHN C. CALHOUN, A DISQUISITION ON GOVERNMENT AND SELECTIONS FROM THE DISCOURSE 28 (C. Gordon Post ed., 1953).

64. *See* Saul Levmore, *Bicameralism: When Are Two Decisions Better than One?*, 12 INT'L REV. L. & ECON. 145, 146, 158 (1992).

A. ANNEXATION AND CONCURRENT MAJORITIES

Annexation of relatively small numbers of nonresidents appears to exemplify the very conditions of permanent minority status that make Calhoun's concurrent majority appropriate. Indeed, in at least one respect, the annexation decision seems to present an even stronger case for the concurrent majority than the setting of Calhoun's exposition. For Calhoun, concurrent majorities were appropriate to address the inability of southern states to have their interests reflected in Congressional decisions dominated by a majority of northern states. In those circumstances, however, southern states had a voice in the decisionmaking process and an opportunity to logroll into coalitions on issues with respect to which their votes may have been necessary to secure a majority. These states did not fit the classification of a voiceless permanent minority.

In the annexation setting, however, annexees typically will have no voice in the formal decisionmaking process. In some contexts, the lack of formal participation may be diluted by a form of virtual representation.[65] Thus, we could imagine inter-local bargains in which residents of a municipality effectively serve as proxies for the interests of voiceless nonresidents. For instance, efforts within the locality to raise taxes on activities in which nonresidents disproportionately engage—such as parking taxes, hotel taxes, or meal taxes—may raise the same specter of municipal exploitation of nonresidents as unilateral annexation. But those residents who provide the taxed activities—parking lot owners, hotel owners, and restaurant owners—will receive few of the benefits generated by the additional taxes and will suffer a disproportionate share of the losses that result if the taxes induce nonresidents to eschew municipal establishments. As a result, those residents have incentives to represent the interests of nonresidents in municipal proceedings. Deliberations in those proceedings, therefore, are likely to reflect external costs as well as internal benefits of municipal proposals.

It is harder to make an analogous argument about virtual representation with respect to annexees. The exploitative effects of a proposed annexation are unlikely to be shared by a discrete group of municipal residents who thereby have an incentive to question or contest the annexation proposal. Indeed, those who have access to the municipal decisionmaking process are more likely to prefer annexation. These would

65. *See, e.g.*, Donald H. Regan, *Judicial Review of Member-State Regulation of Trade Within a Federal or Quasi-Federal System: Protectionism and Balancing, Da Capo*, 99 MICH. L. REV. 1853, 1854–55 (2001).

include, for instance, not only officials who can maximize budgets or geographic dominion through annexation, but also developers who believe that land at the urban fringe will have greater value if provided with city services and who tend to have the resources and, as repeat players in the jurisdiction, the motivation to lobby municipal officials.[66]

As I have suggested above, officials of the municipality already have some incentive to consider annexee interests. Their inclusion in the electorate subsequent to successful annexation imposes a significant constraint on annexor officials who will be reluctant to face a cohesive hostile voting block at subsequent elections. But the need to obtain explicit consent creates a more robust incentive both to internalize costs and benefits of annexation, inducing optimal annexation, and to share the surplus of annexation with annexees by altering the boundaries of the area to be annexed, either by size or by population, or by offering municipal services to proposed annexees at a tax price that the latter would find attractive. That process might be unnecessary if logrolls between annexees and annexors were plausible. Given that such logrolls are unlikely in the annexation setting, however, a concurrent majority rule might provide a reasonable alternative for incorporating a minority view that would otherwise be ignored.

IV. SOURCES OF SUBOPTIMAL BARGAINS

Notwithstanding the theoretical advantages of a concurrent majority system, there remain significant obstacles in such a procedure to attaining an optimal level of annexation. Here, I define some of those obstacles and suggest why their existence does not necessarily undermine the utility of concurrent majorities.

A. REMAINING HOLDOUTS

The benefits of a property rule are only desirable if there are ways to limit the anti-majoritarian consequences that it engenders. Recall that a primary danger of property rule protection of the type that is embodied in a concurrent majority system is the possibility of holdouts. Even if annexation would generate regional surplus, individual annexees who hold veto power might demand a disproportionate share of the surplus, so that the aggregate value that they demand exceeds the benefit of the annexation to the municipality. Under these circumstances, even an annexation that

66. *See, e.g.*, Town of Mt. Pleasant v. City of Racine, 127 N.W.2d 757, 760 (Wis. 1964).

advances regional welfare would not occur. The constraints that induce annexors to consider the interests of voting annexees in formulating a proposal for referendum do not solve this holdout problem.

The use of direct democracy to gauge annexee preferences, however, poses a distinct advantage in addressing the holdout issue. The entitlement to jurisdictional autonomy is not, in fact, protected by a full property right. It is instead transferable by the group of annexees as a unit, not by each individual member. As long as the entire group of annexees is bound by a majority vote, the bargain proposed by the annexors need not satisfy the demands of every annexee. Instead, the proposal may be calculated to attract the median voter. The consequence is that holdouts who demand more than the median voter cannot forestall the annexation. Essentially, direct democracy transforms what might otherwise be a "Chicken Game" among individual voters, each of whom could seek a disproportionate share of the surplus, into something closer to an "Assurance Game," in which each player prefers to follow a certain strategy because she is assured that every other player will follow the same strategy. Majority rule among annexees promotes that result because no individual is bound until they all are.[67] Thus, each individual is bound to cooperate only if a majority agrees, and it will not matter that a few residents have incentives to hold out for more. As long as the majority retains an interest in the cooperative solution (annexation), cooperation should dominate. Minority annexees, for instance, who would prefer a regionally beneficial annexation to no annexation, but whose first preference is for an annexation proposal that provides them with a disproportionate share of the surplus, would be unable to adversely affect the collective decision by holding out for their most preferred position.

B. INSUFFICIENT OFFERS

Indeed, to the extent that the holdout problem remains, it may serve as a useful counterweight to incentives of the municipality to formulate a proposal that systematically offers annexees a disproportionately small amount of the surplus from annexation. Note that where the annexation is contested, annexors will typically be proposing the annexation. If annexees were proposing the annexation, they presumably would already have agreed that the tax price of obtaining municipal services is worth the cost.

67. *See* Annette Steinacker, *Game-Theoretic Models of Metropolitan Cooperation*, *in* METROPOLITAN GOVERNANCE: CONFLICT, COMPETITION, AND COOPERATION 46 (Richard C. Feiock ed., 2004).

Where annexors propose the annexation to be voted on by annexees, however, that vote will take place on the municipal proposal without an opportunity for amendment or revision. Annexees must accept or reject the proposal as formulated by annexors.

Elections in the area proposed for annexation, therefore, separate the function of proposing from the function of enacting. From the annexees' perspective, the annexors' action, whether initiated by municipal officials or by the electorate, can do no more than propose an annexation. In a contested annexation, the annexees can do no more than react to that proposal. The situation replicates the Romer-Rosenthal difficulty examined in the context of school bond elections in which local officials propose a take-it-or-leave-it offer to the electorate for financing municipal facilities.[68] The inability of enactors to amend a proposal entails that the initial proposer can offer a suboptimal solution that will still be acceptable to a majority of enactors, as long as it constitutes an improvement over the status quo and the enactor sees little opportunity for achieving a subsequent vote on a more favorable option. In the annexation context, the choice with which annexees are presented is not between the proposed annexation and the annexation preferred by the median voter within the group of annexees. Rather, the choice with which annexees are presented is between the proposed annexation and the status quo. A rational enactor would adopt any proposal that confers a benefit over the status quo, even if that proposal does not embody the enactor's ideal position. If annexation would generate gains over the status quo for annexees, the median rational annexee would vote for it, even if there is a hypothetical alternative that would be superior. As a result, rational annexors have incentives to propose annexations that are marginally superior to the status quo for annexees, but that retain most of the surplus for annexors. It is in this sense, that the holdout problem, which tends toward offering annexees too much of the surplus, may counterbalance other tendencies for the municipality to offer annexees too little.

C. LEGAL CONSTRAINTS

I suggested above that legal doctrine could reduce the tendencies of annexors to initiate exploitative annexations. For instance, the equal service doctrine requires a locality to provide the same service level to all

68. *See* Thomas Romer & Howard Rosenthal, *Bureaucrats Versus Voters: On the Political Economy of Resource Allocation by Direct Democracy*, 93 Q.J. ECON. 563 (1979). For an extended application to the area of bond elections, see generally Clayton P. Gillette, *Direct Democracy and Debt*, 13 J. CONTEMP. LEGAL ISSUES 365, 396–98 (2004).

constituents. The municipality will not be able to obtain tax revenues from new residents and leave them with service levels consistent with suburban tax rates and below service levels provided to other residents of the municipality. Thus, a municipality will take into account the services that it must provide to new residents when it determines whether their annexation advances regional welfare.

But legal doctrine may also have the effect of reducing the bargaining range that is available to annexors and annexees by constraining the scope of what the former can offer. Hence, the same equal service doctrine that constrains exploitative annexations can simultaneously frustrate efficient ones. Assume, for instance, that proposed annexees currently spend $8000 per child in the public school system and the municipality currently spends $6500 per child. Assume further that the city believes that resistance to annexation emerges from an unwillingness on the part of the proposed annexees to reduce per child school expenditures. The city might be unable to increase per capita spending across the municipality to the level desired by the annexees. But it might be able to increase per capita spending within the area to be annexed to the level desired by those residents, and still be better off given the tax revenues generated by the proposed annexees. Thus, a bargain in which the annexors agreed to raise per capita spending of some schools to $8000, but could not raise other schools to the same level would satisfy all parties. Nevertheless, the equal service provision doctrine presumably removes that bargain from the table. Thus, legal doctrine may interfere with desirable annexations. The more one limits the bargaining range, the more likely it is that an entitlement will not be purchased, even though the transfer would generate a Pareto superior result. If legal doctrine artificially constrains the amount that the purchaser can offer, the maximum offer that can be made may be less than the value of the right to the purchaser, and less than the holder of the entitlement is willing to accept, even though the purchaser would be willing to pay the holder's value if it could do so.

State constitutional provisions that require uniform taxation could have similar effects.[69] Annexees might be more willing to join a municipality if their tax rates were reduced below those payable by other residents, perhaps to reflect the lower rates that annexees had come to anticipate as suburban residents, or to reflect that, at least temporarily, they receive fewer services than preannexation residents. A constitutional requirement of uniform taxation, however, arguably forecloses the option

69. *See, e.g.*, ILL. CONST. art. IX, §§ 2, 4; TEX. CONST. art. VIII, § 1.

of negotiating tax reductions for annexees beyond a limited period, even if the municipality were willing to make it available in order to attract the annexees.[70]

To the extent that legal doctrine forecloses such bargains, there is an anomaly in the treatment of annexations to improve regional welfare and the authority that municipalities can exercise to attract private entities that could generate similar benefits. Municipalities that seek to induce industrial or commercial firms that presumably will generate net gains frequently provide tax subsidies, tax abatements, or low-interest loans not available to existing businesses within the municipality, notwithstanding that it places the latter at a competitive disadvantage. There is something anomalous in the fact that localities can offer such inducements to businesses as part of a bargaining process, but could not do so with respect to individuals who presumably can bring something of similar value (such as the vacant land on which those businesses will be located) to the locality.

There is, however, a downside to expanding the bargaining range. Equal service obligations and uniformity requirements have their own justifications. Those justifications return us to the concern about capture and holdouts. The legal doctrines of equal service provision and uniform taxation preclude discrete interest groups from obtaining cross subsidies at the expense of the rest of the municipality. Similarly, constraining the bargaining range by eliminating possibilities for tax relief or service advantages further reduces annexees' ability to hold out for a disproportionate share of the surplus created by annexation. For instance, if the proposed annexees would agree to annexation only if they received a five-year abatement on property taxes, and if that bargain reduces short-term revenues in ways that would adversely affect the city (even if annexation may still be worthwhile in the long term), a prohibition on differential property tax rates (say, through a state constitutional uniformity of taxation clause), may be an effective precommitment device against acceding to annexee opportunism. Such a mechanism may induce bargaining by creating a credible threat that the municipality cannot provide excessive compensation to annexees and thus reduce annexee incentives to demand more than a fair share of the annexation surplus.

70. *See, e.g.*, Banks v. City of Raleigh, 16 S.E.2d 413, 413 (N.C. 1941). Apparently, however, some municipalities do offer tax breaks in order to attract annexees, but it is not clear that they would be able to do so for more than a limited period; for example, until the municipality could offer the full range of municipal services to the new residents. *See, e.g.*, *Carmel Council Delays Vote on Annexation Plans Again*, INDYSTAR.COM, Nov. 23, 2004 (on file with the *Southern California Law Review*); Westfield, Ind., Ordinance 04-37, *at* http://www.westfieldtown.org/newwestfield/Ordinance%2004-37%20annexation%20process% 20final.DOC (last visited May 8, 2005).

Thus, applying legal principles to restrict the bargaining range between annexors and annexees implies that the holdout risk is greater than the risk of losing desirable annexations when the mutually acceptable bargain falls outside the legally permissible bargaining range. I know, however, of no empirical support for that proposition.

D. INVIDIOUS RESISTANCE TO ANNEXATION

Even if concurrent majority systems provide an incentive for annexors to consider the interests of annexees, and even if direct democracy dilutes the holdout problem that concurrent majorities entail, the grant of a minority veto poses an additional difficulty. Concurrent majorities may make sense where necessary to protect permanent minorities and where the interests of both the majority and minority are "on a plane of moral equality."[71] Thus, where all interests at stake are "reasonable," but one interest has limited access to the political decisionmaking process, concurrent majority systems do not necessarily offend majoritarian principles. On this theory, George Kateb suggests concurrent majorities could not be permitted to allow the continued existence of slavery, though they might have had more credence if applied to avoid the effects that northern-state-dominated tariff policies disproportionately imposed on southern states.[72] Similarly, where annexors and annexees each have plausible but inconsistent claims, for example, a need for expansion to reduce residential density by the former and a desire for limited services and jurisdictional autonomy by the latter, concurrent majorities appear to be a credible, if not essential means of resolving the conflict.

But this principle arguably reduces the suitability of a concurrent majority system in at least some annexation elections. One of the standard criticisms of plebiscitary procedures is their susceptibility to what Joseph Schumpeter described as the "dark urges" of the electorate in the privacy of the voting booth.[73] Individuals who vote in private and without accountability to a constituency will arguably seize the opportunity to display prejudices that representatives who vote in public would be unable or unwilling to reveal.[74] Arguably, annexation elections would be

71. *See* George Kateb, *The Majority Principle: Calhoun and His Antecedents*, 84 POL. SCI. Q. 583, 600 (1969).

72. *Id*. at 600–03.

73. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 256–62 (1976).

74. *See* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 9 (1978). *See generally* Julian N. Eule, *Judicial Review of Direct Democracy*, 99

particularly prone to distortions borne of prejudice. Resistance to annexation is frequently attributed to the desire of annexees to maintain not only areas of socio-economic, but also racial and ethnic homogeneity.[75] Some, albeit weak, empirical support exists for the proposition that annexation efforts are less likely to be successful when the effect would be to increase the minority population of the central city.[76] Even if voters in a direct democracy would not generally be more likely than representatives to engage in invidiously motivated lawmaking,[77] the ability of annexees to frustrate annexation could not easily be attributed to those motivations. It may be possible to demonstrate that proposed annexations were motivated by efforts to dilute the voting power of a racial group within the municipality.[78] But it would be far more difficult to demonstrate that the refusal of annexees to join a municipality was caused by racial animosity or to devise a remedy to address the problem.

Accepting that a risk of discriminatory voting exists, two issues remain. First, is the risk sufficiently great to abandon the idea of plebiscitary processes for annexation in general? Annexations will not necessarily involve merging an ethnically monolithic group with an ethnically diverse one. When such proposals do occur, not all voting will be infected by discrimination. Thus, antipathy toward direct democracy out of fear of dark urges is warranted only if the frequency of discriminatory voting is sufficiently great to offset the modifying influences that I have suggested such a procedure entails.

Second, once we grant the existence of discriminatory voting, it is difficult to imagine a system that would provide a panacea. Aggregate majorities can negate the discriminatory tendencies of annexees to avoid joining an ethnically diverse municipality. But that same aggregate majority can defeat the aspirations of a racially diverse group of proposed annexees to join the municipality. Representative processes are susceptible to the same prejudices that could infect the voting booth. In the annexation setting, those prejudices may arise when representatives gerrymander boundary lines that are less discriminatory than the expression of individual votes. Though it is of little comfort in trying to redress discrimination,

YALE L.J. 1503 (1990) (making similar contentions and arguing for heightened judicial scrutiny of plebiscitary enactments).

75. *See* JACKSON, *supra* note 11, at 150–51, 155.

76. *See* CLINGERMAYER & FEIOCK, *supra* note 4, at 98–99.

77. *See, e.g.*, Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 CHI.-KENT L. REV. 707, 751–53 (1991); Gillette, *supra* note 53, at 974–88.

78. *See* Perkins v. Matthews, 400 U.S. 379 (1971) (applying section 5 of the Voting Rights Act to annexations that allegedly dilute voting power of racial minorities).

ultimately the most that can be said is that plebiscitary systems, and concurrent majority processes in particular, will not necessarily generate more invidious jurisdictional boundaries than the alternatives.

V. CONCLUSION

Annexation procedures matter. The process by which annexations occur may determine the extent to which municipal expansion generates net benefit for the affected region or exploits involuntary new residents. The stakes here are perhaps even greater than in the analogous area of corporate mergers, as shareholders of target firms have boards to represent their interests, and "involuntary" shareholders of target firms have relatively easy exit options, as long as they can sell their shares. Any procedure that limits the scope of annexation inevitably creates the risk of frustrating proposals that would generate net benefit, even if a minority would suffer as a consequence. The alternative is to risk the imposition of costs on a small number of annexees who will be unable to attain offsetting benefits from their new locality of residence. The resulting need to create a mechanism for balancing such interests is common. In the local government literature, it is typically characterized by the takings problem, where the combined requirements of public use and just compensation are viewed as creating incentives for optimal use of governmental processes. My claim here is that a properly structured concurrent majority system can have similar effects in the difficult and underanalyzed area of annexation.