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Municipal Manifest Destiny: Constitutionality of Unilateral Municipal Annexations

In June of 2012, North Carolina passed a bill ending the state's more than fifty-year history of involuntary municipal annexations.[1] The bill's passage followed years of grassroots efforts to eliminate this practice, which is also known as forced annexation or unilateral annexation.[2] Under North Carolina's repealed system, certain classes of municipal corporations could expand their borders, annexing territory not previously included in the municipality, without the approval of the residents of the newly annexed area.[3] Political discourse on the subject was heated. Property owners adamantly opposed cities' power to unilaterally impose higher property taxes. New annexees frequently complained about cities' recurrent inability to provide sewer and other services within a reasonable period of time.[4]

While opponents of unilateral annexation celebrated a victory in North Carolina, state and local political groups in other states who opposed the idea of unilateral annexation were left to deal with the problem in their own states.[5] Meanwhile, proponents of broad municipal annexation powers—seeking to overcome urban blight and allow for more logical, managed city expansion—are advancing legislation to give municipalities more power to annex areas outside of their own boundaries.[6]

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1. An Act to Require a Vote of the Residents Prior to the Adoption of an Annexation Ordinance Initiated by a Municipality, 2012 N.C. Sess. Laws 2012-11, *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H925v6.pdf; Marissa Jasek, *Gov. Perdue Won't Block Forced Annexation Changes*, WWAY NEWSCHANNEL 3 (June 10, 2012), http://www.wwaytv3.com/2012/06/10/gov-perdue-wont-block-forced-annexation-changes.

2. *See, e.g.*, STOP NC ANNEXATION COALITION, http://www.stopncannexation.com (last visited Nov. 19, 2012); Barbara Hunter, *Involuntary Municipal Annexation: The Ugly Truth*, FOUND. FOR ECON. EDUC. (Sep. 1, 2007), http://www.fee.org/the_freeman/detail/involuntary-municipal-annexation-the-ugly-truth.

3. N.C. GEN. STAT 160A-49 (2009) (repealed).

4. *See* Daren Bakst, *Forced Annexation in N.C.: A Question-and-Answer Guide*, JOHN LOCKE FOUND. (Jan. 22, 2009), http://www.johnlocke.org/acrobat/spotlights/spotlight-366-_forcedannexation.pdf. *See also, e.g.*, Darrick Ignasiak, *Anti-annexation Group Reacts to Victory*, THE-DISPATCH.COM (May 30, 2012), http://www.the-dispatch.com/article/20120530/news/305309981.

5. *See, e.g.*, CITIZENS FOR FREE NEB., http://www.freenebraska.net/cause.html (last visited Dec. 19, 2012).

6. *See* Bryan H. Babb & Stephen C. Unger, *Setting the Annexation Record Straight: The Myth Underlying Annexation Reform in Indiana*, 51-MAR RES GESTAE 36 (2008).

As proponents and opponents debate the advantages of expanding or limiting municipalities' powers to unilaterally annex, the constitutional implications of such procedures are frequently ignored. Still, unilateral annexations involve elected representatives of one local government imposing the regulations and laws of that municipality without the input of either the residents of the annexation territory or their representatives.[7] The practice raises concerns about "equal protection of the laws."[8]

This Comment will explore these constitutional implications, arguing that residents of new annexations are entitled to representation concerning the decision. Part I will provide a summary of the current state of municipal annexation in the United States, exploring the different methods that states use to modify the borders of their municipal corporations, along with these methods' relative strengths and weaknesses. Part II will review the history of the Fourteenth Amendment Equal Protection Clause's application to local government. Part III will argue that laws permitting unilateral municipal annexations, such as North Carolina's system prior to its reform, violate the Fourteenth Amendment's guarantee of equal protection.[9] Part IV will provide options for annexation systems that maintain the policy advantages of allowing a city to annex property over the objections of residents and property owners while complying with Equal Protection principles. In particular, this Comment supports quasi-legislative determination through regional governments or counties as the best alternative to unilateral annexations.

Like Mexican nationals and Native Americans facing the seemingly unstoppable territorial aspirations of the United States' westward expansion and manifest destiny, county residents facing annexation may feel threatened that municipal expansion will change their way of life. This Comment seeks to address how their rights can be respected so that residents can view municipal boundary change as a logical and fair political adjustment rather than municipal conquest.

7. *See infra* Part II.

8. U.S. CONST. amend. XIV, § 1.

9. North Carolina's new system may also be unconstitutional because it gives property owners greater powers than other residents in approving annexations. However, the specific problems with the new system are beyond the scope of this paper.

I. AN OVERVIEW OF STATE ANNEXATION METHODS

Classifying the states' various annexation procedures can be a complex and difficult task. No two states use identical annexation procedures, and many states allow for more than one method of annexation.[10] Classification approaches vary in regards to (1) which entity must approve the annexations (e.g. the legislature, the municipality, the voters, etc.) and (2) if there is a vote, which residents are enfranchised to vote on the issue. For the purposes of this Comment, I will work from Frank Sengstock's classifications, which group states by the body that ultimately approves the annexation.[11] Frank Sengstock identifies five annexation method classifications: popular determination, legislative determination, quasi-legislative determination, judicial determination, and municipal determination.[12] I will discuss these methods in order of which methods generally give the most representation to annexees, starting with the fullest representation.

In discussing municipalities, it is important to distinguish the nature of a municipal government and a state agency. A state agency, such as might approve an annexation under quasi-legislative determination, is usually headed by commissioners who have been appointed by an elected body or official (e.g. the governor) in order to supervise some area of state administration.[13] While municipalities are considered merely administrative arms of the state for purposes of the federal constitution, many states give municipal corporations broad powers within municipal borders.[14] Municipalities have varying forms of government, but generally have elected offices or bodies that serve legislative, executive, and judicial functions.[15] Many states have codified municipalities' independence by granting home rule to these municipalities, limiting the ways in which the state legislature may interfere with local self-governance.[16] Thus, municipalities are qualitatively distinct from other agencies in the state.

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

11. *See generally* FRANK S. SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM (1960).

12. *Id.* at 9.

13. *E.g.* Alaska's Local Boundary Commission. *See supra* notes27–31 and accompanying text.

14. SANDRA M. STEVENSON, UNDERSTANDING LOCAL GOVERNMENT 9 (2003).

15. *Id.* at 18.

16. *Id.* at 24–26.

A. Popular Determination

Under a system of popular determination, some combination of residents of the annexing municipality, the annexation area, and the local government from which the annexation area will be taken (e.g. the county) vote directly to approve the annexation.[17] The voters in some jurisdictions are made up of residents, while others consist only of property owners. Some states require that voters in the annexation area must approve of the annexation independently.[18] Other states require approval by voters in both the municipality and the annexation area. In other words, the voters of the territory that would encompass the new city boundaries must approve the annexation.[19]

B. Legislative Determination

Some jurisdictions require that any change to municipal boundaries occur through special legislative acts.[20] This approach is especially popular in New England, where states have generally already incorporated all of their land into townships.[21] Because every resident is already part of a municipal government other than a county, annexation always involves de-annexing part of another municipality, making annexations in New England fairly rare.[22] However, occasionally the need for boundary change will cause the state legislature to act in order to redraw boundaries. State constitutional limitations on special legislation—legislation that affects only one small area or a limited number of individuals[23]—frequently impose restrictions on the exercise of this method in most states.[24] Some states have attempted to bypass such limits by

17. Palmer & Lindsey, *supra* note 10, at 61.

18. *E.g.*, ALA. CODE § 11-42-2(4) (2008) (allowing only qualified electors who have lived within the proposed annexation territory to vote on annexation approvals).

19. *E.g.*, S.D. CODIFIED LAWS § 9-4-4.9 (2004) (requiring a vote of residents of both the annexation area and the annexing municipality before an annexation becomes valid).

20. SENGSTOCK, *supra* note 11, at 9.

21. Palmer & Lindsey, *supra* note 10, at 62.

22. Greg Lindsey & Jamie Palmer, *Annexation in Indiana: Issues and Options*, Indiana Advisory Commission on Intergovernmental Relations, Center for Urban Policy and the Environment, Indiana University School of Public and Environmental Affairs 54 (Nov. 1998), *available at* https://archives.iupui.edu/bitstream/handle/2450/567/112_Annexation_1998.pdf?sequence=3.

23. BLACK'S LAW DICTIONARY 982 (9th ed. 2009).

24. SENGSTOCK, *supra* note 11, at 9.

creating general laws that encompass only one municipality, but most courts reject this kind of maneuver. As a result of these restrictions, this option is unavailable in many states.[25]

C. Quasi-Legislative Determination

In a quasi-legislative jurisdiction, the state legislature delegates its power to approve or initiate boundary changes to an administrative agency, independent board, or non-judicial tribunal.[26]

Sometimes the agency or board may function on a statewide level. Alaska provides a good example. Alaska's system creates a Local Boundary Commission made up of five governor-appointed commissioners—four representing each of Alaska's four judicial districts and one representing the state as a whole.[27] The commission studies and establishes procedures for municipal boundary modification within the state,[28] holds public hearings to determine whether a boundary change should occur,[29] and proposes boundary changes to the state legislature.[30] The commission's proposal automatically becomes effective unless the state legislature acts to disapprove the resolution.[31]

Other states have opted to create boundary commissions on a county or regional level. For example, each California county has a local agency formation commission (LAFCO), charged with "discouraging urban sprawl, preserving open-space and prime agricultural lands, efficiently providing government services, and encouraging the orderly formation and development of local agencies based upon local conditions and circumstances."[32] The exact composition of the commission varies, but generally includes elected officials from the city and county (such as city council members or county supervisors) along with members who are appointed by the other commissioners.[33] The LAFCO is responsible for approving or

25. *Id.* at 9–10.

26. *Id.* at 33.

27. ALASKA STAT. § 44.33.810 (2012).

28. *Id.* § 44.33.812.

29. *Id.*; s*ee also id.* § 44.33.826.

30. *Id.* § 44.33.812; s*ee also id.* § 44.33.828.

31. *Id.* § 44.33.828.

32. CAL. GOV'T CODE § 56301 (West 2012).

33. TAMI BUI & BILL IHRKE, IT'S TIME TO DRAW THE LINE: A CITIZEN'S GUIDE TO LAFCOS 23 (2d ed. 2003), *available at* http://www.calafco.org/docs/TimetoDrawLine_03.pdf.

denying all boundary changes for municipalities and the majority of local special districts after conducting a review of the proposed changes, holding public hearings, and in some cases putting the proposal to a public vote.[34]

D. Judicial Determination

Frequently, the judiciary plays a visible role in the ultimate approval of a municipal annexation, but "[r]arely do legislative guidelines give courts the power to assess substantive issues, such as the prudence or equity of an annexation."[35] A judge's role is generally limited to verifying that annexation procedures have been adequately followed.[36]

Virginia's municipal annexation system is an exception. It establishes a three-judge panel to approve annexations, making substantive decisions about the propriety of the annexation. Either a citizen, or more frequently, the annexing city, may file suit in the annexation court, initiating the judicial review.[37] The Virginia system reflects the state's unique municipal structure. Unlike most states, Virginia's cities do not form a part of the county in which they reside.[38] Therefore, every annexation by a city or a town requires that the surrounding county lose part of its territory, and perhaps more importantly, its tax base.

E. Unilateral Municipal Determination

A few states give broad annexation powers to municipal governments, allowing them to freely annex unincorporated territory or smaller incorporated municipalities, all with little or no involvement by annexed residents, landowners, or their elected representatives.[39] Until 2012, opponents of this method generally cited between five and seven states as examples of unilateral

34. *Id.* at 18–22.

35. Palmer & Lindsey, *supra* note 10, at 62.

36. *Id.*

37. Andrew V. Sorrell & Bruce A. Vlk, *Virginia's Never-ending Moratorium on City-County Annexations*, VA. NEWS LETTER, Jan. 2012, at 1–2, *available at* http://www.coopercenter.org/sites/default/files/publications/Virginia%20News%20Letter%202012%20Vol.%2088%20No%201.pdf.

38. U.S. CENSUS BUREAU, INDIVIDUAL STATE DESCRIPTIONS: 2007, at 296 (2012), *available at* http://www2.census.gov/govs/cog/isd_book.pdf.

39. *See infra* notes49–53 and accompanying text.

municipal annexation.[40] Although North Carolina has since changed its procedures to place final approval—or more accurately, a veto power[41]—with annexed property owners, Delaware,[42] Idaho,[43] Kansas,[44] Nebraska,[45] Tennessee,[46] and Texas[47] still give some municipalities fairly wide discretion to annex by city ordinance or other city action without the approval of landowners or residents. Additionally, several other states give municipalities power to unilaterally annex "islands," or areas surrounded by the municipality on all sides.[48]

Since the fall of the North Carolina system, Nebraska is probably the state that most strongly demonstrates the full extent of unilateral annexation power. Nebraska gives broad powers of unilateral annexation to its incorporated municipalities, the extent of which depends on the size and classification of the city. All incorporated municipalities may annex contiguous urban or suburban land by city ordinance, which is accomplished by a vote of the city council.[49] Additionally, cities of the primary class—those

40. *See* Bakst, *supra* note 4.

41. N.C. GEN. STAT. ANN. § 160A-58.64 (West 2012). ("After the adoption of the resolution of intent under this Part, the municipality shall place the question of annexation on the ballot.").

42. DEL. CODE ANN. tit. 22, §§ 101–101A (2011) (requiring various levels of approval for annexations by municipalities with 50,000 residents or more, but making no such requirement for other municipalities).

43. IDAHO CODE ANN. § 50-222 (2009) (giving municipal governments the power to carry out annexations without consent if the area contains fewer than 100 private ownerships and in which subdivisions of land are no more than five acres). *See also* Crane Creek Country Club v. Boise, 826 P.2d 446, 448 (Idaho 1990) (upholding the involuntary annexation of a country club).

44. KAN. STAT. ANN. § 12-520 (2011) (allowing the city to perform some annexations without prior approval of the county planning commission and without approval of landowners); s*ee also* Robert W. Parnacott, *Annexation in Kansas*, 70-DEC J. KAN. B. ASS'N 28, 28 (2001) (briefly explaining Kansas' annexation process).

45. *See infra* notes49–53.

46. TENN. CODE ANN. § 6-51-102 (2011) (giving municipalities sole discretion to annex territory in some situations).

47. TEX. LOC. GOV'T CODE ANN. §§ 43.021, 43.052 (West 2008) (giving municipalities power to annex areas identified by their own annexation plan three years after adding the area to the plan).

48. CAL GOV'T CODE § 56375.3 (West 2010); COLO. REV. STAT ANN. § 31-12-106 (West 2012); GA. CODE ANN. § 36-36-92 (West 2012); MONT. CODE ANN. § 7-2-4502 (2011); NEV. REV. STAT. ANN. § 268.660 (West 2012) (permitting municipalities to annex areas wholly surrounded by the annexing city without resident approval and according to the municipality's discretion).

49. *See* NEB. REV. STAT. §§ 14-117, 15-104, 16-117, 17-405 (2012).

with more than 100,000 residents[50]—may by an act of city council, annex both adjacent villages and unincorporated urban or suburban land.[51] Cities of the metropolitan class—those with 300,000 or more residents[52]—may further annex any municipality with fewer than 10,000 residents.[53] None of these annexations require the approval of the annexees.

The advantages and disadvantages of unilateral annexations are hotly contested. Supporters point to the need to bring unincorporated areas within a municipality's borders in order to plan future urban growth and account for untaxed city service benefits to residents just outside the city's borders.[54] Giving residents or landowners the ability to unilaterally block the annexation of their territory "unwisely elevate[s] and declare[s] inviolable the wishes of a few residents to the possible detriment of the interests of the broader municipality."[55] Further, objections to annexation frequently are objections to additional taxes that follow becoming a part of a municipality. But unincorporated suburbs and urban areas frequently benefit from the services available through the municipality, and "nonresidents on the fringe should no more have the power to opt out of the responsibilities of urban life than should city residents be able to claim an exemption from taxes to support services they do not use."[56] Unilateral annexation allows municipalities at the heart of a metropolitan area to tax surrounding areas that have benefited from the city's services and growth, providing for the central city's logical future growth.

Although there are plenty of reasons to allow cities the freedom to plan their own growth and to tax those that benefit from their

50. *Id.* § 15-101.

51. *Id.* § 15-104.

52. *Id.* § 14-101.

53. *Id.* § 14-117.

54. *See, e.g.*, Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 253–54 (1992) ("[N]onresidents avoid paying their proportionate share of two significant city expenses: [city services used by the resident and services for the poor.]"); Karen E. Ubell, Recent Development, *Consent Not Required: Municipal Annexation in North Carolina*, 83 N.C. L. REV. 1634, 1635–36 (2005) (citing a North Carolina commission report predicting that without the ability to annex, cities cannot provide municipal services required for sound development).

55. Reynolds, *supra* note 54, at 266.

56. *Id.*

services, opponents of unilateral annexation point to a number of other problems that unilateral annexations either fail to solve or exacerbate. First, it is unclear that giving municipalities unilateral annexation power actually creates more universally beneficial growth patterns.[57] Municipalities acting in their own interests generally seek to annex areas with high property values, generating higher tax revenues while requiring fewer municipal services, at the expense of poorer areas, which cost municipalities more in services and yield little tax revenue.[58] Furthermore, many metropolitan areas include several municipalities, either as suburban areas have incorporated to avoid annexation by the city in the past, or simply because historically separate municipalities have grown into each other. Giving municipalities the power to annex territories unilaterally according to their own interests encourages municipalities to engage in land grabbing.[59]

A municipality may be motivated to annex as much area as possible in order to prevent neighboring municipalities from staking a claim to that territory, even if it is unclear how that territory will be used in the immediate future.

Next, in a system like Nebraska's, which allows larger municipalities to not only annex unincorporated land, but also allows for the unilateral annexation of smaller municipalities, many of the benefits of local government are potentially lost. Local governments, especially smaller governments, give citizens the ability to participate in a level of government where they fully perceive and appreciate the value of their vote and their impact on government.[60] Larger governments are frequently slower to respond to small concerns, such as the placement of stop signs or individual land use, whereas small governments give citizens a vehicle by which

57. SENGSTOCK, *supra* note 11, at 23.

58. *Id*; *see also generally* Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931 (2010) (arguing that because annexation decisions are driven by tax revenue, poor communities of minorities are excluded from annexations).

59. SENGSTOCK, *supra* note 11, at 24; s*ee also, e.g.*, City of Elkhorn v. City of Omaha, 725 N.W.2d 792 (Neb. 2007). The litigation between Elkhorn and Omaha involved a dispute over the annexation procedures of the two cities. Omaha announced plans to annex Elkhorn while Elkhorn sought to immunize itself against annexation by raising its population above 10,000. *Id.* at 868–69. As a result, the two cities engaged in a race to annex enough territory to accomplish their respective goals. *Id.*

60. *See infra* notes 174–77 and accompanying text.

to influence decisions that may affect a small number of people, but have a profound impact on those whom they do affect.

II. EARLY HISTORY OF THE SUPREME COURT AND BOUNDARY CHANGE

Although scholars and activists frequently concern themselves with the myriad policy considerations that help determine the frequency and methods of municipal annexations, there are relatively few sources that study the constitutional issues that arise when considering municipal boundary change. But local governments play an increasingly important role in creating and implementing policy in addition to their traditional role of delivering services. Because of this, each state must assure that the annexation process does not "deny to any person within [the State's] jurisdiction the equal protection of the laws,"[61] when considering annexation policies.

The role of the Fourteenth Amendment in municipal boundary change depends largely on the federal Constitution's reach into matters of local government. The Supreme Court set the tone for discussion of the Constitution's relationship to local government early in the 20th century in *Hunter v. City of Pittsburgh*.[62] Residents of the City of Allegheny, a smaller city bordering Pittsburgh, objected to the merger of Allegheny and Pittsburgh.[63] In a referendum of all voters in the would-be combined municipality, an overwhelming majority of Allegheny residents voted to reject the proposed annexation, but a majority of Pittsburgh residents voted in favor of merger.[64] Plaintiffs, residents of Allegheny, argued that the merger unconstitutionally deprived the City of Allegheny of its property and gave it to Pittsburgh without due process of law.[65] The Court concluded that the municipal corporation itself was entitled to no rights under the Fourteenth Amendment, declaring that "[m]unicipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them."[66] In other words, because the municipality is but a part of the state in the

61. U.S. CONST. amend. XIV, § 1.
62. 207 U.S. 161 (1907).
63. *Id.*
64. *Id.* at 167–68.
65. *Id.* at 168–69.
66. *Id.* at 178.

eyes of the federal Constitution, the municipality as a unit did not have any rights to defend under the federal constitution. The *Hunter* Court further explained, "The number, nature and duration of the powers conferred upon these corporations . . . rests in the absolute discretion of the state."[67]

Although *Hunter* declared that a municipal corporation is a mere subdivision of the state, a municipality is not immune to obligations under the Constitution. In *Gomillion v. Lightfoot*, black residents of Tuskegee, Alabama, were excluded from the city after a redrawing of municipal boundaries.[68] The mayor of Tuskegee invoked *Hunter* as a defense, claiming that States have broad powers to change the political boundaries of their subdivisions.[69] The Court, however, responded that the State's broad power to change political boundaries does not exempt the state from complying with constitutional requirements.[70] In concluding that Tuskegee's boundary changes might have violated the Constitution,[71] the Court relied on the Fifteenth Amendment's prohibition against denying the right to vote on account of race instead of the Fourteenth Amendment. In his concurring opinion, Justice Whittaker argued that the decision should have been based on Fourteenth Amendment Equal Protection. There was no evidence that former residents of Tuskegee had been denied a right to vote in light of the Fifteenth Amendment because black and white voters had the same rights within the municipality:

> [I]nasmuch as no one has the right to vote in a political division, or in a local election concerning only an area in which he does not reside, it would seem to follow that one's right to vote in Division A is not abridged by a redistricting that places his residence in Division B *if* he there enjoys the same voting privileges as all others in that Division, even though the redistricting was done by the State for the purpose of placing a racial group of citizens in Division B rather than A.[72]

67. *Id.*

68. 364 U.S. 339 (1960).

69. *Id.* at 342.

70. *Id.* at 342–43.

71. The issue came before the Court on a motion to dismiss, so the Court did not actually consider the validity of the action, only whether the suit could be maintained based on the allegations. *Id.* at 340–41.

72. *Id.* at 349 (Whittaker, J., concurring).

Instead, Whitaker argued that the new boundaries reflected an attempt to segregate races in violation of Fourteenth Amendment Equal Protection.[73]

The Court soon turned to the Fourteenth Amendment to decide issues of state and local voting rights in *Reynolds v. Sims*.[74] Until 1962, questions of state and local representation were considered primarily non-justiciable political questions.[75] The Court opened up questions of state representation to judicial review in *Baker v. Carr*. *Baker* ruled that political redistricting of federal congressional districts presented questions of Fourteenth Amendment Equal Protection and that districts must reflect proportional representation.[76] In *Reynolds*, the Supreme Court applied the equal protection principles established in *Baker* to representation in state government. The Court struck down Alabama's system of apportionment to the state legislature,[77] which resulted in disproportionate representation whereby residents in some districts enjoyed five times the voting power as residents of other districts.[78] The Court ruled that a state voting system must give each person's vote roughly equal weight to that of another voter:[79] "[T]he fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."[80]

Reynolds had a sweeping effect on state representation. States were suddenly required to change constitutional procedures in order to comply with the new "one person, one vote" principle recognized in *Reynolds*. Despite *Hunter's* broad declaration that local governments acted as agents of the state, and are thus not subject to similar constitutional standards, some scholars predicted that the *Reynolds* standard would apply to local governments as well.[81] As predicted,

73. *Id.*

74. 377 U.S. 533 (1964).

75. Baker v. Carr, 369 U.S. 186, 208 (1962).

76. *Id.* at 207–08.

77. *Reynolds*, 377 U.S. at 537–39.

78. *Id.* at 569.

79. *Id.* at 567.

80. *Id.* at 560–61.

81. *E.g.*, Jack B. Weinstein, *The Effect of the Federal Reapportionment Decisions on Counties and Other Forms of Municipal Government*, 65 COLUM. L. REV. 21, 23 (1965) ("There is strong reason to believe that the apportionment standards which apply to states also apply to those

shortly after *Reynolds*, the Court applied the one person, one vote standard to county governments in *Avery v. Midland County*.[82] There, county commissioners were selected through elections from four county districts.[83] One district entirely encompassed the county's single municipality, while the other three districts were entirely rural.[84] As a result, representation on the county board greatly favored rural residents.[85] The Court held that the principle of one person, one vote "reaches the exercise of state power however manifested, whether exercised directly or through subdivisions of the State."[86] In later decisions, the Court extended Fourteenth Amendment requirements to other forms of local government, such as school boards[87] and municipal bond districts.[88]

III. FOURTEENTH AMENDMENT HEIGHTENED SCRUTINY

The *Reynolds* line of cases opened up state and local governments to federal judicial scrutiny. Consequently, when a state statute "substantially burdens fundamental rights . . . or where the statute employs distinctions based on certain suspect classifications . . . strict scrutiny applies and the statute will be upheld on the equal protection challenge only if the state can show that the statute is narrowly drawn to serve a compelling state interest."[89]

This section will argue that unilateral annexations violate principles of Equal Protection by denying representation in a decision with far-reaching effects to a group of people based only on

municipalities that (1) exercise general governmental functions and (2) are designed to be controlled by the voters of the geographic area over which the municipality has jurisdiction.").

82. 390 U.S. 474 (1968).

83. *Id.* at 476.

84. *Id.*

85. *Id.*

86. *Id.* at 479.

87. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969) (overturning election procedures that granted the franchise to property tax payers or parents with children enrolled in school).

88. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (holding that the city could not restrict a municipal bond election to property tax payers since non property owners were also affected).

89. Green v. City of Tucson, 340 F.3d 891, 896 (9th Cir. 2003). *See also Kramer*, 395 U.S. at 627–28 ("[W]hen we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made are not applicable.").

where they happen to live. I will show that for an annexation procedure to comply with constitutional requirements, final discretionary authority must be vested in an entity or an electorate that represents the interests of all residents within the proposed new boundaries of the municipality.

Representation in state and local government is a fundamental right.[90] As such, any state legislation that denies the right to representation in important decisions is subject to strict judicial scrutiny.[91] Since unilateral annexations give no representation in the annexation process to residents of the annexation area, strict scrutiny applies, and legislation delegating annexation powers to municipal governments is unconstitutional because there are alternative methods to achieving the government's intelligent growth objectives.

A. Representation as a Fundamental Right

Since prior to the Revolutionary War, American values hold that representation in local government is a fundamental right. The American colonists were pushed to revolution in part because of their discontent with their lack of representation in parliament.[92] Citizens of several colonies established local governments and required that representatives to those governments be residents of the area they represented.[93] Because of their tradition of representation in local government, the colonists became accustomed to—and indeed saw as their right—representation in every important decision. They expected such decisions to be made by people who represented them not in a form of "virtual representation," but directly by people who had been elected from among their own.[94] In the colonists' view, the prevailing notion that elected members of parliament represented non-electors stood in

90. *See infra* Part III.A.

91. *Kramer*, 395 U.S. at 626–27 (1969). *See also* Skinner v. Oklahoma, 316 U.S. 535 (1942) (applying strict scrutiny to a law that would have denied some persons the right to procreation).

92. 1 BERNARD BAILYN, PAMPHLETS OF THE AMERICAN REVOLUTION: 1750–1776, at 91–98 (1965).

93. This was most notably true in the New England colonies, where townships regularly held town hall meetings to make important decisions. Although these meetings were open, the decisions were ultimately made by the people's representatives, who were elected from among the districts they represented. *Id.*

94. *Id.* at 94–96.

opposition to basic notions of liberty and right.[95] The importance of representation as a fundamental right is reflected in the Declaration of Independence, stating that governments "deriv[e] their just powers from the consent of the governed."[96] The rebelling colonists further complained that King George had denied certain accommodations "unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only."[97] The constitutional requirement that individual states provide a republican form of government also implicates this fundamental right, at least tangentially.[98]

Although *Reynolds* looked specifically at the election of representatives and therefore focused primarily on the right to vote, the Court emphasized the idea of representation generally: "As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system."[99] By apportioning representatives in such a way that some districts represent significantly more people than others, individual votes in districts with more residents were diluted compared to individual votes in districts with fewer residents.[100] In essence, because of the voting process, state legislatures were not equally representative of all citizens of the state, and therefore, not all citizens were equally protected.

Representative democracy rests on the foundational principle that, although decisions are not necessarily made by a direct vote of all citizens, "democratic government means government by consent

95. *Id.* at 96.

96. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

97. *Id.* at para. 5.

98. U.S. CONST. art. IV § 4. The Supreme Court has held that the responsibility for enforcement of the Guarantee Clause rests with Congress and not the courts. Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. Colo. L. Rev. 849, 849 (1994). As a result, there is little jurisprudence addressing this issue, but the idea that representation is essential in a republican form of government has been argued at least since the mid-19th century. *E.g.* Luther v. Borden, 48 U.S. 1, 20 (1849) (Argument of Plaintiff in Error) ("The institution of American liberty is based upon the principles, that the people are capable of self-government. . . . This is especially true of the several States composing the Union, subject only to a limitation provided by the United States Constitution, that the State governments shall be republican.").

99. Reynolds v. Sims, 377 U.S. 533, 562 (1964).

100. *Id.*

of the governed."[101] Fundamentally, any decision that deprives a citizen of some freedom must ultimately derive its authority from the citizens of the jurisdiction, be it directly through a referendum of the people or indirectly through the citizens' elected representatives.

For example, new taxes are occasionally approved through referendum.[102] Although some people—likely those who would pay the most under the new tax—will invariably oppose it, those who have been outvoted have had their vote counted. The opponents' votes carry weight equal to those voting for the measure. Likewise, if a tax were passed by a state legislature, those opposing the measure can have their voices heard through their representatives. It is true that any one individual's representative might vote against the individual's interest, but as long as representation follows principles of one person, one vote, then the constituent has the same power as any other member of the district by voting to keep the representative in office or to remove her. Thus, any single citizen's influence on the question is equal to that of any other citizen. There is a direct line of representation flowing from the voter through his representative to the decision-making body.

B. Unilateral Annexations Deny Some People the Right to Representation

When a municipality seeks to unilaterally annex an area of unincorporated county territory or another municipality, the right to representation is violated because the decision makers do not derive their authority from those who are brought under the city's control. While municipalities are often referred to as administrative arms of the state, [103] there are significant differences between state agencies and municipalities. An agency receives its authority to act from the state, and agency decision-makers are elected or appointed by elected officials.[104] This creates a stark contrast to the municipality. Like the agency, the municipality's authority comes from the state. However,

101. Richard Briffault, *Who Rules at Home?: One Person/One Vote and Local Governments,* 60 U. CHI. L. REV. 339, 342 (1993).

102. *E.g.,* in 2012, voters in California were asked to approve a temporary increase of income taxes and sales taxes through a ballot initiative. Cal. Sec'y of State, TEXT OF PROPOSED LAWS 80–84 (2012), *available at* http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf.

103. RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 69 (7th ed. 2009).

104. *See infra* notes150–56 and accompanying text.

unlike the agency, municipal decision-makers are elected only by residents of the municipality. Consequently, while all state citizens are represented by agency officials, only residents of the municipality are represented by municipal officials. Only the interests of those living within the city boundaries before annexation are represented throughout all stages of the annexation process.

Fourteenth Amendment protections for representation do have their limits. In *Holt Civic Club v. Tuscaloosa*, Tuscaloosa exercised police jurisdiction over Holt, a neighboring unincorporated community, without giving residents of Holt a right to vote in municipal elections.[105] The powers exercised included the authority to issue licenses, enforce building codes, and enforce traffic laws,[106] but did not include the powers to levy ad valorem taxes, assert eminent domain, or zone property.[107] In upholding the Alabama law granting extraterritorial powers to Tuscaloosa, the Supreme Court reasoned that "a government unit may legitimately restrict the right to participate in its political processes to those who reside within its borders."[108] At first blush, it seems that *Holt* might allow states to give municipalities broad control over extra-territorial residents. However, the court noted that the constitutionality of the state's delegation of power was, at least in part, because the state had delegated only limited extraterritorial powers to the city.[109] The court observed that other states delegate a far broader set of powers to cities to regulate extraterritorial areas, and specifically declined "to imply that every one of them would pass constitutional muster."[110]

In the case of annexations, *Holt* is not strictly on point for at least two reasons. First, the Court explicitly allowed for restrictions on the right to vote for persons living outside the municipality's borders, but annexations are different because, unlike the community of Holt, annexation areas become part of the annexing city. While annexation territories fall outside the municipality's borders at the beginning of the annexation process, by the time the process is complete, the annexation area will fall inside the territorial

105. 439 U.S. 60, 61–62 (1978).
106. *Id.* at 82 n.10 (Brennan, J., dissenting).
107. *Id.* at 72 n.8.
108. *Id.* at 68.
109. *Holt,* 439 U.S. at 72 n.8.
110. *Id.*

borders of the new municipality. Annexations that give decision-making power solely to a municipal government or to the popular vote of the annexing city deny the franchise regarding an important decision affecting residents (annexation) to a group of people merely because they happen to live in the newest part of the city.[111] In *Reynolds*, the Court determined that state policies giving rural areas disproportionate voting power violated principles of equal protection because granting some voters a weightier vote "merely because of where they happen to reside, hardly seems justifiable,"[112] and that "[t]o say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government . . . ."[113] The Court does not specifically address the right to representation on its own, but the inherent right to representation is implicit in the Court's analysis of the voting power to elect representatives.

Second, *Holt* partially turned on the fact that the powers granted to the municipality were limited,[114] but annexations are different because they involve an area coming under the complete jurisdiction of a general-purpose government. The Court has consistently held that general-purpose governments are subject to its Fourteenth Amendment jurisprudence.[115] The Fourth Circuit incorporated some of this line of reasoning in deciding that city annexations implicate constitutional rights. In *Hayward v. Clay*, a South Carolina state law required the approval of landowners before an annexation could go forward.[116] In order to streamline the process, the landowners' referendum and the annexation election were held simultaneously.[117] The court found that the system impermissibly granted additional power to property owners without justification.[118]

The court noted that giving some classes of people an additional right to vote could be permissible in elections of special interest, but "[a] change in the entire structure of local government is a matter of

111. *See* Reynolds v. Sims, 377 U.S. 533, 563 (1963).

112. *Id.*

113. *Id.* at 563–64 (omissions in original) (quoting Wesberry v. Sanders, 376 U.S. 1, 8 (1964)).

114. *See supra* notes106–10 and accompanying text.

115. *See supra* Part II.

116. 573 F.2d 187, 188 (4th Cir. 1978).

117. *Id.* at 189.

118. *Id.*

general interest. Annexation will affect municipal services that every citizen receives . . . [and] 'not only involves changes in taxation, police, and fire protection, sanitation, water, sewer and other public services, but brings about a complete change in the form of municipal government itself.'"[119] If an election for an annexation presents constitutional concerns for voting, it makes sense that similar constitutional concerns would apply when a state limits representation.

C. Unilateral Annexations Do Not Survive Strict Scrutiny

Since unilateral annexations deny a fundamental right to a group of people, the law can only stand if the state can show that the law promotes a compelling state interest and is necessary to promote that interest.[120] Unilateral annexation laws generally address the needs of municipalities to raise revenues and promote intelligent growth patterns.[121] If municipalities fail to address these needs, cities may become blighted, lacking municipal funding to address poverty and the needs of an aging city in which wealthy residents flee the city in favor of the suburbs.[122] Therefore, a court could reasonably find that unilateral annexations promote a compelling state interest.

However, the variety of other methods of annexation lead to the conclusion that unilateral annexation laws are not necessary to address those needs. In applying strict scrutiny, courts must ask, "Is a particular infringement of constitutional rights, measured by its nature and scope, justifiable in light of the benefits likely to be

119. *Id.* at 190 (quoting the opinion of the trial court).

120. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626–27 (1969). In other contexts, particularly cases involving suspect classifications, the Court uses the more familiar three-step, "narrowly tailored" language for strict scrutiny. *E.g.*, Miller v. Johnson, 515 U.S. 900, 904 (1995) ("Laws classifying citizens on the basis of race cannot be upheld unless they are narrowly tailored to achieving a compelling state interest."). Cases involving voting rights using this language generally also involve racial classifications. *E.g.*, *id.* The distinction between the language used in *Kramer* and other cases is irrelevant here because, as will be demonstrated, unilateral annexations are "unnecessary" under *Kramer's* potentially less-exacting standard, and it is therefore unnecessary to ask the question of whether the law is "narrowly tailored." Likewise, the question of whether annexation methods are the least restrictive means of achieving the compelling state interest is unnecessary because, at least in this case, it is subsumed by the question of whether the method is necessary.

121. *See supra* notes 54–56 and accompanying text.

122. *Id.*

achieved and the available alternatives?"[123] As will be discussed in Part IV of this Comment, the state can achieve its most fundamental goals, including allowing municipalities to annex territory despite the lack of direct consent of the annexation area, without denying residents a right to representation in the decision.

D. Decisions Dealing Directly with City Annexations

The Supreme Court has never directly applied the Equal Protection Clause to city annexations, but several lower courts have decided the issue. In their decisions, lower courts have misinterpreted *Hunter's* allocation of power to the state in a way that undermines the rights of residents in annexation proposals. For example, in *Baldwin v. City of Winston-Salem* the Fourth Circuit ruled that North Carolina's statute granting broad powers of municipal annexation did not violate constitutional requirements.[124] After discussing the broad powers granted to states under *Hunter*, the circuit court declared that a state's decisions regarding annexations are "subject to judicial review under the Fourteenth Amendment only where that exercise involves the infringement of fundamental rights or the creation of suspect classifications."[125] However, in upholding the statutory scheme, the Fourth Circuit ignored one of its key flaws: delegation of authority to a body not elected by the residents of the annexation area. *Hunter* declares that *the State* can modify boundaries as it pleases.[126] It makes no mention of the State's ability to delegate that power to a body that in no way represents the interests of the citizens involved in the annexation.

Nearly two decades later, the Fourth Circuit took up North Carolina's controversial annexation statutes again in *Barefoot v. City of Wilmington*, realizing a similar result.[127] The plaintiffs, a group of residents and homeowners of an area annexed by an ordinance adopted by the city council of the city of Wilmington, claimed that North Carolina had denied the right to vote on city annexations to some through the statutory annexation process while granting the right to other areas through special legislation.[128] The court rejected

123. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, U.C.L.A. L. REV. 1267, 1272 (2007).

124. 710 F.2d 132, 135 (4th Cir. 1983).

125. *Id.*

126. Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907).

127. 306 F.3d 113, 121 (4th Cir. 2002).

128. Brief for Appellant at 11–12, Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir.

the claim on a basis similar to the *Baldwin* court's reasoning—namely that "there is no basis for an equal protection claim when no one is granted the right to vote on the matter of [a particular] annexation"[129]—but further explained that the state legislature's decision to allow for some annexations to occur without a vote while conferring a right to vote in others reflected the legislature's judgment to "wisely limi[t] the exercise of its powers to the needs at hand."[130] The Fourth Circuit never considered—and the annexed residents never argued—that granting the annexation power to the Wilmington City Council, made up of people for whom the residents of the annexation area did not vote, had violated the fundamental right to representation.

A number of other circuit courts, state supreme courts, and state appellate courts have also dealt with the issue, but most have resolved the issue by rejecting a fundamental right to put the annexation to a vote,[131] settling claims under state restrictions on delegation of legislative power,[132] rejecting claims based on takings in violation of due process,[133] or simply citing the state's broad powers to modify boundaries under *Hunter*.[134] These cases have not dealt directly with the theory of unconstitutionality based on a denial of representation that I present in this Comment. Even if they had, the Supreme Court's silence on the issue of unilateral annexations means that highest court in the land could decide the issue differently.[135]

IV. OVERCOMING OBSTACLES TO ANNEXATION WITHOUT VIOLATING EQUAL PROTECTION

Proponents of intelligent municipal growth may believe that forcing states to give representation to annexees will impede the

2002) (Nos. 01-1185, 01-2191).

129. *Barefoot*, 306 F.3d at 122 (quoting Berry v. Bourne, 588 F.2d 422, 424 (4th Cir. 1978)) (internal quotation marks omitted).

130. *Id.* at 123.

131. *See, e.g.*, Kane v. City of Beaverton, 122 P.3d 137, 139–40 (Or. Ct. App. 2005) ("[T]here is no fundamental right to vote on municipal annexations.").

132. *See, e.g.*, *In re* Annexation Ordinances, 117 S.E.2d 795, 802 (N.C. 1961).

133. *See, e.g.*, *id.* at 805.

134. *See, e.g.*, City of Millard v. City of Omaha, 177 N.W.2d 576, 579–80 (Neb. 1970) (resolving Fourteenth Amendment claims by quoting *Hunter* at length).

135. Residents of annexation areas have petitioned for and been denied certiorari to the Supreme Court on the issue. *See, e.g.*, Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002), *cert. denied*, 123 S. Ct. 538 (2002) (mem.). However, denial of certiorari does not imply an upholding of the decision. United States v. Carver, 260 U.S. 482, 490 (1922).

ability of municipalities to implement policies that will help solve problems associated with sprawl. However, "[t]hat the buses run on time cannot justify a dilution of any citizen's right to vote."[136] As this Comment has demonstrated, Constitutional protections of equal protection and general democratic principles of representation prevent unilateral annexations, by vote or by action of a municipal government that does not represent the annexation territory. However, this does not mean that constitutional principles must necessarily trump the policy advantages obtained by unilateral annexation.

Before its demise, proponents of the North Carolina annexation system warned that without the power to annex surrounding territory unilaterally, annexations would be impeded and municipalities would lose the economic benefits of annexation.[137] It is important to keep in mind that simply because annexees must be represented in the annexation procedure, equal protection principles do not require that these same residents be given the unilateral power to block the annexation. This section will discuss alternatives to unilateral municipal annexations that preserve constitutional representation and therefore do not violate Equal Protection. Although states must consider the needs of the state in the context of other state laws and the realities of municipal structure within their own states, this Comment ultimately recommends that states adopt a quasi-legislative approach, as this method allows regional governments to plan future growth while representing both those who already reside within a municipality and those who do not.

A. Popular Determination

Methods of popular determination allow residents or property owners outside the city to enter the boundaries of a surrounding city after having their voices heard. The appeal of this method "stems from a belief that property owners should have a voice in the dispensation of their property."[138] That the people involved in the annexation vote directly on the issue fosters voter participation, allowing the voters to act as a "check on ill-conceived and rash action

136. Cunningham v. Municipality of Metropolitan Seattle, 751 F. Supp. 885, 889 (W.D. Wash. 1990).

137. *See* Ubell, *supra* note 54, at 1653.

138. Palmer & Lindsey, *supra* note 10, at 61.

by municipal authority in the extension of boundaries."[139]

Hunter v. City of Pittsburgh presents an example of this process in action. In the more than a century since *Hunter*, the Supreme Court has softened its *Hunter* language somewhat, but has never overruled the case.[140] I do not propose overturning *Hunter* because the facts of *Hunter* do not implicate an impermissible denial of representation. In *Hunter*, Pennsylvania approved the annexation based on a vote of all residents in the proposed new boundaries.[141] Because the residents of Pittsburgh stood to benefit significantly by the annexation, the odds were stacked against Allegheny politically.[142] Although the chances of successfully blocking the annexation were small, the votes belonging to the residents of Allegheny were weighed equally with those of the residents of Pittsburgh. Therefore, there was no violation of Equal Protection, even under the standard that I propose here. A few states incorporate this type of annexation procedure in order to overcome minority objections to annexation.[143] If the annexation really is in the best interest of the community, the democratic process will recognize this interest, and a majority of voters will likely approve the annexation. However, if there are legitimate arguments against annexation, residents of the area, empowered and invigorated to oppose the annexation by the promise of representation in the vote, may convince other voters to join their own votes in opposition to the annexation. In either case, those who have an interest in the annexation will know that their interests are represented, even if the outcome is ultimately adverse to those interests.

The composition of the electorate in popular determination also presents special issues. As argued above, a vote including only the residents of the annexing city would create an unconstitutional denial of representation to the potential annexees, yet certain voting structures denying the vote to residents of the annexing municipality

139. SENGSTOCK, *supra* note 11, at 18.

140. *See* Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978).

141. Hunter v. City of Pittsburgh, 207 U.S. 161, 174–75 (1907).

142. *Id.* at 171 (quoting the statement of plaintiffs in error: "The larger city was almost unanimously in favor of annexing the smaller. The smaller city was almost as strongly opposed to such annexation.").

143. *E.g.*, ARK. CODE ANN. § 14-40-303 (1987); IOWA CODE § 368.19 (2012); S.D. CODIFIED LAWS § 9-4-4.9 (2004); s*ee also* Babb & Unger, *supra* note 6, at 66.

could also implicate the same constitutional problems.[144] Additionally, allowing for popular determination by only annexees allows a minority "oblivious to the needs of a metropolitan area . . . to stifle progress."[145] Therefore, the best approach is to allow for an electorate composed of residents of the proposed new municipal boundaries to vote on the issue, thus avoiding constitutional issues while preventing a minority from blocking a change that is in the best interest of the region.

Furthermore, the very process of voting can be cumbersome and expensive. A city may need to meet certain statutory requirements, followed by a petition which must demonstrate interest, only then to be followed by a popular vote that will require disseminating information to voters.[146] Because an election is involved, a city may have to wait for another election cycle before an annexation can realistically occur, even if there is popular support and the factors urging the need for annexation press for quicker movement on the issue. Besides the amount of time required for an election, elections are increasingly costly to administer.[147] Drafting and printing informational brochures and ballots, and staffing elections all cost money. Local interests may pour vast amounts of money into an election, further raising the overall economic cost of making a decision.

B. Legislative Determination

A system of legislative determination almost certainly would not violate Equal Protection because the decision to annex is made by a group that represents the residents of the entire state, including the residents of the annexing city and residents of the annexation area. Legislative determination provides several benefits for states whose municipal functions, size, and culture allow for fewer changes to municipal boundaries. Because the legislature makes the final

144. These problems would not arise in every case. A system that allows the annexing municipality to initiate the annexation and then presents the proposal to the annexees for a vote would involve representation of both parties. Furthermore, incorporating additional territory into municipal boundaries arguably has a much less significant impact for the residents of the annexing city.

145. SENGSTOCK, *supra* note 11.

146. *See, e.g.*, WASH. REV. CODE. § 35.13.015–120 (2012).

147. Patrick Malone, *Local Election Costs on the Rise*, COLORADOAN.COM (Oct. 12, 2012), http://www.coloradoan.com/article/20121012/NEWS01/310120037/Local-election-costs-rise.

decision, the interests of the state as a whole are represented in the boundary change. Those broader interests can override the narrow interests of a few parties who may block the annexation.

On the other hand, this method can be cumbersome, especially in larger states that do not have a long history of stable municipal boundaries. The legislature's advantage in representation across the state also results in a tendency of the legislature to act slowly in response to the particularized needs of small communities.[148] In home rule jurisdictions, which are founded on the principle of local self-determination, giving the legislature control over boundary changes defeats the purpose of home rule.[149]

C. Quasi-Legislative or County Determination

Handing the final decision-making power to an entity that represents all residents of the annexation area can alleviate some of the difficulties of a popular vote while satisfying constitutional requirements. In this method a regional entity that approves boundary changes represent the residents of the region on a one person, one vote basis. For example, the Portland area Metro is made up of districts of roughly equal population spanning several municipalities.[150] If Oregon were to give Metro the power to approve municipal boundary changes,[151] then any decisions made by Metro would represent the will of the region consistent with one person, one vote.

When a governmental body delegates decision-making power to an administrative agency, individual influence over the administrative agency is diluted, but it is diluted equally for all constituent citizens, thus avoiding equal protection problems. For instance, if an administrative body has been given the power to make an assessment on a property, and an individual disagrees with the assessment, there is some—albeit diluted—recourse through the

148. *See* SENGSTOCK, *supra* note 11, at 12.

149. *Id.*

150. *Council District Map*, METRO, http://www.oregonmetro.gov/index.cfm/go/by.web/id=1124 (last visited Sept. 12, 2013).

151. Metro is already responsible for the area's urban growth boundaries. *Urban Growth Boundary*, METRO, http://www.oregonmetro.gov/index.cfm/go/by.web/id/277 (last visited Sept. 12, 2013).

process of representation.[152] The citizen may complain to his representative armed with the influence of his vote. The representative may then vote to modify the agency's power[153] or constituents may vote for a new executive who will appoint directors with views more in line with voters' views.[154] The line of authority derives from the citizen through his ability to elect representatives, through the representative and her ability to modify the agency, and then to the agency itself.

Some states may be able to apply this method on a state-wide level, while others may need to focus on smaller, regional applications. Alaska's procedure provides a good example of a system that represents statewide interests in municipal boundary change.[155] Alaska's method of appointing representatives to its Local Boundary Commission based on Alaska's judicial districts ensures that regional interests are represented and "that arguments for and against proposals to create or alter municipal governments are analyzed objectively, [while taking] area-wide and statewide needs into consideration."[156] The system is well suited for Alaska's relatively small population and frontier character, but may not be appropriate in most states. A system similar to California's, which gives discretionary approval power to regional committees, may be an option for other states whose size makes a statewide system impracticable.[157]

Quasi-legislative methods are not without complications; they add "another layer of government that costs time and money."[158] In cash-strapped states, it may be difficult to justify funding for a

152. For an explanation of the various methods that elected officials have to guide and control administrative agencies on the federal level as well as the benefits and challenges associated with these methods, see R. Douglas Arnold, *Political Control of Administrative Officials*, 3 J.L. ECON. & ORG. 279 (1987).

153. *Id.* at 280.

154. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 231–36 (2012), *available at* http://knowledgecenter.csg.org/drupal/system/files/4.10_2012.pdf (demonstrating the variety of political appointments to administrative agencies made by governors in all fifty states).

155. *See supra* notes 27–31.

156. *Boundary Commission, Division of Community and Regional Affairs*, STATE OF ALASKA, http://www.commerce.state.ak.us/dca/lbc/lbc.htm (last visited Sept. 12, 2013).

157. *See supra* notes 32–34.

158. Palmer & Lindsey, *supra* note 10, at 64.

function that many other states leave to already-existing levels of government. States can avoid some of these issues by giving greater authority to already-existing government bodies. One obvious choice is the county.

In nearly all states, residents of a municipal corporation are also subject to county laws and regulations.[159] Although historically considered administrative arms of state policy and services, counties have increased their law and policy-making roles in recent years to address concerns of growing metropolitan areas.[160] County government structure varies between mixes of elected and appointed commissions, councils, and administrators with varying degrees of legislative and executive power,[161] but in all cases, elected county officials must represent the interests of county residents on the principle of one person, one vote.[162] Therefore, in many cases, it may be appropriate for the county to approve municipal boundary changes. Being concerned with the health and prosperity of the county as a whole, county governments are well-equipped to evaluate the often-competing, long-term plans of all the municipalities within the county. The county government would be able to approve annexations against the will of the residents of the annexation area when the annexation benefits the county as a whole, including the individual municipalities within the county.

Counties may not provide an adequate means of municipal boundary management in all cases, especially when a metropolitan area spans more than one county. In these cases, regional governments similar to Portland's Metro government or Minneapolis' Metropolitan Council could take on responsibilities to approve annexations since they already engage in regional planning activities.[163] These governments

159. BRIFFAULT & REYNOLDS, *supra* note103, at 12.

160. *Id.* at 10.

161. *Overview of County Government*, NACO, http://www.naco.org/Counties/learn/Pages/Overview.aspx (last visited Sept. 12, 2013).

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

163. *See Urban Development and Revitalization*, METRO, http://www.oregonmetro.gov/index.cfm/go/by.web/id=26 (last visited Sept. 12, 2013); *About the Metropolitan Council*, METROPOLITAN COUNCIL, http://www.metrocouncil.org/About-Us.aspx (last visited Sept. 12, 2013). Portland's Metro in fact already establishes urban growth boundaries for the region, approving the proposals for expansion for the municipalities within Metro's boundaries. BRIFFAULT & REYNOLDS, *supra* note103, at 12. I do not necessarily mean to imply that this would be the best course of action in Indiana, but only to point out that regional governments are or can be equipped to handle the task of approving municipal boundary

would presumably be under the same one-person, one-vote requirements as *Avery*, and so the principle of proportional representation would be preserved in annexation decisions.[164]

Giving annexation authority to counties or regional governments not only helps solve Equal Protection problems, but it also helps address other difficulties associated with annexations, particularly municipal underbounding.[165] Municipal underbounding refers to the problem in which municipalities refuse to annex unincorporated urban areas, leaving the area without adequate municipal services.[166] This situation occurs in part because municipalities normally seek to annex territories that will increase tax revenues at a rate greater than the costs of providing services.[167] Giving municipalities the unilateral decision-making power in annexations creates a perverse incentive to annex areas most likely to generate revenue yet least in need of municipal services, while refusing to annex areas that are most in need of city services.[168] By giving counties a more important role in the annexation process, metropolitan growth policy can account for the interests of residents outside municipal borders, who would benefit from annexation and accompanying municipal services, over the interests of the city. This approach would further aid intelligent municipal growth.[169]

Based on these considerations, states should strongly consider giving annexation power to counties or some other regional or statewide authority. While this method may not work in every circumstance, quasi-legislative power addresses the constitutional concerns about representation without sacrificing efficiency.

changes.

164. *See* Cunningham v. Municipality of Metro. Seattle, 751 F. Supp. 885, 888 (W.D. Wash. 1990). The Minneapolis Metropolitan Council is appointed by the governor from among sixteen population districts. METROPOLITAN COUNCIL, *supra* note 163. However, this does not create a problem because the residents of the metropolitan area elected the governor, and the state is free to appoint representatives as long as they do not serve in their appointed capacity as a result of another elected position. *See Cunningham*, 751 F. Supp. at 891–93.

165. *See* Michelle Wilde Anderson, *Mapped Out of Local Democracy*, 62 STAN. L. REV. 931, 937–40 (2010).

166. *Id.*

167. *Id.* at 957.

168. *Id.*

169. *Id.* at 980–81.

D. Judicial Determination

The judicial determination method for annexations probably does not violate Equal Protection. Because judges are normally appointed by the executive branch or elected by residents,[170] judges represent the state as a whole. However, judicial determination presents special problems from a policy perspective. Courts are generally ill-equipped to make the sort of difficult policy decisions that inhere in municipal annexation and are unable to consider fully future growth patterns, fiscal concerns, and the diverse needs of a city's or county's residents.[171] Further, such decisions are inherently legislative, not interpretive, and are conceptually at odds with the efforts of most states to maintain a strict separation of powers and functions between the three branches of government. This option is unsatisfactory in most states.

V. DESIRABILITY OF CHANGE IN SPITE OF SIMILAR RESULTS

My proposal raises at least one important question: if unilateral annexations can be replaced by other methods that allow for the annexation without the direct consent of the annexees, what purpose is there in requiring states to change annexation methods to a different form yielding the same result?

First, although annexations without consent could go forward under alternative methods, state policies have an effect on the size of annexations.[172] Where cities must work with a boundary agency, cities generally annex smaller portions of land.[173] By forcing cities to seriously consider which areas will be brought into their boundaries, cities will have less incentive to simply grab as much land as possible for tax purposes and plan how to provide city services later. Furthermore, by giving more authority to a regional power, growth policies can consider and accommodate regional needs.

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170. *Fact Sheet on Judicial Selection Methods in the States,* A.B.A., http://www.americanbar.org/content/dam/aba/migrated/leadership/fact_sheet.authcheckdam.pdf (last visited Sept. 12, 2013).

171. SENGSTOCK, *supra* note 11, at 32. *See also* Baker v. Carr, 369 U.S. 186, 217 (1962) (addressing the federal high court's inadequacy in dealing with policy decisions that are non-justiciable political questions).

172. Mary M. Edwards, *Municipal Annexation: Does State Policy Matter?,* 28 LAND USE POL'Y 325, 331 (2011) (finding that there is a statistically significant, although counterintuitive, relationship between annexation methods and the number, frequency, and size of annexations).

173. *Id.*

Second, even if the frequency and size of annexations do not change as a result of prohibiting unilateral annexations, local democracy can function more smoothly if the governed perceive at least some level of power and accountability in local government. That is, political participation has its own merits. "[T]he psychological satisfaction of sharing in governmental decisions cannot be summarily dismissed as immaterial."[174] In the early days of American democracy, Alexis de Tocqueville noted that American municipalities, especially the townships of New England, were fundamentally different from European municipalities in part because the townships claimed and respected the wisdom of each of their citizens.[175] The unique relationship between citizen and local government helped mold better citizens and foment better government:

> It is in the town, amidst the ordinary relationships of life, that the desire for esteem . . . and the thirst for power and notoriety come to be concentrated; these passions, which so often roil society, change in character when they find a vent close to home, in the bosom, as it were, of the family.[176]

The practice of unilateral annexation robs the annexee of this crucial sense of participation, thus alienating him from his local government. How can the annexee enthusiastically participate in a government into which he was brought not only against his will, but also without his voice? As de Tocqueville implied, this resentment for government may in turn affect democratic participation in state and federal levels of government as well.[177]

VI. CONCLUSION

Although some states have recently done away with their municipal annexation provisions, several other states still rely heavily on annexation methods that raise serious questions about their constitutionality under principles of equal protection. Such annexations provide extra protections for those already within municipal boundaries and deny representation concerning a crucial

174. SENGSTOCK, *supra* note 11, at 17.

175. 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 75 (Arthur Goldhammer trans., 2004) (1835).

176. *Id.*

177. *See id.*

decision to those who, through the annexation, suddenly become subject to a variety of new ordinances and regulations. As this Comment has shown, a variety of alternatives allow municipalities to control and manage growth in an intelligent manner without denying representation to those who are most affected by the boundary change. By shifting responsibility for approving municipal growth to a regional or county government, issues inherent in urban growth can be addressed without violating the residents' rights to representation in local government. In this way, state systems can demonstrate responsible representative government instead of a conquering spirit.

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