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OPTING OUT OF PUBLIC PROVISION

CLAYTON P. GILLETTE*

I. INTRODUCTION: THE CASE FOR OPTING OUT

There exist multiple sources to which we look for satisfaction of our material wants or needs, that is for the allocation of resources. Rough classification divides these sources into self-production, or the household; transactions with strangers, or the market; provision (either contractual or donative) by those outside a kinship group, but within a narrow community (such as a church group or social club); and provision by government either with (as in the case of services provided for user fees) or without (as in the case of goods provided by general taxation) direct compensation.¹ Much legal regulation deals with the proper mix of these sources of provision by creating incentives, prohibitions, and mandates for one or more of these groups to provide a particular good or service. Legal rules that mandate² or preclude³ government involvement in production or that constrain market transactions or that allow transactions in families⁴ that might be prohibited among strangers are essentially mechanisms for allocating the resource allocation function itself among these different institutions.

Recent years have seen substantial argument in favor of shifting to the market provision and production functions previously undertaken by government. The increased intensity of arguments for privatization in all its forms⁵ is

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1. See, e.g., PARTHA DASGUPTA, AN INQUIRY INTO WELL-BEING AND DESTITUTION 26 (1993).

2. See, for instance, the various state constitutional clauses that require the provision of a system of public education. For a summary, see Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995).

3. For instance, the "public purpose" requirement prohibits governmental entities from participating in enterprises that provide benefits to an insufficient proportion of the general public. See, e.g., *State ex rel. McLeod v. Riley*, 278 S.E.2d 612, 616-17 (S.C. 1981).

4. Children may work in family businesses under circumstances that would not be permitted if they were working outside the family. See 29 U.S.C. §§ 203(1), 212 (1994).

5. Privatization is a phrase that has been loosely applied to a myriad of arrangements that shift government responsibilities to the marketplace. Only in its extreme form, however, does the market entirely displace government. In more moderate forms, government retains some role in the provision of the "privatized" good or service. For instance, government may specify the characteristics of the good or service to be provided, such as where government contracts out for the manufacture of goods that the government itself distributes; or, government may regulate and retain the right to dismiss the private actor, such as where cities contract with private firms for collection of garbage. For an examination of the range of privatization, see Ronald A. Cass, *Pri-*

neither novel nor surprising. The economist Albert O. Hirschman has documented the shifting preferences that people share for dependence on the public and the private realms, as reliance on either generates disappointment and a desire for change.⁶ In legal literature, the absence of a clear public/private distinction has been the source of substantial commentary suggesting both that government might engage in heretofore "private" activities and that markets might invade the previously "public" realm.⁷ That any such transformation would follow a long tradition of employing private entities to accomplish public goals is evidenced by Hendrik Hartog's rich description of privately supported municipal developments in New York,⁸ and the Handlins' history of the interplay of public/private cooperation to construct the infrastructure of post-Revolutionary Massachusetts.⁹

In its most current incarnation, much of the debate about privatization centers on the replacement of public provision of goods and services with private markets.¹⁰ This part of the debate implicitly assumes that public and private provision of services traditionally supplied by government are plausible alternatives. That is to say that the good or service at issue has sufficient characteristics of a public good that it may be appropriate for government to be involved in its provision; but that the good also exhibits sufficient characteristics of a private good that demand for it will not be significantly understated and adequate numbers of providers will arise if government provision is replaced by market forces.¹¹ Under these conditions, the relevant question becomes, which plausible source of a good or service will provide it in a manner most consistent with a selected standard, e.g., which source will provide the good most efficiently or most fairly?

Implicit in much of this debate is the assumption that private provision displaces the need for government involvement in the same area, so that the

vatization: Politics, Law and Theory, 71 MARQ. L. REV. 449 (1987).

6. See ALBERT O. HIRSCHMAN, *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (1982).

7. See generally Symposium on the Public/Private Distinction, 130 U. PA. L. REV. 1289 (1982).

8. See, e.g., HENDRIK HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER* (1983).

9. OSCAR HANDLIN & MARY F. HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY* (rev. ed. 1969).

10. See, e.g., JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* (1989); Cass, *supra* note 5.

11. A public good is defined by two characteristics: it can be jointly consumed by more than one person simultaneously (nonrivalness); and, once produced, no one can be excluded from enjoying its benefits, even those who did not contribute to its production (nonexclusivity). Classic examples include sunshine, knowledge, and national defense. Local public goods have these characteristics within more limited geographic boundaries, e.g., mosquito spraying or paved streets. Traditional public finance theory suggests that market forces will undersupply public goods because no one has an incentive to incur the costs related to their production, since no one has an incentive to purchase them from the producer (because once produced and paid for by some other party, the nonpayer can still enjoy the good's benefits). For that reason, government provision (and collection of taxes to pay for the good) is traditionally seen as a solution to the problem of public goods.

There is substantial literature on the substitutability of markets for government in the production of goods with public goods characteristics. See, e.g., ANTHONY DE JASAY, *SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM* (1989); Ronald Coase, *The Lighthouse in Economics*, 17 J.L. & ECON. 357 (1974).

two sources of provision are acceptable substitutes for each other. Thus, privatization has typically taken the form of selling governmental assets to private firms or replacement of a government provider with a private one, either through government abandonment of the service or through competitive bidding between public and private providers. Examples include, for the first case, governmental sales of airlines, forests, or communications facilities, and, for the second case, government contracting for fire services or prison operations and competitive bidding for public defenders and ambulance services.¹² Frequently, some governmental involvement continues even after transition to the private firm. But in such cases, the governmental role is to regulate or cooperate with the private entity, rather than to compete with it.

In this article I examine a different element of "privatization" that does not involve government displacement by the private sector. Instead, my concern is with goods or services that are simultaneously offered by both the public and private sectors. What characterizes the difference in providers is that they offer different levels of the same service. Initially, the very existence of competition between private and public provision would seem anomalous. The fact that government provides a kind and level of service, typically paid for by tax revenues collected from the citizenry at large, is presumed to serve as a response to unmet demand from its constituents. But if that is the case, then why should a critical mass of residents (sufficient to support a private provider) desire to expend additional resources for a different level and kind of service, especially where (as in the case of services financed through general taxation)¹³ they must still pay for the publicly provided services of which they do not partake? Nevertheless, the fact that we can easily call to mind examples in which residents have opted out of the service level offered by government—through the use of private schools, private security guards, or privatized mail delivery—suggests that this apparent anomaly occurs with substantial frequency. The source of the apparent anomaly may lie in any of several conditions. First, those who seek additional services may prefer that any of government provide the level that they personally desire, but a majority of the electorate prefers the level that government actually provides. Second, the government may provide a level of service that is inconsistent with the preferences of a majority of constituents, but a discrete interest group has been able to capture the decisionmaking process with respect to the level of that service provided by government. Third, constituents might vary dramatically in their preferences for the level of government provision of a service, so that a majority agrees that the government should provide a level consistent with the lowest common denominator, augmented by private supplementation in different degrees for those who desire it.¹⁴ Indeed, given the strong assumptions

12. See KIERON WALSH, PUBLIC SERVICES AND MARKET MECHANISMS 110-37 (1995); Jim Flanagan & Susan Perkins, *Public/Private Competition in the City of Phoenix, Arizona*, 11 *GOV'T FIN. REV.* 7 (1995).

13. Simultaneous provision may be less puzzling in either of two situations. First, where the public good or service is financed through user fees, so utilization of the services of one entity does not require paying for the other; second, some jurisdictions credit payments made by constituents to private providers for services that would otherwise be provided by public providers.

14. See Dennis Epple & Richard E. Romano, *Public Provision of Private Goods*, 104 *J. POL.*

required to have perfectly harmonious preferences among the residents of a jurisdiction (roughly the assumptions of perfect mobility, financial independence, availability of diverse communities, and no externalities),¹⁵ one would anticipate that residents of the same community frequently will have divergent demands for public services.

In each of these situations, the case for opting out of the governmentally supplied level of service proceeds from the desire to achieve one's preferences privately where one is unable to satisfy them through the political process. At least initially, this desire seems perfectly benign. After all, the decisions of an individual to select one level of service rather than another in the private market causes little comment. The fact that I prefer eating in full-service restaurants to fast-food restaurants does not generate much criticism. It is thus initially puzzling that more is made of the fact when people, in selecting a different level of service, choose a private provider that offers a different level rather than a public one, such as in the choice to attend private schools or to live in a residential association that has a gated or guarded entrance rather than to rely on public schools for education or solely on the local police for protection.¹⁶ Seen simply as matters of contract between citizens and private providers, these latter arrangements presumptively increase welfare; the fact that a private party successfully offers the service (such as where a land developer attracts homeowners by creating a residential association with by-laws that require more aesthetic regulation than local zoning laws) indicates that there is a demand for that level that is not being met by governmental provision and that satisfaction of that demand is welfare enhancing, at least to the immediate parties.¹⁷

In these situations, residents may obtain desired services through private "clubs," the members of which share production costs and can exclude non-members who either do not desire the services offered by the club or whom the club does not wish to serve.¹⁸ Assume, for instance, a community in which a minority of residents desires a swimming pool. Barring altruism and substantial differences in the intensity of those who favor and oppose a publicly funded pool, democratic voting would not produce a swimming pool for these individuals. Nevertheless, if the minority residents have the resources to construct a pool, they may be able to create a swimming club open only to members who have paid the "tax" in the form of dues sufficient to support the

ECON. 57 (1996) (indicating that a majority would prefer a regime of government provision with market supplements to government-only or private-only provisions).

15. These are essentially the assumptions of the Tiebout model, under which government expenditures would be optimally allocated. See Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

16. These two examples illustrate that sometimes opting out of private provision is a complete substitute for public, and sometimes private provision supplements the public. I explore the implications of this distinction below.

17. Here I am assuming that when people contract for a level of service, they do so because they believe that level is consistent with what is best for themselves, rather than out of some commitment to the welfare of others. For a discussion of the possible lack of fit between preferences and welfare, see Amartya Sen, *Behavior and the Concept of Preference*, 40 *ECONOMICA* 241 (1973).

18. See TODD SANDLER, *COLLECTIVE ACTION* 63 (1992).

pool. Because nonpayers can be excluded from the pool, by means of an entranceway at which membership cards must be shown, private providers have incentives to make the pool available, notwithstanding that it has some of the characteristics of a public good, i.e., it is nonrival to the extent that it allows multiple swimmers to enjoy the facility simultaneously.¹⁹

While clubs typically offer goods and services that are not otherwise governmentally provided, the same logic suggests that clubs can offer goods that are provided by government, but at a level of service other than what the potential club members desire. For instance, individuals with a taste for more rapid snow removal on residential streets than the locality might offer (e.g., because the locality places a priority on clearing major thoroughfares rather than residential areas) may live on privatized streets where abutters collectively contract privately for early snow removal.²⁰ Indeed, government sometimes encourages the formation of clubs to provide higher levels of service by authorizing the creation of business improvement districts that are statutorily enabled to collect "dues" from members, including involuntary members, and use the proceeds for functions such as street improvements, landscaping, signage, security, traffic safety devices, bicycle paths, and off-street parking facilities.²¹ Where the club is able to achieve the preferences of its members, at least without cost to nonmembers, there initially seems even less reason (other than envy)²² to object to differential provision than there is with respect to services offered only by market mechanisms, since purchasing additional services does not necessarily disadvantage those who do not make similar purchases. In the case of private providers in traditional markets (as in my restaurant example above), the potential consumer cannot obtain anything without active involvement in a transaction. Where the private provider offers only a different level of service, however, failure to enter into a transaction means that the resident still receives the level of service provided by the government, at least with respect to those services funded through general taxation.²³ The fact that failure to bargain does not deprive one of access to some level of a service might be thought to reinforce the propriety of opting out.

Indeed, the positive social consequences of opting out may involve more than satisfying the preferences of individuals. The claims that privatization will save production costs is typically attributed to economies of scale or reduced

19. See DENNIS C. MUELLER, PUBLIC CHOICE II 150-52 (1989).

20. I discuss the theory of clubs as a justification for strict construction of covenants in residential associations in Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1391 (1994).

21. See, e.g., COLO. REV. STAT. § 31-25-1201 (Supp. 1995); NEB. REV. STAT. § 19-4015 (1991); 53 PA. CONS. STAT. § 1623 (Supp. 1996). On the collection of "dues" from unwilling participants, see, e.g., *Evans v. City of San Jose*, 4 Cal. Rptr. 2d 601 (Ct. App. 1992); *Jensen v. City & County of Denver*, 806 P.2d 381 (Colo. 1991).

22. On envy, see JON ELSTER, *THE CEMENT OF SOCIETY* 252-63 (1989).

23. Services funded by user fees may require that residents actually request the service. But other forms of exaction do not require affirmative action by residents. For instance, services paid for through special assessments, such as some street paving, may be imposed even if the beneficiary never uses the service, because the benefit accrues to the property assessed and not to the individual payor. See, e.g., *Owatonna v. Chicago, Rock Island & Pacific R.R.*, 450 F.2d 87 (8th Cir. 1971).

agency costs in the private sector (resulting in part from better incentives to monitor) as a function of the capacity of private owners to claim residual profits of the firm.²⁴ But any increased efficiency in private provision may be attributable less to the nature of the provider (public or private) than to the presence of competition.²⁵ The simultaneous presence of public and private providers of different levels of service may improve the performance of each, since each has an interest in attracting customers of the other. Finally, opting out should even return benefits to those who subscribe only to the background levels of service, i.e., that level provided by government, since segregation by demand for service allows the jurisdiction's residents to form homogeneous groups that can avoid difficulties, such as cycling among voters, that are associated with heterogeneous populations.²⁶

These consequences might be thought to make any effort by private providers to offer goods and services that the government could, but has chosen not to, make available to constituents relatively noncontroversial. Nevertheless, it is just the cases in which residents with different preferences have formed clubs for local public goods that create controversy. The private institutions to which people seeking to opt out have migrated are consistently under attack as exclusionary and elitist, if not unconstitutional, and are accused of either diluting the level of services available to those who have not opted out or of increasing costs to those others by making them bear a disproportionate burden of serving those excluded from the club.²⁷ These criticisms reflect two

24. See, e.g., DIETER BÖS, *PRIVATIZATION: A THEORETICAL TREATMENT* 33-50 (1991); Michael Schill, *Privatizing Federal Low Income Housing Assistance: The Case of Public Housing*, 75 CORNELL L. REV. 878 (1990).

25. See DONAHUE, *supra* note 10, at 67-68. Donahue contends that perusal of studies comparing the costs of private and public provision of the same service reveals that competition, rather than public or private supply, is the best determinant of efficiency. See also Thomas E. Borcharding et al., *Comparing the Efficiency of Private and Public Production: A Survey of the Evidence from Five Federal States*, ZEITSCHRIFT FUER NATIONALOKONOMIE [J. Econ.], Supp. 2, 127-56 (1982), where the authors conclude:

The literature seems to indicate that (a) private production is cheaper than production in publicly owned and managed firms, and (b) given sufficient competition between public and private producers (and no discriminative regulations and subsidies), the difference in unit costs turns out to be insignificant. From this we may conclude that it is not so much the difference in the transferability of ownership but the lack of competition which leads to the often observed less efficient production in public firms.

Id. at 136.

These studies assume provision at equal levels by public and private entities. My concern is less with efficient provision of a given level of service than with competition between public and private about the level of service provided.

26. See MUELLER, *supra* note 19, at 393. It might be ideal, from the perspective of sorting for service provision, if potential residents could signal their preferences in advance of moving to jurisdictions or if jurisdictions could precommit to a level of service that would attract like-minded residents. We would then see a better fit of residents and services that would minimize the costs related to opting out. This is the intuition behind Boudreaux and Holcombe's view of residential associations as "contractual governments" that reduce transaction costs of bargaining for a set of public goods or for a set of procedural rules to determine which goods will be provided. See Donald J. Boudreaux & Randall G. Holcombe, *Government by Contract*, 17 PUB. FIN. Q. 264 (1989); Donald J. Boudreaux and Randall G. Holcombe, *Contractual Governments in Theory and Practice* (1996) (unpublished manuscript, on file with the author).

27. The primary target of the attack is often residential community associations. See, e.g., EVAN MCKENZIE, *PRIVATOPIA* (1994); Daniel A. Bell, *Residential Community Associations: Com-*

concerns. One concern is that certain characteristics of public provision are themselves valuable, presumably by embodying a procedure that is not reflected in privatized decisionmaking.²⁸ That criticism seems particularly telling where the private alternative is selected by those who are unable to achieve their preferences in the political market, rather than where private alternatives simply reflect wide variations of preferences above a generally accepted minimum. The other concern, which seems implicit in much of the criticism of opting out, but that I hope to make more explicit and to examine more closely, is that the practice imposes more tangible political costs on those who accept only the background level of service. The extent of these costs may depend on the motivations for opting out that I mentioned above. If, for instance, those who opt out do so because political markets do not provide their preferred level of service (either because they are outvoted or because the decisionmaking process has been captured), then opting out may reduce the chances of forming a coalition that would change the background level. On the other hand, if opting out is a response to variation in the demand for public goods, those with relatively low and relatively high demand may seek to keep governmental expenditures relatively low, in order to avoid subsidizing large numbers of individuals who favor different levels of service. In any of these cases, the competitive benefits created by the availability of private options must be balanced against the political costs that interfere with government provision at a level consistent with resident preferences.

If we believed that the level of public goods provision was determined by consideration of all relevant interests, then any concern that some residents were dissatisfied would simply be the inevitable result of democratic decisionmaking. In short, motivations for opting out would consistently fall within the first, relatively benign, condition set forth above, i.e., individuals would opt out because a majority of residents preferred a different level of service. My present concern, therefore, is with the ways in which the mix of public and private provision affects the composition of interests that are considered in decisionmaking about the level of provision for a public good. The fact that the goods at issue share some "public goods" characteristics suggests that they may be provided best when provided collectively.²⁹ But those same

munity or Disunity?, 5 RESPONSIVE COMMUNITY 25 (Fall 1995); David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995). A related attack may be directed at business improvement districts (BIDs). If these entities hire private security forces to remove "undesirables" from the area, those who are removed will migrate to less hostile areas, i.e., those that have not or cannot create BIDs, and these areas will have to bear a greater burden related to having a larger population of "undesirables."

28. See, e.g., Clayton P. Gillette, *Who Puts the Public in the Public Good?*, 71 MARQ. L. REV. 534, 548-50 (1988); Paul Starr, *The Case for Skepticism*, in PRIVATIZATION AND ITS ALTERNATIVES 25 (William T. Gormley, Jr. ed., 1991).

29. I am not suggesting that goods with "public" characteristics cannot be supplied by the market. Indeed, there is much reason to suggest that private providers will produce public goods. See, e.g., DE JASAY, *supra* note 11. But private provision means that the amount of the good provided will correspond to the interests of the private provider, which may deviate from the interests of the public. Of course, as the next sentences of the text indicate, public providers may also supply goods in amounts that deviate from the interests of the public. My modest claim at this point is that in at least some cases, the latter deviation will be smaller than the former.

characteristics and the susceptibility to collective provision suggest that the good or service will be available only when a political coalition forms to signal public officials of the preferred service level, since traditional problems of collective action deter the statement of individual preferences for public goods. Political coalitions, however, notoriously *misrepresent* the public's interest, in large part because joining or forming a coalition is itself a public good.³⁰ The consequence is that if those who opt out would otherwise join competing coalitions that are more representative of the collective will, the social costs of opting out may be considerable. In that case, those who disfavor voluntary arrangements would not simply be acting out of envy; rather, now they would realistically fear that those voluntary arrangements actually conflict with the provision of services to those who remain.

There will, however, be situations in which opting out imposes no or negligible costs on those who accept the background level of service. Thus, wholesale condemnation or endorsement of opting out is inappropriate. My concern here is to identify those characteristics of goods that would tend to increase or decrease either the political costs or the competitive benefits of opting out so that, with respect to any particular good or service, we could determine more readily the desirability of opting out. Even if I were successful at completing a typology of factors that tended towards increased political costs or competitive benefits, I am not confident that it would provide a solution to the issue of opting out. As I discuss later in this article, one of the concerns about opting out is that reducing homogeneity among services inherently reduces the sense of community among residents of a jurisdiction. I am less convinced of the force of this claim than some, but I credit it sufficiently to conclude that weighing political costs and competitive benefits cannot be looked at in isolation in determining the propriety of opting out.

Most of my examples focus on the area with which I am most familiar, the provision of services by local governments. Nevertheless, the principles that I suggest do or ought to inform the debate about private contracting around public provision should remain the same regardless of the level of government serving as the background provider. But the focus on local government does pose one anomaly. One of the features that makes decentralized government most attractive is its capacity to offer different packages of goods and services and thus to appeal to the various preferences of different actors who can, with relative ease, migrate to jurisdictions that offer the package that is most attractive. Opting out plays very much the same role, although the mechanism for registering preferences is now through contracting with private providers rather than through physical exit to another locality. Thus, to the extent that we believe that opting out generates undesirable political costs, we implicitly question the desirability of decentralization generally.³¹ Nevertheless, there may be important distinctions between opting out contractually and through physical exit. For instance, if our ultimate objective is the

30. See CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 50-54 (1994).

31. For a critique of unfettered decentralization, see Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253 (1993).

maintenance of community, we may be less concerned about opting out through physical exit to another community, notwithstanding the disruptive effect that physical movement has on community continuity. When a resident moves, the loss from membership in one community is offset by the gain in membership to another. Opting out through contract while remaining a physical resident of the community does not necessarily produce the same offsetting benefit. Yet to the extent that any decentralized delivery of services produces other effects that I discuss herein, we may need to rethink the priority that much of local government law scholarship gives to the value of smaller governmental units.

A final introductory point relates to the nature of the public goods themselves. Governments provide an array of goods and services that range from the essential to the convenient. Our reaction to opting out may reflect the relative importance that we attribute to the service at issue, especially where we face substantial uncertainty in trying to quantify or balance the competitive benefits and political costs of opting out. In the face of such uncertainty, we may be more willing, for example, to risk excess political costs in the provision of a municipal golf course than in the provision of public education. Again, a typology of factors that tends towards increasing political costs or competitive benefits, standing alone, seems inadequate to the ultimate task of determining our reactions to opting out with respect to any particular service. Nevertheless, I believe that trying to isolate factors that might be used in any such typology will significantly advance our thinking about the issue and help us understand our different reactions to individual pursuit of preferences in different contexts.

II. GOVERNMENT PROVISION AS A DEFAULT

A. *Majoritarian Defaults and Their Implications*

There would be little reason for concern about opting out if we believed that government generally delivered service levels consistent with the preferences of the majority of its constituents. If that were the case, then those who opt out are presumably idiosyncratic. Allowing opting out under these circumstances would appear, at least initially, to evince neither capture of the decisionmaking process nor the imposition of substantial political costs on those who accept the background level. Instead, opting out would only represent the inevitable dissatisfaction with government provision that some would feel, given that governmental decisions are made in gross rather than through highly tailored transactions with individual constituents.

Redistributional concerns aside, government appropriately intervenes in market transactions to overcome obstacles that inhibit consumers from signaling their preferences or that inhibit potential providers from meeting the signaled demand. Governmental intervention to correct these market failures typically does not take the form of individually dickered contracts. Instead, general purpose governments³² provide a package of goods and services to all

32. Special purpose governments, such as authorities and special districts may be even closer

constituents and exact payments in the form of taxes that are charged to individuals regardless of whether they utilize the proffered goods and services. These same governments offer other services to all constituents, whether requested or not, but impose charges or user fees only for the service utilized by or made available to the payor.³³ Whether the package offered is sufficiently consistent with constituent needs is ideally determined by markets that trade in votes rather than in dollars. Initial governmental involvement in these activities, however, seeks the same objective as market transactions—to provide individuals the goods and services they desire at prices that reflect their cost.

Once we recognize that government cannot perfectly replicate the results of private markets, permitting those who could attain greater satisfaction through individualized transactions seems plausible. This is not to say that market transactions perfectly meet all private wants. Transactions in private markets are costly to construct. Suppliers and purchasers must seek each other out and bargain over prices and risks. Reducing these costs is typically seen as a benefit, even if the result is to constrain choice in individual transactions. Thus, private markets offer ready-made goods designed to cater to the desires of a substantial number of, but not all, potential purchasers. Those whose preferences are not a precise “fit” with the off-the-rack selection would prefer the slight misfit to incurring the costs of more individually tailored bargains. Thus, clothing comes in predetermined sizes even though there are people who are “somewhere between” a size 38 and a size 39. New automobiles come with a pre-set array of features, or “standard options” that some buyers would prefer not to purchase. Restaurants offer entrees accompanied by a previously established set of side dishes. In each of these cases, it is possible for those who desire a precise fit to bargain away from the off-the-rack selection. Clothes can be custom made, automobile options can be ordered, restaurants may substitute rice for potatoes on request. The party seeking the change, however, must bargain for it, and frequently must incur additional costs involved in meeting the request.³⁴ In each case, then, the pre-determined selection constitutes a default away from which the parties to the particular transaction can contract. Each of these defaults is presumably set to appeal to a broad range of potential consumers (hopefully a substantial majority), thus minimizing the costs that would attach to highly stylized transactions.

to market transactions in that they provide only a single service, traditionally supported by user fees rather than taxes. Government involvement in such activities may offer fewer advantages over market transactions. See CLAYTON P. GILLETTE, PUBLIC AUTHORITIES AND PRIVATE FIRMS AS PROVIDERS OF PUBLIC GOODS, REASON FOUNDATION POLICY STUDY NO. 180 (1994). Nevertheless, it is conceivable that governmental involvement in such activities effectively reduces transaction costs (by providing a mechanism for collective production and payment for goods that would otherwise require substantial organization among diffuse individuals, such as a toll bridge), internalizes externalities, or solves the collective action problem that interferes with the supply of goods that are nonexclusive and nonrival.

33. Some non-tax governmental exactions may be imposed on parties who do not or cannot directly utilize the underlying service, on the theory that the benefit made available by the government increases the value of the constituent's property and thus justifies governmental charges in the form of cost recovery. See *supra* note 12.

34. Even then, we have all had the experience of finding a favorite product discontinued, presumably because an inadequate number of others shared our tastes.

To the extent that legal rules offer a means of allocating transactional risks, analogous to the allocation of characteristics that are the focus of mass marketed products, the same principles suggest that these rules should also align with majoritarian preferences. As in product markets, legal default rules seek to reduce transaction costs by conferring on parties allocations for which they would presumably bargain if left to their own devices.³⁵ While these defaults may not fit perfectly with personal preferences, the savings in negotiations warrants acceptance of less than ideal terms for all parties. Thus, Article 2 of the Uniform Commercial Code provides background rules around which the parties are free to negotiate, but that apply in the absence of any contrary agreement.³⁶ Default rules thus differ from mandatory rules, which parties may not adjust even if they desire. In order to achieve this reduction in transaction costs, default rules must reflect the terms for which a majority (or at least a plurality) of parties would bargain. Failure to generate majoritarian rules means that there is some alternative rule (the one that would satisfy majority preferences) that would reduce transaction costs even more than the one reflected in the default.

Recall that—at least for tax-supported services such as police protection, road paving, or admission to most public parks—governments offer a background level of service to all constituents without any additional bargain. It is tempting to consider this level of service as equivalent to a default rule under contract law. Once a community decides to offer a service, residents are entitled to a certain level of that service simply by virtue of their membership in that community. The background level of service thus may be thought to serve the same function as preordained product characteristics or legal rules that apply to parties in a particular relationship who do not explicitly bargain for a contrary legal outcome. Assuming, as suggested above, that individuals gravitate toward jurisdictions that hold themselves out as offering a package of goods and services, the package offered by any jurisdiction should be consistent with the preferences of a significant percentage of that jurisdiction.

Whether or not such a conclusion is appropriate depends on whether those who gravitate to a particular community do tend to have similar, if not identical interests; that is, if we believe that the Tiebout assumptions for the provisions of local public goods work well enough to define in general terms the sorting of residents among jurisdictions. The assumptions of that model suggest that we should see substantial homogeneity in the preferences of residents of any decentralized government.³⁷ The smaller the jurisdiction, the more

35. See, e.g., Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554, 588 (1977); Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 971 (1983). Alternative explanations include forcing persons with superior information to reveal that information to contracting parties. See Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). For a compendium and critique of arguments about non-majoritarian default rules, see Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S. CAL. INTERDISCIPLINARY L.J. 389 (1993).

36. See, e.g., U.C.C. § 2-509(1)(a) (1990) (assigning risk of shipment loss).

37. Homogeneity, however, is not the only way of producing an equilibrium in which every-

homogeneous the population of the jurisdiction would tend to be, and the greater similarity we would expect to see in the preferences of residents. Given the variety of services and service levels that any government might provide, individuals with mobility will not want to gravitate to jurisdictions in which they must pay for services that they neither enjoy nor desire. Thus, we would expect that mobile individuals will tend to migrate to jurisdictions that provide preferred services.³⁸ The result is that jurisdictions will attract individuals who are relatively like-minded, at least with respect to governmental services. In addition, we would then expect to see little in the way of opting out because residents would presumptively be satisfied with the default level of service.

Application of the contractual default model to governmental services implies that, if the level of government provision were set to satisfy majoritarian wants, no negative implications should be drawn from the fact that some individuals within the jurisdiction opt for a different level of service. If the analogy to default rules holds, parties who bargain out would be characterized solely by the idiosyncratic nature of their preferences, not by any selfishness or the desire to impose costs on those who accept the background level. Majoritarian rules in contract law or in designing mass-marketed products do not depend on any deontological underpinning for their currency.³⁹ Bargaining out of default rules betokens (tautologically) only that those are the rules selected by a majority, and the person seeking an alternative is not part of that majority.⁴⁰ Far from reflecting some moral norm, default rules may be irrational (such as where they are based on commonly shared biases or low-probability events)⁴¹ or antisocial insofar as they impose costs on non-parties, notwithstanding that they increase the wealth of the parties to the bargain (imagine, for instance, a price-fixing default rule). Nor would opting out imply the disruption of potential coalitions for change, since any such coalitions would either be unnecessary (since the level of provision would be consistent

one prefers his or her community to all others. Susan Rose-Ackerman suggests how heterogeneous populations could also produce an inefficient, but stable, equilibrium. For instance, in a universe of two towns and ten people, five of whom are high demanders of public goods and five of whom are low demanders, equilibrium could be reached either by sorting the high demanders and low demanders in separate towns or by having two towns of five high and five low demanders, where each town produces identical levels of public services. Any shift by a resident of one town to the other town would make the resident better off (by tipping the voting balance) only at the cost of making members of the new minority worse off. Susan Rose-Ackerman, *Beyond Tiebout: Modeling the Political Economy of Local Government*, in LOCAL PROVISION OF PUBLIC SERVICES: THE TIEBOUT MODEL AFTER TWENTY-FIVE YEARS 55, 58-59 (George R. Zodrow ed., 1983).

38. Endowment effects suggest that even among mobile residents, many will form preferences based on what is available to them where they currently reside. Thus, they will not gravitate to a jurisdiction that would be more appealing if they had no prior preferences.

39. For a view that default rules ought to be rooted in concepts of fairness, see Steven J. Burton, *Default Principles, Legitimacy, and the Authority of a Contract*, 3 S. CAL. INTERDISCIPLINARY L.J. 115 (1993). For a response, see Clayton P. Gillette, *Cooperation and Convention in Contractual Defaults*, 3 S. CAL. INTERDISCIPLINARY L.J. 167 (1993).

40. This may be weaker than is necessary. Default rules may also betoken efficiency if the default arises out of repeated negotiations between similarly situated parties and the negotiations tend to generate the same allocation of risks that is reflected in the rule.

41. See Clayton P. Gillette, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, 19 J. LEGAL STUD. 535 (1990).

with majoritarian preferences) or superfluous (since those dissatisfied with the level of service provision could migrate to more hospitable jurisdictions).

Allowing persons to opt out of public provision, therefore, might be no more momentous than allowing opting out of default rules in contract. Within a jurisdiction, those who seek a level of service different from the background level provided by government may, but again, must bargain for a different level of service. Indeed, typically, that bargain must take place with a third party. Governments rarely offer a menu of service levels from which residents can select. To the contrary, once government provides a service to any constituent, the legal doctrine of equal service provision presumptively obligates the government to offer the same level of service to all residents.⁴² Provision of differential levels of service within the same jurisdiction is typically seen as a basis for complaint. As a matter of legal doctrine, the delivery of a higher level of service to the wealthy side of town rather than to the poor side of town is considered an inequity to be remedied, often by judicial intervention, rather than an indication of disparate preferences.⁴³ It is only the infrequent case in which governments offer residents a choice among service levels. A student in public school, for example, may decide whether to take courses oriented toward college or vocational training. The set of cases expands if we mean by different levels of "the same" service any governmental function in which residents can choose how much to consume. Then, virtually any good financed through user fees or service charges will qualify as differentially provided. A municipal gas company will sell as much gas as any user wants, so that one user may obtain 100 cubic feet while another purchases 200 cubic feet (and pays twice as much). If the concern is qualitative rather than quantitative, however, there does not appear to be any difference in demand between the two users in that (assuming ability to pay) each has equal access to the service.

Some financing mechanisms employed by government explicitly make possible the satisfaction of dissimilar preferences among residents. Special assessments or special benefit taxes, for instance, allow those who seek a level of service different from what is otherwise offered to obtain that objective, as long as they are willing to bear the relevant costs. Thus, street paving may be generally unavailable from government, except on petition of a critical mass of abutters who petition the city for the service and indicate their willingness to pay for it.⁴⁴ Distributional effects would follow where some, but not all,

42. *Veach v. City of Phoenix*, 427 P.2d 335, 336 (Ariz. 1967).

43. *See, e.g.*, Clayton P. Gillette, *Equality and Variety in the Delivery of Municipal Services*, 100 HARV. L. REV. 946 (1987). For cases involving judicial intervention to address allegations of unequal service provision, see *Mlikotin v. City of Los Angeles*, 643 F.2d 652 (9th Cir. 1981); *Reid Dev. Corp. v. Parsippany-Troy Hills Township*, 89 A.2d 667 (N.J. 1952). Such cases are also brought on the basis of claims of racial, not wealth, discrimination. *See Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986). For an examination of unequal service provision within cities, see Carl S. Shoup, *Rules for Distributing a Free Government Service Among Areas of a City*, 42 NAT'L TAX J. 103 (1989).

44. *See, e.g.*, KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* (1985). Jackson indicates that certain services were made available differentially within the same municipality:

constituents lacked the resources to contract for their desired level of service. But, since those effects will exist whether the source of inequality is a public or private provider, their presence does not help us to determine the propriety of opting out.⁴⁵

We see additional examples of menus at the federal level.⁴⁶ Postal services offer one rate for first class, another for overnight mail. An overnight visitor to a national park may choose to sleep in a campground at one rate, and at a governmentally operated (or franchised) hotel for another. But aside from these rare cases of menus, constituents do not select among service levels from governmental providers. One does not, for instance, receive a default level of police services simply by virtue of paying local property taxes but then receive an option to obtain an additional level of police protection on payment of an additional sum. Thus, one who desires more of a service than is offered generally must find a private provider. One who seeks more security than is offered to citizens generally typically hires a private security guard or resides behind private walls. One who seeks more religious training in education typically hires private tutors or sends a child to parochial school rather than pay additional fees to the public school system.

B. *Background Service Levels as Majoritarian Defaults*

My assumption to this point has been that the background level of service can be considered as a majoritarian default rule, so that individual efforts to opt out are idiosyncratic and confer negligible harm on others. If this assumption is untrue, if the background level of service does not reflect majority preferences within the jurisdiction, there may be substantial implications for the propriety of allowing individuals to opt out of public provision. Those implications, however, simultaneously cut in different directions. Opting out might be considered more appropriate because it signals officials that they have misread the popular will and creates opportunities for political entrepreneurs who are more attentive to the majority's preferences. Thus, opting out would create competition that should generate efficiency gains. Opting out, however, may be a second-best solution to the problem of official failure to satisfy majority preferences. Direct political appeals by those who would otherwise opt out, e.g., through the formation of political coalitions to alter the level of provision, might be preferable to the relatively haphazard process of

Before the Civil War, streets were paved or widened when owners of a certain percentage (usually three-fourths) of the property facing the right-of-way petitioned the city to do so. To finance such improvements, property-owners "abutting and directly affected" paid special assessments. The municipal government played a limited role: the basic decisions as to when and how to pave were made by private individuals.

Id. at 131.

45. Interestingly, special assessment funding appears to have declined as a basis for municipal improvements. See Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America*, 12 J. LEGAL STUD. 201 (1983).

46. We would expect to see a more centralized level of government offering more menus, since its constituency should have a more varied set of preferences than a decentralized government. Of course, these varied preferences might be handled by allowing constituents to opt out of the service level set by the centralized government.

signaling dissatisfaction and hoping that a political entrepreneur receives and acts on the signal. Thus, opting out may be less appropriate if it reduces the impact of individuals who are willing to lobby for the level of services that the majority prefers.

In light of these effects, it is necessary to consider whether background levels can be treated as simple default rules that imply majoritarian preferences. Given the assumptions of the Tiebout model, it would seem paradoxical for the background level of service offered by a government not to reflect the preferences of a majority of constituents.⁴⁷ I have referred above to one plausible reason why this result may occur. Given the public goods nature of the services with which I am concerned, and the public goods nature of the lobbying efforts that will be employed to indicate levels of services to political officials, one would expect that dominant interest groups would successfully seek idiosyncratic levels of their preferred services.

There exists, however, a more robust explanation of why the default rule model does not easily fit the delivery of municipal services. That explanation concerns the inability to provide a background level to any stable majority view. This inability stems from two sources. First, note that contractual default rules allocate risks between parties in a manner that is likely to be binary in nature. Risk of loss is typically allocated to buyer or to seller; battles of forms will either generate binding contracts or they will not. Loss sharing rules are exceptional. One consequence of this binary choice is that a majority of parties is likely to prefer one allocation to the other. Any given government service, however, can typically be provided on a continuum, rather than in a binary manner. Even where the level of service provided by government corresponds to the preferences of the median voter,⁴⁸ there is no reason to believe that the median voter is likely to represent the views of a majority, or even those of a substantial plurality. Instead, the median voter reflects only that point that can attract more support than any other position in a winner-take-all contest. The fact that others will "go along" with a median position in order to avoid shifts to even more disfavored positions, however, does not entail that the median voter represents the first choice of a majority of the relevant constituents. Nevertheless, taken in combination with the Tiebout theory, which suggests that local governments will attract a population with homogeneous preferences, a proposition for which there is at least some empirical support,⁴⁹ there is a

47. For survey evidence that individuals choose places of residence for reasons other than the available services of this proposition, inconsistent with the Tiebout model, see David P. Varady, *Determinants of Residential Mobility Decisions*, APAJ, June 1983, at 184.

48. The premise of the median voter principle is simply an observation that a decisive coalition in a one-person one-vote democracy consists of the median voter plus all voters either to the left or to the right of that voter. For example, the conservative must start from the right and reach far enough to the left to bring in the median voter. The liberal starts from the left and must reach far enough to the right to bring in the same voter. The election then becomes a fight for that median voter.

Herbert Hovenkamp, *Regulation History as Politics or Markets*, 12 YALE J. ON REG. 549, 554 (1995). For an assumption that local government service provision shifts with the identity of the median voter, see Susan Rose-Ackerman, *Market Models of Local Government: Exit, Voting, and the Market*, 6 J. URB. ECON. 319, 329 (1979)

49. See Edward M. Gramlich & Daniel L. Rubinfeld, *Micro Estimates of Public Spending*

greater possibility that the median voter will represent something close to a majority view.

The second impediment to providing services consistent with the preferences of a stable majority arises from the fact that public budgets tend to be multidimensional, so that different pieces of the budget pie can be increased or decreased while retaining the same total expenditure. Reference to the preferences of the median voter might make sense if the level of each governmental service were decided independently. Under that condition, residents are likely to have single-peaked preferences with respect to individual goods and services. Voters in general-purpose governments,⁵⁰ however, register their preferences on a package of public goods and services simultaneously since they vote for officials, not for individual goods and services.⁵¹ A voter in a local election who is satisfied with the locality's level of education, garbage collection, and snow removal might vote to re-elect local officials, even if the voter was dissatisfied with the level of local cable television regulation. The fact that services must be voted on as a package means that officials will be unable to disaggregate from voting results those service levels that satisfy a majority of voters from those that do not. Indeed, the same process reduces the chance that any package will appeal to a majority, since small tradeoffs among different services could shift preferences or produce cycling among packages. For instance, a majority formed by advocacy of one level of spending on a package of police services, welfare services, and educational services could be displaced by another majority that traded more welfare services for fewer educational services. As a result, there is unlikely to be a stable majority that prefers any particular package, even if there exist majorities with respect to individual services.⁵²

Of course, even where is simultaneous voting on multidimensional issues, there are substitutes for voting that allow officials to hear complaints or praise about the level of provision with respect to particular services. Direct complaint, or "voice" in the vernacular,⁵³ provides an alternative opportunity for voters to inform political leaders that their decisions deviate from constituent preferences. We rely on these political substitutes for voting when we speak of political coalitions that can make their preferences known. But there is no reason to believe that these alternatives will reflect majoritarian or widespread interests. Indeed, just the opposite is true. Given the characteristics of the public goods that government is providing, those in the majority are most

Demand Functions and Tests of the Tiebout and Median-Voter Hypotheses, 90 J. POL. ECON. 536 (1982). Gramlich and Rubinfeld find support for the median-voter hypothesis in the substantial number of survey respondents who want no change in the overall level of local public spending. While these results are consistent with the median-voter hypothesis, they do not demonstrate that voters want no change in spending for any individual service. In addition, endowment effects may skew the responses.

50. Single-purpose governments, such as authorities and special districts, may be more appropriate for the median-voter analysis.

51. See James D. Gwartney & Richard E. Wagner, *Public Choice and the Conduct of Representative Government*, in JAMES D. GWARTNEY & RICHARD E. WAGNER, *PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS* 10 (1988).

52. See DENNIS MUELLER, *CONSTITUTIONAL DEMOCRACY* 199-21 (1996).

53. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

likely to be able to free ride on the efforts of others. Thus, one would anticipate that complaints and praise would issue from those who suffered or enjoyed the most salient consequences from the level of provision and who were least able to rely on others to represent their interests. For instance, debates concerning levels of educational funding may be dominated by teacher groups and administrators who want to maximize budgets. As long as the level of service demanded by those with idiosyncratic preferences is not so costly as to disrupt the entire package on which all constituents vote, officials have incentives to satisfy the preferences of these idiosyncratic interests. Doing so gains officials the support of those with intense interests, without alienating the support of those still relatively satisfied with the overall package of goods and services. The necessary result is that where the level of each service within the package is decided simultaneously, the level of any given service is even less likely to reflect the interests of the median voter or of the majority.

These consequences are likely to be exacerbated in some ways, but diminished in others, when we move from decentralized to more centralized governments. Madisonian theory suggests that we are more likely to see competition among interest groups at centralized levels, where entrepreneurial leaders are more likely to arise and the chances of finding enough interested parties to create an effective coalition is enhanced. Decentralized decisionmaking, on the contrary, is more likely to be dominated by a monopolistic interest group. Thus, we might expect decisionmaking at the centralized level on any one issue would be more consistent with the views of the median voter, though still not consistent with the desires of a majority. At the same time, the variance of interests within the nation is likely to be greater than the variance of interests within any given community in the nation, again assuming that the Tiebout model accurately predicts relative homogeneity within localities. Thus, where discrete interest groups do not face competition at the centralized level, we might expect that the level of public goods that are centrally provided will be less likely to reflect the interests of the median voter. National defense, for instance, is traditionally viewed as a public good whose supply is properly determined at a centralized level. Nevertheless, Boston residents would want more expenditures on naval defense than Omaha residents. But if Omaha residents do not see naval expenditures as a direct tradeoff for other expenditures they would prefer, e.g., agricultural subsidies, they may not coalesce to defeat what, from a national perspective, is an overexpenditure on naval defense.

The result is that we are unlikely to see expenditures that reflect the preferences of the median voter on issues where there are substantial variations in preferences for the service and in intensity for different quantities (or qualities) of the service. Instead, we would expect the default level of service to reflect the preferences of a discrete, yet dominant minority. Then the analogy between opting out of default rules in contract and opting out of public provision dissolves. Whereas in contract law opting out is the signal of idiosyncratic behavior, opting out with respect to publicly provided services may actually be the preference of a substantial majority.

C. The Use and Costs of Opting Out as a Signal

What should we infer about the propriety of opting out if we conclude that the background level of service does not reflect majoritarian preferences? First, the lack of fit between the background level of service and majoritarian preferences suggests that opting out is even more appropriate in these circumstances, because—as I discuss below—opting out cannot be opposed on the argument that doing so removes one from the core of the community. Second, it plausibly emits a more highly tailored signal than the opaque signals of electoral markets, clouded by multidimensional choices, that there is constituent dissatisfaction with the background level of service. Thus, the objection to the analogy between contract default rules and public service levels may turn out not to be an objection to opting out, but instead a basis of support for the practice.

If the above is true, then it might tell an optimistic story about opting out, since it provides reasons to believe that opting out plays a productive role, providing competition that obligates the government provider to be attentive to the demands of its constituents, without imposing significant political costs in the form of diluting coalitions or commonalities. Indeed, where opting out is available, the signal to officials may be effective even where those who exercise the option constitute a small minority, since the resulting signal would be that the current level of provision is acceptable to most residents.

Nevertheless, the signal emitted by opting out itself contains some opaqueness. Opting out may have limited reliability as a signal because the decision to select a level of service other than the background level may reflect dissatisfaction with one feature of the service, and that feature may vary for different parties. Those who opt for private schools rather than public may not be concerned that the budget for education is inadequate. Rather, one group may believe that too much of it is spent on programs for the disadvantaged or on teachers' salaries and not enough on football teams or on programs for the gifted. Others who opt out of the same system may do so because insufficient time is dedicated to religious education or to traditional reading programs. Similarly, residents may be satisfied with the level of spending on police services but believe that not enough of the police budget is spent on foot patrols. The difficulty is that officials cannot easily distill the reasons why different people opt out and thus have little basis for translating the act of opting out into a signal of a specific source of dissatisfaction. Whether we want to employ this signaling device, therefore, may depend on whether we believe that there exist offsetting costs and whether we can define discrete instances when those costs would be outweighed by the benefits of opting out.

These limitations on the value of opting out must be considered when weighing the benefits of the practice against the costs that private options may impose. If the net result of opting out is to threaten the coalition for shifts in service levels, then we might want to encourage alternative means of registering complaint that retain the political participation of potential emigrants. If, for instance, those likely to opt out would otherwise be most likely to monitor

public officials or to become political entrepreneurs for the preferred service level, we might want them to remain customers of the public provider. At least, that would be the case if we thought that, once they opt out, these individuals will have a less intense interest in monitoring the conduct of officials. That seems to be a reasonable assumption. Monitoring is a costly activity, so that we would imagine the task would be undertaken by those who had the most to lose should public officials misbehave (i.e., behave in ways that are inconsistent with the interests of the monitors). To the extent that they reflect the preferences of others, use of voice options by this group means that they would presumptively "raise all boats" when increasing services for themselves. But once potential monitors are no longer receiving publicly available benefits, they have little incentive to ensure that the background level is consistent with public preferences.

The political costs of opting out are more likely to materialize if dissatisfied constituents have independent reasons to favor exit over voice. Where the background level of service is determined by capture of the local decision-making process rather than majority preferences (or even median voters), effective exercise of voice requires creation of countervailing interest groups. This effort, however, necessarily suffers from traditional collective action problems that reduce the likelihood that any complainer will be successful. Indeed, the very presence of an exit option deters membership in potential coalitions because the cooperation of others cannot be assured. Thus, opting out may be a less costly option than voice. Even if exit is more costly than voice (because it requires contracting with a private party for a privatized substitute), a dissatisfied resident may choose the former because exit also increases the certainty of obtaining the desired good. The existence of the alternative market eliminates the need to rely on the participation of others to obtain the desired level of service, so that the expected value of investing in costly exit may be higher than the expected value of investing in voice.⁵⁴

If we want to induce those capable of exiting to remain within or to join a coalition for changing the background level, we may pursue either (or a combination) of two strategies. First, we could raise the costs of exit, up to the point of prohibition. Assume, for instance, that we believe that public transportation is inadequate, but that those who can afford cars will not lobby for better mass transit (even though better mass transit might reduce congestion on the roads), and without their participation we would not expect efforts for better public transportation to be successful. If private cars were banned in the central city, however, we would anticipate that former drivers would join the lobbying effort for better public transportation.

We rarely explicitly employ this strategy of prohibiting opting out. Even where we mandate participation in a collective enterprise, the obligation typically requires a minimum contribution, but does not preclude additional

54. The increased certainty that exit provides for achieving a desired good is discussed in HIRSCHMAN, *supra* note 53, at 37-39; see also Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 137 (1996).

contributions, even though supplements return more personal than collective benefit. I may augment my Social Security payments with contributions to retirement plans, I may volunteer for more military service than is required, or I may purchase more automobile insurance than the statutory requirement.

Opting out, however, can be deterred without being prohibited. When trying to decide which level of government should provide a good or service, it is commonplace to note that centralized provision makes it more difficult to avoid making contributions by physical exit. Thus, redistributive services are perhaps best provided by more centralized governments, so that those from whom wealth is redistributed cannot readily emigrate to less redistributive jurisdictions.⁵⁵ This sentiment, for instance, may underlie much of the recent school finance litigation that seeks state funding rather than local funding for education. One may imagine an analogue in raising the costs to opting out privately. If we believe that there is independent value in avoiding opting out, then it may be possible to restructure the provision of services in a manner that takes that value into account. Centralizing the provision of services, for instance, could conceivably raise barriers to entry for privatized suppliers who were unable to compete on a centralized scale, although they might easily offer decentralized competition in smaller jurisdictions. Alternatively, centralized jurisdictions might regulate private entities or permit local jurisdictions to do so in a manner that provided governmental monopolies free from antitrust liability.⁵⁶ The creation of such a monopoly would have the desired effect of making it more difficult for dissatisfied constituents to select a provider who offers a preferred level of service. Continuing the vocabulary from an earlier part of this article, we can look at the increased exit costs as an effective means of transforming the background service level from a default rule into an immutable rule. But lest we conclude that immutable rules are an unequivocal benefit, recall these same constraints will necessarily impose the costs of noncompetitiveness and inability of some residents to attain their preferences.

Alternatively, we could lower the costs of remaining within the coalition by offering informal "bribes" to those most likely to opt out. As a doctrinal matter, the equal service provision doctrine makes explicit bribes difficult. But implicit bribes may exist in the form of establishing priorities for serving individuals who have substantial influence over governmentally provided goods and services consistent with the interests of those who might otherwise exit. This influence may exist either with respect to political officials or with respect to like-minded residents who would not want to lose the support of those who might otherwise opt out. In either case, those with the capacity to opt out will be able to exercise disproportionate influence even though they

55. See, e.g., Helen F. Ladd & Fred C. Doolittle, *Which Level of Government Should Assist the Poor?*, 35 NAT'L TAX J. 323 (1982).

56. On the scope of municipal antitrust immunity, see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); Einer R. Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 672-76 (1991); Glen O. Robinson, *The Sherman Act as a Home Rule Charter: Community Communications Co. v. City of Boulder*, 2 SUP. CT. ECON. REV. 131 (1983).

have little capacity to organize or to generate collective political action.⁵⁷ Officials have incentives to provide desired services to these individuals in order to avoid their exit, a result that would reduce the tax base and require either additional taxation or reduction of services, either of which would continue the spiral of exit by shifting additional mobile residents to the margin between living within that jurisdiction and their next preferred residence.⁵⁸

Our reaction to opting out, therefore, may depend on whether we think that public officials tend to be influenced more by the preferences of the electoral majority or by those of a rent-paying minority. Perhaps perversely, the more we think that public officials respond to the interests of their constituents, the more confident we should be in allowing those with other preferences to opt for private provision. Where public officials are attentive to the interests of their constituents, there is less need for retaining political coalitions that might contest the status quo. Hence, in those situations, the costs of opting out are less likely to outweigh the competitive benefits and the increased utility of satisfying individual preferences. But the discussion to this point also suggests that certain characteristics of the public provider may affect the propriety of opting out. Political costs will tend to be less in small jurisdictions, *if* those jurisdictions contain constituents with relatively homogeneous tastes for public goods and services, that is, if the Tiebout assumptions work fairly well. In such a case, the range of constituent preferences is likely to be smaller, as is the possibility that the level of service provided deviates substantially from the level widely preferred. If that is the case, then it is likely that those individuals who do opt out have preferences that deviate only marginally from the background level, and the political costs related to opting out should therefore be small. If, however, the small jurisdiction is not composed of residents with homogeneous preferences, the inference from opting out is more complicated. It may reveal the traditional Madisonian concern about factions dominating in small areas. Alternatively, substantial opting out may reveal that residents are in agreement that the government should provide a level of service that reflects the lowest common denominator preferred by all residents, while additional increments are purchased privately.

Homogeneity, moreover, does not unambiguously support liberal opting out. Public goods that have significant distributional effects may require more stringent measures to keep coalitions together, and allowing individuals to satisfy more tailored and homogeneous preferences may interfere with the ability to provide public goods to others. In these situations, the political costs of allowing opting out may be significant, notwithstanding that constraints on exit eliminate the benefits of competition. In the next Section, therefore, I concentrate on the characteristics of specific goods and services to determine the factors that favor and disfavor opting out of the background level of service.

57. See Rose-Ackerman, *supra* note 48, at 77.

58. See David F. Bradford & Harry H. Kelejian, *An Econometric Model of the Flight to the Suburbs*, 81 J. POL. ECON. 566 (1973).

III. OPTING OUT AND EXTERNAL EFFECTS

A. *The Imposition of Substantive Costs*

To this point, I have been alluding to the possibility that opting out could impose costs on those who continue to accept the background level of a service. I have suggested that these costs frequently take a political form in that opting out alters the mix of opinions that are heard by political officials who make decisions about the level of service to provide to constituents. In this Section, I identify different types of costs and the conditions under which they would arise. The result is to afford a more complex, but more thorough means of determining whether allowing or discouraging opting out is a socially desirable strategy in a particular situation.

There are two senses in which the decision by some members of the community to opt out of the background level of service provision may adversely affect others in the collective. First, the level of service selected by those who opt out may impose explicit and direct costs on those who remain and whose interests are not considered in the decision to opt out. Think, for instance, of a university that uses its own disciplinary system for sanctioning students rather than turning students who violate public laws over to local authorities for prosecution.⁵⁹ The punishment meted out by college officials in such circumstances is typically less than we would expect from public prosecution of the same offense. Indeed, given that college officials will not have the power of the state to deprive defendants of liberty or substantial property, it is axiomatic that private punishment will result in less severe sanctions.⁶⁰ The reasons for the decision to use in-house sanctions exclusively may be relatively benign. College officials may believe that publicity of the punishment within the college community means that the official sanction will be augmented by communal shaming that has a more serious effect on the malefactor than prosecution within the larger society.⁶¹ Or officials may be motivated by more malign motives, such as the desire to avoid adverse publicity for the institution (e.g., as a place where crimes occur or where there is rampant drug or alcohol use) or to protect members of an athletic team.⁶² Regardless of motive, however, the private decision to prosecute within the small community threatens to disserve the interests of the larger society. For instance, to the extent that the violator engages in recidivism that would have been forestalled by public prosecution and incarceration, and to the extent that recidivism takes place outside the college community, the private system may punish insufficiently. These effects are essentially the same as would occur in any system of private

59. See Nina Bernstein, *With Colleges Holding Court, Discretion Vies with Fairness*, N.Y. TIMES, May 5, 1996, at A1.

60. Of course, the college could both impose internal sanctions and turn the offender over for public prosecution. Public prosecution may be favored by alleged offenders insofar as it entitles them to procedural protections that may be unavailable privately.

61. On the efficacy of shaming as a punitive measure, see Daniel Kahan, *What Do Alternative Sanctions Mean?*, 61 U. CHI. L. REV. 563 (1996). It appears to be the case, however, that frequently those who bring the offense to light are the ones who suffer communal shame. See Bernstein, *supra* note 59.

62. See, e.g., Michael Farber, *Coach and Jury*, SPORTS ILLUSTRATED, Sept. 25, 1995, at 31.

justice, since such systems leave punishment decisions in the hands of those who typically have personal motivations that lead them to impose too little or too much punishment compared to the social ideal.⁶³ Similarly, a privatized security force hired by a business improvement district may deter crime in that district, but possibly only by shifting the location of misbehavior and thus increasing crime elsewhere.

The second sense in which opting out may impose costs on others, the imposition of political costs with which I am primarily concerned, is different in nature from these more substantive externalities. The political costs affect the procedures by which officials set the background level of a particular service. Thus, the ultimate decision in these cases continues to be made by representatives of constituents. The issue is whether opting out by some residents alters the decision made by those representatives.

B. *Opting Out of Political Participation*

There are several ways in which those who opt out may change the roles they play in public debate about the background level of service. I alluded above to the possibility that those who serve as superior monitors of official misbehavior might be less interested in fulfilling that function once they privately contract out of the background level of service. But the more serious claim is that those who opt out will not simply be passive about the service level for those who remain, but will react with animosity or selfishness to restrict the background level of service. The suspicion is that if those who seek a higher level of service must pay for it, they will fail to support the background level of which they do not take advantage.

It is worthwhile to consider these claims separately, as they raise significantly different issues. The first claim is addressed to the willingness of those who opt out to exclude themselves from the affairs of the larger community. The claim is reminiscent of deTocqueville's assertion that democracies foster individualism, defined as "a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself."⁶⁴ Thus, detractors of residential associations claim that individuals who live within private groups are likely to suffer a diminished sense of civic responsibility.⁶⁵ But the claim

63. This is not to say that social mechanisms of justice consistently impose punishments that correspond to the social ideal. The incentives of litigants and their attorneys often cause what from a social perspective appears to be underinvestment or overinvestment in litigation. But failure to implement perfectly a system designed to reflect all social interests is different in kind from private enforcement mechanisms that are not designed in the first instance to reflect the interests of all those affected by criminal activity.

64. ALEXIS DETOCQUEVILLE, *DEMOCRACY IN AMERICA* 506 (J.P. Mayer ed., 1969).

65. See, e.g., MCKENZIE, *supra* note 27, at 141; Kennedy, *supra* note 27, at 777. But see ROBERT J. DILGER, *NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE* 134-35 (1992) (concluding that "the evidence concerning [residential associations'] impact on political participation is mixed," and that in some cases membership in such an association increases participation in local politics).

is somewhat ambiguous in its reach, and it has very different merit depending on how one interprets it.

The most general form of this claim implies that those who opt for privatized versions of public functions will withdraw from the public sphere generally. This form of the claim is the most problematic. Individuals who opt out of background levels of service of residential street paving or safety protection remain members of the larger polity for multiple other functions, including schools, foreign policy, and federal income tax levels. That those who live in gated communities thereby are less affected by and become less interested in crime rates in other parts of the locality (and if they work, shop, or socialize in those areas, even that assumption may be unjustified) does not entail that they ignore civic concerns over zoning, state and federal legislative elections, or ethnic cleansing in Bosnia. Indeed, the fact that members of residential associations share a community of interest suggests that they may become more involved in civic affairs, because their common interests facilitate solutions to collective action problems that would otherwise make efforts at civic action improvident.

There are, however, narrower forms of the claim that may be more telling. Detractors may be objecting that those who opt out are likely to form coalitions only to foster the narrow interests of the association's members rather than for the common good. One would, in fact, be concerned that once members of a privatized business improvement district had "taxed" themselves to repair sidewalks and promote their stores (thus creating an advantage over competitors) they would lobby against proposed tax expenditures by the locality to provide similar services to other commercial areas in the jurisdiction. Similarly, those who send their children to private school may oppose additional public school funding. Any such objection is very different from the claim that those who opt out will fail to exercise civic responsibility at all.

Opting out, however, does not necessarily generate conflict between those who opt out and those who select the background level of service, nor does it necessarily reflect conflict of an undesirable sort. Take first the latter point, the possibility that any conflict may actually be desirable. Certainly, if the choice of background rules is itself governed by dominant interests rather than by majoritarian concerns, those who choose to opt out cannot readily be described as excluding themselves from the community, since the background level of services does not reflect the choice of the community in the first place. Indeed, if we believe that public debate is already informed by entrenched interests, then the addition of another cohesive group may actually generate more publicly interested decisionmaking. Assume, for instance, that commercial developers are attempting to displace current zoning regulations to permit more commercial development and face little opposition from residents because of traditional obstacles to collective action. The increased capacity of "privatized" residents to use their neighborhood association as a competing interest group may actually increase the chances that anti-development voices will be heard in the process. Thus, the political implications of opting out may turn out to be political benefits rather than costs.

Moreover, whether those who opt out will oppose public expenditures on similar services depends on the relationship between the privately supplied level of service and the publicly supplied background level. In some cases, those who opt out of the background level of service purchase an additional increment of service from a private provider; in other cases, opting out entails complete displacement of the government provider. For instance, the members of a business improvement district who contribute to a fund for private security guards should still be willing to support a high level of police service, because they receive benefits from both public and private sources. Since these merchants must pay all the direct costs of the incremental service, they would presumably prefer that the basic service, supported by tax dollars, be optimal in order to reduce their additional cost. (Although, a district comprising stores that could afford private protection more readily than their competitors might oppose public financing in order to give themselves a competitive advantage by offering a safe shopping area.) I may believe that police services are adequate to provide my business with sufficient protection during daytime hours, so that I only have to hire private guards during evening hours; but I might object to reduction in police budgets because that would cause me to hire private guards during daytime hours as well. Similarly, those who send their children to public schools but who hire tutors to augment their children's education might become more concerned about the level of public education, since they would prefer to save the tutoring costs and not want to incur the still higher costs of private school. The fact that individuals seek higher levels of service in these cases, therefore, does not suggest that they will attempt to undermine or abandon political coalitions that seek to deliver socially optimal levels of the desired service.

In other situations, however, the higher level of service cannot be purchased in increments above the basic level. Opting out in these cases subsumes provision of the background level as well as the desired increment. Those who send their children to private schools in search of a more religious education than the locality provides, for instance, may be less willing to support public schools because their children receive all their formal education, not just a marginal amount, from private schools. In this situation those who opt out may not simply fail to support the level of the background service that is preferred by those who do not opt out, but may actively encourage governments to underinvest in impure public goods for which there are reasonable club or private substitutes. This is the situation represented by the merchants who opt out by repairing their own sidewalks and then lobby to reduce their tax outlay for the background level of service that they do not utilize, and that may actually compete with their privatized benefits.

Indeed, legal doctrine may exacerbate the problem by giving those with the capacity to opt for higher levels of service incentives to constrain governmentally provided services at artificially low levels. Given obligations of equal service provision, providing amenities to the wealthy requires officials to provide those same amenities to all within the jurisdiction. It is unlikely that increased police protection, parks, or school budgets could be offered only to

those willing and able to pay for them.⁶⁶ Once offered throughout the jurisdiction, however, these same amenities are likely to attract more poor households.⁶⁷ Any such shift in population will, in turn, increase the costs of supplying both the new services and other welfare services that require redistributive taxation from the relatively wealthy, again triggering the spiral of exit by the relatively wealthy, who are most capable of exercising that option. Those who are capable of contracting for club goods may attempt to avoid this spiral, without formal violation of the equal service doctrine, by lobbying for relatively low levels of public service, augmented by privately provided services for those who can contract for them.

Even in these cases, however, there exist countervailing incentives that might deter both officials and those who could opt out from artificially limiting the scope of public services. From the perspective of officials, reducing local expenditures is inconsistent with explanations of bureaucratic behavior that contend budget-maximizing bureaucrats spend larger sums of money than an informed majority would prefer;⁶⁸ publicly interested officials might want to avoid disparities in the provision of services; officials may have particular programmatic concerns that require service delivery that is inconsistent with the preferences of those who opt out (e.g., officials who want to support working mothers may sponsor municipal day-care centers notwithstanding that constituents capable of opting for private services are unlikely to use them); officials concerned about personal advancement may be attentive to accusations that they provided low levels of service in their current office; and officials faced with the possibility of competition from private providers might prefer to raise the level of service to all in order to disguise inefficiencies that would be apparent in a competitive environment.

Similarly, residents who are able to opt out might prefer to pay for benefits that they do not enjoy, either out of altruism or to avoid reductions in property values, which are likely to reflect the quality of services. This latter phenomenon is plausible where even the wealthy have limited mobility, such as where the relevant jurisdiction is large or where wealth is tied to the particular jurisdiction (through jobs or proximity to kinship groups). In this situation, even if conditions otherwise favor imposing political costs, e.g., even where the higher level of service subsumes the background level, those who opt out have incentives to be concerned with the service available to others. Those who send their children to private schools (or who do not have

66. With respect to some services, however, it appears that localities may offer differential services, depending on residents' willingness to pay, even if that willingness reflects ability to pay or creates other divisions, such as racial ones. For instance, in *Hadnott v. City of Prattville*, 309 F. Supp. 967 (M.D. Ala. 1970), a locality was deemed not to have violated any constitutional equal protection obligation when it failed to pave streets unless abutters agreed to pay for the improvement through special assessments. The result of the local policy was that 3% percent of the city's white residents lived along unpaved streets, compared to approximately 35% of the black residents.

67. See Robert P. Inman & Daniel L. Rubinfeld, *The Judicial Pursuit of Local Fiscal Equity*, 92 HARV. L. REV. 1662, 1723 (1979).

68. See WILLIAM A. NISKANEN, JR., *BUREAUCRACY AND REPRESENTATIVE GOVERNMENT* (1971).

children), for instance, may support public schools because the value of the public education system is capitalized into the value of their homes.⁶⁹ These homeowners cannot be certain that their purchasers will share their preferences; hence, if they believe that educational quality is an important factor in housing prices, they have reason to support educational expenditures of which they do not take direct advantage.

Political costs may be exacerbated where opting out adversely affects the feasibility of providing the background level preferred by those who remain. Under these circumstances, those who opt out are not merely exercising disproportionate political influence in opposing public provision of public goods. Instead, the very act of opting out may render public provision of the good infeasible, because opting out eliminates certain economies that make collective provision attractive. Municipal facilities frequently have elements of "publicness" because they require substantial capital outlays. But these same characteristics frequently mean that the goods are in the nature of step goods that cannot be provided in small increments but only in large, expensive doses (half a bridge is as useless as no bridge). Opting out may create a situation where public provision is abandoned because there remain an insufficient number of people to make investment in the next step worthwhile, notwithstanding that provision would have been appropriate if all residents participated. For instance, charges for the service may be based on costs to those who actually use it, and if departure by some residents does not reduce the fixed costs made by the jurisdiction (e.g., one garbage truck must be purchased for a city of 1000 households whether all residents have governmental garbage collection or only one does), then those who opt out may increase per capita costs to those who accept the background level.

It is equally plausible, however, that opting out could reduce costs for those who remain. This result would occur when the publicly provided good is subject to congestion, but congestion (which would require provision of additional increments of the good) is avoided because some residents select private providers of substitute goods. Assume, for instance, that no families within a locality sent their children to private schools. It might be necessary to construct and staff additional public schools in order to avoid overcrowding. If the capital expense incurred to meet congestion increases the pro rata cost to each resident, then the fact that opting out eliminates the need for the new facility can return a benefit to those who use public facilities.

The indefinite consequences of opting out on the costs for those who remain can be illustrated by the following example. Assume that a municipal swimming pool can comfortably accommodate 100 persons, that the swimming pool costs \$1000 to construct and operate, and that it makes no sense to construct a second smaller swimming pool if there are fewer than 100 potential users per pool, perhaps because future population growth is expected to materialize within the useful life of the pool. If there are 150 swimmers in the community, two swimming pools will be necessary, with the cost to be shared

69. See, e.g., Wallace E. Oates, *The Effects of Property Taxes and Local Public Spending on Property Values: A Reply and Yet Further Results*, 81 J. POL. ECON. 1004 (1973).

by 150 swimmers. Thus, each swimmer will have to pay \$2000/150, or \$13.33 towards the pools. Now, assume that we again have 150 swimmers within the jurisdiction, but 50 swimmers join a private pool club (they may, for instance, be willing to pay for less crowding, longer hours of operation, status, etc.). There is now no current need for the second pool, so that each of the remaining "municipal" swimmers needs only pay only \$1000/100, or \$10 toward the pool.

Unfortunately, this argument may also work in the opposite direction. Assume that the residents value the pool at \$15 as long as no more than 100 people use it, but at no more than \$9 if between 100 and 150 use it. Now assume that if all 150 swimmers use the municipal pool, the municipality will construct a second pool, so that each swimmer pays \$13.33. If only 110 swimmers use the pool, the municipality may find it more appropriate to tolerate congestion than to construct a new pool. (Under these conditions, the 110 swimmers would have to pay \$18.18 for two pools, in excess of what they would be willing to pay.) If 40 swimmers opt for the private pool, the 110 remaining swimmers would have to pay \$9.09, an amount in excess of what they would be willing to pay for the congested pool. Hence, some swimmers will be unable to use the pool at a price they are willing to pay, even though they would have been willing to pay for a less congested pool.⁷⁰

Ex ante, there is no reason to believe that opting out is more likely to reduce the capital expenditure to a manageable amount (the first case) than it is to frustrate the ability to make the service available at a price that would be affordable if all participated (the second case). None of this is to say that restrictions on mandatory participation would not reduce the utility to those who would like to opt out but could not. It is only to say that the marginal effect of opting out is difficult to calculate ex ante.

But let us take as given that those who opt out and thereby do not take advantage of the background level of service subsequently fail to support that level. Does it follow either that the background level will be inefficient (in that those who would have been subsidized by the payments made by those who opt out gain more than the defectors lose) or that any inefficiency favors redistributive goals? One can tell a more complicated story about the cross subsidies inherent in the decision to opt out without any offset for the payments made in respect of the foregone service.⁷¹ If the background level of service is financed through compulsory taxation that those who opt out cannot escape (such as residents who pay taxes to support public schools even while sending their children to private schools), then wealth is being redistributed.

70. For another example, assume that there are three members of a society, all of whom desire garbage to be collected. Two of the members would value weekly garbage collection if they did not have to pay more than \$4 per week for it. The third member would be willing to spend at least \$4 for weekly garbage collection, but also values twice-a-week garbage collection and is willing to pay \$12 per week for it. Weekly garbage collection costs \$9, and twice-a-week garbage collection costs \$12. If permitted, the third member will contract for twice-a-week garbage collection. The result is that the first two members will not get weekly garbage collection at all, since they will be unable to obtain it at a cost that they are willing to spend on it.

71. See Gillette, *supra* note 20, at 1393.

Assume, for instance, that property tax payments are used to pay for snow plowing of all city streets. Individuals may live on private streets in part because they can contract with private snow plowers for speedier service than the locality is able to provide to residential neighborhoods. Taxes paid by those individuals, however, are used to plow public streets. Once the owners of the privatized streets emerge from their enclave and drive on the plowed public streets, they are obtaining the benefit of their tax payments. Nevertheless, the locality would have had to plow their residential streets out of tax payments had the residents of the privatized area not done so themselves. Hence, the fact that the locality did not have to plow those streets means that (1) the total local outlay for snow plowing was less than it otherwise would have been, a cost-reduction from which all local residents (not just the abutters of the private streets) benefit; and (2) the residents of private streets are paying a greater share of the snow plowing budget than similarly situated residents of public streets.⁷² This redistribution, however, does not necessarily transfer wealth from wealthy to poor or from those who receive less utility from a service to those who receive more. Again, local homogeneity suggests that redistribution within the locality occurs within relatively narrow parameters of wealth.

It is, of course, possible to avoid "double payments," either by rebating tax payments to those who opt out,⁷³ or by allowing opting out with respect to services subsidized only by user fees (which those who opt out would not pay, since they would not be using the public facility). But in the absence of such adjustments, double payments complicate the issue of whether opting out redistributes wealth regressively.

C. *Opting Out and Community*

Although I have been attempting to distinguish between substantive externalities and the procedural political costs generated by opting out, there is one series of effects of the former that is worth additional attention. These effects are perhaps best captured by the term "community" which some have suggested is undermined by allowing individuals to opt out. Presumably the concern is that individuals within a constituency obtain additional value out of sharing the same public goods, and that value is diluted by allowing some members of the community to reject or supplement communally provided goods. For example, some of the literature on educational quality suggests that the best predictor of educational quality is not financial inputs or class size, but other variables, such as the quality of one's peers.⁷⁴ If we believe that those who are most likely to leave low-quality public schools for higher

72. See, e.g., DILGER, *supra* note 65, at 102.

73. See, e.g., N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 1992).

74. The early entry into this debate was the *Coleman Report* in 1966. See JAMES S. COLEMAN ET AL., *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966). The debate about the relationship between financial inputs and educational outputs has raged since. For a collection of the sources and their conclusions, see Michael Heise, *State Constitutional Litigation, Educational Finance, and Legal Impact: An Empirical Analysis*, 63 U. CIN. L. REV. 1735, 1747-49 (1995).

quality private ones are individuals who would have been "better" peers of those who remain, then opting out imposes real, but less measurable, costs. Since, however, we do not expect all those who might contribute to educational equality to do so, i.e., we do not expect individuals to migrate to areas where they might provide the greatest advantage to other students, there appears to be some special claim about the obligation of those who live within a community to other residents of the same jurisdiction. Thus, many of the concerns about opting out ultimately depend on the independent value of maintaining equality within a defined community.

The value of community is rooted in a belief that differential service breeds dissent and inequality, each of which may tear at the soul of the community that service provision fosters. The problem is exacerbated to the extent that one obtains a differential level of service through arrangements with private providers. Circumventing public provision arguably violates what it means to *be* a member of the community, since the community is defined by the services it provides to all. If we return to the rough categorization of sources of provision with which I began, those who appeal to community seek to identify the community more closely with kinship groups and to distance the community from market and governmental transactions.

To the extent that one embraces the value of community, the delicate balance of political costs and competitive benefits, or appeals to individual preferences, are essentially irrelevant. The political costs inherent in opting out are necessarily so great (political cohesion being the basis of the community) that marginal gains in efficiency from competition are inevitably trumped. In addition, satisfaction of individual preferences is presumably of less concern, since the maintenance of community necessarily requires compromise of individual desires. I cannot claim that this value is (or should be) unknown in local government law. To the contrary, the desire to maintain a strong sense of community can be used to explain a significant amount of local government law.⁷⁵ One may, for instance, think of this concern as underlying the doctrine of equal service provision.⁷⁶

Nevertheless, the equal-service doctrine, and preferences for community as embodied in current law generally, provide only limited support for the proposition that intrajurisdictional variations in service cannot be tolerated. With respect to many public goods, the mandate that service be provided "equally" does not translate into equality of result, but only to formal equality of opportunity. For instance, the doctrine applies to services that are financed through user fees, but in that context the doctrine only requires that individuals have an equal right to obtain the service on payment of the required fee. Since some individuals will have a preference for more of the fee-based service than others (those with gardens and swimming pools will use more publicly

75. See, e.g., *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (reasoning that desire to maintain stable population and hence advance concept of community justifies property tax based on value of home at time of acquisition rather than current market value).

76. See ROBERT L. LINEBERRY, *EQUALITY AND URBAN POLICY* 43-45 (1977); see also *supra* text accompanying notes 42-43.

supplied water than those without), the result will be different per capita usages of the same service, albeit the payments made by each individual will reflect the amount of use. As long as opting out entails making payments for the additional levels of service, and as long as all share the opportunity to opt out, exercise of that option does not violate the equal service requirement even as understood in communitarian accounts of local government. Hence, no greater concern arises when inequality stems from privately provided services. Nevertheless, one might claim that governments, by selecting when to utilize user fees, thereby choose appropriate levels of intrajurisdictional inequality. Private decisions to opt out may transcend acceptable boundaries of inequality.

Constraints on opting out to foster community, however, are subject to a broader attack. First, for those who advocate development of community, the fact that club goods require the creation of voluntary associations could be cause for support. That individuals share preferences for particular goods or services does not require homogeneity in other aspects of their lives. Individuals who desire more religion in their lives and who thus opt out of public schools for parochial education may find themselves in a subcommunity with whom, but for this preference, they would share little social or political interaction. If I live in a neighborhood that is socially and economically homogeneous, but send my children to a church school that attracts children from other neighborhoods, I may create a more complex series of relationships (some in my geographic neighborhood and some in my religious community) than would be the case if I sent my children to the public neighborhood school. Clubs, therefore, may engender a level of interaction among communities not otherwise readily available.

Even without the formation of stronger intrajurisdictional bonds, however, the appeal to community is not necessarily undermined by opting out, especially when the alternatives are considered. Opting out of the background level of service offers a private contractual analogue to a more traditional Tieboutian acquisition of the desired level of service through physical exit. Thus, one who is generally satisfied with the package of services in the community, but dissatisfied with the level of a particular service, may pursue any one of three strategies. She may remain in the community and accept a suboptimal level of service, or she may opt out with respect to the unsatisfactory service, or she may exit the jurisdiction. Which option the individual chooses depends on the private costs of each option. Physical exit may be relatively costly, so that it is selected only when the service at issue is of substantial importance. But if the individual is an outlier with respect to that service, then both she and the community (of which she would thereby remain a part) might be better off if she can opt out of that service alone. Assume, for instance, that an individual shares the communal interest in most services, but has an idiosyncratic preference for education. If the individual's concern about education is sufficiently great that exit would be worthwhile, it is unclear that anyone is better off when she exits the jurisdiction rather than contracts privately for better education.

Perhaps out of awareness of the greater costs of physical exit, the legal regime does not identify community with conformity, even where it encourag-

es the former. Recall the situations that I noted above in which mandatory participation is required, such as in areas of Social Security or automobile insurance. It is plausible to think of these situations not simply as solutions to common pool problems, but also as efforts to foster a sense of community by requiring subsidies and avoiding catastrophic losses to any resident of the jurisdiction. In all these cases, prohibitions on augmenting the basic requirement are possible. The consequence in each case, however, would be additional dissatisfaction among those forced to participate at a personally undesirable level. What we might infer from the combination of obligatory participation with the possibility of opting for additional service, therefore, is that the communitarian sentiment seeks to ensure a basic level for all constituents, but does not, at least within a wide range, support a prohibition on opting out.

IV. CAN YOU OPT FOR LESS?

To this point, the examples I have used assumed that those who opt out prefer a higher level of service than government otherwise provides. Presumably, one would opt for less of a governmentally provided service only if doing so generated some alternative good or service that was more valuable to the individual than what had been surrendered. The fact that one is attaining a net gain means that the definitional issue of what constitutes less, rather than more, services is difficult to resolve. In addition, the concept of "service" is sufficiently malleable to render the inquiry into "less" more sophisticated than sophisticated. When a residential subdivision prohibits leafletting, is it providing *more* services, in the form of regimentation and conformity not available outside the gated walls, or *less* services, insofar as residents are denied restrictions on regulatory interference that would apply where governments are the relevant actors? The definitional conundrum is not what interests me here; rather I want, under the (perhaps unfortunate) rubric of "opting for less" than a background level of service, to inquire into the propriety of private regulations that cannot easily be administered by governmental bodies and that are imposed with respect to services typically associated with government.

With respect to some services, opting for less simply means that persons entitled to take advantage of services fail to do so, e.g., a failure to call the police when a crime has been committed or to use as much electricity as the municipal utility will provide. These forms of opting for less are trivial and are not my concern here. But there is another sense in which opting for less has significant import. One type of good or service the government provides is a series of protections against the government itself, that is, an embodiment of negative freedom. These protections typically take the form of rights that individuals have against governmental interference. But there may be occasions in which individuals would like to make pre-commitments enforceable by government, or in which individuals prefer to have government act paternalistically. Assume, for instance, that relatively poor individuals have limited options about where to reside. They value the safety of wealthy suburbs, but (private markets for housing being what they are) cannot afford them. They may attempt to "privatize" security by purchasing strong locks, carrying weapons in self-defense, or joining in collective security arrangements

that range from watching each other's homes to private policing (e.g., the "Guardian Angels"). But another alternative is to join an association of (contract with) like-minded individuals to agree to a regimentation that is inconsistent with our traditional concerns about protections from government. For instance, residents within an apartment complex may be willing to require identification cards for entrance or to abandon their rights to be free of searches and authorize random searches of the apartment for guns and drugs.⁷⁷ Would we think that this kind of "opting out" is appropriate?

Alternatively, think of Professor Katherine Van Wezel Stone's concerns about private procedures that displace judicial adjudication with arbitration that allegedly reduces workers' rights.⁷⁸ The move to private arbitration of labor disputes or disputes in other contexts typically entails fewer procedural safeguards than in full-fledged judicial proceedings. Presumably, those who agree to arbitrate believe that what they gain in speed of dispute resolution, cost savings, and avoidance of abusive discovery procedures outweighs what they surrender in terms of traditional safeguards in governmentally administered proceedings. Thus, opting out of background rights by selecting private dispute resolution allows parties to attain their preferences.

The possibility of opting out of substantive or procedural "rights," however, may cause the same concerns as opting out for more services than the background level provided by government. At least in some cases, we create rights not out of paternalism or to codify a bargain that we think most parties would prefer if left to their own devices. Instead, a right may be recognized to reduce the costs that serve as obstacles to the creation of public goods. Free speech, for instance, may be defended less as a benefit for the speaker than as an inducement to generate the public good of information for listeners. Where rights are rooted in public goods, failure to exercise a right generates costs for others. An individual who agrees to waive the right to speak freely may be acting autonomously, and thus in service of some objectives of the First Amendment. But that same individual thereby deprives others of information in abrogation of alternative objectives of that same concept. Indeed, the desire to avoid disincentives against providing the public good of information appears to lie behind doctrines such as "chilling effects" and tolerance for untruths that cannot easily withstand scrutiny on alternative justifications for free speech.

Perhaps this objection provides better support for Professor Stone's concerns. One may be relatively untroubled by the reduction of workers' statutory

77. Cf. Amitai Etzioni, *Balancing Act; Don't Sacrifice the Common Good to Personal "Rights"*, CHI. TRIB., May 16, 1994, at 11. For a determination that warrantless searches for weapons in an apartment complex operated by a public housing authority is presumptively unconstitutional, see *Pratt v. Chicago Housing Auth.*, 848 F. Supp. 792, 795-96 (N.D. Ill. 1994). More than 5,000 residents of projects operated by the authority signed a petition in favor of warrantless searches. See *Pratt v. Chicago Housing Auth.*, 155 F.R.D. 177, 178 (N.D. Ill. 1994). For an argument that even governmental action is not unconstitutional in this context, see Steven Yarosh, Comment, *Operation Clean Sweep: Is the Chicago Housing Authority "Sweeping" Away the Fourth Amendment?*, 86 NW. U. L. REV. 1103 (1992).

78. Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996).

rights either if one believed that they resulted from competition in a working political market between labor and management or that the ostensibly "defeated" had accepted arbitration as a trade-off for avoiding the costs inherent in adjudication. But reduction of those rights is less acceptable if the failure to exercise those rights deprives others, not parties to the bargain, of the benefits that those rights were created to generate. Arbitration, for instance, eliminates the public goods that adjudication confers on non-parties in the form of precedents that provide notice of acceptable conduct and that ensure the similar treatment of similar cases.⁷⁹

Other instances of opting for less similarly threaten external benefits. Think, for instance, of failures to assert rightful claims against sellers of defective products who are supposed to invest optimally in safety as a result of the incentives of a negligence system, but who go underdeterred where potential cases are unlitigated. The point here is not that these cases systematically cause benefits to be forgone. There are, after all, offsetting correctives, such as high jury awards in cases that are litigated and that thus help compensate for the unlitigated cases. And in some cases, rights are intended to create highly privatized benefits that may generate public goods when surrendered; for instance, shopping mall owners may have the right to exclude solicitors and leafletters, but may increase the availability of information when they choose not to exercise that right.⁸⁰ My point instead is that the category of cases in which individuals opt for less is both far-ranging and susceptible to the same analysis as more traditional cases of opting out insofar as each one ultimately depends on the consequences of the act for those who could not participate in the bargain.

Nevertheless, the balance of political costs and competitive benefits may be more readily resolvable in cases of opting for less. It is unlikely that a critical mass of those protected by a right will abandon it, so that the public goods generated by rights are less likely to be foregone. Exercising fewer rights than one possesses, therefore, poses less of a risk of a downward spiral leading to a deterioration of the right itself. Thus, the signaling function of exit might work here with less threat that the political advantages of collective provision will be reduced.

V. CONCLUSION

Reactions to opting out tend to be somewhat visceral and to be derivative of other values. Whether one believes that such mundane, but visible acts such as living in a residential association, sending one's children to private school, or forming a business improvement district are elitist or part of democratic choice, frequently appears to reflect one's views of redistribution, community, and the acceptable level of externalities imposed by individual conduct. I have tried to show that there is more that we can say about this issue, and that the

79. William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1978); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-23 (1995).

80. See WITOLD RYBCZYNSKI, CITY LIFE 209 (1995).

complexities allow us to think in more precise terms about the propriety of opting out of public provision in any particular context. Opting out always signals some level of dissatisfaction with the status quo and may signal the presence of a competitive alternative that may correct faulty political decisions. Whether we should invite such signals depends on whether the process of amplification improves on more opaque alternatives or generates intolerable costs to political life. But even focusing on these factors fails to reveal the full complexity of opting out. Our willingness to risk efficient provision, efficient politics, or community, varies from service to service. Thus, some multi-dimensional matrix would be necessary to weigh properly all the variables that inform the propriety of opting out in a given context. My objective at the moment is simply to overcome the view that our reactions are readily reducible to a single-minded embrace of the public or the private.

