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Legislation and Administration: Stumbling Giants - - A Path to Progress through Metropolitan Annexation

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LEGISLATION AND ADMINISTRATION

STUMBLING GIANTS — A PATH TO PROGRESS THROUGH METROPOLITAN ANNEXATION

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STUMBLING GIANTS — A PATH TO PROGRESS THROUGH METROPOLITAN ANNEXATION

I. FACTUAL CONTEXT

A. *Introduction*

A glance at any map of the United States quickly reveals that it has come to be dominated by a number of giants — an ever-increasing number of giants called metropolitan areas. But the giants are stumbling. Their strides are tremendous, new areas come within their control every day, yet generally the path travelled is a haphazard one which is as likely to lead to problems as progress. The metropolitan giant is confused. Guidance which formerly came from its nerve center — the core city — has been greatly minimized by a trend toward suburban living which has diminished at least the political power of the city.

With suburbia has come a tremendous upsurge in the number of governmental units in America.¹ Overlap and duplication have become commonplace as urban fringe dwellers either incorporate and finance a municipal government or remain unincorporated and rely on the county or special districts for such everyday needs as water and sewer service, fire protection and perhaps garbage collection.

This fragmentation has caused problems for the central city, for the fringe area, and for the metropolitan area as a whole. Since the exodus to the urban centers is something being experienced throughout the country (over half the population of 40 states is now classified as "urban"²), these problems should be matters of concern to state legislative bodies. It is the purpose of this article to show by a survey of existing legislation that a state can assist its metropolitan areas most easily by relaxing its annexation requirements and, contemporaneously, stiffening its requirements for the formation of municipalities to prevent the frustration of any annexation plan via "defensive incorporation." Thus it is the objective of this plan to make the limits of the city correspond — as nearly as possible — with the limits of the metropolitan area.

B. *The Problem*

1. *Difficulties Facing the City*

Obviously a city that finds itself in a position where it can no longer expand has little hope of looking forward to a prosperous future. Two paths present themselves: maintain the status quo or go downhill. The former is very difficult, the latter much more likely. This is especially true when it is remembered that as the city's residential neighborhoods grow older they are likely to attract either a wave of lower-class residents or give way to second-rate commercial enterprises. Gradually the city loses its so-called intelligentsia, its balance between a residential and commercial/industrial tax base, its unity and community spirit, and its position of dominance in the metropolitan area.

In another sense, however, the entire population of the metropolis can be said to live in the core city. A person who resides in Blue Island, Illinois, is likely to work in Chicago, travel to the Loop for entertainment and cultural activities, call himself a Chicagoan when more than 100 miles from home, and identify numerous other Chicago athletic and social events as his own. Yet this suburbanite contributes not a dime in taxes to the central city.

In fact, the man from Blue Island and the thousands of others residing outside city limits throughout the country are actually hurting the cities. The suburbanites use — without charge — city streets and freeways, parks, museums and other such facilities. Ironically, the freeways and expressways often are built as a result of the

1 There were 17,205 municipalities in the United States and the then-territories of Alaska and Hawaii in 1957. Of this number, 405 new municipalities came into existence between 1952-1957. 29 *THE MUNICIPAL YEAR BOOK* 15-16 (1962).

2 Sheldon, *Urban Places and Population*, 29 *THE MUNICIPAL YEAR BOOK* 24, 25 (1962).

congestion caused by the autos of this group. Not only are the museum, zoo and university sites nontaxable because operated by nonprofit groups, but construction of the superroadways necessitates the ripping out of block after block of taxable property.³

Furthermore, those who move out of the city are taking still other sectors of the tax base with them. For example, San Francisco lost 289 retail stores to the suburbs during just two years of the early 1950's, while the assessed valuation of downtown Flint, Michigan, dropped 37.2 per cent compared to the remainder of the city between 1930 and 1951.⁴

The primary source of funds with which to operate the city is the property tax. Yet rate limitations imposed by the state and deterioration make this a somewhat unsteady support for a city whose expansion is confined by a suburban ring. There has been a slight movement toward the enactment of a city income tax,⁵ or a wage tax. But the rates are extremely low and sometimes such a proposal never gets past the talking stage because it is a "political liability."⁶ Plans for placing a tax on urban motorists have rarely been implemented beyond the construction of an occasional toll road.

Thus the city is faced with the task of making improvements, or at least maintaining existing facilities, with a constantly decreasing source of revenue. Nevertheless, the core city does not monopolize the problems plaguing the metropolitan area.

2. Difficulties of the Fringe

The problems which plague those residing outside the central city are of no small importance, since the 1960 census showed that 10.5 million persons reside in the urban fringe; this constitutes eight per cent of the urban total.⁷ And it is unquestioned that this is the sector of the metropolitan regions in which almost all of the growth is taking place. For example, statistics concerning the nation's largest metropolitan areas shows that during the 1950's suburban population soared 61.7 per cent while that of the cities increased only 1.5 per cent.⁸ It has been estimated that in 30 years the San Francisco Bay Area will be as large as metropolitan New York is today.⁹

Many times persons living in the outlying areas are doing so for reasons of economy. Real estate tends to be less expensive than tracts inside the city and there are lower taxes. But as the influx of new suburbanites continues, the situation begins to change. Property prices, of course, rise and the demand for services increases. An unpaved street which was adequate when used by a half dozen householders is far from sufficient when it leads to a subdivision containing hundreds of homes. "But such construction in unincorporated fringe areas has caused many problems for local and state authorities and the home owners usually find that if they want all of the services which are afforded by the adjacent city, the cost in taxes is higher than it would have been if the home had been constructed in the city."¹⁰

3 GREER, *GOVERNING THE METROPOLIS* 115 (1962).

4 ADRIAN, *GOVERNING URBAN AMERICA* 37-38 (1955).

5 Twenty-six cities enacted income taxes (the highest rate being one per cent) between 1946-1956. Walker, *Fiscal Aspect of Metropolitan Regional Development*, 105 U. PA. L. REV. 489, 498 (1957).

6 This was the situation in Baltimore. Letter from Rep. Samuel N. Friedel, 7th District, Maryland, to the NOTRE DAME LAWYER, March 28, 1963, on file in the Notre Dame Law Library.

7 "Urban fringe," in this context, includes densely settled unincorporated territory adjacent to cities of 50,000 or more and the population of unincorporated places of less than 2,500 located in metropolitan areas. 29 Sheldon, *Urban Places and Population*, THE MUNICIPAL YEAR BOOK 24, 26 (1962).

8 Jones, *Metropolitan and Urbanized Areas*, 29 THE MUNICIPAL YEAR BOOK 31 (1962).

9 San Francisco Chronicle, March 5, 1963, p. 30 col. 1.

10 Banks, *Annexation in Colorado*, 37 *DICTA* 259 (1960).

Because of the small size of most suburbs, efficiency suffers. A person who lives in a \$45,000 home may have to depend on a three-man police force and volunteer fire department although units of full-time professionals are maintained just a short distance away in the neighboring core city. Furthermore, the lack of a balanced tax base which hurts the city also has an adverse effect on the outlying communities — but in reverse. Commercial interests — other than an occasional shopping center — are often discouraged with the result that the residents of the suburbs must absorb the entire cost of whatever facilities they do desire. Many men who would not consider permitting such inefficiency and waste in their businesses tolerate it in their government.

3. Difficulties of the Entire Area

Among the problems which cross the arbitrary lines called city limits are duplication, street coordination and zoning. "Metropolitan areas in all parts of the United States suffer from an excess of governmental units and from a lack of machinery that is sufficiently flexible to keep up with the ever-extending urban sprawl."¹¹ Several major cities illustrate the duplication caused by this excessive number of governments — the Chicago area has approximately 350 law enforcement agencies,¹² there are nearly 100 incorporated areas, special districts and other governmental units providing municipal services in the metropolitan area of Seattle,¹³ 1,467 distinct political entities exist in the New York metropolitan region,¹⁴ and Portland, Oregon, is in the midst of an area containing 194 special districts as well as 13 cities.¹⁵

Street coordination is essential if the automobile which enabled the fringe dwellers to move out of the city is going to be an effective means of getting them back inside to earn their livelihoods. In California,

approximately 3 million persons spend from one to two hours a day traveling to and from work; time which is virtually unproductive. This waste of time is largely unnecessary and the situation could be improved or avoided in the future by the application of good community planning on an area-wide basis.

In spite of these problems, and in spite of the generally recognized need for area-wide planning in metropolitan areas, no truly comprehensive metropolitan area plan has yet been formulated in the State of California. Even if such a plan had been formulated it could not have become effective since no responsible metropolitan area-wide body exists to administer it.¹⁶

And finally, the problem of zoning can be acute when its solution is attempted on a piecemeal basis. Although county zoning is becoming more widespread, a man who has built his house in a quiet unincorporated area still may be awakened some morning by the sound of crews constructing a service station, tavern or drive-in theater on the property next door. If the man lives in a suburb his situation is somewhat better; but the tightest zoning code possible will be of little benefit to those residing near the east edge of the community, who discover that the neighboring suburb has decided its west side should be zoned for heavy industry.

These, then, are a few of the problems which are facing the city, the fringe area and the metropolitan area as a whole. They are becoming matters of increasing concern as is evidenced by the numerous metropolitan studies which have been made in recent years. A number of solutions have been advanced, but the one which has been employed most often is, basically, to make the political influence of

11 Crouch, *The Government of a Metropolitan Region*, 105 U. PA. L. REV. 474 (1957).

12 ADRIAN, *GOVERNING URBAN AMERICA* 43 (1955).

13 Letter from Robert F. Hintz, principal city planner, Seattle, to the NOTRE DAME LAWYER, March 19, 1963, on file in the Notre Dame Law Library.

14 WOOD, *1400 GOVERNMENTS* 1 (1961).

15 Letter from Earl Bradfish, senior planner, Portland, to the NOTRE DAME LAWYER, March 27, 1963, on file in the Notre Dame Law Library.

16 *MEETING METROPOLITAN PROBLEMS* 12-13 (1960).

the central city more closely correspond to the economic and cultural influence which it has in the area.

C. *Other Approaches*

Some of the other approaches to the situation include the placing of the emphasis on the present county, the supplying of services under a contract arrangement, functional consolidation or use of the special district, and formation of a federation of municipalities. Although each proposal offers material for a separate article — or a book — in itself, the reasons they were here rejected can be stated briefly.

1. The "County Plan"

Perhaps, at first glance, a metropolitan government operated through the medium of the existing counties seems like the best solution. However the plan has at least two serious defects: (1) the traditional role of the county in the nation's history and (2) the rigidity of its boundaries. Counties were established basically for record-keeping purposes and have traditionally been considered little more than an administrative arm of the state. Fundamental constitutional changes would be necessary in most states before counties could be empowered to assume the burdens of metropolitan area government.¹⁷ Moreover boundaries would be a problem; a large metropolis spans several counties,¹⁸ while in smaller areas a sizeable rural sector might remain outside the metropolitan complex. In either case arming a county board of supervisors with a few additional powers is not the most satisfactory answer.

It is true that there have been limited attempts at putting such a plan into operation. The best known is the Dade County, Florida, plan but something similar came into being recently when the City of Nashville and Davidson County, Tennessee, consolidated.¹⁹ It is still too early to draw any conclusions on the Tennessee move, but things have been far from perfect in Florida.²⁰ "In devising 'a package that would sell' to the voters, the government that emerged was very weak."²¹ In fact rumblings of discontent have manifested themselves in the form of referendums on proposed reforms which have been held during each of four recent years in Dade County — and have lost three times.²² In addition, it must be remembered that the Miami area which adopted the county plan was one largely populated with fairly recent arrivals from colder parts of the country, people with little or no community awareness. Here adoption was possible but administration is difficult; even adoption would be hard to obtain in a more settled area.

2. Contract Arrangements

The next alternative shades into the first since the outlying area may contract for the supply of their services with the county or with the core city. Los Angeles County, for instance, has undertaken to supply services on a contract basis,²³ and thus this form of contract plan could be called another method of placing the emphasis on the county. However it is more common for small communities to

17 Donoghue, *County Governments and Urban Growth*, 1959 WIS. L. REV. 30, 37-45.

18 Connor, *The Detroit Metropolitan Area Inter-County Plan*, THE URBAN COUNTY CONGRESS 40 (1958).

19 Address by Judge Beverly Briley, The Davidson County Story — Political Action, 27th Annual Conference of the National Association of Counties, July 11, 1962.

20 Note, *The Urban County — A Study of New Approaches to Local Government in Metropolitan Areas*, 73 HARV. L. REV. 526 (1960).

21 GREER, GOVERNING THE METROPOLIS 123 (1962).

22 Bollens, *Metropolitan and Fringe Area Developments in 1961*, 29 THE MUNICIPAL YEAR BOOK 44, 48 (1962).

23 *The Urban County* note 20 *supra*.

enter into such agreements with the central city.²⁴ An example is Columbus, Ohio, which provides the basic services — water and sewer — to most of the small communities in the area under such an arrangement.²⁵ A Michigan decision sets forth the general rule that municipalities may sell such things as surplus water, gas and electric power to outlying areas on a “quasi-public” basis.²⁶

However the contract approach is only a partial answer. It is a problem-by-problem solution which does little to aid overall planning and which depends on the continued maintenance of good relations between the suburbs and city they are undermining. Courts will rarely allow the outlying area to force the city to supply the services and there is no assurance that city residents are going to approve expenditures for additional facilities if nonresidents are going to reap a large share of the benefits. Furthermore a suburb serviced via contract arrangements — especially those involved in plans similar to the so-called “Lakewood Plan” of California²⁷ whereby virtually all municipal services are received in a package — has little justification for remaining in existence, yet the political boundaries remain and suburbanites continue to pay the salaries of its governmental officials.

3. Functional Consolidation/Special Districts

A third alternative solution is a functional consolidation, which usually means the appointing of a joint agency to solve each separate problem such as sewer service, water supply, and fire protection.²⁸ But most often the special district is the device turned to for the solution of these single-function problems.²⁹ The number of special districts has been increasing — especially in the Midwest and West — and their functions range from running airports to cemeteries. Special districts most often operate on the basis of fees or charges for their services, but many can levy taxes. Because such districts frequently are exempt from borrowing and debt limitations imposed on other local governments, there is a danger that taxes might become excessive. What makes matters worse is that many citizens would have trouble naming all the special districts which directly affect their lives, much less being able to list the persons who head the various districts or their respective financing methods. In other words, the special district is a form of government in which the democratic element is at a minimum. Voting records show that almost no one participates in special district elections.³⁰ The districts have been called most accurately “symptoms not solutions” since they flourish when existing governmental units have been unresponsive to the service needs of their citizens.³¹

4. Federation of Municipalities

And finally, the fourth alternative is the creation of a federation of municipalities. This radical plan has been discussed and received a superficial following

24 “In 1954, the fringe was extended some form of utility service by three-fifths of the cities in the United States.” SENGSTOCK, *EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA* 22 (1962).

25 Letter from Harold L. Buchanan, planning director, Columbus, to the NOTRE DAME LAWYER, March 21, 1963, on file in the Notre Dame Law Library.

26 *Andrews v. South Haven*, 187 Mich. 294, 153 N.W. 827 (1915).

27 Address by Arthur Will, city-county coordinator, Los Angeles, 27th Annual Conference of the National Association of Counties, July 11, 1962.

28 Sparlin, *New Cure for Growing Pains*, 42 NAT'L MUNIC. REV. 118 (1953).

29 Approximately 95 per cent of the special districts provide only a single function. Address by Stanley B. Frosh, member of the Montgomery County Council, Rockville, Maryland, 27th Annual Conference of the National Association of Counties, July 11, 1962. See generally POCK, *INDEPENDENT SPECIAL DISTRICTS: A SOLUTION TO THE METROPOLITAN AREA PROBLEMS* (1962).

30 Frosh, note 29 *supra*.

31 *Ibid.*

by areas which have set up multicity advisory groups. It has been adopted fully in North America by only one major area — that of Toronto³²

Here the basic difficulty is the fact that it becomes necessary to bring into being a totally new governmental unit, which most metropolitan areas need like a story-book pirate needs a patch over his good eye. In addition, as in the Dade County plan, there is the inherent difficulty of securing the cooperation of governmental units which are supposed to surrender a large share of their "domain" to the new unit while remaining in existence themselves.

D. Use of Annexation

Thus a program designed to revitalize the giant's nerve-center by giving the central city more opportunity to expand appears to the authors to be both the most sound and the most practical solution. Annexation and merger are devices which were available long before proposals like the Dade County plan, special districts, or the Toronto federation were conceived.

But, existing laws make merger almost impossible today; on the other hand, the amount of activity in the annexation field is astounding in view of the restrictive effect of most statutes on the subject. "In 1961, the number of annexing municipalities containing at least 5,000 people was the largest in the last 17 years. The number was 719; this is more than one of every five municipalities of this size in the nation."³³ The total amount of land annexed was the second largest in the last 14 years, but what is more important is that eight of the 13 cities annexing the most territory (10 square miles or more) were central cities of metropolitan areas.³⁴

Phoenix, demonstrating a determination not to allow itself to be surrounded by fringe communities, has made the most amazing strides in the last 10 years — growing from 19 square miles to over 220 square miles as the population soared from 135,000 to a half million on its way to an estimated one million in 1975.³⁵ The 1960 census showed that 75.7 per cent of the city's population was living in areas annexed during the decade.³⁶ Similarly, over half the population of Tampa lives in areas added since 1950 and the same thing can be said for approximately 45 per cent of El Paso's population.³⁷

Yet, while there are almost 50 cities which have reported large-scale annexations since 1950, they are located in only 22 states.³⁸ And the majority of the massive annexations took place under laws in the few jurisdictions which have recognized the advisability of allowing large cities to expand.³⁹ For example, in Missouri and Texas, the two states giving the most power to home rule cities,

32 Milner, *The Metropolitan Toronto Plan*, 105 U. PA. L. REV. 570 (1957). Among the advisory groups is the Metropolitan Regional Council which has been formed in the New York City area. New York is unable to employ an annexation merger approach effectively because it is in the midst of a tri-state metropolitan area. Letter from Charles H. Tenney, Deputy Mayor, New York, to the NOTRE DAME LAWYER, April 11, 1963, on file in the Notre Dame Law Library.

33 Bollens at 51, note 22 *supra*.

34 *Ibid.*

35 Letters from Stanton S. von Grabill, city clerk, Phoenix, to the NOTRE DAME LAWYER, March 25, 1963, on file in the Notre Dame Law Library.

36 Jones, *Metropolitan and Urbanized Areas*, 29 THE MUNICIPAL YEAR BOOK 31, 34 (1962).

37 *Id.* at 33-34.

38 These cities are Atlanta, Amarillo, Asheville, Austin, Charlotte, Columbia (S.C.), Columbus (Ga.), Columbus (Ohio), Corpus Christi, Dallas, Dayton, Decatur, Fort Wayne, Fort Worth, Fresno, Greensboro, Hamilton-Middletown, Houston, Indianapolis, Jackson (Miss.), Kalamazoo, Kansas City (Mo.), Louisville, Madison, Memphis, Milwaukee, Mobile, Montgomery, Norfolk, Omaha, Orlando, Pueblo, Raleigh, Rockford, Sacramento, San Antonio, San Diego, San Jose, Savannah, Shreveport, Springfield (Mo.), Stockton, Terre Haute, Topeka, Tulsa, Waco, Wichita and Winston-Salem.

39 See Part II *infra*.

Kansas City and Houston have added 234 and 188 square miles respectively in the last 10 years.⁴⁰ Thus, although the use of annexation demonstrates its practicality, it should not be assumed that there is not room for reform.

Currently San Antonio is the only large city with more than 85 per cent of the metropolitan area's population within the city limits.⁴¹ And yet, rapid extension via annexation is essential in fast-growing areas such as Florida and California. "At the end of the decade 48.7 per cent of the inhabitants of San Jose lived in territory annexed since 1950, but her share of the metropolitan population declined from 32.8 to 31.8 per cent!"⁴² Annexation prior to full development is desirable so existing facilities can be used to supply services as they are needed and so that zoning and land-use controls can be applied to save the expense of conforming the area to city standards after a subsequent annexation.

It is true that there should be some safeguards against an overly ambitious city, but the problem lies in the fact that most sets of existing statutes — passed in an era which had never seen the metropolitan giant — are too protective. Oftentimes the will of a handful is allowed to prevail over the will of thousands in other sectors of the area. "The general laws on annexation . . . are the result of historical development on a pragmatic basis, and do not represent an attempt to deal systematically with the problem of municipal expansion."⁴³

E. *Objections to Annexation*

1. Legal Problems

Of course there are certain objections to any proposal which involves the annexation, merger and incorporation statutes — some legal, some nonlegal. Among the legal problems to be hurdled are prohibition of special legislation, the principle that incorporation and boundary changes are legislative functions which cannot be delegated, and the dispute over the merits of home rule for municipalities. All are constitutional matters.⁴⁴

Special Legislation. "All states, except for the northeastern states of Connecticut, Delaware, Massachusetts, and New Hampshire, now have some constitutional provisions either restricting the use of special legislation or expressing a need for general legislation."⁴⁵ This would seem to render impossible any statutory aid the state might want to furnish its metropolitan areas. However, many of the states provide that general legislation is to be used when applicable, possible, proper, or practicable, while others skirt the special legislation problem by specific constitutional provisions concerning their larger cities. Nevertheless the most common means of voiding the principle is the use of classification. Thus most states have established various classes of cities and towns — the distinctions most commonly are made on the basis of population and type of government.

During the last decade there were two outstanding instances of growth by special legislation. In 1951, Atlanta was allowed to expand over an 82-square-mile tract, some of it incorporated, by fiat of the Georgia legislature;⁴⁶ and Greensboro, North Carolina, increased in size from 20 square miles to nearly 50

40 Letter from John T. Henggeler, senior planner, Kansas City, to the NOTRE DAME LAWYER, March 27, 1963, on file in the Notre Dame Law Library; Houston City Planning Commission, COMPREHENSIVE PLAN — HOUSTON URBAN AREA 106 (1959).

41 Note 36 *supra*.

42 *Ibid.* This was accomplished by 769 separate actions. Letter from Michael H. Antonacci, director of planning, San Jose, to the NOTRE DAME LAWYER, March 29, 1963, on file in the Notre Dame Law Library.

43 HAVARD, MUNICIPAL ANNEXATION IN FLORIDA 11 (1954).

44 See generally WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS (1961).

45 *Id.* at 85.

46 ADRIAN, GOVERNING URBAN AMERICA, 277 (2nd ed. 1961).

square miles in 1957 through a process not previously established by law.⁴⁷ Therefore the special legislation hurdle seems to be a minor one to the state which wishes to aid its large cities' expansion.⁴⁸

Nondelegation. It is often stated that municipalities are mere creatures of the state, which may expand or contract a city's territorial area — or even unite the whole or part of it with another municipality at its pleasure.⁴⁹ In the words of the Supreme Court: "In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States."⁵⁰

Practically speaking, the state has to call on cities and other subdivisions for hundreds of tasks and it has long been established that courts, county boards and city councils may be given a voice in matters concerning incorporation and boundary changes.⁵¹ But, as will be shown below, there is still some hesitancy — especially where it is charged that a legislative function has been delegated to a judicial body. Generally, it is held that it is sufficient if the legislature merely determines the requisites to be met and then lets the local body do the rest,⁵² but as statutory terminology grows more vague, the charge of unconstitutionality carries more weight. The strikingly different approach of states like Virginia and Missouri, as well as attempts by courts in other states, to find sufficient legislative standards in the most tenuous of situations will be explored in the following survey of existing legislation.⁵³

Home Rule. Of course a city which is bestowed with home rule status by the constitution of its state could well be in a better position to expand its influence in a metropolitan community. The concept of home rule involves exactly what its name implies: the giving of more freedom to municipalities and a concurrent release from a large share of control by the state legislature.⁵⁴ Yet it is a concept which cuts across the entire area of municipal corporation law. Home-rule cities may have more freedom in setting the wages of police and firemen, establishing health regulations and so on, but they may, or may not, occupy a more favored status from an annexation standpoint. Thus "it must be emphasized that a particular theory of home rule will depend upon both the wording of the Home Rule Amendment and the judicial interpretative gloss by the courts of the state."⁵⁵

At present, 25 states, following the lead of Missouri, have enacted home-rule provisions;⁵⁶ and a constitutional amendment which would make home-rule status available to all cities with a population over 12,000 (except Chicago) is currently pending in the Illinois legislature.⁵⁷ But obviously all these provisions are not of the character of those which give Texas home-rule cities the power to annex by merely passing an ordinance.⁵⁸ It, therefore, appears that a state which wishes to assist its major cities in expanding their boundaries can do so with or without enacting the controversial home-rule doctrine.

47 Letter from Ronald Scott, director of planning, Greensboro, to the NOTRE DAME LAWYER, March 20, 1963, on file in the Notre Dame Law Library.

48 See note 168 *infra*.

49 *Hunter v. Pittsburgh*, 207 U.S. 161 (1907). But a caveat is necessary; it has been held that the Fifteenth Amendment's guarantee of the right to vote overrides the boundary-setting power of state legislatures. *Gomillion v. Lightfoot*, 364 U.S. 339 (1961).

50 *Hunter v. Pittsburgh* at 179, note 49 *supra*.

51 *E.g.*, *People ex rel. Rhodes v. Fleming*, 10 Colo. 553, 16 Pac. 298 (1887); *City of Salina v. Thompson*, 169 Kan. 579, 220 P.2d 147 (1950).

52 *Witt v. McCanless*, 200 Tenn. 360, 292 S.W.2d 392 (1956).

53 See Parts II and III *infra*.

54 See generally 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 3.00 et seq. (1962); LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE (1962).

55 LITTLEFIELD, METROPOLITAN AREA PROBLEMS AND MUNICIPAL HOME RULE 14 (1962).

56 See constitutional provisions collected in 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 3.00 (1962).

57 *The Rock Island (Ill.) Argus*, April 2, 1963, p. 24, col. 4.

58 See note 152 *infra*.

2. Nonlegal Considerations

As was mentioned above, a city wishing to expand must take into account non-legal, as well as legal, considerations. These include recognition of the fact that there are reasons other than financial that persons choose to make their home in the suburbs, that some have vested interests in the maintenance of the existing situation, and that communication of attitudes, policies and goals between the city and the fringe can be essential.

Obviously not every suburbanite lives where he does merely to escape city taxation or because the building site was less expensive. Some were living there when the metropolis was still a distance away, others were attracted by the fact that lots were larger and greener than those available in the crowded city, and still another group felt that the suburb would be the ideal way of combining the best features of small-town and large-city living. There are other even more intangible factors such as the status which comes with a fashionable address in a "manipulated one-layer community."⁵⁹ And there is the more noble factor of civic pride. To illustrate, when Rock Island, Illinois, (population 51,900) completed a 400-acre annexation earlier this year which did much to cut off the growth possibilities of Milan (population 3,100), the Milan Chamber of Commerce delivered a verbal blast at the larger city which included the following:

If your intentions are similar to those who have walled the City of Berlin, please be advised that you shall never shake the unity of our village or the right and desire of our citizens to be governed by a government of their choice.⁶⁰

Thus the right to self-determination is often asserted by the fringe dwellers. The freedom of the individual to choose whether or not he wishes to be included within the jurisdiction of a municipal government is proclaimed as the consideration which should be paramount. Yet this argument has been answered by Ronald Scott, director of planning in Greensboro, North Carolina, who points out:

On the contrary, the people living in the Greensboro area have had every opportunity and freedom of choice and, furthermore, they have already exercised that choice. The moment that any citizen of the Greensboro area decided to choose a small plot of ground and establish his residence thereon in close proximity to others in the urban area, his vote was cast. By the fact of his locating within this urban concentration, he has chosen to identify himself with an urban population and an urban area.⁶¹

It can be seen, therefore, that the reasons persons living on the fringe might resist expansion moves by the city are varied, with a combination of the above factors usually present. Persons living in the occasional suburb which is the site of a large factory could understandably have more than civic pride as the basis of their opposition to a move which would mean sharing the tax revenues of the industry with others in the vicinity. Likewise, it can be assured that most factory owners in such a situation will be anything but supporters of an expansion move which they fear will result in their having to support a larger area. Such persons constitute just two of the groups which may have a vested interest in seeing the fringe remain outside the city limits.

Perhaps increased communication is the answer to some of the nonlegal problems. One writer commented that in 1952 only one city in five tried to explain the core city's side of the case to the fringe dwellers.⁶² Another analyst, writing about the same time, attributed much of the failure to make annexation progress on the city's failure to demonstrate to the fringe how its needs are going to increase and how living costs will leap correspondingly.⁶³ One survey showed that

⁵⁹ PACKARD, *THE STATUS SEEKERS* 91 (1959).

⁶⁰ The Rock Island (Ill.) *Argus*, March 22, 1963, p. 1, col. 6.

⁶¹ Address by Ronald Scott, director of planning, Greensboro, public hearing on 1957 annexation, April 4, 1957.

⁶² Bollens, *Metropolitan and Fringe Area Developments in 1952*, 20 *THE MUNICIPAL YEAR BOOK*, 33, 44 (1953).

⁶³ Reed, *Hope for "Suburbanitis,"* 39 *NAT'L MUNIC. REV.* 542, 551 (1950).

about four-fifths of areas taken into cities will not pay for themselves immediately and — although they will in the long run — this is a fact which should be pointed out to the fringe dwellers who think the expanding city will be on the receiving end of all the benefits involved.⁶⁴

St. Louis, where many proposed metropolitan reforms have met defeat, furnishes an example of a communications failure. A postelection survey showed only 10 per cent of the suburban voters had roughly correct notions of three most important provisions of the proposed plan, and only about 20 per cent could identify any of these provisions.⁶⁵ Certainly, in such situations, ignorance and confusion are allies of the status quo.

There is, however, some evidence of a nationwide trend toward improvement in this regard. The Nashville-Davidson County consolidation, which left sharp criticism of communications in the wake of its 1958 failure,⁶⁶ was approved in 1962. And a report on the fruitful annexation year of 1961 states: "Regardless of whether major opposition was expected or did develop many cities undertook informational programs to explain the benefits of annexation."⁶⁷

F. Areas Excluded

This, then, is the setting of the present study. The remainder of this article will survey the general provisions which are available to cities wishing to expand their boundaries — either through annexation or merger — as well as the legislation which might be used by those who would frustrate a city's annexation plan by incorporating their sector of the metropolis. But a caveat is necessary. Excluded from discussion, except for an occasional reference, are those states which have no positive legislation in the area under discussion.⁶⁸ This occurs mostly in the New England states where the number of municipalities is at a minimum⁶⁹ and where in a number of cases "there have been virtually no changes in town boundaries in the last fifty years other than very minor boundary adjustments."⁷⁰ Rhode Island perhaps best typifies these states. There a statute has been enacted which flatly states "the extent and boundaries of the several cities and towns shall remain as now established by law."⁷¹

II. THE WAYS CITIES CAN GROW

Because of the broad powers of the state governments in regard to municipal boundary changes,⁷² the states have great freedom to provide any annexation and merger procedures which they desire. The single exception is any restriction contained in their constitutions. Yet this "single exception" has been used, on occasion, as a basis for invalidating the method of municipal annexation chosen by the state legislatures. The Arizona Supreme Court, applying the nondelegation doctrine, held unconstitutional an arrangement whereby the judges of that State were to

64 Bollens at 43, note 62 *supra*.

65 GREER, *GOVERNING THE METROPOLIS* 125 (1962).

66 Bollens, *Metropolitan and Fringe Area Developments in 1958*, 26 *THE MUNICIPAL YEAR BOOK* 44, 52 (1959).

67 *Ibid.*

68 These states include: Connecticut, Hawaii, Maine, Massachusetts, New Hampshire and Rhode Island.

69 Connecticut, Delaware, Maine, Massachusetts, New Hampshire, and Rhode Island have less than 50 municipalities each. This contrasts with the 1,181 existing in Illinois. Sheldon, *Urban Places and Population*, 29 *THE MUNICIPAL YEAR BOOK* 24, 25 (1962).

70 Letter from Robert J. Bartels, director of commission on the city plan, Hartford, to the NOTRE DAME LAWYER, March 18, 1963, on file in the Notre Dame Law Library.

71 R.I. GEN. LAWS ANN. § 45-1-1 (1956).

72 The possibility of expansion by special legislation, which was mentioned in Part I, should not be forgotten, but this is an *ad hoc* matter and is not included in the following discussion. See: SENGSTOCK, *ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM* 9 (1960).

make policy judgments as to the desirability of the proposed annexation in passing on the permissibility of the proposal. This was said to constitute a violation of an express constitutional mandate against the exercise of the legislative branch's authority by another branch of government.⁷³ The Supreme Court of Kansas reached the same result in *In re Ruland*,⁷⁴ though the prohibition against delegation of legislative authority was not express, but implied from the structure of the State Constitution which was patterned after the federal Constitution.⁷⁵ Thus, except for these limitations, the state is free to adopt any procedure it deems appropriate to provide for the expansion of municipal boundaries.

In discussing the choices of procedure made by the various states, it will be observed that the writers have made a basic distinction between "annexation" and "merger," the former being used to designate the method by which a city extends its limits to include unincorporated territory, the latter designating the method of acquiring incorporated territory. This is, of course, not the only classification device which can be applied to these statutes,⁷⁶ nor is it totally free from organizational problems caused by statutes which talk in terms of "annexation" to describe what the writers label "merger,"⁷⁷ but it does provide a basic framework for discussing "The Ways Cities Can Grow."

A. Annexation

1. Land That May Be Annexed

It has been assumed by the definition given the term "annexation" that this device may only be used by the city to acquire land which is unincorporated. This assumption should not pass without comment. Several states, in specifying the requirements of the land which may be annexed, are silent on the point of whether the statute may enable one city to annex part of another incorporated area.⁷⁸ Several secondary authorities⁷⁹ and a smattering of case law⁸⁰ support the conclusion that those statutes would not so enable the annexing city to absorb incorporated territory.

The most common statutory restriction on the land that may be annexed is that the land must be "contiguous" or "adjacent" to the annexing city.⁸¹ This

73 *Udall v. Severn*, 52 Ariz. 65, 79 P.2d 347 (1938).

74 120 Kan. 42, 242 Pac. 456 (1926).

75 Even in these states, presumably the judicial branch would not be excluded from playing a role in the annexation procedure as long as its activity was confined to fact-finding. *Udall v. Severn* at 359, note 73 *supra*.

76 *E.g.*, SENGSTOCK, note 72 *supra*. Therein the author discusses the methods of annexation in terms of who passes final judgment on the proposed expansion.

77 *E.g.*, PA. STAT. ANN. tit. 53, §§ 171-175 (1957) apply equally to annexation and merger.

78 *E.g.*, ALASKA STAT. ANN. § 29.70.010 (1962); IOWA CODE ANN. §§ 362.30, .31 (1946).

79 *E.g.*, SENGSTOCK at 43, note 72 *supra*.

80 *State v. City of Columbia Heights*, 237 Minn. 124, 53 N.W.2d 831 (1952); *Village of North Fargo v. City of Fargo*, 49 N.D. 597, 192 N.W. 977 (1923).

81 ALA. CODE tit. 37, § 135 (1958); ARIZ. REV. STAT. ANN. § 9-471 (1956); ARK. STAT. ANN. §§ 19-301, 307 (1956); CAL. GOV'T CODE §§ 35104, 35302; COLO. REV. STAT. ANN. § 139-11-2 (1953); DEL. CODE ANN. tit. 22, § 101 (1953); FLA. STAT. ANN. § 171.04 (Supp. 1962); GA. CODE ANN. § 69-1008 (1957); IDAHO CODE ANN. § 50-303 (1947); ILL. ANN. STAT. ch. 24, § 7-1-1 (Smith-Hurd 1962); IND. ANN. STAT. § 48-701 (Supp. 1962); IOWA CODE ANN. § 362.26 (Supp. 1962); KAN. GEN. STAT. ANN. § 13-1602 (1949); LA. REV. STAT. § 33:151 (1950); MINN. STAT. ANN. § 414.03 (Supp. 1962); MISS. CODE ANN. § 3374-10 (1942); MO. ANN. STAT. §§ 75.020, 77.020, 79.020 (1949); MONT. REV. CODES ANN. § 11-403 (Supp. 1961); NEB. REV. STAT. §§ 17-405, 407 (1962); NEV. REV. STAT. § 266.090 (1957); N.J. STAT. ANN. § 40:43-26 (1937); N.M. STAT. ANN. § 14-6-1 (1953); N.C. GEN. STAT. § 160-453.4, 453.16 (Supp. 1961); OHIO REV. CODE ANN. §§ 709.02, 709.14 (Page 1953); OKLA. STAT. ANN. tit. 11, § 481 (1959); ORE. REV. STAT. § 222.111 (1961); S.D. CODE § 45.2905 (1939), § 45.2906 (Supp. 1960); TENN. CODE ANN. § 6-301 (1955); TEX. REV. CIV. STAT. ANN. art. 974-1 (1953); UTAH CODE ANN. § 10-3-1 (1953); VA. CODE ANN. §§ 15-152.3, 4 (1950); WASH. REV. CODE §§ 35.13.010, 35.13.015, 35.13.020 (Supp. 1961); WIS. STAT. ANN. §§ 66.021, 66.024 (Supp. 1962); WYO. STAT. ANN. §§ 15-365, 15-366 (1957).

seemingly simple and uncomplex requirement has resulted in numerous court contests over the application of those terms to given factual situations.⁸² In order to obviate such contests, legislatures have attempted to clarify the meaning of these terms by statutory "definition."⁸³ These attempts however are universally subject to the criticism that they fail to "define" the term but instead set forth certain hypothetical situations in which the land is not considered to be noncontiguous. For example, a Montana statute provides:

tracts or parcels of land . . . shall be deemed contiguous . . . even though such tracts or parcels of land may be separated from such city or town by a street or other roadway, irrigation ditch, drainage ditch, stream, river, or a strip of unplatted land too narrow or too small to be platted.⁸⁴

To skirt this requirement of "contiguity" so that desirable distant areas can be annexed, municipalities have engaged in so-called "strip," "shoestring," or "leap-frog" annexation. This device consists of extending an "antenna" of land from the city to the area to be annexed. This "antenna" or "strip" is then annexed. This then makes the other tract of land contiguous and it in turn is annexed.⁸⁵ This devious method of acquiring land which is not really contiguous and yet is a desirable prospect insofar as it is a source of potential revenue to the city has been quashed in a number of ways. Courts have invalidated such annexation proceedings on the grounds that even though the proceedings complied with the letter of the law, they did not comply with its spirit.⁸⁶ Idaho has enacted legislation which explicitly prohibits this type of annexation.⁸⁷ The same result is achieved, indirectly, by statutes such as those in Colorado⁸⁸ and North Carolina⁸⁹ which require that a certain percentage of the aggregate external boundaries of the area to be annexed must coincide with the municipal boundary.

One potential problem in this area stems from the fact that the terms "contiguous" and "adjacent" may mean the same thing, and, then again, they may not. A New York court, in deciding a case that was far afield from the annexation area, stated that what is "adjacent" may be separated by the intervention of some third object, what is "adjoining" must touch in some part, and what is "contiguous" must be fitted to touch entirely on one side.⁹⁰ Thus, where a statute requires that the land be "adjacent," whether or not that land must also be "contiguous" to the annexing city is not always clear.

Other less common requirements that the land must meet before it is eligible for annexation are that it be a "reasonably compact addition" to the annexing municipality,⁹¹ that it form a "homogenous part" of the city or town,⁹² or that it be "urban" in character.⁹³ Frequently statutes proscribe the annexation of land in county A by a city situated in county B;⁹⁴ and, in several states, land which is

82 *E.g.*, *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953); *Wild v. People*, 227 Ill. 556, 81 N.E. 707 (1907). See cases cited in 2 McQUILLAN, MUNICIPAL CORPORATIONS § 7.20 (3rd ed. 1949); 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 1.15 (1962).

83 CAL. GOV'T CODE § 35002.5; MONT. REV. CODES ANN. § 11-404 (1947); NEB. REV. STAT. § 15-105 (1962); N.C. GEN. STAT. §§ 160-453.9, 160-453.21 (Supp. 1961); WASH. REV. CODE § 35.13.010 (Supp. 1961).

84 MONT. REV. CODES ANN. § 11-404 (1947).

85 Earlier this year Waukesha, Wisconsin, used a corridor along a highway to annex a 105-acre tract almost a mile beyond the city limits. *Milwaukee Sentinel*, April 5, 1963, p. 3, col. 1.

86 *E.g.*, *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955).

87 IDAHO CODE ANN. § 50-303 (1947).

88 COLO. REV. STAT. ANN. § 139-11-2 (1953).

89 N.C. GEN. STAT. § 160-453.4 (Supp. 1961).

90 *Baxter v. York Realty Co.*, 128 App. Div. 79, 112 N.Y.S. 455, 456 (1908).

91 FLA. STAT. ANN. § 171-04 (Supp. 1962).

92 ALA. CODE tit. 37, § 135 (1958).

93 IND. ANN. STAT. § 48-701a (Supp. 1962); MINN. STAT. ANN. § 414.03 (Supp. 1962).

94 *E.g.*, KAN. GEN. STAT. ANN. § 12-502 (1949).

being utilized for certain purposes such as industrial⁹⁵ or agricultural⁹⁶ is exempt from the threat of annexation.

Having satisfied itself that the land is the proper object of annexation proceedings, the city is then free to undertake the requisite steps in the process of annexation.

2. Annexation Initiated by Petition

(a) The City's Interest in this Method of Annexation.

Of the 44 states which have enacted legislation pertaining to the annexation of unincorporated territory by municipalities, 33 provide a procedure which is initiated by petition signed by the inhabitants of the area to be annexed.⁹⁷ Where this method is the sole means of initiating annexation proceedings, the criticism has been that the city also should have statutory authority to initiate such proceedings.⁹⁸ It is submitted that this is not a totally valid criticism in light of the fact that there may be no statutory bar to using city employees to circulate the petitions in the area sought to be annexed.⁹⁹ Thus, the city might be able to provide the impetus behind the circulation of a petition. Consequently, the city should not overlook this method of initiating annexation proceedings.

(b) Who Must Sign the Petition.

It has been previously stated that the petition must be circulated among the "inhabitants" of the area under consideration and then the petition is submitted to the proper authorities as prescribed by statute. But, statutes describe with greater particularity those who must sign the petition than is denoted by the term "inhabitant." In such statutes there are two variables which differ widely from state to state — the number of signers and their qualifications.¹⁰⁰

95 *E.g.*, MONT. REV. CODES ANN. § 11-509 (1947) protecting land used for agricultural, mining, smelting, refining, transportation or any industrial or manufacturing purpose.

96 Farm lands generally are afforded greater immunity from annexation than are urban areas. *E.g.*, MONT. REV. CODES ANN. § 11-509 (1947); 1 ANTIEAU, MUNICIPAL CORPORATION LAW § 1.15 (1962); 2 McQUILLAN, MUNICIPAL CORPORATIONS § 7.21 (3rd ed. 1949).

97 Statutes cited at note 100 *infra*.

98 *E.g.*, Note, *Annexation and the Law in South Carolina*, 13 S.C.L.Q. 258, 274 (1961).

99 *Swift v. City of Phoenix*, 90 Ariz. 331, 367 P.2d 791 (1961).

100 ALASKA STAT. ANN. §§ 29.70.010, 29.70.020 (1962) (30% of the owners of substantial property interests); ARIZ. REV. STAT. ANN. § 9-471 (1956) (owners of ½ of total real and personal property valuation); ARK. STAT. ANN. § 19-301 (1956) (majority of total number of owners owning majority of acreage affected); CAL. GOV'T CODE § 35116 (¼ of qualified electors residing in territory to be annexed); COLO. REV. STAT. ANN. § 139-11-3 (1953) (owners of a majority of the area who are also a majority of the resident landowners); GA. CODE ANN. § 69-901 (1957) (all owners of all the land); ILL. ANN. STAT. ch. 24, § 7-1-2 (Smith-Hurd 1962) (majority of landowners and electors); § 7-1-7 (Smith-Hurd 1962) (owners of all land; owners of all land and all resident electors); IND. ANN. STAT. § 48-701a (Supp. 1962) (majority of landowners); IOWA CODE ANN. § 362.30 (1946) (all owners of land); § 362.31 (Supp. 1962) (10% of landowners); LA. REV. STAT. § 33:151 (1950) (1/3 of landowners in number and value of land); MD. ANN. CODE art. 23A, § 19 (1957) (¼ of resident voters and owners of ¼ of land value); MICH. STAT. ANN. § 5.2085 (Supp. 1961) (resident freeholder electors equal in number to 1% of population); MINN. STAT. ANN. § 414.03 (Supp. 1962) (1/5 of, or 100, freeholders, whichever is less); MONT. REV. CODES ANN. § 11-506 (1947) (1/3 of resident freeholder electors); NEB. REV. STAT. § 17-405 (1962) (majority of property owners and inhabitants in number or value); NEV. REV. STAT. § 266.090 (1957) (owners of more than ½ the assessed value); N.J. STAT. ANN. § 40:43-26 (1937) (60% of legal voters); N.Y. VILLAGE LAWS art. 15, § 348 (majority of resident voters); N.C. GEN. STAT. § 160-446 (1951) (15% of qualified voters); N.D. CENT. CODE ANN. § 40-51-01 (1960) (¾ of qualified electors and owners of ¾ of assessed valuation); OHIO REV. CODE ANN. § 709.02 (Page 1953) (majority of adult freeholders); OKLA. STAT. ANN. tit. 11, § 482 (1959) (¾ of legal voters and owners of ¾ in assessed valuation); PA. STAT. ANN. tit. 53, § 171 (1957) (5% of qualified voters); S.C. CODE §§ 47-12, 47-19, 47-19.1 (1962) (majority of freeholders; stockholders of corporation; school district board of trustees); S.D. CODE § 45.2905 (1939) (¾ of legal voters and owners of ¾ in assessed valuation); TENN. CODE ANN. § 6-301 (1955) (50 resident freeholders); TEX. REV. CIV.

In commenting on the requirements of the Pennsylvania statutes, one source observed:

To constitute one a requisite signer of a petition for annexation, he must at times, depending on the statute covering the particular situation, be a "freeholder," a "taxable inhabitant," a "qualified elector," or a "qualified registered voter." And the various percentages required to make the petition legal include 5%, 10%, 20%, 60%, 66-2/3%, 80%, and of course in some cases a simple majority of one or more of the categories of signers set out above.¹⁰¹

The writers of the above quotation go on to question whether these were just arbitrary figures and classifications or whether the legislature had given some thought to determining what it considered to be a just and reasonable requirement. It will be admitted that the Pennsylvania situation is a bit more horrendous than usual, one that only a "Philadelphia lawyer" could untangle, but when one surveys the national scene on this point, the same questions arise. Did the state legislature give any thought to the requirements of who can sign such a petition or did it "just happen that way?"

At present, statutes use such terms as "resident freeholder,"¹⁰² "qualified elector,"¹⁰³ "owner of record,"¹⁰⁴ and "freeholder"¹⁰⁵ to describe the qualifications necessary in order for one to be a valid signer of the petition. In Michigan, the petition must be signed by a number of qualified electors who are resident freeholders equal in number to one per cent of the population in the area sought to be annexed before a home-rule city can act on the petition.¹⁰⁶ By way of contrast, Alaska requires the signatures of at least thirty per cent of the owners of substantial property interests in order to validate a petition.¹⁰⁷ Thus, one who has resided in an area in Michigan all of his life, who regularly votes in local elections, but who lives in a house under a lease is not entitled to sign the petition because he is not a freeholder. On the other hand, a petition in Alaska could be signed by an absentee landlord who has retired to Miami, Florida, because he owns a substantial interest in property. One cannot help but wonder whether, in fact, such distinctions were the result of independent value judgments by the legislative bodies of the respective states. If they were not, they should have been for differentiations such as these make the growth of the city either an easy or difficult matter.

In addition to the qualitative requirements which a signer must meet, wide variances also prevail as to the quantitative requirements of the petition signers *i.e.*, the number of persons who must sign the petition. These variations project, on a national scale, the situation previously described as prevailing in Pennsylvania. Illustrating the point, the State of Washington requires the signatures of "a number of qualified voters equal to twenty per cent of the votes cast at the last election"¹⁰⁸ to be placed on the petition before it is adequate to put the "annexation wheels into motion." North Dakota, a state which is much more strict in this re-

STAT. ANN. arts. 965, 974-1 (1953) (majority of qualified electors; 100 or more, or a majority of qualified electors); § 974-g (Supp. 1962) (all owners of a specified minimum amount of land); UTAH CODE ANN. § 10-3-1 (1953) (majority of owners and owners of 1/3 in assessed valuation); VA. CODE ANN. § 15-152.4 (1950) (majority of qualified voters); WASH. REV. CODE § 35.13.020 (Supp. 1961) (qualified voters equal in number to 1/5 of votes cast at last election); W.VA. CODE ANN. § 462 (1961) (5% of resident freeholders in the city); WIS. STAT. ANN. § 66.021 (Supp. 1962) (direct annexation — majority of electors and owners of 1/2 the land in area or value; annexation by referendum — 1/5 of electors and owners of 1/2 the land in area or value); WYO. STAT. ANN. § 15-365 (1957) (majority of owners in number and area).

101 11 U. PITT. L. REV. 446, 460 (1950).

102 *E.g.*, W.VA. CODE ANN. § 462 (1961).

103 *E.g.*, CAL. GOV'T CODE § 35116.

104 *E.g.*, ILL. ANN. STAT. ch. 24, § 7-1-2 (Smith-Hurd 1962).

105 *E.g.*, MINN. STAT. ANN. § 414.03 (Supp. 1962).

106 MICH. STAT. ANN. § 5.2085 (Supp. 1961).

107 ALASKA STAT. ANN. § 29.70.020 (1962).

108 WASH. REV. CODE § 35.13.020 (Supp. 1961).

gard, requires the signatures of "seventy-five per cent of the qualified electors and the owners of not less than seventy-five per cent of the real estate in assessed valuation."¹⁰⁹ The more stringent these requirements, the less likely it is that the city will be able to muster the requisite number of signatures. On the other hand, if these statutes require the signatures of over one-half of the electors in the area to be annexed, that should be sufficient reason to delete the requirement that there also be a referendum on the question in that area in order to determine the will of the area's inhabitants.¹¹⁰

Presently statutes require the signatures of a specified percentage of the "owners" of the area,¹¹¹ of the "electors" in the area,¹¹² and/or the "owners" of either a specified percentage of the acreage¹¹³ or assessed valuation of the real estate in the area.¹¹⁴ Thus, legislatures which are giving consideration to the problems in this area will find available models of a wide variety of approaches to the solution of these problems.

(c) Contents of the Petition.

Above and beyond the requirements as to who must sign the petition, the same statutes often prescribe what must accompany the petition, though some states are silent on this point.¹¹⁵ The usual provision is along the lines of the Arizona statute which provides:

The petition submitted to the owners of property for their signature under the provisions of subsection A shall set forth a description of all the exterior boundaries of the entire area proposed to be annexed to the city or town. The petition shall have attached to it at all times an accurate map of the territory desired to be annexed. . . .¹¹⁶

While the usual requirements are satisfied by including a description of the area to be annexed and/or a map of that area, Minnesota has a much more detailed requirement stemming from the fact that the petition is there used by the state-appointed board of commissioners to better evaluate the soundness of the proposed annexation. Thus, that state provides:

The petition shall set forth the boundaries of the territory, the quantity of land embraced in it, the number of actual residents, the number and character of the existing buildings in the area and the existing facilities such as water system, zoning, street planning, sewage disposal, fire and police protection.¹¹⁷

Not too unusual is the additional requirement that the petition must be verified "by the oath of 1 or more petitioners."¹¹⁸ Thus, by and large, it is not too difficult to fulfill the statutory provisions as to the contents of the petition.

109 N.D. CENT. CODE ANN. § 40-51-01 (1960).

110 In such states as Wyoming where the petition must be signed by a majority of the owners of real estate as well as by the owners of a majority of the property in acreage, the expense of an election to determine the desires of the inhabitants of the area to be annexed is not justifiable. Reasonably enough, Wyoming does not require such an election to accomplish the annexation. WYO. STAT. ANN. § 15-365 (1957). Illinois, on the other hand, though requiring the signatures of a majority of the owners of record and also a majority of the electors, conducts such an election in the area to be annexed. ILL. ANN. STAT. ch. 24, §§ 7-1-2 to 7-1-6 (Smith-Hurd 1962).

111 *E.g.*, IND. ANN. STAT. § 48-701a (Supp. 1962).

112 *E.g.*, CAL. GOV'T CODE § 35116.

113 *E.g.*, ARK. STAT. ANN. § 19-301 (1956).

114 *E.g.*, NEV. REV. STAT. § 266.090 (1957).

115 Arkansas, California, Colorado, Maryland, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Texas, Utah, Washington, West Virginia, and Wyoming. Statutes cited note 100 *supra*.

116 ARIZ. REV. STAT. ANN. § 9-471 (1956). See also, LA. REV. STAT. § 33:151 (1950); MONT. REV. CODES ANN. § 11-506 (1947); NEB. REV. STAT. § 17-405 (1962); NEV. REV. STAT. § 266.090 (1957); OHIO REV. CODE ANN. 709.02 (Page 1953); S.C. CODE § 47-12 (1962); S.D. CODE § 45.2905 (1939); TENN. CODE ANN. § 6-301 (1955); VA. CODE ANN. § 15-152.4 (1950); WIS. STAT. ANN. § 66.021 (Supp. 1962).

117 MINN. STAT. ANN. § 414.03 (Supp. 1962).

118 MICH. STAT. ANN. § 5.2085 (Supp. 1961).

(d) Procedure Subsequent to Completion of the Petition.

After the requisite number of signatures has been obtained and the other required data has been gathered, the petition is then presented to some "duly constituted authority." At this point a question arises as to which authority is best equipped to handle the matter.

The easiest solution to the problem is to require that the petition be filed with the legislative body of the annexing city and this is the approach adopted by a majority of states.¹¹⁹ That body then considers the desirability of annexing the territory. This consideration may be made either with¹²⁰ or without¹²¹ the benefit of public hearings. If the city is favorable toward the annexation, a municipal resolution is passed to that effect and that may be all that is necessary,¹²² though a common requirement is that the matter then be put to vote in the area to be annexed.¹²³ In light of the problems confronting the metropolitan areas and the fact that these problems may be alleviated by expansion of the municipal boundaries, it is not foreseeable that a local legislative body would ever be inclined to reject such a petition.¹²⁴ Indiana has, however, covered that contingency by providing that the petitioners may take their petition to the circuit court of the county in the event of inaction on the part of the city's governing body.¹²⁵ This method whereby the petition is submitted to the city legislature, however, is not the universal solution to the problem.

Other states provide by statute that the petition is to be submitted to a local court.¹²⁶ Under the highly touted "Virginia plan," the courts are the final judges as to whether or not a proposed annexation will be permitted to reach fruition.¹²⁷ This system has received praise from a number of commentators who have considered it¹²⁸ and constructive criticism from a few.¹²⁹ The essence of the scheme involves placing quite a bit of discretion in the hands of the judiciary, a scheme which might be struck down as an unconstitutional delegation of legislative authority under some state constitutions.¹³⁰

A third approach which has been adopted involves the submission of the petition to an independent board or agency. Such a procedure prevails in Michigan,¹³¹

119 ALASKA STAT. ANN. § 29.70.020 (1962); ARIZ. REV. STAT. ANN. § 9-471 (1956); CAL. GOV'T CODE § 35116; COLO. REV. STAT. ANN. § 139-11-3 (1953); IND. ANN. STAT. § 48-701a (Supp. 1962); IOWA CODE ANN. § 362.30 (1946), § 362.31 (Supp. 1962); LA. REV. STAT. §§ 33:151, 33:172 (1950); MD. ANN. CODE art. 23A, § 19 (1957); MONT. REV. CODES ANN. § 11-506 (1947); NEB. REV. STAT. § 17-405 (1962); NEV. REV. STAT. § 266.090 (1957); N.J. STAT. ANN. § 40:43-26 (1937); N.Y. VILLAGE LAWS art. 15, § 348; N.C. GEN. STAT. § 160-452 (Supp. 1961); N.D. CENT. CODE ANN. § 40-51-01 (1960); OKLA. STAT. ANN. tit. 11, § 482 (1959); PA. STAT. ANN. tit. 53, § 53101 (1957); S.C. CODE §§ 47-12, 47-19.1 (1962); S.D. CODE § 45.2905 (1939); TENN. CODE ANN. § 6-301 (1955); TEX. REV. CIV. STAT. ANN. art. 965, (1953); art. 974-g (Supp. 1962); WASH. REV. CODE § 35.13.020 (Supp. 1961); W.VA. CODE ANN. § 462 (1961); WYO. STAT. ANN. § 15-365 (1957).

120 E.g., ALASKA STAT. ANN. § 29.70.020 (1962).

121 E.g., ARIZ. REV. STAT. ANN. § 9-471 (1956).

122 *Ibid.*

123 E.g., WASH. REV. CODE § 35.13.090 (Supp. 1961).

124 As with any general rule, there are exceptions. In this case one of the surprising exceptions is Los Angeles, California, whose present administrative policy seems to disfavor any further expansion unless it carries with it the possibility of greatly increased revenues. Letter from Howard A. Martin, Secretary, City of Los Angeles Coordinating Board, to the NOTRE DAME LAWYER, March 29, 1963, on file in the Notre Dame Law Library.

125 IND. ANN. STAT. § 48-701a (Supp. 1962).

126 ARK. STAT. ANN. § 19-301 (1956); PA. STAT. ANN. tit. 53, § 171 (1957); VA. CODE ANN. § 15-152.4 (1950).

127 VA. CODE ANN. § 15-152.4 (1950).

128 Bain, *Recent Developments in the Virginia Annexation System*, 46 VA. L. REV. 1023 (1960); Note, *Annexation in Minnesota Today*, 39 MINN. L. REV. 553 (1955); Note, *Municipal Annexation and Detachment in Nebraska*, 32 NEB. L. REV. 43, 66 (1952); Note, *Annexation Procedure and Law under Present Virginia Statutes*, 36 VA. L. REV. 971 (1950).

129 Bain, *Annexation: Virginia's Not-So-Judicial System*, 15 PUB. ADMIN. REV. 251 (1955).

130 E.g., *DuPre v. City of Marietta*, 213 Ga. 403, 99 S.E.2d 156, 158 (1957) (dicta.).

131 MICH. STAT. ANN. § 5.2087 (Supp. 1961).

Ohio,¹³² and Minnesota.¹³³ These boards may be used merely as a device to check the petition for deficiencies in the number of signers and like requirements; or, as in Minnesota, the functions of this board may far exceed a cursory examination of the petition and "rubber-stamp" approval thereof. In that State, a state-appointed commission has been established whose sole function is to regulate municipal boundary changes and incorporations.¹³⁴ Those then are the means by which a petition signed by the inhabitants of the area to be annexed can enable a city to grow.

3. Annexation Initiated by Ordinance

This process of annexation is that which is initiated by the legislative body of the city. In a majority of states, this method of annexation is just "another way to skin the cat," using the same rusty and dull knives that are used where the process is initiated by petition. In other words, this method has much in common with the petition process in that the mere passage of an ordinance is a long way from an accomplished annexation. Furthermore the two processes share a number of common points such as land requirements of the area to be annexed,¹³⁵ the requirements of public hearings on the annexation proposal,¹³⁶ and finally the common requirement of a referendum on the question of annexation in the area to be annexed.¹³⁷

There are however, by the same token, a number of points which distinguish the two methods and the treatment of those points will constitute the main emphasis of this subsection.

(a) Findings by the City Council Prior to Passing the Ordinance.

As an integral part of the procedure for acquiring new territory several states set out certain findings which the municipal legislative body must make before passing a city ordinance. If these statutory requirements were designed to slow down a city which is bent on annexation, they constitute rather feeble efforts. For example, Alabama requires the city to find that the public health or public good requires annexation.¹³⁸ Missouri and Montana require findings that "it redounds to the cities benefit"¹³⁹ and that it is in the best interests of the city and the area to be annexed¹⁴⁰ respectively. These nebulous norms which the proposed annexation is supposed to meet do not really set any standards and it is submitted that they should either be deleted or else made much more specific. The courts have on occasion struck down the findings of the city council on the equally vague grounds that they were "unreasonable."¹⁴¹ For the most part though, the requirement that the city council make certain findings is just so much excess statutory verbiage and does not pose any hurdle to the city seeking to annex territory by passing an ordinance.

(b) Restrictions on the Use of the Annexation Ordinance.

After the city council has passed the ordinance, the city council must then

132 OHIO REV. CODE ANN. § 709.02 (Page 1953).

133 MINN. STAT. ANN. § 414.03 (Supp. 1962).

134 *Ibid.* In 1961, the Minnesota Municipal Commission was given automatic jurisdiction over all boundary changes within four miles of an existing municipality; formerly it had jurisdiction of cases involving areas within one mile of an existing city and application had to be made to the district court before the Commission gained jurisdiction. Bollens, *Metropolitan and Fringe Area Developments in 1961*, 29 THE MUNICIPAL YEAR BOOK 44, 46 (1962).

135 *E.g.*, NEB. REV. STAT. §§ 17-405, 17-407 (1962).

136 *E.g.*, CAL. GOV'T CODE §§ 35313-14.

137 *E.g.*, ILL. ANN. STAT. ch. 24, § 7-1-8 (Smith-Hurd 1962).

138 ALA. CODE tit. 37, § 135 (1958).

139 MO. ANN. STAT. § 75.020 (1949).

140 MONT. REV. CODES ANN. § 11-403 (Supp. 1961).

141 *E.g.*, State v. City of Joplin, 332 Mo. 1193, 62 S.W.2d 393 (1933).

comply with subsequent steps to accomplish the annexation. These "steps" might be termed "checks" on the power of the municipality to unilaterally expand its boundaries at its own will, whim and caprice. These "checks" assume a variety of forms.

In some states, the proposed annexation is subject to judicial scrutiny in that the municipality must submit its ordinance to the judiciary for final determination.¹⁴² This judicial determination is partially based on testimony presented at a hearing wherein the inhabitants of the area to be annexed may present their objections to the proposed annexation.¹⁴³ Other states require the city to submit its ordinance to an independent administrative agency for consideration.¹⁴⁴ The inhabitants of the area are likewise given a chance to appear before that body to contest the annexation.¹⁴⁵ Still other states require that the question be put to a referendum vote among the area's inhabitants.¹⁴⁶ Another "check" device being used is the statutory provision which creates the right in any interested person to file a complaint in a local court to contest the annexation after the passage of the ordinance has become a *fait accompli*.¹⁴⁷ In Kentucky, this method of appeal is made a vehicle for expressing the public policy of that state. To invalidate an ordinance of a first-class city by court action, 75 per cent of the freeholders in the area to be annexed must register their protest with the court,¹⁴⁸ whereas only 50 per cent of the freeholders need protest to invalidate an ordinance of a second-class city.¹⁴⁹ Thus it is more difficult in Kentucky to block the growth of the larger city than it is to stymie the smaller one.

Another approach which several states have adopted is to couch the "annexation by ordinance" statute in terms that require the city, as a condition precedent to passing a valid ordinance, to obtain the consent of a given percentage of the inhabitants of the area to be annexed.¹⁵⁰ Finally, another "check" used is the requirement that the city hold a public hearing on the question and upon the protest of a given percentage of the area's inhabitants, the city is no longer authorized to pass such an ordinance.¹⁵¹

In concluding the discussion of these "checks" it would be appropriate to evaluate the statutory mechanics of annexation. However, such evaluations can only be made in terms of how well the statutes accomplish the state's announced legislative policy toward annexation and, on the whole, it is difficult to determine whether there is any such policy. Consequently, all that one can say is that these checks "exist."

142 ARK. STAT. ANN. § 19-307 (1956); IOWA CODE ANN. § 362.26 (Supp. 1962); MISS. CODE ANN. § 3374-11 (Supp. 1960); NEB. REV. STAT. §§ 17-407, 17-408 (1962); VA. CODE ANN. §§ 15-152.3 to 15-152.26 (1950); W.VA. CODE ANN. § 591 (127) (1961); WYO. STAT. ANN. §§ 15-366, 15-367 (1957).

143 E.g., MISS. CODE ANN. § 3374-12 (1942).

144 KAN. GEN. STAT. ANN. §§ 12-501, 12-502 (1949); MINN. STAT. ANN. § 414.03 (Supp. 1962); S.D. CODE § 45.2906 (Supp. 1960) (unplatted land only).

145 E.g., MINN. STAT. ANN. § 414.03 (Supp. 1962).

146 ALA. CODE tit. 37, § 135 (1958); FLA. STAT. ANN. § 171.04 (Supp. 1962) (where more than ten registered electors reside in area to be annexed); ILL. ANN. STAT. ch. 24, § 7-1-8 (Smith-Hurd 1962); OHIO REV. CODE ANN. §§ 709.14 to 709.17 (Page 1953); ORE. REV. STAT. §§ 222.130 to 222.160 (1961). (This election may not be required if the consent of the owners of 2/3 of the land in value and in area is acquired); WASH. REV. CODE §§ 35.13.015, .090 (Supp. 1961); WIS. STAT. ANN. § 66.024 (Supp. 1962). The most unique provision is that of Delaware which states that, in voting, each real estate owner shall be entitled to one vote for each \$100 of real estate assessed to him. DEL. CODE ANN. tit. 22, § 101 (1953).

147 E.g., KY. REV. STAT. ANN. § 81.110 (1955); N.C. GEN. STAT. §§ 160-453.6, 160-453.18 (Supp. 1961).

148 KY. REV. STAT. ANN. § 81.110 (1955).

149 KY. REV. STAT. ANN. § 81.140 (1955).

150 LA. REV. STAT. § 33:172 (1950); MD. ANN. CODE art. 23A, § 19 (Supp. 1962); N.M. STAT. ANN. § 14-6-1 (1953).

151 CAL. GOV'T CODE §§ 35313-35314.

(c) Annexation by Ordinance — *Sans* Restrictions?

Under the statutory schemes discussed above, overenthusiastic would-be annexers are kept in check by a variety of means. There are, however, certain instances whereby the city legislature, upon its own motion, may annex land simply by passing an ordinance. The most extensive grant of this type of power to the city has been made by the legislatures of Texas and Missouri via the home-rule provisions. Texas perhaps provides the better example of the tremendous potential uses of the type of statute which enables a city to act unilaterally. In that state, cities which exercise the option of adopting a home-rule charter possess certain unique powers, including

The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, according to such rules as may be provided by said charter.¹⁵²

A home-rule city thus is given a *carte blanche*. Consequently, Texas home-rule cities have been "pasture-grabbing" at a fantastic rate: The City of San Antonio in 1952 considered the annexation of over 120 square miles of additional territory.¹⁵³ Eight years later, the City of Houston, reflecting a Texas flair for "doing things in a big way," far outstripped San Antonio's efforts. Houston's plan of action was reported as follows:

Booming cities pressed for land have long looked jealously at the liberal laws that permit Texas municipalities to annex more land more easily than cities in any other state. Last month, the Texas spree reached the zany level when Houston staked claim to 1,080 square miles — an area more than double that of Los Angeles, now the nation's largest city in size.¹⁵⁴

It is clear that such a method of annexation is potentially a great device for city growth.¹⁵⁵ However, the Texas situation, which has been criticized as lacking uniformity and basic legislative standards,¹⁵⁶ constitutes an exception to the rule that the power of cities to expand by the mere expediency of passing an ordinance is severely restricted to specific types of land. For example, the power to annex by ordinance alone is restricted to land which the municipality owns,¹⁵⁷ land which has been subdivided or platted into lots of not more than a certain size,¹⁵⁸ or land which is partially¹⁵⁹ or wholly¹⁶⁰ surrounded by the annexing municipality. Other occasions upon which the city may by ordinance alone annex certain territory arise when the area is highly urbanized¹⁶¹ or when the owner begins to sell his holdings by lots of less than a certain size.¹⁶² Thus, this power of annexing by

152 TEX. REV. CIV. STAT. ANN. art. 1175 (1953).

153 This figure was subsequently reduced to slightly under eighty square miles. *State v. City of San Antonio*, 259 S.W.2d 248 (Tex. Civ. App. 1953).

154 Houston did not actually annex this vast tract, but merely had a first-reading of the ordinance at a city council meeting to guard against the possibility that part of the area might be incorporated or annexed by another city. *Houston's Texas-Size Land Grab*, Bus. Week, July 23, 1960, p. 54.

155 See also, IND. ANN. STAT. §§ 48-701, 48-713 (Supp. 1962); MO. ANN. STAT. § 82.090 (Supp. 1962). Missouri is slightly more restrictive in that the city must go through the motions of holding an election on the question in the city.

156 O'Quinn, *Annexing New Territory: A Review of Texas Law*, 39 TEX. L. REV. 172 (1960).

157 ILL. ANN. STAT. ch. 24, § 7-1-9 (Smith-Hurd 1962); N.Y. VILLAGE LAWS § 348-a art. 15; MINN. STAT. ANN. § 414.03 (Supp. 1962); S.C. CODE § 47-18.1 (1962); WIS. STAT. ANN. § 66.025 (1957); WYO. STAT. ANN. § 15-368 (1957).

158 IDAHO CODE ANN. § 50-303 (1947); KAN. GEN. STAT. ANN. § 13-1602 (1949); OKLA. STAT. ANN. tit. 11, § 481 (1959); S.D. CODE § 45.2906 (Supp. 1960); WYO. STAT. ANN. § 15-37 (1957).

159 KAN. GEN. STAT. ANN. § 13-1602 (1949); OKLA. STAT. ANN. tit. 11, § 481 (1959).

160 ILL. ANN. STAT. ch. 24, § 7-1-13 (Smith-Hurd 1962); MINN. STAT. ANN. § 414.03 (Supp. 1962).

161 N.C. GEN. STAT. §§ 160-445 to 160-453.24 (Supp. 1961). The constitutionality of these new and more liberal provisions was upheld in *In re Annexation Ordinances Nos. 866-700*, 253 N.C. 637, 117 S.E.2d 795 (1961).

162 IDAHO CODE ANN. § 50-303 (1947).

ordinance alone, while not subjected to the types of restriction discussed earlier, such as judicial scrutiny or referendum, nonetheless generally is restricted in a very real sense to particular situations of minimal import.

(d) Distinctions Among Classes of Cities.

In contradistinction to those statutes under which annexation is initiated by petition, a common practice among the states which provide for annexation by ordinance is to provide different procedures for the different classes of cities within the state. Assuming that these statutes survive the special legislation objection, the differentiations which are made may provide a valuable means by which the state may enable its larger cities to grow more easily while restricting the efforts of smaller cities. Cities with a population in excess of a given number may be excluded from the general procedure provided,¹⁶³ a larger or smaller number of persons may be required to object at the public hearings in order to invalidate the ordinance,¹⁶⁴ or more liberal or alternative methods of expansion may be provided.¹⁶⁵ Any of these means may be chosen to favor the expansion of the "big city." The Nebraska legislature, which created an easier alternative method of annexation for the City of Omaha, demonstrates this point. Statutory authority is given to Omaha to annex territory and merge with cities of less than 10,000 by merely passing an ordinance,¹⁶⁶ whereas the normal Nebraska procedure requires that such ordinance be submitted to the district court for a hearing and decision.¹⁶⁷ This ease of annexation has enabled Omaha to annex given chunks of territory in each of the past 13 years.¹⁶⁸ During that period of time, 44 separate ordinances have been passed, the net effect of which has been to greatly expand the boundaries of Omaha.¹⁶⁹ Here, the rather obvious use of legislative tools to express public policy is seen at work.

4. The Power of Area Inhabitants to Block Proposed Annexations

Whether the annexation be initiated by petition¹⁷⁰ or ordinance,¹⁷¹ the desires of the inhabitants in the area to be annexed often determine whether the proposed annexation takes place. If the process is initiated by petition, the inhabitants may simply refuse to sign the petition. Under either method, most states require that a referendum be held in the area to be annexed prior to the annexation.

Where the process is begun by ordinance, the "checks" have already been discussed.¹⁷² Under the process begun by petition, a number of states provide that the final determination is to be made by the city council,¹⁷³ but even in those cases,

163 *E.g.*, FLA. STAT. ANN. § 171.04 (Supp. 1962); LA. REV. STAT. § 33:171 (1950).

164 *E.g.*, KY. REV. STAT. ANN., notes 148, 149, *supra*.

165 *E.g.*, ORE. REV. STAT. § 222.410 (1961).

166 NEB. REV. STAT. § 14-117 (1962).

167 NEB. REV. STAT. §§ 14-407, 408 (1962). Omaha is the only city of the "metropolitan class" under the statute.

168 Omaha City Planning Board map showing growth of the city to March 13, 1962, on file in the Notre Dame Law Library.

169 *Ibid*.

170 ALASKA STAT. ANN. § 29.70.010 (1962); CAL. GOV'T CODE § 35112; GA. CODE ANN. § 69-1008 (1957); ILL. ANN. STAT. ch. 24, §§ 7-1-6, 7-1-8 (Smith-Hurd 1962); LA. REV. STAT. § 33:151 (1950); MD. ANN. CODE art. 23A, § 19; MICH. STAT. ANN. § 5.2088 (Supp. 1961); MONT. REV. CODES ANN. § 11-506 (1947); N.Y. VILLAGE LAWS art. 15, § 348; PA. STAT. ANN. tit. 53, § 172 (1957); S.C. CODE § 47-12 (1962); TENN. CODE ANN. § 6-302 (1955); WASH. REV. CODE § 35.13.090 (Supp. 1961); W. VA. CODE ANN. § 591(123) (1961); WIS. STAT. ANN. § 66.021 (Supp. 1962).

171 Statutes cited note 146 *supra*.

172 Materials cited notes 142-151 *supra*.

173 COLO. REV. STAT. ANN. § 139-11-3 (1953); IND. ANN. STAT. § 48-701a (Supp. 1962). NEB. REV. STAT. § 17-405 (1962); NEV. REV. STAT. § 266.090 (1957); N.J. STAT. ANN. § 40:43-26 (1937); S.D. CODE § 45.2905 (1939); TEX. REV. CIV. STAT. ANN. art. 965 (1953); UTAH CODE ANN. § 10-3-1 (1953); WIS. STAT. ANN. § 66.021 (1957).

malcontents are by statute given a right of petition to the local courts.¹⁷⁴ Where the fact of the petition is determined by either a court or a special commission, the statutes often require that the inhabitants of the area be given notice of the hearings on the petition and, as with the ordinance, that they be given a chance to speak in opposition to the proposal.¹⁷⁵ The most risky means of protest on the part of the inhabitants might be to refuse to pay the municipally imposed taxes after the annexation and then, in defense of a tax suit, contest the power of the municipality to impose taxes on them. At any rate, the conclusion is obvious that it is difficult to annex territory if the people living there do not want to be annexed. The situation is worse where the city attempts to merge with an adjacent municipality that does not desire to merge.

B. Merger

If a city has been surrounded by other incorporated municipalities, the only means by which the city can grow is through the use of merger statutes. At the outset of a discussion concerning the topic of "merger" it may be useful to consider a "typical" merger statute. An Oklahoma provision reads:

Whenever the city council . . . of any municipal corporation shall, by resolution, or whenever the resident citizens liable to pay a majority of the taxes of such citizens assessed . . . shall by petition, ask of the city council, of any adjacent city . . . for a consolidation of such adjacent municipal corporations, setting forth the terms of such consolidation, it shall be lawful for the said city council . . . after having first submitted the question of such consolidation . . . to a vote of the qualified electors of such corporation, and, a majority thereof having voted in favor of such consolidation, by ordinance, to consolidate such adjacent municipal corporations. . . .¹⁷⁶

It will be observed that the procedural requirements of the statute set out above are similar to those found in annexation statutes. As with annexation, the merger process may be initiated by either petition of the electorate¹⁷⁷ or by ordinance passed by a city's legislative body.¹⁷⁸ The fact that ordinarily the annexing and annexed cities must be "contiguous" or "adjacent" is a requirement to be found in both annexation and merger statutes;¹⁷⁹ and often this term is, as in the case of annexation, a matter of statutory definition.¹⁸⁰ As might be expected, there are exceptions to the requirement that the cities be "adjacent" before they may merge.¹⁸¹ Where a petition begins the merger process, there exists the same divergence among the states which prevails in the annexation statutes as to who may sign the petition¹⁸² and the required number of such signers.¹⁸³

174 *E.g.*, COLO. REV. STAT. ANN. § 139-11-6 (1953).

175 *E.g.*, IOWA CODE ANN. § 362.26 (Supp. 1962).

176 OKLA. STAT. ANN. tit. 11, § 3 (1959).

177 Statutes cited note 182 *infra*.

178 *E.g.*, IOWA CODE ANN. § 362.19 (Supp. 1962).

179 *E.g.*, MINN. STAT. ANN. § 414.04 (Supp. 1962). For examples of annexation statutes, see note 81 *supra*.

180 ALASKA STAT. ANN. § 29.70.250 (1962); ARK. STAT. ANN. § 19-310 (1956); LA. REV. STAT. § 33:191 (1950); MINN. STAT. ANN. § 414.04 (Supp. 1962); ORE. REV. STAT. § 222.610 (1961).

181 *E.g.*, ALA. CODE tit. 37, § 218 (1958); ORE. REV. STAT. § 222.610 (1961).

182 ALA. CODE tit. 37, § 188 (1958) (50 qualified electors or 1/2 of qualified electors, whichever is less); ARK. STAT. ANN. § 19-310 (1956) (not less than 50 qualified electors from each city); CAL. GOV'T CODE §§ 35700-747 (1/5 of qualified voters of each city), §§ 35800-854 (1955) (1/4 of qualified electors in initiating city); IDAHO CODE ANN. §§ 50-2314, 50-2315 (Supp. 1961) (1/5 of qualified electors of each); ILL. ANN. STAT. ch. 24, § 7-1-16 (Smith-Hurd 1962) (250 electors from city to be annexed); IND. ANN. STAT. § 48-602 (1950) (1/10 of qualified electors); LA. REV. STAT. § 33:193 (1950) (1/4 of qualified electors); MICH. STAT. ANN. § 5.2085 (Supp. 1961) (by qualified electors who are resident freeholders equal to 1% of population in city to be annexed); MINN. STAT. ANN. § 414.04 (Supp. 1962) (1/10 of legal voters in city to be annexed); MISS. CODE ANN. § 3374-17 (1942) (2/3 of qualified electors in city to be annexed); MO. ANN. STAT. § 72.160 (Supp. 1962) (100 residents or 15% of those voting in last election, whichever is greater);

In a limited number of cases, petition is the sole means of commencing the merger process,¹⁸⁴ but in many states this is an alternative to beginning the process by either a resolution of one of the city's legislative bodies or a joint resolution by both city councils.¹⁸⁵ At the other end of the spectrum, in several states the petition plays no part in the process until the proposed merger has neared completion, and then only for the purpose of compelling an election in one of the cities where otherwise it might not be required.¹⁸⁶

Where the process is begun by resolution, a rather common device is to require each city to appoint three men to form a commission whose task it is to grapple with the details of the proposal.¹⁸⁷ Then the agreement worked out by that commission is voted upon by the electors of both cities¹⁸⁸ or, prior to the election, is considered by both legislatures.¹⁸⁹ Where the statutes call for the question of any proposed annexation to be submitted to an independent agency or the judiciary, this same body is sometimes called upon to likewise determine merger proposals.¹⁹⁰ Other states merely assign it an intermediate role of some sort with the electors having the power of final decision.¹⁹¹

Thus, the merger statutes are similar in many respects to the annexation statutes but there are important differences. In the first place, under the annexation statutes the annexing city has only to obtain the consent of the area's inhabitants before annexing the territory — a Herculean task in itself. Under the merger statutes, the annexing city must have the consent of the residents of the other city¹⁹² as well as the consent of the other city's legislative branch.¹⁹³

NEB. REV. STAT. § 15-111 (1962) (1/5 of qualified electors in city to be annexed); N.J. STAT. ANN. § 40:43-65 (1937) (1/5 of qualified voters); OHIO REV. CODE ANN. § 709.24 (Page 1953); OKLA. STAT. ANN. tit. 11, § 3 (1959) (resident citizens of annexing city liable to pay a majority of city taxes on real and personal property); ORE. REV. STAT. § 222.220 (1961) (1/10 of registered voters in each city); PA. STAT. ANN. tit. 53, §§ 171-75 (1957) (1/20 of qualified voters), §§ 30251-54 (1957) (1/4 of voters at last election in area to be annexed), *inter alia*; S.D. CODE §§ 45.29A01-04 (Supp. 1960) (1/4 of electors and owners of property); TENN. CODE ANN. § 6-316 (Supp. 1962) (1/5 of qualified voters of city to be annexed); UTAH CODE ANN. § 10-14-1 (1953) (1/10 of real property taxpayers in each municipality); VA. CODE ANN. § 15-222 (1/10 of qualified voters); WASH. REV. CODE §§ 35.12.010 to .030 (1951) (qualified voters equal to 1/5 of votes cast at last election); W. VA. CODE ANN. §§ 591 (103) to 591 (110) (1961) (1/4 of qualified voters).

183 *Ibid.*

184 *E.g.*, ARK. STAT. ANN. § 19-310 (1956).

185 *E.g.*, IND. ANN. STAT. §§ 48-601, 48-602 (1950).

186 *E.g.*, KAN. GEN. STAT. ANN. § 12-302 (Supp. 1961).

187 *E.g.*, IOWA CODE ANN. § 362.19 (Supp. 1962); N.M. STAT. ANN. § 14-6-9 (1953).

188 *E.g.*, OHIO REV. CODE ANN. §§ 709.23-709.31 (Page 1953).

189 *E.g.*, COLO. REV. STAT. ANN. § 139-9-1 (1953); IOWA CODE ANN. § 362.19 (Supp. 1962).

190 *E.g.*, MISS. CODE ANN. § 3374-17 (1942).

191 *E.g.*, MINN. STAT. ANN. § 414.04 (Supp. 1962); VA. CODE ANN. § 15-180 (1950).

192 ALA. CODE tit. 37, § 188 (1958); ALASKA STAT. ANN. § 29.70.250 (1962); ARK. STAT. ANN. § 19-312 (1956); CAL. GOV'T CODE §§ 35700-35747, 35800-35854; CONN. GEN. STAT. ANN. § 7-199 (1958); FLA. STAT. ANN. § 171.09 (1943), § 171.05 (Supp. 1962); IDAHO CODE ANN. § 50-2315 (Supp. 1961); ILL. ANN. STAT. ch. 24, § 7-1-15 (Smith-Hurd 1962); IND. ANN. STAT. § 48-601 (1950); IOWA CODE ANN. § 362.19 (Supp. 1962); KAN. GEN. STAT. ANN. § 12-302 (1949) (assuming protest is filed); KY. REV. STAT. ANN. §§ 81.120, .160 (1955); LA. REV. STAT. § 33:192 (1950); MICH. STAT. ANN. § 5.2088 (Supp. 1961); MINN. STAT. ANN. § 414.04 (Supp. 1962); MO. ANN. STAT. §§ 72.167, 81.080, 82.090 (Supp. 1962); NEB. REV. STAT. § 15-111 (1962); N.J. STAT. ANN. § 40:43-66.16 (1937); N.M. STAT. ANN. § 14-6-9 (1953); N.Y. VILLAGE LAWS art. 15, § 352; OHIO REV. CODE ANN. § 709.29 (Supp. 1962); OKLA. STAT. ANN. tit. 11, § 3 (1959); ORE. REV. STAT. § 222.220 (1961); PA. STAT. ANN. tit. 53, §§ 175, 30254 (1957); S.C. CODE § 47-13 (1962); S.D. CODE § 45.29A04 (Supp. 1960); TENN. CODE ANN. § 6-316 (Supp. 1962); UTAH CODE ANN. § 10-14-3 (1953); VA. CODE ANN. §§ 15.175-.181, .190-.219 (1950); WASH. REV. CODE §§ 35.10.010-.070, 35.11.010, 35.12.010-.030 (1951); W. VA. CODE ANN. § 591 (105) (1961); WIS. STAT. ANN. § 66.02 (Supp. 1962).

193 *E.g.*, S.D. CODE § 45.29A01-04 (Supp. 1960). Therein the process is begun by petition, both legislative bodies pass an appropriate ordinance and an election is held in both cities. The "annexed" city must cooperate to the extent of passing an ordinance.

Secondly, under the annexation statutes, the state legislators could only make "vertical" distinctions between classes of cities — *e.g.*, first class, second class and third class. Under the merger statutes the legislatures are free to make further distinctions by providing different procedures to govern the merger of a first-class city with another city of the same class, with a second-class city, and so on. These various distinctions and classifications, if used properly, might constitute a statement of an integrated state policy toward annexation and merger and might make merger for the larger city either easier or more difficult.

To illustrate, under Florida's general statutory scheme for merger, the process is begun by the "annexing city" passing an ordinance to the effect that it intends to merge with the other city. The other city is informed of the passage of that ordinance and that city may then, if it desires to do so, pass a similar ordinance. Next an election is held in both cities, an election which will result in the proposed merger becoming final upon the affirmative vote of two-thirds of those voting in each city.¹⁹⁴ But, where the "annexing city" has a population in excess of 10,000, the process is made easier in two ways: (1) there is no requirement that the second city pass an ordinance and (2) the affirmative vote of only a majority in each city is required to pass the proposal, as opposed to two-thirds under the general provisions.¹⁹⁵ This is a clear "vertical" distinction between classes of cities used to benefit the larger cities.

The State of Kentucky, going one step further, not only makes "vertical" distinctions but also sets out different requirements for the merger of a second-class city with a second-, third- or fourth-class city¹⁹⁶ than for the merger of a second-class city with a fifth- or sixth-class city.¹⁹⁷ If these distinctions were carried to the ultimate, Kentucky might have some 15 different provisions governing mergers by the six different classes of cities in that state. *Per se*, this would not be undesirable, but it might be otherwise if there were no internally consistent policy reflected in all these provisions.

Having discussed the "Ways Cities Can Grow" by annexation and merger, these same statutes, as well as others, will now be explored with respect to the roadblocks they constitute to that growth. These statutes are totally inadequate to assist the core city which is surrounded by communities which have defensively incorporated, communities whose principal *raison d'être* is precisely to stop the growth of the city, communities which render illusory the present statutory methods by which a city can grow.

III. ROADBLOCKS TO GROWTH

A. Generally

The statutory procedures for effectuating expansion via annexation or merger are mere "paper tigers" in most jurisdictions because they are so encumbered with procedural requirements as to make their utilization extremely difficult, if not well-nigh impossible. Although the greater number of annexation laws are restrictive, those providing for merger or consolidation are always more so.¹⁹⁸ This explains why "defensive incorporation" has been popular in numerous metropolitan areas and why municipal incorporation is a vital part of a consideration of metropolitan problems.

St. Louis County presently contains 99 municipalities — many of which were

194 FLA. STAT. ANN. § 171.09 (1943).

195 FLA. STAT. ANN. § 171.05 (Supp. 1962).

196 KY. REV. STAT. ANN. § 81.160 (1955).

197 KY. REV. STAT. ANN. § 81.150 (1955).

198 There have been an estimated 2,000 annexations in California during the last 10 years, but the last merger in the state took place in 1931. Letter from Howard Gardner, associate director, League of California Cities, to the NOTRE DAME LAWYER, March 27, 1963, on file in the Notre Dame Law Library.

formed to prevent annexation of the area by the City of St. Louis.¹⁹⁹ Similarly in Wisconsin, the small communities of Glendale, Hales Corners, Bayside, Brown Deer, Franklin, Oak Creek, Greenfield and St. Francis attained legal being during the years 1950-1957²⁰⁰ and thereby seriously hampered any attempt by Milwaukee to make its boundaries more closely correspond with those of the metropolitan area. Vincent L. Lung, Milwaukee Planning Director, has stated that "past efforts [to expand] by the city have resulted in the creation of many of these smaller municipalities which have dedicated themselves to the prevention of any future expansion by the City of Milwaukee."²⁰¹ He adds that this "iron ring" will effectively prevent further expansion in the near future.²⁰²

Thus it is obvious that any proposals aimed at putting the emphasis on the central city must include a dose of "preventive medicine," *i.e.*, statutes discouraging incorporation in metropolitan fringe areas, as well as proposals for making it easier for the core cities to expand their boundaries.

B. Defensive Incorporation

1. Existing Law

As has been mentioned, most existing statutes on the subject of incorporation are products of an era which knew nothing of the metropolitan complex and its problems. Minor revisions have been made, but with the single exception of "growth zone" provisions,²⁰³ those wishing to incorporate part of the fringe — in all but a few states — must meet only the standards faced by their ancestors who were carving a community out of previously unoccupied territory.

(a) Initiating the Proceeding

In almost all jurisdictions which have general incorporation laws the proceeding is instituted by petition.²⁰⁴ Eligible signers are either qualified electors,²⁰⁵ adult bona fide residents who are United States citizens,²⁰⁶ real estate taxpayers,²⁰⁷ inhabitants,²⁰⁸ resident freeholders,²⁰⁹ or members of a similar class. As is the case when these terms are used in annexation and merger statutes, their interpretation has been a frequent source of litigation.²¹⁰ Requirements concerning the requisite number of signers are even more diverse. The statute may call for an absolute number²¹¹ or a percentage.²¹² And the percentage may be of people,²¹³ acreage,²¹⁴ or assessed valuation.²¹⁵

199 *City of Olivette v. Graeler*, 338 S.W.2d 827, 837-38 (Mo. 1960). See also 1961 WASH. U.L.Q. 159.

200 *Cutler, Can Local Government Handle Urban Growth*, 1959 WIS. L. REV. 5, 15.

201 Letter From Vincent L. Lung, planning director, Milwaukee, to the NOTRE DAME LAWYER, March 18, 1963, on file in the Notre Dame Law Library.

202 *Ibid.*

203 See Part III, *infra*.

204 States which do not require initiation via petition are Florida (2/3 of the residents attend a meeting, FLA. STAT. ANN. §§ 165.03-.04 (Supp. 1962) and Minnesota (commission initiates action) MINN. STAT. ANN. § 414.05 (Supp. 1962). However, Minnesota retains the orthodox petition approach for incorporation of fourth-class cities. MINN. STAT. ANN. § 411.01 (Supp. 1962).

205 *E.g.*, IOWA CODE ANN. § 362.1 (Supp. 1962); OKLA. STAT. ANN. tit. 11, § 552 (1959); PA. STAT. ANN. tit. 53, § 35202 (1957), § 35250 (Supp. 1962).

206 ALASKA STAT. ANN. § 29.10.006 (1962) (for first-class cities).

207 ARIZ. REV. STAT. ANN. § 9-101 (1956).

208 MO. ANN. STAT. §§ 72.080, 80.020 (Supp. 1962).

209 N.J. STAT. ANN. § 40:123-2 (1937).

210 *People v. City of Garden Grove*, 165 Cal. App. 2d 794, 332 P.2d 841 (1958).

211 The number required ranges between five for third-class cities in Alaska (ALASKA STAT. ANN. § 29.20.020 (1962)) and 200 (ILL. ANN. STAT. ch. 24, § 2-2-6 (Smith-Hurd 1962), N.M. STAT. ANN. § 14-3-1 (1953), PA. STAT. ANN. tit. 53, § 35202 (1957), § 35350 (Supp. 1962)).

212 *E.g.*, CAL. GOV'T CODE § 34303 MD. ANN. CODE art. 23A, § 21 (1957); MICH. STAT. ANN. § 5.2085 (Supp. 1961); ORE. REV. STAT. § 221.030 (1961); W. VA. CODE ANN. § 456 (1961).

(b) Action Taken on the Petition: Standards

The petition is presented to a lower court — usually a county tribunal — in many states;²¹⁶ but almost as many direct that it be sent to the board of county commissioners or its equivalent.²¹⁷ Two states still provide that the petition go to the Governor,²¹⁸ and the Carolinas direct that it be sent to the Secretary of State.²¹⁹

It is at this point that the inadequacy of most of the existing law on municipal incorporation becomes apparent. In many states those wishing to frustrate a pending annexation plan have only to satisfy basic procedural norms and outdated population and perhaps area criteria and they become entitled to their new governmental unit. A court or board may realize that a pending annexation is what prompted the move and may feel strongly that the neighboring large city would be able to provide the services much more efficiently, but in a majority of jurisdictions its hands will be tied.²²⁰ This unfortunate state of affairs can be traced to the non-delegation doctrine, *i.e.*, because creation of municipal corporations is a matter of policy it is a function of the respective state legislatures which cannot be delegated.²²¹ Strict adherence to this nondelegation idea is found only in very old cases²²² and today the view prevails that it is sufficient for the legislature to merely set general standards. There seems to be an ever-increasing trend away from limitations based on the nondelegation principle as courts and county boards — sometimes with and sometimes without statutory direction — apply the standards discussed below.²²³

213 *E.g.*, ARIZ. REV. STAT. ANN. § 9-101 (1956); KAN. GEN. STAT. ANN. § 15-102 (Supp. 1961); LA. REV. STAT. § 33:52 (1950); NEB. REV. STAT. § 17-201 (1962); N.C. GEN. STAT. § 160-197 (1951).

214 ALA. CODE tit. 37, § 10 (1958).

215 CAL. GOV'T CODE § 34303; MD. ANN. CODE art. 23A, § 21 (1957).

216 ALA. CODE tit. 37, § 10 (1958); ALASKA STAT. ANN. §§ 29.10.006, 29.15.020, 29.25.030 (1962); ARK. STAT. ANN. § 19-101 (1956); COLO. REV. STAT. ANN. § 139-1-2 (1953); ILL. ANN. STAT. ch. 24, §§ 2-2-6, 2-3-5, 2-3-10 (Smith-Hurd 1962); IOWA CODE ANN. § 362.1 (Supp. 1962); (if more than one county); KAN. GEN. STAT. ANN. § 15-1104 (1949); KY. REV. STAT. ANN. § 81.050 (1955); MASS. ANN. LAWS ch. 3, § 5 (1961); MISS. CODE ANN. § 3374-03 (1942); MO. ANN. STAT. § 72.080 (1949), § 80.020 (Supp. 1962); NEV. REV. STAT. § 266.020 (1959); ORE. REV. STAT. § 221.030 (1961); PA. STAT. ANN. tit. 53, § 35250 (Supp. 1962) (alternate method); TENN. CODE ANN. § 6-102 (1955); VA. CODE ANN. § 15-66 (1950); W. VA. CODE ANN. § 456 (1961); WIS. STAT. ANN. § 66.014 (Supp. 1962).

217 ARIZ. REV. STAT. ANN. § 9-101 (1956); CAL. GOV'T CODE § 34303; IDAHO CODE ANN. § 50-701 (1947); IND. ANN. STAT. § 48-103 (Supp. 1962); KAN. GEN. STAT. ANN. § 15-102 (Supp. 1961); MD. ANN. CODE art. 23A, § 21 (1957); MICH. STAT. ANN. § 5.2085 (Supp. 1961); MINN. STAT. ANN. § 411.01 (Supp. 1962) (fourth-class cities); MONT. REV. CODES ANN. § 11-203 (1947); NEB. REV. STAT. § 17-201 (1962); N.M. STAT. ANN. § 14-3-1 (1953), § 14-4-1 (Supp. 1961); N.D. CENT. CODE ANN. § 40-02-05 (1960); OHIO REV. CODE ANN. § 707.03 (Supp. 1962) (alternate method); OKLA. STAT. ANN. tit. 11, § 974 (1959) (towns); S.D. CODE § 45.03.04 (1939); UTAH CODE ANN. § 10-2-1 (1953); WASH. REV. CODE § 35.03.010 (Supp. 1961) (first-class cities); WYO. STAT. ANN. § 15-142 (1957) (towns).

218 LA. REV. STAT. § 33:52 (1950); OKLA. STAT. ANN. tit. 11, § 552 (1959) (cities).

219 N.C. GEN. STAT. § 160-197 (1951); S.C. CODE §§ 47-101, 47-301, 47-351 (1962).

220 KY. REV. STAT. ANN. § 81.060 (1955); MO. ANN. STAT. §§ 72.080, 80.020 (1949); NEB. REV. STAT. § 17-201 (1962) (villages). See also *Moran v. Teolis*, 20 Ill.2d 95, 169 N.E.2d 232 (1960); *Perkins v. Ingalsbe*, 162 Tex. 456, 347 S.W.2d 926 (1961).

221 *State ex rel. Higgins v. Aicklen*, 167 La. 456, 119 So. 425 (1928); *In re Village of Ridgefield Park*, 54 N.J.L. 288, 23 Atl. 674 (1892); *In re Village of North Milwaukee*, 93 Wis. 616, 67 N.W. 1033 (1896) (old law).

222 *City of Galesburg v. Hawkinson*, 75 Ill. 152 (1874); *State ex rel. Luly v. Simons*, 32 Minn. 540, 21 N.W. 750 (1884). Compare *State ex rel. Mercer v. Incorporated Town of Crestwood*, 248 Iowa 627, 80 N.W.2d 489 (1957).

223 In 1961 North Carolina seemed to take a step contrary to the recent liberalization of the state's annexation laws by abolishing the requirement that the proponents show incorporation would better serve the interests of "persons and the public" in addition to satisfying the Municipal Board of Control that the allegations are true (N.C. GEN. STAT. § 160-198 (Supp. 1961)).

Population and Size of Area. Almost all the statutes set minimum population figures²²⁴ and some limit the size of the area.²²⁵ But these are hardly adequate expressions of legislative policy when, in a metropolis, the action of a relatively small number of people can affect the lives of thousands of others who reside in the nearby core city. Some states have imposed one or more of the additional requirements which are discussed below, but only Alaska,²²⁶ Indiana,²²⁷ Virginia,²²⁸ and Wisconsin²²⁹ statutes take the well-being of a neighboring city into account. These laws, except those of Virginia, were passed within the last four years.

Contiguous. One of the most basic of these additional requirements is that the area of the proposed municipality be contiguous. Only Illinois²³⁰ and Indiana²³¹ expressly so provide, but courts often have read this criterion into the statutes.²³² Of course this is easier where the statute contains an implicit requirement of con-

224 ALA. CODE tit. 37, § 10 (1958) (75); ALASKA STAT. ANN. §§ 29.10.006, 29.15.020, 29.25.030 (1962) (400, 50 and 25 for first-class city, second-class city and village respectively); ARIZ. REV. STAT. ANN. (1956) (500); CAL. GOV'T CODE § 34302 (500 inhabitants if county is under two million — otherwise 500 registered voters); FLA. STAT. ANN. § 165.01 (Supp. 1962) (150); IDAHO CODE ANN. § 50-701 (1947) (125); ILL. ANN. STAT. ch. 24, §§ 2-2-5, 2-3-5, 2-3-10 (Smith-Hurd 1962) (2,500, 400 and 500 for city, village and part of a village respectively); KAN. GEN. STAT. ANN. § 15-102 (Supp. 1961) (100); KY. REV. STAT. ANN. § 81.050 (1955) (125 — but 250 for an unincorporated taxing district); LA. REV. STAT. § 33:51 (1950) (150); MD. ANN. CODE art. 23A, § 20 (1957) (300); MICH. STAT. ANN. § 5.2086 (Supp. 1961) (2,000); MINN. STAT. ANN. § 414.05 (Supp. 1962) (2,000 exclusive of existing cities for the incorporation of a township); MONT. REV. CODES ANN. § 11-203 (1947) (300); NEB. REV. STAT. § 17-201 (1962) (100); NEV. REV. STAT. § 265.010 (1957) (250 electors at last general election); N.J. STAT. ANN. § 40:123-1 (1937) (4,000); N.M. STAT. ANN. §§ 14-3-1 (1953), 14-4-1 (Supp. 1961) (1,500 and 160 for cities and towns and villages respectively); N.Y. VILLAGE LAWS art. 15, § 5 (500); N.C. GEN. STAT. § 160-196 (Supp. 1961) (50—25 of whom are freeholders or homesteaders and 25 of whom are qualified voters); N.D. CENT. CODE ANN. § 40-02-01 (1960) (500, 200 and 100 for commission city, council city and village respectively); OKLA. STAT. ANN., tit. 11, § 551 (Supp. 1962) (1,000 for city); ORE. REV. STAT. § 221.020 (1961) (150); PA. STAT. ANN., tit. 53, § 35201 (1957) (10,000 — but there is no minimum population under an alternate method); S.C. CODE §§ 47-101, 47-301, 47-351 (1962) (100, 1,000 and 5,000 — depending on the class of city); S.D. CODE § 45.0302 (1939) (100 — 30 of whom must be qualified electors); TENN. CODE ANN. § 6-101 (Supp. 1962) (200); TEX. REV. CIV. STAT. ANN., art. 966 (1953) (600); UTAH CODE ANN. § 10-2-6 (1953) (100 — but it takes 7,000 to incorporate by petition alone); VA. CODE ANN. § 15-67 (1950) (over 300); WASH. REV. CODE §§ 35.03.010 and 35.02.010 (1951) (20,000 and 300 for first-class city and other municipality respectively); W.VA. CODE ANN. § 455 (1961) (100); WIS. STAT. ANN. § 66.015 (Supp. 1962) (150, 1,000, 2,500 and 5,000 for isolated village, isolated city, metropolitan village and metropolitan city respectively); WYO. STAT. ANN. §§ 15-32 and 15-138 (1957) (4,000 and 150 for city and town respectively). Vermont is unique in that Vt. STAT. ANN. tit. 24, § 1301 (1958) requires 30 houses.

225 ALASKA STAT. ANN. §§ 29.20.010 and 29.25.030 (1962) (not over 50 square miles for third-class city, and residents must be within a three-mile radius for village); ILL. ANN. STAT. ch. 24, §§ 2-2-5 and 2-3-5 (Smith-Hurd 1962) (not over four and two square miles for city and village respectively); KY. REV. STAT. ANN. § 81.040 (1955) (boundary does not exceed half mile in each direction — except for unincorporated taxing district); MONT. REV. CODES ANN. § 11-203 (1947) (must not exceed one square mile per 500 inhabitants); N.M. STAT. ANN. § 14-3-1 (1953) (not over 1½ miles in either direction for city or town); N.Y. VILLAGE LAWS art. 15, § 5 (not over three square miles); N.D. CENT. CODE ANN. § 40-02-01 (1960) (not over four square miles); S.C. CODE, § 47-104 (1962) (not more than one mile from the center); TEX. REV. CIV. STAT. ANN. art. 971 (1953) (limit of two square miles unless population is over 2,000, and limit of nine square miles if population is between 5,000 and 10,000); WASH. REV. CODE § 35.03.010 (1951) (not more than 10 square miles for first-class city); WIS. STAT. ANN. § 66.015 (Supp. 1962) (one-half, one, two and three square miles for isolated village, isolated city, metropolitan village and metropolitan city respectively); WYO. STAT. ANN. § 15-138 (1957) (not over three square miles).

226 ALASKA STAT. ANN. § 29.10.009 (1962).

227 IND. ANN. STAT. § 48-109 (Supp. 1962).

228 VA. CODE ANN. § 15-67 (1950).

229 WIS. STAT. ANN. § 66.016 (Supp. 1962).

230 ILL. ANN. STAT. ch. 24, § 2-3-5 (Smith-Hurd 1962) (villages).

231 IND. ANN. STAT. § 48-103 (Supp. 1962).

232 *E.g.*, Mahood v. State ex rel. Davis, 101 Fla. 1254, 133 So. 90 (1931).

tiguousness,²³³ but some judges have imposed the standard where the statute is absolutely silent.²³⁴

Community. Some statutes demand the presence of a "community," "city," or "town,"²³⁵ raising the question as to whether these words are to be construed according to their ordinary and popular meanings.²³⁶ In addition to meaning that the area would almost certainly be contiguous, such a construction would seem to imply that the proposed incorporation should be denied if it lacks a business district and/or industrial sector. Such a requirement could render impossible the incorporation of what have been termed "dormitory communities" in the urban fringe. However, only a few courts have insisted on the presence of commercial interests.²³⁷ Even such a court has abandoned the test just when it could do the most good — in proposed incorporations which are part of metropolitan centers.²³⁸ Apparently the "community" standard often is interpreted to mean only a "community of interest."²³⁹

Urban. The "urban" test²⁴⁰ is slightly different since it is primarily aimed at prohibiting the seizure of agricultural tracts whose owners would be subjected to municipal obligations without receiving a corresponding benefit.²⁴¹ It is used in other contexts also — a Kentucky court has found such a requirement in the statute's use of the words "city" and "town" and thus prevented inclusion of a railroad yard in the proposed city of Silver Grove.²⁴² The court pointed out that the tract was covered with railroad tracks and thus was not suitable for municipal development. It added that since the railroad maintained its own lighting, power, water and sewerage systems, as well as fire and police departments, it would derive no benefit from the proposed city.²⁴³

Sometimes the same objective is sought by requiring that the area to be incorporated be platted,²⁴⁴ but other states seem to realize that insistence on strict conformity with such a standard would give a new city no place to grow.²⁴⁵ At least one court has solved the problem by allowing inclusion of an unplatted area

233 KY. REV. STAT. ANN. § 81.040 (1955) (boundary shall not exceed one-half mile in each direction; form of city shall be square); N.M. STAT. ANN. § 14-3-1 (1953) (territory shall not exceed one and one-half miles either in length or breadth).

234 Hall v. State ex rel. Ervin, 46 So. 2d 878 (Fla. 1950); State ex rel. Wilke v. Stein, 26 S.W.2d 182 (Tex. 1930).

235 ALA. CODE tit. 37, § 10 (1958); ALASKA REV. STAT. ANN. § 29.10.009 (1962); ARIZ. REV. STAT. ANN. § 9-101 (1956); OKLA. STAT. ANN. tit. 11, § 551 (Supp. 1962) (cities); TEX. REV. CIV. STAT. ANN. art. 966 (1953); UTAH CODE ANN. § 10-2-6 (1953); VA. CODE ANN. § 15-67 (1950).

236 Parnell v. State, 68 Ariz. 401, 206 P.2d 1047 (1949).

237 For a decision in which the court denied incorporation of an area lacking substantial commercial interests, see State ex rel. Burnquist v. Village of North Pole, 213 Minn. 297, 6 N.W.2d 458 (1942).

238 State ex rel. Burnquist v. Village of St. Anthony, 223 Minn. 149, 26 N.W.2d 193 (1947). The new Wisconsin legislation might be interpreted similarly as Wis. STAT. ANN. § 66.016 (Supp. 1962) requires an "isolated municipality" to have a community center including some or all of such features as retail stores, churches, post office, telephone exchange and similar centers of community activity. There is no such requirement for metropolitan municipalities.

239 State on inf. of Wallach ex rel. H. B. Deal & Co., Inc. v. Stanwood, 208 S.W.2d 291 (Mo. App. 1948).

240 ARIZ. REV. STAT. ANN. § 9-101 (1956); IND. ANN. STAT. § 48-103 (Supp. 1962); MINN. STAT. ANN. § 414.05 (Supp. 1962); W.VA. CODE ANN. § 455 (1961).

241 State ex rel. Hilton v. So-Called Village of Minnewashta, 165 Minn. 369, 206 N.W. 455 (1925); Petition to Incorporate the City of Duquesne, 322 S.W.2d 857 (Mo. 1959); State ex rel. Loy v. Mote, 48 Neb. 683, 67 N.W. 810 (1896). "Benefit is the general criterion that determines if particular tracts can be included in a contemplated incorporation." 1 Antieau, Municipal Corporations § 1.06 (1962).

242 Chesapeake & Ohio Ry. Co. v. City of Silver Grove, 249 S.W.2d 520 (Ky. 1952).

243 *Id.* at 521.

244 *E.g.*, OHIO REV. CODE ANN. § 707.02 (Supp. 1962).

245 People ex rel. Bondurant v. Marquiss, 192 Ill. 377, 61 N.E. 352 (1901); Wachendorf v. Shaver, 149 Ohio 231, 78 N.E.2d 370 (1948).

if it has a "community of interest" with the platted portion of the proposed municipality.²⁴⁶ Another has considered whether or not the lands are reasonably susceptible to municipal development.²⁴⁷ While such demands might restrict the size of a fringe area municipality, they certainly will not present a bar to its formation.

Need and Ability To Pay for Services. As has been pointed out in Part I, many metropolitan area dwellers who choose to make their home outside the city do so in order to escape city taxes. When an unincorporated fringe area reaches the point where it is in need of things like water service, police and fire protection, and a sewer system, annexation seems like the logical answer. Yet sentiment in favor of incorporating may prevail. As a result some jurisdictions have added another substantive criterion for incorporation: the need and ability to pay for municipal services.²⁴⁸ Legislation passed by Indiana in 1959 requires that the incorporation petition include:

. . . (c) A statement of the assessed valuation of all the real property within the area . . .

(d) A statement of the services to be provided the residents of the proposed town and the approximate times at which they are to be established.

(e) A statement of the estimated cost of the services to be provided, together with the proposed tax rate for such town. . . .²⁴⁹

Subjective Standards. Despite the objection that the legislature is delegating its functions, there are jurisdictions which employ the more intangible requirement that the incorporation be reasonable²⁵⁰ or right and proper.²⁵¹ In Ohio it has been decided that the word "right" in the statute connoted only that the petition had to be lawful; however the court held that the word "equitable," also in the statute, added the element of fairness.²⁵² Likewise a Pennsylvania court found the same sort of requirement in an even shorter word — "may."²⁵³ The lower court dismissed a petition seeking the incorporation of a borough because it would impair the well-being of the rest of the county and because its small size would make difficult the financing of desired projects. The statute provided:

The court, if it shall find, after hearing, that the conditions prescribed by this article have been complied with, *may* grant the prayer of the petitioners and make a decree accordingly, but, if the court shall deem further investigation necessary, it may make such order thereon as to right and justice shall appertain.²⁵⁴

On appeal it was found that this gave the Court of Quarter Sessions the right to exercise its discretion in dismissing the petition.²⁵⁵

Metropolitan Interests. Still other states interject a similar element as part of a broader list of requirements.²⁵⁶ Because of its subjective character, a demand that the proposed incorporation be reasonable or in the public interest would seem to

246 State ex rel. Township of Copley v. Village of Webb, 250 Minn. 83, 83 N.W.2d 788 (1957).

247 State ex rel. Davis v. City of Largo, 110 Fla. 21, 149 So. 420 (1933).

248 Miss. CODE ANN. § 3374-03 (1942); N.C. GEN. STAT. § 160-197 (1951), TENN. CODE ANN. § 6-101 (Supp. 1962); Wis. STAT. ANN. § 66.016 (Supp. 1962). *Contra*, Ohio Edison Co. v. McElrath, 60 Ohio Op. 462, 137 N.E.2d 642 (1955) (*dicta*), *aff'd* 138 N.E.2d 323 (Ohio Op. 1956).

249 IND. ANN. STAT. § 48-104 (Supp. 1962).

250 KAN. GEN. STAT. ANN. § 15-102 (Supp. 1961); Miss. CODE ANN. § 3374-05 (1942); Mo. ANN. STAT. § 80.020 (1949) (towns and villages); VA. CODE ANN. § 15-67 (1950).

251 ARK. STAT. ANN. § 19-104 (1956); OHIO REV. CODE ANN. § 707.07 (Supp. 1962) (alternate method).

252 Ohio Edison Co. v. McElrath, 60 Ohio Op. 462, 137 N.E.2d 642 (1955), *aff'd* 138 N.E.2d 323 (Ohio Op. 1956).

253 In re Petition for the Incorporation of the Borough of Blandon, 182 Pa. Super. 304, 126 A.2d 506 (1956).

254 *Id.* at 508 (emphasis added).

255 *Ibid.*

256 ALASKA STAT. ANN. § 29.10.006 (1962) (good grounds must be shown to incorporate first-class city); IND. ANN. STAT. § 48-109 (Supp. 1962) (best interests of territory); MINN. STAT. ANN. § 414.05 (Supp. 1962) (whether all or part of area would be best served by incorporation); Wis. STAT. ANN. § 66.016 (Supp. 1962) (in public interest).

be an ideal way for the reviewing body to prevent fringe incorporations. Yet, only Virginia has made much use of its statute for this purpose.

Virginia has turned down incorporation attempts by considering the interests of the area outside — as well as inside — the proposed municipality. The state's statute provides that the court must be satisfied that: "the general good of the community will be promoted . . ." ²⁵⁷ before it can permit a municipality to be incorporated. And the word "community" has been interpreted to mean the entire metropolitan community. Thus Virginia courts have refused to permit the incorporation of part of a "thickly settled community." ²⁵⁸ In one case, the court pointed out that under Virginia law it is impossible to divide a community according to the caprice and whim of a few. ²⁵⁹

There seems to be some movement in this direction as legislation passed recently in three other states contains provisions for consideration of the metropolitan whole. Indiana now declares that incorporation must be found to serve the best interests of the territory involved, and continues:

In making this determination the county commissioners should consider:

- (1) The expected growth and governmental needs of the surrounding area of which the particular territory is a part;
- (2) The extent to which essential services and regulatory functions can be provided more adequately and more economically by an existing unit of government;
- (3) The extent to which the incorporators have indicated a willingness to execute cooperation agreements under the inter-high Local Cooperation Act of 1957 with the largest neighboring municipality, if that municipality has proposed such agreements. ²⁶⁰

Wisconsin, in 1959, passed legislation making a distinction between "metropolitan" and "isolated" municipalities. It is provided that notice of the incorporation must be given to each municipality in the metropolitan community ²⁶¹ and that any of them are entitled to become a party to the incorporation proceeding. ²⁶² Further, any municipality whose boundaries are contiguous to the territory may file a resolution indicating a willingness to annex the territory. ²⁶³ The director appointed to make findings in the matter is to compare the level of services offered by the proposed municipality with those of any unit indicating a desire to annex ²⁶⁴ and to consider "the effect upon the future rendering of governmental services both inside the territory proposed for incorporation and elsewhere within the metropolitan community. There shall be an express finding that the proposed incorporation will not substantially hinder the solution of governmental problems affecting the metropolitan community." ²⁶⁵

In addition, there currently is pending in the California legislature a program dealing with urban area problems which includes a bill to curb the haphazard formation of municipalities and special districts. ²⁶⁶ The bill, a proposal of Governor Edmund G. Brown, seeks the creation of a Local Agencies Formation Commission which is to study incorporation petitions after the county board has determined that all procedural requirements have been met. The proposed section 66625 of Title 7 of the Government Code provides that among the factors to be considered by this agency are

proximity to other populated areas; the likelihood of significant growth in the area, and in adjacent incorporated and unincorporated areas, during the next 10 years; . . . probable effect of the proposed formation and of al-

257 VA. CODE ANN. § 15-67 (1950).

258 *Bennett v. Garrett*, 132 Va. 397, 112 S.E. 772 (1922).

259 *Board of Supervisors of Norfolk County v. Duke*, 113 Va. 94, 73 S.E. 456 (1912).

260 IND. ANN. STAT. § 48-109 (Supp. 1962).

261 WIS. STAT. ANN. § 66.014 (4) (Supp. 1962).

262 WIS. STAT. ANN. § 66.014(5) (Supp. 1962).

263 WIS. STAT. ANN. § 66.014(6) (Supp. 1962).

264 *Ibid.*

265 WIS. STAT. ANN. § 66.016(2)(d) (Supp. 1962).

266 Assembly Bill No. 1662 (1963).

ternative courses of action on the cost and adequacy of services and controls in the area and adjacent area; . . . the effect of the proposed formation, and of alternative actions, on adjacent area, on mutual social and economic interests and on the local governmental structure of the metropolitan community.²⁶⁷

(c) Necessity of Referendum

While the hearing before the court, county board, or staté official is the final step in some states, over half of those with general incorporation procedures require that final approval be obtained by a referendum conducted in the area.²⁶⁸ There is almost universal agreement on two points regarding the referendum — a majority of those voting is required and only those residing within the area are entitled to cast ballots.²⁶⁹ The voting requirement could be a valuable safeguard against rash minority movements in states that have very minimal demands regarding the number of petition signers.²⁷⁰ However, it will be unlikely to slow incorporation of a municipality which is being formed to frustrate a neighboring city's annexation efforts.

(d) Opportunity for Appeal

Although a discussion of procedures for appealing incorporation decisions is beyond the scope of this article,²⁷¹ it might be mentioned that most states provide that incorporations can be challenged only through quo warranto proceedings brought by a state official.²⁷² However some states allow a private citizen to bring the action in certain situations.²⁷³ Moreover, the use of injunction is sometimes

²⁶⁷ *Ibid.*

²⁶⁸ ALA. CODE tit. 37, § 11 (1958); ALASKA STAT. ANN. §§ 29.10.009, 29.25.100 (1962); ARIZ. REV. STAT. ANN. § 9-101 (1956) (10 per cent of realty taxpayers must ask for the vote); CAL. GOV'T CODE § 34318; COLO. REV. STAT. ANN. § 139-1-3 (1953); ILL. ANN. STAT. ch. 24, §§ 2-2-1, 2-3-5, 2-3-10 (Smith-Hurd 1962); MD. ANN. CODE art. 23A, § 21 (1957); MICH. STAT. ANN. § 5.2087 (Supp. 1961); MINN. STAT. ANN. §§ 411.01, 414.05 (Supp. 1962); N.J. STAT. ANN. § 40:123-1 (1937); N.M. STAT. ANN. § 14-3-1 (1953) (cities and towns); N.Y. VILLAGE LAWS art. 15, § 9; N.D. CENT. CODE ANN. § 40-02-10 (1960); OHIO REV. CODE ANN. § 707.16 (Supp. 1962) (alternate method); OKLA. STAT. ANN. tit. 11, §§ 552, 975 (1959); ORE. REV. STAT. § 221.020 (1961); PA. STAT. ANN. tit. 53, § 35205 (1957), § 35253 (Supp. 1962); S.C. CODE §§ 47-102, 47-302, 47-352 (1962); S.D. CODE § 45.03.05 (1939); UTAH CODE ANN. § 10-2-3 (1953); WASH. REV. CODE § 35.02.080 (Supp. 1962); W.VA. CODE ANN. § 459 (1961); WIS. STAT. ANN. § 66.014 (Supp. 1962); WYO. STAT. ANN. § 15-144 (1957) (towns).

²⁶⁹ *E.g.*, *People ex rel. Doney v. Village of Skokie*, 15 Ill.2d 288, 154 N.E.2d 681 (1958); *Ford Motor Co. v. Village of Wayne*, 358 Mich. 653, 101 N.W.2d 320 (1960); *Village of Loch Arbour v. Township of Ocean*, 25 N.J. 258, 135 A.2d 663 (1957). The New Jersey decision was based on statutory provisions for the incorporation of villages, which were repealed in 1960 and 1961; however the remaining procedure for incorporation of towns contains an identical provision. *Contra*, ILL. ANN. STAT. ch. 24, § 2-3-10 (Smith-Hurd 1962) (incorporation of part of a village).

²⁷⁰ *E.g.*, IOWA CODE ANN. § 362.1 (Supp. 1962) (25); MICH. STAT. ANN. § 5.2085 (Supp. 1961), (one per cent — minimum of 100); S.C. CODE § 47-101 (1962) (10 — to incorporate a city in the 100-1,000 class).

²⁷¹ See generally Mandelker, *Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review*, 18 LA. L. REV. 628 (1958).

²⁷² *E.g.*, *Dunn v. Burbank*, 190 Iowa 67, 179 N.W. 969 (1920); *Morris v. Fagan*, 85 N.J.L. 617, 90 Atl. 267 (1914). Care must be taken in Illinois, where filing an information against a municipal corporation by its corporate name may estop further challenge — despite the fact that the purpose of the action is to show the alleged municipality never had any legal existence. *People ex rel. Webber v. City of Spring Valley*, 129 Ill. 169, 21 N.E. 843 (1889).

²⁷³ *E.g.*, ILL. ANN. STAT. ch. 112, § 10 (Smith-Hurd 1962) (after refusal); *Colquhoun v. City of Tucson*, 55 Ariz. 451, 103 P.2d 269 (1940) (individual interested in upholding incorporation of South Tucson over annexation of Tucson allowed to maintain action since steps necessary for annexation were not yet complete); *People ex rel. Wilson v. Blake*, 128 Colo. 111, 260 P.2d 592 (1953) (special interest).

available,²⁷⁴ but other courts expressly deny its availability.²⁷⁵ Individuals are given the right to appeal by some statutes,²⁷⁶ but — what is more relevant to the metropolitan area problem — other governmental units are rarely held to have standing to contest an incorporation.²⁷⁷

Two other problems which confront those who would turn to the courts in an attempt to invalidate the formation of a fringe municipality are the oft-expressed judicial dislike for collateral attacks²⁷⁸ and the possibility of a complainant being estopped from attacking a municipality which has had de facto existence for a number of years.²⁷⁹

2. Growth Zones

Slowly, awareness is growing of the problem caused by the proliferation of governmental units within a metropolitan area. This is reflected in the new Indiana and Wisconsin legislation as well as in the California proposals.²⁸⁰ But an even more definite indication of this increased willingness to cope with the problem is the rash of legislation, most of which has been passed since 1959, prohibiting the formation of new municipalities within a given distance of an existing city.²⁸¹

These areas which are immune from incorporation and which can be labeled "growth zones," range from one-half²⁸² to 15 miles²⁸³ in width. However about half the states which have growth zone legislation have qualified the protection given to the existing city. Six states provide that incorporation can be granted if the city either consents or refuses to annex the area,²⁸⁴ while New Mexico says a municipality can be established within 15 miles of an existing body if the county board finds

274 *E.g.*, OHIO REV. CODE ANN. § 707.11 (Supp. 1962), § 707.20 (Page 1953); *Farrington v. Flood*, 40 So. 2d 462 (Fla. 1949) (municipality did not have even de facto existence).

275 *Osborne v. Village of Oakland*, 49 Neb. 340, 68 N.W. 506 (1896); *Plummer v. Dominy*, 233 N.Y.S.2d 2 (Sup. Ct. N.Y. 1962), *aff'd* 18 App. Div. 2d 190, 239 N.Y.S. 2d 158 (1963).

276 MINN. STAT. ANN. § 414.07 (Supp. 1962); NEB. REV. STAT. § 17.201.01 (1962); N.Y. VILLAGE LAWS art. 15, § 7; VA. CODE ANN. § 15-71 (1950); WIS. STAT. ANN. § 66.017 (Supp. 1962).

277 The orthodox view is contained in the cases cited at note 75 *supra*, and in decisions like *City of Milwaukee v. Town of Oak Creek*, 8 Wis.2d 102, 98 N.W.2d 469 (1959) and *In re Village of Chenequa*, 197 Wis. 163, 221 N.W. 856 (1928). However the Wisconsin decision seems to have been legislatively reversed by WIS. STAT. ANN. § 66.014 (Supp. 1962), passed in 1959, which gives governmental units in the area the right to become parties to the incorporation proceeding and any municipality whose boundaries are contiguous may file a copy of a resolution indicating a willingness to annex the territory. See also MISS. CODE ANN. § 3374-04 (1942) (providing for notice); *In re Town of Waconia*, 248 Iowa 863, 82 N.W.2d 762 (1957) (city which had instituted annexation proceeding has standing); *State ex rel. Town of Stunz v. City of Chisholm*, 196 Minn. 285, 266 N.W. 689 (1936) (state supreme court can grant town leave to file information for writ of quo warranto to test city's annexation of territory belonging to town).

278 *E.g.*, *Chadwick v. Town of Hammondville*, 270 Ala. 618, 120 So. 2d 899 (1960); *City of Florence v. Turbeville*, 239 S.C. 126, 121 S.E.2d 437 (1961).

279 *Armbruster v. City of Middletown*, 74 Ohio App. 321, 58 N.E.2d 778 (1944), appeal dismissed, 144 Ohio St. 324, 58 N.E.2d 784 (1944).

280 See notes 261-267 *supra*.

281 ALASKA STAT. ANN. § 29.25.030 (1962); ARIZ. REV. STAT. ANN. § 9-101.1 (Supp. 1962); IDAHO CODE ANN. § 50-701A (Supp. 1961); ILL. ANN. STAT. ch. 24, §§ 2-2-5, 2-3-5 (Smith-Hurd 1962); IND. ANN. STAT. § 48-108 (Supp. 1962); IOWA CODE ANN. § 362.1 (Supp. 1962); KAN. GEN. STAT. ANN. § 15-102 (Supp. 1961); MO. ANN. STAT. § 72.130 (Supp. 1962); NEB. REV. STAT. § 17-201 (1962); N.M. STAT. ANN. § 14-4-3 (Supp. 1961); N.C. GEN. STAT. § 160-196 (Supp. 1961); OKLA. STAT. ANN. tit. 11, §§ 551, 971 (Supp. 1962); TENN. CODE ANN. § 6-105 (Supp. 1962); WIS. STAT. ANN. § 66.015 (Supp. 1962). For a recent application of the Illinois provisions see *Kelley v. Village of Willowbrook*, 38 Ill. App.2d 112, 186 N.E.2d 369 (1962).

282 NEB. REV. STAT. § 17-201 (1962).

283 N.M. STAT. ANN. § 14-4-3 (Supp. 1961).

284 ARIZ. REV. STAT. ANN. § 9-101.01 (Supp. 1962); IDAHO CODE ANN. § 50-701A (Supp. 1961); ILL. ANN. STAT. ch. 24, §§ 2-2-5, 2-3-5 (Smith-Hurd 1962); MO. ANN. STAT. § 72.130 (Supp. 1962); NEB. REV. STAT. § 17-201 (1962); TENN. CODE ANN. § 6-105 (Supp. 1962).

"it would be in the best interests of the city."²⁸⁵ California and Wisconsin have no statutory prohibition of fringe incorporation, but attempt to protect existing cities through notice requirements.²⁸⁶

The Iowa Supreme Court clearly expressed the policy behind such legislation. "It must be evident that the legislative intent was to prevent cities having a population of 15,000 or more from being limited in their expansion by the incorporation of other towns or cities immediately surrounding them."²⁸⁷

Most of this legislation is expressly designed for the benefit of the larger cities. Seven states make the growth zone wider around cities in the higher population brackets;²⁸⁸ and, as mentioned above, the Iowa statute applies only to cities with a population over 15,000.²⁸⁹ Alaska and Wisconsin handle the problem in a different way by requiring proposed incorporations within the "zone" to meet special requirements. Alaska insists that the municipality qualify as a first-, second-, or third-class city, since formation of villages is prohibited within 10 miles of an incorporated city.²⁹⁰ Wisconsin provides that villages and cities be at least four and six square miles in size respectively before they can be incorporated within the "zone."²⁹¹ In the case of Wisconsin, then, the protection for the existing cities is twofold since the zone is 10 miles wide around Milwaukee (the state's only first-class city) and five miles wide around cities of the second and third class.²⁹²

This type legislation is recent. The provisions in Arizona, Idaho, Nebraska, New Mexico and North Carolina were passed in 1961, while during the same year Oklahoma extended to the cities the protection it had already provided for towns. In 1959, the Wisconsin provisions were passed; Illinois extended the protection to include cities; Indiana increased the size of the zone around first-class cities from three to four miles; and Missouri amended its statute to include third-class and constitutional charter cities. Moreover at the present time legislation is pending in Ohio and Texas which would establish three-mile growth zones around cities in two more states.²⁹³

Although these laws are good in that they show state legislators are aware of the problem and are trying to cope with it, they may be too recent to do anything but keep the problem from getting any worse. It is well known that the core city in most metropolitan areas is either wholly or greatly surrounded by municipalities which came into being before the bulk of the growth zone statutes were enacted.²⁹⁴

3. Incorporation/Annexation: Priority

Since rumor of a pending annexation is often the fact which prompts incorporation activity, it is obvious that the question of which group's interest will prevail is a vital consideration. Normally the question of priority in such situations is determined simply on a "first come, first served" basis,²⁹⁵ but the wording of the

285 N.M. STAT. ANN. § 14-4-3 (Supp. 1961).

286 CAL. GOV'T CODE § 34302.5; WIS. STAT. ANN. § 66.014 (Supp. 1962).

287 In re Town of Avon Lake, 249 Iowa 1112, 88 N.W.2d 784, 787 (1958).

288 ARIZ. REV. STAT. ANN. § 9-101.1 (Supp. 1962); IDAHO CODE ANN. § 50-701A (Supp. 1961); IND. ANN. STAT. § 48-108 (Supp. 1962); NEB. REV. STAT. § 17-201 (1962); OKLA. STAT. ANN. tit. 11, §§ 551, 971 (Supp. 1962); TENN. CODE ANN. § 6-105 (Supp. 1962); WIS. STAT. ANN. § 66.015 (Supp. 1962).

289 IOWA CODE ANN. § 362.1 (Supp. 1962).

290 ALASKA STAT. ANN. § 29.25.030 (1962).

291 WIS. STAT. ANN. § 66.015 (Supp. 1962).

292 *Ibid.*

293 Letters from Howard A. Kapp, assistant planner, Dayton, Ohio, and Ralph S. Effruit, director of city planning, Houston, Texas, to the NOTRE DAME LAWYER, dated March 20, 1963, and March 27, 1963, respectively, on file in the Notre Dame Law Library.

294 See notes 199-201 *supra*.

295 *E.g.*, Colquhoun v. City of Tucson, 55 Ariz. 451, 103 P.2d 269 (1940); People ex rel. Hathorne v. Morrow, 181 Ill. 315, 54 N.E. 839 (1899); State ex rel. Mercer v. Incorporated Town of Crewdson, 248 Iowa 627, 80 N.W.2d 489 (1957); State ex inf. Goodman ex rel. Crewdson v. Smith, 331 Mo. 211, 53 S.W.2d 271 (1932); Baumhardt v. Mitchell, 107 Ohio App. 209, 157 N.E.2d 898 (1958).

particular statute in question can be vital. Perhaps an early Indiana case best expresses the orthodox view in situations where a court grants incorporation and city councils have power to annex by ordinance:

It is a clear principle of jurisprudence, that when there exist two tribunals possessing concurrent and complete jurisdiction of a subject-matter, the jurisdiction becomes exclusive in the one before which proceedings are first instituted, and thus acquires jurisdiction of the subject.²⁹⁶

Prior to 1955, nothing in the California statutes prevented initiation of incorporation proceedings subsequent to the commencement of an annexation attempt concerning the same area. However, the courts of the state applied what they termed a "race of diligence" test, meaning that the first legislative body to commence proceedings acquired jurisdiction and no other annexation or incorporation would be recognized.²⁹⁷ This doctrine was finally put in the California Government Code in 1955 after two years of study on the problem by a special subcommittee.²⁹⁸

But there is not always such a premium placed on speed. In Arkansas, where the same court presides over both the incorporation and annexation cases, the two matters are consolidated before consideration.²⁹⁹ Other instances of where the group which moved first did not prevail have arisen in Michigan³⁰⁰ and Texas.³⁰¹ In the former case the incorporation petition was filed about a month earlier, but there was no evidence concerning what had happened to it subsequent to filing with the county board. The court ruled that the would-be incorporators had to be content with challenging the annexation by way of quo warranto. Similarly in the Texas controversy, an incorporation petition had been filed with the county judge before institution of the annexation proceeding, but the latter procedure prevailed because the judge had taken no "official action" on the incorporation request.

C. Annexation and Merger Procedures

Assuming that those statutes which were presumably enacted to provide for the expansion of municipalities survive the objection that they are unconstitutional,³⁰² it is still most difficult for a majority of the larger cities to acquire additional land as it is needed. The source of this difficulty stems mainly from existing legislation — from both what the statutes provide and what they do not provide, but should have. No great insight is needed to see that each specific statutory requirement, which must be met to effectuate either a territorial annexation or merger, constitutes a "roadblock" to the growth of the city. From a procedural viewpoint, the more stringent and detailed these provisions become, the more difficult either annexation or merger becomes since the city is forced to cut through more red tape. From a substantive viewpoint, with the exception of a very few states, the "big city" is not permitted to get bigger — only its problems are — because of the general approach reflected in the state statutes. By way of illustration, and without attempting to be complete, the following list indicates a number of areas where express statutory provisions act as roadblocks to the growth of the problem-riddled core city.

First, the inhabitants of the area to be annexed or of the smaller city to be subsumed into the larger are given full opportunity to block the expansion.³⁰³ The mere *initiation* of the merger and annexation processes by means of petition requires,

296 Taylor v. City of Fort Wayne, 47 Ind. 274, 282 (1874).

297 Comment, *Municipal Incorporation and Annexation in California*, 4 U.C.L.A.L. REV. 419, 427 (1956-57).

298 CAL. GOV'T CODE §§ 34302.6, 34303.1.

299 Chastain v. City of Little Rock, 208 Ark. 142, 185 S.W.2d 95 (1945).

300 Schipper v. Smith, 368 Mich. 479, 118 N.W.2d 250 (1962).

301 State ex rel. Wilkinson v. Self, 191 S.W.2d 756 (Tex.Civ.App. 1945).

302 E.g., *dicta* in Du Pre v. City of Marietta, 213 Ga. 403, 99 S.E.2d 156, 158 (1957) declaring § 69-901 of the Georgia Code to be an unconstitutional delegation of legislative powers.

303 Statutes cited notes 146, 170, 192 *supra*.

for the most part, the written consent of a rather sizeable percentage of the inhabitants in the area. Even assuming that the requisite number of signatures is successfully gathered, those who did not sign the petition are able to block the proposal by appearing at the polls or in some other forum.³⁰⁴ Only in very limited instances is the beleaguered city able to annex territory upon its own unilateral decision.³⁰⁵

Second, land which is being used for industrial or other specified purposes is often expressly protected from the "threat" of annexation.³⁰⁶ Herein any policy of the legislature in favor of the big city takes a back seat to the more immediate problem of fostering industry or farming in that state.

Third, unsuccessful attempts at annexation in some states result in future attempts along those lines being barred until a set "statute of limitations" has run.³⁰⁷ Other statutes prohibit annexation by a city within a given period before the city holds either its primary or general elections.³⁰⁸

Fourth, proposals to merge two incorporated areas not only require the consent of the inhabitants of the area, but also require the cooperation of that area's legislative body in that it must pass an ordinance to either set up a commission to study the problem or arrange for the referendum in that city.³⁰⁹ If one assumes that the same duplication of bureaucracy which existed before the merger will not be retained after the merger, these men are, in effect, being asked to legislate themselves out of a job. The economic advantage from merger to be gained by both communities, it is submitted, has little appeal to these men.³¹⁰

Coupled with these "express" roadblocks in existing legislation, annexation endeavors are being sabotaged with equal effectiveness by what the statutes do not say. Once again, a few examples are adequate to demonstrate this point.

First, some states have no statutory provisions concerning annexation or merger.³¹¹ Thus, both the state and the metropolitan area are forced to "deal with twentieth-century problems through nineteenth-century governmental forms."³¹² In other words, city limits which existed in 1890 may exist in 1963.

Second, legislative draftsmen have been unnecessarily imprecise in their choice of words in at least three areas. Consequently, the statutes are an open invitation to those who would contest the annexation in a court of law to urge noncompliance with these vague terms as grounds for voiding the annexation proposal. This vagueness occurs:

(a) In describing the land that may be annexed. As indicated previously, a common requirement for annexation is that the land to be annexed be "contiguous" or "adjacent" or "form a compact area."³¹³ Though statutes in some cases "define" these terms,³¹⁴ for the most part they do not. What did the legislature have in mind when it used these words? Are two cities separated by a superhighway contiguous?³¹⁵

304 *Ibid.*

305 Statutes cited notes 157-162 *supra*.

306 *E.g.*, MONT. REV. CODES ANN. § 11-509 (1947), NEB. REV. STAT. § 14-117 (1962).

307 California legislation is typical: "If in any election required to be held by this article a majority of the votes cast is against annexation, a new petition embracing any of the same territory shall not be filed with the same city within 12 months after the result of the election has been canvassed and declared." CAL. GOV'T CODE § 35134.

308 ILL. ANN. STAT. ch. 24, § 7-1-1 (Smith-Hurd 1962).

309 Statutes cited notes 192, 193 *supra*.

310 Richard L. Neuberger, then a state senator of Oregon, being appalled at the waste and duplication of bureaucracy in four very small counties in that state, introduced a bill in the Oregon legislature to consolidate these four counties. Due to the hue and cry raised by the bureaucrats affected, his bill was buried in committee, even though it carried great economic advantages. 41 NAT'L MUNIC. REV. 501 (1952).

311 States cited note 68 *supra*.

312 Wheeler, *Towns in Transition*, 48 NAT'L CIV. REV. 68 (1959).

313 Statutes cited notes 81, 179 *supra*.

314 Statutes cited notes 83, 180 *supra*.

315 Answered affirmatively in *People v. City of Bloomington*, 38 Ill.App.2d 9, 186 N.E.2d 159 (1962).

What about two tracts which corner on each other³¹⁶ or are joined by a strip of land whose only function is to connect the tracts?³¹⁷ Can land be "adjacent" without being "contiguous"?³¹⁸ What is a "compact area"³¹⁹ — a parking lot for Ford Falcons? Can two areas not contiguous to each other but contiguous to the city be annexed by means of only one action?³²⁰ To those who contest annexation proceedings, such questions come easy. The legislature and not the courts should be the "answer man."

(b) In describing the persons who may sign the petition to initiate the proceedings. In this category are those statutes which require "owners" or "freeholders" to sign the petition.³²¹ The Supreme Court of Arizona, in passing on the validity of a petition required to be signed by a certain percentage of the "owners" of the area, stated:

The word "owner" has no technical meaning, but its definition will contract or expand according to the subject matter to which it is applied. As used in statutes it is given the widest variety of construction, usually guided in some measure by the object sought to be accomplished in the particular instance. It has led some courts to declare that the word has no precise legal signification and may be applied to any interest in real estate.³²²

Through the course of the opinion the court discussed whether a husband as "owner" could sign the petition without his wife also signing, whether soldiers and widows given a tax exemption on the property could sign, and whether those who were purchasing the property under a land contract were "owners." The court decided that each of these persons was an "owner" but the language of the opinion does anything but fill the void created by the legislative use of the nondescript term "owner." The same need for definition arises with the use of such terms as "owners of substantial property interests"³²³ and "freeholder";³²⁴ for where do mortgagors and beneficial owners of property held in trust stand in relation to such terminology? Do they qualify under either term?

Third, in describing the number of signers required. Several states require that the petition be signed by the owners of a specified percentage of the acreage in the area to be annexed.³²⁵ Objections have been raised on the grounds that the total acreage figure used to determine the required percentage was incorrectly calculated in that it should have included the streets and alleys in the area,³²⁶ as well as the area occupied by bodies of water. Where the requirement is couched in terms of the owners of a percentage of assessed valuation,³²⁷ an analogous problem may arise as to whether to include corporate property and city-owned property in computing the total assessed valuation. And if the corporate property is included, can the "corporation" sign the petition?

The point is simply that the vague terms, employed in the statutes which prescribe the mechanics of annexation and merger, cause lawsuits and such lawsuits can block the growth of the city. This is unfortunate because such roadblocks

316 *Wild v. People*, 227 Ill. 556, 81 N.E. 707 (1907).

317 *Ibid.*, *Potvin v. Village of Chubbuck*, 76 Idaho 453, 284 P.2d 414 (1955). Both cases indicate "no."

318 *Hillman v. City of Pocatello*, 74 Idaho 69, 256 P.2d 1072 (1953). "Adjacent" means "connected with."

319 *City of Indianapolis v. Pollard*, 241 Ind. 66, 169 N.E.2d 405, 408 (1960); *In re City of Princeton*, 128 Ind. App. 104, 146 N.E.2d 422 (1957) (*dicta*). An area, to be "compact," must not only touch the other area, but must be closely united, territorially.

320 *City of Indianapolis v. Pollard*, 241 Ind. 66, 169 N.E.2d 405 (1960). No, where statute requires that area to be annexed be compact. *Compare, Garner v. Benson*, 224 Ark. 215, 272 S.W.2d 442 (1954).

321 Statutes cited notes 102-105 *supra*.

322 *City of Phoenix v. State*, 60 Ariz. 369, 137 P.2d 783, 786 (1943).

323 *In re Annexation of Slaterville*, 12 Alaska 308, 83 F.Supp. 661 (D.Alaska 1949).

324 *Town of Coreytown v. State*, 60 So. 2d 482 (Fla. 1952).

325 *E.g., Wis. STAT. ANN. § 66.021* (Supp. 1962).

326 This argument was unsuccessfully raised in *In re Kankakee*, 30 Ill.App.2d 391, 174 N.E.2d 710 (1961).

327 *E.g., Md. ANN. CODE art. 23A, § 19* (1957).

are apparently unintentional. When coupled with the somewhat arbitrary procedures now in vogue as to the methods for expanding the core city, an acute problem arises calling for corrective legislation.

For example, early in 1960 the City of Battle Creek, Michigan, a home rule city in exactly the same status as the City of Springfield, Michigan, but having a population of some 50,000 as opposed to Springfield's 5,000, tried to annex all of the industrial properties of the City of Springfield. The election results showed that a majority of those in Springfield did not favor the annexation. The City of Battle Creek argued that since the area to be annexed was uninhabited, only a cumulative majority vote was required to carry the question, *i.e.*, a total majority in both cities as opposed to a majority in each city. The question was litigated and was sufficiently unclear to cause the state circuit court to rule one way on the question and the Supreme Court of Michigan to hold the opposite. That was lawsuit number one.³²⁸

One week after this opinion was rendered, another election was held, this time on the proposal that the entire city of Springfield be absorbed into Battle Creek. A majority vote in each city favored the proposal. That would have ended the matter but for lawsuit number two, based on another vague portion of the statute. Once again the matter went to the supreme court of the state and once again the "merger" was defeated.³²⁹ In between these two lawsuits, a number of other suits had been filed which had been dismissed because they were prematurely brought.³³⁰

This was far from the extent of the litigation. In addition to the suits indicated above, suit was filed "to untangle the affairs of the two cities which had become intermingled during the hiatus"³³¹ between the election in favor of merger and the second supreme court opinion striking down the attempt. Subsequently, a complaint was filed against the county board of supervisors who would not approve a later petition to merge the two cities because, to that point, no one seemed to know whether, under Michigan law, one home rule city could annex another one.³³² Thus, four years after the first overtures toward merger, the two cities are no closer to merger than they were before — and this in an area where merger might help to alleviate the economic "recession" which has settled on both areas.³³³ To repeat a thought expressed previously, "Law suits *can* block the growth of the city."

IV. THE PATH TO PROGRESS

Throughout the discussion an attempt has been made to establish that there are a number of problems confronting the core city of the metropolitan area which are attributable in whole or in part to the multiplicity of governments which surround the core city and/or the inability of that city to expand its boundaries. Part I of this article discussed some of these problems and several of the methods by which these problems are being met. The conclusion was advanced that the "best solution" would be for the state legislature to enact laws making annexation by the city a relatively simple matter. Part II surveyed the existing statutory provisions for annexation and merger and Part III demonstrated that at present the city is relatively powerless to expand in the face of any concerted opposition. It

³²⁸ Cavanagh v. Calhoun County Bd. of Canvassers, 361 Mich. 516, 105 N.W.2d 707 (1960).

³²⁹ Groh v. City of Battle Creek, 368 Mich. 653, 118 N.W.2d 829 (1962).

³³⁰ Letter from Joseph V. Wilcox, attorney of record for intervenor in the case cited note 328, *supra*, to the NOTRE DAME LAWYER, March 16, 1963, on file in the Notre Dame Law Library.

³³¹ *Ibid.*

³³² *Ibid.*

³³³ *Ibid.*

is hoped that Part IV will offer some feasible suggestions which might act as guideposts indicating "The Path to Progress."

A. *Policy Decision*

The initial step which must be taken by any legislature is to determine whether a problem exists in the area of municipal expansion. In light of the evidence introduced in Part I, this should be a fairly simple determination.

Having made this determination, the legislature must make a clear-cut policy decision as to whether or not it is desirable for the large cities to become larger. It is submitted that the evidence offered in Part I supports the conclusion that such cities should be able to expand their boundaries with a modicum of difficulty. It is unfortunate that such a decision cannot be made by a body outside the political arena, since the same self-interest which may have compelled the city-dweller to flee the city is likely to be found in that area's state legislative representative. If the area does have such a representative, he will undoubtedly do all in his power to block any proposals to enable the city to extend its boundaries easily. There is then the possibility of an impasse arising at this point between the legislative representatives of the city and those of the surrounding areas, but it is hoped that the vote of the representatives further removed from facing the immediate problem will reflect a long-range view based on what will be best for the community as a whole.

At any rate, this determination should involve a comparison of the potential solutions outlined in Part I. Should the city be empowered to expand its boundaries? Is this necessary? Will a "county plan" accomplish the same objectives? Why is it not practical to solve the problems as they arise on a contract basis between the city and its suburbs? The writers have concluded that the problems are best solved by permitting the city to expand and have submitted arguments in support of that conclusion. Nevertheless, other solutions should be considered, discussed and even debated by the legislature before a conclusion is reached.

B. *Effectuating That Decision*

The innumerable variables in this area render it inappropriate material for any kind of a uniform act. Nevertheless it is felt that a plan which is built on the foundation suggested below and embellished with refinements to suit the particular jurisdiction will go a long way toward assisting the principal cities to reassume their leadership of the metropolitan areas. Assuming that the legislature agrees with the conclusion of the writers, it can choose from a wide variety of ways in which to enunciate its policy in favor of the cities. Basically, all the plans amount to a fundamental recognition that the core city has an interest — and one which should be considered — in all these matters.

Annexation. The requirements concerning the petition should be made minimal; a number of signers representative of 20 per cent of the residents would be enough to signify the fact that there is interest in annexation existing in the area. "Adult residents" should be the group constituted eligible signers; statutes which concentrate too heavily on including ownership and assessed valuation criteria seem to have sacrificed too much in the way of democratic heritage on behalf of those with vested interests. Furthermore many of the burdensome "extra" requirements of the petition — *e.g.*, verification and detailed descriptions of the area in question — should be eliminated. Attachment of a map or plat of the area would be sufficient. In addition, those states which do not authorize the city to initiate annexation proceedings by ordinance should provide this alternative approach.

As yet there has been very little movement away from the requirement that a proposed annexation be approved at a referendum held in the area. But such a form of protection for those on the fringe places the interests of a large group of city-dwellers in the hands of a few suburbanites. Thus the referendum ought

to be abolished and safeguards incorporated into the legislation in other ways.³³⁴

Some states have woven such safeguards into a procedure whereby the matter is submitted to a specially created administrative body for determination.³³⁵ One of the most recent was Washington, which passed legislation in 1961 providing for a specially created review board to determine the feasibility of all proposed annexations to cities.³³⁶ Factors to be considered by this body include the present and anticipated population of the area to be annexed, the need of the city to expand, the past and future needs for municipal services in the area, the relative capabilities of the city and other governments to provide such services, and the revenues the city will have as a result of the annexation.³³⁷

The administrative approach has received the endorsement of several persons who have studied the problem,³³⁸ and may well be the trend. However, this solution necessitates the needless creation of a governmental body — which is directly contrary to the objective of metropolitan reform. Therefore, it is urged that a plan modeled after the Virginia system — which places the emphasis on the courts — would be more satisfactory. By providing that all annexations be passed upon by a three-judge court, the Virginia plan assures all interested persons an opportunity to be heard. The city should be given the burden of convincing the court that it will be able to provide the area with benefits it does not now possess, and at a cost which is not in excess of that assessed the present residents of the annexing city. This last-mentioned safeguard, which could be of prime importance to those who oppose annexation for financial reasons, might take the form of giving suburbanites either a reduced tax rate until municipal services were installed or an assurance that their city taxes would not be raised for a given number of years. At the present time, several statutes provide a limited tax immunity to residents of the annexed area.³³⁹ If other standards are desired — e.g., that the area be contiguous and that the city file a schedule of proposed improvements — they may be specified in the statute.³⁴⁰ The legislation should contain, however, a provision patterned after that of Virginia, directing the court to place primary importance on the overall good of the county and the metropolitan area.³⁴¹

Such a plan is flexible and the fact that two of the judges are from districts other than the one involved in the controversy assures that the determination will be made by persons with a more removed, objective viewpoint.³⁴² Moreover the safeguard of appeal to a higher court should be incorporated into the system.

Merger. Many of the same ideas which could be used to effectuate a policy in

334 Such a proposal currently is pending before the Wisconsin legislature. The bill provides that a city or village may start annexation of contiguous unincorporated territory by adoption of a resolution of its intent and petitioning the circuit court for approval; the requirement of a referendum would be abolished. *Milwaukee Sentinel*, April 5, 1963, p. 3, col. 1.

335 See the Michigan, Ohio, and Minnesota statutes cited in notes 131-133 *supra*. A similar matter currently is pending in California. Senate Bill No. 861 (1963).

336 Bollens, *Metropolitan and Fringe Area Developments in 1961*, 29 *THE MUNICIPAL YEAR BOOK* 44, 45 (1962).

337 *Ibid.*

338 SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM (1960); *Annexation: Virginia's Not-So-Judicial System*, 15 *PUB. ADMIN. REV.* 251 (1955); Mandelker, *Municipal Incorporation and Annexation: Recent Legislative Trends*, 21 *OHIO ST. L.J.* 285 (1960).

339 E.g., ALA. CODE tit. 37, § 153 (1958); IND. STAT. ANN. § 65-128 (1961). See also SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM 109-112 (1960).

340 Tennessee amended its annexation statute in 1961 to require the governing body of the annexing city to adopt a plan of service before annexing an area of more than one-fourth square mile or which contains over 500 persons. Bollens, *Metropolitan and Fringe Area Developments in 1961*, 29 *THE MUNICIPAL YEAR BOOK* 44, 45 (1962). See also N.C. GEN. STAT. §§ 160-453.3, 160-453.15 (Supp. 1961).

341 VA. CODE ANN. § 15-152.11 (1950).

342 It also would be well to adhere to the Virginia practice of requiring only the local judge to sit on matters involving small, unopposed annexations. Bain, *Annexation: Virginia's Not-So-Judicial System*, 15 *PUB. ADMIN. REV.* 251, 253 (1955).

favor of annexation would also be applicable to a plan designed to promote mergers. However, in this instance there should be a fundamental change at the outset. The common requirement that such plans receive approval of city legislative bodies simply gives those whose political lives are endangered too large a role to play. A procedure should be provided enabling the populace of a smaller municipality — upon submission of a petition signed by 35 per cent of the adult residents — to go over the heads of recalcitrant city council members. In such situations a court should have the power to appoint a committee to arbitrate the terms of the merger.³⁴³

Incorporation. The formation of new municipalities in metropolitan areas should be permitted in only the most unusual cases, if not altogether prohibited. The trend toward restriction of incorporation within growth zones reflects such a policy, and provisions like the one in Wisconsin which requires a finding that the incorporation will have no adverse effect on the area³⁴⁴ is an even clearer expression of legislative will. Existing municipalities should be given every chance to annex the area and a host of standards such as a high number of petition signers, existence of a balanced community, and proof of financial stability should be imposed before any group is allowed to place obstacles on the path to progress.

C. Conclusion

Adoption of the proposed solution would undoubtedly lead to the formation of larger and larger municipal governments. Some would say this amounts to an attack on the citadel of subsidiarity. However this is not valid because the principle of subsidiarity only demands that the smallest governmental unit capable of efficiently performing a function be assigned that function.³⁴⁵ It does not demand the fragmentation which is so common today — fragmentation which has led to duplication and inefficiency and which has thus caused the metropolitan giant to stumble.

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343 For a similar provision regarding annexation in Indiana see note 125 *supra*.

344 See note 265 *supra*.

345 POPE PIUS XI, QUADRAGESIMO ANNO (1931).