

Fordham Law Review

Volume 89 | Issue 4

Article 15

2020

Small Town, Inc.: Mischief at the Margins of Municipal Incorporation

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Recommended Citation

Robert L. Bentlyewski, *Small Town, Inc.: Mischief at the Margins of Municipal Incorporation*, 89 Fordham L. Rev. 1471 (2021).

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NOTES

SMALL TOWN, INC.: MISCHIEF AT THE MARGINS OF MUNICIPAL INCORPORATION

*Robert L. Bentlyewski**

When a state creates a municipality or alters the boundaries of an existing one, there usually is little to no opportunity for judicial review of the decision. Under the centuries-old rule of construction known as Dillon’s Rule, courts consider municipal boundary making to be strictly a political matter best left to state legislatures. This sweeping deference creates opportunities for special interests or politically powerful communities to segregate towns and schools, isolate vulnerable communities, or otherwise manipulate boundaries to hoard the benefits of local government. Courts will only intervene and deem an incorporation void if the action brazenly violates a constitutional protection or state incorporation law.

This Note examines some of the extreme situations in which courts may look beyond Dillon’s Rule and stop problematic incorporations. The threshold for judicial intervention is so high that populations can suffer significant injustice with no opportunity for recourse. This Note recommends that states enact more comprehensive incorporation laws that establish clear and mandatory incorporation procedures, set substantive requirements for what services municipalities must be able to provide, and save room for judicial review. Throughout, this Note uses the Borough of Victory Gardens, New Jersey, as a case study.

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* J.D. Candidate, 2022, Fordham University School of Law; M.P.A., 2019, The City College of New York; B.A., 2014, Brown University. This Note is dedicated to Louis Pacheco, the finest public servant I know. Thank you to Professor Nestor Davidson, Michael Lane, and my teammates on the *Fordham Law Review*. I also thank my parents, Stephanie and Tom Bentlyewski, and my favorite lawyers, Robin and Mark Hoenig. Thanks most of all to my wife, Em, without whom I would be too indecisive to write anything at all.

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INTRODUCTION

The United States is one country, divided into fifty states, split between 3031 counties,¹ broken down into 38,779 towns,² with 51,296 special government districts scattered around them.³ The centuries-long proliferation of miniature governments has turned the nation into a web of overlapping, sometimes redundant, and sometimes warring⁴ fiefdoms. But take a magnifying glass to any political map and you will find little towns that—although you have never heard of them—have rich local histories and fascinating founding impetuses.

Just ask the people of Georgetown, Colorado. When the territorial Colorado legislature wanted to give some order to the formation of rough-and-tumble mining boomtowns during the Pike’s Peak Gold Rush of the 1860s, it created haphazard town governments in an attempt to civilize

1. This figure includes Louisiana’s parishes and Alaska’s boroughs, which are their equivalents of counties. *See County*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/county> [<https://perma.cc/P92X-LMF8>] (last visited Jan. 27, 2021).

2. This Note uses “town” and “municipality” interchangeably to refer to all incorporated subcounty, general purpose governments.

3. *Local Governments by Type and State: 2017*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2017/econ/gus/2017-governments.html> [<https://perma.cc/DY8S-89EY>] (last visited Jan. 27, 2021). The figures are current as of 2017 and contained in the document titled “COG2017_CG1700ORG02_Data.”

4. *See, e.g., City of New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard & Nantucket S.S. Auth.*, 107 N.E.2d 513, 514–16 (Mass. 1952) (describing squabbling between the City of New Bedford and a public steamship authority over whether the authority, which had “New Bedford” in its name, had to include the city in its ferry route to Martha’s Vineyard).

populations of outlaws and prospectors.⁵ Once incorporated, these towns, badly in need of discipline, would each be governed by an elected “police judge,” instead of a mayor.⁶ The territorial governors likely expected these boomtowns to quickly turn to ghost towns after the mines were tapped out, as was the norm,⁷ but Georgetown defied this expectation. Georgetown residents still elect a police judge every two years,⁸ the only municipality in Colorado still operating under a territorial charter.⁹ Although police judges are perhaps not as concerned with highwaymen raiding their constituents’ stagecoaches these days, the elections are still colorful affairs.¹⁰

Roughly one hundred miles northeast of Georgetown, a frontiersman named Tom Nunn once came across a nightmare of a sight: a rail bridge had caught fire, and a train was heading right toward it.¹¹ He frantically waved at the conductor and alerted him to the danger, saving the lives of the passengers and crew.¹² The Union Pacific Railroad Company was so grateful that it set aside a square mile of land it owned and named it after Tom.¹³ Over a century later, the town of Nunn, Colorado, still stands as an independent municipality.¹⁴

Towns like these and countless others are the products of a nationwide approach to public administration that gives great deference to state governments, which can carve their lands into municipalities however they see fit.¹⁵ But for every amusing tale preserved by the creation of municipal boundaries, there is a local government facing perpetual challenges due to

5. Until then, only quasi-judicial “miners’ courts” existed to govern local affairs and protect miners’ gold claims. See MARSHALL SPRAGUE, *COLORADO: A HISTORY* xii–xiii (1984); see also David B. Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 *DENV. L. REV.* 329, 361 (2018) (explaining that the rough governing bodies approximating town governments were called “miner’s districts,” and the courts were also known as “people’s courts”).

6. See SPRAGUE, *supra* note 5, at xii–xiii.

7. Large fires were also common causes for abandonment. See *Georgetown*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Georgetown-Colorado> [<https://perma.cc/3PXA-VVFB>] (last visited Jan. 27, 2021).

8. The town recently appointed an honorary mayor, however. He is a four-year-old Bernese mountain dog named Parker. *Honorary Mayor of Georgetown, Colorado: Parker the Snow Dog*, GEORGETOWN, COLO., <https://Georgetown-colorado.org/mayor-of-georgetown-parker> [<https://perma.cc/WBY4-T63H>] (last visited Jan. 27, 2021).

9. COLO. MUN. LEAGUE, *COLORADO MUNICIPAL CANDIDATE GUIDE 5* (2019), <https://www.colorado.gov/pacific/sites/default/files/atoms/files/2019-municipal-candidate-guide.pdf> [<https://perma.cc/UK4D-LUXE>].

10. Georgetown made national news in 2002 after an exotic dancer won its election for police judge. Upon taking office, sensing waning support, she faked an attempt on her life. Voters removed her in a recall election but not before she leveraged her moment of fame to earn a featured spot in *Playboy*. See Kimberley Sevcik, *Too Wild for the West*, *GUARDIAN* (Apr. 29, 2002, 9:42 PM), <https://www.theguardian.com/world/2002/apr/30/gender.uk> [<https://perma.cc/SYU8-Y5FH>].

11. See *Town of Nunn History*, TOWN OF NUNN, COLO., http://www.nunncolorado.com/tcv_32.html [<https://perma.cc/KWP9-7Z98>] (last visited Jan. 27, 2021).

12. See *id.*

13. See *id.*

14. See *id.*

15. See *infra* Part II.B (describing the municipal incorporation process).

shortsighted or unscrupulous town planning. For example, although Nunn's dirt roads and small-town charm make it look like something out of a John Mellencamp music video, its tiny tax base makes it difficult to fund municipal services with any self-sufficiency.¹⁶ The revenue starved town heavily depends on fining out-of-town drivers to make ends meet, relying on speeding tickets on Interstate 85 to cover 40 percent of its budget.¹⁷

After centuries of municipal accretion, the United States saw a new trend emerge around the year 2000, which gathered steam after the 2008 financial crisis: municipalities started dissolving almost as frequently as new ones were incorporating.¹⁸ Hard financial times, coupled with a growing distrust of government and innumerable locality-specific concerns, caused town populations to lose faith in their local governments and seek to do away with them altogether.¹⁹ With COVID-19 expected to reduce state and local tax revenue by \$500 billion nationwide by the end of 2022,²⁰ the coming years are likely to be far more of a strain on municipalities than even the hardest years of the post-2008 recession, thus priming the country for further turmoil. Additionally, the United States is more politically divided along racial lines than ever before in its history.²¹ Political scientists Steven Levitsky and Daniel Ziblatt suggest that the upswing in divisiveness and an embrace of extremism threaten to make the states, long thought of as "laboratories of democracy," into "laboratories of authoritarianism."²² If states are laboratories, counties are the beakers and towns are the test tubes.

When state legislatures or influential groups of citizens—motivated by any combination of racial, nativist, or political animus—seek to redraw municipal boundaries to reallocate scarce resources away from groups they disfavor, there is little courts can do to stop them.²³ Such fragmentations and

16. In fiscal year 2017, \$299,972 of Nunn's \$744,441 in general fund revenue came from fines. See Mike Maciag, *Addicted to Fines: A Special Report*, GOVERNING (Aug. 21, 2019), <https://www.governing.com/topics/finance/fine-fee-revenues-special-report.html#map> [<https://perma.cc/H5SE-QVHJ>] (Zoom in on Colorado in the interactive map; Nunn is the northernmost town labeled in Colorado).

17. See *id.*

18. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L.J. 1364, 1366 (2012) ("At least 130 cities have dissolved since 2000—nearly as many as incorporated during that same period.").

19. See Sarah Mervosh, *They Wanted to Save Their 119-Year-Old Village. So They Got Rid of It*, N.Y. TIMES (Nov. 26, 2019), <https://www.nytimes.com/2019/11/26/us/amelia-ohio-dissolve.html> [<https://perma.cc/L5WQ-LZK5>].

20. See Louise Sheiner & Sophia Campbell, *How Much Is COVID-19 Hurting State and Local Revenues?*, BROOKINGS INST. (Sept. 24, 2020), <https://www.brookings.edu/blog/up-front/2020/09/24/how-much-is-covid-19-hurting-state-and-local-revenues/> [<https://perma.cc/A4LA-UQCN>].

21. Over the United States's history, Republicans were generally the favored party of Black Americans due to their opposition to slavery, and the city-centric Democrats were the favored party of immigrants. See JAMES A. MORONE, *REPUBLIC OF WRATH: HOW AMERICAN POLITICS TURNED TRIBAL, FROM GEORGE WASHINGTON TO DONALD TRUMP 3* (2020). A recent and unprecedented realignment has made it so that "[f]or the first time, all the so-called minorities are on one side." *Id.*

22. *Id.* at 24.

23. See *infra* Part III (describing the limited circumstances under which courts may intervene in incorporations).

reallocations commonly took place during the rapid spread of suburban sprawl after World War II²⁴ and have recently accelerated.²⁵ Left unchecked, these divisions can solidify and expand segregation, widen wealth and educational disparities, and socially balkanize communities along racial and other lines.²⁶ Despite these grave policy consequences, the law has evolved little since the time of Wild West governance from which Georgetown emerged.²⁷

Americans have widely shared expectations for how a legitimate, democratic government should treat them. Accepted norms include: the opportunity to participate in decision-making; the ability to hold representatives accountable for their decisions; reasonably efficient government administration; and the fair distribution of public goods and services, including to minority populations.²⁸ The constitutions and laws of the federal and state governments are meant to compel governments to meet these democratic expectations, but the unwieldy realm of municipal incorporation creates ample opportunities for ill-intentioned actors to subvert such norms.²⁹ This Note looks at some of the very few ways courts can intervene to stop a town from forming when malfeasance or egregious misfeasance threaten to undermine democratic governance and divide communities along racial, political, socioeconomic, or otherwise arbitrary lines.

The laws and circumstances under which states divide into towns vary so widely that framing the issue in general terms would be futile: what may be unconstitutional under Kentucky's state constitution may be standard operating procedure in Oregon, and incorporation issues long settled in Florida may have never reached a courtroom in Hawaii, which does not

24. See *infra* Part I (discussing how a New Jersey community broke apart after the construction of a war-related housing project influenced local politics).

25. A wealthier area of East Baton Rouge Parish in Louisiana tried to break away into its own town recently but failed to garner enough support to survive a referendum. See Terry L. Jones, *Voters in Southeast East Baton Rouge Parish Say 'Yes' to St. George*, *ADVOCATE* (Oct. 12, 2019, 9:30 PM), https://www.theadvocate.com/baton_rouge/news/article_4c842ecc-ec43-11e9-bf9c-7f1c0b207650.html [<https://perma.cc/3SKF-VYP7>]. Residents tried again, this time removing more Black residents from the proposed city limits, and the measure narrowly passed. See *id.* The neighborhood is now the significantly less diverse City of St. George. See *id.* In Anniston, Alabama, residents of the town's whiter, wealthier fourth ward are attempting to leave the predominantly Black town of Anniston and join a neighboring town. See Janac Pierre, *Annexit: The Push to Deannex Parts of Anniston into Oxford*, *WBHM* (Aug. 20, 2019), <https://wbhm.org/feature/2019/annexit-the-push-to-deannex-parts-of-anniston-into-oxford> [<https://perma.cc/G339-7K8U>].

26. These were the direct effects of the municipal incorporation described in the case study below. See *infra* Part IV.A.

27. Compare *infra* Part II.A (detailing the predominant nineteenth-century legal theory termed "Dillon's Rule"), with *Bragg Hill Corp. v. City of Fredericksburg*, 831 S.E.2d 483, 489–90 (Va. 2019) (applying Dillon's Rule strictly and citing it by name).

28. Joseph P. Viteritti, *Municipal Home Rule and the Conditions of Justifiable Secession*, 23 *FORDHAM URB. L.J.* 1, 30–31 (1995) (citing M. Stephen Weatherford, *Measuring Political Legitimacy*, 86 *AM. POL. SCI. REV.* 149, 149–50 (1992)).

29. See *infra* Parts III.A–B (describing various suspect incorporations).

divide governments lower than the county level.³⁰ Instead, this Note will focus on the woeful creation of a single town—the Borough of Victory Gardens, New Jersey—and use that incorporation as a lens through which to examine the limited opportunities for redress, even for brazen violations of democratic norms. At least one leading scholar has called for an increased use of case studies in analyzing the costs and benefits of boundary changes within their hyperlocal sociopolitical contexts,³¹ and this Note largely uses such case studies to analyze the limits of judicial review of those changes.

Part I of this Note tells the story of Victory Gardens’s incorporation. Part II provides background on the basic structure of municipal corporations and incorporation as a legal device. Part III describes some of the few extraordinary situations in which courts can intervene in a municipal incorporation. Part IV demonstrates how unlikely it was for there to be a legal remedy available to the residents of Victory Gardens and suggests statutory solutions to prevent similar antidemocratic transgressions from happening again.

I. VICTORY GARDENS, NEW JERSEY: A CASE STUDY

Shortly after the attack on Pearl Harbor in 1941, the federal government constructed a housing project in the hills of northern New Jersey to house workers at the country’s largest explosives manufacturer, the U.S. Army’s Picatinny Arsenal.³² The federal government constructed the project on just over one-tenth of one square mile of hilly land in Randolph Township that was likely the site of a disused farm.³³ The project, named Victory Gardens,³⁴ consisted of bare cinder block, bungalow-like dormitories mostly built around a single circular road.³⁵ Most of the workers who moved into the project were not local residents; many moved in from Pennsylvania and

30. Even urban Honolulu is just a city-like county. There are no towns at all in Hawaii. See *About State Government*, HAW. DEP’T OF BUDGET & FIN., <https://budget.hawaii.gov/budget/state-of-hawaii-background-information/#:~:text=There%20are%20no%20independent%20or,parts%20of%20the%20United%20States> [https://perma.cc/2BE2-74LG] (last visited Jan. 27, 2021) (“There are no independent or separate cities or other municipalities, school districts or townships. The State government of Hawai’i has total responsibility for many functions that are performed by or shared by local governments in most other parts of the United States.”).

31. See Michelle Wilde Anderson, *Mapped out of Local Democracy*, 62 STAN. L. REV. 931, 945–46, 945 n.46 (2010).

32. See PATRICK J. OWENS, PICATINNY: THE FIRST CENTURY 219–21 (2017).

33. See *To Vote on Gardens*, DOVER ADVANCE, Sept. 17, 1951, at 1 (quoting the lawyer representing the project’s residents as saying, “it should be remembered that before Victory Gardens was developed that area was an abandoned farm, probably paying \$100 in taxes”).

34. The name is likely a reference to the home gardens grown to aid the war effort during World War II, but it may also have been a tongue-in-cheek insult. The euphemism for the low-cost, low-quality building materials used in defense projects like Victory Gardens at that time was “victory building materials.” See Kristin M. Szylyvian, *The Federal Housing Program During World War II*, in FROM TENEMENTS TO THE TAYLOR HOMES 121, 131 (John F. Bauman et al. eds., 2000).

35. See MORRIS CNTY. HERITAGE COMM’N, MORRIS COUNTY CULTURAL RESOURCES SURVEY (1988) (describing Victory Gardens’s architecture). This report, informally known as the “Acroterion report,” is held at the Morris County Library.

others from all over the country.³⁶ Although it bore no official whites-only designation, it was likely a segregated all-white project in accordance with the federal government's strict policy against integrated defense housing at the time.³⁷

Political strife existed from the start between the residents of the project—who were mostly union Democrats—and the rest of Randolph's solidly Republican population.³⁸ In 1951, a Wall Street investor named Charles Brundage, whose personal landholdings in Randolph significantly exceeded the size of Victory Gardens³⁹ and who had a very particular, passionate drive to remove all bungalows from the town,⁴⁰ enlisted the help of Randolph's mayor⁴¹ to petition the legislature to remove the project from Randolph's borders and incorporate it as its own municipality.⁴² That March, the local state senator, a powerful figure in the state Republican Party,⁴³ wrote a bill to incorporate Victory Gardens, which passed both Republican-controlled chambers of the legislature with just under two-thirds approval in each.⁴⁴

36. See Michael Valkys, 'Poor Orphan' of Morris Fights to Survive, DAILY REC., Jan. 30, 1995, at A5.

37. When the National Housing Agency (NHA) built Victory Gardens, Black Americans were only permitted to live in the 11 percent of defense-related housing the NHA specifically reserved for them. See Szylvian, *supra* note 34, at 131.

38. See *Jersey Township Seeking 'Divorce'*, N.Y. TIMES, Mar. 8, 1951, at 35.

39. Brundage was a partner in the investment firm of Brundage, Story & Rose. See *Charles Edwin Brundage Investment Counselor*, 77, N.Y. TIMES, Jul. 29, 1972, at 28. He and his wife donated over 500 acres of land for use as a park and named it after their favorite milkman. See *James Andrews Memorial County Park*, MORRIS CNTY. PARK COMM'N, <https://www.morrisparks.net/index.php/parks/james-andrews-memorial-park/> [https://perma.cc/8QMY-9HUV] (last visited Jan. 27, 2021). The couple additionally donated land to form Brundage Park, covering 232 acres today. See *About Our Parks*, TWP. OF RANDOLPH, N.J., https://www.randolphnj.org/parks_and_recreation/parks_about [https://perma.cc/E9B8-EPEG] (last visited Jan. 27, 2021). Victory Gardens covers ninety-four acres. See *War Homes Voted Out of Township*, HERALD-NEWS, Sept. 19, 1951, at 1.

40. Brundage served as the chairman of Randolph's planning board in the early 1950s. See *Better Zoning Steps Outlined*, COURIER-NEWS, Apr. 15, 1950, at 7. Brundage once sued in his capacity as a private citizen in an attempt to shut down the all-Jewish bungalow colonies that attracted a largely Orthodox community to Randolph each summer, eventually losing a yearslong legal battle. See *Brundage v. Township of Randolph*, 148 A.2d 841, 842–45 (N.J. Super. Ct. App. Div. 1959).

41. Robert Crowley's official title was "Chairman of the Randolph Township Committee," but the role was understood to be equivalent to that of a mayor. See *Robert Crowley*, 87, *Former Mayor of Randolph Township*, DAILY REC., Jul. 30, 1981, at 2.

42. See Robert G. Geelan, *The Bitter Birth of Randolph's Orphan*, RANDOLPH REP., Apr. 19, 1979, at 9 (stating that Brundage led the "Citizens of Randolph" advocacy group that fought for the removal of Victory Gardens).

43. State Senator David Young III became the majority leader the following year. See *GOP Group to Fete Hannold as State Senate President*, COURIER-POST, Jan. 3, 1952, at 32.

44. See *Senators Approve Bill on Gardens Separation*, DOVER ADVANCE, Mar. 22, 1951, at 1 (approving the bill 12 to 7—a 63 percent majority); see also *Victory Gardens Separation Plan Passes Assembly*, DOVER ADVANCE, Apr. 5, 1951, at 1 (approving the plan 32 to 18—a 64 percent majority).

The state scheduled a September referendum for locals to vote on the incorporation,⁴⁵ and advocates for both sides started campaigning.⁴⁶

Pro-incorporation forces, now led by the mayor, argued that the federal government was failing to pay promised subsidies to cover education expenses for Victory Gardens's schoolchildren, placing the burden squarely on Randolph's taxpayers.⁴⁷ The director of the federal Public Housing Authority's (PHA) New York division publicly called Randolph's accounting practices "fanciful and erratic."⁴⁸ The director suggested that the town government, which had presented widely inconsistent cost estimates for how much it spent on Victory Gardens's schoolchildren, had actually turned a profit off of federal subsidies.⁴⁹ He further attested that he and a PHA lawyer had met with Randolph officials just a few months earlier to make sure funding was adequate, and neither the mayor nor any other official had raised a complaint.⁵⁰ Nonetheless, Randolph's mayor and town auditor told a crowd that Randolph residents' school-related taxes would be cut in *half* if the project were excised from their town.⁵¹ The statement was an abject lie.⁵² The mayor also warned that the project would become the biggest "slum" in the area once the federal government stopped managing it.⁵³ As the word "slum" carried clear racial implications,⁵⁴ this may have played into an anti-integrationist sentiment present in the area.⁵⁵

45. See *Victory Gardens Referendum Date Is September 18*, DOVER ADVANCE, Jul. 23, 1951, at 1.

46. See *Victory Gardens Residents to Fight Against Separation*, DOVER ADVANCE, Jul. 5, 1951, at 1.

47. See *Crowley Says Victory Gardens Project Opposed from Start*, DOVER ADVANCE, Aug. 13, 1951, at 1. In the speech described in this article, the mayor also asserted that the people living in Victory Gardens were not just factory workers but also "professional men" taking advantage of the subsidized housing. *Id.* No historical account supports that assertion.

48. *Gardens Expense to Township Is Denied by Federal Official*, DOVER ADVANCE, Mar. 26, 1951, at 1.

49. See *id.*

50. See *id.* (detailing meetings between the PHA and Randolph's township committee on December 28, 1950, and January 12, 1951).

51. See *Decision Due Tuesday on Separation Issue*, DOVER ADVANCE, Sept. 13, 1951, at 1.

52. The next year, Randolph's taxes only went down by 1 percent. N.J. DEP'T OF THE TREASURY, ANNUAL REPORT OF THE DIVISION OF TAXATION 74 (1952), <https://dSPACE.njstatelib.org/xmlui/handle/10929/26935> [<https://perma.cc/X4QV-NYKB>] (indicating a 1951 tax rate of 7.74 percent and a 1952 rate of 7.68 percent).

53. See *Crowley Says Victory Gardens Project Opposed from Start*, *supra* note 47.

54. See generally Arnold R. Hirsch, *Searching for a "Sound Negro Policy": A Racial Agenda for the Housing Acts of 1949 and 1954*, 11 HOUS. POL'Y DEBATE 393 (2000) (describing how opponents of federal urban renewal programs at this time considered "slum" a pejorative used to indicate the Blackness of a neighborhood).

55. The local newspaper's editorial pages from that year illustrate the regressive ethos. See, e.g., Editorial, *America Is Scared*, DOVER ADVANCE, Apr. 19, 1951, at 2 (comparing Black Americans moving into white areas to the "barbaric hordes" that invaded and destroyed the empires of antiquity); Editorial, *Confederate Flags*, DOVER ADVANCE, Sept. 17, 1951, at 4 (celebrating sightings of Confederate flags in the area and suggesting a return to Confederate-style politics, wishing for no federal government interference in local government).

The project's anti-incorporation advocates faced opposition at every turn, with the Randolph government refusing to allow them to use a sound truck to mobilize voters,⁵⁶ limiting their use of public halls for meetings,⁵⁷ and refusing to participate in discussions with project residents.⁵⁸ The regional PHA director complained in a public statement that he had asked to give a presentation to explain how the budget figures the mayor presented were "inflated, unjustified, and misleading," and although the Brundage-led planning committee had told the public that they had invited the director to do so, he had never actually received an invitation.⁵⁹

On September 18, the referendum passed 735 to 711, with project residents voting against the measure 483 to 30.⁶⁰ The state incorporated a ninety-four-acre municipality over the opposition of 94 percent of its residents.⁶¹ Because school districts are separate corporate entities from municipalities, a second referendum was held on December 4 to decide whether Victory Gardens should be removed from the Randolph school district and given its own board of education.⁶² That measure passed 327 to 10, with Victory Gardens residents not allowed to vote in the referendum.⁶³

Victory Gardens residents unsuccessfully challenged the referendums in court, claiming: (1) ineligible voters had cast ballots, (2) they had received insufficient notice because the ballot question was confusingly worded, (3) notice had been insufficient because Randolph failed to distribute sample ballots, and (4) absentee ballots had not been provided for registered voters from the project who were serving in the Korean War.⁶⁴ The only claim that the judge felt could prevent the incorporation from proceeding was the charge of ineligible voters casting ballots.⁶⁵ After asking the project's lawyer to return with specific names of voters who had cast illegal ballots, the judge⁶⁶

56. *Victory Gardens Asks Forum, Use of Sound Truck*, DOVER ADVANCE, Aug. 6, 1951, at 1.

57. *Id.*

58. The mayor said he would not attend a public meeting because it would be too "political." *Democratic League Holds Gardens Protest Meeting*, DOVER ADVANCE, Sept. 4, 1951, at 1. The leader of the anti-incorporation movement said, "Every suggestion of the [Victory Gardens] residents was turned down." *Id.*

59. *Kervick Cites Payment, VG School Pupils*, DOVER ADVANCE, Sept. 17, 1951, at 1.

60. *'Gardens' Is Ousted, 735-711*, DOVER ADVANCE, Sept. 20, 1951, at 1.

61. *See War Homes Voted Out of Township*, *supra* note 39, at 1.

62. *See Second Election Looms up at VG; School—This Time*, DOVER ADVANCE, Nov. 5, 1951, at 1.

63. *See Set Up School District: Victory Gardens Again Voted Out by Randolph*, DOVER ADVANCE, Dec. 6, 1951, at 1.

64. *See Geelan*, *supra* note 42, at 9.

65. *See Judge Dismisses 3 of 4 Allegations, V.G. Referendum*, DOVER ADVANCE, Oct. 22, 1951, at 1.

66. Judge Donald M. Waesche was a Democrat whose appointment to the bench was fiercely opposed by senate Democrats in the minority. *See Waesche an Issue*, CENT. N.J. HOME NEWS, Feb. 12, 1949, at 2. He was also the attorney on the losing side of an important decision in which the state supreme court clarified the limits of New Jersey municipalities' independence and powers. *See Hart v. Teaneck*, 50 A.2d 856, 857 (N.J. 1947).

dismissed all their complaints.⁶⁷ Victory Gardens—a creation of the state legislature and the citizens of Randolph—has thus stood independently for seven decades. Never given additional land by the legislature, 0.15 square-mile Victory Gardens has survived through recessions and very hard times, despite not having schools, a police department, a library, developable land, or many of the basic elements one expects to find in a town.⁶⁸

Years later, a New Jersey General Assembly Speaker, Alan Karcher, called the incorporation of Victory Gardens “one of the sadder moments of the state’s history.”⁶⁹ Victory Gardens government leaders and those writing about its history have called the town an “orphan” of the state government.⁷⁰ Its incorporation violated various of the aforementioned democratic norms,⁷¹ with an added layer of ugliness from the lies the local government told.⁷² However, despite these transgressions, there likely was and still is no legal remedy available to the residents of Victory Gardens. To explain this lack of redress, Part II covers the formation of municipalities and their legal definition, and Parts III and IV show when courts can intervene in the drawing of municipal boundaries.

II. MAKING A MUNICIPALITY

Rather than rely on their citizens to figure out how to order and preserve their ways of life, state governments create municipalities to perform those functions as more formal political and corporate bodies.⁷³ The Massachusetts Constitution eloquently describes a political body as “a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good.”⁷⁴ But at least since the times of the Greek polis, political bodies have also been defined by their corporate characteristics,⁷⁵ and state legislatures set the pathways to incorporation for today’s municipalities. Part II.A explores the relationship between municipalities and their state legislatures, and Part II.B discusses the legal mechanisms with which municipal corporations can be created.

67. See *Judge Dismisses 3 of 4 Allegations, V.G. Referendum*, *supra* note 65. The local media did not cover the court’s disposition of the fourth allegation, but it presumably was unsuccessful.

68. See BOROUGH OF VICTORY GARDENS, <http://www.victorygardensnj.gov> [<https://perma.cc/X8WB-69Z2>] (last visited Jan. 27, 2021) (containing information on the municipal services Victory Gardens provides).

69. ALAN J. KARCHER, *NEW JERSEY’S MULTIPLE MUNICIPAL MADNESS* 126–27 (1998).

70. See, e.g., *id.* at 126; Geelan, *supra* note 42; Valkys, *supra* note 36.

71. See Viteritti, *supra* note 28, at 30–31.

72. See *supra* notes 51–52 and accompanying text.

73. See *Counts v. Morrison-Knudsen, Inc.*, 663 S.W.2d 357, 362 (Mo. Ct. App. 1983) (“A city functions as a body politic, as an organ of government, and also as a body corporate, an artificial personality or corporation.”).

74. MASS. CONST. pmbl.

75. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1126 (1980) (“[A]ll powerful local units, whether Greek cities, medieval towns or New England towns, combined their ‘political’ identity with other forms of religious or fraternal cohesion or economic power.”).

A. Creature of the State Legislature

In America, state governments ultimately control their municipalities. State legislatures can design, create, alter, and abolish towns as they see fit.⁷⁶ Perhaps the most common and enduring observation about municipalities' subordinate legal condition is that they are "creatures of" state legislation.⁷⁷ Although the image of a "creature" connotes the creation of a separate, subordinate being, municipalities have interchangeably been described as weak "departments" of their states' governments⁷⁸ and mere "instrumentalities" of those governments, designed to perform specific state functions and no more.⁷⁹

In his treatise and opinions, the nineteenth-century Iowa jurist John F. Dillon articulated local government's creature status so clearly that the truism is now called Dillon's Rule.⁸⁰ From the bench of the Iowa Supreme Court, Dillon wrote:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. . . . [Municipalities] are, so to phrase it, the mere *tenants at will* of the legislature.⁸¹

In addition to establishing municipalities' position subordinate to state governments, Dillon's Rule is also a canon of construction suggesting that courts should construe questions of power distribution narrowly against municipalities and residents and broadly in favor of states.⁸² If a court

76. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455, 475 (1868), *superseded by constitutional amendment*, IOWA CONST. art. III, § 38A, *as recognized in* *Berent v. City of Iowa City*, 738 N.W.2d 193 (Iowa 2007). *But see infra* Part II.C (discussing the self-governance powers preserved in home rule statutes and constitutional provisions).

77. *See, e.g.*, *Shirk v. City of Lancaster*, 169 A. 557, 559 (Pa. 1933) ("Municipal corporations are creatures of the state, created, governed, and abolished at its will."); *K. N Energy, Inc. v. City of Casper*, 755 P.2d 207, 210 (Wyo. 1988) ("Municipalities, being creatures of the state, have no inherent powers but possess only the authority conferred by the legislature.");

78. *See, e.g.*, *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923) ("A municipality is merely a department of the state, and the state may withhold, grant or withdraw powers and privileges as it sees fit."); *Barnes v. District of Columbia*, 91 U.S. 540, 544 (1875) ("A municipal corporation . . . is but a department of the State.");

79. *See, e.g.*, *In re Las Vegas Monorail Co.*, 429 B.R. 770, 796 (Bankr. D. Nev. 2010) (explaining that whether an entity is an "instrumentality of the state" is key in assessing if it is a "municipality" under the U.S. Bankruptcy Code); *Burch v. Hardwicke*, 71 Va. (1 Gratt.) 24, 32 (Va. 1878) ("[Municipalities] are instrumentalities of the government acting under delegated powers . . .").

80. *See* *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 641 F.3d 197, 218 n.10 (6th Cir. 2011) (explaining Dillon's Rule and its place in contemporary Tennessee law).

81. *Cedar Rapids*, 24 Iowa at 475.

82. *See* NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 10 n.6 (2020), <https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf> [<https://perma.cc/VE3T-YYSN>]; *see also* *Bragg Hill Corp. v. City of Fredericksburg*, 831 S.E.2d 483, 489 (Va. 2019) ("The Dillon Rule of strict construction controls our determination of the powers of local governing bodies." (quoting *Marble Techs., Inc. v. Hampton*, 690 S.E.2d 84, 88 (Va. 2010))).

perceives that a state legislature's will was to incorporate a municipality or alter its powers, it will give the state the benefit of the doubt, even if the legal validity of the action is questionable.⁸³

Although state legislatures have expansive powers to create municipal governments, they have very limited authority to delegate any of that power to other branches.⁸⁴ When legislatures have attempted to include courts in the incorporation process to serve as a check on the legislatures, courts themselves have struck down the delegations. For example, the Wisconsin Supreme Court called incorporation "emphatically a question of public policy and statecraft" and declared that the soundness of an incorporation decision was "not in any sense a judicial question."⁸⁵ When the Tennessee legislature gave its circuit courts the job of approving or denying all requests for incorporation—for both public and private corporations—as a way to save time in the legislature, the state supreme court forbade it.⁸⁶ Finding the legislature's power to form corporations to be "one of the attributes of the supreme power which they represent," the Tennessee court held that the power was wholly nondelegable.⁸⁷ However, statutes that explicitly require that incorporations be "reasonable" can provide courts with the power to exercise discretion and have a meaningful say in the process.⁸⁸

Just as judiciaries cannot encroach on the legislative domain of incorporation, neither can executives. When the Louisiana governor attempted to incorporate a town by decree, the state supreme court held that he was acting outside his executive function, instead exercising an improper delegation of legislative power.⁸⁹

Legislatures also cannot give the power of incorporation directly to the people through referenda.⁹⁰ Incorporations usually include a referendum at

83. See *Durham v. Crutchfield*, 578 S.W.2d 438, 441–42 (Tex. Civ. App. 1979) (finding an incorporation proper even though the state failed to properly delineate the proposed town's boundaries as required under state law).

84. See *State v. Armstrong*, 35 Tenn. (1 Sneed) 634, 638 (1856) (holding that the state constitution's grant of authority over incorporating municipalities to the legislature "forbids the exercise of this power by any other department of the government").

85. The legislature had required that a circuit court confirm that all the territory in a proposed municipality "ought justly to be included" before finalizing incorporations, a broad judgment call. *In re Village of North Milwaukee*, 67 N.W. 1033, 1035–36 (Wis. 1896).

86. *Armstrong*, 35 Tenn. at 638.

87. *Id.* at 637–38. *But see* *Wiseman v. Calvert*, 59 S.E.2d 445, 453 (W. Va. 1950) (quoting *West v. W. Va. Fair Ass'n*, 125 S.E. 353, 355 (W. Va. 1924)) (finding West Virginia courts can have a role in the formal process of incorporation so long as it is purely administrative and no judicial discretion is exercised).

88. See *infra* Part III.B.3 (discussing reasonableness requirements in incorporation).

89. *State ex rel. Higgins v. Aicklen*, 119 So. 425, 428 (La. 1928) ("The fact that the proclamation declaring the village of Metairie Ridge incorporated was that of the Chief Executive does not make the question in this case a political question, not reviewable by the courts, for the Governor was not performing an executive function in issuing his proclamation. He was acting under the same authority that any other agency to whom the Legislature might have delegated the authority would have acted under.")

90. See *Pershing v. Sixth Jud. Dist. Ct.*, 181 P. 960, 962 (Nev. 1919) ("[T]he power which the Legislature possesses to divide counties and apportion their common burdens is not abridged, limited, restricted, or affected by the initiative and referendum . . .").

some point in the process,⁹¹ but approval by an affected area's inhabitants is merely a condition precedent to the enactment of an incorporation statute; it is not what legally drives the incorporation.⁹² The people may have the final say, but they are merely exercising the *limited* rights that the legislature has explicitly given them.

B. Incorporation: The Act of Creation

Town and city seals often contain the words "incorporated in" followed by a year⁹³ because a community cannot be recognized as a legal entity until it is chartered as a municipal corporation.⁹⁴ Incorporation is the creation of a corporation, producing an entity with legal personhood.⁹⁵ Municipal corporations are corporations of a specific variety that exist only to promote the public welfare and govern affairs within their fixed, relatively narrow borders.⁹⁶

Due to the old age of some U.S. municipalities and the complicated history of different nations seizing and exchanging Native American land, many American communities have assumed a corporate character under murky circumstances.⁹⁷ However, most towns in the United States followed more direct paths to creation through the common mechanism of state-initiated incorporation.⁹⁸ Local governments today do not derive their authority from an abstract presence of sovereignty, but rather they have exactly as much

91. See 1 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 3:81 (3d ed. 2020) (discussing incorporation referenda).

92. See *id.* § 3:35 ("Even where the consent of the people involved is required or any steps must be taken by individuals before corporate existence begins, it is not from the persons who consent or who take the steps that the corporation derives its existence." (footnote omitted)).

93. See, e.g., CHICAGO, ILL., CODE ch. 1, art. 8, § 010 (2020) (requiring that the Chicago, Illinois, seal contain the words "City Of Chicago; Incorporated 4th March, 1837"); MEDFORD, MASS., CODE ch. 2, art. I, § 2-1(a) (2020) (requiring that the Medford, Massachusetts, seal contain the words "Founded 1630: Incorporated a City 1892").

94. *Comm'rs of Laramie Cnty. v. Comm'rs of Albany Cnty.*, 92 U.S. 307, 308 (1875) ("Counties, cities, and towns are municipal corporations, created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the constitution of the State otherwise provides.").

95. See *Incorporation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. *Comm'rs of Laramie Cnty.*, 92 U.S. at 308 ("[Towns are] usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality.").

97. See Jake Sullivan, *The Tenth Amendment and Local Government*, 112 YALE L.J. 1935, 1939–40 (2003) (describing the evolution of local governments in the original colonies). Original claims to local power in western states were equally murky. See Kopel, *supra* note 5, at 362 ("Strictly speaking, the entire settlement of Colorado had been of questionable legality; whatever lands were ceded by Indian treaties belonged to the federal government, which had never enacted any law for transfer of title to settlers.").

98. See Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198, 205 (1899) (describing how most nineteenth-century incorporations were performed through special legislation, but general enabling statutes had become the norm by the turn of the twentieth century).

power as was granted to them by their legislatures at the time of their incorporations.⁹⁹

When states begin breaking themselves into smaller administrative districts, they first split up into counties, which double as geographic subdivisions of states' land and administrative subdivisions of states' governments.¹⁰⁰ States utilize counties in different ways: some use them strictly for geographic demarcation, while others give them essential government functions.¹⁰¹ Land within county borders is by default considered unincorporated and governed by the county's government until town governments are incorporated within it.¹⁰² Although unincorporated land is often inhabited and sometimes even urbanized,¹⁰³ the general practice is for states to leave their more rural sections unincorporated and incorporate their more densely populated areas into municipalities.¹⁰⁴

The traditional route to incorporation is for a state legislature to enact an individual statute that specifically sets up an area as a municipal corporation.¹⁰⁵ These statutes, a variety of "special legislation," detail the town incorporation process.¹⁰⁶ For example, the act that created Victory Gardens identified the land to be included in painstaking detail, with descriptions like: the boundary continues "north 22 degrees 35 minutes 45 seconds," then "west 523.59 feet along a line of lands [owned by] Walter Pitkin to an iron post."¹⁰⁷ The act also described how the referendum to approve the separation must be conducted and provided the structure for the Victory Gardens municipal government: a seven-person council that selects one of its own members to be the mayor.¹⁰⁸

99. See *Hart v. Teaneck*, 50 A.2d 856, 857 (N.J. 1947) ("A municipal corporation . . . [has] no inherent jurisdiction to make laws, but is government of enumerated powers acting by delegated authority which must be exercised in a reasonable manner. The power conferred on municipal corporations by the State Legislature is limited; its exercise must be directed to the protection of a basic interest of society . . .").

100. See *County*, *supra* note 1.

101. The classic example for the latter group is using county sheriffs as the principal law enforcers within their county limits, rather than having a local police department led by a chief. See *FAQ*, NAT'L SHERIFFS' ASS'N, <https://www.sheriffs.org/about-nsa/faq> [<https://perma.cc/SY96-63G5>] (last visited Jan. 27, 2021).

102. See Michelle Wilde Anderson, *Cities Inside Out: Race, Poverty, and Exclusion at the Urban Fringe*, 55 UCLA L. REV. 1095, 1101 (2008).

103. Over one million people live in unincorporated areas in Miami-Dade County, Florida, alone. See *About Miami-Dade County*, MIAMI-DADE CNTY., <https://www.miamidade.gov/global/disclaimer/about-miami-dade-county.page#:~:text=The%20areas%20of%20the%20County,the%20largest%20in%20the%20nation> [<https://perma.cc/ZS2X-HNMA>] (last visited Jan. 27, 2021).

104. In some states, there are statutes forbidding incorporation in less developed areas. See, e.g., ARIZ. REV. STAT. ANN. § 9-101(F) (2020) ("An area to be incorporated shall not include large areas of uninhabited, rural or farm lands, but it shall be urban in nature."); W. VA. CODE § 8-2-1(a)(2) (2020) (requiring incorporated places have an "average of not less than five hundred inhabitants or freeholders per square mile").

105. See *McQuillin*, *supra* note 91, § 3:35.

106. *Id.*

107. Act of June 20, 1951, ch. 259, § 2, 1951 N.J. LAWS 906, 906 (incorporating Victory Gardens).

108. See *id.*

Incorporation by legislative fiat became unpopular in the late nineteenth century because of the advantage it gave to powerful special interests: individuals with connections to the statehouse had significantly better chances of convincing a legislator to introduce a bill to spur an incorporation than did ordinary citizens.¹⁰⁹ Legislatures adopted more wholesale approaches to incorporation, including enabling statutes and “home rule” provisions.¹¹⁰ General enabling statutes lay out standardized pathways to municipal incorporation that are available to qualifying groups of citizens should they choose to pursue it.¹¹¹ Some state constitutions now forbid special legislation and require that towns be incorporated exclusively under general enabling legislation.¹¹²

States supplement this decentralization of incorporation through home rule statutes, which limit legislative supremacy over the internal affairs of towns once they are incorporated.¹¹³ Home rule provisions can serve as heavy counterbalances to Dillon’s Rule, providing municipalities or classes of municipalities with varying degrees of power to amend their charters, decide what government services they will or will not provide, and choose how to generally enforce state law.¹¹⁴ Now, almost all states have some form of a home rule provision.¹¹⁵ While home rule powers can allow a town to significantly alter its form, potentially resulting in the incorporation of a new municipal corporation after replacing its existing charter, these powers cannot create wholly new towns out of unincorporated land or parts of

109. Keasbey, *supra* note 98, at 205 (“During all this time special charters had been freely granted by the Legislature, and companies of every kind had been formed. The Legislature was subjected to the influences of those who sought for special favors, and the statute books were burdened with private acts of incorporation.”).

110. *Id.* (describing the majority of states’ move toward general enabling statutes); *see also* Philip A. Trautman, *Legislative Control of Municipal Corporations in Washington*, 38 WASH. L. REV. 743, 765 n.97 (1963) (describing how nearly half of states had enacted home rule provisions by 1930).

111. *See* MCQUILLIN, *supra* note 91, § 3:35.

112. *See, e.g.*, N.Y. CONST. art. IX, § 2(b)(2) (“[T]he legislature . . . [s]hall have the power to act in relation to . . . any local government only by general law, or by special law only (a) [by request of the town government], or (b) except in the case of the city of New York, on certificate of necessity from the governor . . . [and] with the concurrence of two-thirds of the members elected to each house of the legislature.”); WASH. CONST. art. XI, § 10 (“Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation . . . of cities and towns, which laws may be altered, amended or repealed.”).

113. While municipalities incorporated under special legislation or general enabling statutes by default have only the powers the legislature explicitly gives to them, home rule municipalities have unlimited power to regulate their internal affairs except for what the legislature explicitly forbids them from doing. *Compare* Tex. Dep’t of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 645 (Tex. 2004) (“General-law municipalities . . . are political subdivisions created by the State and, as such, possess those powers and privileges that the State expressly confers upon them.”), *with* City of Davenport v. Seymour, 755 N.W.2d 533, 538 (Iowa 2008) (“[A]s long as [a home rule municipality’s] exercise of police power over local affairs is not ‘inconsistent with the laws of the general assembly,’ municipalities may act without express legislative approval or authorization. City authorities are no longer frightened by Dillon’s ghost.” (quoting IOWA CONST. art. III, § 38A)).

114. *See* MCQUILLIN, *supra* note 91, § 1:44.

115. *See* NAT’L LEAGUE OF CITIES, *supra* note 82, at 7.

neighboring incorporated towns the way special legislation and general enabling statutes can.¹¹⁶ However, no matter which method a state government chooses to incorporate its municipalities, and no matter how much the power seems to rest in the hands of voters, all incorporation power continues to originate from the state government.¹¹⁷

III. VOID INCORPORATIONS

Regardless of how ill-advised an incorporation may seem, with so much legislative control over the process, there are few opportunities for residents to contest the legality of incorporations.¹¹⁸ State governments themselves are often the only parties with standing to challenge an incorporation.¹¹⁹ While the creation of Victory Gardens unquestionably violated basic norms of governance,¹²⁰ the deference provided to states through Dillon's Rule makes it unlikely that such a violation would rise to the high level of being legally void. This section explores some of the narrow, unique circumstances under which courts have put a stop to incorporations.

Part III.A details how courts have found cause to stop a town from forming or cease a town's operation under various protections afforded by the U.S. Constitution. Part III.B looks at situations in which courts have voided incorporations under state constitutions and statutes. Part III.C discusses de facto towns, which are the most common by-products of successful legal challenges to incorporations.

A. Constitutional Violations

The Constitution provides protections to Americans when the land beneath them is being incorporated. Theoretically, for example, an incorporation statute that only opens a referendum up to male voters would likely be found to violate the Nineteenth Amendment today,¹²¹ and a court could strike down its resulting incorporation as void. The cases below are instances where courts—despite the broad deference afforded to states under Dillon's Rule—

116. See *Forwood v. City of Taylor*, 214 S.W.2d 282, 285 (Tex. 1948) (holding that towns incorporated under home rule statutes are qualitatively different from those created by special legislation or general enabling statutes, with only towns in the latter two categories considered to be “incorporated under the General Laws” for the purposes of a Texas statute).

117. See, e.g., *Pershing v. Sixth Jud. Dist. Ct.*, 181 P. 960, 962 (Nev. 1919).

118. See *Lippold v. Meade Cnty. Bd. of Comm'rs*, 906 N.W. 2d 917, 922 (S.D. 2018) (“With few exceptions, a private person cannot ordinarily, either directly or indirectly, usurp this function of government.” (quoting *MCQUILLIN*, *supra* note 91, § 3:107)).

119. The mechanics of legal challenges to prevent an incorporation from proceeding are beyond the scope of this Note, which instead focuses on the substance behind those challenges. In short, quo warranto suits brought under Federal Rule of Civil Procedure 81 are the means for stopping a legislature from exceeding its authority to incorporate. See *Detzner v. Anstead*, 256 So.3d 820, 822 (Fla. 2018) (“A writ of quo warranto is the means for determining ‘whether a state officer or agency has improperly exercised a power or right derived from the State.’” (quoting *Fla. House of Reps. v. Crist*, 999 So.2d 601, 607 (Fla. 2008))).

120. See *Viteritti*, *supra* note 28, at 30–31 (describing general expectations for a legitimate democratic government).

121. U.S. CONST. amend XIX.

found that incorporations ran afoul of the Constitution. This section details various provisions of the Constitution that can give rise to a void incorporation.

1. The First Amendment: Towns as Churches

The Establishment Clause of the First Amendment,¹²² as applied to the states through the Due Process Clause of the Fourteenth Amendment,¹²³ prohibits states from enacting any laws “respecting an establishment of religion.”¹²⁴ The First Amendment’s Free Exercise Clause complements that protection, prohibiting states from passing laws that compel individuals to practice or refrain from practicing a faith.¹²⁵ In the municipal context, an incorporation can be found void if it provides a religious organization with the coercive powers of a municipal government or effectively bars members of a faith from participating in local affairs.¹²⁶

In 1920, the New Jersey legislature recognized a seaside resort operated by the Ocean Grove Camp Meeting Association of the Methodist Episcopal Church as “an asset to the good name and fame of New Jersey.”¹²⁷ To support the resort, the legislature incorporated it as its own municipality and gave it the power to police itself, with the local government notably deprived of authority to interfere with operations.¹²⁸ To keep beachgoers from disturbing worshipers, the incorporation statute required that gates be erected to stop all vehicular traffic in the new town “on each Sabbath day.”¹²⁹ The town government would be completely subordinate to the church.¹³⁰

Initially, a state appellate court found the incorporation to be void but not on First Amendment grounds.¹³¹ Rather, the court found it unconstitutional under the state constitution for too closely regulating the continuing internal affairs of the area after incorporation was complete.¹³² No longer a municipality, the association continued to exert control over the administration of the area uninterrupted.¹³³ For decades after the ruling, the state allowed the association to operate its own police department to enforce resort rules with the force of law.¹³⁴ Chains blocked off streets on Sundays,

122. *Id.* amend. I.

123. *Id.* amend. XIV.

124. *State v. Celmer*, 404 A.2d 1, 5 (N.J. 1979) (quoting U.S. CONST. amend. I).

125. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (“Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.”).

126. *See Celmer*, 404 A.2d at 5–6.

127. An Act to Incorporate the “Borough of Ocean Grove, in the County of Monmouth,” ch. 96 pmbl., 1920 N.J. LAWS 190, 190 (incorporating the borough of Ocean Grove).

128. *Id.*

129. *Id.*

130. The town government would be given the power to exercise municipal control “but without violating the religious integrity of Ocean Grove.” *Id.*

131. *See Att’y Gen. v. Borough of Ocean Grove*, 114 A. 15, 17 (N.J. 1921).

132. *See id.*

133. *See Joseph F. Sullivan, Ocean Grove Tries to Retain Ideals, but Not Some Civic Burdens*, N.Y. TIMES, Aug. 22, 1982, at 6.

134. *See id.*

as planned.¹³⁵ It was not until 1979 in *State v. Celmer*,¹³⁶ when a driver who had been arrested by Ocean Grove police questioned the association's authority to take state action, that courts meaningfully intervened.

In *Celmer*, the Supreme Court of New Jersey found the "government" of Ocean Grove to be a blatant First Amendment violation.¹³⁷ The legislature had violated the Free Exercise Clause by "ordain[ing] that non-Methodists cannot participate in governmental decisions" when it ceded power directly to the association.¹³⁸ The court found that the legislature's action had run afoul of the Establishment Clause due to its "excessive government entanglement with religion."¹³⁹ The court held that, at a minimum, the First Amendment "precludes a state from ceding governmental powers to a religious organization," making incorporations that have that effect unconstitutional and thus void.¹⁴⁰ An incorporation cannot lead to a situation where "the Church shall be the State and the State shall be the Church."¹⁴¹

However, the circumstances that could give rise to a First Amendment challenge to incorporation are exceedingly rare. The most notable instance was in the Oregon commune of Rajneeshpuram, which incorporated as a city.¹⁴² A federal court found the incorporation unconstitutional because it gave "sovereign governmental power to a religion and its leaders."¹⁴³

2. The Fifth and Fourteenth Amendments: Regulatory Takings and Substantive Due Process

The Fourteenth Amendment generally prohibits state governments from taking arbitrary or unreasonable actions.¹⁴⁴ Specifically, the substantive due process guarantees of the Fourteenth Amendment ensure that all state action will have a "reasonable justification in the service of a legitimate governmental objective."¹⁴⁵ Courts generally use a rational basis test to assess whether the justification is reasonable and the ends are legitimate, but this is "the most relaxed and tolerant form of judicial scrutiny."¹⁴⁶ If a court can imagine any possible set of facts that could reasonably justify an action, the court will not intervene.¹⁴⁷

135. *See id.*

136. 404 A.2d 1 (N.J. 1979).

137. *Id.* at 6–7.

138. *Id.* at 7.

139. *Id.* at 6 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

140. *Id.*

141. *Id.*

142. *See generally* Janice L. Sperow, *Rajneeshpuram: Religion Incorporated*, 36 HASTINGS L.J. 917 (1985).

143. *Oregon v. City of Rajneeshpuram*, 598 F. Supp. 1208, 1213 (D. Or. 1984).

144. *Thompson v. Gallagher*, 489 F.2d 443, 446 (5th Cir. 1973) ("The Fourteenth Amendment is a general prohibition against arbitrary and unreasonable governmental action.").

145. *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998).

146. *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

147. *See McGowan v. Maryland*, 366 U.S. 420, 426 (1961).

In the context of regulatory takings, in which courts assess if the government's interference with property rights is justified by a recognizable "public use" and the government compensates for the taking, the government only needs to meet the low bar of the rational basis test for its proposed "use" to satisfy the Fifth Amendment's requirements,¹⁴⁸ as applied to the states under the Fourteenth Amendment.¹⁴⁹ If a court finds an attempted incorporation to be unquestionably illogical and completely unjustifiable—for example decreasing the value of the incorporated land without providing any possible benefit—the court could find the incorporation to be an unconstitutional taking and thus void.¹⁵⁰

When the Superior Oil Company leased a spot to drill in the Gulf of Mexico from Texas, it figured it would not be paying any municipal taxes because it was ten miles off the Texas shore.¹⁵¹ Sensing an opportunity to increase its tax base, the City of Port Arthur extended its borders ten miles into the gulf to place the rig under its jurisdiction.¹⁵² A federal district court found that the rig had lost value once it became taxable, and because Superior Oil could not possibly obtain any benefit from being part of the city, the court deemed Port Arthur's aquatic "land grab" to be an uncompensated and thus unconstitutional taking.¹⁵³ The court found the yawning discrepancy between the taxes to be owed and the nonexistent benefits to be conferred so "flagrant and palpable" that it was unconscionable.¹⁵⁴ A state court had previously heard Superior Oil's complaint and found it nonjusticiable as a political question.¹⁵⁵ The federal district court recognized the res judicata implications of the previous ruling but entered judgment suggesting it was the only way to prevent manifest injustice.¹⁵⁶ The Fifth Circuit Court of Appeals overruled the decision on res judicata grounds, without passing judgment on the due process holding.¹⁵⁷

148. U.S. CONST. amend V ("[N]or shall private property be taken for public use, without just compensation.").

149. *See* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 242–43 (1984) ("When the legislature's purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings—no less than debates over the wisdom of other kinds of socioeconomic legislation—are not to be carried out in the federal courts.").

150. *See* *Superior Oil Co. v. City of Port Arthur*, 553 F. Supp. 511, 517–18 (E.D. Tex. 1982), *rev'd on other grounds*, 726 F.2d 203 (5th Cir. 1984).

151. *See* *Superior Oil Co. v. City of Port Arthur*, 628 S.W.2d 94, 95 (Tex. App. 1981) (detailing facts of the incorporation).

152. *See id.*

153. *Superior Oil*, 553 F. Supp. at 517–18.

154. *Id.* at 518 (quoting *Dane v. Jackson*, 256 U.S. 589, 599 (1921)).

155. *See* *Superior Oil*, 628 S.W.2d at 96 (citing *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907)).

156. *See* *Superior Oil*, 553 F. Supp. at 512.

157. *See* *Superior Oil Co. v. City of Port Arthur*, 726 F.2d 203, 206 (5th Cir. 1984) (overturning the lower court decision on res judicata grounds).

3. The Fourteenth Amendment: Equal Protection at the Ballot Box

States are not required to allow for democratic participation in the incorporation process.¹⁵⁸ However, once they allow residents to have a say, the voting process must conform to the requirements of the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁹ The clause makes it unconstitutional for a state to “deny to any person within its jurisdiction the equal protection of the laws.”¹⁶⁰ In elections, that means every qualified voter’s ballot must carry equal weight.¹⁶¹ If a state chooses to allow citizens to participate in an incorporation referendum, a court can deem the pending incorporation void if the state gives one group of affected residents a disproportionate say in the election.¹⁶²

When a state imposes a “severe” restriction on the franchise, the restriction must be “narrowly drawn to advance a state interest of compelling importance.”¹⁶³ Restrictions that trigger such strict scrutiny usually fall into one of two categories: (1) regulations that unreasonably limit voting for certain residents in a geographic area in elections that affect the entire area or (2) regulations that decrease the voting power of a class of voters and threaten the principle of “one person, one vote.”¹⁶⁴ When a state applies a nondiscriminatory voting restriction that is reasonable both facially and in effect, an “important” government interest must be found to outweigh the burden on the right to vote—satisfying the application of an intermediate standard of review.¹⁶⁵ Finally, when states do not restrict the franchise at all but rather open the vote up to arguably too many voters—diluting the votes of the people most directly affected—they need only show a rational basis for their decisions.¹⁶⁶ In incorporation referenda, limiting the franchise by a criterion other than residence, age, or citizenship must serve a compelling state interest or else the incorporation statute will be struck down as void.¹⁶⁷

158. *See Muller v. Curran*, 889 F.2d 54, 56 (4th Cir. 1989) (stating that states “need not grant anyone the right to vote” on incorporation decisions (quoting *Hayward v. Clay*, 573 F.2d 187, 190 (4th Cir. 1978))).

159. *See id.*

160. U.S. CONST. amend. XIV, § 1.

161. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“[O]ne person, one vote.”).

162. This was the holding of *Hayward v. Clay*, 573 F.2d 187 (4th Cir. 1978), regarding an unconstitutional annexation. *Hayward*, 573 F.2d at 190. *Muller v. Curran*, 889 F.2d 54 (4th Cir. 1989), confirmed that the holding applies to incorporations of wholly new municipal corporations as well. *Muller*, 889 F.2d at 56.

163. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

164. *Green v. City of Tucson*, 340 F.3d 891, 899–900 (9th Cir. 2003) (explaining the two types of voting regulations that require strict scrutiny).

165. *Burdick*, 504 U.S. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

166. *Green*, 340 F.3d at 900 (noting that when a statute calls for an overinclusive incorporation referendum, it “discriminates between different electoral units based on their proximity to existing municipalities, rather than between voters in any single electoral unit,” and the Supreme Court has never applied strict scrutiny to such discrimination).

167. *Hayward v. Clay*, 573 F.2d 187, 189 (4th Cir. 1978) (declaring a statute unconstitutional that limited voting to owners of taxable property).

When Kiawah—an unincorporated area on the South Carolina coast—attempted to become incorporated into the neighboring City of Charleston, the state set up two ballot boxes in each polling place for a referendum.¹⁶⁸ The first box was for all registered voters who lived in Charleston and Kiawah to vote for or against the annexation.¹⁶⁹ The second box was only for people who owned freehold estates in Kiawah.¹⁷⁰ Before or after casting one vote in the box with everyone else, these landowners could cast a ballot in the second box for each separate piece of land they owned in the area.¹⁷¹ For the incorporation to proceed, a majority of the votes in both boxes needed to be in favor of the change.¹⁷²

The Fourth Circuit found that giving certain residents second, third, or even additional votes in an election violates the Equal Protection Clause.¹⁷³ The U.S. Supreme Court has approved of limiting voting to certain classes of residents only in matters of “special interest,” which are highly specific issues that disproportionately affect a definite group within a geographic area.¹⁷⁴ However, the creation of a town is a “matter of general interest” that affects everyone who lives within the area to be incorporated, whether they own land or not.¹⁷⁵ Everyone living within a town’s borders is affected by changes to the local government or the municipal services it provides, so the electorate cannot be restricted in elections on those general matters.¹⁷⁶

4. The Fifteenth Amendment: Dividing by Race

Perhaps the clearest and best known constitutional intervention in municipal affairs came in *Gomillion v. Lightfoot*.¹⁷⁷ The *Gomillion* Court found that the protections of the Fifteenth Amendment¹⁷⁸ could readily overcome not only states’ judicial leeway in boundary making but also other provisions in the Constitution.¹⁷⁹ The Fifteenth Amendment ensures that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”¹⁸⁰ The Court stated that when a legislature “singles out a readily isolated segment of a racial minority for special

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.* at 189 n.2.

172. *See id.* at 189.

173. *Id.* at 190.

174. *Id.* (allowing local landowners to elect the board of an irrigation district). *But see* Rice v. Cayetano, 528 U.S. 495, 499 (2000) (finding that Hawaii could not limit an election to pick the trustees for an agency that supports Native Hawaiians exclusively to Native Hawaiian voters under the Fifteenth Amendment).

175. *Hayward*, 573 F.2d at 190.

176. *See id.*

177. 364 U.S. 339 (1960).

178. U.S. CONST. amend. XV, § 1.

179. *Gomillion*, 364 U.S. at 345 (“[T]he constitutional protection of contracts . . . extensive though it is, is met and overcome by the Fifteenth Amendment . . .”).

180. U.S. CONST. amend. XV, § 1.

discriminatory treatment” and that discrimination limits the group’s right to vote, it violates the Fifteenth Amendment.¹⁸¹ If a state uses a boundary change to take “the municipal franchise and consequent rights” from a racial minority population, the statute effecting the change is void.¹⁸²

Throughout its history, Tuskegee, Alabama, has been recognized for its intellectual, middle-class Black population affiliated with the local Tuskegee University—including residents like Booker T. Washington and George Washington Carver¹⁸³—and the legendary heroics of the Tuskegee Airmen.¹⁸⁴ In 1960, alarmed by a successful voter registration drive within Tuskegee’s Black neighborhoods,¹⁸⁵ the Alabama legislature made a naked attempt to deprive the local Black community of its ability to influence local affairs.¹⁸⁶ The legislature redrew the municipality’s boundaries from an ordinary square to a smaller, bizarre, twenty-eight-sided shape.¹⁸⁷ The areas it removed from the original square included the homes of approximately 395 of Tuskegee’s 400 Black voters.¹⁸⁸ No longer part of Tuskegee, the Black neighborhoods were to be returned to unincorporated status to blend in with the rest of rural Macon County, which was home to a poorer Black population.¹⁸⁹

At no point did Alabama cite a single government function that would be improved by the change.¹⁹⁰ Instead, the state made a Dillon’s Rule argument, convincing the district court to hold that federal courts have no say whatsoever over the boundary changes that legislatures make, regardless of their constitutional implications.¹⁹¹ The Supreme Court overruled the Fifth Circuit, finding that courts had frequently misinterpreted dicta in *Hunter v. City of Pittsburgh*¹⁹² and its progeny to mean that Dillon’s Rule left no room for even the Supreme Court to check incorporations.¹⁹³ It is the role of courts

181. *Gomillion*, 364 U.S. at 346.

182. *Id.* at 347; *see also id.* at 344.

183. *See Alabama: Butler Chapel AME Zion Church*, NAT’L PARK SERV., <https://www.nps.gov/places/alabama-butler-chapel-ame-zion-church.htm> [<https://perma.cc/GHZ4-VAG9>] (last visited Jan. 27, 2021) (describing Tuskegee’s Black middle-class population); *see also Tuskegee*, ENCYC. BRITANNICA, <https://www.britannica.com/place/Tuskegee-Alabama> [<https://perma.cc/C6QZ-VPZ6>] (last visited Jan. 27, 2021) (discussing Tuskegee’s notable Black residents).

184. *See Tuskegee Airmen*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Tuskegee-Airmen> [<https://perma.cc/TH2D-M3VU>] (last visited Jan. 27, 2021) (discussing the first Black flying unit in the U.S. military, which trained in Tuskegee and was highly decorated for its achievements in World War II).

185. *See* Robert Mcg. Thomas Jr., *Charles Gomillion, 95, Figure In Landmark Remap Case, Dies*, N.Y. TIMES, Oct. 12, 1995, at B22.

186. *Gomillion*, 364 U.S. at 347 (calling the boundary change incidental to the desired disenfranchisement).

187. *See id.* at 341.

188. *See id.*

189. *See Alabama: Butler Chapel AME Zion Church*, *supra* note 183 (describing the Macon County population).

190. *See Gomillion*, 364 U.S. at 342.

191. *See id.* at 340–41 (quoting *Gomillion v. Lightfoot*, 167 F. Supp. 405, 410 (M.D. Ala. 1958)).

192. 207 U.S. 161 (1907).

193. *Gomillion*, 364 U.S. at 343–44.

to put a stop to violations of the Constitution when they arise, and as the Court succinctly put it: “[a] statute which is alleged to have worked unconstitutional deprivations of . . . rights is not immune to attack simply because the mechanism employed by the legislature is a redefinition of municipal boundaries.”¹⁹⁴

The Court mentioned how the state’s action created due process and equal protection problems early in its opinion, but only Justice Charles Whittaker’s concurrence analyzed either of those concerns.¹⁹⁵ Justice Whittaker argued that the case should be decided on equal protection grounds because the Black voters had not lost their “right . . . to vote,” as a Fifteenth Amendment violation requires, since they could still vote in county elections.¹⁹⁶ The majority felt the right to vote protected by the Fifteenth Amendment extends beyond the right to cast a ballot somewhere and includes the benefits that accrue to citizens when their government is properly accountable to them at the ballot box.¹⁹⁷

B. State Law Procedural Requirements

In addition to the federal constitutional protections available to individuals during incorporations, state constitutions and laws lay out mandatory procedures for incorporation to bring some order and limits to the process. If a state lays down an absolute requirement for forming a municipality—such as a minimum population before a place can be incorporated—and an incorporation effort fails to satisfy that requirement, a court can deem the incorporation void.¹⁹⁸

This section uses the case of *Durham v. Crutchfield*,¹⁹⁹ in which a Texas state court gave a comprehensive outline of how incorporations can be void under state law,²⁰⁰ to structure its analysis. The court acknowledged that it would be extraordinarily difficult to identify every set of circumstances that could render an incorporation void,²⁰¹ but those circumstances generally fall into three broad categories: (1) incorporations that violate provisions in a state’s constitution, (2) incorporations that are expressly prohibited by a state statute, and (3) incorporations that utterly fail to meet statutory requirements.²⁰²

194. *Id.* at 347.

195. *See id.* at 349 (Whittaker, J., concurring).

196. *Id.*

197. *Id.* at 347 (majority opinion) (finding that Alabama had “deprived the petitioners of the municipal franchise *and consequent rights*,” without defining “consequent rights” further (emphasis added)).

198. *See Durham v. Crutchfield*, 578 S.W.2d 438, 440–41 (Tex. Civ. App. 1979) (describing circumstances under which state governments and citizens can challenge incorporations before courts).

199. 578 S.W.2d 438 (Tex. Civ. App. 1979).

200. *See id.* at 441.

201. *See id.*

202. *See id.*

1. Incorporation Violates the State Constitution

Part II.A described how legislatures cannot delegate the power to incorporate to the courts, the executive branch, or the people themselves. Incorporations that result from such improper delegations are void, but incorporation statutes can also be void even if no improper third party exercises power.²⁰³ This was the case when Victory Gardens's neighbor, Dover, was in the gradual process of breaking away from Randolph and attempted to incorporate as a city in the 1800s.²⁰⁴ The New Jersey Supreme Court disapproved of the enabling statute under which Dover became its own city, indicating that a substantial deviation from the usual legislative process authorized by a given state's constitution can cause an incorporation to fail.²⁰⁵

In 1895, the New Jersey legislature passed a law that would automatically change a municipality's corporate structure as its population grew and hit new benchmarks.²⁰⁶ When a town reached a population of 5000, its corporate structure changed to that of a city, and more government positions would be required to be voted on by the public.²⁰⁷ More structural changes took place when the population hit 10,000, and at 12,000, the city could start issuing bonds.²⁰⁸ The court found that such close and continuing regulation of the internal affairs of municipalities was repugnant to the state constitution's ban on "private, local, or special laws,"²⁰⁹ the same issue that was dispositive in initially dissolving Ocean Grove.²¹⁰ Dover's defunct incorporation shows that states can include in their state constitutions any manner of limitations on legislative power in municipal incorporation, and courts must respect those limits.

2. Incorporation Is Expressly Prohibited by Statute

Within the parameters set by their constitutions and the U.S. Constitution, states can enact statutes that set the procedure by which municipalities are incorporated and the conditions that allow for incorporation.²¹¹ The second category of incorporations found void under state law includes those in which a state sets an absolute procedural requirement or condition precedent to

203. *See State ex rel. Grey v. Mayor of Dover*, 40 A. 640, 642 (N.J. 1898) (finding the legislature's attempt to incorporate under a new enabling statute to be an "invalid exercise of legislative power," making the incorporation void).

204. *See id.* at 640.

205. *See id.* at 643.

206. *See id.* at 641.

207. *See id.*

208. *See id.* at 641-42.

209. *Id.* at 645.

210. *See State v. Celmer*, 404 A.2d 1, 5-6 (N.J. 1979) (discussing why the original incorporation of Ocean Grove was void).

211. *See McQUILLIN*, *supra* note 91, § 3:35.

incorporation and an attempted incorporation fails to meet that specification.²¹²

Some common procedural requirements for incorporation include completing a petition that earns the support of a given percentage of residents or landowners,²¹³ selecting a corporate name,²¹⁴ selecting precise metes and bounds,²¹⁵ and earning approval by referendum.²¹⁶ Common conditions that must be met for incorporation include that the area be contiguous²¹⁷ and that the population have a minimum number of residents²¹⁸ or density.²¹⁹

Finding an incorporation void for statutory violations is not as fact-intensive of an endeavor as finding one void for unconstitutionality. If the statutory requirement is absolute and is not met, no municipality is formed. When thirty out of sixty voters in an Alaskan incorporation referendum voted in favor of creating a utility district but a statute required a majority of voters needed to approve, a court had no problem finding that no valid incorporation had taken place.²²⁰ The judicial inquiry in these cases only becomes complicated where a statute sets an absolute constraint but does so in unclear language, requiring the court to give the statute a fair construction in line with the legislature's perceived intentions. One troubling example of this kind of interpretation comes from a different Alaskan incorporation battle—one in which locals attempted to incorporate an area known as Haines Mission in the early twentieth century.²²¹

Before Alaska was a state, Congress alone had the power to incorporate municipalities in the territory.²²² Congress passed a law allowing any 300 permanent inhabitants of an area in Alaska to incorporate a town to manage their affairs.²²³ Haines Mission residents met that requirement, collecting

212. *See* *Durham v. Crutchfield*, 578 S.W.2d 438, 441 (Tex. Civ. App. 1979) (stating that an incorporation is “absolutely void” if “the act of incorporation itself was either prohibited or unauthorized by law”).

213. *See, e.g.*, IND. CODE § 36-5-1-2(a) (2020) (requiring 10 percent of local landowners to sign a petition); VA. CODE ANN. § 15.2-3600 (2021) (requiring one hundred local registered voters to sign); WASH. REV. CODE § 35.02.020 (2020) (requiring 10 percent of local registered voters to sign); WYO. STAT. ANN. § 15-1-204(a) (2020) (requiring a majority of local voters to sign).

214. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-101(D) (2020); COLO. REV. STAT. § 31-2-101(1)(c) (2021); UTAH CODE ANN. § 10-2a-208(2)(c) (LexisNexis 2019).

215. *See, e.g.*, N.D. CENT. CODE § 40-02-03 (2019); WASH. REV. CODE § 35.02.030; WYO. STAT. ANN. § 15-1-202(a)(i).

216. *See, e.g.*, ALA. CODE § 11-41-2(c) (2020); WYO. STAT. ANN. § 15-1-205(b)(i).

217. *See, e.g.*, S.C. CODE ANN. § 5-1-30(A)(4) (2020); UTAH CODE ANN. § 10-2a-201.5(1)(a)(i) (providing an exception for small discontinuities under subsection (c)(ii)).

218. *See, e.g.*, IDAHO CODE § 50-101 (2020) (requiring at least 125 registered voters in an area to be incorporated); MONT. CODE ANN. § 7-2-4103(1)(a) (2019) (requiring 300 inhabitants); NEV. REV. STAT. § 265.010 (2020) (requiring one thousand inhabitants).

219. *See, e.g.*, S.C. CODE ANN. § 5-1-30(A)(1) (requiring 300 residents per square mile); W. VA. CODE § 8-2-1(a)(2) (2020) (requiring 500 residents per square mile).

220. *Pac. Am. Fisheries v. Gronn*, 103 F. Supp. 405, 406 (D. Alaska 1952) (“[T]he vote was a tie. Since the statute requires a majority for incorporation, it follows that the district was not validly created.”).

221. *See In re Incorporation of Haines Mission*, 3 Alaska 588 (1908).

222. *See id.* at 594.

223. *Id.* at 592.

368 signatures on a petition.²²⁴ The problem was that only 216 of the signatories were white; the other 152 were Alaska Natives.²²⁵ The presiding judge was apologetic in striking down the incorporation, admitting that the decision was at odds with the paternalistic *modus operandi* the U.S. government had in its dealings with Native populations; the government called for them to become civilized and here, they wanted to form a government but were not allowed to do so.²²⁶ The court stated that allowing Alaska Natives to be counted would mean, theoretically, any 300 Alaska Natives could form a municipality without any white men present and that surely was not what Congress envisioned when it passed its incorporation statute.²²⁷ Even though some Alaska Natives had already earned U.S. citizenship and many white Alaskans who regularly voted were not citizens,²²⁸ the court felt it had to interpret the absolute statutory requirement to give it the meaning the legislature intended.²²⁹

3. Incorporation Materially Fails to Follow Statute

The final category includes those in which no state law was violated on its face but rather the state's attempt to comply with the law was so "utterly lacking or defective" in practice that a court is compelled to strike it down.²³⁰ The issue in *Durham* concerned an error in the metes and bounds described in an incorporation referendum, which left a gap in the municipality's proposed borders in clear contravention of a Texas law requiring a municipal corporation to have one, continuous boundary.²³¹ Because voters could almost completely ascertain where the planned municipality would begin and end, the court found the description to be in "substantial compliance" with statutory requirements and therefore excusable.²³² Any manner of statutory violation could cause an incorporation to be void if it is wantonly or carelessly harmful enough.²³³ This section focuses on one type of statutory requirement in which courts are clearly given discretion to assess the severity of a violation: reasonableness statutes.

It is common for states to pass some form of a statute that requires changes in municipal boundaries to be reasonable.²³⁴ How "reasonableness" is

224. *Id.*

225. *Id.*

226. *See id.* at 595.

227. *See id.* at 596.

228. *See id.* at 592–93.

229. *Id.* at 595.

230. *Durham v. Crutchfield*, 578 S.W.2d 438, 441 (Tex. Civ. App. 1979).

231. *Id.*

232. *Id.* at 442.

233. *See supra* Part III.B.2.

234. *See, e.g.*, MO. REV. STAT. § 80.020 (2020) (requiring incorporations be "reasonable" but providing no context for interpreting what the legislature finds reasonable); N.Y. GEN. MUN. LAW § 712(1) (McKinney 2021) (requiring that an annexation be found to be in the "over-all public interest"); MISS. CODE ANN. § 21-1-17 (2021) ("If the chancellor finds from the evidence that the proposed incorporation is not reasonable and is not required by the public necessity and convenience, then a decree shall be entered denying such incorporation.").

defined varies from state to state: for example, Mississippi courts have developed an elaborate fourteen-part test,²³⁵ while nearby Florida's courts use much broader criteria.²³⁶

The attempted incorporation of NASCAR's Pocono Raceway in Pennsylvania in 1992 highlights the broad discretion that reasonableness statutes can afford to state courts.²³⁷ The raceway owners, the Mattioli family, made no attempt to hide that the municipality would be dominated by the track, proposing it be given the corporate name of "Borough of Pocono Raceway."²³⁸ There were only a few homes within the proposed one-thousand-acre corporate boundaries—most of which were occupied by members of the Mattioli family²³⁹—but the Mattiolis had plans to allow developers to build up to 234 single-family homes on 130 of the acres.²⁴⁰ The Commonwealth Court of Pennsylvania reviewed the proposal in *In re Incorporation of Borough of Pocono Raceway*.²⁴¹

A Pennsylvania appellate court had recently clarified the judiciary's power to check unreasonable incorporations in *In re Incorporation of Borough of Glen Mills*²⁴² when it refused to give a private school its own municipality. Although no statute explicitly required it, the court found that a proposed municipality must form "a harmonious whole" to be found reasonable.²⁴³ The *Pocono Raceway* court quoted a concern expressed by the *Glen Mills* court:

[H]ow far would it go: colleges, universities, sundry institutions, corporations, larger land owners, perhaps smaller too, would break-off at will from Townships and into multi-separate boroughs. Each borough going its own way to create a mix of perhaps harmonious, perhaps antagonistic, but incongruous zoning or development patterns, and as well

235. See *City of Jackson v. Byram Incorporators*, 16 So. 3d 662, 675 (Miss. 2009) (listing factors including "(1) whether a proposed area has definite characteristics of a village . . . (4) whether there [have] been any financial commitments toward incorporation or annexation proceedings . . . (8) whether a community has a separate identity . . . (13) whether an estimated tax base of proposed area will support incorporation; and (14) whether the overall welfare of residents of [the] affected area is improved by incorporation" (second and fourth alterations in original) (quoting *City of Pascagoula v. Scheffler*, 487 So. 2d 196, 201–02 (Miss. 1986))).

236. See *Ammons v. Dade City*, 594 F. Supp. 1274, 1299 n.23 (M.D. Fla. 1984) (finding reasonableness where there is a sufficient population to warrant local service provision, the area is not too large for the population therein, and an appreciable community of interest exists in the area to be incorporated); see also *State ex rel. Landis v. Town of Boynton Beach*, 177 So. 327, 329 (Fla. 1937) (finding that incorporations in Florida must be "necessary or desirable").

237. See generally *In re Incorporation of Pocono Raceway*, 646 A.2d 6 (Pa. Commw. Ct. 1994).

238. *Id.* at 8.

239. *Id.* at 9.

240. *Id.* at 8.

241. 646 A.2d 6 (Pa. Commw. Ct. 1994).

242. 558 A.2d 592 (Pa. Commw. Ct. 1989).

243. *Id.* at 594 (quoting *Bear Creek v. Penn Lake Park*, 340 A.2d 642, 645 (Pa. Commw. Ct. 1975)).

conflicting and often inconsistent services. The potential for exclusion, exploitation and overreaching becomes real and ever present.²⁴⁴

The court struck down the raceway's proposed incorporation, citing its fear that the Mattiolis would have a local government all their own; the court echoed a lower court observation that "[t]his concentration of political power among a small family group has great potential for misconduct. . . . The proposed borough casts shadows of an old company town in modern dress."²⁴⁵ Where the court detected imminent injustice—a power grab to be achieved through municipal boundary making—Pennsylvania's reasonableness requirements allowed it to intervene.

C. Voidable Incorporations: De Facto Towns

When a court finds an incorporation void for one of the above reasons, an illegitimate municipality does not automatically disappear at the sound of the judge's gavel. If the legal challenge comes early enough in the incorporation process that no municipal government has yet formed—such as in the failed incorporations of Haines Mission²⁴⁶ and Pocono Raceway²⁴⁷ above—the process stops and municipal boundaries remain unchanged. If the successful challenge comes after a local government is up and running, however, the unlawful municipality is designated as a de facto municipal corporation.²⁴⁸ A de facto municipality has all the powers of a de jure municipal corporation until the state government intervenes and shuts it down through a quo warranto proceeding.²⁴⁹ For this reason, the driver who was arrested by the unconstitutional church police department in Ocean Grove was still liable, even though the court found that the police department itself was illegitimate.²⁵⁰

244. *Pocono Raceway*, 646 A.2d at 12 (alteration in original) (quoting *Glen Mills*, 558 A.2d at 595).

245. *Id.* at 9 (second alteration in original) (quoting Morgan County Court of Pleas opinion below dismissing incorporation petition).

246. *See supra* Part III.B.2.

247. *See supra* Part III.B.3.

248. In a majority of jurisdictions, a de facto corporation results from incorporations that either were unconstitutional or violated a procedural law. *See* 1 JOHN MARTINEZ, LOCAL GOVERNMENT LAW § 8:25 (2020). In the Oklahoma Territorial Supreme Court's opinion in *City of Guthrie v. Territory*, 31 P. 190 (Okla. 1892), and a minority of other jurisdictions, a de facto corporation must proceed from a constitutional statute. *See Guthrie*, 31 P. at 192 ("A de facto corporation cannot exist where there is no law authorizing a de jure corporation.").

249. *West v. Town of Lake Placid*, 120 So. 361, 365 (Fla. 1929) ("Being a de facto municipality, its existence can be challenged only by the state in a direct proceeding, such as quo warranto Until its existence is so challenged and terminated by judgment of ouster, such municipality may continue to exercise its powers and discharge its governmental functions, and those acts must be respected by the public.").

250. *See State v. Celmer*, 404 A.2d 1, 7 (N.J. 1979) ("[M]atters which have been finally disposed of in Ocean Grove Municipal Court and are not presently pending judicial review cannot be relitigated, nor can entries of judgments pertaining thereto be collaterally attacked.").

There are three minimum requirements for creating a de facto municipality. First, a valid statute must authorize the incorporation.²⁵¹ Second, a state or a community must make a bona fide attempt to organize a municipality under that statute.²⁵² Third, the resulting local government must carry out “an actual good faith exercise of corporate powers.”²⁵³ Those corporate powers include the right to levy taxes, enter into contracts, and do anything else a de jure municipality could do.²⁵⁴ Whether or not a state abides by the requirements of its constitution and laws when incorporating an area, the result is practically the same: a municipal government is given power.

Even when a state does choose to dissolve a de facto municipality—recognizing a court’s decision that an incorporation was void and seeking to correct the error—there may be further hindrances to undoing the incorporation. The Contracts Clause of the Constitution²⁵⁵ prevents states from interfering in contracts between de facto corporations and third parties, so de facto municipalities must continue to pay off their debts even after dissolution.²⁵⁶ The Contracts Clause cannot stop a court from finding an incorporation void,²⁵⁷ but it can cause the effects of the improper incorporation to linger indefinitely. If dissolving a de facto municipality erased all of its debts, a state could quickly erect an unconstitutional town government, have it run up debt, and then close the town down without paying its creditors.²⁵⁸

A court finding an incorporation void is an unusual event.²⁵⁹ Yet even in those rare instances in which a court intervenes, illegitimate municipalities that have reached de facto status continue to employ the coercive powers of government.²⁶⁰ If affected residents do not bring a legal challenge before the wrongful incorporation is completed, they may be stuck living under the authority of a local government that a court has explicitly found to violate their constitutional rights.

251. See *State ex rel. Bd. of Regents for Okla. Agric. & Mech. Colls. v. McCloskey Bros.*, 227 P.3d 133, 146 (Okla. 2009).

252. *Id.*

253. *Id.*

254. See *Payne v. First Nat’l Bank of Columbus*, 291 S.W. 209, 213 (Tex. Comm’n App. 1927) (stating that a de facto city may “function as a city and . . . exercise all the powers, duties, and franchises of such”).

255. U.S. CONST. art. 1, § 10, cl. 1.

256. See *Payne*, 291 S.W. at 210–13 (requiring a de facto government to pay for a bridge it built).

257. If an incorporation was unconstitutional, the fact that the illegitimate municipality entered a contract cannot prevent a court from stopping the constitutional violation. See *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (“[T]he constitutional protection of contracts . . . extensive though it is, is met and overcome by the Fifteenth Amendment to the Constitution of the United States . . .”).

258. See *Young v. City of Colorado*, 174 S.W. 986, 997 (Tex. Civ. App. 1915) (“[A] de facto municipal corporation cannot urge the invalidity of its incorporation as a defense in a suit to collect a debt which it has contracted.”).

259. See *supra* Parts III.A–B, IV.A.

260. See 1 MARTINEZ, *supra* note 248, § 8:25 (“A de facto local government unit possesses, generally, the same powers and responsibilities it would have if it were de jure . . .”).

IV. INSUFFICIENT PROTECTIONS UNDER CURRENT LAWS

A primary reason that states moved away from the creation of municipalities through piecemeal acts of special legislation was because such legislation gave special interests connected to the capitol outsized influence.²⁶¹ New Jersey's nonsensical municipal boundaries, egregiously manipulated by powerful interests,²⁶² are among the clearest illustrations of the dangers of a state failing to enact a clear statutory procedure for incorporation. For example, the borough of Tavistock, New Jersey, is just a golf course with five people living on it²⁶³ that local power brokers incorporated in 1921; they did not like that the town it was in did not allow them to drink on the course on Sundays, so they made the course its own town.²⁶⁴ Victory Gardens stands today as an independent micromunicipality because of a political lobbying effort led by a wealthy landowner seventy years ago.²⁶⁵ The influential Tavistock golfers and Randolph's Mr. Brundage are all long deceased, but today's New Jerseyans and future generations continue to live within boundaries that they shaped to their will.

Part IV discusses the consequences of a state failing to enact uniform incorporation statutes that are protective of the public interest. Part IV.A looks at how likely it is that the residents of Victory Gardens could have stopped the incorporation of their tiny project with only the state and federal constitutions to safeguard their interests, applying the law discussed in Part III. Part IV.B describes the kinds of protections states should include in their incorporation statutes to ensure populations like that in Victory Gardens are not vulnerable to abuses of political power and isolated through the redrawing of municipal boundaries.

A. In re Victory Gardens

The people of Victory Gardens raised four procedural complaints challenging their separation from Randolph, but none were successful.²⁶⁶ This section compares Victory Gardens's forced secession to the incorporations found void in Part III to see if any similar remedy may have been available to the project's residents. The Victory Gardens incorporation transgressed democratic norms²⁶⁷ and seems problematic in light of the

261. See Keasbey, *supra* note 98, at 205 (discussing incorporation in New Jersey, which was the predominant state in corporate law in the nineteenth century, before Delaware took up the mantle).

262. See generally KARCHER, *supra* note 69.

263. See *Municipalities Sorted by 2011–2020 Legislative District*, N.J. DEP'T OF STATE, <https://www.nj.gov/state/elections/assets/pdf/2011-legislative-districts/towns-districts.pdf> [<https://perma.cc/52P9-8BXQ>] (last visited Jan. 27, 2021).

264. See Bill Duhart, *The Smallest Town in N.J. (Just 3 Houses!) Is the Epitome of Home Rule*, N.J.COM (May 14, 2019), https://www.nj.com/camden/2018/05/welcome_to_tavistock_dont_blink_youll_miss_it_coun.html [<https://perma.cc/AM7T-HHYL>].

265. See Geelan, *supra* note 42 (identifying the wealthy Mr. Brundage as the leader of the "Citizens of Randolph" group that drove the secession effort).

266. See *id.* (discussing the four legal challenges Victory Gardens residents brought after the incorporation).

267. See Viteritti, *supra* note 28, at 30–31.

constitutional protections described above, but the sweeping deference afforded to states' incorporation decisions likely leaves no remedy available.

The First Amendment is hardly an obstacle to incorporation outside of instances of overwhelming state-church intermingling like those in Ocean Grove and Rajneeshpuram.²⁶⁸ Victory Gardens residents may have had viable First Amendment complaints regarding Randolph limiting their right to use a loudspeaker and assemble for public meetings while advocating against incorporation,²⁶⁹ but those are not the kinds of Establishment Clause violations that give rise to void incorporations under the First Amendment. Even though the intention of Randolph's government may have been to make their town as close to all-Republican as possible—excluding those of different political persuasions the same way non-Methodists were excluded in Ocean Grove—such political discrimination may be nonjusticiable.²⁷⁰

The Fourteenth Amendment's Due Process Clause may seem like a more promising ground for a challenge due to its prohibition against arbitrary state action, including takings.²⁷¹ The sheer loss in property value that resulted from Victory Gardens residents losing access to Randolph's town services and schools,²⁷² unaccompanied by any perceivable benefits, may seem unconscionable—uncompensated and without a rational justification. However, courts are extraordinarily hesitant to make this kind of judgment.²⁷³ Creating an unorthodox, tiny town may be legally justifiable simply in the name of legislative experimentation.²⁷⁴ Additionally, ending the hostility between two community factions by moving municipal boundaries has been found to not only be rational but to be a compelling state

268. See *supra* Part III.A.1.

269. See *Victory Gardens Asks Forum, Use of Sound Truck*, *supra* note 56.

270. The Supreme Court recently held in *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), that courts can intervene in voter discrimination based on race or disruption of “the one-person, one-vote rule” but not when strictly political discrimination is at issue. *Rucho*, 139 S. Ct. at 2497. The Court quoted its 1999 decision in *Hunt v. Cromartie*, 526 U.S. 541 (1999), that said “a jurisdiction may engage in constitutional political gerrymandering.” *Id.* (quoting *Hunt*, 526 U.S. at 551). However, the Court failed to address the accompanying footnote in *Hunt* that reads: “This Court has recognized, however, that political gerrymandering claims are justiciable under the Equal Protection Clause” *Hunt*, 526 U.S. at 551 n.7 (citing *Davis v. Bandemer*, 478 U.S. 109, 127 (1986)).

271. See *supra* notes 148–47 and accompanying text.

272. The State of New Jersey categorizes schools based on the level of advantage inherent in their populations' demographics, considering factors like unemployment rate, percentage of the population living in poverty, educational attainment among adults, and median income. The categories range from Group A (most disadvantaged) to Group J (most advantaged). The public schools available to Victory Gardens students in neighboring Dover are in Group A, along with Newark's, Camden's, and Paterson's, while Randolph's are in Group I, below only New Jersey's wealthiest and most exclusive communities in Group J. See *District Factor Groups (DFG) for School Districts*, STATE OF N.J. DEP'T OF EDUC., <https://www.nj.gov/education/finance/rda/dfg.shtml> [<https://perma.cc/VG5U-947J>] (last visited Jan. 27, 2021).

273. See *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907) (“The number, nature, and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.”).

274. See *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) (stating in dicta that “a State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power”).

interest,²⁷⁵ and the strife between Victory Gardens and Randolph residents certainly was heated.²⁷⁶ Some courts have held that incorporation issues like these are outside the Fourteenth Amendment's protections altogether,²⁷⁷ so a substantive due process argument would also have been very difficult and an unlikely path to victory for the people of Victory Gardens.

The Fourteenth Amendment's Equal Protection Clause may seem more promising yet. The second referendum in the Victory Gardens story—in which only Randolph residents could vote on whether Victory Gardens would receive its own school district²⁷⁸—appears especially problematic on equal protection grounds. If there is a special interest at stake that could justify limiting the franchise to a class of voters in that election, it seems logical that the residents who would live within the new proposed school district would belong to that class, not the residents whose children would stay in Randolph schools.²⁷⁹ Typically, courts find it rational to restrict the franchise to residents of the area directly at issue in a referendum,²⁸⁰ but what took place in Victory Gardens was the exact opposite. The Supreme Court has noted that where it has found local elections to be unconstitutional on equal protection grounds, in each case the state denied the franchise to voters

275. See *Moorman v. Wood*, 504 F. Supp. 467, 475 (E.D. Ky. 1980) (finding a compelling state interest where border disputes “were tearing the community apart and generating hostility to such a degree that some solution had to be found”).

276. See *Jersey Township Seeking ‘Divorce,’ supra* note 38.

277. See, e.g., *Raintree Homeowners Ass’n v. City of Charlotte*, 543 F. Supp. 625, 629 (W.D.N.C. 1982) (interpreting the holding in *Hunter* to mean that “challenges to annexations generally are not actionable under the Fourteenth Amendment”); *State ex rel. Wood v. City of Memphis*, 510 S.W.2d 889, 892 (Tenn. 1974) (“[I]n annexation cases there is no equal protection or due process argument that can properly be made when the statute is properly followed.”).

278. See *supra* Part I.

279. At the time of Victory Gardens's creation, a New Jersey statute provided that whenever a town split into multiple towns, the residents of either new town could elect to divide existing school districts to correspond with the new municipal boundaries. The legislature amended the law two years after Victory Gardens's removal—perhaps after seeing how constitutionally problematic it could be in practice—to make any such changes reviewable by a state board upon residents' request. Only divisions that did not lead to segregation or other unfair consequences would be approved. See *Alfred Vail Mut. Ass’n v. Borough of New Shrewsbury*, 274 A.2d 801, 805 n.5 (N.J. 1971) (“Although L.1953, c. 417, which superceded R.S. 18:5-2, permits the breakup of a school district originally coterminous with one municipality where that municipality is subsequently subdivided into two corporate entities, the municipality attempting to split the district must initially secure the approval of a statutory board of review which includes the State Commissioner of Education before it will be allowed to submit the issue to its electorate.”).

280. See *Broyles v. Texas*, 618 F. Supp. 2d 661, 687 (S.D. Tex. 2009) (“There are a number of rational bases for a municipal voting scheme that restricts the vote to its residents, even if nonresident property owners will be affected by some of the decisions made by the municipality. Residents ‘have a greater individual interest in the development and welfare of the town than do nonresidents. They have a greater personal knowledge of the city’s conditions, and, as inhabitants, they have a greater personal stake in the city’s welfare and progress, including the growth of its schools and other institutions.’” (quoting *Massad v. City of New London*, 652 A.2d 531, 538 (Conn. Super. Ct. 1993))).

who were “physically resident within the geographic boundaries of the governmental entity concerned.”²⁸¹

The incorporation of Victory Gardens itself, however, appears less objectionable in terms of equal protection. The potential problem was one of overinclusion: including so many voters who would not live in Victory Gardens to dilute the local residents’ proportional influence over the outcome.²⁸² Victory Gardens voters were so outnumbered that if they had unanimously opposed the incorporation, they would have only forestalled their forced secession by a margin of six votes.²⁸³ Despite this apparent unfairness, the inclusion of Randolph voters would likely only need to have a rational basis to be acceptable. No Victory Gardens resident was *kept from* voting and—unlike in Kiawah²⁸⁴—every voter had the same power at the ballot box, so neither strict nor intermediate scrutiny applies.²⁸⁵ Since courts are so deferential to states in incorporation decisions, and it is rational for states to be concerned with how neighboring areas feel about a proposed incorporation, overinclusion of the type that created Victory Gardens has been found constitutional in the name of preventing “inter-municipal conflict.”²⁸⁶

The Fifteenth Amendment’s “on account of race” language²⁸⁷ likely makes the remedy found in *Gomillion*²⁸⁸ unavailable to Victory Gardens residents as well. Randolph’s mayor’s warnings about the project becoming the area’s biggest “slum” may have been intended to stoke segregationist impulses in the electorate.²⁸⁹ The local Republican-leaning newspaper certainly attempted to do so when it printed one editorial warning of the arrival of “barbaric hordes”²⁹⁰ and another encouraging locals to display Confederate flags just days before the referendum.²⁹¹ However, although there may have been prospective segregation taking place—and the racial disparities existing today between Randolph and its former neighborhood

281. *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68 (1978).

282. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (finding malapportionment between legislative districts to be unconstitutional on equal protection grounds, stating that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise”).

283. The referendum passed by twenty-four votes, and thirty Victory Gardens residents voted in favor of it. *See ‘Gardens’ Is Ousted*, 735–711, *supra* note 60.

284. *See supra* Part III.A.3.

285. *See Green v. City of Tucson*, 340 F.3d 891, 900 (9th Cir. 2003).

286. *Id.* at 903.

287. U.S. CONST. amend. XV, § 1.

288. *See supra* Part III.A.4.

289. *See supra* notes 53–55 and accompanying text.

290. *America Is Scared*, *supra* note 55.

291. *Confederate Flags*, *supra* note 55.

certainly are shocking²⁹²—the 1951 population was all white or close to it.²⁹³ The decision was not made “on account of” the race of the project’s white residents but rather seemed to be spurred by a combination of class divisions and political loyalties.²⁹⁴ Without a clear racial division like that seen in Tuskegee, Victory Gardens’s ouster does not appear to be the kind forbidden by the Fifteenth Amendment.

Procedural challenges based on state constitutional and statutory requirements appear equally unavailing. Unlike the enabling statute that the New Jersey Supreme Court found unconstitutional in neighboring Dover, the legislative act that created Victory Gardens took a common legal form,²⁹⁵ so no similar remedy is likely to be found in the state constitution. A separate issue may arise from New Jersey’s constitutional provision that requires that any bill deemed “special legislation”—which is usually thought to include incorporation statutes²⁹⁶—to be approved by two-thirds of both chambers of the legislature rather than a simple plurality.²⁹⁷ Neither the New Jersey General Assembly nor Senate reached the two-thirds threshold when they voted on the act to incorporate Victory Gardens.²⁹⁸ However, one New Jersey court has found that the two-thirds provision does not apply to incorporation legislation, so precedent suggests it may be immaterial.²⁹⁹ The state constitution’s only apparent check on the legislature comes in a provision that limits Dillion’s Rule to require courts to construe statutes liberally in favor of municipal corporations instead of the legislature.³⁰⁰

292. Victory Gardens’s residents are overwhelmingly Latinx. See ELLIOTT R. BARKAN, *IMMIGRANTS IN AMERICAN HISTORY: ARRIVAL, ADAPTATION, AND INTEGRATION* 836 (2013). It has the highest percentage of Colombian-born residents of any municipality in the United States. *Id.* Only 10 percent of Randolph residents are Hispanic or Latinx. See *Demographics, TWP. OF RANDOLPH*, https://www.randolphnj.org/about_randolph/demographics [<https://perma.cc/SWF2-WQ4L>] (last visited Jan. 27, 2021).

293. See Szylvian, *supra* note 34, at 131 (discussing how all defense projects were segregated at the time).

294. See *Jersey Township Seeking ‘Divorce,’ supra* note 38.

295. Compare Act of June 20, 1951, ch. 259, § 2, 1951 N.J. LAWS 906 (incorporating Victory Gardens Borough), with An Act to Incorporate the Borough of Chester, in the County of Morris, ch. 67, 1930 N.J. LAWS 284 (incorporating Chester Borough out of land within Chester Township, adjacent to Randolph to the southwest).

296. See *supra* Part II.B.

297. N.J. CONST. art. IV, § 7, para.10 (“Upon petition by the governing body of any municipal corporation formed for local government, or of any county, and by vote of two-thirds of all the members of each house, the Legislature may pass private, special or local laws regulating the internal affairs of the municipality or county.”).

298. See sources cited *supra* note 44 and accompanying text.

299. See *Botkin v. Mayor & Borough Council*, 145 A.2d 618, 627 (N.J. Super. Ct. App. Div. 1958) (“[T]he creation or dissolution of a municipal corporation, including a school district, did not amount to regulation of the internal affairs thereof and so a special law to such effect was not in violation of the [state constitution].”). An appellate court later cited this decision in ruling that the mayor of Victory Gardens did not have standing to sue on behalf of its school-less school district because, even though it was nonoperational, it was technically a separate corporation. See *Borough of Victory Gardens v. State*, No. A-6255-08T3, 2011 WL 677283, at *3 (N.J. Super. Ct. App. Div. Feb. 25, 2011).

300. See N.J. CONST. art. IV, § 7, para. 11.

New Jersey's incorporation statute governing boroughs—Victory Gardens's corporate form—is unlike the more detailed statutes from other states listed in Part III.B.2.³⁰¹ Despite “Incorporation” being in the statute's title, it only concerns boroughs that have already been incorporated.³⁰² Of the required procedures and conditions precedent listed above that are common in other states, the only one New Jersey requires in its statute is the selection of a name.³⁰³

The Victory Gardens incorporation likely would have been void under the statutes of many of the above states if New Jersey had similar laws. For example, there was a contiguity issue because the state allowed Randolph to keep a small triangle of land near a brook in the middle of Victory Gardens, thus breaking Randolph's contiguity.³⁰⁴ Without statutes placing affirmative requirements on incorporation efforts, however, any incorporation that is acceptable under the state and federal constitutions is valid.

Finally, New Jersey does not have a reasonableness requirement in its incorporation laws,³⁰⁵ so no similar remedy to that found in *Pocono Raceway*³⁰⁶ is possible. If such a reasonableness requirement existed, special interests would not have been so successful over the years at carving out personal municipal provinces for themselves in New Jersey. For example, an airport in the marshes of the New Jersey Meadowlands would not have been incorporated as the Borough of Teterboro and become a municipal tax haven for private corporations,³⁰⁷ specially zoned to keep out the greatest of municipal expenses: children.³⁰⁸

Even if Victory Gardens residents were successful in bringing a long-shot legal challenge after incorporation, they still would not have been allowed to return to Randolph. Instead, they would have to be governed by a de facto municipal corporation equal in power to the one the legislature illegitimately gave them until the state acted.³⁰⁹ Considering that Republicans controlled both chambers of the legislature and the attorney general was appointed by the Republican governor,³¹⁰ remedial legislation or a quo warranto

301. See *supra* notes 213–15 and accompanying text.

302. See N.J. STAT. ANN. § 40A:60-1 (West 2020) (bearing the title “Incorporation; corporate seal; change of name”).

303. See *id.*

304. See *Official Street Map*, TWP. OF RANDOLPH, https://www.randolphnj.org/pdf/street_map.pdf [<https://perma.cc/5GBL-ZJLY>] (last visited Jan. 27, 2021) (showing that the triangle is in the northeast section of Randolph, surrounded by Victory Gardens and Dover).

305. See N.J. STAT. ANN. §§ 40:43-1–66.84.

306. See *supra* Part III.B.3.

307. Former Assembly Speaker Alan J. Karcher called Teterboro “New Jersey's own Cayman Island.” KARCHER, *supra* note 69, at 116.

308. See Robert Hanley, *The Talk of Teterboro; Tax Haven in New Jersey, in Bind, Plans to Drop Police*, N.Y. TIMES, Feb. 11, 1991, at 37. (“After World War II, another developer, Alexander Summer, forged the industrial zoning that all but prohibited housing and, consequently, children School taxes have always been a pittance.”).

309. See *supra* Part III.C.

310. The governor at the time was Republican Alfred E. Driscoll. See *Former New Jersey Governors*, NAT'L GOVERNORS ASS'N., <https://www.nga.org/former-governors/new-jersey> [<https://perma.cc/Z6EL-J8FM>] (last visited Jan. 27, 2021).

proceeding to dissolve the de facto corporation may have been slow coming. New Jersey's woeful lack of statutory protections in matters of municipal incorporation leaves its residents vulnerable to abuse by those with the power to curry favorable treatment from the legislature. The kinds of incorporation requirements detailed in Part IV.B prevent states from creating towns that will become "orphans," as Victory Gardens did,³¹¹ both by laying out strict conditions precedent to incorporation and including room for judicial review.

B. Statutory Solutions

Part III.A demonstrated how the Constitution can prevent states from violating their residents' rights through incorporation, but such judicial interventions only come in the most flagrant situations. Unless a state has done something truly outrageous, like given a church a police department or removed the entire Black population from a town famous for its world-renowned Black residents,³¹² the Constitution likely provides no grounds for stopping an ill-conceived incorporation that follows statutory procedural requirements. Therefore, substantive statutory incorporation requirements are necessary to stop boundary changes that clearly are problematic but fall short of a constitutional violation. Below are examples of the types of protections and guarantees that state governments should strongly consider adopting.

First, each state's incorporation statutes should ensure that no municipality is incorporated that will not be able to provide its residents with essential public services. New Mexico has enacted a modest statute to this end, requiring that each area to be incorporated contain a "sufficient tax base to enable it to provide a clerk-treasurer, a police officer and office space for the municipal government within one year of incorporation."³¹³ It is well understood that there are basic government services to which all Americans are entitled, but there is little consensus as to what they are and how extensive they should be.³¹⁴ Generally, essential local government services fall into three categories: education, infrastructure, and safety.³¹⁵ Education is usually the domain of school districts, which are separate from town governments, so incorporation statutes should ensure that no boundary change will deprive residents of access to reliable infrastructure or jeopardize their safety. A Maine statute breaks those two categories down further to

311. *See supra* note 70 and accompanying text.

312. *See supra* Parts III.A.1, III.A.4.

313. N.M. STAT. ANN. § 3-2-2(A)(4) (2020).

314. This is especially apparent in municipal bankruptcies, when courts need to evaluate what levels of services must survive budget cuts and liquidation. *See* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1123 (2014) ("Municipal bankruptcy and receivership laws articulate a duty to protect 'basic public safety' and minimum services 'consistent with public health and safety,' but these laws lack guidance as to what those broad concepts mean as a practical matter.").

315. *See* Michael J. Deitch, Note, *Time for an Update: A New Framework for Evaluating Chapter 9 Bankruptcies*, 83 FORDHAM L. REV. 2705, 2729 (2015) (discussing a bankruptcy court's handling of Detroit's bankruptcy).

identify what kinds of services local governments can and should provide: law enforcement, fire protection, 911 service, road and bridge maintenance, solid waste management, management of polling places, local budgeting, and animal control.³¹⁶ State legislatures should assess whether any of these services are dispensable in their communities and, if not, require that any incorporated municipality be ready, willing, and able to provide them before effecting an incorporation.

After the police homicide of George Floyd in 2020, the need for democratic control over policing services came to the fore in public discourse.³¹⁷ Police should protect the people they serve and be responsive to their needs. Responsiveness is theoretically ensured by virtue of police chiefs being appointed by elected officials and sheriffs themselves being democratically elected. No municipality should be incorporated if residents there may be deprived of adequate police protection provided by a department that is responsive and accountable to the people it serves.

Victory Gardens cannot afford a police department, and the county sheriff does not patrol the town, so the New Jersey State Police is the primary law enforcement agency for the municipality.³¹⁸ For years, there were lapses in patrolling when state troopers made return trips to their barracks a few towns away to use the bathroom.³¹⁹ Apparently lacking a sense of connection to or trust of the distant state police officers, a young man with a gunshot wound in his chest recently knocked on the door of a family friend serving on the borough council rather than calling the police.³²⁰

A poorly policed municipality can have effects far outside its boundaries. Victory Gardens—a veritable island of police inattention—has been home to multiple large, interstate drug rings.³²¹ In Iowa, an area must provide local police services to be incorporated as a city,³²² and the idea of a city relying on state police for local patrolling is considered “illogical and

316. See ME. STAT. tit. 30-A, § 7501(1)–(9) (2020).

317. See generally Shaila Dewan & Serge F. Kovaleski, *Thousands of Complaints Do Little to Change Police Ways*, N.Y. TIMES (May 30, 2020), <https://www.nytimes.com/2020/05/30/us/derek-chauvin-george-floyd.html> [<https://perma.cc/A9FW-Q7BY>].

318. Victory Gardens made various attempts to organize and maintain a small police department, but the town gave up in 1979 and has been patrolled by the state police ever since. See *Price Tag Doesn't Stop Victory Gardens from Appealing to Township for Services*, RANDOLPH REP., Aug. 2, 1979, at 2.

319. See Michael Izzo, *Victory Gardens Allows NJSP to Use Firehouse for Restroom Breaks*, DAILY REC., Sept. 15, 2016, at A4.

320. See Peggy Wright, *Accused Shooter Pleads Guilty to Gun Possession*, DAILY REC., Mar. 18, 2017, at A1.

321. See Katherine Santiago, *Drug Kingpin Sentenced to 30 Years in Prison*, STAR-LEDGER (Aug. 7, 2009), https://www.nj.com/news/2009/08/randolph_man_rumored_to_be_hear.html [<https://perma.cc/HX7Z-V5TC>]; see also *Murder of Scene's Ex-chief Tied to Gang War Over Dope*, DAILY REC., Mar. 20, 1975, at 2 (describing the murder of a Victory Gardens bar owner in relation to a “major cocaine ring”).

322. See *State ex rel. Johnson v. Allen*, 569 N.W.2d 143, 144 (Iowa 1997) (holding that a city “must provide police protection to its residents through locally-hired police officers or through an intergovernmental agreement” under the statute that is now IOWA CODE § 372.4 (2021)).

impractical.”³²³ Other states should likewise require adequate local police services to avoid unconscionable situations like that in Victory Gardens, both for the sake of local residents and to prevent sophisticated criminal organizations from finding local footholds.

Other municipal services can be equally essential and should be statutorily required, like waste management. The Maine local services statute includes animal control as a key service category,³²⁴ and although “dog catchers” are often the butts of jokes because of how inconsequential they seem, Victory Gardens residents would attest that they truly are essential. Victory Gardens has been overrun by feral cats and dogs on separate occasions in the past, to the certain detriment of local quality of life.³²⁵ State legislatures should carefully consider what minimum services all municipalities should provide and enact statutes requiring that all new municipalities be able to provide them.

Broader reasonableness requirements also serve important functions. By requiring that incorporation plans be authorized by a reviewing body that gauges their reasonableness, states can stop incorporations that are arbitrary or malevolent without rising to the high level of a constitutional due process violation. Pennsylvania’s reasonableness requirement empowered a local commission to stop a wealthy NASCAR track owner from getting his own municipal playground, and it afforded the court an opportunity to review the efficacy of that decision in *Pocono Raceway*.³²⁶ Such a statute would have kept the owners of Teterboro Airport from accomplishing that very feat and may have stopped the state from turning Victory Gardens into an isolated pocket of underserved Democrats for the indefinite future. By providing clear statutory minimums for incorporation and giving local commissions and courts the power to see that those minimums are met, states can create safeguards that ensure logical, controlled, and proficient local governance.

CONCLUSION

From Nunn, Colorado, to Victory Gardens, New Jersey, municipal boundaries remain long after the logic behind their incorporations has faded. When a municipality is incorporated for pernicious purposes, the consequent inequity and disunity is institutionalized and affects generation after

323. *Id.* at 146.

324. ME. STAT. tit. 30-A, § 7501(9) (2020).

325. See Joseph Fisher, *Cats Take on Tiny Town*, DAILY REC., Jan. 30, 1982, at 5.

326. See *supra* Part III.C.

generation until people inside³²⁷ or outside³²⁸ the government make a concerted effort to change it. A state government's incorporation decisions are of enormous gravity, and they should thus never be made to satisfy a fleeting political impulse.

The fact that the Victory Gardens municipal government has remained solvent and working on behalf of its citizens, even as much better resourced municipalities have gone bankrupt during economic downturns since World War II, is nothing short of remarkable. The ingenuity and doggedness shown by their councilors and mayors has been extraordinary, at times bordering on heroic.³²⁹ Their fight for survival has been laudable, but no community should be forced to demonstrate heroism just to fund a local budget.

If care is given to ensure that municipalities are only incorporated where there is sufficient justification—where the change will help rather than hurt the people who live there—public administration will become more efficient and equitable. To ensure such care is taken, state governments should enact laws that set clear procedures, substantive service requirements, and reasonableness standards for incorporation. Municipal boundary making continues to be a legal blind spot where injustice takes place outside the purview of judicial review, and reform is necessary to keep vulnerable communities from being abandoned in this vacuum.

327. Sometimes, the state government itself is the only party that can challenge an incorporation, quo warranto. *See* *W. v. Town of Lake Placid*, 120 So. 361, 365 (Fla. 1929) (en banc) (“Being a de facto municipality, its existence can be challenged only by the state in a direct proceeding . . .”). This was the case in *State ex rel. Grey v. Mayor of Dover*, 40 A. 640, 640 (N.J. 1898):

This is [a case] in the nature of quo warranto, filed by the attorney general, ex officio, against the mayor and city council of the city of Dover, commanding it to show by what warrant it claims to exercise, use, and enjoy the certain liberties, privileges, and franchises of a municipal corporation.

Id.; *see supra* Part III.B.3.

328. The lead plaintiff in *Gomillion* was Charles Gomillion, a dean at Tuskegee University. *See* Thomas Jr., *supra* note 185. He founded a small political group called the Tuskegee Civic Association that started out doing local political organizing but ended up winning a landmark case before the Supreme Court. *Id.*

329. One example is the late, longtime Victory Gardens elected official Bill Gratacos. Gratacos was a carpenter by day and mayor by night. *See* Art Daniels, *Former Mayor Holds Head High Despite Adversity*, DAILY REC., Nov. 13, 1980, at 15. As mayor during the difficult economic times of the 1970s, Gratacos fought so hard for federal relief that he eventually got a phone call put through to President Gerald Ford's Oval Office. *See* The Daily Dairy of President Gerald R. Ford (June 20, 1975) (on file with the Gerald R. Ford Presidential Library & Museum), <https://www.fordlibrarymuseum.gov/library/document/diary/pdd750620.pdf> [<https://perma.cc/BAZ5-VGAY>].