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Raising the Stakes for New Towns: State Tools to Curb Exclusionary Municipal Incorporation

Kadie Martin
Boston College Law School, kaitlin.martin@bc.edu

RAISING THE STAKES FOR NEW TOWNS: STATE TOOLS TO CURB EXCLUSIONARY MUNICIPAL INCORPORATION

Abstract: The establishment of a new city or town affects all the communities around it. Before incorporation, an unincorporated territory typically pays taxes into its county government and receives county public services, such as participation in the county's public schools. When an area incorporates, the new city or town effectively opts out of county services and taxes. Instead, the new municipality collects its own property taxes to fund its own public services. As a result, the surrounding county loses part of its tax base. Recently, a trend has emerged in local government law whereby majority wealthy and white unincorporated enclaves, particularly in the southern United States, have incorporated and often broken away from regional school districts. These exclusionary incorporations have created negative externalities for their counties because they have segregated schools, increased income inequality, reduced county revenue, and limited resources for public services. States have broad constitutional authority to shape their municipal incorporation regimes. Some states have embraced this authority and created mechanisms to curtail exclusionary incorporation. Their statutes have created blueprints for others to follow. This Note argues that states should require communities seeking incorporation to demonstrate regional consent and should empower state-level or county-level government entities to review incorporation petitions with regional needs in mind.

INTRODUCTION

East Baton Rouge Parish[1] sits to the east of the Mississippi River.[2] Until 1956, Louisiana permitted racial segregation in the East Baton Rouge Parish Public Schools.[3] Then, in 1954, in *Brown v. Board of Education*, the U.S. Supreme Court outlawed de jure segregation in schools across the United States.[4]

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[1] What other states refer to as "counties," Louisiana refers to as "parishes." *See* Jeffrey D. McMillen, Note, *The Effects of the Voting Rights Act: A Case Study*, 72 WASH. U. L.Q. 725, 725 n.5 (1994) (exploring Voting Rights Act litigation and subsequent voting data in Jefferson Parish, Louisiana as a case study of the Act's ability to increase voter registration among people of color).

[2] *See* Rick Rojas, *Suburbanites in Louisiana Vote to Create a New City of Their Own*, N.Y. TIMES (Oct. 13, 2019), https://www.nytimes.com/2019/10/13/us/baton-rouge-st-george.html [https://perma.cc/D9PW-FSB5] (providing a map of the Mississippi River and East Baton Rouge Parish).

[3] *See* Jessica E. Watson, *Quest for Unitary Status: The East Baton Rouge Parish School Desegregation Case*, 62 LA. L. REV. 953, 954 (2002) (arguing that the U.S. District Court for the Middle District of Louisiana should terminate its judicial control over the East Baton Rouge Parish School System after forty-five years of desegregation efforts).

[4] 347 U.S. 483, 495 (1954). Private individuals' actions create de facto segregation. Jonathan Fischbach et al., *Race at the Pivot Point: The Future of Race-Based Policies to Remedy De Jure Segregation After* Parents Involved in Community Schools, 43 HARV. C.R.-C.L. L. REV. 491, 496 (2008).

A year later, a group of parents of color banded together to sue the East Baton Rouge Parish School Board, demanding school integration.[5] After decades of litigation, court orders, and desegregation plans, parties reached an agreement on June 18, 2003.[6]

In 2012, a group of predominantly white, wealthy parents living in the St. George neighborhood of East Baton Rouge Parish launched their own movement.[7] The group petitioned the Louisiana State Legislature to let it detach from the East Baton Rouge Parish School System and create its own school district.[8] After failing twice, it changed course in 2013 to incorporate its own municipality instead.[9] Incorporation is the legal process for creating a munici-

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Government laws and policies cause de jure segregation. *Id.* In *Brown*, the Supreme Court held that "[s]eparate educational facilities are inherently unequal" and that de jure segregated schools violated the Equal Protection Clause of the Fourteenth Amendment. 347 U.S. at 495; *see* U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *infra* note 122 and accompanying text (explaining the Fourteenth Amendment).

[5] Watson, *supra* note 3, at 954; *East Baton Rouge Parish's Desegregation Case*, THE ADVOCATE (June 19, 2003), https://www.ebrpl.com/oaal/documents/desegchronology.pdf [https://web.archive.org/web/20181006031515/https://www.ebrpl.com/oaal/documents/desegchronology.pdf].

[6] *East Baton Rouge Parish's Desegregation Case*, *supra* note 5. East Baton Rouge Parish Public Schools had the longest standing desegregation order in the country. Adam Harris, *The New Secession*, THE ATLANTIC (May 20, 2019), https://www.theatlantic.com/education/archive/2019/05/resegregation-baton-rouge-public-schools/589381/ [https://perma.cc/3WN5-664D].

[7] Harris, *supra* note 6. East Baton Rouge Parish was 75% African American when the court ended the desegregation order. *Id.* Seven years later, the parish was 81% African American and 89% people of color. *Id.*

[8] *Id.* Dr. Belinda Davis, a professor at Louisiana State University and president of the One Community, One School District, an organization campaigning against the St. George school breakaway, later explained:

> I remember being surprised to hear [proponents of the school district breakaway] wax nostalgic about the days when they were in school in Baton Rouge and how it was just a really great education system. I had to bring up the fact that when they were in school, we were a segregated school district. While Baton Rouge might have been great for White kids, it probably wasn't so great for the Black children in our schools. They kind of brushed that off . . . .

Gabriella Runnels, *Breaking Apart: Confronting Race in East Baton Rouge Parish*, 1 WOMEN LEADING CHANGE: CASE STUD. ON WOMEN, GENDER, & FEMINISM 59, 63 (2016) (citation omitted).

[9] Harris, *supra* note 6. Municipal incorporation is the process of forming a municipal corporation, commonly known as a city or town. 1 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS 305 (3d ed. 2010). Specifically, a municipal corporation is:

> [A] body politic and corporate, possessing a legal entity and name, a seal by which to act in solemn form, a capacity to contract and be contracted with, to sue and be sued, a persona standi in judicio, to hold and dispose of property, and thereby to acquire rights and incur liabilities, with power of perpetual succession, inhabitants and territory.

Id. at 177–78. By creating their own municipality, the families could separate their property tax base from the rest of the parish. Harris, *supra* note 6. Their property taxes would not be pooled into East Baton Rouge Parish for redistribution to all schools. *Id.* Instead, their taxes would only go to St. George schools. *Id.*

pality—a city or town—where one did not previously exist.[10] Before incorporating, St. George was part of an unincorporated territory outside the City of Baton Rouge.[11] Typically, county government is the only form of government for unincorporated territory.[12] East Baton Rouge Parish and the City of Baton Rouge, however, have one consolidated government.[13] Even though St. George is not part of the City of Baton Rouge, it shares a school system with it.[14] By 2019, St. George became the third community within East Baton Rouge Parish to vote to incorporate and detach.[15] By permitting St. George to incorporate, the state of Louisiana will effectively ensure school resegregation.[16]

The incorporation of St. George epitomizes a trend in the American South toward school district secession unraveling decades of integration efforts.[17] School district secessions are part of an even broader story of municipal exclusionary incorporations entrenching and aggravating income and racial dispari-

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[10] MCQUILLIN, *supra* note 9, at 304–05.

[11] Runnels, *supra* note 8, at 59; *see* Rojas, *supra* note 2 (providing a map that shows that St. George is adjacent to the City of Baton Rouge).

[12] Darryl T. Cohen, *Population Distribution Inside and Outside Incorporated Places: 2000*, at 2 (U.S. Census Bureau, Working Paper No. 82, 2007). Incorporated areas have "legally defined municipal boundaries." *Id.* In contrast, "[i]n unincorporated areas, [public] services are typically provided by either the county or minor civil division government, or sometimes by a nearby incorporated place." *Id.* (citation omitted).

[13] *Our Government*, CITY OF BATON ROUGE & PARISH OF E. BATON ROUGE, https://www.brla.gov/1062/Our-Government [https://perma.cc/LQ6W-7VHG]. The East Baton Rouge Parish and City of Baton Rouge consolidated in 1947. *Id.* A consolidated government increases government efficiency and reduces costs by eliminating duplication of public services. *Id.*

[14] Harris, *supra* note 6.

[15] *Id.*

[16] *See id.* (explaining the process by which St. George is seeking to incorporate under Louisiana law). East Baton Rouge Parish has approximately 46.5% people of color, whereas St. George has approximately 15% people of color. *Id.* After incorporating their own city, residents of St. George would have to pass a constitutional amendment to receive funding for a new school district. Runnels, *supra* note 8, at 65. Residents of Central, Louisiana were able to incorporate a new city in 2005 and then receive legislative approval to create their own school district in 2007. Harris, *supra* note 6. If St. George also creates its own school district, it will "build a wall," blocking off school funding redistribution. Runnels, *supra* note 8, at 64, 66. The St. George residents will take their property tax dollars with them for their new municipality, depleting the East Baton Rouge city-parish budget by nearly 30%. *Id.* at 66.

[17] Erika K. Wilson, *The New School Segregation*, 102 CORNELL L. REV. 139, 209, 210 (2016); *see* Harris, *supra* note 6 ("A pattern has emerged over the past two decades: White, wealthy communities have been separating from their city's school districts to form their own. According to a recent report from EdBuild, a nonprofit focused on public-school funding, 73 communities have split to form their own school districts since 2000, and the rate of places doing so has rapidly accelerated [between 2017 and 2019]."). School district secessions in Gardendale, Alabama and Trussville, Alabama each increased county-wide racial segregation in 2014 and 2005, respectively. Wilson, *supra*, at 167. Both Gardendale and Trussville are mostly white areas within racially diverse counties. *Id.* At least ten southern suburban communities seceded or tried to secede from more racially diverse county-wide school districts between 2011 and 2016. *Id.* at 142.

ties in states that have unincorporated territories.[18] Wealthy communities in unincorporated territories in the Southeast have realized that their state laws make it very easy to establish new towns.[19] These formerly unincorporated areas can keep their property taxes within their municipal boundaries and can prevent county fiscal redistribution of their resources.[20] When wealthy communities wall off their resources, their neighboring communities are left with shrinking tax bases, reduced government services, and underfunded schools.[21]

This pattern of exclusionary incorporation is not inevitable.[22] States have tools at their disposal and the constitutional authority to structure their incorporation laws to prevent exclusionary incorporation.[23] This Note explores the variety of ways in which states can structure their municipal incorporation laws to prevent exclusionary incorporation.[24] Part I provides an overview of the municipal life cycle in the United States and describes common components of municipal incorporation statutes.[25] Part II compares and contrasts state incorporation mechanisms through three state case studies.[26] Part III assesses the externalities of municipal incorporation, state tools for minimizing these externalities, and the benefits of state incorporation laws that authorize state oversight entities and require regional consent to incorporation.[27]

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[18] *See* Christopher J. Tyson, *Municipal Identity as Property*, 118 PENN. ST. L. REV. 647, 648, 661, 669 (2014) (exploring the causes of the "perceived property right in municipal identity").

[19] *See, e.g.*, LA. STAT. ANN. § 33:1–3 (2020) (permitting incorporation if it is reasonable and if a majority of the residents of the proposed municipality vote in favor of it); Harris, *supra* note 6 (detailing how residents of an unincorporated part of East Baton Rouge Parish, St. George, forced a vote to incorporate after collecting signatures of only residents of the proposed city). Three Louisiana communities have incorporated in recent years. Runnels, *supra* note 8, at 65.

[20] *See infra* notes 288–296 and accompanying text (explaining how exclusionary incorporation affects neighboring communities by insulating taxes from county redistribution).

[21] *See infra* notes 288–296 and accompanying text (describing the effects of exclusionary incorporation on regional public services). Local property taxes provide the primary funding for public schools in the United States. Harris, *supra* note 6.

[22] *See* ARIZ. REV. STAT. ANN. § 9-101.01 (2020) (reflecting a policy against the incorporation of communities within urbanized areas); Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003) (explaining that the Arizona municipal incorporation statute purposefully protects existing cities and towns from municipal fragmentation).

[23] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) (holding that municipalities are "creatures" of their respective states and that states have the authority to govern incorporation law); *infra* notes 202–282 and accompanying text (describing the ways in which California and Arizona prevent exclusionary incorporation).

[24] *See infra* notes 28–332 and accompanying text.

[25] *See infra* notes 28–149 and accompanying text.

[26] *See infra* notes 150–282 and accompanying text.

[27] *See infra* notes 283–332 and accompanying text.

I. THE LIFE AND STRUCTURE OF AN AMERICAN MUNICIPALITY

Few things are more quintessentially American than local self-government.[28] In fact, twenty American cities predate the existence of the United States of America.[29] Each state has local governments, and in many ways local governments affect people's everyday lives more intimately than either state or federal government.[30] Depending on the state, local governments can have the power to educate youth, maintain police forces, put out fires, remove waste, and control methods of transportation.[31] Yet almost 250 years after the founding of the United States, cities and towns are still in flux.[32] In any given year, Americans create new municipalities, merge municipalities together, change their municipal borders, or even dissolve their cities.[33]

Constitutionally, states have broad discretion in how they design their municipal incorporation processes.[34] To create and maintain a state municipal incorporation regime, states must answer challenging policy questions throughout the process.[35] This Part describes the municipality's role in the landscape of American governance and the anatomy of a municipal incorporation statute.[36]

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[28] *See* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) ("Localism as a value is deeply embedded in the American legal and political culture."); *see also* MCQUILLIN, *supra* note 9, at 56–57 ("Since our country was conceived on the theory of local self-government, it follows naturally that our nation is made up of a collection of subordinate but nearly independent self-governing communities, welded together by common interests and purposes and united into a great commonwealth.").

[29] MCQUILLIN, *supra* note 9, at 11 n.1. The British crown granted twenty-four local government charters, and the state legislatures subsequently confirmed many of them after the American Revolution. *Id.* at 11 & n.1 (citing Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980)).

[30] *See* WILLIAM D. VALENTE ET AL., CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 6–7 (5th ed. 2001) (describing the abundance of local governments in the United States, and explaining that local governments deliver important services to the population, including but not limited to "education, policing, fire prevention, street and road maintenance, mass transit, and sewage and solid waste removal").

[31] *Id.* The city of Phoenix, Arizona "generates 70% of Arizona's total output and 71% of the state's employment." Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 635 (2020) (quoting RICHARD SCHRAGGER, CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 28–29 (2016)).

[32] *See* VALENTE ET AL., *supra* note 30, at 6, 9 (expressing that local governments are often in flux).

[33] *See* RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 206 (8th ed. 2016) (detailing the frequency of municipality creation and boundary changes between 1952 and 2012).

[34] Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907); *see infra* note 109 and accompanying text (detailing the facts and holding of *Hunter v. City of Pittsburgh*).

[35] *See infra* notes 68–72 and accompanying text (describing the fundamental questions every state must answer regarding who can incorporate what land, under what conditions, and how they may go about doing so).

[36] *See infra* notes 40–149 and accompanying text.

Section A of this Part defines the municipality as a governing entity.[37] Section B describes the municipal life cycle.[38] Section C identifies common components of municipal incorporation statutes.[39]

A. Local Government in America

Even though cities and towns represent the quintessential form of local government in America, they are not the only kinds of local government.[40] Some are general-purpose governments, exercising authority over many domains, such as public safety, schools, land use, and transportation, whereas others are special-purpose governments, confined to one function or limited functions.[41] Even within the category of general-purpose governments, the terminology varies by state; some states have counties, cities, and towns, but others call their entities townships, villages, boroughs, districts, and municipal incorporations.[42] Notwithstanding this diversity, states tend to agree on the city-town distinction, labeling their more urbanized, populous areas as cities and their more rural or suburban lower-population areas as towns.[43] At one end of the spectrum, the town of Warm River, Idaho is home to three residents.[44] At the other end, New York City had a population of 8,175,133 as of the 2010 U.S. Census.[45] Because of their municipalities' lower populations, residents of

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[37] *See infra* notes 40–51 and accompanying text.

[38] *See infra* notes 52–67 and accompanying text.

[39] *See infra* notes 68–149 and accompanying text.

[40] *See infra* notes 41–51 and accompanying text (describing the variety of local governments in the United States).

[41] VALENTE ET AL., *supra* note 30, at 11. Special district governments have "very narrowly defined authority and are authorized to undertake only one or a very limited number of functions." *Id.* An example is the school district. *Id.* The special district government is "the most rapidly growing form of local government in the United States." *Id.* The number of special district governments tripled in the second half of the twentieth century, jumping from 12,340 in 1952 to 34,683 in 1997. *Id.* (citing 1 U.S. CENSUS BUREAU, U.S. DEP'T OF COM., 1997 CENSUS OF GOVERNMENTS: GOVERNMENT ORGANIZATION 6 (1999)).

[42] MCQUILLIN, *supra* note 9, at 44, 48–49; VALENTE ET AL., *supra* note 30, at 6, 9, 10. Despite the variety across states, there are patterns of terminology that make the U.S. Census possible. *See* VALENTE ET AL., *supra* note 30, at 10 (explaining that towns and townships are more common in certain states). For example, the New England states, New York, and Wisconsin have "towns," whereas the other Middle Atlantic and Midwestern states have "townships." *Id.* Midwest townships perform more limited functions in comparison to their New England and Middle Atlantic town counterparts. *Id.* Cities are typically dense, urban areas with high populations. *Id.* at 9. Traditionally, in rural states, the county provides sufficient governmental services to the rural areas, while the cities within the state have their own government for additional services beyond what the county can provide. *Id.* These services include "police, fire, sanitation, traffic control, public health, water, sewage disposal, land use, [and] social services." *Id.*

[43] MCQUILLIN, *supra* note 9, at 42–43; VALENTE ET AL., *supra* note 30, at 9.

[44] *Warm River, Idaho Population 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/warm-river-id-population [https://perma.cc/E9V4-N66F].

[45] *The 30 Most Populous Cities*, NAT'L LEAGUE OF CITIES, https://www.nlc.org/the-30-most-populous-cities [https://web.archive.org/web/20200315191245/https://www.nlc.org/the-30-most-

towns usually participate more directly in the government than residents of cities, who typically delegate the decision-making power to representatives.[46]

The authority of municipalities varies too, often depending on the scope of county power.[47] In some states, such as Connecticut and Rhode Island, counties are merely geographic units.[48] In other states, counties play important service-providing and policy roles, rendering local government services less necessary.[49] Municipal governance structures vary as well, with some having mayors and city councils and others having select boards or town meetings, or both.[50] Regardless of their scope of power in relation to the county government, most municipalities have two important powers: the power to tax property and the power to zone.[51]

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populous-cities]. The second most populous city was Los Angeles, California, with 3,792,621 residents in 2010. *Id.* The third most populous was Chicago, Illinois, with 2,695,598 residents in 2010. *Id.*

[46] MCQUILLIN, *supra* note 9, at 43. The differences between a town and a city are comparable to the differences between a democracy and a republic. *See id.* ("The marked and characteristic distinction between a town organization and that of a city is that in the former all the qualified inhabitants meet, deliberate, act and vote in their natural and personal capacities in the exercise of their corporate powers; whereas, under a city government, this is done by representatives." (alteration in original) (quoting Warren v. City of Charlestown, 68 Mass. (2 Gray) 84, 101 (1854))).

[47] *See* VALENTE ET AL., *supra* note 30, at 7–8 (describing the diversity of county authority across the states). The county structure and borders rarely change in most states. *Id.* at 8. The United States inherited the county structure from England. *Id.* at 7. In England, the shire—the equivalent of a county—historically conducted prosecutions, maintained public records such as deeds and birth and death certificates, assessed property value, maintained public roads, registered voters, and provided social services, such as health care. *Id.*

[48] *Id.* at 7.

[49] *See id.* at 8 (explaining that strong county governments provide "housing, mass transit, airports, parks and recreation, water supply and sewage, planning, zoning and regional governance").

[50] *See, e.g.*, Robert W. Ritchie et al., *Forms of Municipal Government and Methods of Governance*, *in* MASSACHUSETTS MUNICIPAL LAW ch. 2 (2d ed. 2015) (describing municipal government diversity in Massachusetts).

[51] Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115, 1134 (1996); *see* ELI MOORE ET AL., HAAS INST., ROOTS, RACE, & PLACE: A HISTORY OF RACIALLY EXCLUSIONARY HOUSING IN THE SAN FRANCISCO BAY AREA 57–58 (2019), https://escholarship.org/uc/item/2j08r197 [https://perma.cc/7BBU-4GQB] (describing how Fremont, California used zoning to attract businesses and raise tax revenue); *infra* note 82 and accompanying text (explaining that municipal zoning can shape a town or city's demographics). Up until the Supreme Court deemed them unconstitutional in the 1948 decision in *Shelley v. Kraemer*, white residents would use racially restrictive covenants to exclude African Americans from certain cities and towns. NANCY BURNS, THE FORMATION OF AMERICAN LOCAL GOVERNMENTS: PRIVATE VALUES IN PUBLIC INSTITUTIONS 55–56, 56 n.73 (1994) (citing Shelley v. Kraemer, 334 U.S. 1 (1948)). Racially restrictive covenants are "subdivision rules or neighborhood agreements that 'run with the land' to bar sales of rentals by minority members." Carol M. Rose, *Racially Restrictive Covenants—Were They Dignity Takings?*, 41 LAW & SOC. INQUIRY 939, 939 (2016). Thereafter, white residents of cities and towns turned to their municipal zoning power to exclude African Americans based on poverty. BURNS, *supra*, at 56. Zoning power is relevant to municipal incorporation because once residents incorporate, they can zone other people out based on character, value, and density of housing. *See* MOORE ET AL., *supra*, at 57–58 (explaining how white residents of Fremont, California used zoning to exclude residents of color). For example, the East Bay of California experienced significant racial stratification during "white flight" in the 1950s and 1960s. *Id.* at 58. Residents of what is now Fremont, California

B. The Municipal Life Cycle

Notwithstanding their importance in American life, local governments, unlike the states and counties under which they exist, are far from permanent or fixed.[52] Whereas the most recent states to join the United States were Alaska and Hawaii in 1959, nine municipalities have incorporated in 2011 alone.[53] Between 2000 and 2010, the United States witnessed a new municipality formation every twenty-four days.[54] Between 1952 and 1997, the number of municipal corporations in the United States increased fifteen percent, from 16,807 to 19,372.[55] By 2007, the number of municipal corporations rose to 19,492, not including the 16,519 new township governments, 50,432 special-purpose local governments, and 3,033 county governments.[56]

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incorporated and then zoned a substantial amount of property for industrial development to attract capital from the nearby cities—Oakland and Richmond. *Id.* at 57. People of color were unable to follow white residents to these new communities due to exclusionary zoning focused on narrow housing types, which in turn led to racial stratification. *Id.* at 58. The white population of Richmond, California decreased from 85,316 in 1950 to 56,066 in 1960 and further down to 47,368 by 1970. *Id.*; *City of Richmond: Contra Costa County*, BAY AREA CENSUS, http://www.bayareacensus.ca.gov/cities/Richmond.htm [https://perma.cc/U9ZW-5L95]. Similarly, the population in Oakland changed from 86% white in 1950 to 73.6% white in 1960 and then to 59.1% white in 1970. *City of Oakland: Alameda County*, BAY AREA CENSUS, http://www.bayareacensus.ca.gov/cities/Oakland.htm [https://perma.cc/E3HA-6VHD]. Meanwhile, nearby Fremont was 98.3% white in 1960, which was the year of its first census as a municipality. *City of Fremont: Alameda County*, BAY AREA CENSUS, http://www.bayareacensus.ca.gov/cities/Fremont60.htm [https://perma.cc/PG9F-7F6K]. Incorporation policy not only affects who can move into a new municipality, but also who can incorporate a municipality in the first place. *See* Sarah Ihn, *The Long Road to Self-Determination: A Critique of Municipal Incorporation Through the East Los Angeles Cityhood Movement*, 13 HARV. LATINO L. REV. 67, 86 (2010) (describing how incorporation has negatively impacted low-income communities in East Los Angeles, California). The California incorporation statute "favor[s] high revenue communities" and notes that the incorporation process "is highly resource-intensive in time and money—two particularly scarce commodities in low-income communities." *Id.*

[52] BRIFFAULT & REYNOLDS, *supra* note 33, at 206; *see* VALENTE ET AL., *supra* note 30, at 9 (stating that local governments are frequently in flux).

[53] Gary Lawson & Robert D. Sloane, *The Constitutionality of Decolonization by Associated Statehood: Puerto Rico's Legal Status Reconsidered*, 50 B.C. L. REV. 1123, 1142 (2009); Kathryn T. Rice et al., *Why New Cities Form: An Examination into Municipal Incorporation in the United States 1950–2010*, 29 J. PLAN. LITERATURE 140, 144 (2013); *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/B9V5-R8CW] (covering the dissolution of Amelia, Ohio); Rojas, *supra* note 2 (highlighting the incorporation referendum creating the new city of St. George in Louisiana). In 2011, there were also 1,697 annexations. Rice et al., *supra*, at 144.

[54] Rice et al., *supra* note 53, at 140.

[55] VALENTE ET AL., *supra* note 30, at 9. The number of municipalities in the United States increased by about 16% between 1952 and 2012. BRIFFAULT & REYNOLDS, *supra* note 33, at 206.

[56] *Number of Municipal Governments & Population Distribution*, NAT'L LEAGUE OF CITIES, https://www.nlc.org/number-of-municipal-governments-population-distribution [https://web.archive.org/web/20200619192129/https://www.nlc.org/number-of-municipal-governments-population-distribution]. Out of the 50,432 special-purpose local governments, there were "37,381 special districts, 13,726 independent school districts, and 1,452 dependent public school systems." *Id.*

In addition to incorporating, municipalities occasionally increase their territory and population by annexing unincorporated land.[57] A municipality typically cannot annex territory within the boundaries of another municipality, but it can annex unincorporated territory within a county.[58] Sometimes, residents of unincorporated territories petition to incorporate in order to preempt a neighboring municipality from annexing them.[59] This type of defensive incorporation has become increasingly frequent, particularly in unincorporated areas surrounding large cities.[60]

Given the regularity of municipal incorporation and boundary change, the law governing these major events merits understanding and analysis.[61] Interestingly, the U.S. Constitution fails to mention municipalities, let alone municipal incorporation.[62] In 1907, in *Hunter v. City of Pittsburgh*, a case addressing a contentious municipal incorporation, the Supreme Court stated that cities are creations of their respective states.[63] That is, states can create or modify municipalities at any time, with or without the consent of their residents, because municipalities are political subdivisions of their states.[64]

Consequently, municipalities rely on state constitutions and state general laws for the authority to exist and for the authority to exercise power within

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[57] VALENTE ET AL., *supra* note 30, at 9.

[58] BRIFFAULT & REYNOLDS, *supra* note 33, at 220.

[59] *Id.* The objective of annexation "is to respond to demands created by expanding urbanization." Robert D. Zeinemann, *Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience*, 39 URB. LAW. 257, 257 (2007). Because municipalities collect property taxes within their borders, they are incentivized to maximize the property value within their boundaries. *Id.* at 262. Cities can maximize their revenue by extending their borders through annexing unincorporated territory. *Id.* Property owners may receive improved government services when a municipality annexes their land, but at the cost of new tax burdens. *Id.* The courts in Wisconsin are sensitive to the incentives of annexation. *Id.* at 276. In *Smith v. Sherry*, the Wisconsin Supreme Court struck down an annexation, holding that its sole "purpose of increasing the corporate revenues by the exaction of taxes [was] an abuse and violation" of the state constitution. 6 N.W. 561, 564 (Wis. 1880).

[60] BRIFFAULT & REYNOLDS, *supra* note 33, at 220. Some states, such as Arizona, Georgia, Illinois, and Montana, are working to limit defensive incorporation by disallowing the practice within a certain mileage of existing municipalities without their consent. *Id.* (citing ARIZ. REV. STAT. ANN. § 9-101.01(A) (2020); ARK. CODE ANN. § 14-38-101 (2020); GA. CODE ANN. § 36-31-2 (2020); 65 ILL. COMP. STAT. 5/2-2-6 (2020); MO. REV. STAT. § 72.130 (2020)). The minimum distance is usually between one and six miles, or within the existing municipality's growth zones. *Id.* (citing U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., STATE LAWS GOVERNING LOCAL GOVERNMENT STRUCTURE AND ADMINISTRATION 22–23 (1993), https://library.unt.edu/gpo/acir/Reports/information/M-186.pdf [https://perma.cc/JJ9X-74TV]).

[61] BRIFFAULT & REYNOLDS, *supra* note 33, at 206.

[62] VALENTE ET AL., *supra* note 30, at 6; *see* MCQUILLIN, *supra* note 9, at 51 (explaining that the U.S. Constitution "does not mention cities, towns, municipal corporations, or indeed any local organs of government").

[63] 207 U.S. 161, 178 (1907). States have "absolute power . . . over the property of municipal corporations." *Id.* at 179.

[64] *Id.* The Supreme Court held that a state could take property, merge, or dissolve municipalities even if the residents protested the state action. *Id.*

their boundaries.[65] State constitutions delegate power to political subdivisions, such as cities and towns, and state general laws provide the rules for incorporating new cities and towns.[66] Just as municipalities vary in form, size, and powers, they also vary in how they are created, altered, and dissolved, based on the state at issue.[67]

C. The Anatomy of State Municipal Incorporation Laws

Although state laws concerning municipal incorporation differ in substance and procedure, every municipal incorporation regime seeks to answer fundamental questions with respect to who can incorporate what land, under what conditions, and how they can go about doing so.[68] First, should a state permit residents to incorporate a new municipality in a proposed area?[69] Second, have the residents adequately determined the boundaries for the proposed incorporated area?[70] Third, who can decide whether the incorporation should occur and what the new municipality's boundaries should be?[71] Lastly, which institution or institutions should make the final determination on the incorporation?[72]

This Section details common characteristics of state municipal incorporation laws.[73] Subsection 1 of this Section describes how states determine whether a new municipality is needed.[74] Subsection 2 examines how states determine the appropriate boundaries for a new municipality.[75] Subsection 3 explains how constitutional doctrine shapes state determinations on who may vote to approve or reject a new municipality proposal.[76] Lastly, subsection 4 discusses the parties that have the final say before a new municipality emerges.[77]

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[65] VALENTE ET AL., *supra* note 30, at 162.

[66] *Hunter*, 207 U.S. at 178; VALENTE ET AL., *supra* note 30, at 162. Unless otherwise specified in a state constitution, state legislatures have "plenary power to create, alter, or abolish at pleasure any or all local governmental areas." MCQUILLIN, *supra* note 9, at 25.

[67] VALENTE ET AL., *supra* note 30, at 162.

[68] *Id.* at 162–63.

[69] *Id.* at 162.

[70] *Id.* at 162–63.

[71] *Id.* at 163. Courts are unable to alter incorporation requirements or mandate requirements surpassing what is included in an incorporation statute, as long as the incorporation statute does not violate the U.S. Constitution or federal laws. MCQUILLIN, *supra* note 9, at 352–53 (citing City of Shasta Lake v. Cnty. of Shasta, 88 Cal. Rptr. 2d 863 (Ct. App. 1999); Atl. Beach Hotel v. Larkin, 202 N.Y.S.2d 769 (Sup. Ct. 1960); *In re* Pewaukee, 521 N.W.2d 453 (Wis. Ct. App. 1994)); *see infra* notes 105–129 and accompanying text (describing how little constitutional law interferes with municipal incorporation).

[72] VALENTE ET AL., *supra* note 30, at 163.

[73] *See infra* notes 78–149 and accompanying text.

[74] *See infra* notes 78–98 and accompanying text.

[75] *See infra* notes 99–104 and accompanying text.

[76] *See infra* notes 105–129 and accompanying text.

[77] *See infra* notes 130–149 and accompanying text.

1. Determining Whether Residents Need a New Municipality Where One Does Not Already Exist

To decide whether and where new municipalities are appropriate, states consider: (1) whether there is a need for local government; (2) whether there is a capacity for a new government; (3) whether there are local preferences for a new government; and (4) what the boundaries would be.[78] These inquiries are the states' ways of determining under which circumstances the benefits of incorporation would outweigh the costs.[79] On the one hand, incorporation gives a community control over matters that most affect it, including public services.[80] On the other hand, a new town may bring a new layer of taxation and regulation that may negatively impact local minority populations whose priorities are not necessarily represented in municipal decision-making.[81] Incorporation also may affect the socioeconomic demographics of a county or region of a state, oftentimes segregating the population by race or intensifying already existing residential segregation.[82]

States have different ways of measuring the need for a new local government in a particular area and often set conditions precedent for incorporation based on these measurements.[83] The conditions may pertain to the nature and character of the land, the population size and density, or the proximity to other cities, towns, or municipalities.[84] Some state incorporation statutes limit incorporation to urban areas or areas that would accommodate urban development.[85] Incorporation laws may require that the proposed municipality's residents need additional services beyond what the county or state can provide.[86] As part of a petition for incorporation in Mississippi, for example, residents must demon-

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[78] VALENTE ET AL., *supra* note 30, at 165–66.

[79] *Id.* at 165. To distill the inquiry to its core, the law must seek to answer "whether the area needs a new local government." *Id.*

[80] *Id.* For example, incorporation could bring about new road maintenance services. *Id.*

[81] *Id.* Majority rule determines who gets elected to local office, and the elected officials ultimately decide which services the municipality will provide and how it will provide them. *Id.* Majority rule also dictates the outcome of local referenda, which have implications for minority populations that are similar to those resulting from the election of local officials. *Id.*

[82] *See* Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1389 (1997) (explaining that residents have incorporated many suburbs for the specific purpose of segregating individuals based on race, particularly in the twentieth century).

[83] MCQUILLIN, *supra* note 9, at 349–53; VALENTE ET AL., *supra* note 30, at 165.

[84] MCQUILLIN, *supra* note 9, at 349; VALENTE ET AL., *supra* note 30, at 165. As of 1993, the municipal incorporation laws of forty states had minimum population requirements. VALENTE ET AL., *supra* note 30, at 165 (citing U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., *supra* note 60, at 22–23).

[85] VALENTE ET AL., *supra* note 30, at 165.

[86] *Id.*

strate either that the incorporation would meet a need for additional services or would increase the accessibility of public services.[87]

Not only do laws require evidence of public necessity, but they also often require evidence of the reasonableness of the incorporation.[88] To satisfy this requirement, states consider a variety of factors.[89] Mississippi courts, for example, consider fourteen non-exhaustive factors to determine the reasonableness of incorporating an unincorporated area.[90] The factors include the character and identity of the community, the costs of incorporation, the estimated tax base of the new community, whether the overall well-being of the community's residents will be enhanced, whether transportation will be impacted, and whether property owners are supportive of the incorporation, among other considerations.[91]

The capacity inquiry typically pertains to municipal financing.[92] State municipal incorporation laws tend to permit incorporation only when it is evident that the area has the financial resources to sustain a new layer of government.[93] In order for a municipality to function, let alone to provide services, it needs a sufficient tax base.[94] Some states permit municipalities to exercise

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[87] City of Jackson v. Byram Incorporators, 16 So. 3d 662, 671 (Miss. 2009). The petition must "state the aims of the petitioners in seeking said incorporation, and shall set forth the municipal and public services which said municipal corporation proposes to render and the reasons why the public convenience and necessity would be served by the creation of such municipal corporation . . . ." *Id.* (citing MISS. CODE ANN. § 21-1-13 (2020)). The Supreme Court of Mississippi employs five factors to assess public convenience and necessity: (1) present government services; (2) how well the government provides those services; (3) what services other sources will provide; (4) how the incorporation would affect the adjacent city; and (5) the "substantial or obvious need" for the incorporation. *Id.* at 681. The Supreme Court of Mississippi ultimately held that the incorporation "was required by public convenience and necessity" because the trial court had found facts demonstrating a need for improved sewer, police, and fire services, the capacity to meet those needs through new municipal services and the county sheriff's department, rapid area growth, and a lack of impediment on the adjoining city's future growth. *Id.* at 681–82.

[88] MCQUILLIN, *supra* note 9, at 351–52.

[89] *Id.*

[90] *Byram Incorporators*, 16 So. 3d at 675. The factors operate as a totality test, with no one factor determining reasonableness "per se." *Id.* Instead, courts consider all the factors to "reach an ultimate conclusion" about the reasonableness of the incorporation. *Id.*

[91] *Id.* Courts might consider who will take over road maintenance and how the municipality will address traffic, for example. *Id.* at 678. For example, in *City of Jackson v. Byram Incorporators*, the Mississippi Supreme Court held that "substantial evidence support[ed] the chancellor's finding that incorporation of the revised [proposed incorporation area was] reasonable" with respect to transportation. *Id.* The incorporators convinced the court that traffic "ha[d] gotten out of control" and that the new municipality would be able to improve road maintenance services rapidly and "have a positive impact on transportation in the area." *Id.* The new municipality's public works department would employ one superintendent and two-to-four laborers to address the traffic issue with "a half-ton truck, a two-ton flatbed truck with dump body, and a rubber tire hoe." *Id.*

[92] VALENTE ET AL., *supra* note 30, at 165.

[93] *Id.*

[94] *Id.* The Alaska municipal incorporation law, for example, requires evidence that the population is "large and stable enough to support" the proposed municipality. *Id.* (citing ALASKA STAT.

what is known as the "Lakewood Plan," contracting with the county or existing municipalities to provide services for the new municipality.[95] Other states, such as Iowa, do not.[96]

Although almost all state municipal incorporation laws take local preferences into account, they vary in how they evaluate the preferences, how they determine which constituencies' preferences matter, and how they factor these preferences into whether an incorporation ultimately occurs.[97] Some states require a percentage of residents to sign a petition to begin the incorporation process, some hold referendum elections to approve or reject incorporations, and others employ both mechanisms.[98]

2. Determining Municipal Boundaries

Defining where the municipality begins and ends is almost as important as deciding whether an area needs a new municipality.[99] As with the other components of municipal incorporation law, states differ in their approaches

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§ 29.05.031(a)(1) (2020)). Similarly, the Iowa version requires that the new municipality have the resources to "provide customary municipal services within a reasonable time." *Id.* (citing IOWA CODE § 368.17(1) (2020)). As of 1993, six states' laws set "a minimum ad valorem tax base" requirement. *Id.* (citing U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELS., *supra* note 60, at 22–23). The term "ad valorem," translated to mean "according to the value," refers to "an assessment of taxes against property, real or personal, at a certain rate upon its value." Pratt & Whitney Engine Servs. v. Steager, 806 S.E.2d 757, 758–59 n.2 (W. Va. 2017) (citing Smith v. Am. Airlines, Inc., 606 So. 2d 618, 620 (Fla. 1992)).

[95] VALENTE ET AL., *supra* note 30, at 165–66. This arrangement first arose in the 1950s in Southern California. *Id.* at 165. The community of Lakewood contracted with Los Angeles County, which provided its municipal services, to reduce municipal government overhead costs. *Id.* at 166.

[96] *Id.* (citing Citizens of Rising Sun v. Rising Sun City Dev. Comm., 528 N.W.2d 597 (Iowa 1995)); *see* Laurie Reynolds, *Intergovernmental Cooperation, Metropolitan Equity, and the New Regionalism*, 78 WASH. L. REV. 93, 126 n.131 (2003) (arguing that intergovernmental cooperative efforts fail to correct the socioeconomic gap between cities and affluent suburbs). In *Citizens of Rising Sun v. Rising Sun City Development Committee*, the Iowa Supreme Court held that the incorporators that had submitted a Lakewood Plan for a proposed municipality did not meet their burden of demonstrating that the proposed municipality would be able "to provide customary municipal services." 528 N.W.2d at 600, 601–02; Reynolds, *supra*, at 126 n.131.

[97] VALENTE ET AL., *supra* note 30, at 166; *see infra* notes 105–129 and accompanying text (discussing cases that illustrate the variety of constituencies that states permit to vote in municipal incorporation and boundary change elections). Within the context of annexation, states can mandate that only residents annexing the new territory vote on the matter, that only those residents that are being annexed may vote, or that both groups can take part in the vote. *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 174–75, 179 (1907) (permitting both the annexing territory and the territory that is being annexed to vote); Moorman v. Wood, 504 F. Supp. 467, 468, 471 (E.D. Ky. 1980) (permitting only the residents of the annexing city to vote on the annexation, and excluding those residents whose property would be annexed from voting).

[98] VALENTE ET AL., *supra* note 30, at 166. Often courts will view local preference for incorporation as evidence in favor of incorporation. *Id.*

[99] *See id.* at 166–67 (highlighting the importance of boundary determinations in the municipal incorporation process).

regarding boundaries.[100] Not only are boundary guidelines about finding the ideal municipal size, but they are also intended to prevent conflicts with public services, such as police and fire protection, garbage collection, water, and sewage.[101] Local governments can often provide these types of services only within their boundaries.[102] Boundaries frequently are a point of contention, determining over whom and what the municipality will have authority and how much tax revenue the municipality will raise.[103] Sometimes incorporators redraw boundaries to maximize support for incorporation.[104]

3. Who Gets to Vote on Incorporation?

The question of who gets to decide whether an area can incorporate is among the most contentious aspects of municipal incorporation law.[105] Some states require only the residents of the proposed municipality to vote, whereas others, such as Arizona, require the consent of the surrounding area.[106] Incorporation not only impacts those residing in the new municipality but also the surrounding area and, as such, outsiders may be given a say in the incorporation process.[107]

The variety of incorporation referenda systems makes sense when one considers how much leeway the Supreme Court gives states in this regard.[108]

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[100] *Id.* In Alaska, the population within the boundaries must "be 'interrelated and integrated as to its social, cultural, and economic activities.'" BRIFFAULT & REYNOLDS, *supra* note 33, at 211 (quoting ALASKA STAT. § 29.05.031(a)(1) (2020)). Some states' provisions seem to discourage diversity by requiring homogeneity. *See id.* For example, in Wisconsin "the 'entire territory of the proposed village or city shall be reasonably homogeneous and compact.'" *Id.* (quoting WIS. STAT. § 66.016(1)(a) (2020)). Similarly, in Alabama, to incorporate, there must "be 'a body of citizens whose residences are contiguous to and all of which form a homogeneous settlement or community." *Id.* (quoting ALA. CODE § 11-41-1 (2020)).

[101] BRIFFAULT & REYNOLDS, *supra* note 33, at 211; VALENTE ET AL., *supra* note 30, at 152.

[102] VALENTE ET AL., *supra* note 30, at 152. Some states permit localities to deliver services beyond their boundaries. *Id.* at 152–53.

[103] BRIFFAULT & REYNOLDS, *supra* note 33, at 211.

[104] *See* Terry L. Jones, *In or Out? Adjusted St. George Boundaries Confuse Some Early Voters*, THE ADVOCATE (Sept. 30, 2019), https://www.theadvocate.com/baton_rouge/news/article_31a960a4-e3b5-11e9-947b-f39023d57a55.html [https://perma.cc/24GP-FKJQ] (explaining critiques that the redrawn map for the St. George, Louisiana incorporation excluded condominiums and apartments with many residents of color).

[105] *See* Green v. City of Tucson, 340 F.3d 891, 893 (9th Cir. 2003) (upholding the constitutionality of an Arizona law requiring the consent of nearby municipalities before incorporating a new municipality).

[106] *Compare* Bray v. Stewart, 214 N.W. 193, 194 (Mich. 1927) (limiting voting eligibility in municipal incorporation elections to "only the electors residing within the territory proposed to be incorporated" (quoting The Home Rule Village Act, ch. 78, 1909 Mich. Acts 278 § 5, *amended by* 1919 Mich. Acts 40 § 5, *amended by* 1925 Mich. Acts 40 § 5)), *with* ARIZ. REV. STAT. ANN. § 9-101.01 (2020) (prohibiting incorporating a new municipality within an urbanized area without approval by the existing city or town).

[107] BRIFFAULT & REYNOLDS, *supra* note 33, at 220.

[108] *See supra* notes 63–64 and accompanying text (introducing the holding from *Hunter*).

At issue in *Hunter* was the fact that Pittsburgh and Allegheny had consolidated even though a majority of Allegheny residents voted against the consolidation.[109] The Supreme Court held that the consolidation did not unconstitutionally deprive Allegheny voters of due process if a majority of the residents in the entire proposed consolidated territory had voted in favor of the consolidation.[110] A state may thus constitutionally change municipal boundaries, without giving residents the opportunity to vote, because there is no constitutional right to vote on municipal incorporation.[111]

When states give residents the opportunity to vote, however, they cannot do so in any way that conflicts with the Constitution, specifically, with the Fifteenth Amendment.[112] In 1960, in *Gomillion v. Lightfoot*, the Supreme Court held that a state law redefining municipal boundaries could not infringe upon the Fifteenth Amendment's right to vote.[113] When African American voters

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[109] 207 U.S. 161, 174–75, 179 (1907). Under the Pennsylvania statutory scheme, two cities can consolidate if a majority of the residents from both cities vote in favor of it, even if a majority of one of the cities opposes the consolidation. *Id.* at 162–63. At the time of *Hunter*, the population of Pittsburgh was much larger than that of Allegheny. *Id.* at 165. Pittsburgh had at least 350,000 residents in 1900, whereas Allegheny had only about 150,000. *Id.* Even though the Allegheny voters opposed the consolidation, the Pittsburgh majority overwhelmed them in the consolidation vote. *Id.* at 174–75. Allegheny voters opposed the consolidation because they did not want to pay taxes toward reducing Pittsburgh's debt. *Id.* at 165–66. Allegheny voters challenged the consolidation as a deprivation of property without due process of law. *Id.* at 166.

[110] *Id.* at 174–75, 179.

[111] Green v. City of Tucson, 340 F.3d 891, 896 (9th Cir. 2003); *see* Twp. of Jefferson v. City of W. Carrollton, 517 F. Supp. 417, 418, 421 (S.D. Ohio 1981) (upholding a territorial annexation after a majority of property owners signed and presented a petition to a board of county commissioners, who then held a hearing and approved the annexation), *aff'd sub nom.* Jefferson Twp. v. W. Carrollton, 718 F.2d 1099 (6th Cir. 1983). There is no federal right to vote on municipal incorporation. *Green*, 340 F.3d at 896. Some states, however, have granted their citizens the right to vote on municipal incorporations. *Id.* at 897. In *Green v. City of Tucson*, the Ninth Circuit held that by "providing for direct incorporation[, Arizona] . . . granted qualified voters in unincorporated areas the constitutional equivalent of a right to vote on municipal incorporation." *Id.* at 898.

[112] Gomillion v. Lightfoot, 364 U.S. 339, 345 (1960); *Green*, 340 F.3d at 897; *see Hunter*, 207 U.S. at 174–75, 179 (granting the franchise to residents of the entire proposed consolidated territory); Moorman v. Wood, 504 F. Supp. 467, 468, 471–72, 477 (E.D. Ky. 1980) (applying *Hunter* and upholding a state law that permitted only the annexable Covington residents to vote on the proposed annexation, while excluding other Covington residents from voting). Because every state has plenary power to modify its subdivisions, its legislature has "broad discretion to adopt the means it deems 'necessary and proper' in complying with the constitutional directive." Woonsocket Sch. Comm. v. Chafee, 89 A.3d 778, 791 (R.I. 2014) (emphasis omitted) (citing *In re* Request for Advisory Op. from the House of Representatives (Coastal Res. Mgmt. Council), 961 A.2d 930, 938 (R.I. 2008)).

[113] 364 U.S. at 345. After World War II, African American voter registration surged in Tuskegee, Alabama, challenging the white voters' control over election outcomes. Jonathan L. Entin, *Of Squares and Uncouth Twenty-Eight-Sided Figures: Reflections on* Gomillion v. Lightfoot *After Half a Century*, 50 WASHBURN L.J. 133, 135, 138 (2010). The Alabama Legislature passed a law changing the boundaries of the City of Tuskegee. *Gomillion*, 364 U.S. at 340. The law would effectively remove either 395 or 396 of the 400 voters of color from the city boundaries without removing one white voter. *Id.* at 341. The redrawn map removed the Tuskegee Institute, in which a large population of middle-class African Americans worked and resided, and a U.S. Department of Veterans Affairs hos-

challenged the Alabama Legislature's redrawing of the city of Tuskegee, which had the effect of excluding voters of color from Tuskegee, the Court found that the voters adequately pled a Fifteenth Amendment claim.[114] The redrawn map exclusively deprived voters of color of their right to vote, while maintaining white voters' right to vote in the city.[115] *Gomillion* stands for the proposition that if a state alters municipal boundaries with the specific intent of depriving individuals of color of the right to vote, the state has violated the Fifteenth Amendment.[116]

Following the *Gomillion* decision, federal courts have continued to defer to states' authority for choosing the electoral methods of their municipal boundary changes, unless there is evidence of racial discrimination.[117] Without

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pital for African American veterans, from the city. Entin, *supra*, at 133, 134–35. Civil rights attorney Fred Gray, in arguing for the petitioners, contested that the law changed "Tuskegee from a square to a '25 sided sea dragon.'" Leonard S. Rubinowitz, *The Courage of Civil Rights Lawyers: Fred Gray and His Colleagues*, 67 CASE W. RES. L. REV. 1227, 1238 (2017) (quoting FRED D. GRAY, BUS RIDE TO JUSTICE 113 (rev. ed. 2013)). In a revealing back-and-forth during oral argument for the case, Justice Frankfurter, who would go on to write the opinion, asked Fred Gray to point out a map of the new Tuskegee in which the Tuskegee Institute was situated. *Id.* at 1238–39 n.44. Gray responded that the Institute was no longer within the boundaries of the city. *Id.* According to Gray, the map ultimately persuaded Justice Frankfurter to hold that the petitioners had adequately pled a Fifteenth Amendment claim. *Id.* The Fifteenth Amendment established universal male suffrage, stating: "The 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." U.S. CONST. amend. XV, § 1.

[114] *Gomillion*, 364 U.S. at 345; *see supra* note 113 and accompanying text (quoting the language of the Fifteenth Amendment).

[115] *Gomillion*, 364 U.S. at 341. The act of the Alabama Legislature exceeded "an ordinary geographic redistricting measure even within familiar abuses of gerrymandering." *Id.* If the facts were true, then the Alabama Legislature passed the act only to segregate white voters and voters of color. *Id.* It is important to note, though, that the Court held that the petitioners in *Gomillion* did not plead facts to sustain a Fourteenth Amendment claim. *Id.* at 343. Under *Hunter* and similar cases, the Supreme Court explained, in *Gomillion*, that there is no contractual relationship that is constitutionally protected between a state and its municipalities such that a change in municipal boundaries would give rise to a Due Process claim. *Id.* Justice Frankfurter's majority opinion did not discuss the merits of the Equal Protection Clause claim. *See id.* at 340, 343, 348 (overturning the lower courts' dismissal of petitioners' constitutional complaint based on Fifteenth Amendment grounds, but rejecting the appeal on Fourteenth Amendment Due Process grounds without deliberating on the merits of an Equal Protection Clause claim). In a concurring opinion, Justice Charles E. Whittaker argued that the Supreme Court should have decided the case on Equal Protection Clause grounds instead of the Fifteenth Amendment. *Id.* at 349 (Whittaker, J., concurring). To Justice Whittaker, the Alabama act illegally segregated its population by race, and thus violated the Equal Protection Clause as understood in *Brown*. *Id.* (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954)).

[116] *Id.* at 346 (majority opinion).

[117] *See Moorman*, 504 F. Supp. at 468, 477 (affirming a city's annexation of adjacent unincorporated territory where only the city residents could vote on the annexation and not those being annexed). For example, in its 1980 decision in *Moorman v. Wood*, the U.S. District Court for the Eastern District of Kentucky applied *Hunter* and affirmed a city's annexation in which only the residents of the territory to be annexed could vote, but not the remaining residents who would suffer population loss. *Id.* at 471–73, 477. The annexation did not violate the Equal Protection Clause rights of the city residents that were barred from voting. *Id.* at 474. The petitioners did not bring a Fifteenth Amendment claim. *See id.* at 471 (explaining that the petitioners brought a Fourteenth Amendment Equal Protection

evidence of racial discrimination, a plaintiff does not have standing to bring a Fourteenth Amendment claim against a state statute defining or changing municipal boundaries.[118]

In 1977, the Supreme Court added a gloss to *Hunter* with its ruling in *Lockport v. Citizens for Community Action at the Local Level, Inc*.[119] In *Lockport*, although a majority of city residents in the county voted in favor of a county referendum to restructure its government, a majority of the residents of the unincorporated area voted against it.[120] The Court held that the residents of the unincorporated area had sufficiently different interests in the election outcome from their city counterparts because those in the unincorporated area did not have city services to fall back on if the county services declined.[121] The outcome of the election, therefore, did not violate the city dwellers' Equal Protection rights because of their different interests.[122] *Lockport* shows that courts are cognizant of groups' different interests in state subdivision elections.[123] If different constituencies have sufficiently different interests in the outcome of an election, then a state that gives only the more interested group the right to vote in the election would not be in violation of the Equal Protection Clause.[124]

States have interpreted the *Hunter-Gomillion-Lockport* doctrinal trifecta as a greenlight to restructure municipal boundaries in a variety of ways.[125] According to *Hunter*, municipalities are creatures of their respective states and thus states can arrange municipalities as they see fit.[126] Under *Lockport*, if states hold elections for municipal life-cycle events or boundary changes, they

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Clause claim). The court in large part based its decision on *Hunter*, emphasizing that despite the voting rights cases, *Hunter* still protected the wide latitude of states to formulate their political subdivisions. *Id.* at 472–73. The court further noted that "*Hunter* is still good law," except as affected by the voting rights cases and where states have reconfigured political subdivisions "for invidious racial motives or in other situations involving a clear denial of due process or equal protection." *Id.* at 473.

[118] *Id.* at 472–73. The court explained that "a state statute directly placing a citizen in a particular city or county, or changing by the redrawing of boundary lines the political subdivision in which he resides, or providing some procedure where that may be done, may not be attacked under the due process or equal protection clauses of the Fourteenth Amendment, except in certain very restricted circumstances." *Id.*

[119] 430 U.S. 259, 271–72 (1977).

[120] *Id.* at 262, 272–73.

[121] *Id.* at 272–73.

[122] *Id.*; *see* U.S. CONST. amend. XIV, § 1 (prohibiting any state from "deny[ing] to any person within its jurisdiction the equal protection of the laws").

[123] 430 U.S. at 271–72.

[124] *Id.*

[125] *See* Gomillion v. Lightfoot, 364 U.S. 339, 345, 347 (1960) (clarifying that states cannot change municipal boundaries with the specific intent of depriving people of color of the right to vote in municipal elections); Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) (giving states the general flexibility to arrange their boundary change processes however they see fit, with or without requiring elections); *infra* note 129 and accompanying text (detailing how courts have applied *Hunter*, *Gomillion*, and *Lockport*).

[126] 207 U.S. at 178–79.

can subsequently restrict the electorate if voters have distinct interests in the outcome of the election.[127] The only constraint on both *Hunter* and *Lockport* is the holding of *Gomillion*, which prohibits a state from engaging in invidious discrimination through municipal life-cycle votes.[128] Consequently, federal courts have been accommodating of most state municipal incorporation, dissolution, annexation, and secession methods.[129]

4. Who Gets the Final Say on Incorporation?

Municipal referendum elections, where state incorporation statutes require them, are not the sole procedural check on incorporation.[130] Courts have pivotal roles in many state incorporation regimes.[131] Some statutes, such as that of Arkansas, require courts to make substantive decisions as part of the process.[132] On the other end of the spectrum, in Texas, courts may only certify that petitioners have fulfilled all the objective criteria.[133] Mississippi's law falls

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[127] 430 U.S. at 272–73.

[128] 364 U.S. at 346.

[129] *See Lockport*, 430 U.S. at 272–73 (affirming the decision not to annex after a majority of voters in the unincorporated territory voted against the annexation, even though a majority of the entire voting population within the proposed boundaries voted in support of the annexation); *Hunter*, 207 U.S. at 174–75, 179 (establishing a franchise for the entire proposed consolidated territory, even though urban voters would end up controlling the outcome at the expense of voters in the unincorporated territory); Moorman v. Wood, 504 F. Supp. 467, 468, 477 (E.D. Ky. 1980) (affirming a city's annexation of adjacent unincorporated territory where only the city residents were permitted to vote on the annexation, and not those to be annexed); Murphy v. Kansas City, 347 F. Supp. 837, 838, 847 (W.D. Mo. 1972) (affirming an annexation where only the existing city dwellers could vote, and not the people to be annexed). For example, in 1972, the U.S. District Court for the Western District of Missouri denied injunctive relief to Platte County residents who were annexed into Kansas City without being given the ability to vote on the matter. *Murphy*, 347 F. Supp. at 838, 847. The court cited *Hunter*, explaining that Kansas City was merely exercising the authority granted to it by the state of Missouri. *Id.* at 847. Kansas City could extend its boundaries without permission from the Platt County residents who would be annexed. *Id.* at 838, 847. The court distinguished the case from *Gomillion* and other voting rights cases by reasoning that the residents of the unincorporated territory to be annexed were not residents of the city yet, and therefore had not been denied the right to vote in the city election. *See id.* at 844 (distinguishing the circumstances of *Murphy v. Kansas City* from those of *Gomillion*). The court held that Missouri had a rational basis for differentiating the voting process for annexing unincorporated territory from that of unincorporated territory. *Id.* at 847. The court found that there was a difference between replacing municipal government services with new ones and forming a new municipal government where only a county government had existed. *Id.* at 846. Requiring voter approval for one and not the other, therefore, was reasonable. *Id.*

[130] BRIFFAULT & REYNOLDS, *supra* note 33, at 221.

[131] *Id.* at 209.

[132] *Id.* (citing White v. Lorings, 623 S.W.2d 837 (Ark. 1981)).

[133] *Id.* (citing *In re* Fitzgerald, 140 S.W.3d 380 (Tex. 2004)). A Texas appellate court reversed the trial court's rejection of an incorporation in the 2004 case *In re Fitzgerald*, holding that the trial court was permitted only to verify that the petition was properly filed, and could not make findings about whether the territory was primarily rural. *Id.*

somewhere in the middle, restricting the judicial role in some matters but granting independence on others.[134]

In Pennsylvania, incorporators file a petition for incorporation with the trial court which then appoints a Borough Advisory Committee made up of residents of the proposed borough and the surrounding area.[135] The Advisory Committee reviews the petition, holds hearings, and issues a report to the trial court either in support of or against the incorporation.[136] The trial court can stray from the Borough Advisory Committee's recommendations, but when that decision is appealed the appellate court must review the decision.[137]

Even when a state statute does not include judicial certification, it typically includes judicial recourse for affected people to appeal incorporation decisions.[138] The Louisiana statute, for example, lists three people or entities that can contest incorporation: (1) an elector living in the area to be incorporated; (2) anyone owning land in the area to be incorporated; and (3) neighboring

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[134] *Id.* (citing Fletcher v. Diamondhead Incorporators, 77 So. 3d 92 (Miss. 2011)). In *Fletcher v. Diamondhead*, although the court could only examine "compliance with technical criteria, such as number of signatures on a petition," it had the discretion to consider "whether the voter rolls actually show the number of qualified voters in an area." *Id.*

[135] *In re* Incorporation of Bridgewater, 488 A.2d 374, 375 (Pa. Commw. Ct. 1985). Pennsylvania has counties, cities, boroughs, and townships. Irina Zhorov, *Explainer: Cities, Boroughs, and Townships, Oh My! Pa. Municipalities Clarified*, WHYY (Apr. 4, 2016), https://whyy.org/articles/explainer-cities-boroughs-and-townships-oh-my-pa-municipalities-clarified/ [https://perma.cc/VS6W-XY59]. In Pennsylvania, boroughs are usually smaller than cities. *Id.* They typically have fewer than five thousand residents. *Id.* Most boroughs follow a weak mayor system in that the elected borough council wields most of the power. *Id.* In one case, *In re Incorporation of Bridgewater*, residents proposed to incorporate Bridgewater (also known as Toby Farms) as a borough within the Chester Township of Pennsylvania. 488 A.2d at 375. The trial court appointed a five-member Borough Advisory Committee, which looked at the consequences of incorporating on the Township's demographic composition. *Id.* Without incorporating Bridgewater, Chester Township was 59% white and 41% people of color. *Id.* at 376. If Bridgewater were to incorporate, Chester Township would become 82.5% white and 17.4% people of color, while the rest of the township, without Bridgewater, would be 26.6% white and 73% people of color. *Id.* The Borough Advisory Committee recommended that the trial court deny Bridgewater's petition for incorporation, citing segregationist motivations for incorporation and concerns that Bridgewater residents were trying to avoid contributing to paying off the township's debts. *Id.* The trial court followed the Borough Advisory Committee's recommendations and denied the petition. *Id.* at 375. The appellate court affirmed the denial and stated that, with the incorporation, the township would lose the "support and balance which is essential to preserve and develop a complete, integrated and, yet, diverse community of population interests, and uses; all of which are essential to the stability and growth of the suburban municipality." *Id.* at 377.

[136] *Bridgewater*, 488 A.2d at 375.

[137] *See In re* Incorporation of the Chilton, 646 A.2d 13, 16–17 (Pa. Commw. Ct. 1994) (overturning the trial court's decision to grant incorporation against the recommendation of the Borough Advisory Commission, and clarifying that the trial court had the discretion to weigh factors unspecified in the state code, which were discussed in the Borough Advisory Committee's report).

[138] *See* LA. STAT. ANN. § 33:4(A) (2020) (providing interested parties with the right to contest incorporations); *infra* notes 158–201 and accompanying text (discussing Louisiana's incorporation statute). After incorporators have succeeded in winning their incorporation vote, it may be too late for other residents to contest the incorporation. *See infra* notes 158–201 and accompanying text (discussing litigation following the St. George, Louisiana incorporation election).

municipalities that an incorporation would negatively impact, or an elected official of the affected municipalities.[139] If the district court grants the incorporation anyway, then anyone who filed a petition contesting the proposed incorporation or a voter residing in the area to be incorporated can appeal the decision.[140]

In a growing number of states, the county legislature, county committee, or state administrators are the ultimate decision-makers.[141] In Kansas, after holding a hearing on the proposed incorporation, the county legislature issues the decision.[142] Alternatively, in California, a county-level committee reviews the incorporation petition and grants approval or denies it.[143] Some states, such as Minnesota and Oregon, appoint state administrative bodies to preside over incorporation decisions.[144] In Oregon, for example, the Land Use Board of Appeals reviews proposals for incorporation.[145]

These state and county administrative bodies consider whether incorporation is in the best interest of the region or state, taking care to avoid unnecessary incorporations near metropolitan areas.[146] To make these decisions, they assess political activity, fiscal data, geography, land use, transportation infrastructure, and the demographics of the area, among other factors.[147] State and county-level review of incorporation successfully has curtailed the propagation of numerous, small new municipalities.[148]

Together with the aforementioned three elements of an incorporation regime—local government need, municipal boundaries, and the relevant elec-

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[139] LA. STAT. ANN. § 33:4(A).

[140] *Id.* § 33:5.

[141] BRIFFAULT & REYNOLDS, *supra* note 33, at 221–22.

[142] KAN. STAT. ANN. § 15-123 (2020); BRIFFAULT & REYNOLDS, *supra* note 33, at 221.

[143] BRIFFAULT & REYNOLDS, *supra* note 33, at 221 (citing CAL. GOV'T CODE § 56826 (West 2020)). The committee is called a Local Agency Formation Commission. *Id.*

[144] *Id.*

[145] *Id.* The Land Use Board of Appeals (LUBA) "has exclusive jurisdiction to review all governmental land use decisions, whether legislative or quasi-judicial in nature." *Land Use Board of Appeals*, OREGON.GOV, https://www.oregon.gov/luba/Pages/index.aspx [https://web.archive.org/web/20190912081715/https://www.oregon.gov/LUBA/Pages/index.aspx]. The Oregon Legislature established the LUBA in 1979. *Id.* It has three members, each of whom is an attorney appointed by the governor. *Frequently Asked Questions*, OREGON.GOV, https://www.oregon.gov/luba/Pages/Frequently-Asked-Questions.aspx [https://perma.cc/3ZKA-GF33]. "LUBA hears and rules on appeals of land use decisions made by local governments and special districts." *Id.*

[146] BRIFFAULT & REYNOLDS, *supra* note 33, at 222 (citing Pleasant Prairie v. Dep't of Local Affairs & Dev., 334 N.W.2d 893, 900 (Wisc. 1983)). The administrative bodies consider the proposed municipal incorporation through "political, economic, fiscal, demographic, geographic, land use, [and] transportation" lenses. *Id.*

[147] *Id.*

[148] Briffault, *supra* note 28, at 83. State administrative bodies do not typically have the power to eliminate existing local governments or force mergers. *Id.*

torate—which entity has the final say and what criteria it considers have implications for the racial and socioeconomic makeup of the state.[149]

II. Case Studies: Louisiana, California, and Arizona

Incorporation is a politically charged process in any state.[150] Nevertheless, a state's specific incorporation requirements and processes often shape how, and among whom, the political fights take place.[151] The methods by which states manage the municipal life cycle have significant implications for the socioeconomic and demographic patterns in rural, suburban, and urban communities.[152] This Part explores the state municipal incorporation regimes of Louisiana, California, and Arizona.[153] Section A of this Part discusses Louisiana's municipal incorporation landscape.[154] Section B explores California's processes.[155] Section C concludes the tri-state analysis with an explanation of Arizona's municipal incorporation laws.[156] These three states' municipal incorporation laws are samples of the diversity in incorporation processes throughout the United States.[157]

A. Louisiana

Out of the three states that this Part examines, Louisiana has the fewest obstacles to incorporate an unincorporated area.[158] The state's incorporation

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[149] *See* Briffault & Reynolds, *supra* note 33, at 219 (describing how municipal incorporation affects racial, ethnic, and class composition of a region of a state). Between the summer of 1973 and the winter of 1974, there were 104 municipal boundary change incidents—incorporations, annexations, detachments, mergers, consolidations, or dissolutions—in the United States. Donald G. Hagman, Symposium, *The White Curtain: Racially Disadvantaging Local Government Boundary Practices: Introduction and Summary*, 54 U. Det. J. Urb. L. 681, 697 (1977). The boundary changes disadvantaged people of color in fifty-four of those 104 incidents through at least one of five ways: "school segregation, the dilution of voting strength, the denial of quality services, the denial of housing, and disadvantageous taxation." Gayle Binion, *Chapter 2: Incident Survey and Analysis*, 54 U. Det. J. Urb. L. 695, 703–04 (1977).

[150] *See* JR Ball, *JR Ball: St. George About a Political Divide, Not a Racial One*, Greater Baton Rouge Bus. Rep. (Oct. 23, 2019), https://www.businessreport.com/opinions/st-george-political-divide-baton-rouge [https://perma.cc/565Z-6BSK] (exploring the complicated dynamics of the St. George, Louisiana incorporation).

[151] *See infra* notes 158–282 and accompanying text.

[152] *See* Briffault & Reynolds, *supra* note 33, at 219 (explaining that municipal borders impact the racial makeup of an area and that "[r]acial, ethnic, and class concerns have long played an important role in local government formation"); *see also* Binion, *supra* note 149, at 703–04 (citing data demonstrating that boundary changes significantly disadvantaged people of color between 1973 and 1974).

[153] *See infra* notes 158–282 and accompanying text.

[154] *See infra* notes 158–201 and accompanying text.

[155] *See infra* notes 202–235 and accompanying text.

[156] *See infra* notes 236–282 and accompanying text.

[157] *See infra* notes 158–282 and accompanying text.

[158] *Compare* La. Stat. Ann. § 33:1–3 (2020) (requiring that incorporators collect signatures of 25% of only residents of the proposed municipality, submit a petition to the governor, and then hold

procedure includes: (1) a petition for incorporation; (2) the governor's review of that petition; and (3) a special election wherein only electors residing within the area proposed for incorporation can vote.[159]

The first step to incorporate an unincorporated area in Louisiana is to compile a petition.[160] After the chair files the petition with the secretary of state and receives an endorsement, the secretary of state submits the petition for certification in each parish within which the municipality will exist.[161] The registrar of voters for each parish then tells the chair how many electors reside in that parish's portion of the municipality.[162] The chair must gather signatures of at least twenty-five percent of the electors living in the proposed area.[163]

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an election among only those residing in the proposed municipality), *with* ARIZ. REV. STAT. ANN. § 9-101.01 (2020) (requiring organizers of proposed municipalities within urbanized areas to obtain consent of the neighboring municipalities that make the area urban).

[159] LA. STAT. ANN. § 33:1–3. The Louisiana state legislature enacted the state's current municipal incorporation law in 1984. 1984 La. Acts 536, §§ 21–27.

[160] LA. STAT. ANN. § 33:1. The petition must either be on the approved petition form or provide the same information as the approved form. *Id.* § 33:1(A). Otherwise, the petition is invalid. *Id.* A petition must include the desired name of the proposed municipality, "a legal description of the area," a map, and a list of every parish within which the proposed municipality is located. *Id.* § 33:1(A)(1), (5). A petition must certify that the entire geography of the proposed municipality is contiguous. *Id.* § 33:1(A)(1). Additionally, a petition must state the number of residents in the proposed municipality, based on the latest federal census or a similar verifiable report. *Id.* § 33:1(A)(2). The area must have a population of at least two hundred residents. *Id.* § 33:1(A). The proponents must state the assessed land value within the proposed municipality as well. *Id.* § 33:1(A)(3). A petition must also list the public services that the municipality will provide and explain how the municipality will provide them. *Id.* § 33:1(A)(4). Lastly, the petition must identify a chair and vice-chair for the incorporation process. *Id.* § 33:1(A)(6). The chair and vice chair are the agents for legal purposes, and "[n]otice will be sufficient if served on the chairperson or vice chairperson." *Id.*

[161] *Id.* § 33:1(B)(1). It is not uncommon for municipalities to straddle parish lines. *See* LORI L. SMITH, SE. LA. UNIV., LOUISIANA DIRECTORY OF CITIES, TOWNS, AND VILLAGES 4–42 (2005), https://docplayer.net/15486828-Louisiana-directory-of-cities-towns-and-villages-lori-l-smith-sims-memorial-library-southeastern-louisiana-university.html [https://perma.cc/9YNG-K9BA] (matching the cities, towns, and villages of Louisiana to their parishes). The secretary of state notifies the chair of the filing date within ten business days of the filing. LA. STAT. ANN. § 33:1(B)(1)(a). The chair cannot file a petition for incorporation within thirteen days of an upcoming election, or until ten days have passed since an election. *Id.* § 33:1(B)(1)(c). Within the window for certification, no municipality may annex an area that is part of the proposed municipality. *Id.* § 33:1(G). The registrar of voters will have already seen the petition because the chair must provide notice to the registrar of voters for each parish of the chair's intention to submit the petition to the secretary of state at least fourteen days before submitting the petition to the secretary of state. *Id.* § 33:1(C)(2).

[162] LA. STAT. ANN. § 33:1(B)(1)(b).

[163] *Id.* § 33:1(C)(1). The chair then submits the petition, with the signatures, to the registrar of voters. *Id.* § 33:1(C)(2). The signatures must "reasonably correspond" with the electors' signatures on file in the registrar's offices. *Id.* § 33:1(D)(1). If there are under ten thousand qualified electors in the proposed municipality, the chair must submit the petition with signatures within 180 days of the secretary of state endorsing the petition. *Id.* § 33:1(C)(2)(a). If there are more than ten thousand qualified voters in the proposed municipality, the chair must submit the petition with signatures for the registrar of voters' certification within 270 days of the endorsement date. *Id.* § 33:1(C)(2)(b). When the chair submits the petition and signatures, the chair must also submit "an affidavit attesting to the fact that no signatures were obtained prior to the receipt of notice of the endorsement date." *Id.* § 33:1(C)(3)(a). If

Electors who sign a petition may withdraw their signatures within five days of the chair submitting the petition.[164] If the petition has enough signatures, the registrar or registrar of voters certifies the petition and sends it to the governor for review.[165] Next, the governor checks to see that the petition complies with the requirements, including that the proposed municipality has at least two hundred residents.[166] The governor then schedules a special election, in which only electors residing within the proposed municipality may vote.[167]

Three types of people or entities have standing to contest the incorporation in district court: (1) an elector living in the to-be-incorporated area; (2) a landowner in the to-be-incorporated area; and (3) a municipality or elected official of a municipality that could be adversely affected by the incorporation.[168] The district court considers the reasonableness of the incorporation and whether the municipality would be able to provide the public services as proposed within in a timely manner.[169] As part of this determination, the district court evaluates the possible negative impacts of incorporation on neighboring municipalities.[170] Depending on the findings, the district court will either order the incorporation or deny the incorporation.[171] Either party may appeal the district court's holding.[172]

The most recent Louisiana incorporation vote occurred in St. George.[173] St. George is an unincorporated area of East Baton Rouge Parish.[174] The de-

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the chair does not meet the deadline for filing, then the petition is null and void and the chair must wait at least sixty days to start the process anew. *Id.* § 33:1(C)(3)(b). If, after submitting the petition, the registrar of voters informs the chair that fewer than 25% of the electors signed the petition, the chair has up to sixty more days to find additional signatures. *Id.* § 33:2(B).

[164] *Id.* § 33:1(D)(2).

[165] *Id.* § 33:2(C).

[166] *Id.* § 33:3(A).

[167] *Id.* § 33:3(A), (B). If a majority of voters decide to vote against incorporation, the incorporators must wait two years before beginning the process again. *Id.* § 33:3(C). If, however, a majority votes in favor of the incorporation, the area will be legally incorporated after thirty days unless someone contests the incorporation within that period. *Id.* § 33:3(D).

[168] *Id.* § 33:4(A). Any of these parties may file a petition in district court and serve the chair with a summons. *Id.* § 33:4(B). If there is more than one petition, the court will consolidate the actions into one matter. *Id.* The district court can appoint a noninterested party as a commissioner to convene hearings and to file a recommendation with the district court, stipulating the commissioner's factual and legal conclusions. *Id.* § 33:4(C).

[169] *Id.* § 33:4(D). The district court also checks for incorporation procedural compliance. *Id.*

[170] *Id.*

[171] *Id.* § 33:4(E)(1), (2)(a). If the district court denies the incorporation, and the incorporators do not appeal in a timely manner, the proponents of the incorporation may not submit another petition within two years of the denial. *Id.* § 33:4(E)(2)(b).

[172] *Id.* § 33:5. If the incorporation succeeds, the governor will appoint officers to hold office until the next municipal election. *Id.* § 33:6.

[173] Stephanie Riegel, *Baton Rouge Inches Closer to Lawsuit Against St. George with "Litigation Hold Notice,"* GREATER BATON ROUGE BUS. REP. (Oct. 24, 2019), https://www.businessreport.com/business/news-alert-city-inches-closer-to-lawsuit-against-st-george-with-litigation-hold-notice [https://perma.cc/YF22-M8W4].

mographics of the St. George area are unrepresentative of the broader Parish—St. George is less than 15% black, whereas East Baton Rouge Parish is about 46.5% black.[175] The mean household income of St. George is approximately thirty thousand dollars higher than the city of Baton Rouge.[176] In explaining the motivation to secede from the East Baton Rouge Parish school district and create their own Southeast Community School District, the predominantly white, wealthy St. George parents reasoned that East Baton Rouge Parish schools have historically underperformed.[177] The parents, however, failed to gather sufficient support for school district succession twice, once in 2012 and

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[174] Stephanie Riegel, *St. George Votes to Incorporate . . . Now What?*, GREATER BATON ROUGE BUS. REP. (Oct. 23, 2019), https://www.businessreport.com/business/st-george-ncorporates-now-what-baton-rouge [https://perma.cc/MSF3-656X]; *see supra* note 2 and accompanying text (explaining that a parish is Louisiana's version of a county). St. George is sixty square miles. Riegel, *supra*. East Baton Rouge Parish and the City of Baton Rouge consolidated into a single form of government in 1947. *Id.*; *Our Government*, *supra* note 13. Because of the consolidation, a single government manages both East Baton Rouge Parish and the City of Baton Rouge. *Our Government*, *supra* note 13. The consolidation "enabled economies of scale and empowered elected officials to make spending decisions based on what was best for the rapidly growing parish, not just the particular pockets where tax dollars were generated." Riegel, *supra*. In 1982, citizens of Baton Rouge Parish voted to further consolidate the two entities by merging the City and Parish Councils into one—the Metropolitan Council. *Our Government*, *supra* note 13. The Metropolitan Council promulgates policies for the City-Parish by managing the budget and passing legislation. *Id.* The Mayor-President, who is both the Mayor of the City of Baton Rouge and the Parish President, manages the daily City and Parish functions, and also appoints and supervises most department heads. *Id.* The Mayor-President appoints and may remove the Finance Director, Purchasing Agent, Personnel Administrator, Fire Chief, and the Police Chief, as well as the heads of many departments, including Environmental Sciences, Transportation and Drainage, Maintenance, Development, Buildings and Grounds, Fleet Management, and the Office of Business Operations and Capital Programs. CITY OF BATON ROUGE & PARISH OF EAST BATON ROUGE, THE PLAN OF GOVERNMENT OF THE PARISH OF EAST BATON ROUGE AND THE CITY OF BATON ROUGE §§ 4.03, 5.01, 5.02 (last amended 2015) [hereinafter THE PLAN OF GOVERNMENT]. In lieu of a "Home Rule Charter," voters from the Parish approved a "Plan of Government," in 1947, which outlines the organization of the government. *Id.*

[175] Harris, *supra* note 6. The Baton Rouge Public Schools were under a desegregation order that had been instituted in 1956, after *Brown v. Board of Education*. 347 U.S. 483, 495 (1954); Harris, *supra* note 6. The order was lifted in 2003, making it the longest post-*Brown* desegregation order. Harris, *supra* note 6. When a federal judge lifted the desegregation order in 2003, the school district was 75% black. *Id.* By 2019, after three communities incorporated as their own cities and left the Parish school district, the school was 81% black and 89% students of color. *Id.*

[176] Runnels, *supra* note 8, at 66. At least 60% of the households in Baton Rouge have incomes below fifty thousand dollars, whereas at least 60% of St. George households have incomes above fifty thousand dollars. *Id.*

[177] Tom Gogola, *The Jim Crow Soft-Shoe Segregationists of St. George*, THE BAFFLER (July 2014), https://thebaffler.com/salvos/the-jim-crow-soft-shoe-segregationists-of-st-george [https://perma.cc/4FH7-WRPS]; Harris, *supra* note 6. Louisiana State Senator Mack "Bodi" White filed the bill in March 2013 to create a St. George breakaway school district. Runnels, *supra* note 8, at 63–64. The bill passed the House of Representatives, but failed in the Senate. *Id.* at 64. According to a Baton Rouge Area Chamber study, about six out of every ten students in the East Baton Rouge Public School District attended a school that was either "failing" or "almost failing" in the 2011–2012 academic school year. Gogola, *supra*. Additionally, 20% of high school students dropped out of school during the 2011–2012 school term. *Id.*

again in 2013.[178] Eventually, the St. George residents realized that they would have a better chance of creating their own school district if they incorporated as their own city.[179]

The parents launched an incorporation campaign in 2015.[180] They gathered at least eighteen thousand signatures, but then lost one thousand of them to a withdrawal campaign.[181] In the end, the St. George incorporation supporters were just seventy-one signatures short of the threshold to add incorporation to the next ballot.[182] In 2018, they adjusted the boundaries of the proposed city and tried again.[183] By February 2019, the St. George incorporation supporters had amassed a sufficient number of signatures to hold an incorporation vote later that year, in which only residents of St. George could vote.[184] Then, on October 12, 2019, the residents of St. George went to the polls and fifty-four percent of them voted in favor of the incorporation.[185] The City of Baton Rouge estimated that St. George's cessation from the City-Parish consolidated government would reduce the City-Parish's annual revenues by $48.3 million, which in turn would require the government to either increase taxes or cut services and expenditures by forty-five percent.[186]

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[178] Harris, *supra* note 6.

[179] *Id.* The St. George parents simply followed the blueprint of their neighbors in Central, Louisiana. *Id.* After the parents in Central failed to convince the state legislature to create a new school district in 2005, Central incorporated as a city and created its own school district in 2007. *Id.*

[180] *Id.* The proposed city would be about eighty-five square miles and have 107,000 residents. Jones, *supra* note 104.

[181] Harris, *supra* note 6. A group named Better Together led the withdrawal campaign, going door to door to speak with residents about the consequences of incorporation. *Id.* Advocates of the incorporation, those particularly situated in the eastern part of the proposed municipality, argued that it would improve the schools and empower St. George residents to have better control over how their tax dollars were being spent. Riegel, *supra* note 174. In contrast, their neighbors in the western part of St. George were older, wealthier, and more in favor of maintaining a strong city-parish government. *Id.* In fact, residents in six western St. George neighborhoods circulated annexation petitions to join the City of Baton Rouge, instead of incorporating. *Id.*

[182] Harris, *supra* note 6.

[183] *Id.*; Jones, *supra* note 104. The proposed city would be sixty square miles and have eighty-six thousand residents. Jones, *supra* note 104. Opponents of the incorporation criticized the new map, accusing the incorporators of carving out condominiums and apartments in which many residents of color and low-income residents lived. Harris, *supra* note 6; Jones, *supra* note 104. Whereas the population in the 2015 proposal was 20% Black, the population in the new proposal was only 12% Black. Sophie Kasakove, *The School Secession Movement Is Growing. That's Bad News for Integration*, NEW REPUBLIC (Oct. 15, 2019), https://newrepublic.com/article/155369/school-secession-movement-growing-thats-bad-news-integration [https://perma.cc/AM43-AXLZ]. In response to the accusations, the St. George incorporators posted the following message on the group's Facebook page: "If a precinct had a small percentage of signatures and clearly did not want to be in the new city, they were not included in the updated boundaries." Harris, *supra* note 6.

[184] Harris, *supra* note 6.

[185] Rojas, *supra* note 2.

[186] Kasakove, *supra* note 183. For context, the City-Parish generated $316,347,122 in total revenues for the General Fund in 2018. MARSHA J. HANLON, FIN. DEP'T, COMPREHENSIVE ANNUAL FINANCIAL REPORT: THE CONSOLIDATED GOVERNMENT OF THE CITY OF BATON ROUGE AND PARISH

Under state law, parties have thirty days to challenge the incorporation before it goes into effect.[187] Only three days after the vote, East Baton Rouge Parish Mayor-President Sharon Weston Broome announced that the City-Parish consolidated government was exploring its legal options.[188] On November 4, 2019, Mayor-President Broome, joined by a St. George elector and a Baton Rouge resident, filed a complaint in the Nineteenth Judicial District Court, challenging the incorporation under section 33:4(B) of the Louisiana Revised Statutes.[189] They argued that the incorporation process was fatally flawed because the incorporation petition treated the provision of certain public services as optional.[190] They also contended that the incorporation was unreasonable because it would have a significant negative impact on the City-Parish.[191] Moreover, the plaintiffs argued that the incorporation violated the City-Parish Plan of Government, which prohibited the incorporation of new cities within the parish.[192] Under the Plan of Government, creating a new mu-

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OF EAST BATON ROUGE, LOUISIANA, at Exhibit A-5 (2018), https://www.brla.gov/DocumentCenter/View/7506/2018-CAFR-PDF [https://perma.cc/3E2Z-5HB3].

[187] LA. STAT. ANN. §§ 33:3(D), 4(A) (2020).

[188] Riegel, *supra* note 174. Mayor-President Broome said she was keen on "find[ing] a path forward that was best for ALL the citizens of the parish, not a portion of our population." *Id.*

[189] Terry L. Jones & Blake Paterson, *St. George Incorporation in Limbo After Mayor, Others Sue to Stop Creation of New City*, THE ADVOCATE (Nov. 4, 2019), https://www.theadvocate.com/baton_rouge/news/article_1a07709a-fb65-11e9-81e7-9fcc950f12f5.html [https://web.archive.org/web/20210222020355/https://www.theadvocate.com/baton_rouge/news/article_1a07709a-fb65-11e9-81e7-9fcc950f12f5.html]. Private donors financed the lawsuit. *Id.* In the lawsuit, the plaintiffs requested that the court deny the incorporation. *Id.* Alternatively, the plaintiffs asked that the court order a parish-wide election to validate or invalidate the incorporation. *Id.*

[190] Petition at 4–5, Broome v. Rials, No. C-690041-23 (La. Dist. Ct. Nov. 4, 2019). The plaintiffs pointed out that, despite writing in the incorporation petition that St. George would continue to receive police services from the parish sheriff, "no one from the proposed new city has made any plausible or credible effort to negotiate an agreement with Sheriff Sid Gautreaux for the provision of these services or what the cost may be." *Id.* at 6. The plaintiffs estimated that policing would cost between eighteen and twenty-one million dollars, not four million dollars as the incorporators had budgeted. *Id.* at 7. If the incorporators miscalculated or misrepresented the cost of police services, that would increase the budgeted expenditures for the municipality. *See* COMM. FOR THE INCORPORATION OF ST. GEORGE, LLC, CRI FINAL REPORT: CITY OF ST. GEORGE 4, Exhibit 1 (2018), http://stgeorgelouisiana.com/wp-content/uploads/2020/05/CRI-Final-Report-City-of-St.-George-1.3.2018.pdf [https://perma.cc/5WS9-PGE9] (presuming that St. George residents would continue to receive police services from the East Baton Rouge Parish through a separate tax district, and otherwise accounting for only four million in supplementary police services in the proposed budget). In the proposal, the incorporators estimated the total budgeted expenditures for St. George at $33,911,000. *Id.* at 4.

[191] Petition, *supra* note 190, at 5–6.

[192] *Id.* at 8–9. The Parish Plan of Government specified that, aside from the municipalities of Zachary, Baker, and Central, "[n]o additional city, town or village shall be incorporated in East Baton Rouge Parish." *Id.* (citing THE PLAN OF GOVERNMENT, *supra* note 174, § 1.05). The defendants responded that, in 1984, a state court declared the Plan of Government unconstitutional and unenforceable. Exceptions of No Cause of Action and No Right of Action and Alternative Exceptions of Improper Cumulation of Actions and Failure to Join Parties Needed for Just Adjudication at 1, *Broome*, No. C-690041-23 (La. Dist. Ct. Dec. 2, 2019) [hereinafter Exceptions of No Cause of Action] (citing De-

nicipality would require an amendment, which could be accomplished only through a parish-wide vote.[193] Lastly, the plaintiffs alleged that, in changing the map between the first and second attempts, the incorporators had intentionally removed people of color from the city in order to dilute the voting power of voters of color and decrease minority representation in St. George.[194] Consequently, the plaintiffs requested that the district court either deny the incorporation or order a parish-wide election to amend the City-Parish Plan of Government.[195]

In their response brief, the incorporation organizers claimed that the plaintiffs failed to state a cause of action to contest the election outcome, and argued that an appellate court had held that the Plan of Government's moratorium on incorporations was unenforceable.[196] The defendants did not address the plaintiffs' allegations of racially discriminatory intent.[197] The district court has not yet scheduled the first hearing in the case.[198]

The Mayor-President has considered challenging the incorporation in federal court, arguing that the incorporation process violated residents' Fourteenth Amendment due process rights.[199] In the meantime, pending these legal contests, St. George is not legally a city.[200] If the plaintiffs fail in their legal challenges, St. George will become the fifth largest city in Louisiana.[201]

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vall v. Starns, 2006-2155 (La. App. 1 Cir. 03/21/07), 960 So. 2d 75, 83, *writ denied*, 2007-1224 (La. 06/22/2007), 959 So. 2d 513).

[193] Petition, *supra* note 190, at 9.

[194] *Id.*

[195] *Id.* at 11.

[196] Exceptions of No Cause of Action, *supra* note 192, at 1; Memorandum in Support of Exceptions of No Cause of Action and No Right of Action and Alternative Exceptions of Improper Cumulation of Actions and Failure to Join Parties Needed for Just Adjudication at 2, *Broome*, No. C-690041-23 (La. Dist. Ct. Dec. 2, 2019) [hereinafter Memorandum in Support]. The defendants also claimed that the plaintiffs failed to join necessary parties, including the Secretary of State. Memorandum in Support, *supra*, at 12.

[197] *See generally* Memorandum in Support, *supra* note 196 (lacking any mention of racial demographics of the proposed municipality).

[198] Stephanie Riegel, *The St. George Saga Will Continue*, GREATER BATON ROUGE BUS. REP. (Jan. 7, 2020), https://www.businessreport.com/business/st-george-lawsuit-baton-rouge [https://perma.cc/NSJ7-CBWG].

[199] Riegel, *supra* note 173. Lawyers on both sides predict that the case will last at least two to three years. *Id.*

[200] LA. STAT. ANN. § 33:3(D) (2020). The Louisiana governor will not name any city officials until after the issue has been resolved in court. *Id.* § 33:6.

[201] Rojas, *supra* note 2.

B. California

The California state government exercises more oversight over the municipal incorporation process than its Louisianan counterpart.[202] Even aside from the high financial cost of incorporation in California, incorporation is challenging in California because incorporators must persuade their county's local agency formation commission (LAFCO) to approve of the incorporation.[203] Under the Cortese-Knox-Hertzberg Local Reorganization Act of 2000, organizers must collect signatures, conduct a fiscal analysis, submit a petition, persuade the LAFCO, and then submit the proposal to the voters in an election.[204]

First, if the proposed municipality has over one hundred thousand residents and is situated in a county with over four million residents, the organizers must publish their intention in a newspaper to make others aware of their plan.[205] Then, they can begin collecting signatures.[206] They must obtain signatures of at least twenty-five percent of the registered voters of the proposed

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[202] *Compare* LA. STAT. ANN. § 33:1–3 (granting a limited role to the governor, who checks for procedural compliance), *with* CAL. GOV'T CODE § 56720 (West 2020) (forbidding a local agency formation commission (LAFCO) from approving an incorporation proposal unless certain requirements have been met).

[203] Ihn, *supra* note 51, at 78, 79.

[204] *Id.* Before 1963, the California state government exercised very little state administrative oversight over the municipal incorporation process. Dolores Tremewan Martin & Richard E. Wagner, *The Institutional Framework for Municipal Incorporation: An Economic Analysis of Local Agency Formation Commissions in California*, 21 J.L. & ECON. 409, 412 (1978). Local Boundary Commissions would verify incorporation petitions, unless they did not meet the statutory requirements, and then the organizers would collect sufficient signatures to get the incorporation on their next election's ballot. Ihn, *supra* note 51, at 78. In effect, organizers could freely incorporate territory. Tremewan & Wagner, *supra*, at 412. Then, the California State Legislature passed the Knox-Nisbet Act in 1963 to "discourage[e] urban sprawl, contribut[e] to the logical and reasonable development of local governments, shap[e] the development of local agencies so as to provide for the future need of the county and the communities within the county, and determin[e] the maximum service area and service capacities of existing governmental agencies." *Id.* at 412, 413. In 2000, the California State Legislature tinkered with its incorporation regime by enacting the Cortese-Knox-Hertzberg Local Reorganization Act, which was most recently updated in 2009. Ihn, *supra* note 51, at 78.

[205] CAL. GOV'T CODE § 56760. The notice is at most five hundred words and explains why the organizers are working toward incorporation. *Id.* Between one and three "chief petitioners" must sign the notice of intent. *Id.* California statute formerly defined "chief petitioners" as "any persons designated in a petition for the purpose of receiving any notice authorized or required to be given to those persons." Act of Sept. 9, 1985, ch. 541, § 3, 1985 CAL. GOV'T CODE § 56022 (repealed 2000). The California Legislature did not replace the repealed statute. *See* CAL. GOV'T CODE §§ 56010–56081 (2020) (lacking a definition for "chief petitioners"). Additionally, the newspaper must have a "general circulation within each affected county, affected city, or affected district." *Id.* § 56153.

[206] Ihn, *supra* note 51, at 79. The Governor's Office of Planning and Research suggests that organizers conduct an initial fiscal analysis (IFA) before embarking on the incorporation process, though the IFA is not a requirement under law. *Id.* at 78. When organizers tried to incorporate East Los Angeles in 2007, the IFA cost twenty-five thousand dollars. *Id.* (citing Susannah Rosenblatt, *East L.A. Ready, Financially, for Independence*, L.A. TIMES (Oct. 17, 2007), http://articles.latimes.com/2007/oct/17/ local/me-eastla17 [https://perma.cc/AA52-5WU3]).

municipality or of the landowners of the area in the proposed municipality.[207] Next, the organizers must submit the signatures to their county's LAFCO, which verifies the signatures within thirty days.[208] After completing the signature-collecting step, the organizers draft and submit an incorporation petition.[209] The petition must contain an explanation of the proposed municipality, a boundary map, and the names of one to three organizers.[210] Then, the organizers must commission a Comprehensive Fiscal Analysis (CFA).[211]

The executive director of the LAFCO reviews the petition and CFA and, at least five days prior to the hearing on the incorporation, issues a report with recommendations for the LAFCO.[212] Then, the LAFCO convenes a hearing.[213] The statute does not restrict who can offer comments at the hearing, either in favor of or against the incorporation.[214] LAFCOs have a long list of factors that they must consider as they review a proposal for incorporation, including population density, proximity to other municipalities, the need for public services and cost of delivery, the impact of changing the public services on neighboring areas, the socio-economic impact on the county, the region's transportation plan, water plans, and how the incorporation would affect affordable housing in the county.[215] The statute makes clear that the LAFCO also can consider

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[207] *Id.* at 79 (citing CAL. GOV'T CODE § 56764). The landowners collectively must own at least 25% of the assessed property value in the proposed municipality. *Id.* (citing CAL. GOV'T CODE § 56764).

[208] *Id.* (citing CAL. GOV'T CODE § 56706). The LAFCO prepares a certificate of sufficiency. CAL. GOV'T CODE § 56706. If the petition does not have enough signatures, the LAFCO will immediately notify the organizers. *Id.* § 56706(b)(1). Then, the organizers will have fifteen days to turn in more signatures, and the LAFCO will respond again within ten days. *Id.* § 56706(b)(2), (c).

[209] Ihn, *supra* note 51, at 79.

[210] *Id.* The petition also includes a legal description of the proposed municipality. *Id.*

[211] *Id.* The CFA reflects the estimated costs of public services and facilities. *Id.*

[212] CAL. GOV'T CODE § 56665. The report goes out to the organizers and every local agency and city that would be impacted by the incorporation. *Id.*

[213] *Id.* § 56666.

[214] *See id.* § 56666(b) ("[T]he commission shall hear and receive *any* oral or written protests, objections, or evidence that shall be made, presented, or filed . . . ." (emphasis added)). The LAFCO may continue the hearing, but not past seventy days from the original notice of the hearing. *Id.* § 56666(a).

[215] *Id.* § 56668. The statute lists other factors, too, including:

> [L]and use; assessed valuation . . . the likelihood of significant growth in the area, and in adjacent incorporated and unincorporated areas, during the next 10 years . . . [t]he conformity of both the proposal and its anticipated effects with both the adopted commission policies on providing planned, orderly, efficient patterns of urban development . . . [t]he effect of the proposal on maintaining the physical and economic integrity of agricultural lands . . . [t]he definiteness and certainty of the boundaries of the territory, the nonconformance of proposed boundaries with lines of assessment or ownership, the creation of islands or corridors of unincorporated territory, and other similar matters affecting the proposed boundaries . . . [t]he proposal's consistency with . . . county general and specific plans . . . [t]he sphere of influence of any local agency that may be applicable to the proposal being reviewed . . . [t]he comments of any affected local agency

factors outside of the seventeen enumerated.[216] The LAFCO has the option to consider the region's goals, as identified by its elected officials.[217] The LAFCO then approves or rejects the incorporation proposal.[218] If it approves the proposal, the LAFCO schedules an election.[219] Residents of the proposed municipality also may run for the city council of the proposed municipality.[220] Only residents of the proposed municipality may vote in the election.[221]

The voting arrangement in California—permitting only residents of the proposed municipality to vote—has not gone uncontested.[222] In 1986, organizers in an unincorporated area of Sacramento County, known as Citrus Heights, collected sufficient signatures to hold an incorporation vote.[223] Only residents of the proposed municipality could vote, which did not settle well with parties in the surrounding county who would have been negatively affected by the incorporation.[224] The Sacramento County Board of Supervisors and co-parties sued, alleging that the incorporation election statute, codified at that time as

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> or other public agency . . . [t]he ability of the newly formed or receiving entity to provide the services that are the subject of the application to the area, including the sufficiency of revenues for those services following the proposed boundary change . . . [a]ny information or comments from the landowner or landowners, voters, or residents of the affected territory . . . [a]ny information relating to existing land use designations . . . [t]he extent to which the proposal will promote environmental justice . . . [and] [i]nformation contained in a local hazard mitigation plan . . . .

Id.

[216] *See id.* (stating that the LAFCO may, but is not "limited to," reviewing the seventeen factors listed in the statute).

[217] *Id.* § 56668.5.

[218] Ihn, *supra* note 51, at 79.

[219] *Id.* The incorporation proposal will be on the ballot at the next scheduled general election, as long as at least eighty-eight days have passed since the LAFCO approved of the proposal. *Id.* The Supreme Court of California referred to this last step as "like that of the masons who place a keystone at the apex of a high and intricate arch." Bd. of Supervisors v. Local Agency Formation Comm'n (*LAFCO*), 838 P.2d 1198, 1203 (Cal. 1992). Although the vote is essential, by that point the "proposal will already have undergone a labyrinthine process containing elaborate safeguards designed to protect the political and economic interests of affected local governments, residents, and landowners." *Id.*

[220] CAL. GOV'T CODE § 56724; Ihn, *supra* note 51, at 79.

[221] *LAFCO*, 838 P.2d at 1200.

[222] *Id.*

[223] *Id.* The LAFCO approved the resolution only after the organizers had altered the boundaries of the proposed municipality to exclude two shopping centers. *Id.* Otherwise, the county would have lost substantial sales tax revenue from the shopping centers. *Id.* Even after this adjustment, though, the plaintiffs calculated that the incorporation of Citrus Heights would reduce the county's revenues by $2.5 million for the initial year. *Id.* at 1210. The loss would come out to about $36 per resident. *See id.* at 1200 (estimating the population of Citrus Heights at sixty-nine thousand residents). The defendants disagreed, contesting that the cost would only be about $5 per unincorporated-area resident. *Id.* at 1210.

[224] *Id.* at 1200, 1201.

section 57103, denied them equal protection under the Fourteen Amendment.[225]

Ultimately, the California Supreme Court held that section 57103's limitation on voting eligibility did not violate the Equal Protection provision of the U.S. Constitution, nor California's Constitution.[226] The decision rested on two theories.[227] First, the state had the power to organize its political subdivisions however it saw fit.[228] Second, the residents living inside the proposed municipality had a greater degree of interest in the vote than those living outside of the proposed municipality's boundaries.[229] Because of the residents' distinct interests, the classification would be struck down only under a facial challenge if it lacked a rational basis.[230] The court decided that the statute did have a rational basis because the Legislature had a legitimate purpose in enacting the statute: to promote regional growth.[231]

Citrus Heights became the first city to incorporate in Sacramento County since 1946.[232] After Citrus Heights paved the way to incorporation in Sacra-

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[225] CAL. GOV'T CODE § 57103 (1992); *LAFCO*, 838 P.2d at 1201 (citing U.S. CONST. amend. XIV, § 1; CAL. CONST. art. 1, § 7); *see supra* note 122 and accompanying text (explaining the Fourteenth Amendment). The two co-parties were the Sacramento County Deputy Sheriffs' Association and the Sacramentans to Save Our Services. *LAFCO*, 838 P.2d at 1201. About forty local organizations were members of the Sacramentans to Save our Services, working in "social and community service, labor, law enforcement, and business organizations, many of which receive[d] county funds." *Id.* The appellate court held that the statute was unconstitutional as applied, but the California Supreme Court later reversed the decision. *Id.* at 1200.

[226] *LAFCO*, 838 P.2d at 1211. Section 57103 did not violate the federal or state Equal Protection Clause on its face, nor as applied to the Citrus Heights incorporation. *Id.*

[227] *Id.* at 1209.

[228] *Id.*

[229] *Id.* The California Supreme Court distinguished the Citrus Heights incorporation from a dissolution vote in an earlier case, based on the reasoning that dissolution "has a substantial effect upon the residents of both territories involved." *Id.* at 1208 (citing Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., 654 P.2d 168 (Cal. 1982)).

[230] *Id.* at 1209–10. When a court applies rational basis review, the state "has no obligation to produce evidence to sustain the rationality of a statutory classification." Heller v. Doe, 509 U.S. 312, 320 (1993). Rather, the court will uphold the classification as long as "there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* The California Supreme Court declined to apply strict scrutiny to the as-applied challenge as well, deferring to the state legislature's decision to address specifically Sacramento County's "unique circumstances" by giving it its own separate chapter in the Government Code. *LAFCO*, 838 P.2d at 1210. Sacramento County is unique because of the City of Sacramento's large population, "which affects its role in the growth and development of urban areas." Act of Sept. 19, 1991, ch. 439, § 2, 1991 Cal. Legis. Serv. ch. 439 (West). The "unique facts and circumstances" apply only to Sacramento County. *Id.*

[231] *LAFCO*, 838 P.2d at 1211. The court was hesitant "[t]o frustrate the endeavor of individuals to fix the unit of their local governance . . . ." *Id.* (quoting Curtis v. Bd. of Supervisors, 501 P.2d 537, 554 (Cal. 1972)). It ultimately reasoned that permitting "relatively disinterested majorities [to] veto incorporations" would undermine the state's structured incorporation process. *Id.* at 1211.

[232] Leora Waldner & Russell M. Smith, *The Great Defection: How New City Clusters Form to Escape County Governance*, 39 PUB. ADMIN. Q. 170, 192 (2015). Citrus Heights then had to compen-

mento County, other communities followed its lead.[233] As of January 1, 1990, only 39.3% of Sacramento County residents lived in municipalities as opposed to unincorporated territory.[234] By December 31, 2009, however, the percentage had increased to 60.9%.[235]

C. Arizona

Whereas Louisiana and California's incorporation processes leave much to be desired, Arizona strikes a balance between local, regional, and state interests in its incorporation regime.[236] With respect to urban areas, the Arizona state government prioritizes the consolidation of local governments.[237] Since 1961, Arizona has had a two-tiered system of incorporation.[238] When residents of a territory not located in an urbanized area seek incorporation, they need to either petition collectively for incorporation or vote amongst themselves.[239] Residents of territorities within urbanized areas, who want to incorporate, however, need the consent of the neighboring city or town.[240]

Section 9-101 of the Arizona Revised Statutes is the default incorporation procedure for any territory that is not in an urbanized area.[241] To be eligible for incorporation, a territory must have certain characteristics.[242] For example, the proposed municipality must constitute a "community," in that the residents live close to one another, have similar interests in terms of the public services their government would provide, and come into contact with one another for a va-

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sate Sacramento County for lost revenues under a different provision of the Local Government Reorganization Act. *Id.* Citrus Heights paid $5.6 million annually to the county. *Id.*

[233] *Id.* Both Rancho Cordova and Elk Grove incorporated after Citrus Heights. *Id.* After Rancho Cordovo incorporated, City Councilwoman Linda Budge said that Citrus Heights was the inspiration for their own incorporation. *Id.* at 193.

[234] *Id.* at 177, 195.

[235] *Id.*

[236] *See* ARIZ. REV. STAT. ANN. § 9-101.01(C) (2020) (prohibiting any "territory within an urbanized area" from incorporating without consent of the bordering incorporated city or town); *supra* notes 158–235 and accompanying text (describing the municipal incorporation regimes of Louisiana and California). Section 9-101.01 defines urbanized area as "all territory within six miles of an incorporated city or town . . . having a population of five thousand or more persons, and all territory within three miles of any incorporated city or town . . . having a population of less than five thousand persons." § 9-101.01(A).

[237] *See* City of Tucson v. Pima Cnty., 19 P.3d 650, 660 (Ariz. Ct. App. 2001) ("The very purpose of section 9-101.01 is to protect cities and towns from problems that may flow from the existence of many separate governmental entities in a limited geographical area." (quoting City of Tucson v. Woods, 959 P.2d 394, 397 (Ariz. Ct. App. 1997))).

[238] *Id.* at 653.

[239] *Id.*

[240] *Id.* at 653–54 (citing ARIZ. REV. STAT. ANN. § 9-101.01).

[241] ARIZ. REV. STAT. ANN. § 9-101; *Pima Cnty.*, 19 P.3d at 653.

[242] ARIZ. REV. STAT. ANN. § 9-101.

riety of reasons.[243] The area to be incorporated must be "urban" in nature and cannot have a substantial amount of rural, farming, or uninhabited land.[244] The board of supervisors will not sanction an incorporation if the area remaining unincorporated, after the fact, becomes entirely surrounded by incorporated territory.[245] Unless the territory is within ten miles of a national park or monument, the minimum population size for incorporation in Arizona is fifteen hundred.[246] If the territory is within ten miles of a national park or monument, the minimum is five hundred.[247]

Petitioners first file an incorporation petition with the county recorder or county elections department.[248] The petitioners then have 180 days to collect signatures in one of two ways.[249] One option is to gather signatures of two-thirds of the population within the proposed boundaries, and submit the signatures to the board of supervisors to sign off on the incorporation.[250] Alternatively, the petitioners can gather signatures of ten percent of the population within the boundaries to call for an election for incorporation.[251] If a majority vote in favor of the incorporation, it passes.[252] Under either process, the residents of the proposed municipality have control over the outcome unless a neighboring municipality interferes.[253] A neighboring municipality, for example, can pass an annexation ordinance to annex part of the area in question.[254] In that case, the board of supervisors would be required to exclude that area from the new municipality.[255] Moreover, if the proposed municipality subse-

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[243] *Id.* § 9-101(E). Specifically, in a community, the residents live "in more or less proximity having common interests in such services as public health, public protection, fire protection and water that bind together the people of the area, and where the people are acquainted and mingle in business, social, educational, and recreational activities." *Id.* § 9-101(J).

[244] *Id.* § 9-101(F).

[245] *Id.* § 9-101(G). A proposed municipality must include all interior county roads, unless exempt from that requirement by the board of supervisors. *Id.*

[246] *Id.* § 9-101(A), (B).

[247] *Id.* The legislature added the exception for areas near national parks because the community of Tusayan, sitting approximately one mile from a Grand Canyon entrance, wanted to incorporate and had fewer than five hundred residents. Ariz. S. Fact Sheet for S.B. 1122, 1st Reg. Sess. (2003).

[248] ARIZ. REV. STAT. ANN. § 9-101(C). The petitioners must state their purpose "clearly and concisely," and sign and verify the petition. *Id.*

[249] *Id.*

[250] *Id.* § 9-101(A). If the proposed municipality is in more than one county, two-thirds of the residents in the area in each county must sign the petition. *Id.* § 9-131(A).

[251] *Id.* § 9-131(B). If the proposed municipality is in more than one county, then 10% of the residents of the area in each county must sign the petition. *Id.* The board or boards of supervisors must meet to call the election within sixty days of the petitioners submitting the signatures, and the election must take place within 180 days. *Id.* §§ 9-101(B), 9-131(B). If the residents have already tried to incorporate the territory, then the board must wait at least a year before holding a new election. § 9-101(B).

[252] *Id.*

[253] *Id.* § 9-101.

[254] *Id.* § 9-101(H).

[255] *Id.*

quently fails to meet the incorporation requirements because it has lost part of its proposed territory to annexation, the board of supervisors must reject the incorporation petition.[256]

For territory that is not within an urbanized area, the process resembles that of California, but without the condition of a hearing.[257] When the territory at issue is in an urbanized area, however, the story is different.[258] Pursuant to section 9-101.01(C) of the Arizona Revised Statutes, the board of supervisors may not approve an incorporation petition in an urbanized area unless either: (1) the existing municipality that makes the area urban adopts a resolution approving the proposal; or (2) the proposed municipality requests annexation into the existing municipality, and the existing municipality has not previously annexed it within 120 days.[259]

The state's restrictions on urbanized area incorporation have withstood judicial scrutiny at both the state and federal level.[260] In 1997, residents of an unincorporated area in Pima County, Arizona, known as Tortolita, petitioned for incorporation.[261] Tortolita, however, was within six miles of three cities and

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[256] *Id.*

[257] *See id.* § 9-101(A), (B) (restricting the incorporation vote to residents of the proposed municipality); Bd. of Supervisors v. Local Agency Formation Comm'n (*LAFCO*), 838 P.2d 1198, 1200 (Cal. 1992) (explaining that, in California, only the residents in the proposed municipality may vote in an incorporation election).

[258] *See* ARIZ. REV. STAT. ANN. § 9-101.01 (setting different incorporation requirements for territories in urbanized areas). The statute defines urbanized area as "all territory within six miles of an incorporated city or town . . . having a population of five thousand or more persons, and all territory within three miles of any incorporated city or town . . . having a population of less than five thousand persons." *Id.* § 9-101.01(A).

[259] *Id.* § 9-101.01(C). The existing municipality must adopt a resolution to approve the proposed municipality. *Id.* § 9-101.01(C)(1). The proposed municipality would then file the resolution with its petition for incorporation. *Id.* Alternatively, an existing municipality could annex the area in the proposed municipality by passing an ordinance. *Id.* § 9-101.01(C)(2). If the existing municipality has not acted on the annexation request, then the proposed municipality would submit an affidavit to that effect. *Id.* The statute carves out some exceptions to this process. *Id.* § 9-101.01(E)–(H). For example, the board of supervisors can approve an incorporation petition without the existing municipality's consent if the proposed municipality fits three criteria. *Id.* § 9-101.01(E). The municipality must: (1) have more than fifteen thousand residents; (2) exist in a county where between 60-65% of the population lives in an existing municipality; and (3) "ha[ve] a governing board, including a planned community board of directors or a special district board." *Id.* In a similar vein, the board of supervisors may approve a petition for incorporation without the proposed municipality haven taken those two steps, even if the existing municipality disapproves, if the proposed municipality has more than fifteen thousand residents and has more residents than "the city or town that causes the urbanized area to exist." *Id.* § 9-101.01(F).

[260] Green v. City of Tucson, 340 F.3d 891, 893 (9th Cir. 2003); City of Tucson v. Pima Cnty., 19 P.3d 650, 653 (Ariz. Ct. App. 2001).

[261] *Green*, 340 F.3d at 893. Residents in Casas Adobes petitioned for incorporation, as well. *Pima Cnty.*, 19 P.3d at 654. Pima County runs along the southern border of Arizona, flanked by Yuma County to the west and Cochise County to the east. *See County Map of Arizona*, GOOGLE MAPS, https://www.google.com/maps/search/County+Map+of+Arizona/@34.0858901,-116.435679,6z/data=!3m1!4b1 [https://perma.cc/8QT7-GX2A] (search "county map of Arizona"). The City of Tuc-

towns—the City of Tucson and the towns of Marana and Oro Valley.[262] All three municipalities opposed Tortolita's incorporation.[263] Because Tortolita lacked the required consent for incorporation in an urbanized area, it could not incorporate.[264] Tortolita then challenged the constitutionality of section 9-101.01 in state court.[265] Specifically, Tortolita and its co-plaintiffs argued that the consent requirement of section 9-101.01(B) burdened the Tortolita residents' right to vote, thereby violating the Equal Protection Clause of the Fourteenth Amendment.[266] The Arizona Court of Appeals, however, held that section 9-101.01 did not violate the Equal Protection Clause.[267]

Concurrent with the state claim, organizers of the Tortolita incorporation also filed a section 1983 civil action for deprivation of rights in federal district

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son is toward the northeastern part of the county. *Map of Pima County, Arizona*, GOOGLE MAPS, https://www.google.com/maps/place/Pima+County,+AZ/@31.9651782,-113.0147836,8z/data=!3m1!4b1!4m5!3m4!1s0x86d5e18f3072c27b:0x97100bf0c82023d8!8m2!3d32.057499!4d-111.6660725 [https://perma.cc/TXJ2-2VDM] (search "Pima County, AZ"). The county is named after the Pima Native Americans. PIMA PROSPERS COMPREHENSIVE PLAN INITIATIVE, APPENDIX A: BACKGROUND & CURRENT CONDITIONS A1.3, https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Pima%20Prospers/Official%20Plan/Appedix%20A%20Backgound%20and%20Current%20Condtions.pdf [https://perma.cc/9H4K-L94N]. Today, much of the Tohono O'odham reservation is in Pima County, along with the Pascua Yaqui Tribe, both of which are sovereign nations. *Id.* The Tohono O'odham reservation is the third largest reservation in the United States. *Id.*

[262] *Green*, 340 F.3d at 893.

[263] *Id.* In 1997, the Arizona Legislature passed a statute to suspend the consent requirement between July 21, 1997 and July 15, 1999 for areas within a county that have populations between five hundred thousand and one million residents. 1997 Ariz. Sess. Laws ch. 204, § 2; *Green*, 340 F.3d at 894; *Pima Cnty.*, 19 P.3d at 654. Only Pima County qualified for the exception. *Green*, 340 F.3d at 894 n.4. The City of Tucson challenged the 1997 statute in superior court and lost. *Id.* at 894–95. The board of supervisors, relying on the 1997 law, then approved the Tortolita incorporation and announced an upcoming election for the Casas Adobes election. *Pima Cnty.*, 19 P.3d at 654. The Arizona Court of Appeals, meanwhile, struck down the 1997 law as a special or local law in violation of the Arizona Constitution, consequently voiding the Tortolita and Casas Adobes incorporation processes. *Id.* (citing City of Tucson v. Woods, 959 P.2d 394 (Ariz. Ct. App. 1997)). Pima County, joined by the board of supervisors, "the Committee to Incorporate [the Village of Casas Adobes] . . . and the Committee to Incorporate the Town of Tortolita," challenged section 9-101.01. ARIZ. REV. STAT. ANN. § 9-101.01; *Pima Cnty.*, 19 P.3d at 654.

[264] *Pima Cnty.*, 19 P.3d at 654.

[265] *Id.* The superior court upheld section 9-101.01(B)(1), rejecting Tortolita's claim that the statute violated "equal protection, procedural or substantive due process, the 'right to self-determination' or any of the rights enshrined by the First Amendment to the United States Constitution." *Id.* at 655. Moreover, the court said that the statute had "a rational relationship to a legitimate state interest against the Balkanization of its counties." *Id.* Balkanization is the breaking up of a region "into smaller and often hostile units." *Balkanize*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/balkanization [https://perma.cc/N4EL-6JV5].

[266] *Pima Cnty.*, 19 P.3d at 656.

[267] *Id.* at 660. Because the statute treated all residents within the proposed municipality equally, it did not burden the residents' right to vote, and thus the court chose to apply a rational basis level of scrutiny. *Id.* at 659. Furthermore, given that the policy of requiring an existing municipality's consent for proposed municipalities in urbanized areas had "a rational relationship to a legitimate state interest," and promoted "orderly development and efficient municipal administration," the statute withstood rational basis review. *Id.* at 660 (quoting *Woods*, 959 P.2d at 401).

court, similarly alleging that section 9-101.01 violated the Equal Protection Clause.[268] The Court of Appeals for the Ninth Circuit likewise held that section 9-101.01 did not violate the Equal Protection Clause because it survived rational basis scrutiny.[269]

Despite remaining unincorporated, Tortolita continues to experience steady population growth.[270] In 2000, 89,597 people lived in Tortolita.[271] By 2010, the population had risen to 108,154.[272] Like its unincorporated neighbor, the City of Tucson experienced population growth from 405,390 residents in 1990 to 520,116 in 2010.[273] The demographics have not changed significantly in either Tortolita or Tucson.[274] The housing market continues to improve in both Tortolita and Tucson.[275] The median income also rose in both Tortolita and Tucson between 1990 and 2010.[276]

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[268] *Green*, 340 F.3d at 895 (citing 42 U.S.C. § 1983). Section 1983 of Title 42 of the U.S. Code provides:

> Every person who, under color of any [law] subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

42 U.S.C. § 1983.

[269] 42 U.S.C. § 1983; *Green*, 340 F.3d at 903. The Ninth Circuit applied rational basis scrutiny because even though "[s]ection 9-101.01 undoubtedly discriminates . . . it discriminates between different electoral units based on their proximity to existing municipalities, rather than between voters in any single electoral unit." *Green*, 340 F.3d at 900. Under *Hunter v. City of Pittsburgh*, the state of Arizona had control over its municipalities, and it properly delegated some of that authority to urban municipalities through the consent provision in section 9-101.01. *Id.* at 900–01 (citing Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907)). Rational basis, therefore, was the appropriate standard of review for the statute. *Id.* at 902. Moreover, the statute "easily passe[d] constitutional muster" under rational basis scrutiny. *Id.* at 903. Section 9-101.01 was rationally related to regulating incorporation and protecting the interests of other municipalities. *Id.* The court noted that permitting incorporation on the fringe of existing municipalities, without their consent, would lead to "intergovernmental conflict over resources and economic development." *Id.* (citing Briffault, *supra* note 28, at 77).

[270] PIMA PROSPERS COMPREHENSIVE PLAN INITIATIVE, *supra* note 261, at A2.20.

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.* at A2.33. In 1990, 86.5% of Tortolita was non-Hispanic white. *Id.* In 2000, the percentage rose to 92%, but by 2010 it had decreased to 89.5%. *Id.* In 1990, 10.6% of the Tortolita population was Hispanic. *Id.* By 2010, that percentage had risen to 17.6%. *Id.* The percentage of white residents of Tucson decreased from 63% in 1990 to 48% in 2010. *Id.*

[275] *Id.* at A2.41. The average house (or dwelling unit) in Tortolita was worth $106,680 in 1990 and $289,494 by 2010. *Id.* The average house (or dwelling unit) in Tucson was worth $66,600 in 1990 and $171,200 by 2010. *Id.*

[276] *Id.* at A2.35. The median household income in Tortolita was $41,285 in 1990 and $78,035 in 2010. *Id.* The median income in Tucson was $21,748 in 1990 and $37,448 in 2010. *Id.* As a comparison, the median income in Phoenix was $30,797 in 1990 and $42,260 in 2010. CITY OF PHOENIX, PHOENIX GROWTH 46 (2013), https://www.phoenix.gov/budgetsite/Documents/2013Sum%20Community%20Profile%20and%20Trends.pdf [https://perma.cc/JL7T-49WM].

Years after Tortolita's failed incorporation, much of Pima County, Arizona remains unincorporated.[277] There are still only five municipalities in Pima County.[278] Most county residents live in either Tucson or the unincorporated suburban areas around Tucson.[279] In 2009, thirty-six percent of Pima County's one million residents resided in unincorporated territory.[280] The Arizona state legislature has therefore succeeded in protecting its urban areas from a proliferation of suburbs that would drain urban resources and development.[281] This is a stark contrast to the California regime, and even more so with respect to Louisiana's regime.[282]

III. THE NEED FOR FACTORING REGIONAL IMPACT INTO A STATE MUNICIPAL INCORPORATION REGIME

This Part explains what is at stake when states decide how to organize their cities and towns.[283] How a state drafts its incorporation statutes affects where municipalities can emerge, who lives within them, and what resources are accessible to those municipalities.[284] Because states have so few tools at their disposal to remedy the effects of municipal proliferation, they should ensure that their municipal incorporation statutes only permit incorporations that do not restrict urban resources.[285] Section A of this Part describes the adverse

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[277] Joe Pangburn, *Unincorporated Pima County Communities Leave Millions of Shared Revenue on the Table*, INSIDE TUCSON BUS. (Sept. 11, 2009), https://www.insidetucsonbusiness.com/news/unincorporated-pima-county-communities-leave-millions-of-shared-revenue-on/article_4218a01a-2cda-56d3-931d-0f5ee677375a.html [https://perma.cc/T3K6-AHJS].

[278] PIMA PROSPERS COMPREHENSIVE PLAN INITIATIVE, *supra* note 261, at A2.12. The municipalities are: the town of Marana, the town of Sahuarita, the City of Tucson, the City of South Tucson, and the town of Oro Valley. *Id.*

[279] *Id.* at A1.3. Distinct from the eastern party of Pima County, "[t]he rest of the county is sparsely populated and primarily rural in character." *Id.* at A2.11. Only 13.6% of the county is private land, or 1,250 square miles. *Id.* at A1.4. The rest of the county is either owned by Pima County, the State of Arizona, the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, the U.S. Military, or the U.S. Park Service, or comprises Native American reservation land. *Id.* at A2.59.

[280] Pangburn, *supra* note 277.

[281] Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003).

[282] *See* Charles Lussier, *Why Forming a New City Like St. George Might Be Easier Than Starting a New School System*, THE ADVOCATE (Aug. 24, 2019), https://www.theadvocate.com/baton_rouge/news/education/article_8242116e-c682-11e9-8ab1-27dbb391e67c.html [https://perma.cc/L5V3-ZP6X] (stating that three communities seceded from East Baton Rouge Parish before St. George voted to do the same); *Incorporated Cities*, CNTY. OF L.A., https://lacounty.gov/government/about-la-county/incorporated-cities/ [https://perma.cc/ZM3H-NLDQ] ("The first of the County's 88 cities was incorporated in 1850, the last in 1991.").

[283] *See infra* notes 288–330 and accompanying text (describing how exclusionary municipal incorporations negatively affect their neighboring communities and what states can do to prevent them from happening).

[284] *See infra* notes 288–306 and accompanying text.

[285] *See infra* notes 307–330 and accompanying text.

impacts, particularly on urban areas, of municipal proliferation.[286] Section B explains why incorporation regime reform is a promising starting point, especially when implemented with other regional and redistributing policies.[287]

A. The Adverse Consequences of Municipal Proliferation

There are clear incentives to incorporation: once a municipality incorporates, its residents have the autonomy to elect local government officials who will, in turn, enact public policies and operate government services that the residents desire.[288] But every municipal incorporation affects the surrounding communities and has the capacity to cause or to exacerbate regional racial segregation.[289]

Municipal incorporations create externalities, or negative economic consequences, for their regions by removing their property tax base from the preexisting jurisdiction and instituting exclusionary zoning codes.[290] Municipalities and counties raise most of their revenue through local taxes, primarily property taxes.[291] They can provide public services only when they raise sufficient revenues through taxes to do so.[292] When higher-income individuals secede from a county and incorporate, the residents of the county lose taxes that would be spent on public services.[293] Particularly in metropolitan areas, municipal incorporation builds a tax wall between neighbors who previously received goods and services from the same government entity.[294] In other words, new municipal boundaries make it possible for high-income residents to preserve their tax revenue pool for themselves and prevent redistribution of their

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[286] *See infra* notes 288–306 and accompanying text.

[287] *See infra* notes 307–330 and accompanying text.

[288] Briffault, *supra* note 51, at 1115. Municipalities derive their autonomy from state home rule statutes. GERALD E. FRUG ET AL., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 198 (6th ed. 2015).

[289] *See* Agustin Leon-Moreta, *Municipal Incorporation in the United States*, 52 URB. STUD. 3160, 3162 (2015) ("History suggests that urban heterogeneity has been a central factor in initiatives for municipal incorporation in America." (citations omitted)); *see also id.* (explaining that individuals incorporate new municipalities to "circumvent [regional] redistribution since municipalities can redistribute resident income through tax-and-service policies"). Income gaps are often correlated with racial segregation in urban areas, so "municipal incorporations might also reflect a collective choice to circumvent both ethnic and income heterogeneity." *Id.*

[290] BURNS, *supra* note 51, at 81; Rice et al., *supra* note 53, at 140. An externality is "[a] consequence or side effect of one's economic [or political] activity, causing another to benefit without paying or to suffer without compensation." *Externality*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[291] Briffault, *supra* note 51, at 1129.

[292] *Id.* at 1134.

[293] *See* Tyson, *supra* note 18, at 669 ("Municipal fragmentation operates to limit the scope of wealth redistribution within the broader metropolis. Municipal boundaries have functioned to reinforce existing racial and class-based systems of privilege and disadvantage . . . .").

[294] Laurie Reynolds, *Local Governments and Regional Governance*, 39 URB. LAW. 483, 493 (2007); Tyson, *supra* note 18, at 669.

property tax dollars to urban public services, such as schools and transportation.[295] As a result, incorporation causes the imbalanced allocation of government benefits and services, with higher property value municipalities having better funded public schools than their neighboring urban communities.[296]

Exclusionary incorporation also segments and aggravates regional racial segregation, as illustrated by the St. George, Louisiana case study.[297] Federal Civil Rights legislation precludes gerrymandering in congressional districts, but does not prevent incorporation along racial lines.[298] That is up to the states, who are the managers of their municipalities.[299] The implications are not theoretical.[300] American history has shown that municipal boundaries more frequently divide populations by race than do neighborhood boundaries.[301] And the segregation amplifies once a white enclave has successfully incorporated.[302] As soon as wealthy enclaves incorporate into a municipality, they can use the zoning power to sustain the municipality's income composition.[303] Race and income are often correlated, such that people of color are disproportionately excluded from these communities.[304] Very quickly, a county that once had a consolidated government structure and a unified school district, such as East Baton Rouge Parish, can turn into an urban school district with a majority of students of color, surrounded by small school districts with primarily white

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[295] *See* Reynolds, *supra* note 294, at 493 ("[L]ocal government boundaries have improperly allowed some privileged local government units to avoid participation in regional redistribution of wealth and opportunities."); *see also* Bruce Katz & Elizabeth Kneebone, *On Ferguson, Fragmentation, and Fiscal Disparities*, BROOKINGS (Apr. 2, 2015), https://www.brookings.edu/blog/the-avenue/2015/04/02/on-ferguson-fragmentation-and-fiscal-disparities/ [https://perma.cc/L34Q-D5D8] (explaining that Ferguson, Missouri, with a population of twenty-one thousand, is only one of ninety-one local governments in Missouri, each needing to raise its own revenue to pay for municipal services). Because of municipal fragmentation, communities like Ferguson, with declining employment opportunities and population, rely on traffic fines and court fees to supplement dwindling property tax bases. Katz & Kneebone, *supra*.

[296] Tyson, *supra* note 18, at 669; *see supra* notes 173–177 and accompanying text (describing the demographic differences between St. George, Louisiana and the broader East Baton Rouge Parish).

[297] Tyson, *supra* note 18, at 669; *see supra* notes 173–200 and accompanying text (describing the racial implications of St. George's incorporation movement). This phenomenon is known as "destructive localism." Wilson, *supra* note 17, at 147. Destructive localism is "the use of decentralization to foster the tenets of localism for one group, but in a way that divorces that group from serious social problems and allows them to hoard and insulate vital resources." *Id.*

[298] Leon-Moreta, *supra* note 289, at 3163.

[299] *Id.*

[300] BURNS, *supra* note 51, at 81.

[301] *Id.*

[302] *Id.*

[303] *Id.*

[304] *Id.*; *see* Tyson, *supra* note 18, at 669 ("[N]otions of the benefit and value to be derived from the formation of municipalities involve assessments about the race and class identity of the residents within those boundaries and the potential impact their presence within the municipal community might have on real or perceived property values.").

students.[305] This reality is unacceptable, and certainly a far cry from what the Supreme Court justices proclaimed in *Brown v. Board of Education* almost seventy years ago.[306]

B. Why Incorporation Regime Reform Is a Promising Solution

When incorporation statutes permit any community to incorporate, the consequences described in the previous Sections become inevitable.[307] States have tried to remedy the income heterogeneity that municipal proliferation causes, to varying degrees of success.[308]

When exclusionary incorporation aggravates property tax base disparities among municipalities and county governments, states and counties have to find ways to compensate for unequal tax revenues.[309] One way in which states have addressed regional inequality is through tax base sharing.[310] The Minnesota State Legislature passed the Minnesota Fiscal Disparities Act in 1971 to create a regional tax base sharing initiative between Minneapolis and St. Paul.[311] The experiment has proven to be successful.[312] States also can create regional gov-

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[305] *See* Christina A. Samuels, *Voters Approve First Step in Carving Out New School District in Louisiana*, EDUCATIONWEEK (Oct. 14, 2019), https://www.edweek.org/education/voters-approve-first-step-in-carving-out-new-school-district-in-louisiana/2019/10 [https://perma.cc/69Y4-Z4H9] (explaining that St. George's incorporation would increase the percentage of students of color in the East Baton Rouge school system from 73% to 77% and would decrease the percentage of white students from 12% to 8%).

[306] *See* 347 U.S. 483, 495 (1954) (outlawing de jure segregation in schools, and stating that "[s]eparate educational facilities are inherently unequal"); *supra* note 4 and accompanying text (explaining the holding and consequences of the Court's decision in *Brown*).

[307] *See supra* notes 288–306 and accompanying text.

[308] *See infra* notes 309–317 and accompanying text.

[309] *See* Briffault, *supra* note 28, at 3 ("The delegation of fiscal responsibility for schools . . . to local governments serves to heighten the significance of interlocal wealth differences and to perpetuate inequalities in education, housing and employment opportunities.").

[310] Katz & Kneebone, *supra* note 295. In a tax base sharing system, each community contributes part of its tax base to a single regional pool. Myron Orfield & Nicholas Wallace, *The Minnesota Fiscal Disparities Act of 1971: The Twin Cities' Struggle and Blueprint for Regional Cooperation*, 33 WM. MITCHELL L. REV. 591, 602 (2007). The funds in the pool are redistributed "according to set criteria other than the original contribution rate." *Id.* Depending on the system, the communities can agree to redistribute based on "tax capacity, service cost or need indicators, land-use decisions, or other criteria." *Id.*

[311] MINN. STAT. § 473F.01 (2020); Katz & Kneebone, *supra* note 295.

[312] *See* Orfield & Wallace, *supra* note 310, at 603 (discussing the benefits of the Minnesota Fiscal Disparities Act, citing a decrease in the local tax base disparity by about 20% and a decrease in the ratio of 95th-to-5th percentile tax base by nearly 25%). States have other ways of sharing revenue, as well. LEAGUE OF ARIZ. CITIES & TOWNS, STATE SHARED REVENUE 1 (2011), https://www.azleague.org/DocumentCenter/View/26/1112shared_re venue?bidId= [https://perma.cc/C746-VN96]. Arizona, for example, uses its Vehicle License Tax, Highway User Revenue, State Sales Tax, Transaction Privilege Tax, Urban Revenue Sharing Fund, and State Income Tax to distribute revenue. ARIZ. SENATE RSCH. STAFF, ARIZONA STATE SENATE ISSUE BRIEF: STATE SHARED REVENUES 1–2 (2018), https://www.azleg.gov/Briefs/Senate/STATE%20SHARED%20REVENUES%202018.pdf [https://perma.cc/QB9X-UU6L]; LEAGUE OF ARIZ. CITIES & TOWNS, *supra*, at 1. The state distributes revenue from the Urban

ernments to coordinate individual municipalities' strategic planning.[313] Two other ways in which states can attempt to equalize revenue is through supplementing local public education funding with state funds[314] or by increasing affordable housing availability.[315] To combat interlocal housing disparities, for example, New Jersey requires certain municipalities to have a certain number of affordable housing units.[316] These state measures can only go so far, though, because municipalities still have significant zoning and taxing powers.[317]

Revenue Sharing Fund to cities, towns, and counties "based on the proportion of the city or town's population compared with the total incorporated population of the state based on the last decennial or special census." ARIZ. SENATE RSCH. STAFF, *supra*, at 1 (citing ARIZ. REV. STAT. ANN. § 43-206 (2020)).

[313] Briffault, *supra* note 51, at 1122. The regional government must have independent legal authority, granted through state legislation and voter approval, to enforce municipal cooperation. *Id.* at 1122, 1168.

[314] *School Finance and District Support: FY19 Chapter 70 Aid and Required Contribution Calculations*, MASS. DEP'T OF ELEMENTARY & SECONDARY EDUC. (Jan. 24, 2018), http://www.doe.mass.edu/finance/chapter70/fy2019/whitepaper.html [https://perma.cc/KFW4-WA3D]. Through its Chapter 70 Foundation program, Massachusetts identifies the adequate spending level for each district and how much could be funded from local property taxes. *Id.* The amount that the state expects the city to contribute for per-pupil spending is called the "target local contribution." *Id.* The state then contributes an amount to make up the difference between the two amounts. *Id.* The state changes the total budget every "year to reflect changes in the district's enrollment; changes in student demographics . . . inflation, and geographical differences in wage levels." *Id.* In 2019, the state determined that cities and towns would contribute 59% of the foundation budget, with the state supplementing 41%. *Id.*

[315] FRUG ET AL., *supra* note 288, at 454–55.

[316] *Id.* The New Jersey state judiciary first waded into this area, establishing its affordable housing requirements in response to Mt. Laurel's exclusionary zoning measures. *Id.* at 454 (first citing S. Burlington Cnty. NAACP v. Mt. Laurel (*Mt. Laurel II*), 456 A.2d 390 (N.J. 1983), *rev'd sub nom.* Urb. League of Greater New Brunswick v. Carteret, 559 A.2d 1369 (N.J. 1989); then citing S. Burlington Cnty. NAACP v. Mt. Laurel (*Mt. Laurel I*), 336 A.2d 713 (N.J. 1975), *rev'd*, *Mt. Laurel*, 456 A.2d 390, *rev'd sub nom. Urb. League*, 559 A.2d 1369). Mt. Laurel's population had grown from a population of 2,817 in 1950, to 5,249 in 1960, and later to 11,221 in 1970 because of industry development and highway improvement in the region. *Mt. Laurel I*, 336 A.2d at 718. Mt. Laurel adopted a zoning ordinance in 1964 to restrict land use, for the most part, to solely industry and single-family housing. *Id.* at 718–19. The ordinance prohibited more affordable housing, such as attached townhouses, apartments not located on farms, and mobile homes. *Id.* at 719. Housing in Mt. Laurel was only "within the financial reach of persons of at least middle income." *Id.* In *South Burlington County NAACP v. Mt. Laurel*, the New Jersey Supreme Court held that developing municipalities in New Jersey must zone to "make realistically possible an appropriate variety and choice of housing." *Id.* at 724. Eventually, the New Jersey State Legislature stepped in, adopting the Fair Housing Act of 1985. FRUG ET AL., *supra* note 288, at 455 (citing N.J. STAT. ANN. §§ 52:27D-301–52:27D-329 (West 2020)). The Fair Housing Act created the Council on Affordable Housing to approve local affordable housing plans. *Id.* The Act also gave localities the option "to sell their fair share obligation to other localities through regional contribution agreements." *Id.* A municipality could pay another municipality to take on up to 50% of its own fair share obligation, as long as one of the municipalities built affordable housing with "convenient access to employment opportunities." *Id.* (quoting Hills Dev. Co. v. Bernards (*Mt. Laurel III*), 510 A.2d 621 (N.J. 1986)). The New Jersey Supreme Court upheld the Act's constitutionality. *Id.*

[317] Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926). In *Euclid v. Amber Realty Co.*, the U.S. Supreme Court held that a zoning ordinance is only unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

Rather than relying on these state mechanisms to equalize municipal revenue-generating capabilities, it is imperative that states improve their municipal incorporation laws to prevent further damage.[318] The Arizona State Legislature recognized that the proliferation of municipal incorporations, particularly surrounding urban areas, would harm its urban areas.[319] The legislature saw that incorporation often aggravated income inequality, siphoning away tax revenue from the county government for the exclusive benefit of the new municipality.[320] Incorporations adjacent to existing cities also can prevent the cities from annexing those same areas to recollect residents who have moved outside the city.[321] When they cannot capture additional taxpayers, they cannot increase their tax base to provide services to residents of fewer means.[322] For the aforementioned reasons, the Arizona Legislature decided to build in the city consent requirement for incorporation in urbanized areas.[323] And this has worked.[324]

Other states with unincorporated territory should follow Arizona's lead to protect their residents from the harmful consequences of unruly incorporation. Because states have the constitutional freedom to structure their municipal incorporation regimes however they want, they can—and should—permit all impacted communities to vote on incorporation matters, as opposed to solely

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Id. In *Belle Terre v. Boraas*, the Court upheld a local ordinance restricting land use to one-family homes, with family meaning "one or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants." 416 U.S. 1, 2 (1974). The Supreme Court interpreted the municipality's police power broadly, not confining it "to elimination of filth, stench, and unhealthy places." *Id.* at 9. Instead, the Court affirmed the municipality's ability to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

[318] *See* George D. Vaubel, *Toward Principles of State Restraint upon the Exercise of Municipal Power in Home Rule*, 20 STETSON L. REV. 5, 16 (1990) ("Limiting incorporation . . . furthers a state policy of reducing the proliferation of local units of government."); *see also* Wilson, *supra* note 17, at 210 (arguing for a new conceptualization of localism, within the context of "suburban municipal secessions from county-based school districts," that recognizes the county-wide effects). When a municipality incorporates and secedes from a school district, the benefits that the new municipality experiences are not felt by "the *relevant* larger community." Wilson, *supra* note 17, at 208.

[319] *See* Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003) ("As the district court correctly noted, 'Arizona has a legitimate state interest not only in regulating the formation of new municipalities, but also in protecting the interests of already existing municipalities.'").

[320] *See* Briffault, *supra* note 28, at 76–77 (explaining that incorporation may "aggravate" wealth disparities among localities "or [may] interfere with regional approaches to economic and social problems").

[321] *Id.* at 77.

[322] *Id.*

[323] ARIZ. REV. STAT. ANN. § 9-101.01 (2020); *Green*, 340 F.3d at 903.

[324] *See supra* notes 236–281 and accompanying text (describing Arizona's municipal incorporation regime).

residents of the proposed municipality.[325] Moreover, each state should empower either a state or county entity to review incorporation petitions critically before they go into effect.[326] Particularly in urban areas, states should look to the Arizona model to encourage regional growth and minimize interlocal income and racial demographic disparities.[327] Ideally, states should combine elements of the California and Arizona models, empowering a state or county entity to review petitions to ensure that they meet certain criteria before holding an election wherein both residents of the proposed municipality and residents of impacted communities may vote.[328] That way, the state would be able to ensure that: (1) the neighboring communities have a voice in the process, and (2) the incorporation petition fulfills the state's criteria.[329]

It is in every state's best interest to regulate incorporation effectively in order to reduce inequality, promote even growth, and minimize the need for state equalizing mechanisms.[330] States have significant latitude under the U.S. Constitution to enact incorporation laws that reflect their values.[331] By reforming their incorporation laws to incorporate urban residents' voices, states can make sure that St. George is the last majority-white breakaway without urban consent.[332]

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[325] *See* ARIZ. REV. STAT. ANN. § 9-101.01 (requiring neighboring municipality consent for incorporation); Wilson, *supra* note 17, at 206 (arguing that the entire community, not just the detaching residents, must give consent before a community can secede).

[326] *See* CAL. GOV'T CODE § 56668 (2020) (outlining the factors that a LAFCO must consider before approving or denying an incorporation petition).

[327] *Compare* ARIZ. REV. STAT. ANN. § 9-101.01 (requiring that proposed municipalities in urbanized areas receive consent from the cities or towns that make the area urbanized, prior to incorporation), *with* LA. STAT. ANN. § 33:3 (2020) (forbidding adjacent municipalities and surrounding county residents from voting in incorporation elections). People living on the outskirts of a city have already made the decision to live in an urban area. Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 266 (1992). They should not be able "to opt out of the responsibilities of urban life." *Id.* After all, their neighbors within the city boundaries have to pay city taxes, regardless of whether they personally use the city services that their tax dollars are funding. *Id.*

[328] *See supra* notes 202–282 and accompanying text (highlighting the benefits of the California and Arizona incorporation regimes).

[329] *See supra* notes 202–282 and accompanying text.

[330] *See* Green v. City of Tucson, 340 F.3d 891, 903 (9th Cir. 2003) (recognizing that Arizona had a strong interest in both regulating the incorporation of new municipalities and protecting existing municipalities); *supra* notes 288–317 and accompanying text (explaining why state incorporation laws that permit exclusionary incorporations are problematic and create a need for greater state equalizing mechanisms).

[331] Hunter v. City of Pittsburgh, 207 U.S. 161, 179 (1907) (recognizing states' authority to decide their own parameters and processes for municipal boundary change).

[332] *See* LA. STAT. ANN. § 33:1–3 (permitting incorporation based on a petition sign by only residents of the proposed municipality and a vote among the same); Harris, *supra* note 6 (quoting East Baton Rouge Parish school board member Dadrius Lanus, a graduate of the school district, who said that the recent incorporation votes in St. George, Zachary, and Central were "because of white flight," and "for a city the size of Baton Rouge, it has been devastating").

Conclusion

Municipal incorporations impact not only the residents of the new municipality, but also all individuals who reside around the new municipality. The Supreme Court gifted states with the opportunity to structure their incorporation regimes however they see fit, so long as they do not violate constitutionally protected rights. States should seize that opportunity by implementing mechanisms to permit only beneficial incorporations, such as: (1) empowering state entities to review proposals through the lens of regional impact; and (2) granting neighboring municipalities the right to vote on nearby incorporations that will affect them. These mechanisms would promote regional growth and reduce interlocal income disparity and racial segregation.

Kadie Martin