

## Overlooked Linkages Between Municipal Incorporation and Annexation Laws: An In-Depth Look at Wisconsin's Experience

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### I. Introduction

MUNICIPAL ANNEXATION AND INCORPORATION are legal processes that transfer territory from unincorporated to incorporated units of local government. The core purpose of annexation and incorporation is to respond to demands created by expanding urbanization.<sup>1</sup> They are statutory processes that attempt to impose a modicum of orderly growth on urban centers by matching the intensity of development to the structure of the local government unit.<sup>2</sup> Annexation attaches unincorporated territory to an existing incorporated unit of government, and incorporation creates a new incorporated unit of government with home rule powers over territory that was previously unincorporated.

The nomenclature statutorily applied to incorporated government units versus unincorporated governments is not uniform throughout the fifty states. Although cities are routinely designated as incorporated units of government, in some states, villages are incorporated, e.g., Wisconsin and Ohio, but in others they are not, e.g., Washington

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1. See J. Mark Hansen, Comment, *Municipal Annexation in Tennessee*, 47 TENN. L. REV. 651 (1980); Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 251–53 (1992).

2. See, e.g., WIS. STAT. §§ 66.201(1), 66.0217(6) (2003). The Wisconsin incorporation statute includes a statement of its purpose:

It is the policy of this state that the development of territory from town to incorporated status proceed in an orderly and uniform manner and that toward this end each proposed incorporation of territory as a village or city be reviewed as provided in ss. 66.0201 to 66.0213 to assure compliance with certain minimum standards which take into account the needs of both urban and rural areas.

and California.<sup>3</sup> Towns have broad corporate powers throughout New England,<sup>4</sup> Pennsylvania,<sup>5</sup> and New Jersey.<sup>6</sup> In those states, local municipal boundaries are essentially fixed and all or nearly all land is within a local unit of government with broad powers.<sup>7</sup> Other states, such as Alabama,<sup>8</sup> Virginia,<sup>9</sup> Arkansas,<sup>10</sup> Montana,<sup>11</sup> Arizona,<sup>12</sup> and Washington,<sup>13</sup> for example, have incorporated towns but also unincorporated land within townships or counties. In the upper Midwest, towns and townships are unincorporated and without home rule powers.<sup>14</sup>

Annexation and incorporation processes vary between states.<sup>15</sup> In some states, annexations and incorporations are rare, while in others, commonplace.<sup>16</sup> In most states, however, statutes dictate that annexation

3. Compare Wis. STAT. § 66.0203 (2003) and OHIO REV. CODE ANN. § 707.01 (West 2006) with WASH. REV. CODE § 35.02.001 (2006) and CAL GOV'T CODE §§ 21, 50001, 56043, 56720 (West 2006).

4. See, e.g., MASS. GEN. LAWS ch. 40, § 1 (2006); ME. REV. STAT. ANN. tit. 30, § 2001 (2005); N.H. REV. STAT. ANN. § 49-B:2 (2006); CONN. GEN. STAT. §§ 7-148, 7-194 (2006); R.I. GEN. LAWS § 45-2-1 (2006). Vermont has separate statutory chapters granting powers to various towns. E.g., VT. STAT. ANN. tit. 24, § 105-32 (2006).

5. PA. STAT. ANN. §§ 53151-53811 (West 2006).

6. N.J. STAT. ANN. § 40A:62-1 (2006).

7. PAULA E. STEINBAUER ET AL., AN ASSESSMENT OF MUNICIPAL ANNEXATION IN GEORGIA AND THE UNITED STATES: A SEARCH FOR POLICY GUIDANCE 15 (Univ. of Ga. Pub. Policy Research Series 2002), available at <http://www.cviog.uga.edu/publications/pprs/53.pdf>; NATIONAL ASSOCIATION OF COUNTIES, ANNEXATION: A STATE BY STATE GUIDE 1 (1999); see, e.g., R.I. GEN. LAWS § 45-1-1 (2006) and VT. STAT. ANN. tit. 24, § 1461 (2006). Hawaii has only two levels of government (state and county); hence, it has no incorporation or annexation statutes.

8. ALA. CODE § 11-40-6 (2006).

9. VA. CODE ANN. § 1-254 (2006).

10. ARK. CODE ANN. §§ 14-45-101, 14-38-101 (2006).

11. MONT. CODE ANN. § 7-2-4101 (2006).

12. ARIZ. REV. STAT. ANN. §§ 9-101, 9-134 (2006).

13. WASH. REV. CODE §§ 35.02.001, 35.01.040 (2006).

14. See, e.g., Wis. STAT. § 66.0203 (2003); OHIO REV. CODE ANN. § 707.01 (West 2006); MINN. STAT. § 414.02 (2005); IOWA CODE §§ 362.2, 364.1 (2005).

15. EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS §§ 3.24, 7.15 (3d ed. 1997); OSBORNE M. REYNOLDS, JR., LOCAL GOVERNMENT LAW 230-41 (2d ed. 2001); DAVID RUSK, CITIES WITHOUT SUBURBS: A CENSUS 2000 UPDATE 108-10 (2003) (outlining annexation laws). For an example of differences in incorporation processes, compare MUNICIPAL RESEARCH AND SERVICES CENTER OF WASHINGTON, MUNICIPAL INCORPORATION GUIDE, Rep. No. 21 (2006), available at <http://www.mrsc.org/Publications/mig06.pdf> with LEAGUE OF ARIZONA CITIES AND TOWNS, MUNICIPAL INCORPORATION IN ARIZONA (2000), and MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, INCORPORATION HANDBOOK (2006), available at <http://www.masc.sc/Resources/2006%20Incorporation%20Handbook.pdf>. Similarly, for an example of differences in annexation processes, compare MUNICIPAL RESEARCH AND SERVICES CENTER OF WASHINGTON, ANNEXATION HANDBOOK, Rep. No. 19 (2005), available at <http://www.mrsc.org/Publications/textah.aspx>, with LEAGUE OF ARIZONA CITIES AND TOWNS, A GUIDE FOR ANNEXATION (2000), and MUNICIPAL ASSOCIATION OF SOUTH CAROLINA, ANNEXATION HANDBOOK (2006), available at <http://www.masc.sc/Resources/2006%20Annexation%20Handbook.pdf>.

16. See STEINBAUER, *supra* note 7, at 66-67.

can only occur by petition and the consent of residents or property owners to be annexed.<sup>17</sup> Incorporation is effectuated by various mechanisms from state to state:<sup>18</sup> acts adopted by state legislative bodies,<sup>19</sup> determinations by state-level commissions, boards and agencies,<sup>20</sup> local commissions,<sup>21</sup> counties,<sup>22</sup> referenda elections,<sup>23</sup> and courts.<sup>24</sup>

As illustrated by the preceding discussion, each state's municipal incorporation and annexation laws are different. Thus, tracing the development and operation of one set of annexation and incorporation laws requires focusing upon one jurisdiction. This article provides an in-depth case study of the development and operation of the incorporation and annexation laws of Wisconsin. The overall picture that emerges from this case study is one of development and implementation of uncoordinated and inconsistent annexation and incorporation laws. This article suggests that reforms are needed. Ultimately, however, it is for you the reader to decide what lessons Wisconsin's experience with incorporation and annexation holds for it and other states. Part II of this article is a short exploration of the shared constitutional underpinnings of annexation and incorporation to provide readers a solid foundation for understanding those processes. Similarly, Part III provides important background regarding the early formation and use of annexation and incorporation in Wisconsin. In Part IV, the Wisconsin Supreme Court's current annexation and incorporation doctrines, and their development, linkages, and shortcomings, are explored. The history of Wisconsin's current annexation and incorporation statutes is discussed in Part V. The linkages between various doctrines and statutes are revealed in Part VI. Part VII of this article examines the practical linkages between annexation and incorporation through two case studies partly drawn from firsthand knowledge the author gained while implementing Wisconsin's incorporation and annexation statutes while working within the

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17. Reynolds, *supra* note 1, at 247–48. State statutes define five types of annexation methods: (1) by petition of landowners being annexed; (2) by municipal ordinance; (3) by judicial determination; (4) by review boards or commissions; and (5) by the state legislature. *Id.* at 260.

18. REYNOLDS, *supra* note 15, at 230–33; Wisconsin's process uses three of those incorporation mechanisms—a state board, local court, and election. WIS. STAT. §§ 66.0205–66.0211 (2003).

19. *E.g.*, FLA. STAT. § 165.041 (2006).

20. *E.g.*, MINN. STAT. § 414.02 (2005); WIS. STAT. § 66.0207 (2003).

21. *E.g.*, WASH. REV. CODE §§ 35.02.001, 36.93.030 (2006).

22. *E.g.*, MD. CODE ANN. art. 23A, §§ 21–28 (West 2006).

23. REYNOLDS, *supra* note 15, at 231 (stating that election requirements are common); *e.g.*, WIS. STAT. § 66.0211 (2003).

24. REYNOLDS, *supra* note 15, at 231; WIS. STAT. § 66.0205 (2003).

Wisconsin Department of Administration. Finally, Part VIII concludes the article by summarizing the linkages between annexation and incorporation. Given their linkages, a common doctrine is suggested to advance a more rational jurisprudence that is consistent. Wisconsin courts do not have to look far for a starting point in developing such a doctrine: the *Lammers*<sup>25</sup> Doctrine and *Smith v. Sherry*<sup>26</sup> offer guidance.<sup>27</sup>

In Wisconsin, annexation and incorporation are the two primary methods by which territory transfers from the jurisdiction of towns to cities and villages.<sup>28</sup> Wisconsin has three forms of general purpose local government—towns, villages, and cities.<sup>29</sup> Towns are unincorporated government units each with jurisdiction over a township.<sup>30</sup> All unincorporated territory is within the jurisdiction of one of the 1,259 towns, and all incorporated territory is under the jurisdiction of either a city or village. Incorporated municipalities—cities and villages—may annex territory, whereas towns and counties cannot. In 1900, Wisconsin had 244 cities and villages;<sup>31</sup> today there are 591.<sup>32</sup> Whether municipal

25. State *ex rel.* Town of Holland v. Lammers, 89 N.W. 501 (Wis. 1902).

26. *Smith v. Sherry*, 6 N.W. 561 (Wis. 1880).

27. This article does not advocate a “return” to the *Lammers* Doctrine, but rather explains the existing state of Wisconsin’s incorporation and annexation jurisprudence, which still includes the *Lammers* Doctrine. Careful examination of the linkages between annexation and incorporation is long overdue. It seems unrealistic to create a new doctrine from whole cloth. Therefore, the existing doctrines should serve as *starting points* for an updated and hopefully more coherent one. It would be preferable for the Wisconsin legislature to comprehensively address these issues instead of leaving the courts and state agencies to struggle with them. The legislature has not substantially changed the basic statutes for over forty-five years. See *infra* Part V. Moreover, the words “village” and “city” are within the Wisconsin Constitution, and it is basic constitutional law that courts have a duty to interpret the language of the Constitution. See *infra* Part IV.

28. Other important methods for territorial changes are consolidation of local governments, Wis. STAT. § 66.0229 (2003), and change by cooperative plan and agreement. Wis. STAT. § 66.0301 (2003).

29. Some persons may include Wisconsin’s counties in the list of general-purpose governments; however, the legislature has assigned them specific duties compared to those undertaken by cities, villages, and towns.

30. Wisconsin towns follow the boundaries of “civil townships” surveyed by the federal government while Wisconsin was a United States territory for the purpose of subdividing counties and conveying land to new settlers. The typical township—and hence town—is six miles by six miles square (36 square miles). See Susan C. Paddock, *The Changing World of Wisconsin Local Government*, STATE OF WISCONSIN BLUE BOOK 1997–1998, 115–21 (1997); the Wisconsin Department of Natural Resources has an online map of townships in Wisconsin, available at <http://www.dnr.state.wi.us/maps/gis/dataplss.html>.

31. CURTIS W. TARR, A BLUE PRINT FOR LOCAL GOVERNMENT REFORM IN WISCONSIN: A SUMMARY OF THE REPORT OF THE TASK FORCE ON LOCAL GOVERNMENT FINANCE AND ORGANIZATION 4 (February 1969).

32. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2005–2006, 744 (2005) (stating there were 590 cities and villages as of January 1, 2005). In the year 2005, the Village of Caledonia was incorporated. Sheila B. Lalwani, *Caledonia Chooses First Board*, MILWAUKEE JOURNAL-SENTINEL, Apr. 8, 2006, available at <http://www.jsonline.com/story/?id=414192>. This creates a total of 591 cities and villages.

incorporation is easy or difficult to achieve affects the number and location of new cities and villages that are formed.

The proliferation of new local government units in relation to existing cities and villages has made efficient coordination of governmental services across Wisconsin's metropolitan areas more difficult.<sup>33</sup> A string of Wisconsin blue ribbon commissions and committees have examined local government organization and suggested that local governance and public service delivery in Wisconsin is not well-coordinated and that the multiplicity of local governments contributes to the lack of coordination, especially within large metropolitan areas.<sup>34</sup> The existence of numerous local governments within a single urban complex has been termed a "problem."<sup>35</sup>

Rivers, lakes, air, disease, crime, economic markets, and transportation systems do not respect the boundaries of a municipality. Hence, effective management and resolution of air and water pollution issues, public health issues, crime, economic development issues, multi-modal transportation needs, as well as infrastructure associated with these issues, need to be effectuated and coordinated over a large area.<sup>36</sup> Under Wisconsin's present system of local government, accomplishing this requires a local unit of government large enough to encompass, for instance, an entire regional economic market. The alternative is coordination voluntarily occurring between local governments within that regional market. But coordination mechanisms take considerable time and effort.<sup>37</sup>

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33. See generally CARROLL E. METZNER, REPORT OF THE INTERIM URBAN PROBLEMS COMMITTEE (January 1959).

34. *Id.*; see CURTIS W. TARR, TASK FORCE ON LOCAL GOVERNMENT FINANCE AND ORGANIZATION IN WISCONSIN (TARR TASK FORCE), ch. VIII-1 (1969); GILBERT CHURCH, CITIZENS STUDY COMMITTEE ON METROPOLITAN PROBLEMS, 6-6 to 6-9 (Final Report 1973); HARRY L. WALLACE, FINAL REPORT OF THE COMMISSION ON STATE-LOCAL RELATIONS AND FINANCING POLICY 7-1 to 7-8 (1977); DONALD KETTL, WISCONSIN BLUE RIBBON COMMISSION ON STATE-LOCAL PARTNERSHIPS FOR THE 21ST CENTURY 10-19 (January 2001).

35. METZNER, *supra* note 33; FRANK S. SENGSTOCK, ANNEXATION: A SOLUTION TO THE METROPOLITAN AREA PROBLEM 2 (1960); CHURCH, *supra* note 34; Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996).

36. SENGSTOCK, *supra* note 35, at 1-8 (An enlightening and balanced account of these issues as they relate to annexations.).

37. Others argue that small governments are superior. Georgette C. Poindexter, *Collective Individualism: Deconstructing the Legal City*, 145 U. PA. L. REV. 607 (1997) (arguing that small communities foster citizen participation, efficiency, government responsiveness, and a sense of community). Further, even presupposing a multiplicity of small governments are inefficient in terms of service delivery, perhaps inefficiency is a price worth paying for smaller, more responsive local governments.

In Wisconsin, each local government collects property taxes within its borders. The amount collected depends in part upon the valuation of the property contained within a given locality. Thus, proliferation of local government can promote “tax islands,” as persons with high incomes and valuable properties gravitate to certain municipalities,<sup>38</sup> and collectively make land use decisions that directly or indirectly exclude certain types of land uses as well as socioeconomic groups.<sup>39</sup> Because municipal property tax payments are collected and received by each single municipal unit, some municipalities are winners, and others are losers, in the search for property tax revenues per capita.<sup>40</sup> Annexation and incorporation are central to addressing those issues.<sup>41</sup> Incorporations add new cities or villages. On the other hand, annexations allow existing cities and villages to expand.

Therefore, new statutes or judicial decisions that change the ease or difficulty with which municipalities may incorporate or annex territory affect the costs and availability of local government services.<sup>42</sup> They also partially determine which jurisdictions will capture new property tax base. For these reasons, the leading statewide associations of local governments pay close attention to legislative acts and court decisions affecting municipal incorporation and annexation.

38. See, e.g., CHURCH, *supra* note 34, at 7-1; see Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing citizens are “consumer-voters” who choose to locate in the locality best satisfying his or her pattern of preferences for public goods). Of course, not all persons have the income to freely choose among all communities.

39. See Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COL. L. REV. 346 (1990); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994). See generally MICHAEL N. DANIELSON, *THE POLITICS OF EXCLUSION* (1976); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1 (1990) (Exclusionary zoning underscores the close connection between local legal and political autonomy, and court decisions demonstrate the salience of inter-governmental conflicts and distributive justice issues.).

40. MYRON ORFIELD & THOMAS LUCE, *WISCONSIN METROPATTERNS* (Metropolitan Area Research Corporation, 2002) (illustrating fiscal disparities between central cities and suburbs in Wisconsin); PAUL KANTOR, *THE DEPENDENT CITY REVISITED: THE POLITICAL ECONOMY OF URBAN DEVELOPMENT AND SOCIAL POLICY* 164 (Westview Press 1995).

41. Actions taken today set the future geographical patterns of local governments. The full societal effects of our annexation and incorporation laws are fully felt many years in the future. Changes to the current annexation and incorporation laws will determine the future number of local governments within the areas where new development is occurring on the fringes of existing metropolitan areas and within newly forming metropolises.

42. KETTL, *supra* note 34; see CHURCH, *supra* note 34; WALLACE, *supra* note 34. See generally METZNER, *supra* note 33.

The history of the formation of the current statutory scheme and court doctrines amply illustrate that the local government structure in Wisconsin presupposes that incorporated jurisdictions are urban<sup>43</sup> and rural territory is in towns.<sup>44</sup> However, urbanization continues to spill into unincorporated towns, which has created mounting political pressure to reform Wisconsin's statutes.<sup>45</sup>

The authority for, and process of, incorporation is found in sections 66.0201 to 66.0211 of the Wisconsin Statutes, and for annexation, sections 66.0217 to 66.0223. Annexation and incorporation actions have been the topics of numerous law review articles<sup>46</sup> and lawsuits. The lawsuits, which pit cities and villages on one side against towns on the other, have created a large body of case law.

The majority of past scholarly treatments have tended to focus solely upon either annexation or incorporation.<sup>47</sup> They are, indeed, distinct

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43. In this article, the use of the term "urban" includes any built-up environment; thus, it generally includes suburban areas.

44. *Lammers*, 89 N.W. 501; see *Paddock*, *supra* note 30; WIS. STAT. §§ 66.201(1), 66.0207, 66.0217(6)(c) (2003). This premise is not unique to Wisconsin. Alison Yurko, *A Practical Perspective About Annexation In Florida*, 25 STETSON L. REV. 699 (1996). The incorporation laws do not allow large tracts of rural territory to be included in cities and villages; therefore, by default, rural territory must remain in towns. A town may be rural or urban. However, the governance structure of Wisconsin's towns is not equipped for highly populated areas, e.g., as a town grows in number of residents, the annual town meeting becomes increasingly impractical. WIS. STAT. §§ 60.01–60.24 (2003). Moreover, the powers and governance structure of incorporated municipalities position them to deliver a larger number of governmental services at greater levels of expertise than unincorporated units of government. See generally WIS. STAT. chs. 61–62.

45. E.g., 2003 Wis. Act 317; see *Church*, *supra* note 34; *Wallace*, *supra* note 34, at 7-1 to 7-9; see also Wisconsin Legislative Special Committee on Annexation 2004–2005, <http://www.legis.state.wi.us/lc/committees/study/2004/ANNEX/index.htm> (last visited Feb. 23, 2007); *Tarr*, *supra* note 34, at VIII-1.

46. E.g., Richard F. Maruszewski, *Legal Aspects of Annexation as It Relates to the City of Milwaukee* 1952 WIS. L. REV. 622; Carl H. Quast, *Why Annexation for the City of Milwaukee?*, 1952 WIS. L. REV. 617; Clifford K. Meldman, Comment, *Annexation Under 62.07 Statutes*, 40 MARQ. L. REV. 199 (1956); Richard W. Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality*, 1958 WIS. L. REV. 6 [hereinafter Cutler, *Characteristics*]; Daniel R. Mandelker, *Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review*, 18 LA. L. REV. 628 (1958); Daniel R. Mandelker, *Standards for Municipal Incorporation on the Urban Fringe*, 36 TEX. L. REV. 271 (1958); Joel J. Rabin, Comment, *Changes in Wisconsin Annexation Proceedings and Remedies*, 1961 WIS. L. REV. 123 [hereinafter Rabin, *Changes*]; Walter K. Johnson, *The Wisconsin Experience with State-Level Review of Municipal Incorporations, Consolidations, and Annexations*, 1965 WIS. L. REV. 462; C. Michael Conter, Note, *Municipal Corporations: The Rule of Reason as Applied to Annexations*, 50 MARQ. L. REV. 149 (1966); M.G. Woodroof III, *Systems and Standards of Municipal Annexation Review: A Comparative Analysis*, 58 GEO. L.J. 743 (1970); Stephen L. Knowles, Comment, *The Rule of Reason in Wisconsin Annexations*, 1972 WIS. L. REV. 1125; Reynolds, *supra* note 1; Briffault, *supra* note 35; Nathan J. Zollik, Comment, *Suburbs, Separatism, and Segregation: The Story of Milwaukee's Boundary Through the Lens of Annexation Law*, 2001 WIS. L. REV. 501.

47. See sources cited *supra* note 46.

procedures with separate bodies of laws; however, annexation and incorporation are, nonetheless, linked in doctrine, history, and practice.

Doctrinally, at the beginning of the twentieth century, the constitutional basis for the Wisconsin Supreme Court's annexation and incorporation jurisprudence was the same.<sup>48</sup> In the 1950s, however, the annexation and incorporation doctrines diverged. In 1959, a comprehensive revamp of the incorporation statutes rendered the court's incorporation doctrine—the *Lammers* Doctrine—obsolete for the vast majority of incorporation actions.<sup>49</sup> The *Lammers* Doctrine requires that a city or village in-fact exists at the time of incorporation.<sup>50</sup> At approximately that same time, Wisconsin's annexation doctrine—the Rule of Reason—was maturing without using the principles from a seminal annexation case<sup>51</sup> or the incorporation doctrine,<sup>52</sup> even though during the early 1900s the Wisconsin Supreme Court quite logically applied a similar analysis to annexations and incorporations.<sup>53</sup>

Historically, the Wisconsin legislature recognized the linkages between annexation and incorporation. The first general annexation and incorporation statutes were adopted as a package in 1889.<sup>54</sup> Over the years, several special legislative study councils, committees, and commissions have examined annexation and incorporation—often termed municipal boundary issues—together.<sup>55</sup> To illustrate, the Wisconsin legislature's 1959 Urban Problems Study Committee considered annexation and incorporation as part and parcel of the “urban problems” it was charged to study. The Urban Problems Study Committee Report to the legislature expressly detailed linkages between annexation and incorporation.<sup>56</sup>

In practice, the annexation of large tracts of territory from the jurisdiction of towns is often a driving factor in attempts to incorporate towns, which in turn seek to secure, *inter alia*, their boundaries and tax base. It is not uncommon for towns that create land use plans to

48. WIS. CONST. art. XI, § 3, as interpreted by *Lammers*, 89 N.W. 501 and *Sherry*, 6 N.W. 561.

49. WIS. STAT. §§ 66.0201–6.0213 (2003).

50. *Lammers*, 89 N.W. at 503.

51. *Sherry*, 6 N.W. 561.

52. *Lammers*, 89 N.W. 501.

53. WIS. CONST. art. XI, § 3.

54. 1889 Wis. Sess. Laws ch. 326, §§ 1-2 dealing with annexation and §§ 7-8 dealing with incorporation.

55. See, e.g., TARR, *supra* note 34, at VIII-1; CHURCH, *supra* note 34, at 6-6 to 6-9; WALLACE, *supra* note 34, at 7-1 to 7-8; Wisconsin Legislative Council, Staff Brief 90-1, *Overview of Wisconsin Law on Incorporation, Annexation and Other Municipal Boundary Procedures* (July 20, 1990).

56. See generally METZNER, *supra* note 33.



guide development in a manner that will eventually qualify them to meet the requirements for incorporation.<sup>57</sup> Those plans, however, may be rendered obsolete upon the annexation by a city or village of territory the towns contain. In addition, incorporation of a new municipality adjacent to an existing city or village stops the expansion of the older municipality into the newly incorporated territory.<sup>58</sup> Consequently, the new municipality reaps the perceived benefits of greenfield developments, and the expanding property tax base they bring, at the expense of the older—often a struggling central city—municipality. Milwaukee has been completely cut off from territorial growth for decades, and Racine’s territorial growth was recently halted. Sheboygan, Green Bay, and La Crosse, for example, have few growth corridors remaining.

## II. Sources of Authority and Constitutional Contours of the Power to Annex and Incorporate Local Governments

This section provides a basic introduction to the sources of authority that enable the annexation and incorporation processes, and the constitutional limits, or lack thereof, placed upon that power by federal and state constitutions and courts. It also shows the shared legal foundation of annexation and incorporation.

### A. *Legislative Power over Municipalities in Wisconsin*

The Wisconsin Supreme Court has recognized the state legislature’s power to create municipal corporations and alter their boundaries since at least 1860.<sup>59</sup>

[T]he power of the legislature to enlarge, restrict, change, modify, control and repeal all [ ] public corporations is undoubted. They are established as a part of the police

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57. Town land use plans also often allow development adjacent to the border with a neighboring city or village in order to block annexations. In practice, when town subdivisions abut a city or village, they create a barrier to annexation because there are more electors from whom signatures are required for any annexation petition. It is easier to convince one farmer owning 200 acres to annex his or her land than it is to annex that same 200 acres when 400 people are living on it.

58. Incorporated municipalities cannot annex territory from each other. *See City of Wauwatosa v. City of Milwaukee*, 192 N.W. 982 (Wis. 1923).

59. *Town of Milwaukee v. City of Milwaukee*, 1860 WL 2531 at \*1 (Wis. 1860). Some municipal corporations in Wisconsin were incorporated by act of the territorial legislature before statehood, e.g., the City of Milwaukee was chartered while part of the Northwest Territories. CHARLES R. ADRIAN & ERNEST S. GRIFFITH, *A HISTORY OF AMERICAN CITY GOVERNMENT: THE FORMATION OF TRADITIONS, 1775–1870* 50 (Praeger Publishers 1976); *Town of Milwaukee*, 1860 WL 2531, at \*1 (stating that the City of Milwaukee’s charter was granted by the territorial legislature).

[power] of the State and to meet the object of their creation, must be subject to such changes as the exigencies of the times require.<sup>60</sup>

This power is lodged in article XI, section 3 of the Wisconsin Constitution.<sup>61</sup> Upon formation, cities and villages obtain a municipal charter, which is a grant of state legislative power to the municipality; however, the municipality holds only those powers expressed or implied by the charter or other governing statutes.<sup>62</sup> The Wisconsin legislature's control over local governments has been reaffirmed by the Wisconsin Supreme Court numerous times since 1860.<sup>63</sup> The power, however, only applies to issues not of purely local concern pursuant to home rule.<sup>64</sup> For our purposes, it is important to note that incorporation and alteration of

60. *Town of Milwaukee*, 1860 WL 2531, at \*5.

61. "Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city and village. . . ." WIS. CONST. art. XI, § 3 (2006). The first eight words are relevant here. Prior to a 1924 amendment, section 3 began: "It shall be the duty of the legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages. . . ." WIS. CONST. art. XI, § 3 (1922). Today, article XI, section 3 of the Wisconsin Constitution is less explicit that it is empowering the legislature to organize cities and villages, but that power is still lodged there.

62. *State ex rel. Ekern v. City of Milwaukee*, 209 N.W. 860 (Wis. 1926); REYNOLDS, *supra* note 15, at 156-57.

63. *See, e.g., Milwaukee Gun Club v. Schulz*, 979 F. 2d 1252 (7th Cir. 1992) (applying Wisconsin law); *State ex rel. Mueller v. Thompson* 137 N.W. 20 (Wis. 1912) (finding state legislative authority over local government plenary and unlimited); *Richland County v. Vill. of Richland Ctr.*, 18 N.W. 497 (Wis. 1884) (finding that municipal corporations hold their powers at the pleasure of the state); *State ex rel. Prahlow v. City of Milwaukee*, 30 N.W.2d 260, 263 (Wis. 1947) (referring to state legislative authority as "supreme" over local governments); *State ex rel. Martin v. City of Juneau*, 300 N.W. 187, 190 (Wis. 1941) (finding state legislative authority "supreme" over local governments); *City of Marshfield v. Town of Cameron*, 127 N.W.2d 809, 813 (Wis. 1964) (calling municipalities "creatures of the state . . . not permitted to censor or supervise the activities of their creator"); *Scharping v. Johnson*, 145 N.W.2d 691, 694 (Wis. 1966) (finding state legislative powers over municipal corporations to be "complete"); *see also Town of Holland v. Vill. of Cedar Grove*, 282 N.W. 111 (Wis. 1938) (Municipal corporations have no private powers or rights as against the state, but hold their powers from the state, which can take them away at its pleasure, except as to contracts lawfully entered into by them with third persons.); *Silver Lake Sanitary Dist. v. Wis. Dep't of Natural Res.*, 607 N.W.2d 50 (Wis. Ct. App. 1999) (Municipal corporations and quasi-municipal corporations are all creatures of the state, and their powers are only those ascribed to them by the state.).

64. Wisconsin's current home rule provision states in part: "Cities and villages . . . may determine their local affairs and government, subject . . . to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village." WIS. CONST. art. XI, § 3. Home rule gives municipalities powers that generally prevail over state laws on matters of purely local concern. LEAGUE OF WISCONSIN MUNICIPALITIES, HANDBOOK FOR WISCONSIN MUNICIPAL OFFICIALS [hereafter LEAGUE OF WISCONSIN MUNICIPALITIES, HANDBOOK 1983] 5-9 (1983); REYNOLDS, *supra* note 15, at 87-88; *see* JAMES R. DONOGHUE, LOCAL GOVERNMENT IN WISCONSIN 47 (reprinted from STATE OF WISCONSIN BLUE BOOK 1979-1980). But matters of purely local concern are few because courts have interpreted almost every municipal activity to have at least some statewide effect. LEAGUE OF WISCONSIN MUNICIPALITIES,

municipal corporate boundaries are matters of statewide concern not subject to home rule.<sup>65</sup> Home rule does not limit the Wisconsin legislature's power to form, extinguish, expand, or diminish cities and villages.<sup>66</sup> That power is limited, however, when contracts between a municipality and third party are infringed upon by state action.<sup>67</sup>

In Wisconsin, therefore, the legislature has the power to set by statute the terms by which municipalities are formed and changed relatively free of constitutional constraints.<sup>68</sup> But a few important constraints do remain. The Wisconsin Supreme Court has developed an elaborate pair of doctrines to determine when state or local legislative bodies act ultra vires in incorporating or annexing territory, and they are the topic of Part IV of this article.

### B. *United States Supreme Court Decisions*

Leading treatises and federal cases view annexation and incorporation as exercises of the plenary power of states to determine the boundaries of their respective local governments.<sup>69</sup> State legislatures have the power to create, extinguish, and change the territorial composition of local

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HANDBOOK FOR WISCONSIN MUNICIPAL OFFICIALS 8 (1998)[hereinafter LEAGUE OF WISCONSIN MUNICIPALITIES, HANDBOOK 1998]. Constitutional home rule in Wisconsin provides only minimal autonomy to cities and villages because, even in matters of primarily local concern, the Wisconsin legislature may enact legislation controlling those issues if the act uniformly applies to every city or village in the state. *City of West Allis v. County of Milwaukee*, 159 N.W.2d 36, 40 (Wis. 1968); Wis. CONST. art. XI, § 3; see also Rick Champagne, *Wisconsin Constitutional Article XI Section 3, Municipal Home Rule*, Constitutional Highlights from the Wisconsin Legislative Reference Bureau, <http://www.legis.state.wi.us/LRB/pubs/consthi/05consthiIV3.htm> (last visited March 3, 2007)[hereinafter Champagne, *Municipal Home Rule*]. Moreover, the prevailing Wisconsin Supreme Court decisions have taken a cramped interpretation of article XI, section 3 of the Wisconsin Constitution. *Van Gilder v. City of Madison*, 267 N.W. 25 (Wis. 1936); *State ex rel. Sleeman v. Baxter*, 219 N.W. 858 (Wis. 1928). *But cf. State ex rel. Ekern*, 209 N.W. See generally Sam Brugger, Note, *Municipal Corporations—Home Rule in Wisconsin*, 1955 Wis. L. REV. 145. In fact, local governments have successfully asserted constitutional home rule in only two cases, *State ex rel. Ekern*, 209 N.W. 860, and *State ex rel. Michalek v. LeGrand*, 253 N.W.2d 505 (Wis. 1977). Champagne, *Municipal Home Rule*, *supra*.

65. *City of Beloit v. Kallas*, 250 N.W.2d 342, 345 (Wis. 1977); *Town of Wauwatosa v. City of Milwaukee*, 62 N.W.2d 718, 721 (Wis. 1954); *Barth v. Vill. of Shorewood*, 282 N.W. 89, 93 (Wis. 1938); *Bleck v. Monona Vill.*, 148 N.W.2d 708, 710 (Wis. 1967); see REYNOLDS, *supra* note 15, at 126. See generally *In re Incorporation of Vill. of Elmwood Park*, 101 N.W.2d 659 (Wis. 1960); *Scharping*, 145 N.W.2d 691; *City of Madison v. Town of Madison*, 377 N.W.2d 221 (Wis. Ct. App. 1985).

66. *Bleck*, 148 N.W.2d at 710; LEAGUE OF WISCONSIN MUNICIPALITIES, HANDBOOK 1998, *supra* note 64, at 31.

67. *E.g., Town of Holland*, 282 N.W. at 117; *Richland County*, 18 N.W. 497.

68. One important constraint, Wis. CONST. art. XI, § 3, will be thoroughly addressed later in the article.

69. See McQUILLIN, *supra* note 15, § 3.24, 4.3, 7.10, 7.12 (3d ed.); REYNOLDS, *supra* note 15, at 85–86; *Meriwether v. Garrett*, 102 U.S. 472, 527–28 (1880); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907).

governments, and only constitutional provisions limit that power.<sup>70</sup> Such state power has been “referred to as plenary, supreme, absolute, complete, or unlimited” by various courts.<sup>71</sup>

In 1880, the United States Supreme Court found in *Meriwether v. Garrett*<sup>72</sup> that municipal corporations are “mere instrumentalities” of the states created for the states’ convenience in exercising the states’ powers.<sup>73</sup> State police power is “entrusted” or granted to municipal corporations.<sup>74</sup> In *Meriwether*, the Court opined: “[Municipal corporate] powers are such as the legislature may confer, and these may be enlarged, abridged, or entirely withdrawn at its pleasure. This is . . . found in all adjudications on the subject of municipal bodies and repeated by text-writers.”<sup>75</sup> Twenty-seven years later, the United States Supreme Court reasserted state plenary power over municipal corporations in *Hunter v. Pittsburgh*<sup>76</sup> and specifically addressed municipal boundaries:

The state, therefore, at its pleasure, may modify or withdraw all such powers . . . expand or contract the territorial area, unite the whole or part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the [municipality’s] citizens, or even against their protest. In all these respects, the state is supreme . . .<sup>77</sup>

In *Hunter*, a Pennsylvania law allowing for the consolidation of a smaller city into a larger adjacent city was challenged under the Contracts and Due Process Clauses of the United States Constitution.<sup>78</sup> The Pennsylvania law provided that a combined vote of citizens in both cities—the larger and smaller—determined the consolidation’s outcome. Although a majority of citizens in the City of Allegheny voted against the consolidation, Pittsburgh’s larger population, which voted for consolidation, easily overcame the Allegheny voters. A group of Allegheny taxpayers brought suit, claiming the state law impaired a contract between them and the City of Allegheny insofar as the taxpayers should only be taxed for “governmental purposes of [Allegheny], and that the legislative attempt to subject them to the taxes of the enlarged city violates article 1, § 9, 10, of the

70. McQUILLIN, *supra* note 15, §§ 4.3, 3.02; *Meriwether*, 102 U.S. at 511–12 (municipal charters may be altered or repealed at the state’s pleasure absent state constitutional prohibitions); Rabin, *Changes*, *supra* note 46, at 124; *State ex rel. Mueller*, 137 N.W. at 22–3; see WILLIAM BENNETT MUNRO, *THE GOVERNMENTS OF AMERICAN CITIES* 53 (The MacMillan Co. 1913).

71. McQUILLIN, *supra* note 15, § 4.3.

72. 102 U.S. 472 (1880).

73. *Id.* at 511.

74. *Hunter*, 207 U.S. at 178.

75. *Meriwether*, 102 U.S. at 511.

76. *Hunter*, 207 U.S. 161. For a critical analysis of *Hunter*, see Note, *The Right to Vote in Municipal Annexations*, 88 HARV. L. REV. 1571 (1975).

77. *Hunter*, 207 U.S. at 178–79.

78. *Id.* at 174–77.

Constitution of the United States.”<sup>79</sup> The United States Supreme Court flatly rejected the Contracts Clause challenge, calling it “utterly inconsistent with the nature of municipal corporations, the purposes for which they are created,”<sup>80</sup> and the relationship they have with citizens and property owners.<sup>81</sup> The other constitutional question addressed by the Court was the plaintiffs’ claim of deprivation of property without due process because the consolidated city subjected them to additional tax burdens.<sup>82</sup> The Court also flatly dismissed the due process claim.<sup>83</sup> The Court opined that neither the Contracts Clause nor the Due Process Clauses of the United States Constitution have application to actions taken by a state against a municipality to repeal or amend governing charters.<sup>84</sup> Regarding the consolidation of the City of Allegheny into the City of Pittsburgh, the Court found that state legislative bodies and state constitutions are supreme regarding the relationship between states and municipal corporations “unrestrained” by the United States Constitution.<sup>85</sup> In language later favorably quoted by the Wisconsin Supreme Court in *State ex rel. Zilisch v. Auer*,<sup>86</sup> the *Hunter* Court stated:

Although the inhabitants and property owners [of Allegheny] may . . . suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences.<sup>87</sup>

The federal constitution generally does not restrain states acting to incorporate, extinguish, or change the borders of municipalities absent harms to third parties,<sup>88</sup> even under the Contracts,<sup>89</sup> Privileges and

79. *Id.* at 177.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Hunter*, 207 U.S. at 178.

84. *Id.* at 177–78; *see also Meriwether*, 102 U.S. 472; *Mount Pleasant v. Beckwith*, 100 U.S. 514, 524–25 (1879) (arising out of Wisconsin); *Associated Hosp. Serv., Inc. v. City of Milwaukee*, 109 N.W.2d 271, 281–82 (Wis. 1961); REYNOLDS, *supra* note 15, at 85–87.

85. *Hunter*, 207 U.S. at 179. Later cases, however, have “restrained” the power of state legislatures in organizing municipal corporations when a federally protected civil right is infringed; *e.g.*, *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

86. 221 N.W. 860, 864 (Wis. 1928).

87. *Hunter*, 207 U.S. at 179. This may be an overstatement today. When civil rights are infringed upon, the Equal Protection and Due Process Clauses of the United States Constitution come into play to limit state power over municipalities, as will be promptly addressed in this article.

88. *Id.*; *Forsyth v. Hammond*, 166 U.S. 506 (1897) (finding that questions over municipal boundaries are local issues for states, not for the federal government, to decide); *State ex rel. Zilisch*, 221 N.W. at 864 (quoting *Hunter*, 207 U.S. at 178–79); *Mandelker, Municipal Incorporation on the Urban Fringe*, *supra* note 46, at 629 n. 3; *Rabin, Changes*, *supra* note 46, at 124.

89. *City of Covington v. Kentucky*, 173 U.S. 231 (1899) (finding statute giving tax exemptions in city was not a contract between citizens and city); *see, e.g., Gomillion*, 364 U.S. at 343. *Cf. Williamson v. New Jersey*, 130 U.S. 189 (1889) (grant of taxation

Immunities,<sup>90</sup> Due Process,<sup>91</sup> or Equal Protection Clauses.<sup>92</sup> But federal questions do arise, albeit infrequently.

Federal courts will step into cases involving municipal formation, dissolution, or territorial alteration of municipalities in which a federally protected right is at stake. One example of the United States Supreme Court finding federal constitutional questions of equal protection and due process in the alteration of municipal boundaries is found in *Gomillion v. Lightfoot*.<sup>93</sup> In *Gomillion*, the Alabama legislature adopted an act changing the boundaries of the City of Tuskegee, which altered Tuskegee's corporate limits to remove all but four or five of its 400 African-American voters from the city without removing a single white voter.<sup>94</sup> In doing so, the Alabama legislature changed Tuskegee's corporate limits from a square into an irregularly shaped twenty-eight-sided figure.<sup>95</sup> In overturning the Court of Appeals for the Fifth Circuit, the United States Supreme Court held that such gerrymandering to exclude African-American voters from Tuskegee constituted discrimination in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment and the Fifteenth Amendment's right to vote.<sup>96</sup> Speaking for the majority, Justice Frankfurter wrote: "Legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the United States

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power to city can be withdrawn without violating Contracts Clause); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251 (5th Cir. 1976) (state can authorize annexation even where it violates contractual provisions between several municipalities). Creation of a municipality is a political act that does not fall under *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

90. *E.g.*, *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36 (1933); *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *City of Marshfield*, 127 N.W.2d at 813.

91. *City of Trenton*, 262 U.S. at 183; *Associated Hosp. Serv., Inc.*, 109 N.W.2d at 281.

92. This is true of the Equal Protection Clause only to the extent that no third-party rights are involved. REYNOLDS, *supra* note 15, at 86-87; *City of Newark v. New Jersey*, 262 U.S. 192 (1923) (city attempted to avoid paying state water charge that did not apply to all cities in the state); *State ex rel. Zilisch*, 221 N.W. 860 (finding statute authorizing changes in school district boundaries does not violate federal or state equal protection clauses). But where rights of third persons are violated under the Equal Protection Clause, it may apply to state actions affecting municipalities; *see* *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) (finding that the Equal Protection Clause invalidates Washington initiative measure that barred use of mandatory busing for racial integration).

93. *Gomillion*, 364 U.S. 339. The Wisconsin Supreme Court has taken note of *Gomillion*. *See* *Columbia County v. Bd. of Trustees*, 116 N.W.2d 142, 147 (Wis. 1962) (stating that the state's legislative control of municipalities is not entirely beyond the scope of limitations imposed by the United States Constitution).

94. *Gomillion*, 364 U.S. at 341.

95. *Id.* at 339.

96. *Id.*

Constitution.”<sup>97</sup> Normally, the exercise of state power over its subunits is wholly within the domain of state interest and, hence, insulated from federal judicial review. Nevertheless, “such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.”<sup>98</sup>

Thus, when states change the boundaries of local governments, the federal courts have a narrow role in protecting constitutionally protected rights. On the whole, however, states exercise broad powers to structure their local governments without federal interference. Hence, the constitutions, statutes, and state courts are where the vast majority of the rules reside, and battles are fought, regarding local government boundaries.

### III. Wisconsin’s First Incorporation and Annexation Laws: Special-Act Municipal Charters from 1848–1889

The early history of Wisconsin’s annexation and incorporation laws provides additional background for understanding legal developments that constitute the core of this article. Those developments are a pair of court-created doctrines<sup>99</sup> and, starting in the 1950s, new statutes that created greater state agency oversight over annexation and incorporation.<sup>100</sup>

Along with important background laws, this section illustrates that from the beginning, a close relationship existed between the annexation and incorporation statutes as evinced by the fact that the first city incorporation and annexation statutes were both enacted in 1889.<sup>101</sup>

When Wisconsin gained statehood in 1848, cities, and some villages, were chartered by special acts of the state legislature.<sup>102</sup> Each special-act charter was a unique instrument granting specific powers to a city or village.<sup>103</sup> The City of Madison, for example, was incorporated by special legislative act in 1856.<sup>104</sup> Thus, the powers and structure of incorporated

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97. *Id.* at 344–45.

98. *Id.* at 347.

99. *See infra* Part IV.

100. *See infra* Part V.

101. Wis. LAWS ch. 326, §§ 1–2, 7, 8 (1889); *see Adams v. City of Beloit*, 81 N.W. 869 (Wis. 1900).

102. Wis. CONST. art. XI, § 3 (1848), provided: “It shall be the duty of the legislature, and they are hereby empowered to provide for the organization of cities and incorporated villages. . . .”; *see DONOGHUE, supra* note 64, at 46; LEAGUE OF MUNICIPALITIES, HANDBOOK 1983, *supra* note 64, at 3; Cutler, *Characteristics, supra* note 46, at 14; *see also ADRIAN & GRIFFITH, supra* note 59, at 30–39.

103. LEAGUE OF MUNICIPALITIES, HANDBOOK 1983 *supra* note 64, at 3; ADRIAN & GRIFFITH, *supra* note 59, at 34.

104. 1856 Wis. Sess. Laws ch.75.

municipalities were not uniform: a charter granted to one municipality might differ from that granted to another.<sup>105</sup> Special legislation was required not only to form a city, but also for any alteration of city boundaries that required amending the charter, which in turn required specific legislation by the state.<sup>106</sup> Hence, Wisconsin witnessed an increasing amount of special legislation granting or withholding powers from municipalities.<sup>107</sup> Special-act bills pertaining to municipalities were choking the legislature.<sup>108</sup>

Although it is now eclipsed by other constitutional provisions, authority for such special legislation is in article XI, section 1 of the Wisconsin Constitution, which allows for creation and repeal of the corporate charters of both municipal and private corporations. The following language in today's article XI, section 1 was in the original Wisconsin Constitution of 1848:

Corporations without banking powers or privileges may be formed under general laws, but shall not be created by special act, except for municipal purposes . . . All general laws or special acts enacted under the provisions of this section may be altered or repealed by the legislature at any time after their passage.<sup>109</sup>

Municipal corporations could be formed by special act, and this is the manner in which cities and many villages<sup>110</sup> were created during the first few decades of statehood.<sup>111</sup>

Two constitutional amendments, however, eventually prohibited the legislature from incorporating villages and cities by "special or private

105. LEAGUE OF MUNICIPALITIES, HANDBOOK 1983, *supra* note 64, at 3; DONOGHUE, *supra* note 64, at 46; ADRIAN & GRIFFITH, *supra* note 59, at 34.

106. *See* LEAGUE OF MUNICIPALITIES, HANDBOOK 1983, *supra* note 64, at 3; DONOGHUE, *supra* note 64, at 46; ADRIAN & GRIFFITH, *supra* note 59, at 34.

107. LEAGUE OF MUNICIPALITIES, HANDBOOK 1983, *supra* note 64, at 3–5; ADRIAN & GRIFFITH, *supra* note 59, at 34.

108. The number of special bills related to municipal incorporation and annexation were legion before 1889 because every change in the municipal boundaries of the special charter cities required a new charter from the state legislature. For example, the session laws from the Wisconsin legislature's three biennial sessions for 1883 through 1887 are published in two volumes for each session. The second volumes are dedicated strictly to amendments to city charters, and the city charter volumes have substantially more pages than the first volumes containing all other laws adopted during each session. *Compare* 1883 Laws of Wis. Vol. I *with* 1883 Laws of Wis. Vol. II; *compare* 1885 Laws of Wis. Vol. I *with* 1885 Laws of Wis. Vol. II; *compare* 1887 Laws of Wisconsin Vol. I *with* 1887 Laws of Wis. Vol. II. Even as late as 1911, one-third of the legislature's biennial session was spent debating and adopting bills related to city charters. LEAGUE OF MUNICIPALITIES, HANDBOOK 1998 *supra* note 64, at 5; DONOGHUE, *supra* note 64, at 46. During the 1911 legislative session, 200 bills relating to Milwaukee's charter powers alone were adopted. LEAGUE OF MUNICIPALITIES, HANDBOOK 1998, *supra* note 64, at 5.

109. WIS. CONST. art. XI, § 1 (1848).

110. At this time a village could be created by either special act or with local petition and referendum. *See* WIS. REV. STAT. ch. 52, § 8 (1849).

111. Cutler, *Characteristics*, *supra* note 46, at 14.



law.”<sup>112</sup> The first, adopted in 1871, prohibited the legislative practice of adopting special acts for incorporating villages and altering their charters;<sup>113</sup> then, in 1892, cities were added to the prohibition.<sup>114</sup> Today, the prohibition on special laws is found in article IV, section 31.<sup>115</sup> Following those constitutional amendments, incorporation of municipalities was instead accomplished by local petition and referendum by electors within the petitioned territory.<sup>116</sup> Since 1849, villages could be created by local petitions and referenda elections,<sup>117</sup> a statute for consolidating local governments was enacted in 1873,<sup>118</sup> and the first general city incorporation statute was adopted in 1889.<sup>119</sup> This provided for the creation of “general charter” cities for the first time. That same year, 1889, Wisconsin’s first general annexation laws were enacted alongside the new incorporation law.<sup>120</sup>

The early incorporation and annexation laws enacted together in 1889 are easily recognizable to someone familiar with today’s incorporation and annexation statutes. The laws of 1889 set out requirements for circulating a petition, publishing notice in a newspaper, collecting the requisite number of signatures from electors and landowners within the petitioned territory, and provisions for referenda elections;<sup>121</sup> all of which are still found in today’s more complex statutory procedures for

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112. Wis. CONST. art. IV, § 31 (2005).

113. Wis. CONST. art. IV, § 31 (1871) (created by 1870 SJR-14, 1871 AJR-29, 1871 c. 122); *Sherry*, 6 N.W. at 564.

114. Wis. CONST. art. IV, § 31 (1892); *State ex rel. Boycott v. City of La Crosse*, 84 N.W. 242, 246 (Wis. 1900); *State ex rel. City of Shawano v. Engel*, 177 N.W. 33, 35 (Wis. 1920).

115. Wis. CONST. art. IV, § 31 (2005).

116. Cutler, *Characteristics*, *supra* note 46, at 14.

117. *Id.*; LEAGUE OF MUNICIPALITIES, HANDBOOK 1983, *supra* note 64, at 3.

118. 1873 Wis. LAWS ch. 234, § 1–2.

119. 1889 Wis. LAWS ch. 326, §§ 7–8; *see Adams*, 81, N.W. at 869.

120. 1889 Wis. LAWS ch. 326, §§ 1–2.

121. 1889 Wis. LAWS ch. 326, §§ 17–21. A representative example of early incorporation and annexation laws are sections 925-8 to 925-21, Wisconsin Statutes of 1898. Under those statutes, incorporation of a general charter city required a petition with 100 signatures of electors and taxpayers living within the territory proposed for incorporation to be collected. Wis. STAT. § 925-8 (1898). The territory proposed for incorporation as a city must contain at least 1,500 persons. The statute contemplated that the proposed city territory could be an existing village, “or the [village] and adjacent [town] territory.” *Id.* After the petition was filed (the statute neglects to say where to file), “the trustees of such village or the board of such town may, by resolution, provide that the question . . . be submitted to a vote of electors residing within the limits of said proposed city.” Wis. STAT. § 925-9 (1898). A vote of electors residing within the territory was required, and notice of the proposed incorporation was to be published within a local newspaper “once each week for four successive weeks immediately preceding the date for holding such election.” Wis. STAT. § 925-10 (1898). If the territory was a village seeking to become a city, consent of a majority of the electors and owners of at least one-third the taxable property must have been given in writing. Wis. STAT. § 925-8 (1898). Annexation in 1898 required territory annexed to be “adjacent” to the annexing

annexation and especially incorporation.<sup>122</sup> Since the 1889 laws were adopted, a fundamental aspect of both incorporation and annexation has remained constant to the present: they are usually initiated by petition of citizens within the territory proposed to be annexed or incorporated.<sup>123</sup> Nonetheless, important differences exist between the statutes of today and those of 1889, and as will be explained more fully in Part V, it is particularly more difficult for incorporation.

The advent of a general charter law for cities created two types of cities in Wisconsin: those with special charters and those with general charters. Because the annexation law of 1889 applied only to general charter cities, and the 1892 constitutional amendment prohibited the former practice of annexing territory by special act, special charter cities were without a means to annex territory for approximately three years. In 1893, however, a new annexation law was enacted that rectified this anomaly by providing a means for special charter cities to annex territory.<sup>124</sup> Special charter cities also had the option of adopting by ordinance the entire general charter law or portions of any subchapter, section, or subsection of it.<sup>125</sup> Special charter villages, fewer of which existed than cities, were in a similar situation.<sup>126</sup> Over time, the gradual adoption by special charter cities of the general charter law increased uniformity between city charters, which created a more comprehensible body of municipal incorporation and annexation law.

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city. WIS. STAT. § 925-17 (1898). The statutes provided three methods of annexation for cities. WIS. STAT. § 925-18 (1898). First, the common council may annex property provided that “[t]hree-fourths of the electors and owners of at least one-third of the taxable property . . . adjacent to such city may together present a petition to the common council of such city asking for annexation thereto”; second, if no electors resided in the territory, the “petition must be signed by the owners of at least three-fourths of the taxable property desired to be annexed. . . .” *Id.* Third, “upon petition of one-half of the resident electors and of the owners of one-half of the real estate within the limits of the territory proposed to be annexed” and a favorable referendum vote. *Id.* Cf. WIS. STAT. §§ 66.0201–66.0217 (2005–06).

122. Compare 1889 WIS. LAWS ch. 326, §§ 17–21 with WIS. STAT. § 66.0217 (2005–06).

123. Contrary to popular belief in Wisconsin, government bodies are not the drivers behind incorporation and annexation. This is not the case with consolidation, which is opposite: it is started by a vote of government bodies.

124. 1893 WIS. LAWS ch. 214, § 1. Chapter 214 simply references to the annexation law for general charter cities. See *Zweifel v. City of Milwaukee*, 201 N.W. 385, 389 (Wis. 1924) (detailing statutory history of annexation law). For an in-depth discussion of the complex history of the nineteenth century statutory laws of annexation and how they affected Milwaukee (a special charter city), see Zolik, *supra* note 46, at 504.

125. 1893 WIS. LAWS, ch. 312, § 72; *Adams*, 81 N.W. 869; *State ex. rel. Boycott*, 84 N.W. 242.

126. See 1889 WIS. LAWS ch. 40, § 852. However, there were fewer special charter villages because villages could be created by general charter since 1849, whereas for many years cities could only be created by special charter.

The elements of the aforementioned provisions for incorporation and annexation statutes changed only marginally for sixty years. It was not until the late 1950s that the Wisconsin legislature considerably changed these statutes adding substantive requirements, and even then, procedural elements of the old statutes were kept and remain law today.<sup>127</sup> Before addressing the current statutory scheme, however, it is crucial to explain Wisconsin's annexation and incorporation doctrines because elements of those doctrines are codified in the current statutes.<sup>128</sup> Moreover, as will be shown, the constitutional basis of the *Lammers* Doctrine means that it trumps statutory provisions conflicting with it. Therefore, it is necessary to first understand the doctrines so that their effects on recent legislative acts may be evaluated. The doctrines were developed by a series of court decisions from 1880 until the early 1970s.

#### IV. Wisconsin's Annexation and Incorporation Doctrines

Wisconsin courts apply two well-known doctrines that have developed over decades—the *Lammers* Doctrine to incorporations and Rule of Reason to annexations. Although statutes govern incorporation and annexation, the two judicial doctrines are applied parallel to the statutory requirements.

The *Lammers* Doctrine requires that territory seeking to incorporate contain a city—or village—in-fact.<sup>129</sup> In other words, the proffered territory must have the attributes of cities or villages. One basic attribute of cities and villages is that their territory is not entirely, or even largely, rural and undeveloped.<sup>130</sup> For example, territory is more likely to meet the requirements of the *Lammers* Doctrine when it is urban or suburban as defined by the presence of houses, businesses, churches, and schools within close vicinity of each other.

Under the Rule of Reason, courts apply a three-pronged test to annexations of territory to cities and villages. The present-day Rule of Reason dictates that (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness; (2) there must be some present or demonstrable future need for the annexation; and (3) there must be no other factors that constitute an abuse of discretion on the part of the municipality.<sup>131</sup>

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127. See *infra* Part V.

128. See *infra* Part V.B.

129. *Lammers*, 89 N.W. at 502.

130. *Id.*

131. *Town of Delavan v. City of Delavan*, 500 N.W. 2d 268, 276 (Wis. 1993).

The development, practical effects, linkages, and continued relevance of the *Lammers* Doctrine and Rule of Reason are fully examined in the following sections of this article.

A. *Wisconsin Constitution Prohibits the Creation of “Sham” Cities and Villages*

One scholar has examined enigmatic phrases within the Wisconsin Constitution, such as “village” and “city,” and concluded that “laws enacted on the basis of a constitutional provision that includes one of the enigmatic phrases may not be used to create a sham.”<sup>132</sup> Court decisions have made clear that pursuant to article XI, section 3, which grants the state authority to organize “cities” and “villages,” neither the legislature nor persons wishing to create a city or village may create municipal units “purporting to be a cities or villages but lacking the attributes essential to those entities.”<sup>133</sup> Moreover, article IV, section 23 requires uniformity in town governments.<sup>134</sup> That provision has been interpreted to disallow the incorporation and annexation of territory with the attributes of a town rather than city or village.<sup>135</sup> Thus, the Wisconsin Constitution places parameters upon the type of territory that may become, or attach to, a city or village. When the legislature or persons seeking to create a city or village exceed those constitutional bounds by creating “sham” villages or cities, the Wisconsin Supreme Court has reversed such actions.<sup>136</sup> The court rigorously enforced that principle in a series of cases.<sup>137</sup> In that series of late-nineteenth and early twentieth century decisions, the Wisconsin Supreme Court applied the aforementioned doctrine to annexations and incorporations—either a sham city or village territory; hence, the same constitutional limit applied to both processes. Thus, the court found that the Wisconsin Constitution presents thresholds for what constitutes a city or village, albeit these thresholds have varied over time.

The two seminal cases that find and outline the constitutional limitations for what territory may be in cities or villages are *Smith v. Sherry* (1880)<sup>138</sup>

132. Jack Stark, *Enigmatic Grants of Law-Making Rights and Responsibilities in the Wisconsin Constitution*, 81 MARQ. L. REV. 961, 970 (1998) [hereinafter Stark, *Enigmatic Grants*]; see also JACK STARK, *THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE* 226–27 (1997).

133. Stark, *Enigmatic Grants*, *supra* note 132, at 931.

134. The relevant language has remained unchanged since its inception. Compare WIS. CONST. art. IV, § 23 (2005) with WIS. CONST. art. IV, § 23 (1848).

135. *E.g.*, *In re Incorporation of Town of Hallie*, 33 N.W.2d 185, 187 (Wis. 1948).

136. Stark, *Enigmatic Grants*, *supra* note 132, at 970.

137. *Id.*

138. 6 N.W. 561.

and *State ex rel. Town of Holland v. Lammers* (1902),<sup>139</sup> the latter of which spawned the *Lammers* Doctrine. The *Lammers* Doctrine was crucial to nearly every municipal incorporation case for five decades until its requirements were largely codified by the legislature in the late 1950s. Other early notable cases upholding *Lammers* were *Fenton v. Ryan* (1909),<sup>140</sup> *In re Village of Biron* (1911),<sup>141</sup> and *In re Village of St. Francis* (1932).<sup>142</sup>

Strong links exist between the *Lammers* Doctrine and an early annexation case, *Sherry*,<sup>143</sup> which has been infrequently cited in the past sixty years<sup>144</sup> and misused when it was cited.<sup>145</sup> A correct reading of *Sherry* adds another dimension to judicial review of annexations that directly relates to the *Lammers* Doctrine for incorporation.

#### 1. *SMITH v. SHERRY*

In *Sherry*, the Village of Shawano annexed territory not contiguous to the village; the territory was six miles from the “nearest point of said village.”<sup>146</sup> The plaintiffs argued that the composition of the village violated the uniformity clause of the Wisconsin Constitution.<sup>147</sup> The court gravitated, however, not to the uniformity clause, but to article XI, section 3.<sup>148</sup> Section 3 empowers the legislature to create cities and villages. The court held that the annexation at issue violated article XI, section 3 of the Wisconsin Constitution.<sup>149</sup> It stated:

we hold that where the territory so admitted to be included in a village is not adjacent or contiguous thereto, and the village has no interest therein as a village, its annexation for the mere purpose of increasing the corporate revenues by the exaction of taxes, is an abuse and violation of that provision of section 3 art. 11, of the constitution, which provides “it shall be the duty of the legislature, and they are hereby empowered, to provide for the organization of cities and incorporated villages.” The

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139. 89 N.W. 501.

140. 122 N.W. 756 (Wis. 1909).

141. 131 N.W. 829 (Wis. 1911).

142. 245 N.W. 840 (Wis. 1932).

143. 6 N.W. at 561.

144. It was last cited in *Town of Ctr. v. City of Appleton*, 235 N.W.2d 504 (Wis. 1975).

145. *Sherry* has been repeatedly cited as the basis of the Rule of Reason, but this article will show that today’s Rule of Reason for annexations is not the rule announced in *Sherry*. See *infra* Part IV.B.2.

146. *Sherry*, 6 N.W. at 561.

147. *Id.* (citing Wis. CONST. art. VII, § 1 (1848)).

148. Because the language of article XI, section 3 has been amended several times, most notably in 1924, the exact language interpreted by the court in *Sherry* and *Lammers* has been eliminated; however, the Wisconsin legislature still maintains the power to create cities and villages. Today, article XI, section 3 begins: “Cities and villages organized pursuant to state law. . . .” Although the language has changed, the words “cities” and “villages” remain, and the court’s interpretations of those terms before the 1924 amendment are still relevant. Wis. CONST. art. XI, § 3.

149. *Sherry*, 6 N.W. at 564.

idea of a city or village implies an assemblage of inhabitants living in the vicinity of each other. . . .<sup>150</sup>

Thus, the court interpreted the term “village,” as used in the Wisconsin Constitution, as having a distinct meaning, and although it is within the domain of the legislature to form incorporated villages and cities,<sup>151</sup> it shall not create sham villages and cities lacking their commonly understood attributes.

Twice during the 1960s, the Wisconsin Supreme Court credited *Sherry* as the root of the Rule of Reason for annexations; however, today’s Rule of Reason bears little resemblance to the rule from *Sherry*.<sup>152</sup> Under the Rule of Reason, courts review the reasonableness and propriety of annexations beyond statutory requirements. Because the present day Rule of Reason for annexations departs from *Sherry* in significant ways that require extensive analysis, and several incorporation decisions at the dawn of the twentieth century undoubtedly have the same constitutional basis as *Sherry*, those incorporation cases are examined next. *Sherry*’s impact on the Rule of Reason, if any, is addressed later in Part IV.B. First, *Town of Holland v. Lammers*, the next case chronologically after *Sherry* in which the Wisconsin Supreme Court addressed “sham” villages and cities, is explained.

## 2. LAMMERS DOCTRINE: VILLAGE—AND CITY—IN-FACT STANDARD

The leading incorporation decision is *State ex rel. Town of Holland v. Lammers*.<sup>153</sup> For over one-half century from 1902, it was instrumental to incorporation jurisprudence and upheld in at least nine subsequent cases.<sup>154</sup> In *Lammers*, the court was asked to invalidate the incorporation of the Village of Cedar Grove. All statutory requirements, including minimum area and population density, had been met; however, the opponents argued that the 1898 statute authorizing village incorporation contained no size or density limits.<sup>155</sup> Opponents specifically argued that

150. *Id.*

151. This case involved a village, but the same reasoning applies to cities.

152. *Town of Beloit v. City of Beloit*, 155 N.W.2d 633, 637 (Wis. 1968); *Town of Fond du Lac v. City of Fond du Lac*, 126 N.W.2d 201, 205 (Wis. 1964); Knowles, *supra* note 46, at 1131.

153. *Lammers*, 89 N.W. 501.

154. *Fenton*, 122 N.W. 756; *Vill. of Biron*, 131 N.W. 829; *In re Vill. of Chenequa*, 221 N.W. 856 (Wis. 1928); *Vill. of St. Francis*, 245 N.W. 840; *Town of Hallie*, 33 N.W.2d 185; *In re Town of Preble*, 53 N.W.2d 187 (Wis. 1952); *In re Vill. of Oconomowoc Lake*, 72 N.W.2d 544 (Wis. 1955); *In re Incorporation of Vill. of Oconomowoc Lake*, 97 N.W.2d 189 (Wis. 1959); *In re Incorporation of Vill. of Elm Grove*, 64 N.W.2d 874 (Wis. 1954); *In re Incorporation of Vill. of Brown Deer*, 66 N.W.2d 333 (Wis. 1954).

155. *Lammers*, 89 N.W. 501.

a lack of size or density limits was contrary to article IV, section 23 of the constitution, which provided that the legislature “shall establish but one system of town and county government, which shall be as nearly uniform as possible.”<sup>156</sup> The court observed that the constitution contained no limitation on the legislature’s power to incorporate cities and villages “except such as may be implied from the use of the words” city and village within the Wisconsin Constitution, article XI, section 3.<sup>157</sup> At the outset of its opinion, the court explained: “if the law . . . permits rural territory, possessing none of the attributes of villages, to change from town to village government at will, it cannot be sustained.”<sup>158</sup> Instead of striking down the statute and the incorporation of Cedar Grove, the court reconciled the statute with the constitution. One commentator has summarized the court’s logic:

The Constitution requires that a village or city exist in fact prior to incorporation because

1. Art. IX, § 3, required the legislature to provide for the “organization of cities and incorporated villages.”
2. Art. IV, § 23 of the Constitution required the legislature “to establish but one system of town and county government which shall be as nearly uniform as possible.”
3. The framers of the Constitution must have impliedly defined cities and villages as those respective communities were understood in 1848.
4. The two constitutional sections read together indicated a constitutional intention that
  - (a) A village or city must exist in fact prior to its incorporation.
  - (b) There must be some factual basis for determining which areas in a township could incorporate and which could not, otherwise the system of town and counties would be subject to change by the whim of whosoever sought incorporation.
5. The legislature is presumed to have incorporated the constitutional definition of a village and city in fact into its statute and the act, as thus limited, is constitutional.<sup>159</sup>

In determining the definition of city and village that the framers impliedly wrote into the Wisconsin Constitution, the court harkened back to its creation. The court stated: “We may refer to the constitution itself

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156. Wis. CONST. art. IV, § 23 (1848).

157. *Lammers*, 89 N.W. 501.

158. *Id.*

159. Cutler, *Characteristics*, *supra* note 46, at 11–12; *see also Fenton*, 122 N.W. 756 (upholding and summarizing *Lammers*). Further, *Lammers* and *Fenton* distinguish—perhaps even implicitly overrule—*In re Vill. of N. Milwaukee*, 67 N.W. 1033 (Wis. 1896), which held that the determination of whether a given territory should be incorporated is strictly a legislative function, not judicial. Professor Daniel Mandelker has suggested that *North Milwaukee* was overruled. *See Mandelker, Municipal Incorporation on the Urban Fringe*, *supra* note 46, at 634 n. 16; *see also Fenton*, 122 N.W. at 757–58 (distinguishing *North Milwaukee*).

to ascertain the scheme of government had in mind by its framers, and also seek aid from such collateral sources as are deemed helpful. . . .”<sup>160</sup> To discover the attributes the constitution requires of cities and villages, the justices transported themselves back to the Wisconsin Constitutional Convention of 1847:

Undoubtedly, when the [Wisconsin] constitution was formed, its makers had in mind the three political subdivisions existing in the older sections of the country—towns, cities, and villages. . . .

It is a fact of common knowledge that very many of the members of our constitutional convention were from New England and New York. In those states the town was the political unit of territory into which the county was subdivided, and a mere inspection of the constitution demonstrates that where the word “town” is used therein it was used with reference to this idea. The word “city” undoubtedly refers to a municipal corporation of the larger class, somewhat densely populated, governed by its mayor and board of aldermen, with other officers having special functions. A “village” means an assemblage of houses less than a city, but nevertheless urban or semiurban in its character, and having a density of population greater than can usually be found in rural districts. A very common definition of a village found in the books is as follows: “Any small assemblage of houses, for dwelling or business, or both. . . .”<sup>161</sup>

The court held, therefore, that power to incorporate is limited to territory that is a village or city in fact, “with a reasonably compact center or nucleus of population. . . .”<sup>162</sup> In addition to upholding the incorporation of Cedar Grove and the incorporation statute of 1898, *Lammers* effectively froze the definition of village and city as they were defined upon ratification of the Wisconsin Constitution in 1848. However, as the industrial revolution gained momentum, producing ever faster forms of transportation and concerns with the health and sanitation problems in overcrowded industrial cities, new modes of living emerged, and the old 1848 concept of “city” and “village” began to change in some minds.

In a series of decisions from 1909 to 1955, the Wisconsin Supreme Court broadly interpreted *Lammers*, eschewing strict adherence to its definition of “city” and “village” as those terms are originally defined.<sup>163</sup> These subsequent decisions relaxed the *Lammers* Doctrine in two ways. First, they allowed territory to incorporate that contained ever larger amounts of uninhabited territory.<sup>164</sup> That was somewhat predictable, because *Lammers* acknowledged that some lands adjacent to the village in

160. *Lammers*, 89 N.W. at 502.

161. *Id.* (citation omitted).

162. *Id.* at 503.

163. *Vill. of Biron*, 131 N.W. at 830; *In re Incorporation of Vill. of Twin Lakes*, 277 N.W. 373, 376 (Wis. 1938); *Vill. of Chenequa*, 221 N.W. at 859; *Vill. of St. Francis*, 245 N.W. 840; *Village of Oconomowoc Lake*, 72 N.W.2d 554; *Incorporation of Vill. of Oconomowoc Lake*, 97 N.W.2d 189.

164. See sources cited *supra* note 163.



fact might be included when “reasonably appurtenant and necessary for future growth, in view of the surroundings and circumstances of location and prospects of future prosperity.”<sup>165</sup> Second, the proposed Village of Chenequa was allowed to incorporate even though it lacked stores, churches, and other generally required attributes of an 1848 “village.”<sup>166</sup> *In re Village of Chenequa* still recognized the constitutional basis for the “village in fact” standard announced in *Lammers* but it nonetheless substantially loosened the *Lammers* Doctrine.<sup>167</sup>

a. *Village of Chenequa* (1928)

In *Village of Chenequa*, a wooded area surrounding Pine Lake containing 200 wealthy residents’ domiciles, many of which were second homes, was incorporated, and the trial court upheld it.<sup>168</sup> Appellants argued in the Wisconsin Supreme Court that the lower court “erred in finding that the territory sought to be incorporated had the characteristics requisite to authorize incorporation under the Constitution of Wisconsin.”<sup>169</sup> Appellants claimed that the proposed village should not incorporate because it, *inter alia*, lacked the attributes of a village as defined in the Wisconsin Constitution as interpreted in *Lammers*. In *Village of Chenequa*, as in *Lammers*, the court transported itself imaginatively to the year 1848 and inserted itself into the shoes of the constitution’s framers.<sup>170</sup> This time, however, the Wisconsin Supreme Court found that the framers were “optimistic” men who wrote a constitution that was meant to change with the times: “The Constitution, while remaining the same, is sufficiently elastic to be applied to the changing conditions of the life and the growth of the state.”<sup>171</sup> The court said that the framers foresaw a future of transportation innovations that would change daily life and make possible an exurbanite community such as Chenequa that provided comfortable residential living for wealthy businessman and presumably their families without the need for a traditional nineteenth-century village center, i.e., downtown.<sup>172</sup> In upholding the incorporation of Chenequa, the court opined: “The Constitution was made for an expanding future.”<sup>173</sup> The court said that because the constitution’s framers “had witnessed the development of the telegraph

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165. *Lammers*, 89 N.W. at 502.

166. *Vill. of Chenequa*, 221 N.W. at 856; Cutler, *Characteristics*, *supra* note 46, at 18.

167. *Vill. of Chenequa*, 221 N.W. at 859.

168. *Id.* at 857.

169. *Id.*

170. *Id.* at 859.

171. *Id.* (citing *Borgnis v. Falk Co.*, 133 N.W. 209, 215 (Wis. 1911)).

172. *Vill. of Chenequa*, 221 N.W. at 859.

173. *Id.* at 859.

and many modern inventions,” they knew the constitution would have to change with societal modernizations.<sup>174</sup> In writing the constitution, therefore, “[the framers] used general and apt language to include not only the present but the future.”<sup>175</sup> Thus, the constitution’s text could be given modern meanings.

b. *Village of St. Francis* (1932) and *Village of Oconomowoc Lake I* (1955)

In 1932, only four years after *Village of Chenequa*, the Wisconsin Supreme Court decided *In re Village of St. Francis*.<sup>176</sup> *Village of St. Francis*, unlike *Village of Chenequa*, remained more faithful to *Lammers* by narrowly interpreting the village attributes that *Lammers* required of a territory before it may become a village. In *Village of St. Francis*, the court found that the proffered village did not have the requisite attributes to become a village.<sup>177</sup> The court focused upon the territory’s rural character and a lack of physical and social cohesion needed to form a community of interest.<sup>178</sup> Over the next two decades, the Wisconsin Supreme Court demonstrated its continued willingness to reject proposed incorporations not meeting the *Lammers* Doctrine.<sup>179</sup>

In *Village of Oconomowoc Lake I*,<sup>180</sup> a 4–3 decision decided in 1955, the court forcefully upheld the *Lammers* Doctrine, bringing it closer to its original form despite new statutory standards adopted by the legislature in 1939 containing density and area requirements.<sup>181</sup> Finding that “area and population are not the only attributes of a village,” the court refused to alter “time-honored definitions of a village” and found that *Lammers*’ “implied constitutional requirement is basic and cannot be read out of the statute, but must be considered as underlying the legislative enactment.”<sup>182</sup> The court continued strongly:

A loosely composed structure made up of given areas lumped together merely because they contain given populations does not satisfy the constitutional concept of a village. If an area is not a village, as conceived by the framers of the constitution, then area and density of population *per se* do not make it so, and it cannot be incorporated as a village.<sup>183</sup>

174. *Id.* at 859.

175. *Id.*

176. 245 N.W. 840.

177. *Id.* at 843.

178. *Id.*

179. *See Town of Hallie*, 33 N.W.2d 185; *Vill. of Oconomowoc Lake*, 72 N.W.2d 544.

180. 72 N.W.2d 544.

181. *Id.* at 547.

182. *Id.* at 547.

183. *Id.*

The court found that a village is more than a given density of persons living within a proscribed territory, but rather a combined “political, sociological and geographic unit.”<sup>184</sup>

c. *Village of Oconomowoc Lake II* (1959)

Four years later, the same parties brought the same issue back to the Wisconsin Supreme Court in *In re Incorporation of Village of Oconomowoc Lake v. Town of Summit*.<sup>185</sup> This time the court returned to a relaxed application of the *Lammers* standards. Relying upon *Village of Chenequa*, the court upheld the incorporation of Oconomowoc Lake. Thus, the court began seesawing between broad and narrow interpretations of the *Lammers* Doctrine.<sup>186</sup>

d. Status of the *Lammers* Doctrine

Because the *Lammers* Doctrine is an interpretation of the Wisconsin Constitution, those who relax its standards depart from the *Lammers* court’s original interpretation of article XI, section 3. Thus, whether one believes that the *Lammers* standards may be relaxed to meet present-day notions may depend upon the method of constitutional interpretation one applies.<sup>187</sup> Regardless of one’s views on its soundness, however, the *Lammers* Doctrine is firmly planted in Wisconsin jurisprudence. The *Lammers* Doctrine stopped being crucial to incorporations when legislation was adopted in 1959, today found in Wis. Stat. § 66.0207, that provided standards to be applied by a state agency (now board) that determines whether proffered territory may incorporate. Because a community that meets the statutory standards also meets the *Lammers* village and city in-fact test, litigation action has moved to challenging the administrative agency’s decisions, and *Lammers* has faded. Nonetheless, *Lammers* is still good law. In fact, it could have been used to challenge several incorporations over the past decade.

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184. *Id.*

185. 97 N.W.2d 189.

186. Between *Village of Oconomowoc I* (1955) and *Village of Oconomowoc II* (1959) several justices were replaced. The author of *Oconomowoc I*, Chief Justice Edward T. Fairchild, was no longer on the court when *Oconomowoc II* was decided. In fact, three court seats turned over during those four intervening years. WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 32, at 728.

187. The divide is whether one believes the constitution should be interpreted to adhere to its framers’ intentions or should be elastic enough to fit modern changes. As an aside, when faced with that issue, Judge Posner said of originalists’ arguments: “they would if accepted change the Constitution from a living document into a petrified reminder of the limits of human foresight.” *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1096 (7th Cir. 1990) (Posner, J., concurring).

For example, in 2002, 2003, and 2005, the Wisconsin legislature adopted bills to incorporate three towns into villages.<sup>188</sup> These bills were essentially special laws for the towns of Hobart, Campbell, and Caledonia, but they avoided the constitutional prohibition on special laws by not naming or describing any particular place. Each bill was carefully tailored with standards that, not coincidentally, were met only by the towns of Hobart, Campbell, and Caledonia, respectively.

Governor Doyle vetoed the bill for the Town of Campbell. This article provides an explanation of that episode in the case study found in Part VII. The bills for the towns of Hobart and Caledonia, however, became law.<sup>189</sup>

The towns of Hobart and Caledonia did not meet the statutory requirements for incorporation within Wis. Stat. § 66.0207. Caledonia's petition for incorporation under sections 66.0201 to 66.0211 was not granted by the Wisconsin Department of Administration. The western part of Hobart was much too rural for the entire town to meet the requirements of section 66.0207. Because those towns could not pass through the sieve of section 66.0207, which historically stopped incorporations of cities and villages that did not meet the *Lammers* Doctrine through the application of the statutory standards, they did not meet the *Lammers* village-in-fact standard either. It was known by leaders in those towns (or the lawyers advising them) that they could not meet the statutory standards,<sup>190</sup> which is why they sought legislative assistance in the form of new laws targeted to help them.

In adopting what are essentially special laws to incorporate villages, the legislature acted akin to those of the nineteenth century before the constitutional amendment prohibiting special laws for incorporating villages.<sup>191</sup> And *Lammers*, a 105-year-old decision, would again take center stage in any legal action against special incorporations, because

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188. For the Town of Hobart there was S.B. 55, 2001-02 Leg. (Wis. 2001), which became 2001 Wis. Act 16 § 9159(3f) (2001); for the Town of Campbell, Assemb. B. 85, 2003-04 Leg. (Wis. 2003) (vetoed); for the Town of Caledonia, Assemb. B. 100, 2005-06 Leg. (Wis. 2005), which became 2005 Wis. Act 25 § 1242p (2005).

189. See Don Behm, *If Caledonia Can Do It, Richfield May Be Next*, MILWAUKEE JOURNAL-SENTINEL, Oct. 19, 2005, available at <http://www.jsonline.com/story/index.aspx?id=364331>; the law for Caledonia is Wis. STAT. § 66.0216 (2003). Caledonia's and Hobart's incorporations were slipped into the state budget bills, which, of course, became law. Scott Hildebrand, *Town Seeks Village Status*, GREEN BAY PRESS-GAZETTE, June 21, 2001 (discussing consequences of village status); see also Katrina Harrmann Kharrman, *Hobart Residents OK Taking Village Status*, GREEN BAY PRESS-GAZETTE, Apr. 3, 2002 (describing residents' response).

190. In Caledonia's case, the town's incorporation bid was explicitly not granted by the state.

191. Wis. CONST. art. IV, § 31 (1872).

there was no agency decision to challenge.<sup>192</sup> The constitutionality of the law itself would be at issue, because the Wisconsin Constitution requires that a village or city exist in fact prior to incorporation.<sup>193</sup> The *Lammers* Doctrine still looms over incorporation actions—preventing the creation of sham villages or cities—despite the fact that it is seldom needed today due to statutory provisions.<sup>194</sup>

#### B. Annexations and the Rule of Reason

Wisconsin courts use the Rule of Reason to examine the “propriety and reasonableness of annexations despite compliance with the statutory requirements.”<sup>195</sup> Courts, of course, also review annexations for compliance with detailed statutory requirements for persons petitioning for annexation and for municipalities that entertain the petitions. These statutory requirements mostly relate to the form and process of annexations, and a large number of court decisions address those questions, e.g., did petitioner obtain the requisite number of signatures. The Rule of Reason, however, is altogether different. Courts applying the Rule of Reason are not interpreting statutes but applying a separate set of rules made by the courts.

Whether the present-day Rule of Reason is constitutionally based, rooted in *Sherry*, or a judicial doctrine that could be altered by the legislature has been the subject of speculation and debate.<sup>196</sup> Wisconsin Supreme Court decisions can be marshaled to support either contention.<sup>197</sup> But what is clear is that (1) the direction of Wisconsin Supreme Court’s annexation jurisprudence is of increasing deference to legislative bodies, making it unlikely the court will forcefully apply the reasoning of its earlier decisions prohibiting “sham” villages and cities as detailed in Part IV.A. and (2) the similarities between annexation and incorporation suggest that a common doctrine for both

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192. The *Lammers* Doctrine could take centerstage again in other situations, such as when the administrative agency, now board, charged with applying section 66.0207 stretches those requirements too far.

193. Alternatively, the court could read into the statutes implied standards “underlying the legislative enactment.” *Oconomowoc Lake I*, 72 N.W.2d at 547. In addition, those laws could be challenged as violating article IV, section 31 of the Wisconsin Constitution. Keep in mind, however, that towns, cities, and villages cannot challenge the constitutionality of a state law. See *City of Marshfield*, 127 N.W.2d at 813 (municipalities are “not permitted to censor or supervise the activities of their creator”).

194. See *infra* Part V.B. (comparing the incorporation statutes and *Lammers* Doctrine).

195. Knowles, *supra* note 46, at 1132–34.

196. *Id.* at 1131.

197. Compare *Town of Beloit*, 155 N.W.2d at 638, with *City of Beloit v. Towns of Beloit, Turtle and Rock*, 177 N.W.2d 361, 369 (Wis. 1970).

processes would be beneficial for lessening the confusing mix of rules and doctrines that currently exist.

#### 1. THE RULE

The present-day Rule of Reason has three prongs that are firmly established in Wisconsin jurisprudence.<sup>198</sup> Under the Rule of Reason, (1) exclusions and irregularities in boundary lines must not be the result of arbitrariness; (2) there must be some present or demonstrable future need for the annexation; and (3) there must be no other factors that constitute an abuse of discretion on the part of the municipality.<sup>199</sup>

A finding that an annexation ordinance violates the Rule of Reason is equivalent to a finding that the local legislative body acted *ultra vires* when adopting an annexation ordinance. Courts have no supervisory power over legislative functions of a municipality and cannot substitute their judgment for that of the governing body. Courts may, however, interfere to curb action that is *ultra vires* because of some constitutional impediment, lack of valid legislative authority, unlawful action, or action under a valid statute that is arbitrary, capricious, unreasonable, or an abuse of discretion rather than a *bona fide* exercise of power.<sup>200</sup> Tellingly, all three prongs of the Rule of Reason contain language pertaining to *ultra vires* acts: the first prong addresses “arbitrary” boundary lines; the second, “reasonable” need; and, the third prong, any “other misuse of discretion.” It is worth pointing out that the third prong is not unique to annexations—courts may, although they rarely do, overturn any action of a municipality that constitutes an abuse of discretion, *i.e.*, *ultra vires*. Wisconsin courts have been steadily limiting the situations to which the Rule of Reason applies to the point of depriving citizens and towns from exercising legitimate checks upon *ultra vires* actions by city and village legislative bodies.<sup>201</sup>

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198. *E.g.* *Town of Waukesha v. City of Waukesha*, 206 N.W.2d 585, 586–88 (Wis. 1973); *Town of Lyons v. City of Lake Geneva*, 202 N.W.2d 228, 232 (Wis. 1973); *Town of Lafayette v. City of Chippewa Falls*, 235 N.W.2d 435, 443 (Wis. 1975); *Town of Germantown v. Vill. of Germantown*, 235 N.W.2d 486, 492 (Wis. 1975); *Town of Pleasant Prairie v. City of Kenosha*, 249 N.W.2d 581, 584–85 (Wis. 1977); *Town of Medary v. City of La Crosse*, 277 N.W.2d 310, 316 (Wis. 1979); *Town of Delavan*, 500 N.W.2d at 276; *Town of Menasha v. City of Menasha*, 488 N.W.2d 104, 108 (Wis. Ct. App. 1992); *Town of Sugar Creek v. City of Elkhorn*, 605 N.W.2d 274, 277 (Wis. Ct. App. 1999); *Town of Brockway v. City of Black River Falls*, 702 N.W.2d 418, 425–26 (Wis. Ct. App. 2005); *Town of Baraboo v. Vill. of West Baraboo*, 699 N.W.2d 610, 619–20 (Wis. Ct. App. 2005).

199. *See* sources cited *supra* note 198.

200. *See, e.g.*, *Eudora Dev. Co. of Kan. v. City of Eudora*, 78 P.3d 437 (Kan. 2003).

201. In addition, a recent far-reaching statutory change, 2003 Wis. Act 317, codified in WIS. STAT. § 66.0217(11)(c), expressly limits the ability of towns to challenge

Since 1972,<sup>202</sup> property-owner and elector-initiated annexations generally have been exempt from the first prong of the Rule of Reason.<sup>203</sup> The rationale is that a municipality cannot be charged with arbitrarily drawing annexation boundaries when it did not draw them unless it can be shown to be the “real controlling influence” in drawing them.<sup>204</sup> Under today’s Rule of Reason, if the municipality is neither the petitioner nor exerts control over the petitioner, it cannot be charged with violating the first prong of the Rule of Reason, regardless of irregularities in shape or location of the annexed territory. Currently, therefore, in order to avoid the application of the first prong, Wisconsin municipalities generally do not initiate annexations, but rather wait for property owners and electors to file annexation petitions. Thus, for the vast majority of annexations, the first prong of the Rule of Reason does not apply.

## 2. WHAT ARE THE ROOTS OF THE RULE OF REASON?

The possible constitutional bases for the Rule of Reason are explored in this subsection. Tracing the history of the Rule of Reason illustrates there is no one indisputable path to its origin. Its development has been ad hoc, and the decisions are difficult to harmonize.<sup>205</sup> Of specific interest is whether *Sherry*<sup>206</sup> is the basis for the Rule of Reason, which would subsume it into subsequent weakening of the rule, or outside the rule and still available to use in its original form. When the three prongs of

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unanimously petitioned annexations. Towns bring the largest number of lawsuits challenging annexations. Towns serve as the primary check on annexing cities and villages because towns have the incentive and resources to challenge annexations violating the statutory process or Rule of Reason. Without that check, more statutory and Rule of Reason violations will occur. *E.g.*, Village of Holmen, Ordinance No. 1.118 (Jan. 19, 2006) (balloon-on-a-string annexation of territory from the Town of Holland to the Village of Holmen).

202. *Town of Lyons*, 202 N.W.2d at 232 (citing *Town of Waukechon v. City of Shawano*, 193 N.W.2d 661 (Wis. 1972)).

203. *Town of Baraboo*, 699 N.W.2d at 619–20.

204. *Town of Pleasant Prairie*, 249 N.W.2d at 591.

205. *See* *Town of Campbell v. City of La Crosse*, 673 N.W.2d 696, 706–07 (Wis. Ct. App. 2003). The Rule of Reason warrants an article of its own; this subsection only scratches the surface. For those interested in tracing its development, the major Wisconsin Supreme Court decisions are the following: *Town of Wilson v. City of Sheboygan*, 283 N.W. 312, 318 (Wis. 1939); *Town of Greenfield v. City of Milwaukee*, 78 N.W.2d 909 (Wis. 1956); *Town of Brookfield v. City of Brookfield*, 80 N.W.2d 800 (Wis. 1957); *Town of Fond du Lac*, 126 N.W.2d 201; *Town of Mt. Pleasant v. City of Racine*, 127 N.W.2d 757 (Wis. 1964); *Ash Reality Corp. v. City of Milwaukee*, 130 N.W.2d 260 (Wis. 1964); *Town of Mt. Pleasant v. City of Racine*, 137 N.W.2d 656 (Wis. 1965); *Vill. of Elmwood Park v. City of Racine*, 139 N.W.2d 66 (Wis. 1966); *Town of Beloit*, 155 N.W.2d 633; *City of Beloit*, 177 N.W.2d 361; *Town of Lyons*, 202 N.W.2d 228; *Town of Waukechon v. City of Shawano*, 193 N.W.2d 661 (Wis. 1972); *Town of Waukesha*, 206 N.W.2d 585.

206. 6 N.W. 561; *see* discussion *supra* Part IV.A.1.

the Rule of Reason were brought together in 1964,<sup>207</sup> the first prong bore a slight resemblance to the *Sherry/Lammers* Doctrine. But digging deeper demonstrates that not one Rule of Reason decision applies the core of *Sherry's* analysis, which is its interpretation of article XI, section 3 of the Wisconsin Constitution, and the majority of the Rule of Reason decisions do not cite *Sherry*. This includes the first decision to declare that the court applies a "Rule of Reason" to annexations.<sup>208</sup> Moreover, those few decisions that cite *Sherry*, in actuality, do not use its principles, e.g., *Town of Fond du Lac* (1964).<sup>209</sup> Since at least the 1970s, interpretations of the Rule of Reason have moved it even further from the rule established in *Sherry*, in which the court clearly applied article XI, section 3 of the Wisconsin Constitution. Thus, the sounder view is that *Sherry* is not the basis for the Rule of Reason,<sup>210</sup> and in this the rule is not constitutionally based.

Before the current three-pronged Rule of Reason was formed in 1964, two legal rules were available to declare an annexation ordinance ultra vires. One was the rule announced in *Sherry*. It is based upon article XI, section 3 of the Wisconsin Constitution and holds that annexed territory must be contiguous to the annexing city or village. The reasoning is that cities and villages without contiguous territory lack an essential attribute of villages and cities.<sup>211</sup> The second annexation rule to develop was the "reasonable need" standard that originated in *Town of Wilson v. City of Sheboygan* (1939)<sup>212</sup> and *Town of Greenfield v. City of Milwaukee* (1956),<sup>213</sup> which was given a gloss by *Town of Brookfield v. City of Brookfield* (1956)<sup>214</sup> and *Village of Elmwood Park v. City of Racine* (1966),<sup>215</sup> and was later curiously altered by *Town of Lafayette v. City of Chippewa Falls* (1975).<sup>216</sup> Original forms

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207. *Town of Fond du Lac*, 126 N.W.2d 201 (creating the three-pronged test used today).

208. *Town of Brookfield*, 80 N.W.2d 800 (first to use the phrase "Rule of Reason" as it pertains to annexations).

209. 126 N.W.2d at 205.

210. Another commentator reached the same conclusion, albeit for different reasons. See Knowles, *supra* note 46.

211. It is possible, but unlikely, that that rule is the forerunner of the current first prong of the Rule of Reason. The first prong states: "exclusions and irregularities in boundary lines must not be the result of arbitrariness."

212. *Town of Wilson*, 283 N.W. at 318.

213. 78 N.W.2d 909 (Wis. 1956). In the decision *City of Beloit*, 155 N.W.2d at 637–38, Chief Justice Hallows suggested that *Town of Wilson*, 283 N.W. 312, and *Town of Greenfield*, 78 N.W.2d 909, are extensions of the rule announced in *Sherry*, 6 N.W. 561; however, that is incorrect. They neither cite to *Sherry* nor follow its rule.

214. 80 N.W.2d 800.

215. 139 N.W.2d 66.

216. 235 N.W.2d 435.



of those two rules, as espoused in *Sherry* and *Lammers* for the former and *Village of Elmwood Park* for the later, contain enduring principles that serve to limit annexations and incorporations contrary to the Wisconsin Constitution.

The usefulness of the *Sherry/Lammers* Doctrine in preventing “sham” cities and villages was explained earlier and requires no further explanation here. The function of the “need” prong of the Rule of Reason—arguably the most important prong—does require more explanation.

3. THE NEED PRONG: THERE MUST BE SOME  
PRESENT OR DEMONSTRABLE FUTURE NEED  
FOR THE ANNEXATION

The “need” requirement prevents villages and cities from having many large tracts of undeveloped territory by, in effect, setting an outer limit on the size of annexations.<sup>217</sup> Logic dictates that without the need requirement or some other limit upon a municipality’s discretion over the annexation of territory, especially rural territory, absurdities could result. For instance, presuming enough property owners agree, a small village could annex a massive amount of rural territory—tens or even hundreds of square miles—with the resulting village having no resemblance to a “village” as that term is used colloquially and within the Wisconsin Constitution, and such action would be an abuse of discretion beyond the authority invested to the local governing body by the constitution and legislature.<sup>218</sup> *Village of Elmwood Park* was such a case.<sup>219</sup> A tiny village of only 0.16 square miles annexed a whole town of 35.64 square miles, a large portion of which was still rural. The Wisconsin Supreme Court found that the Village of Elmwood Park had no need for such an annexation. In addition, the court provided four factors, “by way of illustration,” which may establish that a municipality has a need for territory:

[1] a substantial increase in population; [2] a need for additional area for construction of homes, mercantile, manufacturing or industrial establishments; [3] a need for

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217. This only applies when an annexation violating that prong makes its way into court. “Need” is not part of the review, under Wis. STAT. § 66.0217(6) (2003), conducted by the Wisconsin Department of Administration.

218. Moreover, the Supreme Court of Wisconsin has opined that “the need element serves a useful purpose in furthering the public policy of favoring orderly growth of urban areas by preventing irrational gobbling up of territory.” *Town of Lafayette*, 235 N.W.2d 435, 445.

219. *Village of Elmwood Park*, 139 N.W.2d 66. *Village of Elmwood Park* is an important decision because it put flesh on the bones of the Rule of Reason in two respects: (1) it struck down an annexation based solely upon the village’s lack of need for it, and (2) developed several factors to be considered when determining whether the need requirement has been met. *Id.*

additional land area to accommodate the present or reasonably anticipated future growth of the municipality; [4] the extension of police, fire, sanitary protection or other municipal services to substantial numbers of residents of adjacent areas.<sup>220</sup>

Those factors are now a vital part of the need prong of the Rule of Reason.<sup>221</sup> Three more factors have been added by subsequent opinions. Thus, in determining need, courts may also consider: (5) “[whether the proposed annexation is] an attempt to eliminate a possible pollution problem; (6) [the expansion of] residential areas in the vicinity of schools”;<sup>222</sup> and, (7) whether the territory is within the annexing municipality’s “zone of economic interest.”<sup>223</sup> Courts may adopt other factors as each sees fit.<sup>224</sup> The Wisconsin Court of Appeals has stated that the list is not all-inclusive.<sup>225</sup> In *Village of Elmwood Park*, the court ultimately held: “Without a showing of some reasonable need the proceeding, in legal parlance, is arbitrary and capricious, and contrary to the [R]ule of [R]eason.”<sup>226</sup>

*Town of Lafayette v. City of Chippewa Falls*<sup>227</sup> applied a fundamentally different need analysis. Until *Town of Lafayette*, need referred solely to the need of the annexing city or village. *Town of Lafayette*, however, added another factor—the need of annexed property owners to join the city or village.<sup>228</sup> Furthermore, in *Town of Lafayette*, that new factor swallowed the others. Although the court found that the City of Chippewa Falls had no need for the annexed territory under any of the factors, the need of the annexed property owners was found sufficient by itself.<sup>229</sup> That finding, however, is an anomaly; subsequent decisions considered property-owners’ needs as a factor, but *Town of Lafayette* is the only decision in which the need of the property owners trumped all of the other factors.<sup>230</sup> Further, *Town of Lafayette*’s assumption that preventing “disorderly growth” is a public policy consideration relevant only when the annexation is instituted by the annexing municipality is

220. *Id.* at 71. Factors were taken from *Nix v. Vill. of Castor*, 116 So. 2d 99, 101 (La. App. 1959).

221. *Town of Sugar Creek*, 605 N.W.2d 274, 279; see also *Town of Lafayette*, 235 N.W.2d 435. The original four factors were taken from *Nix*, 116 So. 2d at 101.

222. *Town of Lafayette*, 235 N.W.2d at 443–44.

223. *Town of Sugar Creek*, 605 N.W.2d at 279.

224. This test leaves a very high level of discretion to each court.

225. *Id.*

226. *Vill. of Elmwood Park*, 139 N.W.2d at 72.

227. 235 N.W.2d 435 (Wis. 1975).

228. *Id.* at 445.

229. *Id.* at 446.

230. *Town of Campbell*, 673 N.W.2d at 708 (“*Town of Lafayette* appears to be the only case in which the need of the annexed property owners was considered sufficient by itself.”).

unsupported.<sup>231</sup> Property-owner initiated annexations can also lead to disorderly growth.<sup>232</sup>

Finally, *Town of Lafayette*'s emphasis on the "will or wish of the petitioners"<sup>233</sup> is from a line of reasoning at odds with the basic relationship of persons with their state and local governments, Wisconsin's Constitution, and annexation statutes.<sup>234</sup> As detailed in Part III, state governments, including Wisconsin's, have plenary powers to alter municipal boundaries as they see fit, including against the wishes of a locality's citizens.<sup>235</sup> Pursuant to the annexation statutes,<sup>236</sup> property owners and electors have the choice not to sign annexation petitions or vote against annexation in referenda, but that does not necessarily prevent them from being annexed against their "wishes and will" when a majority of electors and property-owners within the prescribed territory vote for annexation and the municipality adopts an ordinance.<sup>237</sup> Further, when a citizen desires annexation and manifests that desire by circulating, signing, and submitting an annexation petition pursuant to section 66.0217 of the Wisconsin Statutes, the municipality has no obligation to accept the petition in accordance with the "wishes or will of the petitioners" and can always refuse to adopt an annexation ordinance. Therefore, the need analysis in *Town of Lafayette* over-elevates the need of property owners and understates the importance of examining the need of the municipality when applying the second prong of the Rule of Reason.

Requiring that a municipality have a "need" for territory it annexes is a sensible method of providing some semblance of order for annexations

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231. See *Town of Lafayette*, 235 N.W.2d at 445.

232. This statement is based upon the author's experience reviewing over 2,000 annexation petitions while working for the Municipal Boundary Review unit of the Wisconsin Department of Administration from 1997 to 2003.

233. *Town of Lafayette*, 235 N.W.2d at 445.

234. *Id.* (quoting *Town of Waukesha*, 206 N.W.2d at 588). In turn, *Town of Waukesha* cited as authority *Town of Blooming Grove v. City of Madison*, 33 N.W.2d 312, 314 (Wis. 1948). In *Town of Blooming Grove*, the court made the following unsupported statement regarding annexation: "The right to live in a particular municipal unit is an important right and should be protected by all the safeguards that the law provides." *Town of Blooming Grove*, 33 N.W.2d at 314. No such right exists under the Wisconsin Constitution or Statutes. Under the Wisconsin Statutes, citizens have a statutory right to circulate, sign, and submit a petition for annexation, but the municipality has no obligation to accept the petition or adopt an annexation ordinance. Furthermore, persons may be annexed against their will pursuant to WIS. STAT. §§ 66.0217(3), 66.0219 (2003).

235. Recall that in *Hunter*, the United States Supreme Court stated: "The state, therefore, at its pleasure, may modify or withdraw all such powers . . . expand or contract the territorial area. . . . All this may be done, conditionally or unconditionally, with or without the consent of the [municipality's] citizens, or even against their protest. In all these respects, the state is supreme." 207 U.S. 161, 178-79 (1907); accord *Town of Milwaukee*, 1860 WL 2531.

236. WIS. STAT. § 66.0217 (2003).

237. WIS. STAT. §§ 66.0217(3), 66.0219 (2003).

by placing flexible, minimal standards to be met before territory may be annexed, which, in effect, limits the size of annexations. It ought to be uncontroversial that a size limitation is required. Without one, the resulting absurdities are fairly easy to imagine.<sup>238</sup>

This section examined the development of the *Lammers* Doctrine and the common constitutional basis it shares with an annexation decision from 1880—*Sherry*—that predates *Lammers* by twenty-two years. Later, during the mid-1900s, the Rule of Reason for annexations developed without relying upon *Sherry* or *Lammers*. Thus, there is currently a split between Wisconsin's annexation and incorporation doctrines. Nonetheless, it was shown that the "need" prong of the Rule of Reason is similar to the *Lammers* Doctrine insofar as it allows only territory that is urban or urbanizing to become part of city or village. Although Wisconsin's judiciary has seldom recognized the linkages between annexation and incorporation in its doctrines, the Wisconsin legislature has been more adept at seeing the links.

#### V. History of the Current Statutes

The statutory history of Wisconsin's current incorporation and annexation laws provides another illustration of the links between incorporation and annexation. These links were explicitly recognized in the legislative history of the current incorporation statute. In 1959, statutory reforms of the incorporation laws codified common law doctrine that Wisconsin courts developed during the preceding 100 years.

##### A. 1950s Legislative Reforms

In the 1950s, the post-war boom in housing and advancing urban development produced more legislative interest in incorporations and annexations. Between 1950 and 1957, cities in Milwaukee County were growing at a brisk pace: the City of Milwaukee's total area nearly doubled, Wauwatosa tripled, and West Allis more than doubled in area.<sup>239</sup> Moreover, eight new suburban cities and villages formed near Milwaukee within those seven years.<sup>240</sup> A large amount of litigation emerged from municipal boundary disputes, and these ongoing annexation and

238. At least one annexation in Wisconsin approximated an absurdity. See *infra* Part VII.B.–C.

239. RICHARD W. CUTLER, *GREATER MILWAUKEE'S GROWING PAINS, 1950–2000: AN INSIDER'S VIEW* 24 (Milwaukee County Historical Society 2001)[hereinafter CUTLER, *GREATER MILWAUKEE'S GROWING PAINS*].

240. *Id.* at 25. These new communities were City of Glendale in 1950, City of St. Francis in 1951, Village of Hales Corners in 1952, Village of Bayside in 1952, Village of Brown Deer in 1954, City of Brookfield in 1954, Village of Elm Grove in 1955, City of Oak Creek in 1955. *Id.*

incorporation “battles” between the City of Milwaukee and its neighboring towns created media attention and legislative action.<sup>241</sup>

#### 1. OAK CREEK STATUTE

In 1955, a town adjacent to Milwaukee, the Town of Oak Creek, successfully lobbied the Wisconsin legislature to adopt a new statute defining specific standards that would allow it to incorporate as a city. The legislature adopted what became known as the Oak Creek Law. The law, which can still be found in Wis. Stat. § 66.0215, allows any town adjacent to a city of the first class, i.e., Milwaukee, with a population over 5,000, an equalized valuation over \$20 million, and a vote by town residents in favor of incorporation to become a city.<sup>242</sup> After its passage, many towns adjacent to the City of Milwaukee incorporated until Milwaukee’s avenues for territorial expansion were completely blocked, which created what was dubbed by Milwaukee officials as the “Iron Ring.”<sup>243</sup> It is immediately apparent from comparing the requirements

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241. See generally FRANK P. ZEIDLER, *A LIBERAL IN CITY GOVERNMENT: MY EXPERIENCES AS MAYOR OF MILWAUKEE* (2005); CUTLER, *GREATER MILWAUKEE’S GROWING PAINS*, *supra* note 239; Zolik, *supra* note 46. These three sources provide accounts of the specific events in the Milwaukee area during the post-World War II period.

242. WIS. STAT. § 66.0215(1) (2003). Although the Oak Creek Law is still in the Wisconsin Statutes, it is inoperable because all territory surrounding the only city of the first class, Milwaukee, is now incorporated. The Oak Creek Law did, however, raise its head one more time during the 1980s for the incorporation of the City of Fitchburg, which is adjacent to the City of Madison. The decision *City of Madison v. Town of Fitchburg*, 332 N.W.2d 782 (Wis. 1983), allowed the Town of Fitchburg to incorporate into a city via the Oak Creek Law over dissents by Justices Heffernan and Abrahamson and Chief Justice Beilfuss. The population of the City of Madison had grown over the threshold required for a first class city (150,000 persons), but Madison had never declared itself a city of the first class by “proclamation of the mayor.” WIS. STAT. § 62.05(2) (2000). Nonetheless, the court found that “the legislature did not intend to allow a city with a population of 150,000 or more to frustrate the purpose of sec. 60.81 by refusing to take the steps necessary to effect a formal classification change.” *Town of Fitchburg*, 332 N.W.2d at 789. The Wisconsin legislature, however, soon manifested its intent, and it was contrary to the *Town of Fitchburg* court majority. The legislature adopted WIS. STAT. § 990.001(15), which provides that “[i]f a statute refers to a class of city specified under s. [sic] 62.05(1), such reference does not include any city with a population which makes the city eligible to be in the class unless the city has taken the actions necessary to pass into the class under s. 62.05(2).” WIS. STAT. § 990.001(15) (1998). Today, Madison remains a city of the second class; the *Town of Fitchburg* dissenters had the better argument. Nevertheless, Fitchburg is a city.

243. John Gurda, *Brookfield’s Battle Latest in Municipal Mayhem*, MILWAUKEE JOURNAL-SENTINEL, April 2, 2005, available at <http://www.jsonline.com/news/editorials/apr05/314788.asp> (citing Mayor Frank Zeidler as using the term “Iron Ring”); CUTLER, *GREATER MILWAUKEE’S GROWING PAINS*, *supra* note 239, at 30–31; ZEIDLER, *supra* note 241, at 113; Zolik, *supra* note 46, at 507. According to Mayor Frank Zeidler, the term “Iron Ring” was coined during the annexation disputes between Milwaukee and its neighboring communities during the 1920s. ZEIDLER, *supra* note 241, at 89–90. Mayor Frank Zeidler popularized “Iron Ring” while he was the mayor of Milwaukee from 1948–1960, using it to refer to the group of people supporting suburban interests and the suburban communities themselves. *Id.* at 90–178.

of the Oak Creek Law with the *Lammers* Doctrine that the former likely does not meet essential constitutional attributes of a city as required by the *Lammers* Doctrine.<sup>244</sup> Moreover, *Oconomowoc Lake I*<sup>245</sup> robustly upheld *Lammers*<sup>246</sup> the same year that the Oak Creek Law was created. It would be a stretch for anyone to suggest that the rural, spread-out town incorporated under the Oak Creek Law was a city-in-fact pursuant to *Lammers*. The Oak Creek Law is difficult to harmonize with *Lammers* and over one-half century of stare decisis upholding it.<sup>247</sup> Moreover, in 1955, Wisconsin Attorney General Vernon Thomson issued an opinion questioning the validity of the Oak Creek Law.<sup>248</sup> The Oak Creek Law stood, however, because no court addressed its constitutionality. Milwaukee challenged the incorporation of Oak Creek directly rather than through a friendly elector living within the territory proposed for incorporation.<sup>249</sup> That suit never reached the merits: Milwaukee was found not to have standing to challenge the incorporation of Oak Creek, and the suit was dismissed.<sup>250</sup>

## 2. REVAMP OF THE ANNEXATION AND INCORPORATION STATUTES

During Wisconsin's first century of statehood, the majority of its population was rural, but by 1950, a solid majority of the state's population resided in urban areas. After a long-awaited—since 1931—legislative reapportionment of the state assembly and senate was adopted in 1951 and effectuated in 1954, representatives of urban areas controlled the legislature.<sup>251</sup> Consequently, a new interest in urban problems emerged. In 1955, the legislature directed the Legislative Council to study annexation, incorporation, and consolidation and make recommendations.<sup>252</sup>

244. Unfortunately, the presence of the Oak Creek Law causes no end of confusion. Many towns seeking to incorporate today look at the Oak Creek Law and believe they should be entitled to incorporate. They often do not realize that it is a unique law that is no longer useable and possibly unconstitutional.

245. 72 N.W.2d 544.

246. 89 N.W. 501.

247. See *supra* Part IV.A.2.; see Cutler, *Characteristics*, *supra* note 46, at 35.

248. 44 Op. Wis. Att'y Gen. 151 (1955) (questioning the constitutionality of the Oak Creek Law); ZEIDLER, *supra* note 241, at 112–13. Due to his concerns over the Oak Creek Law's constitutionality, Attorney General Thomson ordered the secretary of state not to issue a certificate of incorporation to Oak Creek until the Wisconsin Supreme Court tested the law's validity. ZEIDLER, *supra* note 241, at 112–13.

249. CUTLER, *GREATER MILWAUKEE'S GROWING PAINS*, *supra* note 239, at 30–1.

250. *City of Milwaukee v. Town of Oak Creek*, 98 N.W.2d 469, 472 (Wis. 1959); see also *Schatzman v. Town of Greenfield*, 77 N.W.2d 511 (Wis. 1956) (Milwaukee denied interpleader to challenge incorporation of the Town of Greenfield). *But see Town of Fitchburg*, 332 N.W.2d at 784–85 (Wis. 1983) (Madison allowed to challenge a town that was using the Oak Creek Law to incorporate).

251. Johnson, *supra* note 46, at 463.

252. S.J. Res. 15, 1955 Wis. Leg.

The Council in turn, appointed a special Urban Development Committee, which issued a report in 1957.<sup>253</sup> In response to that report, the legislature enacted a measure that repealed separate statutory provisions for annexations to cities and villages and created a new uniform annexation process in Chapter 66 of the Wisconsin Statutes,<sup>254</sup> where it remains today. Several other recommendations from the 1957 General Report, however, were not adopted. Subsequently, the 1957 legislature created another body to examine problems confronting municipalities: The Urban Problems Committee.<sup>255</sup> Its charge was to study problems confronting municipalities resulting from urban expansion, evaluate the appropriate roles of the state and local governments in solving those problems, recommend necessary revisions to statutes to aid in the solution of the urban expansion problem, and report its findings and recommendations to the 1959 legislature.<sup>256</sup>

a. Work of the Urban Problems Committee

The Urban Problems Committee met ten times beginning in February 1958 and ending upon issuance of its report in January 1959. The Committee was chaired by Representative Carroll E. Metzner of Madison<sup>257</sup> and research was supplied by Legislative Council staff<sup>258</sup> and also several members of the public. In particular, Professor J.H. Beuscher, of the University of Wisconsin Law School, Richard W. Cutler, a Milwaukee attorney,<sup>259</sup> and James R. Donoghue, Director of the Bureau of Government, University of Wisconsin-Extension, were involved in providing information to the committee and, furthermore, those three capable individuals constituted a bill-drafting subcommittee.<sup>260</sup>

The Urban Problems Study Committee Report (UPSCR) consisted of five chapters and three recommended bills for the legislature. The UPSCR thoroughly examined urbanization and local governance in Wisconsin, municipal incorporation law, the regional planning commission

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253. WISCONSIN LEGISLATIVE COUNCIL, 1957 GENERAL REPORT 220 (1957).

254. 1957 Wis. Sess. Laws 1005.

255. 1957 Wis. Sess. Laws ch. 544.

256. *Id.*; see generally METZNER, *supra* note 33, at iii.

257. See METZNER, *supra* note 33, at front cover.

258. Earl Sachse and Bonnie Reese.

259. At that time Mr. Cutler worked for a law firm that was one of the predecessors of what became Brady, Tyrrell, Cotter and Cutler, which in 1974 combined with Quarles, Clemmons, Herriot, Teschner and Noelke to become Quarles & Brady. CUTLER, GREATER MILWAUKEE'S GROWING PAINS, *supra* note 239 n.5. Today, Quarles & Brady is a firm with over 400 attorneys.

260. METZNER, *supra* note 33, at preface; see also Urban Problems Committee meeting minutes.; CUTLER, GREATER MILWAUKEE'S GROWING PAINS, *supra* note 239, at 48-49.

law, and cooperation among governmental units. After citing statistics demonstrating, *inter alia*, that in 1952 Wisconsin ranked fourth among states in its number of local government units, the UPSCR found that the primary problem in urban areas is the multiplicity of governments and fragmentation of regulatory authority.<sup>261</sup> The UPSCR said this about the problem:

Balkanization of political power often is regarded as the greatest single problem facing urban areas. It is difficult to develop unity of purpose or to coordinate planning and action over the whole urban complex when a multiplicity of units are each exercising varying power over portions of the urban area.<sup>262</sup>

The UPSCR also found a related problem was the “lack of a local governmental unit with broad enough powers to deal with matters over the entire urban area.”<sup>263</sup> And the UPSCR made a prediction that became reality: “This governmental dispersion produces an uneven distribution of services and costs throughout the metropolitan area and this pattern is likely to become even more pronounced as the urban trend is intensified in Wisconsin.”<sup>264</sup>

Regarding incorporation, the UPSCR found that the statutes needed to be revamped “to provide a more systematic and stable legal framework for the orderly development of land and government within an urban area.”<sup>265</sup> It cited the following reasons to revamp the incorporation laws:

1. [P]rotracted court battles over incorporations have caused unnecessary and prolonged uncertainty as to the legality of municipal boundaries. This hampers the development of land use planning and the initiation of needed governmental services in the disputed area, as well as causing considerable expense to the litigants.
2. There is no precise statutory definition of the type of land which reasonably could be considered municipal in character, and thus logically eligible for incorporation. Without such guide-posts some areas have been incorporated which lack the characteristics normally associated with village or city government.
3. [P]resent law . . . [contains] variation between the requirements and procedures for incorporation as a village and a city. [T]hese

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261. METZNER, *supra* note 33, at preface.

262. *Id.*

263. *Id.* at iv.

264. *Id.* at 5; ORFIELD & LUCE, *supra* note 40 (illustrating disparities between central cities and suburbs in Wisconsin). See generally United States Census, available at <http://www.census.gov/> (providing per capita income data for all communities in Wisconsin, e.g., compare the City of Milwaukee to City of Mequon).

265. METZNER, *supra* note 33, at 12.



differences have caused confusion and possible opportunism in incorporation proceedings. A more uniform and systematic incorporation procedure obviously would be desirable.

4. No legal means is currently available giving contiguous municipalities an opportunity to protest the incorporation of territory on their borders. Many persons believe it would be preferable to permit parties with a legitimate interest in the incorporation to appear in the proceedings.<sup>266</sup>

The UPSCR also stated: “Perhaps the most serious shortcoming of the present [incorporation] law is the lack of consideration given to the impact of separate incorporations on the entire metropolitan area within which they occur.”<sup>267</sup>

The UPSCR did more than identify problems; it made numerous recommendations, and the drafting subcommittee wrote bill drafts that were appended to the UPSCR.<sup>268</sup> Those bills directly addressed the problems identified. Regarding the incorporation law, the UPSCR recognized that it could not be revamped alone, because the interrelationship of the different methods for altering municipal boundary lines—the others being annexation and consolidation—required them to be reformed together, otherwise parties could circumvent the purposes of the new incorporation statute.<sup>269</sup> Thus, the proposed bill subjected the consolidation of any town with a city or village to the same standards required for municipal incorporation, including review by a circuit court of nondiscretionary standards and binding determination by a state agency,<sup>270</sup> and provided for nonbinding agency review of annexations within counties containing over 50,000 people.<sup>271</sup> In each of those functions, the agency is charged with determining the “public interest.”<sup>272</sup> With only minor changes, the UPSCR’s recommended bill became law in 1959.<sup>273</sup> It addressed the UPSCR’s professed concerns

266. *Id.* at 9–10; regarding the fourth reason, the committee was implicitly referring to *Schatzman*, 77 N.W.2d 511 at 280–81, which held that neighboring jurisdictions have no standing in court to contest incorporations.

267. METZNER, *supra* note 33, at 9.

268. The subcommittee finished an outline of the proposed legislation on July 8, 1958; thereafter, Professor Beuscher drafted the specific bill. CUTLER, GREATER MILWAUKEE’S GROWING PAINS, *supra* note 239, at 49.

269. METZNER, *supra* note 33, at 16.

270. Assemb. 226, 1959 Leg., Reg. Sess. (Wis. 1959); *see* WIS. STAT. § 66.0229 (2003).

271. Assemb. 226, 1959 Leg., Reg. Sess. (Wis. 1959); *see* WIS. STAT. § 66.0217(6) (2003).

272. WIS. STAT. §§ 66.021(6), 66.0207(2), 66.0229 (2003).

273. *Compare* Assemb. 226, 1959 Leg., Reg. Sess. (Wis. 1959), *with* WIS. STAT. § 66.021 (subsequently § 66.0217).

with balkanization of metropolitan areas by making incorporation more difficult to achieve.

Communities seeking to incorporate may not do so without approval from the state, which writes binding incorporation determinations applying specific statutory requirements.<sup>274</sup> On the other hand, annexations taking place within counties with populations under 50,000 persons are not even reviewed by the state, and in those counties with over 50,000 persons, the state issues an advisory opinion rather than binding determination.<sup>275</sup> The statutory requirements for achieving a successful incorporation are substantially more onerous than those for completing an annexation.<sup>276</sup> Thus, annexation to existing cities, rather than incorporating new ones, was made the implicitly preferred policy for accommodating urbanization.<sup>277</sup>

#### b. Current Incorporation Statute

The incorporation statute spells out two sets of standards. The first gives the circuit courts review of nondiscretionary requirements pertaining to minimum population and area and the sufficiency of the incorporation petition, and the second set contains more flexible standards applied by a state agency (now a review board).<sup>278</sup> An incorporation petition<sup>279</sup> is

274. WIS. STAT. §§ 66.0203–66.0209 (2003).

275. WIS. STAT. § 66.0217(6) (2003).

276. *E.g., compare* WIS. STAT. § 66.0207 *with* § 66.0217(6) (2003).

277. This policy has been only marginally successful. It might be time to rethink the current annexation and incorporation statutes in light of current-day realities.

278. WIS. STAT. §§ 66.0205, 66.0203(8), 66.0207 (2003). In 2003, an incorporation review board was placed into the former role of the Wisconsin Department of Administration. 2003 Wis. Act 171. However, staff within the Department of Administration serve the board and still conduct public legislative hearings and research and write the incorporation determinations as they did before Act 171.

279. Merely fifty signatures on a properly noticed incorporation petition of electors living within the petitioned territory will trigger a hearing before the circuit court. WIS. STAT. § 66.0203(2) (2003). That sets a low bar that allows a small group of citizens to start what is often a contentious and costly process; approximately one-half of the petitions are dismissed by the state. George Hall, Director of Municipal Boundary Review for the State of Wisconsin, once observed: “The incorporation process is like a funnel with home rule powers at the bottom—it’s easy for communities to jump in the top, but many get stuck along the way down.” Furthermore, after an incorporation petition is noticed within a newspaper, all subsequent annexations from that petitioned territory stop. WIS. STAT. § 66.0203(1). This is known as the Rule of Prior Precedence. *Vill. of St. Francis*, 245 N.W. 840. Hence, towns and other parties seeking to block annexations began filing frivolous incorporation petitions merely to temporarily halt annexations. But the courts and the reviewing agency (Department of Administration) were obligated to give serious review to each petition submitted. At one point during the late 1990s, fifteen incorporation petitions were backlogged in the Department of Administration. The Department’s solution to this abuse of the process was to require a \$20,000 filing fee for incorporations, which represents a portion of the cost of researching and writing an incorporation determination. *See* WIS. STAT. §§ 66.0203(9)(a)–(b), 16.53(14) (2003). The new fee eliminated frivolous petitions.

first submitted to the circuit court, which conducts a hearing and submits the petition to the state if it meets the standards within Wis. Stat. § 66.0205. Those standards are relatively simple to meet. It is the requirements applied by the review board<sup>280</sup> in Wis. Stat. § 66.0207 that are more difficult to surmount. The review board's decision is sent back to the circuit court, which is required to issue an order coinciding with the board's findings.<sup>281</sup> If the board grants the incorporation petition, a binding referendum on incorporation is ordered within the petitioned territory.<sup>282</sup>

The incorporation statute provides that neighboring governmental units and "any other person found by the court to be a party in interest may become a party to the proceeding. . . ."<sup>283</sup> Prior to that provision, municipalities adjacent to territory proposed for incorporation had no standing to contest it even though their growth could be forestalled by the creation of a new municipality at their doorstep.<sup>284</sup> With or without an intervener party involved, however, the same statutory standards must be met. Incorporations are oftentimes popular within the territory seeking to incorporate, especially when it is an entire town. Laypersons and local officials sometimes mistake the incorporation process for a political election-type process, perhaps because the final stage of the incorporation process is a referendum within the petitioned territory. Territory petitioned for incorporation, however, must first meet the statutory requirements in Wis. Stat. §§ 66.0205 and 66.0207 before any referendum is ordered. Local popular sentiments have no bearing upon the application of those statutory standards—a feature of their design oftentimes lost on local leaders and the press.<sup>285</sup>

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280. Created by 2003 Wis. Act 171.

281. WIS. STAT. § 66.0203(9)(f) (2003).

282. *Id.*

283. WIS. STAT. § 66.0203(5) (2003).

284. *Schatzman*, 77 N.W.2d 511.

285. See Editorial, *State Muffs Decision on Caledonia's Status*, RACINE JOURNAL-TIMES, May 5, 2005 (lobbying mean-spirited criticisms, e.g., calling the determination "ludicrous" and those responsible "dense[] between the ears," at the Department of Administration's denial of the Town of Caledonia's incorporation petition; one criticism is that it stopped popular sovereignty), available at <http://www.journaltimes.com/articles/2005/05/01/opinion/export421.txt>; Robert Gutsche Jr., *Legislature Could Help Move Caledonia Incorporation Plans*, RACINE JOURNAL-TIMES, May 18, 2005 (discussion of efforts to circumvent the Department's rejection with special legislation), available at [http://www.journaltimes.com/articles/2005/05/18/local/iq\\_3526674.txt](http://www.journaltimes.com/articles/2005/05/18/local/iq_3526674.txt); Editorial, *Legislation Could Give Caledonia New Chance*, RACINE JOURNAL-TIMES, May 19, 2005, available at [http://www.journaltimes.com/articles/2005/05/19/opinion/iq\\_3527965.txt](http://www.journaltimes.com/articles/2005/05/19/opinion/iq_3527965.txt); Robert Gutsche Jr., *George Hall Wields Much Power with Incorporation Proposals*, RACINE JOURNAL-TIMES, May 9, 2005 (criticizing the incorporation process and the author of the determination turning down Caledonia, questioning how a non-elected "bureaucrat's bureaucrat" can make a decision that is "nothing more

B. *Connections Between Incorporation Statutes and Lammers Doctrine*

The 1959 statutory standards for incorporation, coupled with full-time expert state agency staff that reviews and either approves or disapproves of incorporations,<sup>286</sup> reduced—perhaps eliminated—incorporations that violate *Lammers*. Moreover, state agency (now board) involvement has changed the nature of challenges to incorporations. Today, parties file Wis. Stat. ch.227 administrative appeals challenging the board's action approving or disapproving a proposed incorporation.<sup>287</sup> Winning such an appeal requires a finding that the board acted in an arbitrary and capricious manner or its decision was unsupported by substantial evidence in the record.<sup>288</sup> Such an appeal, however, is difficult to win, because the board's legal conclusions are afforded the deferential "great weight" standard by the courts.<sup>289</sup> Although aggrieved parties have appealed a substantial number of the seventy-seven determinations issued by the state since 1960, no party has been successful, which demonstrates the deference afforded the determinations and the quality and thoroughness of the analysis within the determinations themselves.<sup>290</sup> As discussed earlier, territory that meets the statutory standards in section 66.0207 will meet the *Lammers* village and city in-fact test. The authors of what is now section 66.0207 were aware that *Lammers* is constitutionally based and that any statutory incorporation standards must square with it.<sup>291</sup> Thus, it is likely that the incorporation statutes were written to have standards

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than his interpretations of statutes"), available at [http://www.journaltimes.com/articles/2005/05/09/local/iq\\_3511879.txt](http://www.journaltimes.com/articles/2005/05/09/local/iq_3511879.txt). Because no neighboring municipality intervened as a party against the Caledonia incorporation, all local officials were presumably in favor, which made the state's decision more vulnerable to one-sided attacks in the local press. Because the Caledonia incorporation process was started before 2003 Wis. Act 171 was adopted, the agency, rather than review board, issued the determination even though the board was operational in 2005.

286. For all incorporations filed after 2003, agency staff writes incorporation determinations at the direction of the review board.

287. Wis. STAT. § 66.0209(2) (2003).

288. Wis. STAT. § 227.20(1) (2003); see *Westring v. James*, 238 N.W.2d 695, 702 (Wis. 1976); *In re Incorporation of Town of Pewaukee v. Wis. Dep't of Dev.*, 521 N.W.2d 453, 453–56 (Wis. Ct. App. 1994); *Hilton v. Dep't of Natural Res.*, 717 N.W.2d 166, 169 (Wis. 2006).

289. *Walag v. Wis. Dep't of Admin.*, 634 N.W.2d 906, 909 (Wis. Ct. App. 2001); see *Hilton*, 717 N.W.2d at 169.

290. Municipal Incorporation-Consolidation Summary, Wisconsin Department of Administration, [http://www.doa.state.wi.us/docs\\_view2.asp?docid=3839](http://www.doa.state.wi.us/docs_view2.asp?docid=3839) (last visited Feb. 22, 2007). For an example of an incorporation determination, see [http://www.doa.state.wi.us/pagesubtext\\_detail.asp?linksubcatid=365&linkcatid=215&linkid=](http://www.doa.state.wi.us/pagesubtext_detail.asp?linksubcatid=365&linkcatid=215&linkid=) (last visited Feb. 22, 2007).

291. See METZNER, *supra* note 33, at 11–12. Richard Cutler, a member of the bill drafting subcommittee, was undoubtedly aware of the *Lammers* Doctrine, because he extensively wrote about it in a law review article. Cutler, *Characteristics*, *supra* note 46.

at least as strict as the *Lammers* Doctrine. In doing so, incorporation litigation action moved to challenging the administrative agency's (now board's) decisions rather than constitutional issues under the *Lammers* Doctrine. As the law's framers had hoped, incorporation decisions have become more predictable and uniform throughout the state.<sup>292</sup>

In this age of decentralized suburban development, societal notions of what constitutes a city and village often differ from the 1848 vision of the quaint, compact New England village containing houses, a main street, local school, and church. In a sense, the incorporation standards within section 66.0207—unchanged since their adoption in 1959 and arguably codifying the *Lammers* Doctrine—have frozen Wisconsin's definition of a city and village because the statutes define required attributes of what is a village or city in detail, leaving little wiggle room for reinterpretation by courts or the review board.<sup>293</sup> For example, one of the six statutory standards applied by the agency requires the following characteristics:

The entire territory of the proposed village or city shall be reasonably homogeneous and compact, taking into consideration natural boundaries, natural drainage basin, soil conditions, present and potential transportation facilities, previous political boundaries, boundaries of school districts, shopping and social customs. An isolated municipality shall have a reasonably developed community center, including some or all features such as retail stores, churches, post office, telecommunications exchange and similar centers of community activity.<sup>294</sup>

The above quoted standard is the one that proffered villages and cities most often fail to meet.<sup>295</sup> In a concrete sense, this standard equates

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It is a safe assumption that the other two members of the drafting committee, Professor J.H. Beuscher and James R. Donoghue, were also aware of the doctrine.

292. METZNER, *supra* note 33, at 12; *see also* first drafting note within Assemb. 226, 1959 Leg., Reg. Sess. (Wis. 1959)(stating intent of the bill is “to provide more comprehensive state level control over the development of new municipalities to assure that the creation of such units is in the public interest”). Although the *Lammers* Doctrine has been largely codified, the same cannot be said of the Rule of Reason. Unlike the incorporation decisions by the state agency, the annexation decisions by the courts have not led to more predictable and uniform annexation outcomes. This experience suggests that a state agency function or board dedicated and experienced in municipal boundary issues may be better equipped than the courts in addressing annexation and incorporation issues.

293. Other laws, however, have sidestepped the incorporation and annexation statutes and any debate over what attributes belong to a “city,” “village,” or “town,” respectively, by empowering towns to engage in urban-type development through special purpose districts that deliver water and sewer services to higher density urban or suburban housing, commercial, and industrial developments approved by town boards; in general, towns have an increasing amount of powers once reserved for cities and villages. *See infra* note 307.

294. WIS. STAT. § 66.0207(1)(a) (2003).

295. Municipal Incorporation-Consolidation Summary, Wisconsin Department of Administration, [http://www.doa.state.wi.us/docs\\_view2.asp?docid=3839](http://www.doa.state.wi.us/docs_view2.asp?docid=3839) (last visited Feb. 22, 2007).

with the *Lammers* Doctrine, albeit it is more specific. And section 66.0207(1)(a)'s most important language is within its first phrase: "The entire territory . . . shall be reasonably homogeneous and compact. . . ." <sup>296</sup> Compare that phrase with the *Lammers* court's finding that a village and city in-fact requires "a reasonably compact center or nucleus of population." <sup>297</sup> Moreover, the statutory provision regarding consideration of "previous political boundaries, boundary of school district, shopping and social customs" <sup>298</sup> is likely pulled from a progeny of *Lammers* that found a village is a "political, sociological and geographic unit." <sup>299</sup> The *Lammers* Doctrine is arguably embedded within the statutory requirements. The persistence of the 1959 statutory standards have perpetuated a statutory copy of *Lammers* perhaps longer than the Wisconsin Supreme Court would have if it was still routinely applying *Lammers* and shifting between broad and narrow interpretations as it did during the 1950s. <sup>300</sup> A body of seventy-seven agency determinations since 1960 have applied and interpreted section 66.0207, <sup>301</sup> and such agency expertise and experience is the primary reason courts at all levels are deferential to administrative agencies. <sup>302</sup>

Moreover, section 66.0207(1)(a) is not the only standard pertaining to compactness. Section 66.0207(1)(b) requires identification of the

296. WIS. STAT. § 66.0207(1)(a) (2003).

297. *Lammers*, 89 N.W. at 503.

298. WIS. STAT. § 66.0207(1)(a) (2003).

299. *In re* Incorporation of Vill. of Oconomowoc Lake, 72 N.W.2d at 547.

300. *See supra* Part IV.A.2.b.-c.

301. *See* Municipal Incorporation-Consolidation Summary, Wisconsin Department of Administration, [http://www.doa.state.wi.us/docs\\_view2.asp?docid=3839](http://www.doa.state.wi.us/docs_view2.asp?docid=3839) (last visited Feb. 22, 2007).

302. *See Hilton*, 717 N.W.2d at 171-72; *Clean Wis. v. Pub. Serv. Comm'n*, 700 N.W.2d 768, 795-96 (Wis. 2005). Federal courts afford similar deference to federal agencies. *Cf. Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In the author's experience in applying WIS. STAT. § 66.0207 while working for the Wisconsin Department of Administration, the agency was conservative in its interpretations of the statute, never straying too far from the plain language of the statute and past agency decisions, and staying faithful to the extensive history of the law and its intent found within the original bill's drafting notes and the Urban Problems Study Committee Report of 1959. Not surprisingly, some parties were upset with the agency's reluctance to stretch the statutes to fit their particular desires for a new village or city. To stretch the statutes too far is to usurp power from the legislature. The Wisconsin Court of Appeals, in response to an argument regarding the benefits of incorporation, addressed it such:

whether an incorporation would benefit the proposed village area is not the standard adopted by our legislature and set forth in Wis. Stat. § 66.016 [subsequently § 66.0207]. We reject the petitioners' request that we depart from existing case law and the explicit statutory requirements of incorporation. We further note that the petitioners' concerns that the current standards do not address present day realities are better addressed to the legislature.

*Walag*, 634 N.W.2d at 915. This is essentially the same tack taken by the executive branch when applying the statutes.

“most densely populated one-half square mile” or “core,” and territory beyond the core must have a certain density of development or potential for development “on a substantial scale within the next three years.”<sup>303</sup> Hence, petitioners of territory with large swaths of undeveloped rural territory are unlikely to succeed.

The standards in Wis. Stat. § 66.0207 have been unsuccessfully attacked as outdated.<sup>304</sup> Perhaps they, and the *Lammers* Doctrine, are outdated in a time when a majority of Americans live in suburban communities with little resemblance to a nineteenth-century village. On the other hand, it appears that we may be about to come full circle as developers, planners, and municipalities are again creating small, compact, and walkable village centers.<sup>305</sup>

The *Lammers* Doctrine has never been overturned. Although not used in many years, it is still available to provide a check on incorporations. Because the doctrine is constitutionally based, it trumps any agency finding or statutes contrary to its edicts. For example, if the review board were to apply statutory standards in a manner that approved the incorporation of a village without attributes required by the *Lammers* village-in-fact doctrine, *Lammers* and its progeny dictate that such incorporation is vulnerable to being declared unconstitutional.

#### **VI. TRIPLE LINK: Commonalities Between the “Need” Prong of the Rule of Reason, *Lammers* Doctrine, and Incorporation Statutes**

Now that this article had addressed the *Lammers* Doctrine, Rule of Reason, and incorporation statutes, their commonalities may be understood.<sup>306</sup> The “need” requirement for annexations, the *Lammers* Doctrine, and Wis. Stat. § 66.0207(1)(b) (the statutory incorporation

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303. The statute is actually a bit more complicated than this; however, all the specifics are not necessary for the present discussion. Suffice to say, the requirements in section 66.0207(1)(b) differ depending upon whether the petitioned territory is “isolated” or “metropolitan.” For those who want more detail, also see Wis. Stat. §§ 66.0205(1)–(5) and 66.0201(2)(c) (2003).

304. See, e.g., *Walag*, 634 N.W.2d at 913.

305. New Urbanism or Traditional Neighborhood Development (TND) has become increasingly popular. See <http://www.tndtownpaper.com/neighborhoods.htm> (last visited Mar. 18, 2006). Wisconsin has a TND model ordinance. WIS. STAT. § 66.1027 (2003). The Congress for the New Urbanism is a successful national organization promoting compact, walkable communities and developments. See [www.cnu.org](http://www.cnu.org) (last visited Feb. 22, 2007).

306. Recall that this article has already established a link between the *Lammers* Doctrine and *Sherry*. See *infra* Part IV (explaining that the *Lammers* Doctrine and *Sherry* have the same constitutional basis).

standards) all work toward the same end: they foster a policy of allowing only territory that is urban or urbanizing to be in cities and villages and keeping rural territory in towns.<sup>307</sup>

Most of the factors developed under the “need” prong contribute to fostering the policy of allowing urbanization to take place in territory that is transferred into cities and villages. For example, the second factor considers whether there is “a need for additional area for construction of home, mercantile, manufacturing or industrial establishments,” the third “a need for additional land area to accommodate the present to reasonably anticipated future growth of the municipality.”<sup>308</sup>

The *Lammers* city and village in-fact standard requires the incorporated municipality to be a combined “geographic unit” that is physically cohesive with a compact core.<sup>309</sup> Cohesiveness refers, in part, to the overall characteristics of the territory, which for a village or city will be more urban or suburban than rural. Thus, *Lammers* also advances a policy of only allowing urban or urbanizing territory to be incorporated.

The incorporation statute contains several provisions that apply a policy of keeping rural territory in towns and placing urban territory in villages and cities. Wis. Stat. § 66.0207(a) contains numerous limits on the characteristics of territory that may incorporate in a manner that mirror parts of the *Lammers* Doctrine.<sup>310</sup> However, the part of the incorporation statute most similar to the need prong for annexation is section 66.0207(b), which states in part: “The territory beyond the most densely populated square mile . . . shall have the potential for residential or other urban land use development on a substantial scale within the next 3 years.”<sup>311</sup> In other words, the newly incorporated city or village must have a need to develop certain undeveloped territory within the specified time period. That limits incorporation of territory that is inordinately rural, thereby keeping rural territory in towns.

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307. In practice, the relatively easy creation of special districts to provide sewer and water services within towns, *see generally* WIS. STAT. ch. 60 (1993), the ease by which private sewer (septic) systems may be used, *see* WIS. ADMIN. CODE, Comm. ch. 83, and the increasing ability of towns to make their own land use decisions and even use infrastructure financing mechanisms once reserved only for cities and villages, all allow towns to urbanize. *See, e.g.*, 1993 Wis. Act 246 (popularly known as the Town Parity Act).

308. *E.g.*, *Vill. of Elmwood Park*, 139 N.W.2d at 71; *Town of Sugar Creek*, 605 N.W.2d at 279.

309. *Oconomowoc Lake I*, 72 N.W.2d at 547. *See generally In re Vill. of St. Francis*, 245 N.W. 840.

310. *See infra* Part V.c. (explaining relationship between the *Lammers* Doctrine and WIS. STAT. § 66.0207).

311. WIS. STAT. § 66.0207(b) (2003).



Hence, the effects of the “need” prong of the Rule of Reason, the *Lammers* Doctrine, and section 66.0207(1)(b) of the Wisconsin Statutes all create a common policy of keeping rural territory in towns by allowing only urban and urbanizing territory in villages and cities. Moreover, because annexation and incorporation are the two primary processes for altering municipal boundaries, achieving on-the-ground outcomes consistent with that policy requires recognition that both processes must work in harmony toward the same end.

The linkages between annexation and incorporation are not merely on paper, however. Municipal incorporation and annexation are linked in practice. Both are often involved in larger boundary disputes between cities and villages on one hand and towns on the other. The following section presents two case studies.

### VII. Practical Linkages Between Annexation and Incorporation: Examples from the Field

In addition to linkages in doctrine and history, annexation and incorporation are intertwined in practice. Town officials<sup>312</sup> in Wisconsin are increasingly reacting against the more limited powers of towns among Wisconsin’s local governments and, with some success, they have sought a share of the urban powers and growth that traditionally occurred in cities and villages.<sup>313</sup> Because the typical town covers a large territory,<sup>314</sup> even “urban towns” are usually at least one-half rural. Although portions of *some* towns are urban enough to qualify for incorporation, the electors living within those areas typically do not seek it. The most typical incorporation petition is for an entire town, because its citizens identify with the whole town as their community<sup>315</sup> and will usually reject splitting into two.<sup>316</sup> The large rural sections of such a

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312. As represented by the Wisconsin Towns Association.

313. In Wisconsin’s government circles, the concept of an “urban town” has gained currency. The Wisconsin Towns Association even has an Urban Towns Committee, available at <http://www.wisctowns.com/utc.html>.

314. Wisconsin towns do not reflect patterns of settlement, but follow the boundaries of “townships.” The typical township is six miles by six miles square (36 square miles). See, e.g., Paddock, *supra* note 30. A township is further divided into 36 sections, each one square mile. *Id.*

315. Another reason entire towns often petition for incorporation is that the town government’s resources can then be used for the incorporation attempt. Anything less than the entire town requires a group of petitioners to find money to pay lawyers, consultants, and a fee to the state.

316. Persons who think about this in terms of “splitting” the town are those who identify with the whole town and seek to keep it united. One could just as easily think about it as preserving the town, i.e., the rural territory, by allowing the urban part to form a new village or city. Thus, nothing is “split.”

town, however, often doom it from meeting the various requirements for incorporation listed in Wis. Stat. § 66.0207; thus, the town falls short of incorporating.<sup>317</sup> Examples abound. Attempts to incorporate the towns of Sheboygan, Pewaukee, Waukesha, Pleasant Prairie, and Bridgeport were dismissed for, *inter alia*, excess amounts of undeveloped territory, i.e., lack of homogeneity and compactness.<sup>318</sup> One of the driving factors in the push for those towns to incorporate was to halt annexations of their territory by the neighboring cities of Sheboygan, Waukesha (adjacent to the towns of Pewaukee and Waukesha), Kenosha, and Prairie du Chien.<sup>319</sup>

The practical interactions between incorporation and annexation include the strategic use of incorporation petitions to block annexations.<sup>320</sup> After a legal notice is published,<sup>321</sup> all subsequent annexations from that petitioned territory stop until the Incorporation Review Board (before 2003, the Wisconsin Department of Administration) either grants or dismisses the petition.<sup>322</sup> Pursuant to statute, the board's determination is to be issued within 180 days of receiving the petition unless extended for mediation.<sup>323</sup> Thus, even if the incorporators know that the incorporation petition will likely be dismissed, noticing and filing it will stop

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317. After being turned down by the state, town supervisors then speak to their state legislators, who may introduce special bills or seek legislative changes to the incorporation laws, or they may contact the governor to attempt to put pressure on the state agency, which during the author's tenure there, 1997–2003, fended off attempts to politicize the incorporation process.

318. Records kept by the Wisconsin Department of Administration, Municipal Boundary Review Unit, available at [http://www.doa.state.wi.us/pagesubtext\\_detail.asp?linksubcatid=365&linkcatid=215&linkid=](http://www.doa.state.wi.us/pagesubtext_detail.asp?linksubcatid=365&linkcatid=215&linkid=). The Town of Pewaukee was turned down four times, starting in 1972, before meeting the incorporation standards in 1998 and becoming a city.

319. Telephone conversation with Richard Stadelman, Executive Director, Wisconsin Towns Association (June 26, 2006).

320. *Id.*

321. WIS. STAT. § 66.0203(1) (2003).

322. This is known as the Rule of Prior Precedence, the proceeding first instituted, i.e., the first required step taken takes precedence, regardless of which is first completed or effective. Application for Incorporation of Vill. of St. Francis v. City of Milwaukee, 243 N.W. 315, 317 (Wis. 1932); Vill. of Brown Deer v. City of Milwaukee, 79 N.W.2d 340, 344–45 (Wis. 1956); *Town of Delavan*, 500 N.W.2d at 273.

323. WIS. STAT. § 66.0203(9)(d)–(dm) (2003). For at least the past decade, incorporation determinations are from forty to eighty pages in length and include extensive analysis of a wide array of local governance issues, e.g., land use planning, natural features, intergovernmental issues, transportation networks, current and projected tax revenues, and expenditures of the new city or village. The Department of Administration's informational needs for writing a determination constitutes a six-page list, available at [http://www.doa.state.wi.us/pagesubtext\\_detail.asp?linksubcatid=365&linkcatid=215&linkid=](http://www.doa.state.wi.us/pagesubtext_detail.asp?linksubcatid=365&linkcatid=215&linkid=). Since the adoption of 2001 Wis. Act 16, a \$20,000 fee has been charged incorporation petitioners to allow the state to recoup some of the cost of holding public hearings and writing the determinations. See WIS. STAT. §§ 66.0203(9)(a)–(b), 16.53(14) (2003).

annexations for a number of months, and sometimes years, when legal wrangling delays the time before the petition is received and acted upon by the board.

Two case studies are presented below to provide a practical glimpse at how the interrelationship between annexation and incorporation can play out. The first case is the dispute between the Town of Campbell and City of La Crosse, which dragged on through years of litigation, perhaps a record amount of time for a municipal boundary dispute. The second case is Kronenwetter, which provides two lessons: (1) not recognizing the linkages between annexation and incorporation can lead to absurd consequences,<sup>324</sup> and (2) the creation of a “village” without the required attributes of one is possible because the state is not engaged.

A. *Case Study One: Town of Campbell and City of La Crosse*

The Town of Campbell (Campbell)<sup>325</sup> and City of La Crosse (La Crosse) engaged in years of legal and political entanglements over annexations and incorporation. The disputes revolved around three issues: the annexation of properties from Campbell to La Crosse, the need for a better water supply for Campbell residents, and the incorporation of Campbell. The dispute resulted in numerous lawsuits, three incorporation petitions, special legislation allowing the incorporation of Campbell, a gubernatorial veto of that special legislation, and two mediated agreements.

The most recent battles<sup>326</sup> between Campbell and La Crosse started in November of 1996 when Campbell residents voted in an advisory

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324. In this case, annexation and incorporation presented two separate paths to the same desired end.

325. The Town of Campbell is a series of islands in the Mississippi River directly west of La Crosse, the largest of which is French Island. French Island's territory is currently partially within the Town of Campbell and the City of La Crosse. Substantial territory on the far north and south ends of French Island are within La Crosse, including the La Crosse Municipal Airport, which is on the north end of the island. A secondary island within Campbell—Hiawatha Island—is relevant because several disputed annexations were on it. Although on maps it appears to be part of the Mississippi River, the portion of the river between La Crosse and Campbell is known as the Black River.

326. Municipal boundary disputes between the Town of Campbell and City of La Crosse date back decades. The Town of Campbell attempted to incorporate in 1966, 1972, 1977, and in a series of three incorporation petitions, from 1996 to 2003. Municipal Incorporation-Consolidation Summary, Wisconsin Department of Administration, [http://www.doa.state.wi.us/docs\\_view2.asp?docid=3839](http://www.doa.state.wi.us/docs_view2.asp?docid=3839) (last visited Mar. 3, 2007). The 1966 petition was approved by the state and turned down by Campbell voters in a referendum; the 1972 and 1977 petitions were dismissed. *Id.* The series of petitions since 1996 were withdrawn for various reasons, and ultimately a negotiated agreement was approved by La Crosse and Campbell. *Id.*; see Joan Kent, *City OKs deal with Campbell*, LA CROSSE TRIB., Feb. 13, 2004.

referendum to pursue incorporation as a village.<sup>327</sup> As discussed above, publishing a legal notice of intent to circulate an incorporation petition and filing an incorporation petition halts annexations within the petitioned territory until a decision on the proposed incorporation is released by the state. Before a legal notice of the incorporation petition was published by Campbell residents, a property owner living in Campbell published a notice of intent to circulate a petition for annexation of territory to La Crosse on November 15, 1996.<sup>328</sup> La Crosse adopted annexation ordinances for three Campbell properties on December 17, 1996.<sup>329</sup> On December 24, 1996, Campbell initiated the incorporation process by publishing legal notice of its “intent to circulate an incorporation petition.”<sup>330</sup> Therefore, under the Rule of Prior Precedence, the annexations were first instituted and took precedence over any incorporation petition that included their territory.<sup>331</sup>

The next fight, therefore, was over whether Campbell had included the annexed properties within the territory it petitioned to incorporate. The La Crosse County Circuit Court ruled that the annexed properties were not included within the incorporation petition noticed on December 24, 1996.<sup>332</sup> Meanwhile, Campbell challenged those annexations on the basis that the annexed property was not contiguous to La Crosse as required by Wis. Stat. § 66.021(2)<sup>333</sup> because the properties were separated from La Crosse by the Black River, which in that vicinity is 800 feet wide.<sup>334</sup> County Circuit Court Judge Dennis G. Montabon granted Campbell’s motion for summary judgment in each case.<sup>335</sup> Thus, those properties were, for the time being, back in Campbell. The return of those properties to Campbell, however, created a potential problem for its bid to incorporate, because they then constituted nonviable town

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327. See *Battle*, LA CROSSE TRIB., Mar. 2, 2002, at A-10; Wisconsin Department of Administration, Municipal Boundary Review, Town of Campbell Incorporation Process Timeline of Events.

328. *In re Incorporation as a Vill. of Certain Territory in the Town of Campbell*, No. 97-CV-135 (Wis. Cir. Ct. La Crosse County, Aug. 2000).

329. *Town of Campbell*, 673 N.W.2d at 700-01, *review denied*, 675 N.W.2d 805 (Wis. 2004).

330. *Battle*, *supra* note 327. That petition was filed with the La Crosse County Circuit Court on March 5, 1997.

331. *Village of Brown Deer*, 79 N.W.2d at 345; *Town of Delavan*, 500 N.W.2d at 273.

332. *In re Incorporation as a Vill. of Certain Territory in the Town of Campbell*, No. 97-CV-135.

333. That section was subsequently renumbered to Wis. STAT. § 66.0217(3) (2003).

334. *Town of Campbell v. City of La Crosse*, 634 N.W.2d 840, 841 (Wis. Ct. App. 2001), *review denied*, *Town of Campbell v. City of La Crosse*, 638 N.W.2d 589 (Wis. 2001).

335. *Id.*

remnants not included in the incorporation petition for a new village.<sup>336</sup> Campbell moved to either include the territory subject to the overturned annexations in its incorporation petition or dismiss the petition so that a new one could be filed.<sup>337</sup> While those motions were pending before the county circuit court, Campbell noticed a new incorporation petition on January 3, 2001, and on February 12, 2001, filed a second petition with the La Crosse County Circuit Court.<sup>338</sup> On June 19, 2001, a decision and order of the circuit court dismissed the first petition.<sup>339</sup>

The second incorporation petition included the annexations that Judge Dennis Montabon returned to Campbell, but since La Crosse was appealing his decision, Campbell wrote a contingency clause into the legal description of the territory to be incorporated: “[S]hould the Court of Appeals overturn the Circuit Court . . . said parcels shall be considered to be deleted from this description.”<sup>340</sup> The contingency petition itself became the subject of another lawsuit that culminated in a Wisconsin Court of Appeals decision.<sup>341</sup> In that case, La Crosse moved to dismiss the second petition based upon its use of a contingency clause, claiming that such a clause is inconsistent with the incorporation procedures in Wis. Stat. § 66.0203.<sup>342</sup>

The second petition’s contingent legal description became operative in 2001 when, in a consolidated appeal, the Wisconsin Court of Appeals reversed Judge Montabon’s grant of summary judgment in favor of Campbell, which found that the 1996 annexations lacked contiguity to La Crosse, holding “that the property of the City meets the annexed properties at the center of the riverbed of the Black River. It follows that the annexed properties are contiguous to the City. . . .”<sup>343</sup> Thereafter, La Crosse County Circuit Court Judge Pasell ruled in favor of La Crosse’s motion to dismiss the second incorporation petition and the court of appeals affirmed, holding that the use of contingent legal descriptions in incorporation petitions is inconsistent with statutory requirements.<sup>344</sup>

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336. Leaving small remnants of territory within a town creates—in the author’s experience applying that statute—a problem in meeting Wis. STAT. § 66.0207(2)(c) (2003) (requiring examination of impacts on the remainder of the town; hence, remaining town territory must have the population and tax base to maintain a viable government).

337. *In re* Incorporation of Certain Territory as a Vill., 667 N.W.2d 356, 359 (Wis. Ct. App. 2003).

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Incorporation of Certain Territory as a Vill.*, 667 N.W.2d at 360.

343. *Town of Campbell*, 634 N.W.2d at 842.

344. *Incorporation of Certain Territory as a Vill.*, 667 N.W.2d at 364.

In October 2002, before its second incorporation petition was dismissed by the Wisconsin Court of Appeals, Campbell filed a third incorporation petition.<sup>345</sup> The La Crosse County Circuit Court forwarded the third petition to the Wisconsin Department of Administration on March 7, 2003.<sup>346</sup>

Meanwhile, mediated negotiations that took place in 1998 led to an agreement in which La Crosse would sell city water to Campbell. The Campbell Town Board approved the agreement, and La Crosse Mayor Medinger supported it, but the city council refused to ratify it.<sup>347</sup> Again, in 2001, at the suggestion of George Hall of the Wisconsin Department of Administration, County Circuit Judge Dale Pasell ordered mediation to resolve the boundary dispute.<sup>348</sup>

In a further complication, in 2003, Representative Mike Huebsch introduced a bill in the Wisconsin legislature that allowed Campbell to incorporate as a village without state approval under Wis. Stat. § 66.0207. Assembly Bill 85 was legislation written specifically to incorporate the Town of Campbell. Because the Wisconsin Constitution prohibits such special legislation,<sup>349</sup> the bill was ostensibly written with general requirements.<sup>350</sup> But in reality, only the Town of Campbell met the bill's requirements.<sup>351</sup> Despite possible constitutional infirmities,<sup>352</sup> Assembly Bill 85 passed both houses of the Wisconsin legislature.<sup>353</sup> In a twist of fate, Governor Doyle vetoed it,<sup>354</sup> stating: "The bill would set a dangerous precedent—encouraging other towns interested

345. WISCONSIN DEPARTMENT OF ADMINISTRATION MEMORANDUM, TOWN OF CAMPBELL INCORPORATION PROCESS TIMELINE OF EVENTS (on file with author and Department of Administration).

346. *Id.*

347. Reid Magney, *Judge Orders Mediation Between La Crosse, Campbell*, LA CROSSE TRIB., Nov. 6, 2001, available at <http://www.lacrossetribune.com/articles/2001/11/06/stories/news/1.txt>.

348. *Id.* Both the circuit court and state (for approximately forty-four years, a state civil servant made the decision, but since 2003, an incorporation review board is statutorily charged with making the decision) are involved in municipal incorporation; see Wis. STAT. §§ 66.0203(8), 66.0205, 66.0207 (2003). During these events from 1998 through 2001, George Hall had the authority to grant or dismiss incorporation petitions as the director of Municipal Boundary Review for the State of Wisconsin, and he was a major player seeking solutions to ongoing annexation and incorporation disputes.

349. Wis. CONST. art. IV, § 31 (2006).

350. Assemb. 85, 2003–2004 Leg. Reg. Sess. (Wis. 2003).

351. *Id.*

352. *Cf.* 44 Op. Wis. Att'y Gen. 151 (1955) (contending that a 1955 bill proposing the incorporation of certain cities "appears on its face to be in possible conflict with the state constitution").

353. See Tom Sheehan, *Doyle Vetoes Campbell Bill*, LA CROSSE TRIB., Dec. 19, 2003, available at <http://www.lacrossetribune.com/articles/2003/12/19/news/z00lead.txt>.

354. *Id.*

in incorporation to seek special legislation rather than going through the regular process.”<sup>355</sup>

Ultimately, a negotiated boundary agreement was approved by La Crosse and Campbell “ending seven years of court battles.”<sup>356</sup> The agreement, finalized in February 2004, will be in force through 2025.<sup>357</sup> It allows La Crosse to annex some territory on Hiawatha Island; however, any annexation that would reduce Campbell’s land area below the minimum four square miles required to become a village cannot proceed.<sup>358</sup> At the time the agreement was approved, Campbell was 4.12 square miles.<sup>359</sup> Campbell can “pursue incorporation again after June 30, 2024.”<sup>360</sup> The dispute, therefore, was simply shelved for approximately twenty years.

The practical lessons contained within this case study are twofold. First, annexation and incorporation processes can and have been used strategically like chess moves<sup>361</sup> on a grand scale—actions produce reactions. Second, the annexation and incorporation processes are the tools used to strive for or protect territory and tax base. In this case, two common law doctrines, the Rule of Prior Precedence and Rule of Reason, were available for courts to apply in sorting out the issues. But the available judicial doctrines were unable to end the larger dispute. A negotiated settlement halted the dispute for twenty years. If and when the dispute breaks out again, a comprehensive approach to annexation and incorporation might be the best hope of permanently putting this dispute—and the dozens of others like it in Wisconsin—to rest.<sup>362</sup>

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355. Press Release, Office of Wisconsin Governor Jim Doyle, Governor Doyle Vetoes Assembly Bill 85, Cites Agreement Between La Crosse, Campbell Leaders to Resolve Dispute (Dec. 18, 2003) (on file with author) *available at* [http://www.wisgov.state.wi.us/media\\_list.asp?catid=1&name=Press%20Releases&locid=19](http://www.wisgov.state.wi.us/media_list.asp?catid=1&name=Press%20Releases&locid=19).

356. Joan Dent, *City OKs Deal with Campbell*, LA CROSSE TRIB., Feb. 13, 2004, *available at* <http://www.lacrossetribune.com/articles/2004/02/13/news/z01campbell.txt>.

357. *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. The Chinese board game Go is the best simile.

362. A legislative solution would be preferable. However, the legislature has been deadlocked on annexation and incorporation issues for over forty years. The powers of towns on the one side, and cities and villages on the other, are in equilibrium, which has led to little reform of the municipal boundary laws since 1959. Thus, Wisconsin limps along with an outdated, ill-working system. This article points the way toward available but dormant judicial doctrines that could be the bases of a new doctrine that could add systematic order to the current disorder. The new doctrine does not necessarily have to mimic the old. However, understanding the old doctrines is a prerequisite, i.e., starting point, for reforming the law. At a minimum, this article illustrates that reform is needed, both legislatively and judicially.

B. *Case Study Two: Kronenwetter, Incorporation and Annexation*

The facts of the Kronenwetter case study are relatively simple compared to the La Crosse-Campbell dispute. No lawsuits were filed. However, the resulting extent of the Village of Kronenwetter makes this case worthy of study. Before 2002, the Village of Kronenwetter was the Town of Kronenwetter. Kronenwetter is located directly north of Mosinee and immediately south of the Village of Rothschild, Marathon County, Wisconsin, which puts it on the southern end of the Wausau metropolitan area.

Kronenwetter's geographical size places it among the largest local governments in Wisconsin. A typical Wisconsin town is thirty-six square miles in size. The Town of Kronenwetter was over fifty-two square miles in size. It had the usual six-by-six mile square along with an additional sixteen square miles of territory along the Wisconsin River. The developed portion of Kronenwetter is its northwest corner, consisting of several residential subdivisions and scattered commercial establishments on either side of Interstate 39. That portion constitutes one-fifth of the total area of Kronenwetter. The remaining four-fifths of Kronenwetter was (and still is) sparsely populated with forest preserves and farmlands. The Town of Kronenwetter, apparently recognizing that any attempt to incorporate the entire town would not meet the nondiscretionary requirements under Wis. Stat. § 66.0205(3),<sup>363</sup> petitioned to incorporate only the urbanized northwest part as a village, leaving the rural forty-one square miles—still larger than most towns—under town government.

On August 19, 2002, the Wisconsin Department of Administration (Department) granted the incorporation of eleven square miles of the Town of Kronenwetter as a village, finding that it met all statutory requirements for incorporation.<sup>364</sup> On December 16, 2002, the Department received—for its public interest review pursuant to Wis. Stat. § 66.0217(6)—a petition seeking to annex the entire remaining Town of Kronenwetter to the new village.<sup>365</sup> On January 8, 2003, the Department

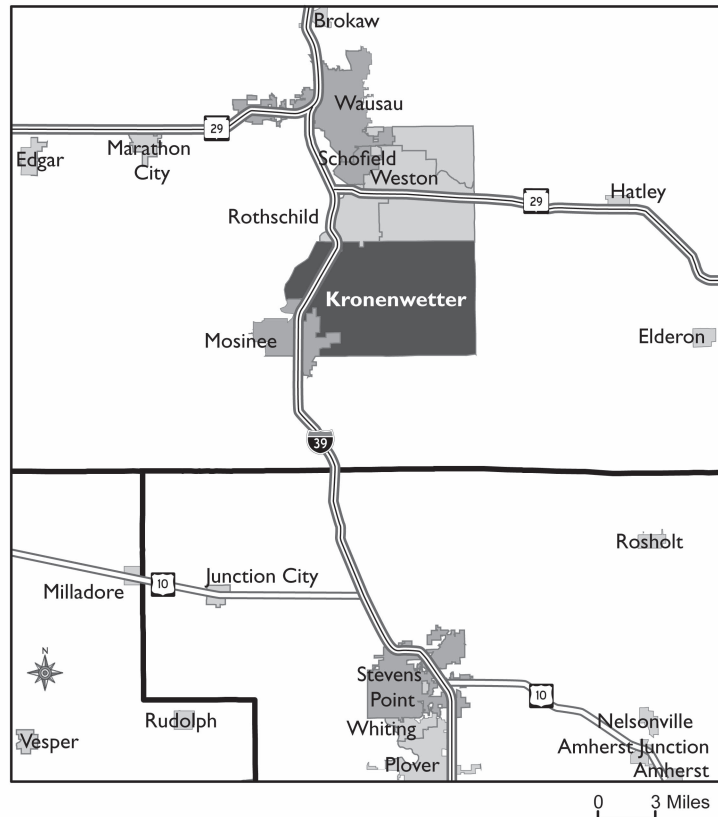
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363. It would have fallen short under Wis. STAT. § 66.0207 (applied by the department) as well, but by not first meeting section 66.0205 (local court reviews thresholds), the petition would have been dismissed before even being subjected to section 66.0207. Wis. STAT. §§ 66.0205, 66.0207 (2003).






364. The author was employed by the Wisconsin Department of Administration during these events, co-researched and co-wrote the state's incorporation decision, was responsible for a letter to the village advising against the annexation, attended meetings discussing the state's possible response, and advocated, to no avail, that the state take action.

365. Kronenwetter Incorporation Petition (on file with the Wisconsin Department of Administration).





## Kronenwetter in Context

-  Village of Kronenwetter
-  City
-  Village
-  Divided Highway
-  Major Road

sent a letter advising against the proposed annexation.<sup>366</sup> Despite the state's contrary advice, the Village of Kronenwetter adopted an ordinance annexing 26,106 acres (forty-one square miles)—quite possibly the largest annexation in Wisconsin's history—constituting the entire remaining Town of Kronenwetter.<sup>367</sup> No citizen or neighboring municipality challenged the annexation, and the State of Wisconsin sat idle.<sup>368</sup> As a result of that annexation in 2003, the Village of Kronenwetter (52.14 sq. mi.) became the third largest incorporated municipality in Wisconsin by area. Out of 585 cities and villages at the time, only Milwaukee (ninety-six square miles) and Madison (sixty-eight square miles) covered more territory.<sup>369</sup> Kronenwetter, however, did not resemble Milwaukee or Madison. Its population was merely 5,369. The map on page 313 shows that Kronenwetter is three times the size of any municipality in its vicinity.

### C. *Lessons from Practical Examples*

In the case studies above, the parties and courts applied many of the laws explained in other parts of this article. The everyday practical linkages between annexation and incorporation must be understood when thinking about the court doctrines examined in Part IV and for understanding the statutory history outlined in Part V. Effectuating useful urbanization policies requires creating statutes and doctrines that are not circumvented in practice, as the incorporation statutes were in Kronenwetter,

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366. Letter from Robert Zeinemann, Planning Analyst, Wisconsin Department of Administration, to Krystal Antone, Clerk, Village of Kronenwetter and Marie Wonsil, Clerk, Town of Kronenwetter (Jan. 8, 2003) (on file with the Wisconsin Department of Administration, file No. 11941). That letter was sent pursuant to the Department's official statutory charge under Wis. STAT. § 66.0217(6) (2003).

367. Village of Kronenwetter, Wis. Ord. VII 7.4, March 10, 2003.

368. However, it is not entirely clear whether the neighboring municipalities or the state have standing to sue. See *Schatzman*, 77 N.W.2d 511 (finding Milwaukee did not have standing to bring action contesting incorporation of adjacent municipality); *Town of Madison v. City of Madison*, 70 N.W.2d 249, 252 (Wis. 1955); see also *Town of Kronenwetter v. Knoedler*, 187 N.W. 688 (Wis. 1922) (stating that the only persons with interests in the annexation were residents and taxpayers of annexing village, petitioners for annexation, and owners of land in the annexed territory). But see *Town of Fitchburg*, 332 N.W.2d at 784–85 (questioning *Schatzman* and granting Madison standing to challenge the incorporation of adjacent municipality). Moreover, in *Vill. of Slinger v. City of Hartford*, 650 N.W.2d 81, 84–85 (Wis. Ct. App. 2002), persons with property in a town did not have standing to challenge an ordinance annexing neighboring properties into a city.

369. WISCONSIN LEGISLATIVE REFERENCE BUREAU, STATE OF WISCONSIN BLUE BOOK 2003–2004 (stating that Wisconsin had 585 cities and villages the year before Kronenwetter incorporated); Municipality sizes and populations were supplied to the author by Demographic Services Section, Wisconsin Department of Administration (populations are year 2000 United States Census data).

and understanding existing doctrines, such as Wisconsin's early incorporation and annexation doctrines.

### VIII. Conclusion

Municipal incorporation and annexation in Wisconsin have linkages in practice, doctrine, and history that have gone largely unrecognized by Wisconsin courts for decades. In practice, Wisconsin towns, cities, and villages vie for territory and property tax base using the complicated annexation and incorporation statutes and doctrines as tools to advance interests, often at the expense of the underlying policies those statutes and doctrines are meant to advance.

This article has shown that the United States and Wisconsin Constitutions invest the state legislature with broad authority to set the rules for annexation and incorporation. In Wisconsin, that grant of power is derived from identical constitutional and judicial authority, which grant states plenary powers to create, expand, combine, or extinguish their respective local governments.

*Sherry* and the *Lammers* Doctrine represent coherent applications of enigmatic phrases in the Wisconsin Constitution regarding annexation and incorporation. Importantly, they recognize the constitutional linkages between annexation and incorporation, whereas the Wisconsin Supreme Court's current annexation and incorporation jurisprudences are disconnected because the court eventually took its annexation jurisprudence in new directions with the Rule of Reason, which today is a confusing set of ad hoc and oftentimes conflicting opinions. The Rule of Reason needs revision. When doing so, it must be recognized that annexation and incorporation are areas of law that are intertwined; changes to one area affect the other. This article illustrates those linkages, which can be found not only in the Wisconsin Constitution and doctrines, but also in practice and statutory history.

Given the similarities and linkages between annexation and incorporation in practice and history, and the current largely unrecognized, albeit sporadic, links in doctrine, a common doctrine for both processes is sensible and constitutionally advisable. The Wisconsin Supreme Court provided the beginnings of a common doctrine, but it fell into disuse as the current Rule of Reason rose to prominence. Unless the Wisconsin Supreme Court is comfortable with essentially relinquishing the use of judicial review to prevent the creation of villages and cities without the commonly understood attributes thereof, the *Sherry/Lammers* Doctrine should be reexamined in the context of annexations. The Wisconsin

Supreme Court's original consistency between its approaches to reviewing annexations and incorporations made more sense than the current split in doctrine. Given the muddy waters that constitute Wisconsin's Rule of Reason jurisprudence,<sup>370</sup> the *Sherry/Lammers* rule may point the way to a new approach.

Recall that in *Sherry*, the court opined that the annexation at issue violated article XI, section 3 of the Wisconsin Constitution because annexation of the territory at issue would create a municipality purporting to be a village but without the attributes of one—a "sham" village.<sup>371</sup> The Wisconsin Supreme Court held: "where the territory so attempted to be included in a village is not adjacent or contiguous thereto, and the village has no interest therein as a village, its annexation . . . is an abuse and violation of that provision of section 3 art. XI, of the constitution."<sup>372</sup> Likewise, *Lammers* relied upon article XI, section 3 of the Wisconsin Constitution to create the *Lammers* Doctrine, which covers municipal incorporations. The underpinnings of the *Lammers* Doctrine and the rule announced by *Sherry* are the same.

The doctrinal divergence of Wisconsin's annexation and incorporation jurisprudences does not recognize the inherent linkages between the purposes of annexation and incorporation. Combining the doctrines may create a more coherent and stable jurisprudence rather than two doctrines that occasionally work at cross-purposes. A combined doctrine may reduce litigation between disputing local governments. Moreover, a new approach is an opportunity to lessen the intergovernmental problems discussed within the introduction of this article, including inefficiencies in the delivery of local governmental services and inequities in local tax bases within current and forming metropolitan areas. Ultimate resolution of those problems may require legislative action. Nonetheless, Wisconsin's jurisprudence contains the *Lammers* Doctrine

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370. The Wisconsin Court of Appeals has recently begged the Wisconsin Supreme Court for clarification. See *Town of Campbell*, 673 N.W.2d at 706. The development of the Rule of Reason is difficult to trace and even more difficult to rationalize.

371. For additional authority, the court quoted Judge Cooley's, *Constitutional Limitations*: "the legislature cannot arbitrarily include within the limits of a village, borough or city, property and persons not properly chargeable with its burdens. . . ." *Sherry*, 6 N.W. at 564 (quoting JUDGE COOLEY, CONSTITUTIONAL LIMITATIONS 504).

372. *Sherry*, 6 N.W. at 564. Before the quoted language the court stated: "And we hold. . ." Thus, it explicitly made its constitutional point a holding. Nonetheless, in his 1972 comment, Stephen L. Knowles discounted that part of *Sherry* because he considered the court's exposition on that point to be dicta. Knowles, *supra* note 46, at 1132. Language toward the end of the opinion states: "It is unnecessary to discuss this point further, as the first point disposes of the case in favor of the appellant. . . ." *Sherry*, 7 N.W. at 565.

and Rule of Reason, and the courts should begin working to create consistency within and between those doctrines. Finding an elegant, single doctrine for annexation and incorporation is, admittedly, not an easy task. But we need not start from scratch. The *Lammers* Doctrine and *Sherry*, perhaps combined with the “need” element of the Rule of Reason, provide starting points for developing a more coherent approach.

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Although it may be impossible to definitively resolve the issue, a view contrary to Mr. Knowles is sounder because it takes the court at its word when it stated: “And we hold that. . .” *Id.* at 564. Anything within a sentence starting with the phrase—“[a]nd we hold that”—should be considered a holding of the court infused with precedential value. *Id.*

