Municipal Incorporation on the Urban Fringe: Procedures for Determination and Review

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America's metropolitan areas are presently struggling with governmental difficulties which seem well-nigh impossible of resolution. Part of the problem lies in the ease with which new municipalities may be incorporated on the urban fringe, strangling the growth of the central cities and compounding the task of constructing local governments that are metropolitan both in function and jurisdiction. That newly-incorporated municipalities proliferate unabated in fringe areas is due not only to the lack of adequate statutory substantive criteria,¹ but to the limiting and antiquated procedural framework under which the incorporation proceeding must be brought.

Initial power to pass on incorporation petitions is usually confided either to a local court of general jurisdiction or to a local governmental body having primarily administrative duties. Not only are these agencies ill equipped to discharge the incorporation function, but not every jurisdiction has provided statutorily for the judicial review of their decisions. Consequently, since challenges to the organization of new municipalities were made historically only by the sovereign, through the writ of quo warranto, non-statutory review procedures have been circumvented by the limitations inherent in this type of proceeding.

¹This phase of the problem has been elaborated in an article, Standards For Municipal Incorporations on the Urban Fringe, 36 Tex. L. Rev. 271 (1958).
Often, no other writ may be utilized, and if quo warranto must be employed the traditions surrounding its use often confine its availability to the state's legal representative. Furthermore, the characterization of the incorporation function as "legislative" has limited the area of discretion which may be confided to administrative and judicial agencies, both in making the original decision to incorporate and in reviewing that decision on appeal.

In the discussion of incorporation procedures that follows, attention will be focused to a considerable extent on the role of the judiciary. While initial judicial consideration of the petition to incorporate may not be desirable, judicial review of the standards to be applied is essential if the statute is to be properly implemented and interpreted and if it is to be applied uniformly within a given jurisdiction. Besides, the exigencies of the judicial review process influence the decision that must be made regarding the agency to which the initial decision to incorporate should be confided.

CONSTITUTIONALITY OF STATUTORY PROCEEDINGS TO INCORPORATE
— THE BASIC PROBLEM OF JUDICIAL PARTICIPATION

Judicial participation in the incorporation process has often been challenged as a violation of the constitutional injunction requiring the separation of powers. An understanding of the

2. The statutes under review provide for the original organization of incorporated cities, towns, or villages. In most states the civil jurisdiction intermediate the incorporated municipalities and the county is called a township. In Minnesota and Wisconsin this unit of government is called a town, and the junior incorporated municipalities are called villages. For purposes of this paper the term township will be used. The New England "town" is not strictly the equivalent of the incorporated town of most jurisdictions, and will not receive consideration. Most New England states still incorporate by special act of the legislature. See note 4, infra. The Pennsylvania borough is the equivalent of the incorporated town or village of most jurisdictions.

3. The United States Supreme Court early held that separation of power problems involved in the creation and territorial expansion of municipal governments present no federal constitutional questions. Forsyth v. Hammond, 166 U.S. 506 (1897) (annexation). The preservation of legislative control over such matters was held not to be one of those essential elements of a republican form of government which was guaranteed by the federal constitution. For discussions of this problem see Nutting, Non-'Judicial' Functions of the District Court in Iowa, 19 IOWA L. REV. 385 (1934); Comment, 39 YALE L.J. 413 (1930); Note, 3 OXLA. L. REV. 449 (1930); Note, 69 A.L.R. 266 (1930).

Similar questions are presented under statutes which delegate the initial power to incorporate to administrative bodies such as county boards. In this case, the question is whether the standards fixed by the legislature are definite enough to constitute a sufficient guide for administrative action. In re Municipal Charters, 86 Vt. 562, 86 Atl. 307 (1913) (delegation of power to incorporate villages to public service commission unconstitutional as conferring too much discretion). Cf. Annexation of Slaterville, 83 F. Supp. 661 (D. Alaska 1949) (Congress may constitutionally delegate legislative functions to territorial courts).
statutory framework under which incorporations take place is necessary to a discussion of this and other problems relating to incorporation procedures. The typical general municipal incorporation law provides for a petition to be made to a public agency, which is to make the initial determination. Almost half of these statutes provide that the petition is to be made to a local agency primarily exercising administrative powers. Usually the agency is at the county level, such as the county board of commissioners or its equivalent. In most of the other states the petition is to be heard by a court of inferior jurisdiction, although in a few instances the petition goes to the governor or to a state agency. Over half of the statutes provide for an election

4. This study covers the general incorporation laws in 40 states and the territory of Alaska. Eight states do not appear to have general incorporation laws: Connecticut, Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, and Rhode Island.

5. This count does not include a few states which have more than one incorporation law and which authorize both procedures. See N.J. Rev. Stat. § 40:128-2 (1940) (town incorporations; governing body of unincorporated area); N.J. Rev. Stat. § 40:168-7 (1940) (city incorporations; township commissioners); N.J. Rev. Stat. § 40:157-2 (Supp. 1956) (village incorporations; county court); Wis. Stat. § 61.04 (1955) (village incorporations; circuit court); Wis. Stat. § 62.06(2)(a) (1955) (city incorporations; clerk of local governmental unit). The Florida law provides for an organizational meeting which is called for the purpose of forming the municipality. Fla. Stat. Ann. §§ 165.03, 165.04 (Supp. 1957).


8. La. R.S. §§ 83-52 (1950) (Governor); N.C. Gen. Stat. § 160-197 (1952) (state Municipal Board of Control); S.C. Code §§ 47-101, 47-301, 47-351 (1952) (secretary of state). The Oklahoma city incorporation law provides for a petition
to determine whether the persons living in the area wish to incorporate, a third empower the agency which hears the petition to make the determination, while the remaining jurisdictions provide for both methods.\(^1\)

The difficulties that surround judicial review of incorporations flow from the anomalous position of the incorporation order. Because the function of the agency hearing the petition is not strictly to resolve a conflict between opposing parties but to determine whether a certain area shall have a municipal corporate existence, the order of incorporation is not a true judgment. Perhaps for this reason the incorporation process has usually been characterized as “legislative.” While the choice of language is not apt, the analogy to the political question doctrine is apparent. Like the Federal Constitution’s guaranty of a republican form of government, the implication is that the issues to the governor. OKLA. STAT. ANN. tit. 11, § 552 (1936). The town incorporation law provides for a petition to the county board. OKLA. STAT. ANN. tit. 11, § 975 (1936).

9. ALA. Code tit. 37, § 11 (1940); ALASKA COMP. LAWS ANN. § 18-1-1 (1949); CAL. GOVT. CODE § 34318 (Supp. 1955); COLO. REV. STAT. § 139-1-3 (1953); ILL. ANN. STAT. c. 24, §§ 2-5, 3-5 (Supp. 1957); IND. ANN. STAT. § 48-105 (Burtz 1950); IOWA CODE ANN. § 362.5 (1949); MINN. STAT. ANN. §§ 412.01(3) (Supp. 1957), 411.01(3) (1947); MONT. REV. CODES ANN. § 11-204 (1953); N.J. REV. CODES ANN. §§ 40:123-4, 40:185-7, 40:157-4 (1940); N.Y. VILLAGE LAW § 9; N.D. REV. CODE § 40-0206 (1943); OKLA. STAT. ANN. tit. 11, §§ 552, 975 (1936); OR. REV. STAT. § 221.040 (2) (1953); S.C. CODE §§ 47-102, 47-302 (Supp. 1955), 47-302 (1952); S.D. CODE § 45.0305 (1939); TENN. CODE ANN. §§ 6-110 (1955); TEX. STAT. REV. CIV. art. 1138 (1953); UTAH CODE ANN. § 10-2-2 (1953); WASH. REV. CODE §§ 35.02.080, 35.03.080 (1955); 35.04.080 (Supp. 1955); W. VA. CODE ANN. § 458 (1955); WYO. COMP. STAT. ANN. § 29-406 (1945).

10. ARK. STAT. ANN. § 19-103 (1956); IDAHO CODE ANN. § 50-701 (Supp. 1967); KAN. GEN. STAT. § 15-102 (Supp. 1955); KY. REV. STAT. ANN. § 81.060 (Baldwin 1955); LA. R.S. § 53.52 (1950); MISS. CODE ANN. § 3374-05 (1957); MO. ANN. STAT. §§ 72.050, 80.020 (Vernon 1962); NEB. REV. STAT. § 17-201 (1954); NEV. REV. STAT. § 266.025 (1957); N.C. GEN. STAT. § 160-193(2) (Supp. 1955); PA. STAT. ANN. tit. 53, § 45304 (1957); VT. REV. STAT. § 3728 (1947); VA. CODE § 15-67 (1956). But cf. MO. ANN. STAT. § 72.050 (Vernon 1962) (voters of unincorporated village of 200 or more may vote to become 4th class city).

11. Again, this count is not quite accurate since a few states having more than one statute provide for both methods. For statutes providing for an agency determination see ARIZ. REV. STAT. ANN. § 9-101(A) (1956) (on petition by two-thirds of real property taxpayers); MICH. STAT. ANN. § 5.1209 (1936) (villages); N.M. STAT. ANN. § 14-4-3 (1955) (villages); OHIO REV. CODE § 707.07 (Supp. 1955) (platted territory); WIS. STAT. § 61.08 (1955) (villages). For statutes providing for an election see ARIZ. REV. STAT. ANN. § 9-101(B) (1956) (on petition by 10% of real property taxpayers); MICH. STAT. ANN. § 5.1515 (1936) (villages); MICH. STAT. ANN. § 5.2087 (Supp. 1955) (home rule cities); N.M. STAT. ANN. § 14-3-2 (1953) (cities and towns); OHIO REV. CODE § 707.17 (1963) (unplatted territory); WIS. STAT. § 62.06(2) (a) (3) (1955) (cities).

12. Luther v. Borden, 7 How. 1 (U.S. 1849). The classification of the incorporation process as legislative seems attributable to the early practice of creating municipal corporations by special act of the legislature. However, it is also a part of the general judicial tendency similarly to classify many of the functions of local
involved in municipal incorporations are not for judicial consider-
ation.

Despite this characterization, the courts have not given incor-
poration orders a fully conclusive effect. The problem can best be illustrated by a consideration of the issues that might be presented in a typical incorporation proceeding. A new municipality must meet both procedural and substantive requirements. An example of the former would be a statutory require-
ment that 20 days’ notice of the hearing be given. An example of the latter would be statutory or judicial requirements that the area have a minimum population of 250, that an excessive amount of unplatted land not be included, or that the need for a new government be shown. In the example just given, the first substantive requirement is factual, while the second and particularly the third require an exercise of discretion as well as a finding of fact on the part of the court. Those substantive standards that compel an exercise of discretion as to the desirability of creating a new municipality relate to what this paper will term the reasonableness, propriety, or expediency of the incorpor-
ation. Most of the substantive standards that are responsive to the problems presented by suburban incorporations will be found in this group.

Differences in the context in which the question arises and in the verbalizations employed by the courts make it difficult to rationalize the cases dealing with the availability and scope of judicial review. Perhaps the best approach to an all-inclusive statement is the proposition that an incorporation is reviewable whenever it is so “void” that a “jurisdictional” error has been committed. But the courts differ considerably regarding what errors are jurisdictional, so that it may be suggested that the results in the cases will have to be explained on a functional basis. Perhaps because questions relating to the propriety of the incorporation are thought to present policy matters best left to the legislative body, the tendency is to exclude the consideration of expediency or propriety from the jurisdictional category.

This general approach becomes evident in the separation of power cases. In states in which original jurisdiction to incor-
porate is lodged in a judicial body the separation of powers ques-
tion arises at this level. Otherwise it arises in connection with judicial proceedings to review a decision by the local administra-
tive agency. A few cases read the separation of powers clause to mean that the courts have no part to play in incorporation proceedings and that no question arising in such proceedings is judicial in nature. In spite of this characterization, however, most jurisdictions recognize that while the legislature is to determine the conditions precedent to the incorporation, the courts may constitutionally be permitted to determine whether the facts establish that the conditions precedent have been met.

But the cases disagree on the scope of judicially ascertainable fact. Probably most courts hold, under this approach, that judicial review should be limited solely to the procedural steps necessary to the incorporation and should not involve any substantive questions relating to its expediency or propriety. But a few decisions hold that expediency and propriety are facts to be ascertained by the court, and some courts permit judicial review of government, even though their exercise eventuates in orders and decrees that affect private parties and private property. E.g., French v. Barber Asphalt Paving Co., 181 U.S. 324 (1901) (special assessment); Slenta v. Fort Wayne, 233 Ind. 226, 118 N.E.2d 484 (1953) (eminent domain).


There is some indication in the Iowa cases that the propriety of the incorporation cannot be determined by the court. State v. Incorporated Town of Crestwood, 80 N.W.2d 489 (Iowa 1957); Ford v. Incorporated town of North Des Moines, 80 Iowa 626, 45 N.W. 1031 (1890). But cf. City of Des Moines v. Lampart, 82 N.W.2d 720 (Iowa 1957), holding constitutional a statute which leaves to the court the application of standards that relate to the propriety of municipal annexations.


15. In these cases the shift in judicial attitude has usually not been made explicit. The Minnesota cases are typical. Compare State v. So-called Village of Fridley, 233 Minn. 442, 47 N.W.2d 204 (1951), State v. City of Nashwauk, 151 Minn. 534, 186 N.W. 694, 189 N.W. 592 (1922) with State v. Simons, 32 Minn. 540, 21 N.W. 750 (1884); State v. Ueland, 30 Minn. 29, 14 N.W. 58 (1882). A recent Michigan case simply assumed for purposes of the decision that the reasonableness of the incorporation was reviewable. Hempel v. Rogers Tp., 313 Mich. 1, 20 N.W.2d 787 (1945). But cf. Attwood v. County of Wayne, 84 N.W.2d 708 (Mich. 1957); Shumway v. Bennett, 29 Mich. 451 (1874) (apparently holding to the contrary).
this and any other substantive standards by declaring in effect that the incorporation function is judicial.¹⁶

Once it is admitted that it does not transgress on the separation of powers for a court to consider the “facts” of the incorporation, the difficulties inherent in the delimitation of what is a fact and what is not permit a relatively unfettered judicial discretion in applying the constitutional requirement, and typify the ambiguities involved in the concepts that are employed in this area. That these ambiguities exist is all the more unfortunate since, apart from the constitutional issue involved, the separation of powers cases tend to set the allowable limits of judicial participation in the incorporation process. This is most evident in the cases dealing with judicial review under statutes expressly providing for it. In this instance, even though the statute would not necessarily require it, the statutory scope of judicial review is often identified with the constitutionally permissible maxima of judicial review. When review of the incorporation is sought by use of one of the extraordinary writs, the relationship may not be so clear. But, because recourse to some of these writs turns on whether the proceeding sought to be reviewed presents judicial issues of a substantive nature, the question presented is the same.

¹⁶. Probably no jurisdiction can be placed in this category without qualification. But the Virginia court comes closest, both because the area of judicial inquiry has been expanded to include almost every aspect of the proceeding, and because that court has been less stringent in applying the separation of powers doctrine. Norfolk County v. Duke, 113 Va. 94, 73 S.E. 456 (1912). The early West Virginia cases adopted a similar position, although the precise characterization to be given the incorporation proceeding was never clear. Morris v. Taylor, 70 W. Va. 618, 74 S.E. 872 (1912); Elder v. Incorporators of Central City, 40 W. Va. 222, 21 S.E. 738 (1895). While West Virginia now characterizes the incorporation proceeding as legislative, the extent to which the court may constitutionally participate in the incorporation proceeding has not been changed. Wiseman v. Calvert, 134 W. Va. 303, 59 S.E.2d 445 (1950).

The Missouri cases have undergone a similar development. City of Kinloch, 362 Mo. 434, 242 S.W.2d 59 (1951); Kayser v. Bremen, 16 Mo. 88 (1852). The proceeding is characterized as legislative now only because the agency to which it is entrusted is not classified as a court under the 1945 constitution. Cf. Chicago, St. L. & N.O.R.R. v. Town of Kentwood, 49 La. Ann. 931, 22 So. 192 (1898) (scope of allowable judicial participation not clear); State v. Bay City, 65 Ore. 124, 131 Pac. 1038 (1913) (county court has broad discretion but basis for opinion not clear).

In Wisconsin, the standards for incorporation derive mainly from the constitution, and the court has interpreted the constitutional command to make the propriety of the incorporation judicially reviewable as a constitutional fact. Earlier cases to the contrary seem to have been overruled. Compare Village of Oconomowoc Lake, 270 Wis. 530, 72 N.W.2d 544 (1955), Fenton v. Ryan, 140 Wis. 353, 122 N.W. 756 (1909), with Village of North Milwaukee, 93 Wis. 616, 67 N.W. 1038 (1896). Cf. Heyward v. Hall, 144 Fla. 344, 198 So. 114 (1940).
MUNICIPAL INCORPORATION

AVAILABILITY OF JUDICIAL REVIEW OF INCORPORATION PROCEEDINGS

Statutory Review

Because the incorporation petition is heard by a local public agency, judicial review of incorporation orders may be had only through the high prerogative or extraordinary writs, unless it is afforded by statute. In a few of the incorporation laws express provision has been made for an appeal to the courts, but in every other jurisdiction the authority for judicial review must be implied from general statutes applicable to the agencies which hear incorporation proceedings. For example, if the power to pass on the petition is lodged with the county board, the general statute allowing appeals from the orders of the board might be applicable.

Those decisions dealing with the applicability of a general appeals statute to incorporation proceedings often do not make the ground for the opinion explicit, but when they do the influence of the separation of power cases is evident. A few cases have denied an appeal under general statutory provisions. When the basis for the decision is made clear it turns on the point that the incorporation proceeding is non-adversary and therefore presumably nonjudicial. While most of the decisions have found

17. For a history of the writs see de Smith, The Prerogative Writs, 11 CAMB. L.J. 40 (1951). In the absence of a statutory provision the decisions of local public agencies are not reviewable as of right. For the most comprehensive study of the writs on a jurisdictional level see Riesenfeld, Bauman, & Maxwell, Judicial Control of Administrative Action by Means of the Extraordinary Remedies in Minnesota, 33 MINN. L. REV. 569, 685 (1949), 36 MINN. L. REV. 435, 37 MINN. L. REV. 1 (1952), cited henceforth as Riesenfeld.

18. ARK. STAT. ANN. § 19-105 (1956) (by injunction in circuit court); FLA. STAT. ANN. § 165.30 (Supp. 1957) (by quo warranto); IND. ANN. STAT. § 48-109 (Burns 1950) (appeal to circuit court); MISS. CODE ANN. § 3374-08 (1957) (appeal to supreme court); N.Y. VILLAGE LAW §§ 7, 8, 15-18 (appeal to county court and appellate division); OHIO REV. CODE §§ 707.11, 707.20 (1953) (by injunction); PA. STAT. ANN. tit. 53, 46209 (1957); W. VA. CODE ANN. § 468(10) (1935); WIS. STAT. § 61.15 (1955) (by certiorari or any proper direct proceeding). When the statute simply authorizes recourse to one of the extraordinary writs, the appeal may be governed by the rules generally applicable to these remedies.

A Kentucky statute precluding direct appeals has not been given its full effect. See note 22 infra. And a similar provision in the Michigan law has so far not limited judicial inquiry under the extraordinary writs. City of Dearborn v. Village of Allen Park, 83 N.W.2d 447 (Mich. 1957); Kalamazoo Tp. v. Stamm, 239 Mich. 619, 64 N.W.2d 595 (1954). On the other hand, a New York statute denying a further appeal to the appellate court has been given preclusive effect. Village of Belle Terre, 222 App. Div. 848, 240 N.Y.S. 897 (2nd Dep't 1930). The right to appeal, of course, may stand on a different footing. Cf. N.J. REV. STAT. § 40:137-8 (1949) (appeal limited to election irregularities).

that a right of appeal has been conferred by general statutes authorizing an appeal from orders and decisions of county boards or inferior courts, to the extent that they discuss the question they are predicated on a holding that the particular decision subject to review is judicial in character, either in whole or in part.

Quo Warranto

Historically, the extraordinary writ available to test the incorporation of municipalities was the information in the nature of a quo warranto, and the fact that it was at first the only writ available for this purpose still inhibits resort to any other. This results from the common limitation that an extraordinary writ is not available if another adequate remedy exists. Of course, this requirement is circular, since it can just as well be argued that quo warranto should be precluded by the availability of some other writ. But the historical tradition surrounding quo warranto has often given it a primary position. At the same time, the necessity that recourse be had to this writ may have unfortunate results in the case of incorporations in metropolitan


21. Chesapeake & O. Ry. Co. v. City of Silver Grove, 249 S.W.2d 520 (Ky. 1952); Engle v. Miller, 303 Ky. 731, 199 S.W.2d 123 (1947); City of Uniondale, 285 Mo. 143, 225 S.W. 985 (1920) (under prior law); Town of Chesapeake, 120 W. Va. 527, 4 S. E.2d 113 (1947) (prior to statute conferring appeal). Cf. People v. Blake, 128 Colo. 111, 260 P.2d 592 (1943) (dictum); Incorporation of Windsor Heights, 232 Iowa 143, 4 N.W.2d 850 (1942) (court took appeal without considering propriety of doing so).

22. E.g., Town of Olsburg, 113 Kan. 501, 215 Pac. 451 (1923) (can only appeal judicial decisions made in the incorporation). The West Virginia case, note 21 supra, simply expresses the liberal view regarding the separation of powers which was evident in the delegation cases. The Kentucky cases reach their result in the face of a statute denying judicial review, by holding that it cannot apply to constitutional questions. But cf. Dickerson v. Sharpe, 291 Ky. 391, 164 S.W.2d 945 (1942). The argument that an appeal is not allowable because the proceedings are special statutory proceedings unknown to the common law has also been overcome by a finding that the decision to incorporate is judicial. E.g., Grusenmeyer v. City of Logansport, 76 Ind. 549 (1881) (prior to statute conferring an appeal).


24. E.g., 17 McQUILLIN, MUNICIPAL CORPORATIONS § 49.67 (3d ed. 1949) (certiorari).
areas. At first quo warranto could only be instituted by the public attorney,\textsuperscript{25} and even under contemporary statutory modifications those parties interested in challenging a metropolitan incorporation may be seriously handicapped in doing so if the public attorney does not consent to bring the suit. This point will be more fully developed later.

A brief inquiry into the basis for the availability of quo warranto is necessary to a discussion of the problems that arise under this writ. If the state constitution or statutes confer jurisdiction to issue quo warranto on the courts,\textsuperscript{26} the common law writ as it later developed has been received\textsuperscript{27} and is available to test the validity of municipal incorporations.\textsuperscript{28} Most statutes have now codified the writ, and while they do not refer in terms to municipal incorporations they do authorize it whenever an “association of persons” acts as a corporation without having the authority to do so,\textsuperscript{29} or whenever a public “franchise” is held unlawfully.\textsuperscript{30} Most courts hold that these statutes apply to public

\textsuperscript{25} High, op. cit. supra note 23, at 544-557.

\textsuperscript{26} E.g., ALA. CONST. § 140; ARIZ. CONST. art. 6, §§ 4, 6; ARK. STAT. ANN. § 12-713 (1956) (attorney-general has “full power” to sue out writs); CAL. CONST. art. 6, § 5; DEL. CODE ANN. tit. 10, § 562 (1953); FLA. CONST. art. 5, §§ 5, 11; GA. CODE ANN. § 24-2616(1) (1936); ILL. ANN. STAT. c. 37, § 72.25 (1955); MICH. CONST. art. 8, § 10; MINN. STAT. ANN. § 484.03 (West 1947); MONT. CONST. art. 8, § 11; PA. STAT. ANN. tit. 12, §§ 2021, 2022 (1951); R.I. GEN. LAWS c. 496, § 9 (1958); WASH. REV. CODE § 2.08.010 (1953); WIS. CONST. art. 8, §§ 3, 8.

\textsuperscript{27} E.g., Brooks v. State, 3 Boyce 1, 79 Atl. 790 (Del. 1911); State v. Kent, 96 Minn. 255, 104 N.W. 948 (1905). Compare Hawkins v. State, 81 Md. 305, 32 Atl. 278 (1895) (writ not available in absence of statute conferring authority to issue).

\textsuperscript{28} 17 McQuillin, MUNICIPAL CORPORATIONS § 50.09 (3d ed. 1949). The dictum to the contrary in State v. City of Newark, 57 Ohio St. 430, 49 N.E. 407 (1898) must be taken to refer to the use of the writ to forfeit a municipal charter for misuse of power. The statement often appears that quo warranto is the only remedy available. Lindquist v. Village of Island Lake, 344 Ill. App. 400, 101 N.E.2d 120 (1951).

\textsuperscript{29} ALA. CODE tit. 7, § 1136 (1940); ALASKA COMP. LAWS ANN. § 16-4-4 (3d) (1949); ILL. ANN. STAT. c. 112, § 9(d) (1954); IND. ANN. STAT. § 2-3001(3) (Burns 1946); IOWA RCP § 299(c) (1940); KAN. GEN. STAT. § 60-1602 (3) (1949); LA. R.S. § 42-76(3) (1950); MICH. STAT. ANN. § 27.2315(3) (1938); MINN. STAT. ANN. § 556.01(3) (West 1947); MISS. CODE ANN. § 1120(3) (1956); MONT. REV. CODES ANN. § 93-6401(3) (1947); NEB. REV. STAT. § 25-21,121 (1956); N.C. REV. STAT. § 35.010(3) (1957); N.M. STAT. ANN. §§ 23-15-4(e) (1953); N.Y. CIV. PRAC. ACT § 1217(1); N.D. REV. CODE § 32-1303(2) (1948); OHIO REV. CODE § 2733.01(c) (1953); OKLA. STAT. ANN. tit. 12, § 1532(3d) (1937); ORE. REV. STAT. § 30.510(3) (Supp. 1955); PA. STAT. ANN. tit. 12, § 2022 (1951); S. C. CODE § 10-2256(3) (1952); S.D. CODE § 37.0509(3) (1939); TENN. CODE ANN. § 23-2801(3) (1955); TEX. STAT. REV. CIV. ART. 6253 (1949); UTAH RCP § 65(b)(1) (1953); WASH. REV. CODE § 7.06.010(4) (1953); W. VA. CODE ANN. § 32-1303(2) (1953); WIS. STAT. § 294.04(1)(c) (1955); Wyo. COMP. STAT. ANN. §§ 3-7101(3) (1945).

\textsuperscript{30} ARIZ. REV. STAT. ANN. § 12-2041 (1956); CAL. CODE CIV. PROC. § 803 (1953); COLO. RCP § 106(a)(3) (1953); CONN. GEN. STAT. § 8227 (1949); IDAHO CODE ANN. § 6-602 (1948); MO. ANN. STAT. § 531.010 (Vernon 1952);
as well as to private corporations, and that a public “franchise” includes a municipal charter. If a court were to hold to the contrary, however, the possibility does exist that quo warranto would not be available to test the validity of a municipal corporation in a jurisdiction in which the statutory provisions are held to preclude resort to the common law remedy.

Although the courts have not found quo warranto preempted by the availability of another extraordinary remedy, in those states in which the statutes confer an appeal the writ might be preempted by a strict application of the rule noted above that quo warranto is not available if another adequate remedy is provided by law. There are not too many municipal incorporation cases in which this issue has been presented, and those which have considered this question in other contexts are much confused both as to result and theory. But there is some indication that not even the provision of a statutory remedy will preclude resort to the writ that has traditionally been used to test the validity of a municipal franchise.

N.J. REV. STAT. § 2A:66-6 (1952); N.C. GEN. STAT. § 1-515(1) (1952). Many of the statutes cited in note 29 also authorize the bringing of the writ to test a public franchise held unlawfully. The Virginia and Massachusetts statutes are expressly made inapplicable to municipal corporations. MASS. ANN. LAWS c. 249, § 6 (1956); V.A. CODE § 8-857 (1950).

31. State v. Town of Addison, 262 Ala. 139, 77 So. 2d 663 (1955); West End v. State, 138 Ala. 295, 36 So. 423 (1903); State v. Town of Heserville, 191 Ind. 251, 131 N.E. 48 (1921); State v. Roberts, 200 La. 36, 7 So.2d 607 (1942); State v. Urdidill, 37 Neb. 371, 55 N.W. 1072 (1893); State v. Osburn, 24 Nev. 197, 51 Pac. 837 (1898); People v. Carpenter, 24 N.Y. 86 (1861); Manning v. Rama Rural Community, 182 N.C. 881, 109 S.E. 576 (1921); Hines v. Sumner, 45 S.D. 92, 186 N.W. 116 (1921). Only State v. Roberts, 67 N.D. 92, 269 N.W. 913 (1936) is contrary, and it is based in part on the legislature's power to repeal municipal charters. Cf. People v. City of Oakland, 32 Cal. 611, 28 Pac. 807 (1891) (annexation case; municipality is a “person” within the quo warranto act).


Resort to the common law writ is expressly precluded by the language of some statutes. E.g., ALASKA COMP. LAWS ANN. § 56-4-1 (1949); N.M. STAT. ANN. § 22-15-1 (1953); N.C. GEN. STAT. § 1-514 (1953); OKLA. STAT. ANN. tit. 12, § 1531 (1937); S.C. CODE § 10-2251 (1932); S.D. CODE § 37.0501 (1939). But see State v. Roberts, supra.

33. The authorities on this point are in considerable confusion. Sometimes the question is assumed to be one of statutory intent, but sometimes preclusion is treated as a matter of principle apart from the statutory language. State v. District Court, 37 N.M. 407, 24 P.2d 265 (1933) (quo warranto held precluded but basis for opinion not clear).

For cases in which, often without discussion, the court holds quo warranto to be cumulative of the statutory remedy as a matter of right see State v. Wildey, 209 Ind. 1, 197 N.E. 844 (1935) (election contest); State v. Burgess, 364 Mo. 548, 264 S.W.2d 339 (1954) (ouster of officer for malfeasance); State v. Ryan,
Because of the limitations that govern capacity to bring the writ of quo warranto, parties having an interest in incorporation proceedings have often turned to other extraordinary remedies for judicial relief. No other writ requires the intervention of the public attorney. But attempts to utilize other writs have brought on new complications. While the historical antecedents of quo warranto have usually made unnecessary an express determination that the incorporation proceeding is judicial in nature, the other writs do not have this background.

**Certiorari, Prohibition, and Mandamus**

The difficulties that ensue are well illustrated by a review of the availability of certiorari and prohibition. Under the usual formula, certiorari is available only to review those decisions of inferior tribunals which have a substantive content that is judicial or quasi-judicial. Considerable conflict exists, however, as to what should be so classified, and some courts have allowed the writ to be used in other than the customary situations. If certiorari is not ordinarily limited to the review of judicial or quasi-judicial decisions, no difficulty is presented by its use to test a municipal incorporation. If the writ is so limited, its avail-

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In other jurisdictions the courts may review in quo warranto for lack of jurisdiction if a statutory appeal is provided. E.g., People v. Darst, 265 Ill. 354, 106 N.E. 938 (1914) (drainage district organization); State v. Consolidated Independent School District, 246 Iowa 566, 68 N.W.2d 305 (1955) (school district organization); State v. Rowe, 187 Iowa 1116, 175 N.W. 32 (1919) (same); State v. City of South Hutchinson, 175 Kan. 516, 286 P.2d 299 (1954) (city incorporation). The Iowa cases are discussed in Note, 31 Iowa L. Rev. 255 (1946). However, some courts so limit the scope of review even in the absence of a statutory procedure. But see Stephens v. People, 89 Ill. 337 (1878) (without discussion, court holds, quo warranto available as matter of right to test organization of municipality). Cf. Note, 119 A.L.R. 725 (1939) (forfeiture of public office cases).

34. The argument that judicial review of incorporation proceedings in quo warranto is unconstitutional has been dismissed on the ground that such review is but a "proper" exercise of the judicial function. State v. So-Called Village of Fridley, 233 Minn. 442, 47 N.W.2d 204 (1951).

35. 17 McQuilllin, MUNICIPAL CORPORATIONS § 49.69 (3d ed. 1949).


37. State v. Sutton, 71 N.E. 530, 3 N.W.2d 106 (1942); State v. Clark, 21 N.D. 517, 131 N.W. 715 (1911). These cases turn on the provisions of a local statute. The incorporation cases in which certiorari was used do not seem to have given attention to the difficulties in the way of resort to this writ which are sometimes presented by the absence of a record and a hearing and by the non-adversary character of the proceedings.
ability depends on whether the court will characterize the decision to incorporate as either judicial or quasi-judicial. Most of the certiorari cases have not adopted either characterization.  

Certiorari has also been precluded by the provision of an express statutory appeal and by the availability of quo warranto. 

Originally, prohibition was addressed to a court which had acted in excess of its jurisdiction, but it has been expanded to include other than judicial bodies provided they act in a quasi-judicial capacity. This writ is thus available in almost the same circumstances as is certiorari, except that it can be brought prior to a final order. Either because the prohibition cases have arisen in jurisdictions in which the incorporation function is characterized as judicial or quasi-judicial, or because the writ has been allowed although the function is characterized as legislative, most of the cases have held that prohibition is a proper remedy. As in the case of certiorari, the writ has sometimes


For cases denying the writ on the ground that the proceeding is not judicial see Faulkner v. Gila County, 17 Ariz. 139, 149 Pac. 382 (1915); Beaumont v. Sampson, 5 Cal. App. 491, 90 Pac. 839 (1907); State v. Osburn, 24 Nev. 187, 51 Pac. 837 (1898) . Cf. Riesenfeld, 33 MINN. L. REV. at 695.


In spite of a constitutional revision eliminating the prerogative writs, the New Jersey courts have held that the availability of quo warranto precludes resort to certiorari since to allow the latter remedy would bypass the requirement in quo warranto that permission to sue be obtained from the public attorney. Bridge-water v. Raritan, 3 N.J. Super. 194, 65 A.2d 861 (App. Div. 1949). See State v. Wainwright, 50 N.J.L. 555, 14 Atl. 903 (Sup. Ct. 1888). But cf. State v. Sloane, 49 N.J.L. 356, 8 Atl. 101 (Sup. Ct. 1887) (incorporation; certiorari available to test a preliminary order, which is an "adjudication.")

41. In this respect, the Minnesota development is typical. Riesenfeld, 36 MINN. L. REV. at 455.

42. Davis, ADMINISTRATIVE LAW § 227 (1951). For a historical treatment see Hughes & Brown, The Writ of Prohibition, 26 GEO. L.J. 831 (1938). Prohibition has developed into a discretionary writ, though at first it was a writ of right. Comment, 37 MICH. L. REV. 789 (1939).

43. Writ issued to inferior court to prevent consideration of incorporation petition: State v. Simons, 32 Minn. 540, 21 N.W. 750 (1884) (function classified as quasi-judicial); State v. Lichts, 226 Mo. 273, 126 S.W. 466 (1910) (nature of function not discussed; writ assumed to be available to control excess of jurisdiction). Writ issued to board of elections to prohibit election on village incor-
been precluded by the provision of a statutory remedy.\textsuperscript{44}

By comparison with certiorari and prohibition, mandamus was at first available only to compel the performance of ministerial duties as compared with discretionary acts.\textsuperscript{45} In some jurisdictions it has presently evolved into a proceeding to review, on the facts and on the law, an arbitrary abuse of discretion by an administrative agency.\textsuperscript{46} The difficult problem in the mandamus cases has been the drawing of an intelligible line between discretionary and ministerial functions, and the similarity to the judicial-nonjudicial dichotomy is apparent. Litigants in the incorporation cases have seized on some phase of the incorporation process, such as the statutory direction to call an election, as the basis for the mandamus suit, and have sought in this manner to secure some judicial consideration of the issues involved in the incorporation proceeding. Attempts to use mandamus have been successful\textsuperscript{47} or unsuccessful\textsuperscript{48} depending on the court's characterization of the particular function under review, although a decision on the merits is often reached in the course of passing on
the availability of the writ. There is a division of opinion on the effect to be given to the availability of another remedy.

Apart from the remedy of quo warranto, the confusion that exists regarding the availability of the extraordinary writs inheres partly in the writs themselves, partly in the difficulties presented by the dichotomies employed to determine whether the decision to incorporate is reviewable. Indeed, the multiple characterization of the incorporation proceedings which is common to some courts has made more than one remedy available. In a few cases litigants have resorted to relief by declaratory judgment to escape these difficulties.

**Declaratory Relief and Injunction**

Declaratory relief was conceived as a non-coercive procedure which would be available to adjudicate conflict in advance of harm. But it has also been utilized as a concurrent remedy in areas in which the selection of the appropriate procedure presents difficulties. Unfortunately, in some jurisdictions it has been hedged with the same restrictive requirements that impede resort to the extraordinary writs. For example, the courts have sometimes held that it is precluded by the existence of another adequate remedy. This tendency is evident in the incorporation cases. Impressed with the exclusiveness of quo warranto to test a municipal incorporation, the courts tend to allow declaratory relief only if the inferior tribunal exceeded its jurisdiction, or will not allow writ to control abuse of discretion. *Cf.* Shreve v. Pendleton, 129 Ga. 374, 58 S.E. 880 (1907) *(semble; under prior law).*

In the following cases the court did not consider the propriety of the writ but instead construed the statute or interpreted the facts to find a duty not to act: Krouser v. San Bernardino County, 29 Cal.2d 766, 178 P.2d 441 (1947); Vernon v. San Bernardino County, 142 Cal. 513, 76 Pac. 253 (1904); Page v. Los Angeles County, 85 Cal. 50, 24 Pac. 607 (1890); State v. Crabill, 136 Neb. 819, 287 N.W. 669 (1939). *Cf.* People v. Du Page County, 309 Ill. App. 609, 33 N.E.2d 761 (1941) *(proceeding to change from village to town; no duty to proceed)*; Commonwealth Real Estate Co. v. City of South Omaha, 78 Neb. 368, 110 N.W. 1007 (1907) *(dictum; mandamus available in incorporation proceedings).*

49. This is not uncommon in mandamus proceedings. *E.g.*, Note, 25 IOWA L. REV. 638 (1940).


51. For a recent treatment see *Developments in the Law — Declaratory Judgments,* 62 HARV. L. REV. 787 (1949).

52. *Developments in the Law,* supra note 51, at 808-813. Although the article concludes that this requirement does not exist in most jurisdictions, the incorporation cases do not bear out this contention.

53. There are no cases directly in point. But Skinner v. City of Phoenix, 54 Ariz. 316, 85 P.2d 424 (1939), is an annexation case in which the court took this
if the incorporation is "void."\textsuperscript{54} That not much additional in the way of judicial review has been accomplished by resort to the declaratory judgment will become evident in the discussion of the scope of review under quo warranto and the other extraordinary writs, and in the discussion of the availability of the injunction.

Under present practice the conditions precedent to the granting of an injunction, or taxpayers' suit, have been liberalized to the point that it is almost available as a matter of right.\textsuperscript{55} But the availability of the injunction to test a municipal incorporation has been restricted in much the same manner as declaratory relief.\textsuperscript{56} When the injunction is denied the decision may

position and indicated that incorporation proceedings would be governed by the same principles. The court was much worried that the declaratory judgment action would be used to circumvent the local requirement that an individual could not bring the writ of quo warranto. See also Walker Reorganized School District R-4 v. Flint, 303 S.W.2d 200 (Mo. App. 1957).

The Oregon cases on school district consolidations and municipal annexations have also adopted this position, but either have abandoned the jurisdictional error limitation or have interpreted it quite broadly to allow a review on the facts and the law. Compare Portland General Electric Co. v. City of Estacada, 195 Ore. 145, 241 P.2d 1129 (1952) (municipal annexation), with School Dist. No. 1 v. School Dist. No. 45, 148 Ore. 554, 37 P.2d 873 (1934) (school district consolidation). For a discussion of a similar development in related contexts see Development in the Law, supra note 51, at 810-812.

Declaratory relief to test the propriety of a municipal incorporation has sometimes been allowed without discussion of the remedy. Richmond v. Large, 155 Fla. 226, 19 So. 2d 791 (1944). Cf. Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 310 (1953) (same; action to test constitutionality of law authorizing creation of special authority). But cf. Alquist v. Biwabik, 224 Minn. 503, 28 N.W.2d 744 (1947) (suggesting that declaratory relief not available to test incorporation of city).


56. The discussion that follows with reference to the use of the injunction collaterally also applies to a similar use of any of the other writs, or to an offensive or defensive collateral attack by other means, e.g., in a suit by the municipality to collect taxes. The following are representative non-injunction cases in which the collateral attack was disallowed: County of Macon v. Shores, 97 U.S. 272 (1877); Cooper v. Town of Valley Head, 212 Ala. 125, 101 So. 874 (1924) (court relies on availability of quo warranto to private litigants); Merrell v. City of St. Petersburg, 74 Fla. 194, 76 So. 699 (1917); People v. Freeman, 301 Ill. 662, 134 N.E. 121 (1922); Town of Decorah v. Gillis & Espy, 10 Iowa 234 (1859); Smith v. City of Prairie Village, 175 Kan. 409, 264 P.2d 1053 (1953); People v. Smith, 131 Mich. 70, 90 N.W. 666 (1902); State v. Village of Spring Lake Park, 245 Minn. 302, 71 N.W.2d 812 (1955) (can't challenge incorporation in quo warranto proceedings brought to test validity of annexation); Stout v. St. Louis I.M. & S. Ry., 142 Mo. App. 1, 125 S.W. 230 (1910); McClay v. City of Lincoln, 32 Neb. 412, 49 N.W. 282 (1891); Town of Henderson v. Davis, 106
turn on the familiar ground that quo warranto is the proper remedy,57 with overtones to the effect that the injunction may not be used to escape the strict requirements as to capacity to sue which ordinarily prevent private litigation in quo warranto.

If the decision denying resort to the injunction does not turn on the availability of quo warranto it turns on the point that because the injunction suit is a collateral attack on the legality of the corporation it may not be allowed if the municipality has a de facto though not a de jure existence.58 Sometimes the additional point is made that to allow a collateral attack by injunction would permit private harassment of the conduct of municipal affairs long subsequent to the organization of the municipality. That the de facto-de jure rationale does not afford a complete explanation, however, is indicated by those cases in which the injunction has been allowed. Aside from the decisions in which the propriety of the remedy has not been discussed,59 the

57. The same point is also made with reference to special statutory appeals: Bridges v. Incorporated Town of Gateway, 192 Ark., 411, 91 S.W.2d 592 (1936) (injunction); Gardner v. Christian, 70 Hun 547, 24 N.Y.S. 339 (Sup. Ct. 1893) (damage suit); Southern Oregon Co. v. Port of Brandon, 91 Ore. 308, 178 Pac. 215 (1910) (injunction; special district).

58. Again, the cases on this point are legion. See 1 McQuillin, Municipal Corporations § 3.52 (3d ed. 1949). The following cases illustrate the various reasons advanced to deny an injunction: Robinson v. Jones, 14 Fla. 256 (1873); Dunn v. Burbank, 190 Iowa 67, 170 N.W. 969 (1920); Wellman v. City of Burr Oak, 124 Kan. 750, 262 Pac. 607 (1928); Soniat v. White, 155 La. 290, 99 So. 223 (1924); Coast Co. v. Borough of Spring Lake, 56 N.J. Eq. 615, 36 Atl. 21 (Ch. 1896), aff'd, 58 N.J. Eq. 586, 47 Atl. 1131 (1897); Prankard v. Colley, 147 App. Div. 145, 132 N.Y.S. 289 (2d Dep't 1911); De Treville v. Groover, 219 S.C. 313, 65 S.E.2d 232 (1951); Wolf v. Young, 275 S.W.2d 741 (Tex. Civ. App. 1955); Wright v. Phelps, 89 Vt. 107, 94 Atl. 294 (1915). Cf. Calhoun v. Lenahan, 121 Ky. 601, 88 S.W.2d 288 (1935) (equity court refuses to enjoin successive incorporation petitions on grounds of harassment); Larncom v. Olin, 160 Mass. 102, 35 N.E. 113 (1893) (granting of injunction not within equity jurisdiction).

59. E.g., Bracwell v. Warnock, 208 Ga. 388, 67 S.E.2d 114 (1951); Ford v. Incorporated Town of North Des Moines, 50 Iowa 626, 45 N.W. 1031 (1890) (merits considered though court recognizes proceedings as collateral); Hayzell v. City of Mount Vernon, 33 Iowa 229 (1871); Chicago, St. L. & N.O.R. Co. v. Town of Kentwood, 49 La. Ann. 931, 22 So. 192 (1897) (though court expresses reservations about deciding merits in a collateral attack); Ogle v. Town of Ronan, 112 Mont. 394, 117 P.2d 257 (1941); Gray County Production Co. v. Christian, 231 S.W.2d 901 (Tex. Civ. App. 1950) (injunction and quo warranto consolidated); Ferguson v. City of Snohomish, 8 Wash. 668, 36 Pac. 969 (1894) (merits considered though court recognizes proceedings as collateral); Baker v. Workman, 72 W. Va. 518, 78 S.E. 670 (1913). For a similar approach in other collateral
cases allowing collateral attacks by injunction have done so on the ground that the incorporation is "void,"\textsuperscript{60} often because the agency which decreed the incorporation lacked jurisdiction.\textsuperscript{61} Indeed, there seems to be no dissent from the proposition that an injunction will lie to invalidate a "void" incorporation.

This approach is consistent with the rules usually applicable to injunctions sought against municipal action. Only "illegal" acts of the municipality may be enjoined; "discretionary" acts may not.\textsuperscript{62} Furthermore, not only is the resemblance to the rules governing the availability of certiorari, prohibition, and mandamus apparent, but in each case limitations inherent in the writ govern the availability of judicial review.\textsuperscript{63} The de facto-de jure proceedings attacking the incorporation of a municipality, see Brinkley v. State, 108 Tenn. 475, 67 S.W. 796 (1902) (criminal prosecution) ; in injunction proceedings attacking collateral the existence of a special district, Billings School Dist. v. Lomma Special School Dist., 56 N.D. 751, 219 N.W. 336 (1928) ; Bennett Trust Co. v. Sengstaken, 58 Ore. 338, 113 Pac. 868 (1911). Some of these cases have been modified by later decisions in the same jurisdiction, or can be made consistent with the rule that only municipal corporations that are invalid de jure may be attacked collaterally.

60. The following are representative cases in which the allowance or disallowance of an injunction depended on whether or not the municipality had a de jure as well as a de facto existence: Ocean Beach Heights Inc. v. Brown-Crummer Inv. Co., 302 U.S. 614 (1938) ; McCarroll v. Arnold, 199 Ark. 1125, 107 S.W.2d 921 (1940) ; Waldrop v. Kansas City Southern Ry. Co., 131 Ark. 425, 99 S.W. 369 (1917) ; Farrington v. Flood, 40 So.2d 462 (Fla. 1949) ; Heyward v. Hall, 144 Fla. 344, 198 So. 114 (1941) ; Brown v. Milliken, 42 Kan. 769, 28 Pac. 167 (1889) ; Booth v. Copley, 283 Ky. 23, 140 S.W.2d 662 (1940) ; Saylor v. Town of Walls, 220 Ky. 651, 285 S.W. 963 (1927) ; Kayser v. Bremen, 16 Mo. 88 (1852) ; Campbell v. Bryant, 104 Va. 309, 52 S.E. 683 (1905). The same rule has been applied to collateral attacks on the existence of municipalities other than by injunction. E.g., United States v. Heyward, 95 F.2d 432 (5th Cir. 1938) ; City of Albuquerque v. Water Supply Co., 24 N.M. 368, 174 Pac. 217 (1918) ; Ruohs v. Town of Athens, 91 Tenn. 20, 18 S.W. 400 (1894) ; Town of Winneconne v. Village of Winneconne, 111 Wis. 10, 86 N.W. 589 (1901). See also Tooke, De Facto Municipal Corporations Under Unconstitutional Statutes, 37 Yale L.J. 935 (1928) ; Note, 129 A.L.R. 255 (1940).

61. There are special district and annexation cases in which the courts have been even more lenient in allowing an injunction: Roberts v. Caddo Parish School Board, 213 La. 436, 34 So.2d 916 (1948) (constitutional provision interpreted to impose no limitation on granting of injunction) ; Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953) (semble) ; Jarl Co. v. Village of Groton-on-Hudson, 258 N.Y. 303, 179 N.E. 708 (1932) (court seems to place no limits on granting of injunction provided substantial time hasn't elapsed since annexation) ; Hines v. Sumner, 45 S.D. 93, 186 N.W. 116 (1922) (injunction treated as complaint in quo warranto). For equally broad dicta see State v. North, 42 Conn. 79 (1875) ; State v. Johnson, 76 Ore. 85, 147 Pac. 926 (1915).

62. 18 McQuillen, Municipal Corporations §§ 52.07, 52.20, 52.21 (3d ed. 1949) ; Spelling, Injunctions and Other Extraordinary Remedies § 887 (1901).

63. This point is illustrated by cases that deny the injunction in situations in which it is not the office of equity to intervene. For example, injunctions preliminary to the order of incorporation, such as actions brought to enjoin the calling of an election, have been denied as premature and an improper interference by the equity court with the administrative process. French v. County of Ingham, 342 Mich. 660, 71 N.W.2d 244 (1955) ; Speaker v. Oklahoma County, 312 P.2d
rationale can be accepted, then, only if it is recognized that it is but a variant of the rule which customarily limits the availability of the taxpayers' suit in any context. This conclusion is reinforced by the decisions which have involved a direct rather than a collateral attack on the existence of the municipality. Injunctive relief in these cases, if not precluded by the availability of quo warranto or a statutory remedy, is also available provided the incorporation is void.

Striking parallels have already been noted in the circumstances in which judicial review can be made available under any of the extraordinary writs. These similarities become even more pronounced in a consideration of the scope of judicial review in incorporation proceedings.

**Scope of Judicial Review in Incorporation Proceedings**

In those states in which statutory appeals are provided, the extent of judicial review is sometimes specified in the incorporation statute, which may be interpreted to confer broad powers of review on the court. If the statutory appeal provision does not

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65. In the following cases allowance or disallowance of the injunction was predicated on this point: Smith v. Skagit County, 45 Fed. 725 (Wash. C.C. 1891); Colquhoun v. City of Tucson, 65 Ariz. 451, 108 P.2d 269 (1940); Vanover v. Dunlap, 172 Ky. 523, 188 S.W. 315 (1916); Angel v. Town of Spring City, 63 S.W. 181 (Tenn. 1899); Hooper v. Bhea, 3 Shannon's Cases 145 (Tenn. 1853).

In the following cases in which the injunction was not allowed the discussion implies that a different result would have been reached had the incorporation been void: Guebelle v. Epley, 1 Colo. App. 199, 28 Pac. 89 (1891); Smith v. City of Emporia, 168 Kan. 187, 211 P.2d 101 (1949) (annexation; incorporation cases reviewed); Word v. Schow, 29 Tex. Civ. App. 120, 68 S.W. 192 (1902).

For cases in which the propriety of the injunction was not discussed but in which the merits were considered see Bray v. Stewart, 239 Mich. 240, 214 N.W. 133 (1927); Gambrill v. Gulf States Creosote Co., 216 Miss. 505, 62 So.2d 772 (1953). In Weyerhaeuser Timber Co. v. Banker, 186 Wash. 332, 58 P.2d 285 (1936), the court enjoined the holding of an election for a flood control district and indicated that the remedy was available without limitation.

66. Geauga Lake Improvement Assn. v. Losier, 125 Ohio St. 565, 182 N.E. 489 (1933); Village of Elba, 37 Hun 548 (4th Dept. N.Y. 1883). Cf. Ark. Stat. Ann. § 19-106 (1956) (whether town "unreasonably large or small"). When broad powers are conferred on the agency hearing the initial petition, and statu-
specify the scope of judicial review, its extent will depend on how the incorporation proceedings are characterized. Consistent with the cases dealing with judicial participation in the incorporation process as a violation of the separation of powers, the courts are limited to the review of those decisions which are considered judicial in nature. For example, whenever it is constitutional to delegate consideration of the propriety of an incorporation to the court, the articulation of substantive standards relating to propriety is properly within the ambit of the court’s scope of review.

One important problem involves the power of the agency which hears the petition, or of the court on review, to redraw the boundaries of the area seeking incorporation. Some statutes clearly confer this power, but if the statute is interpreted not to confer it, or if a statute lodging this power in the courts is considered an unconstitutional delegation, the agencies which hear and review the petition will be seriously hampered. While they can always hold the incorporation void in toto, they may be reluctant to do so. Besides, if the court’s consideration of the issues in an incorporation is too severely restricted it may not be able to exercise an effective check on the petitioners. In this event, the initiative as to the size and area of the new municipal...
ity will be with the incorporators, perhaps to the detriment of the governmental needs of the metropolitan area.

In the discussion of the extraordinary writs it was noted that their availability often turned on the nature of the question to be examined. For this reason, it is difficult to isolate for separate analysis the scope of judicial review that they afford. The "legislative" nature of the incorporation proceeding is another factor to consider. It has prompted decisions that a finding of facts is not necessary,71 so that the record in the inferior tribunal may include only the necessary papers and the order of incorporation and may not include a transcript of the evidence. While the practical limitations which the absence of a transcript places on judicial review may be cured by statute,72 the restrictions customarily inherent in the writ proceeding may prevent effective judicial review of the facts. This may occur, for example, if new evidence cannot be introduced to impeach the incorporation record.73

71. E.g., State v. Town of Addison, 262 Ala. 139, 76 So.2d 663 (1955); City of Uniondale, 225 Mo. 143, 225 S.W. 985 (1920); State v. Stanwood, 208 S.W.2d 201 (Mo. App. 1950); Wolf v. Young, 277 S.W.2d 744 (Tex. Civ. App. 1955); Village of Biron, 145 Wis. 444, 131 N.W. 829 (1911). Cf. Lindquist v. Village of Island Lake, 344 Ill. App. 400, 101 N.E.2d 120 (1951) (proceedings are in rem and ex parte). Some of these cases hold that the agency may act on the verified pleadings alone or may, if it wishes, satisfy itself informally that the conditions precedent to the incorporation have been met.

If proceedings for the incorporation of municipalities are considered non-judicial, constitutional requirements as to due process are not applicable. For example, neither a notice to interested parties nor a hearing is required. E.g., Faulkner v. Gila County, 17 Ariz. 139, 149 Pac. 382 (1915); Territory v. Town of Jerome, 7 Ariz. 329, 54 Pac. 417 (1901); Ford v. Incorporated Town of North Des Moines, 50 Iowa 626, 45 N.W. 1031 (1890); City of Uniondale, supra. In some jurisdictions a notice requirement has been considered jurisdictional. See State v. Sutton, 71 N.D. 530, 3 N.W.2d 106 (1942). Cf. Nickel v. School Board of Axtell, 157 Neb. 813, 61 N.W.2d 566 (1953) (school district organization; hearing needed if board acts quasi-judicially). Many statutes now require a notice and hearing.

72. There is considerable variation in the extent to which the reviewing courts will defer to the finding of fact by the agency which incorporates. Taken literally, the Pennsylvania rule discussed in note 67, supra, would limit judicial review to cases in which there has been an abuse of discretion. At the other extreme, general statutes permitting a review of incorporation orders by county boards have been construed to permit a trial de novo. Gardner v. Blaine County, 15 Idaho 698, 99 Pac. 826 (1909); Grusenmeyer v. City of Logansport, 76 Ind. 549 (1881). Cf. Village of Riggins, 68 Idaho 547, 200 P.2d 1011 (1948) (lower court's fact finding in turn affirmed by supreme court under substantial evidence test). Under the 1945 Missouri Constitution, incorporation orders of the county court are subject to the customary "substantial evidence" test applied to the orders of administrative agencies. Village of Pleasant Valley, 272 S.W.2d 8 (Mo. App. 1954) (although no evidence in the transcript of proceedings before the county court). But cf. State v. Public Serv. Comm., 291 S.W.2d 95 (Mo. 1956). As to what is a non-appealable interlocutory order see, e.g., State v. Montgomery County, 115 N.E.2d 888 (Ct. App. Ohio 1953); Borough of Jefferson, 163 Pa. Super. 569, 63 A.2d 100 (1949).

73. While evidence may be taken and findings of fact had in quo warranto
Of most importance to the decision in a metropolitan incorporation is the court's view regarding what errors of law committed by the inferior tribunal are reviewable in the writ proceeding. On this point the decisions are hopelessly confused, both in theory and result. This is evident in the quo warranto cases. Some of the decisions view the quo warranto proceeding like any other civil action and permit that review of the facts and of the law that is common in other civil cases. Under this approach, the court will review the application of any substantive standards thought to be imposed by the statute.

Most of the quo warranto decisions give some element of conclusiveness to the decision below. This may occur because the incorporation proceeding is considered legislative and therefore not subject to judicial scrutiny. But even if the incorporation function is considered judicial, the courts, apparently treating the quo warranto proceeding as a collateral attack, hold that the judgment below is ordinarily unimpeachable. An exception is made which tends to equate review of error in quo warranto with review of error under the other writs. If the incorporation is "void," either because the inferior tribunal exceeded its jurisdiction or committed fraud, then it is reviewable.

But the extent of review afforded under this approach varies. While the Arizona court will review to determine whether a

proceedings, 17 McQuillin, Municipal Corporations § 50.19 (3d ed. 1949), the practice under the other writs is not always as liberal. Certiorari furnishes an example. Compare Riesenfeld, 33 Minn. L. Rev. at 706, 707 (Minnesota follows common law rule, evidence not admissible to impeach the record), with Ward v. Keenan, 3 N.J. 298, 70 A.2d 77 (1949) (contrary practice in New Jersey). Furthermore, the parties are not always entitled to judicial review de novo of the facts. See, e.g., Crum, The Writ of Certiorari in North Dakota, 27 N. Dak. L. Rev. 271 (1951).

74. State v. Roberts, 200 La. 36, 7 So.2d 607 (1942) (but governor's determination on petition to incorporate entitled to "great weight"); State v. So-called Village of Fridley, 233 Minn. 442, 47 N.W.2d 204 (1951) (within court's function to determine if power to incorporate unreasonably exercised); State v. Village of Dover, 113 Minn. 452, 130 N.W. 74 (1911) (territory to be included in new municipality a question of fact); State v. Village of Gilbert, 107 Minn. 364, 120 N.W. 528 (1909); State v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902) (based in part on holding that standards for incorporation derive from constitution).

Cf. Mahood v. State, 101 Fla. 1254, 132 So. 90 (1931) (based apparently on point that standards for incorporation derive from constitution); Dickerson v. Sharpe, 291 Ky. 391, 164 S.W.2d 945 (1942) (dictum; irregularities in incorporation to be challenged in quo warranto only); State v. Dimond, 44 Neb. 154, 62 N.W. 498 (1895) (standard for review not clear).


76. People v. City of Belmont, 100 Cal. App. 537, 280 Pac. 540 (1929); State v. Holcomb, 95 Kan. 660, 149 Pac. 684 (1915) (based on characterization of incorporation proceeding then adopted by court).
town exists in fact, other courts will not do so and, furthermore, will not consider the propriety of the incorporation. Some of the decisions last cited would appear to preclude the review of any substantive criteria, although other courts review such standards insofar as they relate to the inclusion of non-urban land within the new municipality.

Except in mandamus, where the cases have sometimes interpreted the statute in the process of determining whether it creates a duty such that the writ will lie, similar results have been reached under the other extraordinary writs. The use of the injunction is restricted to cases in which the incorporation is void, and certiorari and prohibition are limited to cases in which the inferior tribunal has exceeded its jurisdiction. As in the case of quo warranto, the same conflicts appear. While Arkansas appears to permit review of the propriety of the incorporation, most of the cases either permit no review of substantive stand-

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77. Parnell v. State, 68 Ariz. 401, 206 P.2d 1047 (1949). This decision should be compared with the court's view of the use of certiorari in incorporation proceedings. See note 88 supra. See also note 82 infra.

78. People v. Town of Loyalton, 147 Cal. 774, 82 Pac. 620 (1905); People v. City of Belmont, 100 Cal. App. 537, 280 Pac. 540 (1929); State v. City of South Hutchinson, 175 Kan. 516, 206 P.2d 290 (1954) (cannot even consider reasonableness of including agricultural land); State v. Holcomb, 95 Kan. 660, 149 Pac. 684 (1915) (implied that reasonableness of petition cannot be considered); State v. Church, 158 S.W.2d 215 (Mo. App. 1942). But cf. State v. Standwood, 208 S.W.2d 291 (Mo. App. 1948). See also State v. Bay City, 65 Ore. 124, 131 Pac. 1035 (1913) (failure of the parties to participate in the incorporation proceedings precludes their raising objections in quo warranto).


Some courts have held that various procedural errors are jurisdictional, without indicating, however, whether the standards to be applied to the incorporation will be given the same classification. E.g., Foshee v. Kay, 197 Ala. 157, 72 So. 891 (1918); People v. Blake, 128 Colo. 111, 260 P.2d 592 (1953); Kamp v. People, 141 Ill. 9, 30 N.E. 680 (1892); State v. Porter, 23 N.M. 508, 169 Pac. 471 (1917).

80. See the cases cited in note 48 supra. It will be noted that the scope of review practically afforded by the California courts in these cases is somewhat inconsistent with their express formulation of the scope of review in mandamus. See note 82 infra.

81. McCarroll v. Arnold, 199 Ark. 1225, 137 S.W.2d 921 (1940); Brang v. Thompson, 177 Ark. 870, 9 S.W.2d 24 (1928); Waldrop v. Kansas City Southern Ry. Co., 131 Ark. 453, 199 S.W. 369 (1917). These are injunction cases which turn in part on the point that the tests applicable to the incorporation derive from the constitution.
ards or limit review solely to the propriety of including non-urban lands.82

In the cases in which quo warranto was not used, the failure to rely on the traditional remedy has sometimes operated as a factor limiting judicial review. Otherwise, the basis for the decisions, whether involving quo warranto or another writ, is not clear. While the cases sometimes indicate that a given error is jurisdictional, independent of the statute, because the nature of the judicial function in incorporation proceedings cannot permit the court to hold otherwise, this position has no basis except perhaps in jurisdictions in which the standards for incorporation derive from the constitution.83 If this is not so, the only ground on which a particular error can be said to be jurisdictional is that the statute makes it so.84 Certainly, standards relating to the propriety of the incorporation cannot be found in the common law.

Because the basis for the allegation of jurisdictional error is statutory, a decision on the scope of judicial review tends to merge with a decision on the nature of the standards which the statute imposes, and some of the courts have been cognizant of

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82. For a case which permits review to determine whether non-urban land was improperly included in the new municipality see State v. Crabill, 136 Neb. 819, 287 N.W. 689 (1939) (mandamus). The following cases all hold that a proper determination on this point is not essential to jurisdiction and so is not reviewable: Colquhoun v. City of Tucson, 55 Ariz. 451, 103 P.2d 269 (1940) (injunction; implied); Skinner v. City of Phoenix, 54 Ariz. 316, 95 P.2d 424 (1939) (declaratory judgment action to test annexation); Peart v. Santa Clara County, 301 P.2d 874 (Cal. App. 1956) (mandamus); Guebelle v. Epley, 1 Colo. App. 198, 28 Pac. 269 (1891) (injunction; improper finding on this point indicated not to be such a "fraud" as would permit review); Elise v. Lampe, 275 S.W.2d 64 (Ky. 1955) (prohibition); State v. Lichte, 260 Mo. 283, 102 S.W. 466 (1910) (prohibition). But note that the Missouri courts review this issue in quo warranto on the assumption that it is jurisdictional. See note 79 supra.

83. E.g., State v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902).

84. No additional basis for the absence or presence of judicial review is contained in the theory that the order of incorporation is nonreviewable if the statute confides the final decision on jurisdiction to the inferior tribunal. This is but another way of saying that the statute has been interpreted to impose no standards. Courts expressing this view customarily make the reservation that the decision of the inferior tribunal is nevertheless reviewable for fraud or abuse of discretion, which is quite close to the review-for-voidness formula. E.g., State v. Town of Phil Campbell, 177 Ala. 204, 58 So. 905 (1912); State v. Town of Clyde, 18 S.W.2d 262 (Tex. Civ. App. 1929).
this. Furthermore, since a finding of jurisdictional error depends on the vagaries of statutory interpretation, the courts have been permitted considerable leeway, and this is indicated by the divergent results that have been reached. As a consequence, the review-for-voidness rule that appears to govern the availability of the extraordinary writs and the scope of judicial review that they afford is really a functional concept which empowers the court to review the incorporation decision for whatever errors it considers sufficiently serious to require judicial intervention.  

Much the same comments can be made of the related constitutional and interpretive issues that arise under statutory provisions for the judicial hearing and review of incorporation petitions, since the imprecise nature of the concepts selected to govern the solution of these problems also permits the courts to proceed largely on an ad hoc basis.

PARTIES TO INCORPORATION PROCEEDINGS AND APPEALS

Possible limitations on the parties entitled to participate in incorporation proceedings are of particular importance in metropolitan areas. A community adjoining the area seeking to incorporate, or the county or township out of which it is to be carved, may wish to challenge the incorporation. But it may not do so if it may not intervene in the proceeding or join in the appeal. Unless a party entitled to intervene chooses to do so and to cooperate with an adjoining community having an interest, the metropolitan issues which the incorporation raises may not be presented.

The nature of this problem is best understood by a consideration of the extraordinary writs. A subsisting interest in the litigation is the criterion for capacity to bring any of these writs. Apart from the writ of quo warranto, however, this question has not assumed an independent importance in the incorporation cases, since the very availability of another writ has often depended on whether the plaintiff may resort to another remedy to avoid the limitations on private litigation which are inherent in quo warranto. Cases in which writs other than quo warranto were allowed have involved actions brought both by taxpayers of the area seeking incorporation and by incorporated communities adjacent to it.

85. For a similar comment in a related context see Jaffe, Judicial Review: Constitutional and Jurisdictional Fact, 70 Harv. L. Rev. 953, 963 (1957).
86. E.g., Riesenfeld, 33 Minn. L. Rev. at 700, 701 (certiorari).
87. E.g., Smith v. Skagit County, 45 Fed. 725 (Wash. Cir. Ct. 1891)
At first quo warranto could only be brought by the public attorney, but the Statute of Anne of 1711\(^{88}\) authorized the writ to be brought on the relation of a private individual. This statute is applicable to common law proceedings in quo warranto in states in which the English statutes of this period have been received as part of the common law heritage. Almost half of the statutes codifying the writ go one step further and allow it to be brought directly by a private individual. But they either provide or have been interpreted to provide that the relator must show a sufficient "interest" in the proceedings.\(^9\) In the absence of such a provision the statutes have usually been interpreted to mean that the writ, even though initiated on the relation of a private individual, must be brought by the public attorney.\(^{90}\)

Whether or not the statute authorizes a direct suit in quo warranto by a private relator, a municipality in a metropolitan area that desires to challenge a new incorporation in quo war-

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\(^{88}\) 9 Anne c. 20.

\(^{89}\) ALA. CODE tit. 7, § 1134 (1940); ILL. ANN. STAT. c. 112, § 10 (1954) (private relator "having an interest in the question"); IND. ANN. STAT. § 3-2002 (Burns 1948) (similar); IOWA RCP § 300(b) (1949); KAN. GEN. STAT. § 60-1603 (1949); MICH. STAT. ANN. § 27.2341 (1938); N.J. REV. STAT. § 2A:66-6 (1952) (scope not clear); N.M. STAT. ANN. § 22-15-4 (1953); N.C. GEN. STAT. § 1-516 (1953); N.D. CODE § 32-1303 (1943) ("special interest"); OKLA. STAT. ANN. tit. 12, § 1533 (1937) (implied, if interest in or adverse to franchise); PA. STAT. ANN. tit. 12, § 2022 (1951) (on suggestion of person "desiring to prosecute"); S.C. CODE § 10-2256 (1952); S.D. CODE § 37.0502 (1939) (special interest); UTAH RCP § 65B(d) (1953); VT. REV. STAT. § 2112 (1947) ("person interested"); WASH. REV. CODE § 7.56.020 (1953); W. VA. CODE ANN. § 5313 (1955); WIS. STAT. § 294.04(2) (1955). The Colorado court recently held that the principles governing capacity to bring quo warranto are substantive and cannot be changed by the Colorado rules of civil procedure, which authorize the writ at the suit of a private person. Enos v. District Court, 124 Colo. 335, 238 P.2d 861 (1951).

\(^{90}\) E.g., Faulkner v. Gila County, 17 Ariz. 139, 149 Pac. 382 (1915) (dictum); State v. City of Sarasota, 92 Fla. 563, 109 So. 473 (1926) (annexation case, dictum); State v. Hall, 53 Mont. 595, 165 Pac. 757 (1917) (limiting private suits under statute to claims to public office); Holloway v. Dickinson, 69 N.J.L. 72, 54 Atl. 529 (Sup. Ct. 1905); State v. Vickers, 51 N.J.L. 180, 17 Atl. 153 (1889); State v. Burke, 120 Ohio St. 410, 166 N.E. 354 (1920). See also Notes, 131 A.L.R. 1207 (1941); 21 L.R.A. (n.s.) 685 (1909). But see note 98 infra.
rantto faces several obstacles. If the statute does not authorize a direct suit, the consent of the public attorney must be secured. If his consent is not forthcoming, the courts are divided as to whether he can be compelled to act by mandamus. Even if the public attorney consents to bring the writ or is compelled to do so, the private relator ordinarily does not control the litigation. Under a statute authorizing a private direct suit in quo warranto the municipality has two hurdles. It must first show that it has an interest sufficient to entitle it to bring the writ. Since the courts have a discretion to refuse the writ at the instance of a private relator, it must then convince the judge that the writ should issue.

Under statutes authorizing a direct suit by a private relator, most of the cases have held that a taxpayer or resident of the area seeking to incorporate has an interest sufficient to bring

91. An analysis of a representative group of these cases reveals considerable conflict. A few cases may be said to foreclose resort to mandamus in any fact situation. E.g., Hermann v. Morlidge, 298 Ky. 632, 183 S.W.2d 507 (1944); State v. Clarendon Independent School District, 298 S.W.2d 111 (Tex. 1957). There is another group of cases which have mandamused the public attorney when he has abused his discretion in denying the writ, or have implied that he could be so controlled in a case of abuse of discretion. These cases do not limit the situations in which mandamus will issue. Lamb v. Webb, 151 Cal. 451, 91 Pac. 102, 846 (1907); Cain v. Brown, 111 Mich. 657, 70 N.W. 337 (1897); Lamoreaux v. Attorney General, 89 Mich. 146, 70 N.W. 812 (1891); State v. Talty, 166 Mo. 529, 66 S.W. 361 (1902); Commonwealth v. Franek, 103 Pa. 341, 106 Atl. 878 (1933).

On the other hand, some courts view the mandamus problem as another phase of the special interest question, and mandate the public attorney to bring the writ only if the private relator has a sufficient special interest in the litigation at hand. The result has sometimes been to deny mandamus in incorporation and related cases thought to involve public interests merely. E.g., People v. Healy, 230 Ill. 280, 82 N.E. 599 (1907) (prior law); Thomas v. Fuller, 166 La. 847, 118 So. 42 (1928); State v. Attorney General, 30 La. Ann. 954 (1878); Thompson v. Watson, 48 Ohio St. 552, 31 N.E. 742 (1891); Bank of Mount Pleasant, 5 Ohio 209 (1821); State v. Ryan, 41 Utah 327, 125 Pac. 606 (1912) dictum.

In Washington, the court's power to mandate the public attorney has most recently been put on a statute providing that the writ shall be filed when directed by the court. State v. Brotherhood of Friends, 41 Wash.2d 133, 247 P.2d 787 (1952). See NEB. REV. STAT. § 25-21, 123 (1956) (similar). Since a private relator is authorized to bring the writ directly in Washington, the court has indicated that the special interest requirement is applicable here, and not in an action to mandate the public attorney. State v. Union Sav. Bank, 92 Wash. 484, 159 Pac. 761 (1916).


93. E.g., State v. Village of Mound, 224 Minn. 551, 48 N.W.2d 855 (1951); State v. McClain, 157 Mo. 409, 86 S.W. 135 (1905); Albermarle Oil & Gas Co. v. Morris, 158 Va. 1, 121 S.E. 60 (1924). See 17 McQuillen, MUNICIPAL CORPORATIONS § 50.05 (3d ed. 1949). The lower court's decision is reviewable, if at all, only on a limited basis. Because a court may always decide that the case is one in which the writ should not issue, not even the public attorney's discretion to bring quo warranto is unfettered. Note, 35 HARV. L. REV. 73 (1921).
the proceeding. Since no private relator could have more direct interest, the net effect of the cases disallowing a suit by a taxpayer or resident is to deny the writ to any private party, and the cases so holding are influenced by the proposition that the suit should be brought only by the public attorney in spite of a statute purporting to change the common law rule.

In jurisdictions in which a taxpayer's or resident's interest is sufficient, it is difficult to tell how far the courts will go. The very requirement of a private interest in the litigation is anomalous, since questions of public moment must also be involved or else the writ will not issue. If the cases allowing suits by taxpayers or residents are taken to mean that any person "affected" by the incorporation may bring the writ, the possibilities with respect to private parties litigant are limitless. The following cases have arisen under statutes allowing the writ to be brought by private relators. In most of them the public attorney refused his permission, although the decisions do not seem to turn on this point. That the interest of a resident or taxpayer is sufficient, Norton v. People, 102 Colo. 489, 81 P.2d 393 (1938) (under prior law; permission of district attorney secured); People v. Firek, 5 Ill.2d 317, 125 N.E.2d 637 (1955) (dissolution of sanitary district); People v. Wilson, 346 Ill. App. 175, 104 N.E.2d 559 (1952) (school district); State v. Consolidated Independent School Dist., 246 Iowa 566, 68 N.W.2d 305 (1955); Smith v. Norton Tp., 319 Mich. 365, 29 N.W.2d 836 (1947) (point not discussed); Hines v. Sumner, 45 S.D. 93, 186 N.W. 116 (1922) (school district); State v. Leischer, 117 Wis. 475, 94 N.W. 299 (1903). Contra, Miller v. Town of Palermo, 12 Kan. 21 (1873); Cheek v. Eye, 96 Okla. 44, 219 Pac. 883 (1923) (school district); State v. Ryan, 41 Utah 327, 125 Pac. 666 (1912) (school district).

The cases sometimes confuse suits brought directly by a private relator without the intervention of the public attorney, and those brought by the public attorney on behalf of a private relator. In the latter situation an interest on behalf of the private relator may not be necessary. E.g., People v. Milk Producers' Ass'n, 60 Cal. App. 439, 212 Pac. 957 (1923). Cf. State v. Tracy, 48 Minn. 497, 51 N.W. 613 (1892). Some statutes require the relator on whose behalf the proceeding is brought to have an interest, e.g., Ore. Rev. Stat. § 30.610 (1955); W. Va. Code Ann. § 5311 (1955). See State v. Freeland, 139 W. Va. 327, 81 S.E.2d 655 (1954). Other courts have read such a requirement into their statutes. E.g., State v. North, 42 Conn. 79 (1875) (relator not living within challenged school district doesn't have sufficient interest); State v. Small, 131 Mo. App. 470, 109 S.W. 1079 (1908) (taxpayers living in area sought to be incorporated have sufficient interest). The problems which might arise in the ex rel. cases can be solved by a friendly public official who can always choose to proceed ex officio. Cf. People v. Blake, 128 Colo. 111, 260 P.2d 592 (1953) (private suit; court waived claim that intervention by public attorney improper).

Conceptually, this may create an impossible situation for the relator, who must be careful not to obliterate the public nature of the proceedings in showing a private interest, and vice versa. This difficulty was recognized by one court, which finally decided that each case of this type must be decided "on the facts." People v. Lockard, 26 Colo. App. 498, 143 Pac. 273 (1914) (formation of irrigation district).


See Norton v. People, 102 Colo. 489, 81 P.2d 393 (1938). The court commented that a property owner in the proposed new city had a sufficient interest to bring the writ because he was "subject to its license and police regulations."
Only one case\(^9\) squarely considered the status of other communities in the metropolitan area, and it held that the township from which the newly-incorporated municipality was being separated had a sufficient interest. The court based its holding on the point that lands subject to the township's jurisdiction would be transferred by the proceeding to a new corporate entity.\(^9\) None of the cases have squarely faced the question whether an adjacent incorporated municipality has an interest sufficient to prosecute quo warranto.\(^10\)

Problems similar to those arising in quo warranto also arise under statutes providing for intervention in the incorporation proceedings or in the statutory appeal. Just as in the case of quo warranto many of these statutes,\(^10\) and some of the general joinder statutes under which intervention is attempted, limit their permission to "interested" parties. Even without the benefit of a statute the courts uniformly imply this limitation. With little dissent taxpayers and residents of the area seeking incorporation have been found to have a sufficient interest in the proceeding.

But a municipality has an extraterritorial police jurisdiction as well. Do persons affected by potential extraterritorial regulations likewise have an interest in the incorporation?

\(^9\) State v. City of Chisholm, 196 Minn. 285, 264 N.W. 786, 266 N.W. 689 (1936). Permission to bring the writ had been refused by the attorney general. This case implicitly overruled earlier decisions holding that the writ could be brought only by the public attorney. See State v. Tracy, 48 Minn. 497, 51 N.W. 613 (1892). Interestingly, the case was based on the court's conception of the extent of the common law writ in Minnesota. Suits by private relators are not expressly permitted by the quo warranto statute. See also State v. So-called Village of Fridley, 235 Minn. 442, 47 N.W.2d 204 (1951), in which taxpayers of the affected village brought the writ with the permission of the attorney general. The opinion does not discuss this point.


In one case the writ was brought by the mayor of a town which sought to annex the area which was seeking incorporation. State v. Incorporated Town of Crestwood, 80 N.W.2d 489 (Iowa 1957). The opinion does not discuss this procedure, but the conflict of jurisdiction would give the town seeking annexation a direct interest in the incorporation proceeding. But cf. City of Bethany v. Mason, 202 Okla. 66, 210 P.2d 353 (1949) (same facts, but writ denied on general Oklahoma rule that only public attorney may contest incorporation). Cf. People v. Blake, 128 Colo. 111, 260 P.2d 592 (1953) (state, which cannot be party to incorporation proceeding, therefore not precluded by statutory appeal provisions from bringing quo warranto). But cf. Nunda v. Chrysal Lake, 79 Ill. 311 (1875) (village may not represent interests of its taxpayers in injunction proceeding).

ceedings. Some of the statutes limit participation to residents or taxpayers, but in the absence of such an express limitation what other parties may participate has not been made clear.

In some instances the township from which the municipality is to be separated, or taxpayers of the township, have sought to intervene. Some courts have recognized that the loss of property from the tax base gives these intervenors a sufficient interest in the proceedings, but the Wisconsin court has not. It pointed out that since public assets were to be apportioned between the township and the new municipality the burdens of the township would not be increased. But this reasoning overlooks the fact that the detachment of the built-up portion of the township leaves the remaining rural sections with a tax base relatively the less adequate to support the necessary public services that still must be provided. Considerations such as this have sometimes militated against the incorporation of a new municipality. Significantly, the Wisconsin decision has been changed by statute.

A few cases involving statutory appeals have involved attempts to intervene by adjoining municipalities, solely on the basis that they were opposed to the incorporation. While there has been some recognition of the right of a city to intervene if it seeks annexation of the territory attempting to incorporate, the cases dealing with attempts to intervene based merely on opposition to the incorporation have ruled against the adjoining city. These decisions have been based on an evaluation of the

102. Harris v. Millidge, 151 Ind. 70, 51 N.E. 102 (1898); City of Lockland v. Shaver, 98 N.E.2d 643 (C.P. Ohio 1950) (recognizing the rule); State v. Port of Bay City, 64 Ore. 139, 129 Pac. 496 (1913) (dictum; special district). See N.C. Gen. Code § 160-198(1) (1952) (taxpayer or voter may appear at hearing). Many cases involving appeals by residents and taxpayers of the area do not even discuss the question. E.g., Village of Pleasant Valley, 272 S.W.2d 8 (Mo. App. 1954). But cf. City of Uniondale, 285 Mo. 143, 225 S.W. 985 (1920) (incorporation proceeding non-adversary so taxpayers not permitted to intervene).


104. Village of Chenequa, 197 Wis. 163, 221 N.W. 856 (1928).

105. Wis. Stat. § 61.07(2) (1955). The township may become a party upon application.

106. Town of Waconia, 82 N.W.2d 762 (Iowa 1957). See also Village of St. Francis, 209 Wis. 645, 245 N.W. 840 (1932).


The Colorado court has intimated that the state has no interest sufficient to allow it to intervene in the incorporation proceedings. People v. Blake, 125 Colo. 111, 260 P.2d 592 (1953). To the extent that the provision of government for
purpose behind the incorporation statute, and the opinion of the Wisconsin court bears quoting for this reason. Noting the contention of the city of Milwaukee that the incorporation of an adjoining area "will cut off the necessary and proper extension of the City," the court replied:

"It is a startling proposition that a city has a right, which a court must recognize, to commence or participate in an action to block the attempt of electors in another municipality to choose their own form of local government."108

Deficiencies such as this in the incorporation statute may be handled by a provision such as that in the Mississippi law, which requires every municipality within three miles of the area proposing to incorporate to be notified of the proceeding and to be made a party.109 But the Wisconsin decision also provides a significant clue to judicial attitudes toward the nature of the substantive standards thought to be imposed by the incorporation statutes.

IMPROVING INCORPORATION PROCEDURES

Because of a narrow view of the extent to which the issues in incorporation proceedings present judicial questions, serious restrictions have been placed on the judicial development, through interpretation, of substantive standards that can be made applicable to metropolitan incorporations. As the issues arising in incorporation proceedings are often resolved of necessity within the framework of the extraordinary writs, these

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108. Schatzman v. Town of Greenfield, 273 Wis. 277, 77 N.W.2d 511, 513 (1956). One Ohio court indicated that to allow the city to intervene would require the court to "reserve to each municipality according to its speculative future needs" enough territory to equalize the tax burden in the area. It found no such principle in the incorporation law. City of Lockland v. Shaver, 98 N.E.2d 643, 645 (C.P. Ohio 1950). But the court seems to confuse the formulation of standards with the right of the adjoining city to participate in the formulation of standards.

109. Miss. CODE ANN. § 3374-04 (1957). Participation by adjacent municipalities is obligatory, and they need not apply for intervention. The statute also allows "interested" parties to intervene. If the incorporation proceeding is governed by the terms of a general appeal provision, the terms of the latter statute may allow participation by other than the residents of the area seeking incorporation. See Village of Ilo v. Ramey, 18 Idaho 642, 112 Pac. 126 (1910) (statute allowing appeals from county boards permits appeals by any taxpayer of the county). Under this provision an appeal by residents of a nearby village was allowed, although the court indicated that ordinarily it would not extend the parties in interest concept this far. California authorizes notice to but not intervention by all cities within three miles of a proposed new city. CAL. GOVT. CODE § 34302.5 (Supp. 1955).
limitations on judicial review derive partly from the characteristics inherent in these remedies. Consequently, the problems presented by the organization of municipal government for this country's growing urban areas must often be resolved within the framework of an ancient, cumbersome, and limited writ procedure that antedates the American Revolution.

Present inadequacies in incorporation procedures are the product of legislative inattention, and the solution lies in legislative reformulation within the framework of the incorporation law to correct existing inadequacies and to make resort to the extraordinary remedies unnecessary. First to be considered is the selection of the proper agency to hear the incorporation petition initially. While incorporation petitions presently go either to a local court or to a local administrative agency such as the county board, the most telling point against the selection of either body is that neither is equipped to handle them. To each, the consideration of incorporations is an infrequent and part-time function. Under the circumstances, it could hardly be expected that either courts or county boards would have the opportunity fully to formulate standards that would be sensitive to the many problems involved.

At the same time, the infrequency of incorporation petitions makes it difficult to delegate their consideration to other than a part-time agency. This is especially true if they are to be considered at the local level. But since the organization of government on the urban fringe now has more than local consequences, especially in multi-county urban areas, it could be argued that municipal incorporation is at least a state-wide problem.

If this is so, to confide the consideration of incorporation petitions to an appropriate state agency seems the best solution. As indicated earlier, this has been done in a few states. If the

110. Statutes which seek to adjust the existing incorporation laws to the procedural problems presented by the incorporation of a municipality that straddles county lines do not provide a complete solution to this problem. E.g., WASH. REV. CODE § 35.04.010 et seq. (Supp. 1955) (joint hearing by both county boards).

111. This is the procedure recommended by a recent study in Virginia. THE COUNCIL OF STATE GOVERNMENTS, THE STATES AND THE METROPOLITAN PROBLEM 48 (1956). Another approach is found in the present Indiana law, which requires that all incorporations of new towns in counties having an organized city must secure the "written" approval of the city and county plan commissions. IND. ANN. STAT. § 48-105 (Supp. 1957). However, the statute contains no standards to guide the commissions, nor does it indicate whether the commissions should afford a hearing or should proceed informally and ex parte. Nor have the decisions of the commissions expressly been made appealable. Whether the general statute allow-
state government has a strong hand in the administrative supervision of local government, the choice of the agency most directly interested may be the best solution. It can formulate policy on a state-wide basis, and since the breadth of its jurisdiction will bring to it more incorporation petitions than would be brought to a local agency, it will have more of an opportunity to acquire expertise in incorporation matters. It may even have funds to hire staff to assist in the development of policy. Equally as important, its orders can be made subject to the judicial review provisions of the local administrative procedure act or to the court-made rules regularly governing the judicial review of state administrative decisions. Ample judicial participation in the incorporation process will thus be assured. A provision modeled on the Mississippi law can insure that all truly interested parties will have an opportunity to make their views heard.

One obstacle to this approach lies in those decisions which take a strict view of the separation of powers. In these states, the formulation of standards by even a state administrative agency may be inhibited by a narrow view of the power of the legislature to delegate responsibility under a broadly-stated statutory authority. This reflection suggests the important relationship that exists between the procedures applicable to municipal incorporations and the substantive standards that are to be imposed. A resolution of the problem of municipal incorporation on the urban fringe requires not only the imposition of adequate substantive statutory criteria but the provision of adequate administrative machinery which is as modern as the problems with which it will be presented.

112. Location of the agency which hears incorporation petitions at the state level would overcome the difficulties created by the fact that the Model State Administrative Procedure Act and many of the state enactments fashioned after it do not apply to the agencies of municipalities or of other subdivisions of the state. DAVIS, ADMINISTRATIVE LAW 791-793 (1951).

113. E.g., Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E.2d 316 (1953), in which the court held that it was an unconstitutional delegation of authority to empower the Municipal Board of Control to determine when, in the "public interest," a turnpike authority might be formed. Following this decision, similar language in the incorporation statute was deleted. N.C. Laws 1953, c. 1032. These problems are obviated in those few states that derive their substantive standards for incorporation from their state constitutions. See the discussion in the text at note 83 supra.