

THE POLITICS OF MUNICIPAL INCORPORATION IN SOUTH FLORIDA*

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I. INTRODUCTION

“In such experience as I have had with taxation—and it has been considerable—there is only one tax that is popular, and that is the tax on the other fellow.”¹

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Who could refuse the promise of decreased taxes and increased services? Many unincorporated areas of Florida are realizing that by incorporating they can reduce their taxes, localize, and increase the responsiveness and services of their local governments.² Incorporation conjures images of Mayberry—local folks taking care of local problems.³ It is government on a first-name basis—close, personal, and responsive. However, like all good things, incorporation comes at a price. Counties presently depend upon the tax revenues garnered from more affluent areas to subsidize services to poor communities.⁴ Incorporation spurs a dramatic redistribution of local revenues which often leaves the remaining county scrambling to fill the revenue void left by seceding municipalities. Compounding the problem, most of the incorporating municipalities are wealthier areas that have long subsidized poorer regions of their respective counties. Logically, with affluent unincorporated communities increasingly exercising the tempting option of self-governance, counties will be forced to find new sources of funding to maintain services at existing levels for the poorer unincorporated regions. The question remains: Who will ultimately pay this subsidy?

This article analyzes the causes and effects of Florida's recent wave of municipal incorporation and discusses proposed legislative reforms aimed at alleviating some of the funding disparities that often result. Part II presents a brief overview of the structure of Florida's system of local government. Part III discusses why many of Florida's unincorporated communities have recently sought incorporation and explains the current legislative and constitutional provisions governing the creation of new municipalities.⁵ Part IV analyzes these provisions and argues that

1. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of Sir Thomas White during 1917 debate in the Canadian Parliament).

2. See Monica Davey, *An Island of their Own*, ST. PETE TIMES, Dec. 11, 1995, at 1B, 4B.

3. See Keith Goldschmidt, *Lawmakers Take Services Unincorporated Areas in Brevard, Indian River See Rising Growth Rate*, FLA. TODAY, Feb. 9, 1997, at 01B ("And incorporation can benefit people in taking care of their own community, rather than being swallowed by either a county or nearby municipal government.").

4. See discussion *infra* Part III (discussing funding).

5. Some Southeast Florida communities discussed in the coming sections which were seeking incorporation at the time this article was originally drafted have now become incor-

the absence of stringent requirements for municipal incorporation has created a revenue distribution crisis requiring legislative attention. Part V presents the legislative and constitutional solutions proposed by both sides of the incorporation debate and assesses their feasibility. Part VI concludes that no perfect solution exists to increase local autonomy and reduce taxes, thus incorporation is likely to remain a tempting option.

II. LAYING THE FOUNDATION: STRUCTURE OF FLORIDA'S LOCAL GOVERNMENTS

In Florida, local government⁶ generally operates as one of two types of governmental units: county government or municipal government.⁷ The scope of a local government's power is determined by whether it is a municipality or a county and by the charter or non-charter status of the county in which the local government resides.⁸ Florida's constitution requires that the state be subdivided into counties.⁹ The Supreme Court of Florida interprets this provision to mean that the *entire* state must be divided into counties.¹⁰ The scope of each county's power depends upon whether the county is a charter or a non-charter county.

A. Counties

porated. These municipalities include: Wellington, Aventura, Pinecrest, Deltona, and Weston. See Jay Weaver, *Cityhood Will Cost Weston, Some Say No-New-Tax Vow Called a Mistake*, FT. LAUD. SUN SENT., Aug. 28, 1996, at 1B; Michael E. Young, *Residents Make Weston Broward's 29th Municipality*, FT. LAUD. SUN SENT., Sept. 4, 1996, at 5B; Davey, *supra* note 2, at 1B, 4B. Destiny incorporation was recently defeated in a referendum, and Sunny Isles is nearing the final steps of incorporation. See Telephone Interview with Barbara Falsey, Principal Planner, Metro Dade Department of Planning, Development, and Regulation (Mar. 31, 1997) [hereinafter Falsey Interview] (discussing incorporation plans of Dade County communities).

6. A brief description of the structure and funding of Florida's local governments is provided to help in understanding the problems that can be created by municipal incorporation; however, a comprehensive analysis of Florida's local governmental structure and funding sources is beyond the scope of this article.

7. See FLA. CONST. art. VIII, § 1, 2.

8. See generally Illene S. Lieberman & Harry Morrison, Jr., *WARNING: Municipal Home Rule is in Danger of Being Expressly Preempted By . . .*, 18 NOVA L. REV. 1437, 1442-44 (1994) (describing various sources of and limitations on home rule authority).

9. See FLA. CONST. art. VIII, § 1(a).

10. See *Lipscomb v. Gialourkis*, 133 So. 104 (Fla. 1931).

A charter county has “all powers of local self-government not inconsistent with general law, or with special law approved by a vote of the electors.”¹¹ In the event of a conflict between a municipal ordinance and a charter county ordinance, the charter county ordinance will prevail unless the county charter specifies otherwise.¹²

A non-charter county “shall have such power of self-government as is provided by general or special law.”¹³ The non-charter county government is empowered to enact all ordinances not inconsistent with general or special law, but unlike a charter county ordinance, a non-charter county ordinance is not effective when in conflict with a municipal ordinance.¹⁴ Regardless of whether a county is a charter or non-charter county, it has implicit authority to perform governmental functions unless this power is expressly preempted by another governmental unit.¹⁵ Counties are responsible for providing state and municipal multi-jurisdictional services to county residents.¹⁶ Multi-jurisdictional services may include public health, major roads, sophisticated police labs, and the medical examiner’s office.¹⁷ The county levies a county-wide ad valorem tax to fund these services.¹⁸ Over half of county-wide ad valorem taxes go to fund the county school system, which communities cannot avoid paying by incorporating.¹⁹ In addition

11. FLA. CONST. art. VIII, § 1(g). A special law is “a law passed by both houses of the Legislature that applies to a limited geographic area.” FLA. H.R. COMM. ON COMM’Y AFF., 1995 FLORIDA LOCAL GOVERNMENT FORMATION MANUAL (4th ed. 1995).

12. See FLA. CONST. art. VIII, § 1(g); see also Lieberman, *supra* note 8, at 1443.

13. FLA. CONST. art. VIII, § 1(f).

14. See *id.*

15. See *id.*

16. See generally John P. Thomas, *Why County Public Financing is Inadequate to Meet the Infrastructure Crisis*, 20 STETSON L. REV. 799, 804-05 (1991) (describing the various functions of county government).

17. See Fred Tasker, *The Aventura Rebellion*, MIAMI HERALD, Mar. 12, 1995, at J1, J4. Multi-jurisdictional services tend to be services that are administered more efficiently by a larger governmental body. See *id.*

18. See *id.*

19. See, e.g., Letter from Ken Venturi, Chairman, City of Marco Island, P.A.C., to Registered Voters of Marco Island (Mar. 15, 1997) (on file with author) (providing statistics that show that over 50% of Marco Island’s ad valorem taxes go to the county school system). Opponents of incorporation of the Marco Island community in Southwest Florida claim that if Marco Island were to incorporate, the city would continue to pay the county

to multi-jurisdictional services, counties provide traditional municipal services, such as police and fire protection, to unincorporated areas.²⁰ Residents in the county's unincorporated area pay an additional ad valorem tax to fund these services.²¹

Dade County represents a relatively novel experiment in local government called metropolitan (or metro) county government. Article VIII, section 6(f) of the Florida Constitution provides that Dade County may, to the extent not inconsistent with general law or the powers of existing municipalities, exercise all powers conferred by general law upon municipalities.²²

more than 90% of what is currently paid to the county to support county services. Thus, incorporation does not exempt the incorporated community from paying county taxes. See Kathleen McNamara, *PAC Submits Incorporation Feasibility Study*, MARCO IS. EAGLE, Feb. 19, 1997, at A6, A15.

20. See Thomas, *supra* note 16, at 805.

21. See Tasker, *supra* note 17, at J5. "[Aventura residents are] angry that they and other affluent neighborhoods in Dade's unincorporated area are taxed to subsidize local services to the poor" *Id.* at J1.

22. See FLA. CONST. art. VIII, § 6(f).

B. Municipalities

A municipality is a municipal corporation.²³ Like other corporations, a municipality must be established through incorporation procedures.²⁴ Florida's constitution allows for the creation of municipalities empowered to "conduct municipal government, perform municipal functions and render municipal services."²⁵ Municipalities, absent an express prohibition by the state, have authority to provide services and pass ordinances under what is known as "home rule."²⁶ This power stems from article VIII, section 2 of the Florida Constitution and from the Municipal Home Rule Powers Act.²⁷

Florida's municipalities are creatures of statute.²⁸ The power to create and dissolve a municipality rests almost exclusively within the discretion of the Florida Legislature (Legislature),²⁹ which is generally said to have inherent and plenary power in the creation and establishment of municipal corporations.³⁰ The Legislature's authority to create and dissolve municipalities has been somewhat limited by the Formation of Municipalities Act (Act).³¹ The Act provides that a charter for incorporation of a municipality, except in cases of merger, may only be adopted by special law upon a legislative determination that the incorporating community satisfies the requirements of the Act.³² Additionally, the Legislature may

23. See 12 FLA. JUR. 2D *Counties, Etc.* § 4 (1989).

24. See FLA. STAT. § 165.041 (1995) (providing that a charter "for incorporation of a municipality . . . shall be adopted only by a special act of the Legislature").

25. FLA. CONST. art. VIII, § 2(a), (b).

26. See FLA. STAT. §§ 166.011-.141 (1995); see also Lieberman, *supra* note 8, at 1439-42.

27. See FLA. CONST. art. VIII, § 2.

28. See 12 FLA. JUR. 2D *Counties, Etc.* § 6 (1989).

29. See FLA. STAT. §§ 166.011-.161 (1995). "Municipalities may be established or abolished and their charters amended pursuant to general or special law." FLA. CONST. art. VIII, § 2(a); see also discussion *infra* Part IV.

30. See *Coen v. Lee*, 156 So. 747, 749 (Fla. 1934) ("The creation of municipal corporations with governmental powers . . . are inherent legislative powers and such powers are plenary in the absence of organic restrictions.").

31. Act effective July 1, 1974, ch. 74-192, 1974 Fla. Laws 513 (codified at FLA. STAT. ch. 165 (1995)); see discussion *infra* Part IV (providing a more detailed discussion of the Act).

32. See FLA. STAT. § 165.041(1) (1995). In contrast, a charter for merger "of two or more municipalities and associated unincorporated areas may . . . be adopted by passage

change a municipality's boundaries³³ or cause it to be annexed by a neighboring community³⁴ by general or special law.

Dade County is an exception to the general rule that municipal incorporation is an exclusively legislative function. As a metro form of government, Dade County is empowered to merge, consolidate, or abolish all municipal corporations "whose jurisdiction lies wholly within Dade County."³⁵ Dade County may also provide a method for establishing municipal boundaries incorporating new municipalities within the county.³⁶

III. FUNDING OF FLORIDA'S LOCAL GOVERNMENTS

Taxation is one of the few areas that local governments do not have broad authority to legislate.³⁷ Florida's constitution dramati-

of a concurrent ordinance by the governing bodies of each municipality affected, approved by a vote of the qualified voters in each area affected." *Id.* § 165.041(2)(a).

33. See 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989). The Legislature's power to change and fix municipal boundaries is "limited by the requirement that the elements which necessitate or make desirable the creation of a municipal corporation must be present." *Id.*

34. See FLA. CONST. art. VIII, § 2(c).

35. *Id.* at art. VIII, § 11(1)(c)m.3.

36. See *id.* Article VIII, section 11(1)(e) states that the Dade County charter "[m]ay provide a method for establishing new municipal corporations, special taxing districts, and other governmental units in Dade County from time to time and provide for their government and prescribe their jurisdiction and powers." *Id.* The county charter currently provides:

The Board of County Commissioners and only the Board may authorize the creation of new municipalities in the unincorporated areas of the county after hearing the recommendations of the Planning Advisory Board, after a public hearing, and after an affirmative vote of a majority of the electors voting and residing within the proposed boundaries. The Board of County Commissioners shall appoint a Charter Commission, consisting of five (5) electors residing within the proposed boundaries, who shall propose a charter to be submitted to the electors in the manner provided in Section 5.03. The new municipality shall have all the powers and rights granted to or not withheld from municipalities by this Charter and the Constitution and general laws of the State of Florida.

DADE COUNTY CODE, CHARTER OF DADE COUNTY, § 5.05 (1992). Section 5.03 provides the method by which a municipality may adopt, revoke, or amend its charter. Section 5.03 requires that the governing body of the municipality draft a proposed charter, amendment, revocation or abolition, which must be submitted to a vote of the electors of the municipality within 120 days after adopting a resolution or after certification of a petition signed by 10% of the electors of the municipality. See *id.* § 5.03.

37. See FLA. CONST. art. VII, § 1(a) (providing that "[n]o tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible

cally limits the ability of local governments to generate tax revenues by expressly preempting virtually all forms of taxation to the State of Florida.³⁸ The only substantial tax which municipalities are authorized to levy is the ad valorem tax, commonly known as the property tax.³⁹ As a result of this constitutional limitation, local governments depend primarily upon three major sources of revenue: ad valorem taxes, state-shared revenue, and service charges.⁴⁰

The latter two of these three sources are currently in jeopardy. The State has substantially decreased state-shared revenues while increasing the burden on local governments by imposing more unfunded mandates.⁴¹ Unfunded mandates are directives by the Legislature to create or improve any given program or to reach a particular standard, without financial contribution from the state.⁴² By definition, local governments do not have the ability to opt out of these mandates.⁴³ Essentially, local governments are told to bear the full burden of funding state programs and directives.⁴⁴ Furthermore, recent United States Supreme Court decisions that mandate tighter connections between impacts and exactions may limit the ability of local governments to satisfy their public's needs by requiring private citizens to dedicate lands or contribute to public infrastructure (such as building public roads or sidewalks) in exchange for permits.⁴⁵ Accordingly, with the decreasing ability to

personal property. All other forms of taxation shall be preempted to the state except as provided by general law.”).

38. *See id.* at art. VII, § 1.

39. *See id.* at art. VII, § 9(b).

40. *See* Kristin C. Rubin, *Unfunded Mandates: A Continuing Source of Intergovernmental Discord*, 17 FLA. ST. U. L. REV. 591, 594 (1990) (discussing the authority of local governments to generate revenue).

41. *See id.*

42. *See id.*

43. *See generally id.* at 595-605. Local governments' hands are tied when dealing with the Legislature and the use of unfunded mandates. Generally, the most effective deterrent to unfunded mandates is for local governments to lobby the Legislature not to pronounce unfunded mandates as a matter of public policy. *See id.*

44. *See* Thomas, *supra* note 16, at 802.

45. *See, e.g.,* *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). This connection is more commonly described as the nexus between exactions and impacts. *See* Nicholas V. Morosoff, Note, "Take my Beach, Please!": *Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823, 824 (1989).

use exactions as a tool, local governments must depend even more upon ad valorem taxes as a key source of revenue to satisfy public needs. Additionally, total service charge collections appear to be faltering, also resulting in increased reliance on ad valorem taxes.⁴⁶

When an unincorporated area incorporates to form a municipality, the new municipality essentially withdraws from certain elements of the county taxing unit⁴⁷ and, with some exceptions, becomes responsible for providing its own municipal government and many of its own municipal services,⁴⁸ including code enforcement, garbage collection, street cleaning, landscaping, and fire and police protection.⁴⁹ Decisionmaking authority likewise shifts to the municipality, authorizing the governing municipal body to exercise those powers delegated by and implied from its municipal charter.⁵⁰ Incorporation localizes control of a community, making the municipal government directly and exclusively accountable to local residents.⁵¹ It can also lower taxes of "donor communities"⁵²

46. In fiscal year 1993-94 service charge collections totaled \$351,029,942. See 1995 FLORIDA TAX HANDBOOK 119 (1995). Fiscal year 1994-95 estimates project a 4.99% decrease in total service charge collections. See *id.* Total service charge collections for fiscal year 1995-96 were expected to increase only .69%. See *id.* Each year between 1989-1994 total service charge collections increased at rates ranging from 4.46% to 84.35%. See *id.*

47. Some counties may levy two kinds of ad-valorem tax. See Tasker, *supra* note 17, at J4. For example, Metropolitan-Dade County levies a service tax on the entire county and a second service tax on the county's unincorporated communities. See *id.* The county-wide tax funds services that are provided to the entire county include: schools, public health, major roads, sophisticated police labs, and the medical examiner's office. See *id.* This tax is not affected by the incorporation of a community within the county. See *id.* On the other hand, the second tax, levied by the county to provide unincorporated areas with municipal services like: zoning, police, and garbage collection, is impacted by municipal incorporation. See *id.* The newly incorporated municipality, not the county, would be empowered to collect this tax. See *id.*; see also FLA. CONST. art. VIII, § 6(f) (stating that Metro-Dade County may exercise municipal powers to the extent that such power is not inconsistent with the powers of existing municipalities or general law).

48. See Tasker, *supra* note 17, at J4.

49. See *id.*

50. See Stanley L. Seligman & Robert L. Beal, *The Sovereignty of Municipalities: Out Again, When Again*, FLA. B. J., June 1976, at 338.

51. See Lieberman, *supra* note 8, at 1438-44.

52. A donor community is one that pays taxes for services which are predominately used by other populations who use those services in disproportion to their payment in taxes. See generally Marjorie Lambert, *7 Unhappy Dade Groups Mount Drive to Form Cities*, FT. LAUD. SUN SENT., Mar. 26, 1995, at B1.

that under the county taxing system contribute more in taxes than they receive in services.⁵³

Sparked largely by a desire to retain a greater percentage of scarce tax revenues, many communities are pursuing the prospect of municipal incorporation. In 1995, seven communities in Dade County alone announced their desire to incorporate.⁵⁴ Additionally, the communities of Wellington⁵⁵ in Palm Beach County and Weston⁵⁶ in Broward County instituted campaigns for their own local governments and incorporated in 1995 and 1996, respectively.⁵⁷ Current incorporation efforts represent a \$41 million dollar revenue flight problem for South Florida's three largest counties.⁵⁸ Consequently, in 1996 Dade County instituted a freeze out on incorporation efforts for at least a year, recognizing the rapid erosion of its tax base due to wealthy neighborhoods incorporating.⁵⁹ To combat revenue problems caused by

53. See *id.* Lambert points out that many supporters of incorporation in Dade County are inspired by the example of Key Biscayne, which was able to lower its taxes and increase services after incorporating. See *id.*

54. See Dexter Filkins, *City Fever Sweeping the County*, MIAMI HERALD, June 4, 1995, at B1, B5; see also Lambert, *supra* note 52, at B1.

55. See Diane Hirth, *Wellington Moves Closer to City Status: State Senate Clears Way for Community to Vote on Incorporation*, FT. LAUD. SUN SENT., May 12, 1995, at B1.

56. See Glenn B. Sterling, *In Some Ways Weston Already Looks Like, Functions as a City*, FT. LAUD. SUN SENT., Feb. 7, 1995, at A17; see also Battinto Batts, Jr., *Weston Study to Determine Cost of Becoming a Broward City*, FT. LAUD. SUN SENT., Oct. 4, 1994, at B1.

57. See Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129 (Wellington incorporation); Act effective June 2, 1996, ch. 96-472, 1996 Fla. Laws 43 (Weston incorporation).

58. The seven Dade County communities considering incorporation in 1995 had a 1995 tax base of \$107,948,500 and represented a potential \$32,691,646 revenue flight problem for Dade. See Lambert, *supra* note 52, at B1. In 1995, it was estimated that the incorporation of Weston would cause a \$1.8 million revenue flight problem for Broward County. See Evelyn Larrubia, *Report Says Weston Can Run Itself*, FT. LAUD. SUN SENT., Apr. 4, 1995, at B1. 1995 estimates of the cost of Wellington's incorporation calculated that Palm Beach County would lose over \$7.4 million. See Diane Hirth, *Wellington Needs Rural Areas*, FT. LAUD. SUN SENT., Mar. 15, 1995, at B5. In total, estimates in 1995 found that Dade, Broward, and Palm Beach Counties stood to lose almost \$41.9 million from the incorporation wave. See *id.*

59. See Jacqueline Bueno, *Dade Ponders a Future as Miami's Caretaker*, WALL ST. J., Dec. 11, 1996, at F1 (reporting on Dade County's response to numerous rich neighborhoods' recent incorporation); see also Martin Wisckol, *Decision to Abolish Miami Up to Voters*, FT. LAUD. SUN SENT., Jan. 8, 1997, at 1A. In fall of 1996, several Dade communities officially announced their intentions to begin incorporation efforts to the Dade Board of County

incorporation, Miami residents are considering dissolving the city of Miami, thereby allowing Dade County to take over the municipal services of the former city.⁶⁰ With this move, Dade County would absorb Miami's financial debts and help keep Miami afloat by offering a higher per-capita tax roll value to pay for current Miami residents' services.⁶¹ However, some Miami officials fear that the unincorporation of Miami would add fuel to the incorporation wave by prompting the remaining affluent neighborhoods within Miami to incorporate, leaving only poor neighborhoods.⁶²

A. Dumping the Tea in the Harbor: The Call for Representative Government

"Taxation without representation is tyranny."⁶³

Incorporation supporters have likened the incorporation wave to the Boston Tea Party—a stand against taxation without representation.⁶⁴ They are angered by what they view as bloated and unresponsive county government and want greater control over how their taxes are spent.⁶⁵ Proponents argue that the best way to make government responsive to community interests is to make it a community government.⁶⁶ The theory seems facially

Commissioners. Incorporation proceedings were deferred for these communities, which include Miami Lakes, Doral, Palmetto Bay, and Country Club Lakes. See Falsey Interview, *supra* note 5.

60. See Bueno, *supra* note 59, at F1.

61. See *id.* Dade County would be responsible for providing services to the poorer areas of Miami. Miami's annual per-capita tax roll value is about \$31,000, while Dade County's value totals about \$38,655. See *id.* Thus, Dade County would absorb Miami's lower tax base, which might cause a potential financial struggle for the County, as less money would be available per capita but additional services would have to be provided. See *id.*

62. See *id.*

63. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of James Otis).

64. See Lambert, *supra* note 52, at B1 ("[P]roponents compare their uprising with the Boston Tea Party, a revolt against taxation without representation.").

65. See *id.*

66. See generally Ankur J. Goel, et al., Comment, *Black Neighborhoods Becoming Black Cities: Group Empowerment, Local Control, and the Implications of Being Darker than Brown*, 23

sound: A decentralized government operating at a neighborhood level will better serve that neighborhood because its constituents' interests should be more homogeneous.

1. *Control of Local Government*

Many communities are embracing incorporation because of a general dissatisfaction with large and impersonal county government.⁶⁷ Residents of Florida's unincorporated communities often complain that distant county governments are accountable to many widely scattered and dissimilar communities and do not respond adequately to their particular concerns.⁶⁸ Voters complain of disfranchisement and argue that county commissioners ignore the problems of voters outside their particular county districts.⁶⁹

Disfranchisement has become particularly problematic now that some counties have switched from a county-wide, or at-large, election system to a district election system.⁷⁰ Under the county-wide election system, each voter in the county could vote on the entire county ballot.⁷¹ Now, under a district election system, each district within the greater county elects only its district representatives.⁷² A voter no longer has a voice in selecting each member of the county commission.⁷³ Consequently, the power of many communities that historically had produced a large voter turnout has been diluted.⁷⁴ As one Aventura⁷⁵ resident described

HARV. C.R.-C.L. L. REV. 415, 418 (1988) (describing the incorporation of predominately-minority communities and the need for self-empowerment).

67. See Lambert, *supra* note 52, at B1.

68. See *id.*

69. See *id.*

70. This change was sparked largely by *Meek v. Metro Dade County*, 805 F. Supp. 967 (S.D. Fla. 1992), which held that Dade County's county-wide election system unlawfully diluted African American and Hispanic voting power and excluded minorities from holding office. However, recent decisions of the United States Supreme Court may call into question the constitutionality of such race-conscious districting. See *Miller v. Johnson*, 115 S. Ct. 2475 (1995) (holding that Georgia's congressional redistricting plan violates the equal protection clause).

71. See Tasker, *supra* note 17, at J4.

72. See *id.*

73. See *id.*

74. See *id.*

prior to Aventura's incorporation: "[E]very one of the candidates was up here campaigning, because they knew we were the ones turning out the votes. Now we only have one commissioner, and none of the other commissioners could care less about us because we don't vote for them."⁷⁶

2. *Visions of Marbury: The Appeal of Localizing Government*

The idea that localization of government begets more responsive and effective government is deeply ingrained in the American ethos.⁷⁷ This idea stems from a Jeffersonian notion that local government is an effective way to ensure citizen participation in government.⁷⁸ Incorporation evidences a belief that citizens are more apt to participate in smaller, more localized government because they are more likely to believe that their participation counts.⁷⁹ This sense of "civic effectiveness" encourages more participation, which, in turn, restores decisionmaking power to the community.⁸⁰ Additionally, the theory suggests that a more localized government should face fewer competing and conflicting demands from citizens than a larger county government. The rationale is the unified concerns of one local community become diluted at the county level. Each separate community has its own

75. Aventura, located in Dade County, incorporated in 1995. See Wisckol, *supra* note 59, at 1A.

76. Lambert, *supra* note 52, at B1.

77. For an insightful analysis of the various defenses of localization and fragmentation of government, see Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775, 825-30 (1992).

78. Jefferson described the town meeting system of government as "the wisest invention ever devised by wit of man for the perfect exercise of self-government" George W. Liebmann, *Devolution of Power to Community and Block Associations*, 25 URB. LAW. 335, 336 (1995), *citing* Letter from Thomas Jefferson to Samuel Rercheval, July 12, 1816, in 12 AUTOBIOGRAPHICAL WRITINGS 8 (1905).

79. See Briffault, *supra* note 77, at 827-28; see also Liebmann, *supra* note 78, at 337 (stating that decreased voter and political participation have inspired drives for more liberal incorporation laws).

80. See Briffault, *supra* note 77, at 827-28; see also Liebmann, *supra* note 78, at 337 (stating that local government helps to preserve a necessary element of free government, citizen participation).

separate demands.⁸¹ For example, an unincorporated Aventura's unified request for more landscaping on Country Club Boulevard was one of many requests for street beautification on the county commission's calendar. However, after Aventura's incorporation, the new municipal government is only accountable to the demands of Aventura residents.⁸²

Localization of government also provides more basic benefits. Citizens are closer to their local officials. For example, Aventura residents no longer must drive eighteen miles to communicate with their government officials.⁸³ Residents can walk to their local town hall to voice concerns over landscaping, potholes, and barking dogs.⁸⁴

Incorporation supporters argue that localization restores control of government to people who are both familiar to and familiar with the community.⁸⁵ The difference is perceived as a choice between a government of "folks you know" and a government that is accountable to someone else.⁸⁶ One Sunny Isles resident accurately described the sentiment stating: "I don't want to destroy this county, but a lot of those commissioners don't even know where Sunny Isles is."⁸⁷

B. Will Localization of Government Improve Local Government?

Jefferson's theory suggests that residents of incorporated municipalities should be more satisfied with their municipal government and services than are residents of the larger

81. Thomas Jefferson advised, "[D]ivide the counties into wards . . . Begin them only for a single purpose; they will soon show for what others they are the best instruments." Liebmann, *supra* note 66, at 335 (cited in Letter from Thomas Jefferson to Joseph C. Cabell, Feb. 2, 1816, in 14 AUTOBIOGRAPHICAL WRITINGS 419 (1905)).

82. Only "electors" can vote in municipal elections. See FLA. STAT. § 98.091(3) (1995). An elector of a municipality must be a resident of that municipality. See *id.* § 166.032.

83. See Tasker, *supra* note 17, at J4.

84. See *id.* at J1, J4 (providing a vivid, Mayberriesque description of an incorporated Aventura).

85. See *id.* (providing an image of life in a locally-governed community).

86. Prior to incorporation, one Aventura resident envisioned an incorporated Aventura as having residents chatting with local neighbor-officials on the street during morning walks. See *id.* at J4.

87. Filkins, *supra* note 54, at B5.

unincorporated county. However, recent studies indicate that satisfaction with public services bears little relation to whether a community is incorporated.⁸⁸ In fact, a majority of residents in many of the Dade County communities considering incorporation have favorably reviewed county police, fire, garbage, and library services.⁸⁹ In all but three of these communities, a majority of the unincorporated Dade County residents responding to the survey also expressed a favorable opinion of the county parks and recreation services.⁹⁰ Only county code enforcement and county planning and zoning received unanimous disapproval from Dade County's unincorporated communities.⁹¹ Surprisingly, these figures are well in line with the satisfaction levels of many of Dade's incorporated communities.⁹² In fact, the only strong correlation evidenced by the study was the positive correlation

88. See generally Todd Hartman, *City or County, Residents Have Similar Complaints*, MIAMI HERALD, July 16, 1995, at MB Neighbors 3, 67 (comparing satisfaction levels among residents of unincorporated Dade County with satisfaction levels among residents of Dade's incorporated municipalities).

89. See *id.* In many respects satisfaction levels among residents of unincorporated Dade County rivaled many of the surveyed municipalities. For example, in the unincorporated community of West Kendall, 66.8% of the residents surveyed responded that their police protection was excellent or good. See *id.* In the unincorporated community of Westchester, this figure was 64.8%. See *id.* Before incorporation, the area of Sunny Isles returned police approval ratings of 63.4%, and the non-seceding remainder of Dade County returned ratings of 61.8%. See *id.* These figures are in line with or superior to a number of the surveyed municipalities including: Hialiah (65.4%), Miami (58.9%), North Miami (68.1%), Miami Beach (66.8%), and Opa Locka (35.5%). See *id.* Similarly, residents of unincorporated Dade County showed a general satisfaction with their library services that rivaled, and in some cases surpassed, many of the surveyed municipalities. See *id.* A comparison of the percentage of residents of the unincorporated county who rate their library service as excellent or good with the responses of a number of Dade municipalities proves illustrative. See Appendix, Table 1. Since this survey was taken, three Dade County communities have actually incorporated.

90. See Hartman, *supra* note 88, at MB Neighbors 3, 6-7.

91. See *id.* Not surprisingly, a majority of residents in many of the incorporated communities and unincorporated communities responded unfavorably. More interesting perhaps are the communities that responded favorably. The unincorporated communities of West Kendall and Westchester and the incorporated communities of Key Biscayne, Miami Beach, and Coral Gables expressed general satisfaction with their code enforcement services. See *id.* Only Key Biscayne and Coral Gables gave favorable reviews to their planning and zoning officials. See *id.* The only connection between these two communities is their notable affluence in comparison to other communities surveyed. See *id.*

92. See *id.*

between a community's affluence and its satisfaction with local services.⁹³ By contrast, incorporation may improve resident satisfaction in some predominately minority communities, where the variables involved with incorporation create a very different equation.⁹⁴ Destiny, a predominately African American community in Dade County, is a current example.⁹⁵

1. Race and the "Destiny" of a Little Community Seeking Self-Determination

A strange twist on the traditional incorporation scenario comes from a number of predominantly African American communities seeking self-empowerment.⁹⁶ A recent example is the community of Destiny in Dade County.⁹⁷ In sharp contrast to the integrationist philosophy of the 1960s civil rights movement, these incorporationists argue that minorities can best empower themselves by establishing separate, self-reliant municipalities.⁹⁸ Advocates of minority neighborhood incorporation maintain that by incorporating, they can employ a pro-active approach to discrimination in the provision of municipal services.⁹⁹ For example, residents of an incorporated minority municipality could address problems of police brutality *ex ante* by hiring a police chief whom they feel is attentive to their needs and by creating citizen review boards.¹⁰⁰ Incorporation also could allow minority communities to govern themselves, rather than relying upon county governments that many residents view as being predominantly white and unresponsive to the needs of minorities.¹⁰¹ To many minorities, the pro-active option of self-empower-

93. *See id.*

94. *See* Goel, *supra* note 66, at 473-81.

95. *See* Marjorie Lambert, *New City Might be Dade's Destiny*, MIAMI HERALD, June 1, 1995, at B2.

96. *See generally* Goel, *supra* note 66 at 440-60 (analyzing the incorporation of minority communities).

97. *See* Filkins, *supra* note 54, at B1, B5 (discussing the particular issues facing Destiny's incorporation drive).

98. *See* Goel, *supra* note 66, at 477.

99. *See id.* at 439.

100. *See id.* at 438.

101. *See id.* at 447-48.

ment is more appealing than the reactive and uncertain approach of seeking vindication post-injury in the courts.¹⁰² However, the economic feasibility of many such communities, including Destiny, is questionable.¹⁰³ Unlike donor municipalities, these communities often receive more in services than they pay in taxes.¹⁰⁴ In many cases, incorporation requires an increase in taxes to maintain existing service levels.¹⁰⁵ The question is one of self-determination and fair representation. It is, in essence, more tea in the harbor.

2. *“An Offer You Can’t Refuse:” Decreased Taxes and Improved Services*

Minority empowerment movements generally are the exception to the incorporation norm.¹⁰⁶ As a matter of course, donor communities tend to incorporate to reduce taxes.¹⁰⁷ Donor communities are affluent communities whose tax revenues subsidize certain services to the county’s poorer regions.¹⁰⁸ If the economic disparity between the donor community and the rest of the county is substantial, the donor community’s tax burden will probably be substantial because some of the donor’s tax revenues

102. See *id.* at 438.

103. See *id.* at 480-81; see also Filkins, *supra* note 54, at B1, B5 (citing to the Destiny feasibility study, which concludes that Destiny would have to raise taxes to maintain its current level of services); Lambert, *supra* note 52, at B1.

104. See generally Lambert, *supra* note 52, at B1 (noting that the community of Destiny receives more in services than it pays in taxes).

105. See Filkins, *supra* note 54, at B1, B5.

106. See *id.* at B1, B5; see also Lambert, *supra* note 52, at B1.

107. See Lambert, *supra* note 52, at B1. See generally Tasker, *supra* note 17, at J1, J4.

108. See Tasker, *supra* note 17, at J1, J4. Metropolitan-Dade County, like many other counties, levies two kinds of property taxes: a service tax on the entire county, including incorporated areas, and second service taxes on the county’s unincorporated communities. See *id.* The county-wide tax funds services that are provided to the entire county, including schools, public health, major roads, sophisticated police labs, and the medical examiner’s office. See *id.* This tax is not affected by the incorporation of a community within the county. See *id.* On the other hand, the second tax, levied by the county to provide unincorporated areas with municipal services, such as zoning, police, and garbage collection, is impacted by municipal incorporation. See *id.* The newly incorporated municipality, not the county, would be empowered to collect this tax. See *id.*; see also FLA. CONST. art. VIII, § 6(f) (stating that Metro-Dade County may exercise municipal powers to the extent that such power is not inconsistent with the powers of existing municipalities or general law).

will be used to subsidize neighboring communities.¹⁰⁹ By incorporating, the donor community can eliminate this subsidy and thereby reduce its taxes.¹¹⁰ The tax ramifications of incorporation have in many cases been so dramatic that the incorporating community has been able to decrease its tax burden while simultaneously increasing municipal services.¹¹¹ In fact, six of the seven Dade County communities that engaged in the incorporation process in 1995 paid more in taxes than they received in services.¹¹² In West Kendall, this gap totaled over \$13,793,200.¹¹³ In East Kendall, the figure was \$7,922,300.¹¹⁴ The total gap among the six communities was \$32,691,646.¹¹⁵ Coupled with the benefits of locally controlled government, incorporation presented these donor communities with a \$32,691,646 “offer they can’t refuse.”

109. See Tasker, *supra* note 17, at J1, J4.

110. For a detailed breakdown of the financial impact of incorporation, see DELTONA INCORPORATION STUDY STEERING COMM. & VOLUSIA COUNTY DEV. AND CODE ADMINISTRATION DEP'T, COUNTY COUNCIL OF VOLUSIA COUNTY, FLORIDA, AN ANALYSIS OF THE FEASIBILITY OF INCORPORATION OF DELTONA, FLORIDA 76 (Jan. 22, 1987) (on file with the *Journal of Land Use and Environmental Law*) [hereinafter DELTONA FEASIBILITY REPORT] (indicating that incorporation, on the average, would reduce the property taxes of Deltona residents). For commercial property, the average projected tax decrease was over 47.8%. See *id.* at 70. This computation was derived by dividing Deltona's current average commercial property tax (\$396.68) by the projected average commercial property tax after incorporation (\$189.90) plus a required utility franchise fee (\$60.22). See *id.* Since this report, the Legislature approved the incorporation of Deltona in 1995, and Deltona's incorporation was finalized by referendum in 1996. See Act effective June 17, 1995, ch. 95-498, 1995 Fla. Laws 148; Act effective May 25, 1996, ch. 96-441, 1996 Fla. Laws 1.

111. By incorporating in 1992, Key Biscayne was able to augment its level of services while lowering its tax rate to the lowest rate of any Dade County municipality. See Dexter Filkins, *The Moses of Metro Secessionists*, MIAMI HERALD, July 13, 1995, at A1, A8; see also *Incorporate Metro's City*, MIAMI HERALD, July 12, 1995, at A10; Lambert, *supra* note 52, at B1.

112. See Lambert, *supra* note 52, at B1.

113. See *id.*

114. See *id.*

115. See *id.*

IV. ANALYSIS OF FLORIDA'S FORMATION OF MUNICIPALITIES ACT AND THE PROBLEMS WITH MUNICIPAL INCORPORATION

A. *Breakdown of the Act*

The Act¹¹⁶ was first enacted in 1974¹¹⁷ and currently states that its purpose is to “provide standards, direction, and procedures for the formation of municipalities in this state and the provision of municipal services so as to: (1) allow orderly patterns of urban growth and land use. (2) assure adequate quality and quantity of local public services. (3) ensure financial integrity of municipalities. (4) eliminate or reduce avoidable and undesirable differentials in fiscal capacity among neighboring local governmental jurisdictions. (5) promote equity in the financing of municipal services.”¹¹⁸ The Act provides the exclusive procedure pursuant to general law for forming or dissolving a municipality, except where a county operates by a home rule charter that provides for an exclusive method as specifically authorized by the Florida Constitution.¹¹⁹ Despite its lofty aims, the Act lacks the teeth necessary to address the revenue flight problem facing South Florida.¹²⁰ A closer review of the statute illustrates that assumption.

The Formation of Municipalities Act provides in pertinent part:

- (1) The incorporation of a new municipality, other than through merger of existing municipalities, must meet the following conditions in the area proposed for incorporation:

116. The Formation of Municipalities Act was formerly known as the Formation of Local Governments Act. See Act effective Oct. 1, 1989, ch. 89-169, 1989 Fla. Laws 603 (amending chapter 165, *Florida Statutes* and effecting the name change).

117. Act effective July 1, 1974, ch. 74-192, 1974 Fla. Laws 513 (codified at FLA. STAT. ch. 165 (1995)).

118. FLA. STAT. § 165.021 (1995).

119. See *id.* § 165.022. The exception will be important in considering the particular issue facing Dade County.

120. In comparison, Kentucky's law governing incorporation requires: (1) a petition signed by two-thirds of the proposed territory's registered voters or a number of real property owners equal to the owners of at least two-thirds of the assessed value of the real property in the proposed territory; (2) a determination by the reviewing court that incorporation constitutes a reasonable way of providing the public services sought by voters; and (3) a determination by the reviewing court that the interest of other areas and adjacent local governments will not be unreasonably prejudiced by the incorporation. See KY. REV. STAT. ANN. §§ 81.050-.060 (1995).

(a) It must be compact and contiguous and amenable to separate municipal government.

(b) It must have a total population . . . in the area proposed to be incorporated of at least 1,500 persons in counties with a population of less than 50,000, and of at least 5,000 population in counties with a population of more than 50,000.

(c) It must have an average population density of at least 1.5 persons per acre or have extraordinary conditions requiring the establishment of a municipal corporation with less existing density.

(d) It must have a minimum distance . . . from the boundaries of an existing municipality within the county of at least 2 miles or have an extraordinary natural boundary which requires separate municipal government.¹²¹

1. Compact, Contiguous, and Amenable to Separate Municipal Government Requirement

The Act requires that an incorporating municipality be compact and contiguous.¹²² Compactness, unity, and continuity are considered necessary and implied elements of a city.¹²³ An attempt to incorporate two distinct, detached tracts of land as one corporate territory is void.¹²⁴

The compact and contiguous requirement ensures that an incorporated municipality is a geographically unified community,¹²⁵ which as a whole will benefit from incorporation.¹²⁶ Additionally, the prerequisite prevents a prospective municipality from incorporating large tracts of rural land solely to increase its tax base.¹²⁷ The rationale of the requirement is consistent with the general principle that an area should only be incorporated if the

121. FLA. STAT. § 165.061(1) (1995).

122. *See id.* § 165.061(1)(a).

123. *See* 62 C.J.S. *Municipal Corporations* § 9 (1987).

124. *See* *Enterprise v. State ex rel. Attorney General*, 29 Fla. 128, 138 (Fla. 1892).

125. *See generally* OSBORNE M. REYNOLDS, JR., *HANDBOOK OF LOCAL GOVERNMENT LAW* § 67 (1982) (describing and noting the overlap of the requirements of compactness, contiguity, and community).

126. *See, e.g., State ex rel. Davis v. Lake Placid*, 147 So. 468, 471-72 (Fla. 1933) (noting that Legislature may not incorporate within a municipality rural lands removed from the benefits of incorporation).

127. *See id.*

conditions making incorporation desirable, namely, the facilitation of municipal services, are present.¹²⁸

However, requirements of compactness and contiguity do not appear to be substantial obstacles to most of the communities currently considering incorporation. In fact, none of the communities currently seeking to incorporate have been challenged on either ground.¹²⁹ More importantly, the requirement fails to address the key issue in the current incorporation debate—the secession of compact and contiguous affluent communities to the detriment of the remaining county.¹³⁰ Any resolution of the current incorporation debate should address the needs of the remaining county, an element that is lacking in the Formation of Municipalities Act.¹³¹

“Amenable to separate government” has not been interpreted by Florida’s courts. However, most of the communities currently incorporating are donor communities that can afford to pay for their own municipal services.¹³² The provision could preclude incorporation of communities that receive more in services than they pay in taxes; however, these communities are the exception to the incorporation norm.¹³³ Again, the statute is an inadequate attempt at addressing the current incorporation dispute.

2. Population

In comparison to many other southeastern states, Florida’s minimum incorporation population threshold of 1,500 in counties with less than 50,000 persons and 5,000 in counties with more than 50,000 inhabitants is relatively lofty.¹³⁴ However, Florida’s recent

128. *See id.*

129. The reason why communities seeking incorporation do not encounter compact and contiguous obstacles is likely because the current incorporation wave has come from developed communities within South Florida’s more densely populated counties. *See* Milan J. Dluhy, *Dade County’s Incorporation Fever*, *MIAMI HERALD*, Apr. 9, 1995, at 1M, 5M.

130. *See* FLA STAT. § 165.061 (1995).

131. *See id.* ch. 165.

132. *See* Filkins, *supra* note 54, at B1, B5.

133. In 1995, Destiny was the only incorporating community that was subsidized. *See* Lambert, *supra* note 52, at B1.

134. *See, e.g.*, GA. CODE ANN. § 36-31-3 (1993) (requiring that a proposed municipality have a minimum population of 200 persons); ALA. CODE § 11-41-1 (1989) (requiring that a proposed municipality have at least 300 persons to incorporate); KY. REV. STAT. ANN. §

incorporation wave has come almost entirely from large and mid-sized communities¹³⁵ within Florida's more developed counties.¹³⁶ Even with the heightened population requirement for larger counties, secessionists in densely populated counties have no difficulty meeting the population threshold.¹³⁷ While the threshold arguably may deter smaller communities from incorporating, it fails to address the current concern of many South Florida counties—the secession of larger, affluent communities from the greater county.

3. Density

Florida, like many other states,¹³⁸ has a minimum density threshold for incorporating municipalities.¹³⁹ A community seeking incorporation must have a minimum density of 1.5 persons per acre unless the Legislature determines that extraordinary circumstances merit waiving the density requirement.¹⁴⁰ The density requirement helps to assure that incorporating communities would genuinely benefit from incorporation and that the incorporating community needs additional municipal services.¹⁴¹ The density requirement also inhibits incorporating municipalities from including contiguous, but unrelated, rural areas to increase

81.060 (1993) (setting the minimum population threshold for incorporation at 300 persons).

135. See Dluhy, *supra* note 129, at 1M, 5M. (noting the populations and density of the Dade County communities proposing incorporation).

136. See *id.*

137. Of the communities that launched campaigns for incorporation in 1995, all had populations well in excess of the minimum population requirement. In Dade County, the populations of the various communities in 1995 were: Aventura (19,400); Sunny Isles (11,772); Pinecrest (15,800); Destiny (69,785); East Kendall (81,940); and West Kendall (154,797). See *id.* at 5M. Likewise, the Palm Beach County community of Wellington, with a population of 25,000, well exceeded the threshold. See Hirth, *supra* note 58, at B1. Weston, in Broward County, has a population of 17,000. See Larrubia, *supra* note 58, at B1.

138. See, e.g., GA. CODE ANN. § 36-31-3 (1995) (requiring an average resident population of at least 200 persons per square mile). See generally REYNOLDS, *supra* note 125, at § 67 (describing the requirements for municipal incorporation in various jurisdictions).

139. See FLA. STAT. § 165.061 (1)(c) (1995).

140. See *id.*

141. "There must be a basis for additional governmental facilities; otherwise those provided by the state and county are ample." 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989).

tax revenues.¹⁴² For example, a community with a population density only slightly above the 1.5-person-per-acre threshold would not be able to incorporate sparsely populated rural areas and maintain a density above the minimum requirement.

The density requirement may present an obstacle to the incorporation of some communities.¹⁴³ However, only one of the seven communities in Southeast Florida seeking incorporation has run afoul of the density requirement.¹⁴⁴ It remains unclear whether the current density threshold will prevent affluent communities from continuing to secede, particularly considering that the incorporation wave has largely been a phenomenon of Southeast Florida's more densely populated counties.¹⁴⁵

142. See *id.* § 39 (commenting that an abuse of power could arise if a municipality attempts to incorporate an area with no resident population or an area that is small and disproportionate to an excessive area).

143. The Act's density requirement initially was a problem to be overcome by Wellington. See *Wellington Clears Hurdles*, FT. LAUD. SUN SENT., May 4, 1995, at B3 [hereinafter *Wellington Clears*]. However, Wellington succeeded in its incorporation attempts in 1995. See Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129.

144. See *id.*; see also Dluhy, *supra* note 129, at 5M (indicating that the density of each of the Dade County communities proposing incorporation clearly exceeds the statutory requirement).

145. The incorporation drive has come from communities in Dade, Broward, and Palm Beach Counties. See Filkins, *supra* note 111, at A1, A8.

4. Proximity

A community seeking to incorporate must be at least two miles away from another municipality.¹⁴⁶ However, the Act provides an exception for communities with extraordinary natural boundaries that require the community to establish separate municipal government.¹⁴⁷ The proximity requirement helps to ensure the presence of a genuine need for additional governmental facilities.¹⁴⁸ If the community can be adequately served by a neighboring municipality or by the county, then, theoretically, incorporation is not necessary.¹⁴⁹

The proximity requirement has been an obstacle to the incorporation of some communities.¹⁵⁰ However, the provision does not prevent communities that meet the condition from seceding from the county,¹⁵¹ even when secession will detrimentally impact the county.¹⁵² Therefore, a community that meets the technical requirements of the Act can be incorporated, even if incorporation would severely prejudice neighboring communities.

5. The Advisory Nature of the Formation of Municipalities Act

“For all intents and purposes the [Formation of Municipalities]Act is advisory.”¹⁵³

146. See FLA. STAT. § 165.061 (1)(d) (1995).

147. See *id.*

148. See 12 FLA. JUR. 2D *Counties, Etc.* § 38 (1989).

149. See *id.*

150. In 1995, Wellington did not satisfy the Act's proximity requirement as initially proposed. See *Wellington Clears*, *supra* note 143, at B3. Sunny Isles also ran afoul of the proximity requirement. It is less than two miles away from the municipalities of Bal Harbor and North Miami Beach. See generally 1992 COMMERCIAL ATLAS & MARKETING GUIDE (Rand McNally ed., 123d ed. 1992). Wellington was incorporated in 1995. See Act effective June 17, 1995, ch. 95-496, 1995 Fla. Laws 129; Wisckol, *supra* note 59, at 1A. Sunny Isles is moving toward incorporation. See Falsey Interview, *supra* note 5.

151. In fact, the provision has not prevented the current Dade County incorporation drives from going forward. See Tasker, *supra* note 17, at J1, J4.

152. The Act requires only that the area meet the listed conditions. See FLA. STAT. § 165.061 (1995). The Act contains no condition prohibiting incorporation when incorporation would prejudice neighboring communities or the greater county. See *id.*

153. Telephone Interview with David Ramba, Assistant General Counsel to the Florida League of Cities (Jan. 29, 1996).

Perhaps the most significant shortfall of the Act is that the Legislature is not bound by it. While politically the Legislature may feel pressure to comply with its own standards, under the Act it is not legally obligated to do so. As a matter of statutory interpretation, special law supersedes general law.¹⁵⁴ Municipalities must be incorporated by special act of the Legislature.¹⁵⁵ Therefore, despite providing well-defined standards, the Legislature is free to incorporate a municipality in contravention of some or all of those standards.¹⁵⁶

B. The Incorporation Problem in Perspective

Currently, over one million people live in unincorporated Dade County.¹⁵⁷ This figure is expected to swell by 35%, or 700,000 people by the year 2010.¹⁵⁸ Seventy-six percent of this growth is expected to be in unincorporated areas of the county.¹⁵⁹ By 2010, Metro-Dade County could be responsible for providing municipal services to over 1.7 million people.¹⁶⁰ Dissatisfaction with the large and impersonal county government can be expected to increase with the population.¹⁶¹

Currently, unincorporated communities have an option that allows them to escape the specter of bloated county government and, in many cases, lower taxes.¹⁶² More importantly, under existing Florida law, the impact of such action on the remaining areas of the county is irrelevant.¹⁶³ Absent legislative attention, the

154. See *Rowe v. Pinellas Sports Auth.*, 461 So. 2d 72 (Fla. 1984) (holding that a special act prevails over a general law unless the general law amounts to an overall revision or general restatement of law on the same subject).

155. See FLA. STAT. § 165.041(1) (1995).

156. See, e.g., DELTONA FEASIBILITY REPORT, *supra* note 110, at 16-17 (addressing Deltona's deficiencies in meeting the statutory requirements for incorporation and stating that incorporation is still possible if extraordinary conditions exist).

157. See Dluhy, *supra* note 129, at 5M.

158. See *id.*

159. See *id.*

160. See *id.*

161. See *id.*

162. See discussion *supra* Part II and accompanying footnotes.

163. See *supra* notes 151-152.

problem will become self-perpetuating.¹⁶⁴ Residents will continue to flock to South Florida's unincorporated communities.¹⁶⁵ As these areas grow, new communities will face the tempting incorporation option.

C. Impact of the Growth Management Act on Incorporation

One aspect of municipal incorporation which is often overlooked by residents of a proposed municipality is the impact of Florida's growth management laws.¹⁶⁶ These laws impose many requirements on new municipalities which county government previously addressed. While the municipal comprehensive planning process may allow the residents to have more control over the future of their community than in the county planning process, certain responsibilities will fall on the residents to provide for needs of residents which may have been provided for in other areas of the county. These requirements include parks and recreation areas,¹⁶⁷ conservation and protection of natural resources,¹⁶⁸ and affordable housing plans.¹⁶⁹

Many members of a community may prefer that local control of such services as parks and zoning are provided and that the environment is protected and not ignored by the larger county government. However, providing for affordable housing,¹⁷⁰ special housing and group homes,¹⁷¹ and historic preservation¹⁷² may not be so popular. The required housing element of the municipal com-

164. See Dluhy, *supra* note 129, at 5M.

165. See *id.*

166. See The Florida State Comprehensive Planning Act, FLA. STAT. §§ 186.001-.901 (1995 & Supp. 1996) (establishing the state comprehensive planning process); County and Municipal Planning and Land Development Regulation Act, FLA. STAT. §§ 163.3161-.3244 (1995 & Supp. 1996) (requiring local government comprehensive planning requirements including mandatory comprehensive plan requirements such as housing and recreation elements); The Florida Environmental Land and Water Management Act, FLA. STAT. §§ 380.012-.12 (1995 & Supp. 1996); see also FLA. ADMIN. CODE ch. 9J-5 (1997).

167. See FLA. STAT. § 163.3177(6)(e) (1995 & Supp. 1996).

168. See *id.* § 163.3177(6)(d).

169. See *id.* § 163.3177(6)(f).

170. See *id.* § 163.3177(6)(f)1d.

171. See *id.*

172. See *id.*

prehensive plan must specify how the municipality will provide for existing housing needs and projected future housing needs.¹⁷³

The affordable housing requirement is particularly relevant to Florida municipal incorporation because it suggests that a community cannot disregard the disadvantaged elements of the community. In fact, section 163.3177, *Florida Statutes* requires municipalities to provide "adequate sites for future housing, including low-income, very-low income, and moderate income families."¹⁷⁴ The communities that are incorporating in Southeast Florida are generally affluent communities that are incorporating, in part, to avoid subsidizing public services to poor areas. Often these affluent areas fear that low income housing near affluent neighborhoods will lower their property values. In practice, the planning statutes do not require the municipality to provide affordable housing within the municipal boundaries.¹⁷⁵ While any existing affordable housing cannot be forced out of the municipality, future affordable housing needs do not need to be provided within the municipal boundaries. The municipality can enter into an inter-local agreement with the county to provide for the future affordable housing needs in another part of the county.¹⁷⁶ Thus, the municipality can prevent the construction of new affordable housing within the municipality while still complying with the statutory obligation to provide affordable housing.

If there is no existing or future affordable housing need in the municipal boundaries, the city will not be required to provide affordable housing.¹⁷⁷ Consequently, if the proposed municipality were to draw the city limits so as only to include affluent areas, the

173. See FLA. ADMIN. CODE r. 9J-5.010 (1997).

174. FLA. STAT. § 163.3177(6)(f)1d (1995 & Supp. 1996). The Growth Management Act requires all Florida jurisdictions to put together a comprehensive plan. See *id.* §§ 163.3161-.3215. Among the elements required in the plan is a housing element, ensuring that jurisdictions anticipate the housing needs of current and future residents, including low income residents. See *id.* § 163.3184. See generally Charles E. Connerly & Marc Smith, *Developing a Fair Share Housing Policy for Florida*, 12 J. LAND USE & ENVTL. L. 63, 69-73 (1996) (discussing Florida's current requirement for jurisdictions to provide housing).

175. See FLA. STAT. §§ 163.3161-.3215 (1995 & Supp. 1996).

176. See FLA. ADMIN. CODE r. 9J-5.010(3)(c)10 (1997).

177. See Telephone interview with Paul Noll, Florida Department of Community Affairs (Aug. 26, 1996).

city may not be required to provide affordable housing at all. In this respect, the comprehensive planning process reinforces existing housing patterns. Communities with little or no affordable housing can attempt to structure their boundaries so as to legally exclude lower income areas.¹⁷⁸

V. OPTIONS FOR REFORM

Four primary options have been considered as possible responses to the incorporation crisis:¹⁷⁹ municipal revenue sharing, requirement of economic balance, quasi-city councils or quasi-city halls, and judicial or administrative review of incorporation proposals.¹⁸⁰ An examination of each proposal and its advantages and disadvantages must be undertaken to correctly assess the best alternative to solve the current incorporation problems in South Florida.

A. *Municipal Revenue Sharing*

Municipal revenue sharing contemplates that all cities in a county contribute to a pool to provide subsidies to the county's poor communities.¹⁸¹ Affluent municipal residents would contribute a portion of their property taxes to fund this subsidy program.¹⁸² A Minnesota legislative proposal provides an example of a possible Florida model. The proposed Minnesota municipal revenue sharing plan would collect a portion of the total municipal property tax revenue (the portion paid on the value above \$200,000) and deposit it into a revenue pool to be shared by all

178. The only exception to this statement is group homes, foster homes, and other special housing. The comprehensive planning laws require that these needs be met. See FLA. STAT. § 163.3177(6)(f)1d. (1995 & Supp. 1996). The inter-local agreement authority for affordable housing discussed above does not extend to other housing needs. See *id.*

179. See Goel, *supra* note 66, at 443-46; see also Filkins, *supra* note 54, at B5.

180. See Filkins, *supra* note 54, at B5.

181. See *id.* The revenue sharing plan proposed by Metro-Dade Planning Director Guillermo Olmedillo should not be confused with the revenue sharing plan set out in the Florida Revenue Sharing Act of 1972. See FLA. STAT. §§ 218.20-.26 (1995).

182. For an illustration, see Dane Smith, *House Backs Tax-Sharing Proposal*, MINNEAPOLIS/ST. PAUL STAR TRIB., May 5, 1995, at B1.

municipalities according to need.¹⁸³ While many Florida incorporationists have expressed qualified support for a revenue sharing plan,¹⁸⁴ such a plan may face constitutional challenges. Municipal revenue sharing redistributes taxes levied upon municipal residents to subsidize services to the county's unincorporated areas.¹⁸⁵ Under the revenue sharing plan, the taxes of municipal residents would be used to fund services provided exclusively to residents of the unincorporated county.¹⁸⁶

Even in the absence of constitutional defects, the future of municipal revenue sharing is questionable because revenue sharing fails to eliminate subsidies.¹⁸⁷ Incorporating communities would still gain the benefit of increased autonomy, but they would pay higher taxes than they would by incorporating under the current system.¹⁸⁸ Arguably, the subsidy under the revenue sharing plan may be more palatable than remaining unincorporated if the contribution requirement is less than the current subsidy. However, in either case, someone must still pay a subsidy.

183. *See id.* The plan's sponsor, Minnesota state representative Myron Orfield, estimates that "the proposed extension of an existing fiscal disparity formula" would redistribute an additional \$100 million a year in property taxes from a few of Minneapolis and St. Paul's most affluent suburbs to the county's average and low income suburbs. *See id.*

184. *See* Filkins, *supra* note 54, at B5.

185. *See id.*

186. *But see* FLA. CONST. art. VIII, § 1(h) (prohibiting municipal property taxes from being used for "services rendered by the county exclusively for the benefit of the property or residents in unincorporated areas").

187. Under a revenue sharing plan an incorporating municipality would continue to pay subsidies to the county. *See* Filkins, *supra* note 54, at B5.

188. The incorporating community under the revenue sharing plan would still pay a subsidy in addition to the cost of providing its own municipal services. However, under the present system, an incorporating community would not pay a subsidy to provide services to residents of the unincorporated county. *See id.*

B. Requirement of Economic Balance

The economic balance option requires the area seeking to incorporate to show that the property values in the area are within a certain dollar cap.¹⁸⁹ Accordingly, more affluent communities seeking to incorporate must draw in poorer communities to lower their average property values to the requisite level.¹⁹⁰ The system would also work the opposite way, requiring a poor community seeking to incorporate to draw in more affluent communities to raise the average municipal property value to the minimum requirement.¹⁹¹

The problems with the economic balance proposal are two-fold. First, under the economic balance plan, affluent communities continue to pay a *de-facto* subsidy.¹⁹² For example, assume the required property value range for a municipality is \$40,000 to \$50,000. A community with an average property value of \$60,000 would have to include areas with average property values below \$40,000 to lower the total average property value to within the \$40,000 to \$50,000 range because only the recipient of the subsidy changes. This occurs because affluent communities generally contribute more in taxes than they receive in services.¹⁹³ The surplus subsidizes services to poorer areas of the county.¹⁹⁴ Under the economic balance system, wealthy areas of a newly-incorporated municipality would continue to subsidize the poor communities within their municipal boundaries.¹⁹⁵ Thus, the subsidy remains, but the recipient changes. The ultimate result remains the same: Affluent communities would continue to pay more for services than they receive, and poor communities would continue to pay for less than they receive.¹⁹⁶

189. *See id.*

190. *See id.*

191. *See id.*

192. *See* discussion *supra* Part IV.B.

193. *See* Tasker, *supra* note 17, at J1, J4.

194. *See id.* at J4.

195. *See* Filkins, *supra* note 54, at B5.

196. While in some cases it may be possible to include areas with low to average property values that are not subsidized (i.e., a fairly densely populated condominium development might not require subsidies), such action defeats the intent of the economic

The economic balance plan is deficient in a second respect. It presumes that divergent areas will cooperate to form and maintain a unified municipality. The current incorporation wave is largely attributable to the inability of Florida communities to agree on how municipal funding and services should be distributed.¹⁹⁷ A viable plan must address the incorporationists' desire for self-governance.¹⁹⁸

C. Neighborhood City Halls and Quasi-city Councils

In an effort to return local control to outlying communities, some counties have proposed implementing a system of neighborhood government within the greater county government structure.¹⁹⁹ The primary examples of such systems are neighborhood city halls and quasi-city councils.²⁰⁰

1. Neighborhood City Halls

The plan to create neighborhood city halls proposes that branch offices of county government be established in unincorporated communities.²⁰¹ Neighborhood city halls would theoretically facilitate outlying communities' access to local government and municipal services.²⁰² Citizens could voice complaints at a local branch office rather than traveling downtown to the county's central office.²⁰³ Additionally, neighborhood city halls would provide county officials with "a forum through which they could maintain close contact with community leaders."²⁰⁴

balance proposal. The plan is designed to require an incorporating municipality to bear some of the county's burden of subsidizing poorer communities.

197. See, e.g., Tasker, *supra* note 17, at J1, J4 (describing Aventura's various reasons for seeking incorporation).

198. See discussion *supra* Part III.

199. See, e.g., Filkins, *supra* note 54, at B5.

200. See Goel, *supra* note 66, at 444-45.

201. See *id.*

202. See *id.* at 445.

203. See *id.*

204. *Id.*

However, the neighborhood city hall has not been widely embraced by local government or community residents.²⁰⁵ Nor does it appear that the plan would be adequate to meet the needs of South Florida's unincorporated communities. Residents of South Florida's unincorporated communities are demanding more than a clearing-house for complaints.²⁰⁶ They are seeking control over local expenditures, a power the neighborhood city hall lacks.²⁰⁷

205. See *id.* (noting two major criticisms of neighborhood city halls: (1) spending funds to increase public image and to buy uneasy inner city peace; and (2) becoming tools for increased central control and circumventing city councils and administrative departments).

206. See generally Tasker, *supra* note 17, at J4 (describing Aventura's various reasons for seeking incorporation).

207. See, e.g., *id.* (describing Aventura's fight to control how its taxes are spent).

2. *Quasi-city Councils*

Proposed quasi-city councils would enable residents of the unincorporated county to have some input in local financial matters.²⁰⁸ Quasi-city councils or community-based administrative centers, are community councils that participate in decisionmaking regarding the preparation of local budgets and the provision of local services.²⁰⁹ Some councils are also empowered with limited authority over zoning matters, police patrols, and minor local matters.²¹⁰

Quasi-city councils are a relatively palatable response to complaints of disfranchisement among residents of South Florida's unincorporated communities. In fact, Dade County residents overwhelmingly support the establishment of quasi-city councils.²¹¹ However, these councils lack budgetary power and generally have minimal administrative authority.²¹² Additionally, the establishment of quasi-city councils does not eliminate the tax incentive to incorporate. Despite strong community support for quasi-city councils, incorporation still presents a better option for many neighborhoods.²¹³ Incorporation would offer a viable solution²¹⁴ to address the tax incentive to secede.²¹⁵

208. See Goel, *supra* note 66, at 444-45.

209. See *id.*

210. See, e.g., Filkins, *supra* note 54, at B5.

211. See Dexter Filkins, *Dade Poll May Slow Rush to Secession*, MIAMI HERALD, July 12, 1995, at A1. Fifty-two percent (52.4%) of Dade County residents surveyed responded that community based administrative centers were a very good idea. See *id.* at A8. Thirty-one percent (31.3%) responded that community-based administrative centers are mostly a good idea. See *id.* Compare the response to community-based administrative centers with the 18.7% support for incorporation. See *id.* Fifty-two percent (52.7%) of the residents surveyed either did not know whether they favored incorporation or wanted to wait for further study. See *id.*

212. See Goel, *supra* note 66, at 444-45.

213. The survey asked residents of unincorporated Dade County whether "establishing community-based administrative centers to handle citizen problems is" (1) a very good idea; (2) a mostly good idea; (3) mostly bad; (4) very bad; or (5) don't know. See Filkins, *supra* note 211, at A8. The strong support for community-based administrative centers evidenced by the survey and a desire to incorporate are not mutually exclusive. A resident who wants to localize governmental control may favor community-based administrative centers as one possible response. The same resident could likely believe incorporation is also a good option. Another possibility is a resident may support the establishment of community-based administrative centers but may be uncertain of, or desire more

D. Judicial or Administrative Determination that Incorporation Will Not Unreasonably Prejudice Adjacent Areas

In Florida, the argument that a community is withdrawing from a county taxing unit to avoid paying county taxes and subsidies to the poor is not an acceptable defense against incorporation.²¹⁶ In fact, reduction of taxes is a perfectly valid reason to incorporate even if the incorporation of the donor community would severely prejudice the greater county.²¹⁷ After the recent incorporation of Pinecrest, Pinecrest vice-mayor, Bob Hingston stated that “[w]e feel we can provide services to the community for less than what [Dade County] cost us. Whatever additional funds we have will be used for start-up costs,” and Aventura mayor Arthur Snyder agreed that incorporation will lower tax increases for at least two years in newly incorporated Aventura.²¹⁸

Some states have limited the ability of communities to incorporate when incorporation would be injurious or prejudicial to neighboring areas by requiring a judicial determination that the incorporation is “right” or “reasonable.”²¹⁹ For example, Mississippi requires that the reviewing court enter an order denying incorporation if it finds that “the proposed incorporation is not reasonable and is not required by the public necessity and convenience.”²²⁰

information about, the prospect of incorporation. For example, Aventura residents voted almost seven to one in favor of incorporation after a feasibility study indicating incorporation would decrease taxes was released in the community. See Marjorie Lambert, *Aventura Residents Reject Dade, Vote Resoundingly for Own City*, FT. LAUD. SUN SENT., Apr. 12, 1995, at B3.

214. See Tasker, *supra* note 17, at J4.

215. See discussion *supra* Part III.

216. See discussion *supra* Part IV (discussing Florida’s statutory provisions for incorporation and the absence of provisions regarding detriment to the remaining unincorporated area).

217. No incorporation effort in Florida has ever been invalidated simply because the incorporating community was incorporating to reduce taxes. Naturally, the conditions making incorporation necessary or desirable must still exist. See *State ex. rel. Landis v. Boyton Beach* 177 So. 327 (1937). More efficient municipal services would seem to be a condition making incorporation desirable to the incorporating community.

218. Weaver, *supra* note 5, at 1B.

219. See, e.g., MISS. CODE ANN. § 21-1-17 (1996).

220. *Id.*

Kentucky requires that a reviewing court determine as a matter of law that incorporation would not severely prejudice the interests of other areas and adjacent local governments.²²¹ Such a requirement would provide courts with an avenue to prevent incorporation in cases where the incorporation would severely prejudice the remaining county.²²² The court would be empowered to review the impact of each incorporation effort on the greater community to determine whether incorporation is right or reasonable.²²³

Any delegation of reviewing power would require clear legislative standards to avoid constitutional challenges. Under article II, section 3 of the Florida Constitution, the respective branches of government are prohibited from exercising any powers pertaining to the other branches.²²⁴ However, the Legislature may vest courts with the authority to determine whether statutory criteria have been satisfied.²²⁵ As long as the Legislature establishes clear criteria for the court to consider in determining the rightness or reasonableness of the incorporation, the statute should survive constitutional challenge.²²⁶

However, the vague language of such a requirement would also empower courts with some latitude to establish new judicial standards for the legislative function of incorporation.²²⁷ Moreover, the requirement that incorporation be right or reasonable does not eliminate the subsidy shell game. Someone will still have to pay the subsidy;²²⁸ however, the court, not the incorporating area, would be the instrumental party in this decision.

221. See KY. REV. STAT. § 81.060 (1)(e) (1995).

222. See *id.* (allowing a court to enter an order denying incorporation if the incorporation would substantially prejudice the interest of other areas).

223. See, e.g., REYNOLDS, *supra* note 125, at § 67 (noting that some jurisdictions require that a court determine incorporation is "right" or "reasonable").

224. See FLA. CONST. art. II, § 3.

225. The separation of powers doctrine is not violated if the executive or judicial body is merely left to execute the expressed will of the Legislature. See, e.g., *Albrecht v. Department of Env'tl. Regulation*, 353 So. 2d 883 (Fla. 1st DCA 1977).

226. See REYNOLDS, *supra* note 125, at § 67.

227. See *id.*

228. A court would merely accept or reject a petition for incorporation. See KY. REV. STAT. § 81.060 (1995). If the court approves the incorporation, the remaining county would pay the entire subsidy. If the court denies the petition, the community seeking incorporation would continue to pay the subsidy along with the county. See *id.*

VI. CONCLUSION

None of the proposals offered by this article present a comprehensive solution to the incorporation problem. A viable solution must increase local autonomy and reduce taxes. Otherwise, incorporation remains a more tempting option. The ideal solution should also provide a mechanism for achieving these objectives while still providing adequate public services and protect public safety in the poorer communities.

No proposal has promised to eliminate subsidy and increase local autonomy to the level of an incorporated municipality. Instead, proposals merely redistribute the current tax burden and provide limited increases in local government control.²²⁹ Local councils increase community autonomy, but they present a less tempting option than incorporation, which offers more autonomy and decreased taxes. Revenue sharing, economic balance, and the requirement that incorporation be "reasonable" minimally augment local authority and merely redistribute the burden to support the county's poor.²³⁰ Ultimately, someone must pay this tax. As is often the case with taxation, the most popular tax will invariably remain "the tax on the other fellow."²³¹

229. See discussion *supra* Part V.

230. See discussion *supra* Part V.

231. A DICTIONARY OF LEGAL QUOTATIONS 166 (Simon James & Chantal Stebbings eds., 1987) (comment of Sir Thomas White during 1917 debate in the Canadian Parliament).

VII. APPENDIX

Table 1

Percentage of Residents of Dade County Who Rated Their Library Services Excellent or Good²³²

| Unincorporated Communities | Incorporated Municipalities |
|----------------------------|-----------------------------|
| West Kendall (70.2%) | Hialiah (53.1%) |
| East Kendall (62.0%) | Miami (51.4%) |
| Pinecrest (52.5%) | North Miami (54.9%) |
| Westchester (73.9%) | Miami Beach (52.1%) |
| Destiny (64.4%) | Opa Locka (42.7%) |
| Aventura (72.4%) | |
| Sunny Isles (51.4%) | |

232. Hartman, *supra* note 88, at MB Neighbors 3, 67. Since this poll was taken, Pinecrest and Aventura have incorporated. Sunny Isles is moving toward incorporation, but Destiny voted down incorporation. See Falsey Interview, *supra* note 5.