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## Constitutional Problems in School Redistricting

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## Comments

# Constitutional Problems In School Redistricting

One national authority on the redistricting of school districts has said this about the situation in Nebraska:

Nebraska has no good, clear-cut legislative procedure encouraging school redistricting and would be wise to get busy and pass legislation adding incentive to consolidation.<sup>1</sup>

Unfortunately, any attempt to heed this call to legislative action is at once confronted with both socio-philosophical and legal complications. This comment will direct its attention to the latter, concentrating on an analysis of the constitutional feasibility of various measures that could be enacted by the Legislature to facilitate the redistricting process. The present statutory structure<sup>2</sup> will be adverted to only incidentally.<sup>3</sup>

To start out, it seems useful to imagine a situation not entirely dissimilar to the present school district structure in Nebraska. Let us suppose that the Legislature has established enabling legislation through which every portion of the state is organized into school districts—thousands of them—and that each school district has the power to levy taxes on property within its boundaries for the support of an educational program which it alone controls. Such a structure having been established, the Legislature becomes convinced that it breeds great inequalities in educational opportunities and in tax burdens. The Legislature decides the solution is simple—fewer and larger districts will give a broader tax base, which will give more revenue to each unit, which in turn will support a better educational program. What are the constitutional inhibitions against the several techniques that can be used to change existing structures? Or, to put it more dramatically, to what extent do the existing districts (and their residents, taxpayers

<sup>1</sup> Robert M. Isenberg, assistant secretary in the National Education Association's Department of Rural Education, quoted in *The Lincoln Journal*, Jan. 23, 1958, p. 5, col. 7, and in *The Lincoln Star*, Jan. 24, 1958, p. 19, cols. 3, 4.

<sup>2</sup> Neb. Rev. Stat., § 79-101 et seq. (Reissue 1952).

<sup>3</sup> See Bar Proceedings, 37 Neb. L. Rev. 245 (1958) for a discussion of constitutional and legal aspects of the present reorganization statutes.

and parents) have a constitutionally-protected right to have the present situation continue until the end of time?

### I. CONSTITUTIONAL POSITION OF SCHOOL DISTRICTS; LEGISLATIVE SUPREMACY

It is an oft-avowed maxim of school law that education is a state function, as contrasted to a local matter.<sup>4</sup> The Nebraska Constitution expressly charges the Legislature with the responsibility for the school system.<sup>5</sup> The state Supreme Court has verbalized the legislative obligation and authority.<sup>6</sup> School districts as recognized entities are accorded only incidental mention in the state Constitution.<sup>7</sup> The Nebraska Court has indicated that school districts are instrumentalities of the state, established at the will of the Legislature merely as a convenient means of discharging the constitutional mandate to furnish free education for the youth of the state.<sup>8</sup> Thus, school districts exist by legislative grace and the law-making body is free to create, restrict, alter or destroy districts as it desires.<sup>9</sup>

But this legislative power to act is narrowed by the Constitution in two ways. First, as a practical matter, the Legislature may be displeased with the existing school district map but dis-

<sup>4</sup> *Carlberg v. Metcalfe*, 120 Neb. 481, 234 N.W. 87 (1930); *Atty. Gen. v. Lowrey*, 199 U.S. 233, 26 S. Ct. 27, 50 L. Ed. 167 (1905); *Edwards, The Courts and the Public Schools* (Rev. Ed. 1955), pp. 23-30.

<sup>5</sup> Neb. Const. Art. VII, § 6: "The Legislature shall provide for the free instruction in the common schools of this state of all persons between the ages of five and twenty-five years."

<sup>6</sup> *State v. Board of Education*, 152 Neb. 644, at 648, 42 N.W. 2d 168, at 170 (1950): "... [T]he method and means to be adopted in order to furnish free instruction to the children of the state have been left by the Constitution to the Legislature. Clearly legislation is necessary to carry into effect the constitutional provision. It is not a self-executing provision."

<sup>7</sup> Neb. Const. Art. VII, §§ 4, 7, 9.

<sup>8</sup> *School District No. 49 v. School District No. 65-R*, 159 Neb. 262, 66 N.W. 2d 561 (1954); *Nickell v. School Board of Axtell*, 157 Neb. 813, 61 N.W. 2d 566 (1953).

<sup>9</sup> *Ibid.* In both cases, this unequivocal language was cited from *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L. Ed. 151, (1907), quoted with approval in *Seward County Rural Fire Protection Dist. v. County of Seward*, 156 Neb. 516, 56 N.W. 2d 700 (1953): "Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them. . . . The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."

inclined to draw a new one itself.<sup>10</sup> Some type of administrative unit at the state or county level, or both, will be the alternative. This raises constitutional questions of the validity of the delegating statute, and of the procedures which must be used by the delegate. Second, a statute or administrative decision may have the consequence of changing the taxes of a taxpayer, or changing the nature of the school to which a parent is compelled to send his children under the compulsory education law. If so, the taxpayer or parent may challenge the substantive validity of the law against those provisions of due process, equal protection, privileges and immunities, etc., whose essence may be distilled into a right to judicial scrutiny of the statute or decision for arbitrariness.

## II. TECHNIQUES

### A. REDISTRICTING BY INDIRECTION

#### 1. *Raising the Educational Standards and Requirements*

Suppose the Legislature, after a reappraisal of the state school system, decides that the educational standards in many schools are too low. To correct this, the Legislature passes an act whereby

Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the State within the meaning of the Federal Constitution. The State, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right by contract or otherwise in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." 159 Neb. at 271, 272, 66 N.W. 2d at 565; 157 Neb. at 819, 820, 61 N.W. 2d at 571, 572.

<sup>10</sup> The Legislature could, for example, pass an act incorporating a statewide school district map, as it did in the case of the state highway system. Neb. Rev. Stat., § 39-1309, paragraph 1 (1955 Cumulative Supplement). The map could be drawn up on the basis of a study by the State Depart-

it either (1) directly imposes specific minimum teacher and curricula standards on all districts, or (2) authorizes an administrative agency to formulate regulations directed toward the same result.

Assume this means a deficient district will be faced with alternatives which it finds financially distasteful. The district must either (1) hire the necessary teaching personnel and improve its curricula and physical plant, which might mean a prohibitive tax levy, or (2) suffer itself to become a part of another district that already meets the standards, which action might also mean imposing a new and higher levy. Thus, regardless of the choice made, the district will be faced with the possibility of an increased levy. This raises the question of whether the school district, its resident taxpayers, or parents have a standing in court to test the constitutional validity of (1) the fact of tax increase, (2) the standard, (3) the indirect coercion applied to force the adoption of the standard, or (4) the procedure by which the standard is set.

*May the school district challenge the constitutionality of the statute?* Although not directly in point, two cases growing out of claims by municipalities carry the implication that the district could not be a plaintiff. These cases grew out of a situation where Gage and Dodge counties had been collecting and keeping the road taxes which, by statute, rightfully belonged to the cities of Beatrice and Fremont. The two cities began actions against their respective counties to obtain these monies. Judgment was given for Beatrice.

ment of Education. Such a method might incur the objection that it involves local legislation, particularly if the map affected some district boundaries while leaving others intact, thus limiting the law's new scope to particular localities. Art. III, § 18 of the Nebraska Constitution provides, in part: "The Legislature shall not pass local or special laws in any of the following cases, that is to say: . . . Providing for the management of Public Schools." It might be noted that the court has at least once upheld a statute that had particular geographic application. The law, which dealt with the erection of cattle guards and gates across roads, was effective only in a particular territory of the state. It was attacked on the grounds that Art. III, § 18 of the state Constitution forbids a local or special law in regard to "laying out, opening, altering, and working roads or highways;" "vacating roads;" or "granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever." The court noted that conditions might be different in various areas and decided that in this case the classification made by the lawmakers was reasonable. *McFadden v. Denter*, 118 Neb. 38, 223 N.W. 462 (1929). The statewide comprehensive nature of a school district map, too, would seem to enervate this kind of a constitutional objection. See generally, 29 Neb. L. Rev. 139 (1950) and 17 Neb. L. Bulletin 332 (1938) for a discussion of special and local legislation in Nebraska.

However, while Fremont's case was being litigated, the Legislature passed a statute to authorize the counties to keep the funds and negate the effects of the judgment for Beatrice. The Court decided the cities had no rights as to tax funds against the state.<sup>11</sup> Hence, it would follow by analogy, that since school districts have no rights against the state as far as taxes are concerned, they would certainly have no rights in connection with school policies that lead to an increase in taxes.<sup>12</sup>

*May a taxpayer challenge the constitutionality of the statute?* An affected taxpayer would have the standard to challenge the statute, but he has no right that his taxes not be increased; only a right that they not be increased arbitrarily. The constitutional validity of any particular standard would, of course, be open. But the taxpayer could not win simply by asserting that the Legislature forced upon the district a burden which it was unwilling to assume. As noted above, the school district is not a home rule governmental unit, and even if it were, home rule units must yield to the Legislature on matters of statewide concern,<sup>13</sup> and the Court has held that education is a state function.<sup>14</sup>

For reasons which will be developed later, there would be a problem of delegation involved if an administrative delegatee were setting the standards,<sup>15</sup> but there would probably be no constitutional requirement that the delegatee give notice and hearing prior to setting the standards.

<sup>11</sup> *Beatrice v. Gage County*, 130 Neb. 850, 266 N.W. 777 (1936); *Fremont v. Dodge County*, 130 Neb. 856, 266 N.W. 771 (1936). In the latter case, the court said: "There is no ground here for the application of constitutional restraints by a municipality against the action of the state legislature. They do not apply as against the state in favor of its own municipalities unless there are clear constitutional provisions to that effect." The court cited *City of Trenton v. State of New Jersey*, 262 U.S. 182, 43 S. Ct. 534, 67 L. Ed. 937, 29 A.L.R. 1471 (1923). 130 Neb. at 869, 266 N.W. at 777.

<sup>12</sup> However, school districts as plaintiffs have been successful in actions attacking administrative decisions as such. See *School Dist. No. 228 v. State Board of Education*, 164 Neb. 148, 82 N.W. 2d 8 (1957); *School District No. 39 v. Decker*, 159 Neb. 693, 68 N.W. 2d 354 (1955).

<sup>13</sup> *Axberg v. City of Lincoln*, 141 Neb. 55, 2 N.W. 2d 613 (1942).

<sup>14</sup> *Carlberg v. Metcalfe*, note 4, *supra*.

<sup>15</sup> In *School District No. 39 v. Decker*, note 12, *supra*, the court held unconstitutional a statute granting the Superintendent of Public Instruction authority to "formulate rules and regulations for the approval of all high schools for the collection of free high school tuition money." In the course of its opinion, which invalidated a teacher-pupil minimum ratio promulgated by the Superintendent, the court said: "Thus the Superintendent of Public Instruction has been delegated a free hand without

## 2. *Subsidies*

A major stumbling block to permissive school reorganization is the fact that schools are, for the most part, financed by local property taxes.<sup>16</sup> Landowners in a district who enjoy a relatively low school mill levy, for example, may be extremely reluctant to relinquish their tax advantage for the sake of larger, more efficient school units. This natural inclination could be softened by financial incentives to redistrict.

One tax device tried by the Legislature in 1949 to nudge small districts into mergers failed to clear its constitutional hurdle. The device, a blanket mill levy tax,<sup>17</sup> called for a levy in all elementary school districts of each county to meet two-thirds of the total expenses of the districts, up to four mills. Distribution of the money realized from this tax, however, was confined solely to those districts that had at least five students the previous year.<sup>18</sup> The act provided that each district eligible to share in the fund was to be refunded the full amount of the tax collected in its particular district. Of the balance, two-thirds was to be divided equally among the eligible districts. The remaining third was distributed to these same districts on an average daily attendance basis. In *Peterson v. Hancock*,<sup>19</sup> the court decided the tax operated to release regular

legislative limitations or standards to make or change at will any numerical ratio or standard required for the approval of high schools for the collection of free high school tuition money when it would have been a simple matter for the Legislature, which had the power and authority, to have incorporated limits and standards in the statute. As a consequence, without questioning the motives or ability of the Superintendent of Public Instruction, there might well be approval of some high schools upon one standard and a withholding of approval from others by a qualification of such standard or by virtue of another. Thus, defendant... [the Superintendent]... had arbitrary power over the life or death of all high schools in this state and the preservation or destruction of their property and the grant or denial of free high school revenue, dependent upon the granting or refusal of approval." 159 Neb. at 699, 68 N.W. 2d at 359. See also *School Dist. No. 228 v. State Board of Education*, note 12, *supra*, dealing with the construction of a statute. Also Part II, § C, this comment, p. 793, *infra*, for a more detailed treatment of the delegated authority problems.

<sup>16</sup> Neb. Rev. Stat., § 79-431 (Reissue 1950). The rural character of the county reorganization committees under the present statutory machinery is also significant in this regard. *Id.*, § 79-426.05.

<sup>17</sup> *Id.*, §§ 79-438.01-07.

<sup>18</sup> Except for cases where mergers were impractical. *Id.*, § 79-438.06.

<sup>19</sup> 155 Neb. 801, 54 N.W. 2d 85 (1952).

school taxes in districts with five or more pupils,<sup>20</sup> was discriminatory as tax levied upon one district of a county for the exclusive benefit and local purpose of other districts, and was not uniform and proportional.<sup>21</sup>

Interestingly, the court quoted from Cooley, *The Law of Taxation*:

A state purpose must be accomplished by state taxation, a county purpose by county taxation, and a public purpose for any inferior district by taxation of such district. . . .

A state cannot tax itself for the benefit of the people of another state. So the imposing a tax on one municipality or part of the state, for the purpose of benefiting another municipality or part, violates the rule as to uniformity. No taxing district can be taxed for the exclusive benefit of another district.<sup>22</sup>

The court evidently took the view this was a local purpose tax. Yet earlier, in *Carlberg v. Metcalfe*, the court had held that schools are of statewide concern, stating:

The schools, in which are educated the children who are to become in time the directors of our political destinies, are matters of state concern and not of strictly municipal concern. To have educated and intelligent men and women cannot be a strictly local concern. It concerns and affects the whole state.<sup>23</sup>

It is submitted that the tax was essentially a state tax and could thus be directed in the best interests of the public welfare as the Legislature thought wise. The court said the purpose of the tax was a meritorious one, having as its aim the inducement of districts to reorganize, with the resultant proficiency and economy based upon a broader and greater tax base.<sup>24</sup> It is suggested that the basic question is whether the tax is appropriated for a state

<sup>20</sup> Neb. Const. Art. VIII, § 4: "The Legislature shall have no power to release or discharge any county, city, township, town or district whatever, or the inhabitants thereof, or any corporation, or the property therein, from their or its proportionate share of taxes to be levied for state purposes, or due any municipal corporation, nor shall commutation for such taxes be authorized in any form whatever."

<sup>21</sup> *Id.*, § 1: "The necessary revenue of the state and its governmental subdivisions shall be raised by taxation in such manner as the Legislature may direct; but taxes shall be levied by valuation uniformly and proportionately upon all tangible property and franchises, and taxes uniform as to class may be levied by valuation upon all other property."

<sup>22</sup> *Peterson v. Hancock*, note 19, *supra*, 155 Neb. at 816, 817, 54 N.W. 2d at 94.

<sup>23</sup> Note 4, *supra*, 120 Neb. at 488, 234 N.W. at 91.

<sup>24</sup> *Peterson v. Hancock*, note 19, *supra*, 155 Neb. at 812, 54 N.W. 2d at 92.



purpose in promoting the statewide public welfare.<sup>25</sup> Reorganization and a broader tax base to equalize educational opportunities would seem to be of primary importance to the state as a whole.

However, the decision may have been justified on a ground not decided by the court, although noted.<sup>26</sup> Districts not eligible to participate in the fund could not by their own action automatically qualify for the aid by perfecting a merger, since consent of other districts was necessary. However, the court declined to say whether a means for voluntary qualification would have saved the act.

Although this potentially-useful redistricting lever was struck down, the court's language plus cases cited and distinguished in the opinion leave room for conjecture whether the blanket tax principle could be tailored to a constitutionally-acceptable standard. For instance, the court said in *Peterson*:

The act . . . deals with both the county and all school districts therein. They are two well-recognized separate governmental subdivisions of the state. The county was not made a school district. It was only a taxing unit for elementary school districts therein,

<sup>25</sup> Illustrative of this concept is a Maine case, in which the court said:

"The Legislature has the right under the constitution to impose an equal rate of taxation upon all the property in the State, including the property in unorganized townships, for the purpose of distributing the proceeds thereof among the cities, towns and plantations for common school purposes, and the mere fact that the tax is assessed upon the property in four municipal subdivisions and distributed among three, is not in itself fatal. . . . [Emphasis supplied.]

"The fundamental question is this: Is the purpose for which the tax is assessed a public purpose, not whether any portion of it may find its way back again to the pocket of the taxpayer or to the direct advantage of himself or family. . . . In order that taxation may be equal and uniform in the constitutional sense, it is not necessary that the benefits arising therefrom should be enjoyed by all the people in equal degree nor that each one of the people should participate in each particular benefit. . . . [Emphasis supplied.]

"Inequality of assessment is necessarily fatal, inequality of distribution is not, provided the purpose be the public welfare. The method of distributing the proceeds of such a tax rests in the wise discretion and sound judgment of the Legislature. If this discretion is unwisely exercised, the remedy is with the people and not with the court. Such distribution might be according to population, or according to the number of scholars of school age, or according to school attendance, or according to valuation, or partly on one basis and partly on another. The Constitution prescribes no regulation in regard to this matter and it is not for the court to say that one method should be adopted in preference to another." *Sawyer v. Gilmore*, 109 Me. 169 at 174-178, 83 Atl. 673 at 676, 677 (1912). See also *City of Louisville v. Board of Education*, 154 Ky. 316, 157 S.W. 379 (1913); *Miller v. Korns*, 107 Ohio St. 287, 140 N.E. 773 (1923).

<sup>26</sup> *Peterson v. Hancock*, note 19, *supra*, 155 Neb. at 812, 813, 54 N.W. 2d at 92.

which remained intact as such districts, which, 'once lawfully established retain their character and territorial integrity until such time as they shall be divided, changed or modified in some manner authorized by law.'<sup>27</sup>

This language from *Fremont v. Dodge County*<sup>28</sup> was also cited:

It is true that inequality of tax assessments vitiates an act of the legislature, but inequality of distribution of the proceeds does not, provided the purpose be for the *public welfare of the whole taxing district*.<sup>29</sup> [Emphasis supplied in the Peterson opinion.]

In *Fremont*, the court sustained a county road tax levy that was being challenged by municipalities seeking to reclaim taxes on property within their borders. The *Peterson* opinion said the purpose of the county road tax clearly was for the public welfare of the whole taxing district.<sup>30</sup>

Another case cited in *Peterson*, *State v. Board of County Commissioners*,<sup>31</sup> upheld the constitutionality of an act requiring the county to furnish rooms in the courthouse for municipal courts of any city in which the county seat of that particular county is located. This language from the case is found in *Peterson*:

The revenues of the county do not become the property of the county in the sense of private ownership, and the Legislature has authority to prescribe the division and apportionment of money, raised by county taxation, between the county and a city within its limits. . . . This is not a diversion of funds or property of the county to the use of persons who have not contributed by taxation to these funds. A large part of the contributions from which the courthouse was built were furnished by the City of Omaha. It is simply an apportionment of the use for general benefits and a direction as to how to use the property, procured by these funds, shall be used to the interest and benefit of the taxpayers in that particular taxing district.<sup>32</sup>

The Peterson opinion immediately thereafter said ". . . [s]uch a statement clearly defines the yardstick upon which constitutionality may be predicated."<sup>33</sup>

The benefits to the municipalities in the *Fremont* case lay in the fact that the county roads brought trade to the cities.<sup>34</sup> Benefits to the county in *State v. Board of County Commissioners* were

<sup>27</sup> Id., 155 Neb. at 810, 811, 54 N.W. 2d at 91, citing *Whelen v. Cassidy*, 64 Neb. 503, 90 N.W. 229 (1902).

<sup>28</sup> Note 11, *supra*.

<sup>29</sup> *Peterson v. Hancock*, note 19, *supra*, 155 Neb. at 814, 54 N.W. 2d at 93.

<sup>30</sup> Ibid.

<sup>31</sup> 109 Neb. 35, 189 N.W. 639 (1922).

<sup>32</sup> *Peterson v. Hancock*, note 19, *supra*, 155 Neb. at 814, 815, 54 N.W. 2d at 93.

<sup>33</sup> Ibid.

<sup>34</sup> Note 11, *supra*, 130 Neb. at 867, 266 N.W. at 776.

the reduction in the county and district court loads realized by the municipal court, and the accessibility of all courts in one building.<sup>35</sup>

Also mentioned in *Peterson* was a Minnesota decision that upheld the constitutionality of a statute providing for a comparable county school tax levy.<sup>36</sup> The levy was to be distributed to the school districts of the county on the basis of their respective enrollments. The Nebraska Court noted all the schools in the county received a proportionate amount, to distinguish it from the Nebraska act. Thus the ostensible criterion in each of the three cases cited in *Peterson* was whether there was at least some benefit inuring generally to the taxpayers of the *taxing district*.

In light of this, it would seem that retention of the blanket tax while eliminating the individual school district as a taxing unit might be acceptable to the court. The school board could be continued solely to determine educational policy and enter contracts. The county would become the taxing district, setting one inter-district levy for the total county school needs, rather than several intra-district levies. This would change the "character"<sup>37</sup> of the individual school district from a combined fiscal-administrative agency to solely an administrative unit.

Moreover, to paraphrase language found in *State v. Board of County Commissioners*, the Legislature would have authority to prescribe the division and apportionment of money raised by county taxation to the school districts within the county.<sup>38</sup>

Fitting the blanket tax technique to a constitutional form by this procedure may, nevertheless, not pass judicial inspection. The Nebraska Court has indicated it will not confine itself to an examination of statutory form, but will evaluate constitutionality in the light of an act's results.<sup>39</sup> Perhaps retaining the blanket tax as it

<sup>35</sup> Note 30, *supra*, 109 Neb. at 42, 189 N.W. at 642.

<sup>36</sup> *State v. Delaware Iron Co.*, 160 Minn. 382, 200 N.W. 475 (1924).

<sup>37</sup> This is in reference to language to which note 27, *supra*, is directed.

<sup>38</sup> This refers to the quotation to which note 32, *supra*, is directed.

<sup>39</sup> E.g., in a case in which an act was attacked as special legislation, the court said: "In an examination into the character of an act of the legislature to ascertain whether it is general or otherwise, the determination of the question must depend on the substance of the act, not its form." *State v. Stuht*, 52 Neb. 209 at 222, 71 N.W. 941 at 945 (1897) (dictum). See also *State v. Bauman*, 120 Neb. 77, 231 N.W. 693 (1930) and *Galloway v. Wolfe*, 117 Neb. 824, 223 N.W. 1 (1929), in which population classification techniques failed to pass judicial scrutiny. The court has also said the Legislature "cannot accomplish indirectly what it may not do directly." *Steinacher v. Swanson*, 131 Neb. 439 at 448, 268 N.W. 317 at 322 (1936). But cf. *Tukey v. Douglas County*, 133 Neb. 732, 277 N.W. 57 (1938).

was enacted, but turning back to the school districts the revenue on a proportional basis, would be an acceptable alternative. Each district would derive some benefit and comply with the standards found in the Minnesota case<sup>40</sup> cited in Peterson.

Probably a more efficient method for promoting mergers through subsidies would lie in the distribution of a blanket tax on a progressive basis. The amount of remission for each pupil would increase with the district school population. Or perhaps this could be set up on a classification basis, breaking down school population spreads into aid categories. Justification for these approaches could exist to the extent that costs of buildings, equipment, teachers and transportation rise in relation to the number of pupils. Neither of these methods should run afoul of the special legislation inhibition since all districts occupying the same status would share alike.<sup>41</sup> Some means for voluntary mergers should be available, to allow any district to qualify for the extra aid if it is so inclined.<sup>42</sup>

A blanket tax could also be utilized to provide extra money for larger districts by way of (1) capital outlay for new buildings and equipment necessitated by consolidation, (2) pupil transportation payments, and (3) additional funds for districts meeting higher standards.<sup>43</sup> The first technique might be open to a constitutional objection as discriminatory against districts that have already reorganized and built additional facilities at their own expense.<sup>44</sup> The other two would not be discriminatory in that respect since they would reward all soundly-organized districts.

<sup>40</sup> Note 36, *supra*.

<sup>41</sup> See *State v. Berryman*, 102 Neb. 553, 167 N.W. 790 (1918). Also *Dorrance v. County of Douglas*, 149 Neb. 685, 32 N.W. 2d 202 (1948); *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451 (1940); *Dougherty v. Kubat*, 67 Neb. 269, 93 N.W. 317 (1903); *State v. Graham*, 16 Neb. 74, 19 N.W. 470 (1884).

<sup>42</sup> "... [A] law is not special when it applies to all citizens and persons who may be brought under the circumstances affected thereby." *Livingston Loan and Bldg. Assn. v. Drummond*, 49 Neb. 200 at 205, 68 N.W. 375 at 377 (1896). This would eliminate the possible objection to which note 25 refers, preventing any frozen class argument, as in *State v. Consumers Public Power District*, 143 Neb. 753, 10 N.W. 2d 448 (1943).

<sup>43</sup> See generally *Fitzwater, School District Reorganization Policies and Procedures*, pp. 88-102 (U.S. Dept. of Health, Education, and Welfare, Special Series No. 5, 1957), for a resume of school finance in relation to reorganization programs.

<sup>44</sup> But see *State v. Love*, 89 Neb. 149, at 156, 131 N.W. 196 at 199 (1911), where it was held that the fact that some firemen earned pensions by serving a comparatively short time subsequent to the passage of an act, whereas others were compelled to continue in the service for a greater

Although we have set consideration of these alternative devices by setting the county as a taxing unit, and discussing redistributions to school districts within the county, it would be equally constitutional to accomplish the same results through direct state levy, by-passing the county.

This discussion of taxing and redistribution between school districts to accomplish legislative purposes might be mooted if a state sales or income tax were levied. Under the present Nebraska Constitution, such a tax would have to replace state property taxes.<sup>45</sup> As a practical matter, the state sales or income tax is not likely to provide revenue substantially larger than is needed to perform existing state functions, and, without recourse to property tax, the Legislature would not have available sufficient funds and taxing power to make the redistributions previously discussed a strong incentive to redistrict.<sup>46</sup> Even a county inter-district distribution would be prevented, since the legal basis for spending money in school district A raised by property tax in school district B is that education is a state rather than a district function. As noted above, passage of a sales or income tax precludes use of a property tax for a state purpose.

#### B. REDISTRICTING BY ANNEXATION<sup>47</sup>

Suppose the Legislature sets up an enabling statute that permits a K-12 district (kindergarten through grade 12) to annex elementary districts, under certain conditions. Let us say that a particular K-12 district, desirous of strengthening its science and math-

length of time, did not make the legislation void. The court said: "The constitutional limitations do not apply to such conditions. The legislature is not restrained from paying unequal compensation for official services so long as its laws with regard thereto are general. Legislation must be couched in general terms, and in its application exact equality cannot always be obtained among individuals." This is capable of analogy to the capital outlay situation, where newly-reorganized districts might be the main beneficiaries.

<sup>45</sup> Neb. Const. Art. VIII, Sec. 1A: "When a general sales tax, or an income tax, or a combination of a general sales tax and income tax, is adopted by the Legislature as a method of raising revenue, the state shall be prohibited from levying a property tax for state purposes."

<sup>46</sup> See Comment, 32 Neb. L. Rev. 629 (1953) for an analysis of ways various present state funds for financing schools could be rechanneled to encourage the elimination of some districts. Further questions as to Legislative authority may arise should Congress enact legislation for federal aid to education.

<sup>47</sup> See Comment, 32 Neb. L. Rev. 43 (1952) for a thorough treatment of municipal annexation in Nebraska.

ematics programs or of adding some vocational courses, decides to annex an adjacent grade school district for the added property tax revenue the area would offer. Are there any assertable rights by which the taxpayers in the elementary district could prevent such a step?

Since the annexation of property by a governmental subdivision in this state for tax purposes alone is conceived of as taking of property for public use without just compensation,<sup>48</sup> it follows that any such annexation procedure by the K-12 district must be capable of showing some "compensation" in the way of benefits or service to the elementary district.<sup>49</sup> Such "compensation" could be predicated on the premise that the K-12 district would provide more educative variety and quality for the elementary district student.

There is the additional problem of whether past or present educative "compensation" to the elementary district is required. Suppose the elementary district had been contracting with the K-12 district and using the high school under the free high school tuition system. In such a case, there would be no *additional* benefit resulting to the elementary district as a result of the annexation.<sup>50</sup> However, the majority of Nebraska cases on municipalities, according to one commentator, considers benefits already accrued as a criterion for valid annexation.<sup>51</sup>

Another problem in connection with annexation procedures would arise should two K-12 districts desire to annex the same area. This question could be foregone by specifically providing in any annexation statutory setup for such solutions as preference elections in the annexed area, permitting the district that acts first to prevail, or, better yet, let an administrative agency make a decision based on legislative policy guides.<sup>52</sup>

#### C. REDISTRICTING BY ADMINISTRATIVE ACTION

Assume the Legislature decides a general statewide reorganization should be accomplished within the shortest practicable

<sup>48</sup> *Witham v. City of Lincoln*, 125 Neb. 366, 250 N.W. 247 (1933); *Bradshaw v. City of Omaha*, 1 Neb. 16 (1871).

<sup>49</sup> See *City of Wilber v. Bednar*, 123 Neb. 324, 242 N.W. 644 (1932); *Chapin v. Village of College View*, 88 Neb. 229, 129 N.W. 297 (1911). Also 32 Neb. L. Rev., note 47, *supra*, at 49-53.

<sup>50</sup> See *Village of Syracuse v. Mapes*, 55 Neb. 738, 76 N.W. 458 (1898).

<sup>51</sup> 32 Neb. L. Rev., note 46, *supra*, at 49.

<sup>52</sup> This, of course, raises questions concerning delegation of powers. See note 15, *supra*, and Part II, § C, *infra*.

time and directs an administrative unit, agency or officer to carry this out.<sup>53</sup>

This gives rise to several questions. First, there is the inevitable problem growing out of the separation of powers concept.<sup>54</sup> The doctrine has been accorded various interpretations in the Nebraska decisions.<sup>55</sup> Legislative functions, the court has said, cannot be delegated to private individuals,<sup>56</sup> nor to the courts.<sup>57</sup> The Legislature may delegate administrative duties or discretion to a public agency or officer,<sup>58</sup> or to a general function unit local governing body.<sup>59</sup> However, care must be taken to provide a standard to be

<sup>53</sup> Since the Legislature is supreme in the matter of school districts, note 9, *supra*, it is patent that the lawmakers could take a direct hand in re-districting. See note 10, *supra*. The Legislature could, for example, abolish all districts and make each of the 93 counties in the state the unit of local school administration. E.g., W. Va. Code of 1955, §§ 1724 [3], 1777 [16]; Nev. Rev. Stat. §§ 386.101, 386.111. Another device would be to abolish all districts having fewer than a minimum number of school age children and create in each county a new district composed of the territory of the districts abolished (e.g., Ark. Stat. 1947 Ann. § 80-426), or attach the abolished districts to existing districts. These latter techniques might be challenged as special legislation. However, since it would affect all districts equally within a specified class, it should not be objectionable, particularly if it is a continuing device. See notes 41, 42, *supra*. It could also require that all districts be K-12 units.

<sup>54</sup> Neb. Const. Art. II, § 1: "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." The State Department of Education, Board of Education, and Commissioner of Education also occupy constitutional status. Art. VII, §§ 14-16. § 14 sounds self-executing, while §§ 15 and 16 are limited to powers given by the Legislature. *Quaere*: Is § 14 inconsistent with §§ 15 and 16, or are they cumulative?

<sup>55</sup> See 18 Neb. L. Bulletin 368 (1939) for a discussion on the separation of powers in Nebraska.

<sup>56</sup> *Rowe v. Ray*, 120 Neb. 118 at 123, 231 N.W. 689 at 691 (1930). Also *Elliott v. Wille*, 112 Neb. 86, 200 N.W. 347 (1924).

<sup>57</sup> *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929); *Winkler v. City of Hastings*, 85 Neb. 212, 122 N.W. 858 (1924).

<sup>58</sup> *Nickell v. School Board of Axtell*, 157 Neb. 813, 61 N.W. 2d 566 (1953); *Nebraska Mid-State Reclamation District v. Hall County*, 152 Neb. 410, 41 N.W. 2d 397 (1950).

<sup>59</sup> *Lennox v. Housing Authority of City of Omaha*, 137 Neb. 582, 290 N.W. 451 (1940).

adhered to by the delegee in the administration of delegated functions.<sup>60</sup>

Second, if the boundary adjustment decided upon by the public body enhances taxes, must the taxpayers be given the right to vote on the proposal? The Nebraska court has made it clear that an election is not a constitutional necessity.<sup>61</sup> It has expressly held that boundary lines of school districts may be altered by the county superintendent and commissioners, after a hearing and judgment based on the evidence.<sup>62</sup>

Nevertheless, setting up reorganization machinery minus a popular acquiescence requirement may invite a judicial inclination to invalidate the legislation as too much delegation of power.<sup>63</sup> In addition, elections seem to provide a procedural backstop in situations where there might be some doubt about the delegation question or sufficiency of notice.<sup>64</sup> Even an election is not an auto-

<sup>60</sup> See *School Dist. No. 39 v. Decker*, note 15, *supra*, in which delegation of rule-making power to the State Superintendent without adequate standards was held unconstitutional.

A declaration of legislative policy would have considerable utility in this regard. The court has said that the findings of the Legislature as set out in the declaration of policy in an act, while not absolutely controlling, are entitled to great weight. *Omaha Parking Authority v. City of Omaha*, 163 Neb. 97 at 100, 77 N.W. 2d 862 at 866 (1956). See also *Lennox v. Housing Authority of City of Omaha*, note 59, *supra*, in which about the only statutory condition imposed on the city council in creating a housing authority was that it determine such action was expedient. A good model for a declaration of intent might be the one used to preface the statutes on the state highway system. Neb. Rev. Stat. §39-1301 (Supp. 1955).

<sup>61</sup> "... [A] reclamation district could be established and put into operation without the calling of an election. The Legislature might have chosen some other mode for the formation of the district, which, if reasonable in its terms, would be effective without the calling of an election of property owners. . . ." *State v. Hanson*, 80 Neb. 724 at 734, 115 N.W. 294 at 298 (1908) (dictum).

<sup>62</sup> *Malin v. Housel*, 105 Neb. 784, 181 N.W. 934 (1921). See also *Nebraska Mid-State Reclamation District v. Hall County*, note 58, *supra*.

<sup>63</sup> E.g., *State v. Hines*, 163 Kan. 300, 182 P. 2d 865 (1947), in which the Kansas Supreme Court declared the Kansas Reorganization Act unconstitutional. However, the Kansas act had no provision requiring county committees to consider various factors relating to the desirability of reorganization. Studies were to be made, but the law neglected to expressly require the committees to take the results into consideration or to set up other conditions upon which the committee should act.

<sup>64</sup> In *Nickell v. School Board of Axtell*, note 58, *supra*, in which the 1949 State School Reorganization Act was held constitutional, the court noted that a county committee could not by itself "change, realign, or readjust any existing school district or the boundaries thereof. That power is



matic safeguard against constitutional objections, however, as in the situation where private individuals may determine the boundaries of a proposed district and may thus, by gerrymandering, determine the electorate.<sup>65</sup>

Third, under what circumstances is a taxpayer entitled to notice and hearing prior to an administrative decision on an issue? The law on this is clear; its application difficult. If an administrative decision affecting rights (e.g., the right not to be taxed except according to law) is a *judicial* one, notice and a hearing are prerequisites; otherwise the decision is legislative. Some Nebraska cases relevant to this problem of classification are:

- (1) *Bradshaw v. City of Omaha*:<sup>66</sup> the Nebraska Supreme Court held that a municipal boundary extension by act of the legislature which would subject plaintiff's unplatted agricultural property to

left with the electorate of the area involved in any proposed plan." 157 Neb. at 825, 61 N.W. 2d at 574. In addition, the court decided the county committee had been the recipient of legislative powers and that its actions did not fall within the federal or state due process clauses. Id., 157 Neb. at 825, 61 N.W. 2d at 574. It is not altogether clear whether the court meant the committee could have summarily set new boundaries (within its delegated limits), or whether the court merely confined this discussion to the sufficiency of notice issue. Immediately after the last cited language, the court noted, in assuming "for the purpose of discussion only, that a hearing and proper notice thereof to all parties interested were required," that it felt the act provided for insufficient notice in providing for a hearing on the initial question of fixing the boundaries. Id., 157 Neb. at 826, 61 N.W. 2d at 574, 575.

It might also be useful to examine this language in *Rowe v. Ray*, 120 Neb. 118 at 122, 231 N.W. 689 at 690 (1930):

"The legislature may enact general laws providing for the incorporation of municipal corporations, such as cities, towns, villages and school districts, and it may provide the conditions on which such municipal corporations may be created, and leave to some officer or official body the duty of determining whether the prescribed terms and conditions exist, and, when found to exist, the law directs the creation of the municipal corporation. The legislature may also prescribe and fix the terms and conditions on which such a law may come into operation. It may, by law, provide that two school districts may merge and become one, upon a vote of the electors of the two districts. It may and does authorize one city to annex an adjacent suburb or village upon a majority vote of the electors thereof, and by the consent of the municipal authorities of the larger city. In all such cases the legislative function has been performed. The legislature, in those cases, has fixed the terms and conditions on which an electorate, which is definite and certain, may determine whether the act of the legislature shall become operative. . . ." [Emphasis supplied.]

<sup>65</sup> See *Rowe v. Ray* and *Elliott v. Wille*, note 56, supra.

<sup>66</sup> 1 Neb. 16 (1871). Cf. *Wertz v. City of Ottumwa*, 201 Iowa 947, 208 N.W. 511 (1926), holding that annexation is not a taking of property.

city taxation, was *judicial* in so far as to permit court review of plaintiff's contention that his property received no benefit from inclusion in the city, and thus the city taxes deprived him of property without substantive due process.<sup>67</sup>

(2) *Turner v. Althaus*:<sup>68</sup> this case substantially weakened *Bradshaw* by holding that inclusion of plaintiff's property within the boundaries of a taxing district was a matter for the legislative branch, and raised no question for judicial scrutiny unless plaintiff alleged the sole purpose of the inclusion was to tax plaintiff for the benefit of others in the district.

(3) *Elliott v. Wille*:<sup>69</sup> the court invalidated an enabling statute that called for an election on the incorporation of a special function district after certain initiating procedures by private individuals. The court decided that the omission of a requirement for determination by a "competent authority" of whether the incorporation would further the public welfare made it constitutionally untenable, since it could lead to the taking of property without due process of law via gerrymandering.<sup>70</sup>

(4) *Northwestern Bell Tel. Co. v. State Board of Equalization and Assessment*:<sup>71</sup> the court held that where an increase in the assessed valuation of a class of property, as returned by a county, was made by the state board without notice and hearing, the increase was in violation of a statute and amounted to confiscation of property without due process.

Legislation that conferred on the county superintendent, county clerk, and county board power to make boundary changes between school districts was struck down by the court in *Ruwe v. School District*<sup>72</sup> for not providing for notice and hearing. It should be noted, however, that the court found that the enabling statute conferred *judicial* power upon the board.

These cases well illustrate the grey area that confronts any

<sup>67</sup> 1 Neb. 16, 30 (1871).

<sup>68</sup> 6 Neb. 54 (1877).

<sup>69</sup> Note 56, *supra*.

<sup>70</sup> Ironically, the Legislature evidently took the court's hint and passed an act that provided for district court review of any proposed district. This, however, was held to violate the separation of powers. *Searle v. Yensen*, 118 Neb. 835, 226 N.W. 464 (1929).

<sup>71</sup> 119 Neb. 138, 227 N.W. 452 (1929). *Quaere*: Did the court mean statutory or constitutional due process?

<sup>72</sup> 120 Neb. 668, 234 N.W. 789 (1931). The court also said this: "Due process of law requires notice and an opportunity to be heard, where financial burdens are necessarily imposed on property owners by an exercise of judicial power pursuant to specific terms of a statute. *Id.*, 120 Neb. at 671, 234 N.W. at 790. See also *Schutte v. Schmitt*, 162 Neb. 162, 75 N.W. 2d 656 (1956).

attempt to determine whether a particular action involves the taking of property.

A recent decision resolving this issue in a school redistricting contest is *Nickell v. School Board of Axtell*, which held the 1949 Reorganization Act<sup>73</sup> constitutional, stating:

Questions of public policy, convenience, and welfare, as related to the creation of municipal corporations, such as counties, cities, villages, school districts, or other subdivisions, or any change in the boundaries thereof, are, in the first instance, of purely legislative cognizance and, when delegated to any public body having legislative power, any action in regard thereto does not come within the due process clause of either the state or federal constitutions. [Cases cited.]

But when, as a condition to their creation or change, the public body to which such authority is delegated must find certain facts to exist upon which the Legislature has said depends its authority to declare such subdivision, or any change therein to exist, then the questions presented are of a quasi-judicial character. In such cases a hearing must be had to determine if such facts exist and proper notice thereof must be provided for and given to all parties interested therein.<sup>74</sup> [Cases cited.]

The court then concluded that the duties of the county reorganization committee—authorized to act when it determines that some reorganization of districts is “desirable” and to draw up plans, giving consideration to enumerated factors<sup>75</sup>—did not fall within the category to which the state or federal due process clauses have application.<sup>76</sup> This was the court’s answer to a contention that notice was insufficient.

In the recent case of *Schutte v. Schmitt*,<sup>77</sup> an act which directed the dissolution of a district under certain conditions was declared unconstitutional for not providing for notice and hearing. The finding of such antecedent facts is of a quasi-judicial character, the court said. In such cases a hearing must be had to determine if the necessary facts exist and proper notice must be provided for all interested parties.

Two cases will serve to illustrate the fine distinction between what is deemed to be legislative or judicial decisions. They are *Searle v. Yensen*<sup>78</sup> and *City of Wahoo v. Dickinson*.<sup>79</sup>

<sup>73</sup> Neb. Rev. Stat., §§ 79-426.01—79-426.19 (Reissue 1950).

<sup>74</sup> 157 Neb. 813 at 825; 61 N.W. 2d 566 at 574 (1953).

<sup>75</sup> See Neb. Rev. Stat., § 79-426.09 (Reissue 1950).

<sup>76</sup> Note 74, *supra*, 157 Neb. at 826, 61 N.W. 2d at 574.

<sup>77</sup> Note 72, *supra*.

<sup>78</sup> Note 57, *supra*.

<sup>79</sup> 23 Neb. 426 (1888).

*Searle* involved the creation of a power district. The statute provided that, upon receipt of a proper petition, the district court should determine by a hearing whether the district should be incorporated, whether the proposed boundaries were reasonable and proper for public convenience and welfare; change, alter and fix the boundary lines with the idea of promoting the interest of the district and its units; and submit the proposal to the voters if it was satisfied on these points. The court held this an unconstitutional delegation of legislative power to the judiciary.

In *Wahoo*, the court upheld a statute that allowed a district court, upon receipt of a petition from a municipality, to decree annexation of territory to a municipal corporation upon a finding either of "material benefit" to the annexed property or that "justice and equity" required the annexation. The court decided the power of annexation actually resided in the city, when it passed a resolution to that effect. The court said that their duty was confined to a determination of whether the conditions precedent (i.e., benefit or justice and equity) were present.<sup>80</sup>

There might be the suggestion that the only real difference between "public welfare" and "justice and equity" lies in phonetics.

Suppose a public body privileged to adjust school district boundaries has been given a quasi-judicial role by a particular enabling statute. This gives rise to a fourth problem, for which it might be useful to imagine two districts, A and B. Suppose this public body is considering attaching a part of District A to District B. Three groups of taxpayers will be affected by this rearrangement: (1) those in District B; (2) those in the District A area that is proposed to become a part of District B and (3) those in the remaining part of District A. To which of these taxpayers must notice be given?

In *Ruwe v. School District*,<sup>81</sup> taxpayers were allowed to challenge the constitutionality of a statute that failed to provide for notice and hearing, even though their land was not being detached in a school boundary change. This was because the detachment of another's land would have increased the school taxes of the plaintiffs.

In *Seward County Rural Fire Protection District v. Seward County*,<sup>82</sup> the court decided that notice to and consent by the directors of an existing district was sufficient. On the possibility that the action might mean increased taxes for the existing district, the

<sup>80</sup> See also *Bisenius v. City of Randolph*, 82 Neb. 520, 118 N.W. 127 (1908).

<sup>81</sup> Note 72, *supra*.

<sup>82</sup> Note 9, *supra*.

court cited U.S. Supreme Court language that emphasized state supremacy in the creation, change, or dissolution of municipal corporations, regardless of lack of consent of and consequences to property owners.<sup>83</sup>

Along the same line, a boundary contraction reduces the tax base upon which the returns to general obligation bondholders depend. But the bondholder's rights are subject to the paramount legislative power to change the boundaries, at least so long as there is some property left within the issuing district.<sup>84</sup> Query whether a boundary contraction harmful to a bondholder is valid if made under a statute passed subsequent to the bond issue.<sup>85</sup> Presumably the bondholder, lacking substantive rights against a contraction, would not have the adjective right to notice and hearing.

A problem of comparatively recent origin also presents itself: What kind of notice is now constitutionally sufficient?<sup>86</sup> Does the *Mullane*<sup>87</sup> requirement of notice reasonably calculated to apprise interested parties of proceedings extend to the area of school boundary adjustments? The concept has thus far been extended to condemnation<sup>88</sup> and special assessment<sup>89</sup> proceedings. The key might once again lie in whether the public body handling the boundary changes is deemed to be exercising a function of legislative or judicial character. In a special assessment situation, the ostensible theory of taxation is to apportion burden in accordance with bene-

<sup>83</sup> Cited in Note 9, *supra*.

<sup>84</sup> *Hustead v. Village of Phillips*, 131 Neb. 303, 267 N.W. 919 (1936); *Hardin v. Pavlat*, 130 Neb. 829, 266 N.W. 637 (1936).

<sup>85</sup> *Ibid*.

<sup>86</sup> On the question of adequate notice, the court in an early decision said: "In controversies in regard to the boundaries of school districts, where it is sought to change the same, it must appear that the preliminary steps were taken not only by the presentation of the proper petitions, but by notice of the time and place of presenting the same. These notices should be placed in public places within each district to be affected, and if not so posted the proceedings will be invalid. The design of the notices is to give publicity to the proposed change so that all parties interested may appear in favor of or to oppose such change." *School District No. 10 of Polk County v. Coleman*, 39 Neb. 391 at 396, 397, 58 N.W. 146 at 148 (1894). See also 10 Neb. L. Bulletin 496 (1932), for a discussion of due process and notice.

<sup>87</sup> *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950). See also *City of New York v. New York, New Hampshire and Hartford Railway Co.*, 344 U.S. 293, 73 S. Ct. 299, 97 L. Ed. 333 (1953).

<sup>88</sup> *Walker v. Hutchinson*, 352 U.S. 112, 77 S.Ct. 200, 1 L.Ed. 2d 178 (1956).

<sup>89</sup> *Wisconsin Electric Power Co. v. City of Milwaukee*, 275 Wis. 121, 81 N.W. 2d 298 (1957), 352 U.S. 948, 77 S.Ct. 324, 1 L.Ed. 2d 241 (1956).

fits. This is not necessarily true in the case of a school district boundary adjustment that might enhance a landowner's taxes. School support involves a general tax burden in the interest of the public as a whole. Nevertheless, there is at least some doubt whether published notice would be enough.<sup>90</sup> As far as federal due process is concerned, the leading *Bi-Metallic* case<sup>91</sup> points to the conclusion that the U.S. Supreme Court would characterize a school district boundary change as legislative in character and hence as not requiring notice and hearing.

### III. CONCLUSION

The salutary results of statewide school reorganization could undoubtedly be achieved by Legislative fiat with only little danger of legal complications. However, the Legislature may be reluctant to take such action. There are other redistricting techniques available that fall at least somewhat short of direct action by the lawmakers.<sup>92</sup>

An attempt has been made to show some of the problems, both procedural and substantive, of which note should be taken in any attempt to enact legislation to speed up the redistricting process. The line of constitutionality in some instances is exceedingly fine, if not altogether indiscernible. Nevertheless, it seems apparent that taking cognizance of some of the past difficulties in weaving any one of these techniques into statutory form would play a large role in determining whether any method will attain judicially-acceptable fruition.<sup>93</sup>

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<sup>90</sup> Neb. Rev. Stat., §§ 25-520.01—25-520.03 (Supp. 1957) and Bar Proceedings, 37 Neb. L. Rev. 232 and 240 (1958). Also Comment, 32 Neb. L. Rev. 432 (1953).

<sup>91</sup> *Bi-Metallic Investment Company v. State Board*, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915).

<sup>92</sup> No attempt has been made to assess the practical merits of any of the discussed techniques. E.g., the blanket tax principle may induce only limited redistricting—to the extent that districts might proceed in mergers only to the point where cost and revenue coincide, and might further reject a redistricting for non-economic reasons.

<sup>93</sup> The court has indicated it will look to language in such matters as determining whether a device violates the separation of powers concept. It had this to say in *Ruwe v. School District*, 120 Neb. 668 at 671, 234 N.W. 789 at 790 (1931): "Whether the county tribunal was required to act judicially in determining the facts and equities essential to an order detaching a quarter section of land from district 43 and annexing it to district 35 depends upon the language of the legislature." [Emphasis supplied.] In some cases where legislation ran into trouble, obvious procedural remedies were available. See *School District No. 39 v. Decker*, notes 12 and 15, *supra*, and *Schutte v. Schmitt*, note 72, *supra*. The court has also manifested an inclination to go along with the spirit of reorganization legislation. See cases cited in note 8, *supra*.