1979

City of Salt Lake City, A Municipal Corporation; Emigration Properties Partnership, A Utah Limited Partnership; Bowers-Sorenson Copstruction Company, A Utah Corooration, and Fred A. Smolka v. Peter Doengss, Miles Crockard, William Bowen, Richard H. Watson, Carl Peterson, and Emigration Improvement District : Brief of Defendant-Appellant

IN THE SUPREME
OF THE STATE OF

CITY OF SALT LAKE CITY, a municipal corporation; EMIGRATION PROPERTIES PARTNERSHIP, a Utah limited partnership; BOWERS-SORENSON CONSTRUCTION COMPANY, a Utah corporation and FRED A. SMOLKA

Defendants-Appellants,

vs.

PETER DOENGES, MILES CROCKARD, WILLIAM [illegible] RICHARD H. WATSON, [illegible] PETERSON, and EMIGRATION IMPROVEMENT DISTRICT,

Plaintiffs-Respondents.

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Clerk, Supreme Court

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OF THE STATE OF UTAH

CITY OF SALT LAKE CITY, a municipal corporation; EMIGRATION PROPERTIES PARTNERSHIP, a Utah limited partnership; BOWERS-SORENSON CONSTRUCTION COMPANY, a Utah corporation, and FRED A. SMOLKA, Defendants-Appellants, vs. PETER DOENGES, MILES CROCKARD, WILLIAM BOWEN, RICHARD H. WATSON, CARL PETERSON, and EMIGRATION IMPROVEMENT DISTRICT, Plaintiffs-Respondents.	BRIEF OF DEFENDANT-APPELLANT Case No. 16649

STATEMENT OF THE NATURE OF THE CASE

Respondents brought an action in the District Court seeking to have the Utah statute authorizing annexation declared unconstitutional.

DISPOSITION BY THE LOWER COURT

The lower court granted respondents' motion for summary judgment and held that Section 10-2-401 Utah Code Annotated 1953, as enacted by the Laws of Utah 1977, is unconstitutional.

RELIEF SOUGHT ON APPEAL

Appellant seeks a reversal of the lower court's order and a determination by this Court that the statute

authorizing annexation of certain property located within Emigration Canyon, to Salt Lake City, is constitutional.

STATEMENT OF THE FACTS

Between September 1977 and August 1978, three annexation petitions, subject of this appeal, were filed with the Board of Salt Lake City Commissioners. These petitions, when consolidated for consideration by the City Commission, described a contiguous parcel of unincorporated territory abutting the eastern boundary of Salt Lake City in an area known as Emigration Canyon. The purpose of the petitions appeared to be to upgrade current service levels in the canyon and to expand potential for residential development within the area. (Mayor's Deposition, p. 23-24).

Each annexation petition was, upon receipt, referred to the Salt Lake City Planning and Zoning Commission for investigation and recommendation. Final recommendation was made by the Planning Commission on August 10, 1978, following approximately 8 months of study, including public hearings, on the proposal. The Planning Commission found that: (a) the proposed annexation met necessary petition requirements; (b) the only way the area could receive adequate services was from Salt Lake City; and (c) the basic purpose of a city is to provide "proper services to developing areas." Accordingly, the Planning Commission

recommended in favor of annexation and proposed that a public hearing be held by the City Commission to consider the matter. (Jorgensen Deposition, Exhibit "1").

The City Commission in turn conducted its own investigation of the annexation proposal and held numerous public hearings thereon. During deliberations, it considered reports and documents from City departments, public agencies and private individuals on zoning, sewer, water, flood control, health, traffic and terrain conditions and the City's ability to service the area in these respects. It also evaluated police, fire, refuse collection and other such services. In addition, all residents, property owners and interested citizens wishing to be heard were given an opportunity to express their opinions and present facts, which were fully considered by the Commission. (Mayor's Deposition, p. 26-33).

On April 10, 1979, following consideration of the foregoing factors, the City Commission voted unanimously, in public hearing, to approve the petitions for annexation. (Mayor's Deposition, Exhibit "1"). The following day, respondents obtained a preliminary injunction from the District Court restraining the City from approving by ordinance the annexation. That injunction remains in current effect.

ARGUMENT

SECTION 10-2-401, UTAH CODE ANNOTATED 1953, AS ENACTED BY THE LAWS OF UTAH 1977, DOES NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE UNITED STATES OR UTAH CONSTITUTIONS.

A. THE COURT SHOULD GIVE THE LEGISLATIVE ACT THE PRESUMPTION OF VALIDITY ABSENT A SHOWING THAT RESPONDENTS ARE DEPRIVED OF A "VOTING RIGHT" UNDER THE UTAH ANNEXATION STATUTE.

Four distinct types of annexation procedures are utilized in this country, namely: (1) special act of the state legislature; (2) delegation of annexing power directly to cities; (3) acts of appointed commissions; and (4) popular determination. The selection of which method to be used for the extension of municipal boundaries within a state is "purely a political matter, entirely within the power of the state legislature to regulate. It is, in other words, a legislative function." McQuillin, Municipal Corporations, (Vol. 2) §7.10, p. 297.

The annexaton method selected by the Utah legislature is the delegation of the annexing power directly to municipal governing bodies; however, in Utah, annexation is initiated by petition of a majority of the property owners within the area proposed to be annexed. At all times relevant herein, Section 10-2-401, Utah Code Annotated, 1953, provided in this regard as follows:

> "Whenever a majority of the owners of real property and the owners of at least one third

> in value of the real property, as shown by the last assessment rolls, in territory lying contiguous to the corporate boundaries of any municipality, shall desire to annex such territory to such municipality, they shall cause an accurate plat or map of such territory to be made under the supervision of the municipal engineer or a competent surveyor, and a copy of such plat or map, certified by the engineer or surveyor as the case may be, shall be filed in the office of the recorder of the municipality, together with a written petition signed by a majority of the real property owners and by the owners of not less than one third in value of the real property, as shown by the last assessment rolls, of the territory described in the plat or map; . . ." (Emphasis added).

Upon receipt of such a petition the municipality is empowered to review such annexation in light of its resources and the equities of the matter and determine the advisability of the boundary proposal. Section 10-2-401, described this process as follows:

> ". . . the governing body of the municipality, at a regular meeting shall vote on the question of such annexation. The members of the governing body may by resolution passed by a two-thirds vote, accept the petition for annexation, subject to the terms and conditions as they deem reasonable, and the territory shall then and there be annexed and within the boundaries of the municipality. . . ."

This particular provision was amended by the 1979 Legislature to make minor changes not pertinent here. With the exception of the inclusion of the requirement pertaining to one-third of the value of the real property in 1957, the foregoing statute has provided for the initiation of

annexation proceedings, by a written petition of a majority of the real property owners, since 1898.

In adopting a statutory procedure, the state legislature is presumed to have acted within its constitutional powers. The Utah Supreme Court has addressed this issue as follows:

> "It is well settled in this state, as elsewhere, that the courts will not declare a statute unconstitutional unless it clearly and manifestly violates some provision of the constitution of the United States. Every presumption must be indulged in favor of the constitutionality of an act, and every reasonable doubt resolved in favor of its validity. (citations omitted) The whole burden lies on him who denies the constitutionality of a legislative enactment. State v. Packer, 297 P. 1013, 1016 (Utah, 1931). See also State v. Packard, 250 P.2d 561 (Utah, 1952) (Emphasis added).

In the recent case of Freeman v. Centerville City, (filed September 21, 1979), this Court upheld the constitutionality of the very annexation statute here in question; in doing so, the Court expressed its extreme reluctance to interfere with the legislative prerogatives contained in our statutory annexation process. The Court, citing numerous supporting cases, summarized as follows:

> "The power to change or modify municipal boundaries is a legislative function, and as long as the statutory process is complied with, the courts will not generally interfere with the legislative prerogative, even though a person's property by becoming subject to different jurisdiction may be subject to different rules, obligations, or

assessments."

This willingness of the Utah Supreme Court to extend broad discretion to legislative bodies in establishing municipal boundaries is fully consistent with longstanding precedent recognized nationally as early as 1907 in the leading case of Hunter v. Pittsburg, 207 U.S. 161, 52 L.Ed. 151, 28 S.Ct. 40. That policy was reaffirmed in the recently reported case of Holt Civil Club v. Tuscalousa, - U.S. -, - S.Ct. -, 58 L.Ed.2d 292 (1978) wherein the Supreme Court stated:

> "Government, observed Mr. Justice Johnson, 'is the science of experiment [citation omitted] and a state is afforded wide leeway when experimenting with the appropriate allocation of state legislative power. This Court has often recognized that political subdivisions such as cities and counties are created by the State 'as convenient agencies for exercising such of the governmental powers of the State as may be intrusted to them.' [citations omitted] In Hunter v. City of Pittsburg, supra, the court discussed at length the relationship between a State and its political subdivisions, remarking: 'The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state.' Ibid. While the broad statements as to state control over municipal corporations contained in Hunter v. City of Pittsburg, supra, have undoubtedly been qualified by the holdings of later cases such as Kramer v. Union Free School Dist., supra, we think that the case continues to have substantial constitutional significance in emphasizing the extraordinarily wide latitude that states have in creating various types of political subdivisions and conferring authority upon them."

The case of Kramer v. Union Free School Dist., 395 U.S. 621, 23 L.Ed.2d 583, 89 S.Ct. 1886 (1969) cited by the Court above, is one of several cases which have carved a narrow exception to the "extraordinarily wide latitude" the Supreme Court has granted state legislatures in equal protection matters. It is precisely upon this case which the Third District Court placed heavy reliance in its invalidation of the Utah annexation statute.

At issue in Kramer was a New York voter qualification statute that limited the vote in school district elections largely to property owners within the district. Without deciding whether or not a State may in some circumstances limit the franchise to residents primarily affected by the activities of a given governmental unit, the court held that the statute was not sufficiently tailored to meet that state interest since its classifications excluded some residents of the district who had direct interests in school board decisions and included many others whose interests were remote.

The upshot of Kramer and related cases, is that the traditional presumption of constitutional validity of a statute remains and if the court can conceive of any rational connecton between the classification and a proper state objective, the act will be held valid. However, if the law creates a "suspect classification," such as race, or

affects a "fundamental right" such as the right to vote, and the state action affects plaintiffs differently from other people who are similarly situated, the burden will fall on the state to prove that the classification is necessary to promote a "compelling interest." See Holt, supra, p. 299; Reynolds v. Simms, 377 U.S. 533, at 562, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

A "fundamental right" is alleged to have been violated in this action, namely, the right to vote. As will be shown in Section B hereof, participation in Utah's annexation petition process is not a fundamental, voting right. See Berry v. Bourne, 588 F.2d 422 (4th Cir., 1978). Therefore, the Utah annexation statute is presumed constitutional and the Court should reverse the decision of the lower court and rule, as a matter of law, that the statute is valid.

B. THE LOWER COURT ERRED WHEN IT CONCLUDED THAT TO PETITION FOR ANNEXATION UNDER UTAH STATUTES CONSTITUTES A VOTING RIGHT. FURTHER, NO BASIS FOR AN EQUAL PROTECTION CLAIM EXISTS IN THE ABSENCE OF SUCH A RIGHT.

The Third District Court in the instant action did not rule as to whether the statutory annexation process had been complied with. Instead, it concluded that Section 10-2-401, Utah Code Annotated, 1953, is void on its face in that it contravenes the equal protection provisions of both state and federal constitutions by denying the right of "persons other than taxpayers" a voice in the annexation process.

The lower court based its decision on the Kramer case, supra, and upon several other cases construing equal protection provisions as they apply to the exercise of the elective franchise. Also cited was a student authored law review article proposing that the principles applied in these voter franchise cases should be extended to preclude the annexation petition process employed within our state. Conspicuously absent was any case ruling on the point at issue - the constitutionality of a non-elective petition process leading to a legislative determination.

Interestingly, in its decision voiding the statute which establishes the sole mechanism for annexation within our state, the district court acknowledged the existance of the very recent case of Torres v. Village of Capitan, 582 P.2d 1277 (New Mexico, 1978). However, the Court failed to follow that decision and it is the only case noted by the lower court which was in point. In fact, the holding of that case is on all fours with the issues in the instant action.

In the Torres case, the Supreme Court of New Mexico upheld ons annexation statute similar to the Utah statute. This law permitted cities to approve annexation of contiguous territory upon receipt of petitions signed by "owners of a majority of the number of acres in the contiguous territory." Like the case before the Bar, the

parties in that case sought to void the New Mexico annexation statute by attempting to equate the signing of an annexation petition with the "right to vote." In doing so, they attempted to avail themselves of the same case law regarding elective processes now relied upon by plaintiffs in the instant action.

The New Mexico Court, however, rejected that equation. It correctly held:

> "that petitioning for annexation of land in this case is not a fundamental voting right and that §14-7-17, [the annexation statute in question] supra, is constitutional." Id. at p. 1283

Plaintiffs' argument before the District Court in the case at hand parrots precisely the reasoning heard and rejected by the New Mexico high court. (See Exhibit "A," Brief of Salt Lake County as amicus curiae, corrected August 14, 1979). Not one single case has been presented by plaintiff-respondents which holds for the position they urge this court to novelly adopt; namely, that petition process leading to a legislative determination on annexation is unconstitutional.

Rather, each case relied upon dealt with either an election or a petition process which lead to an election. As such, the cases presented by plaintiffs and relied upon by the District Court are clearly not in point.

Numerous additional attempts have recently been made to

strike down, on equal protection grounds, petition process leading to review of annexation proposals by municipal bodies. As in Torres, each such challenge has failed. The most recent case, in which such an attack has been considered is Berry v. Bourne, 588 F.2d 422 (1978). In this case, the United States Fourth Circuit Court of Appeals ruled valid the statute, which authorized municipal annexaton within the State of South Carolina under a similar petitioning process as employed in the Utah statute.

The South Carolina statute authorized the governing body of a city, upon filing of a petition signed by seventy five percent or more of the freeholders in any area contiguous to the city requesting annexation, to annex such area by the adoption of an appropriate resolution. The plaintiff in that action, one of thirteen registered voters living in an area proposed to be annexed, sought an injunction against the City of North Charleston. He asserted that the statute, by denying to the registered voters the right to vote on the annexation, violated the rights of such voters under the equal protection clause.

The Fourth Circuit affirmed the District Court's denial of the injunction and upheld the South Carolina annexation statute. In doing so, that Court relied upon the broad language of the Supreme Court in Hunter, supra, and upon the cases which followed it. These cases unequivically declare

that annexation by a city is purely a state political or legislative matter, entirely within the power of the state legislature to regulate.

It was urged, however, by plaintiffs attacking the statute, that Hunter, supra, and the many cases decided under it, must be considered to have been overruled by the later decisions in Cipriano v. City of Houma, (1969) 395 U.S. 701, 89 S.Ct. 1897, 23 L.Ed.2d 647 and Kramer, supra. However, such an assertion was without merit because, these cases merely established the principle that otherwise qualified electors may not be excluded from voting in an election on the basis that they did not own property within the area. They do not consider and do not relate to the process of by which a legislative body considers exercising its legislative function of approving an annexation. Therefore, they have no precidential value in the matter at issue.

The Fourth Circuit Court correctly analysed these authorities and noted that there is no basis for an equal protection claim where no one is given the right to vote on the matter of annexation. The court emphasized that under the petition process before it, no such voting right existed because final determination of the matter was reserved to the municipal authority. The Court summarized this point as follows:

"We emphasize again that neither freeholders nor electors as such are given the right to vote on annexation under the statute in question; that right is given exclusively to the governing board of the annexing city. It is true that three-fourths of the freeholders in the area to be annexed must request annexation before the governing body of the annexing city may consider annexation. This is a common preliminary prerequisite for authorization of an annexation, whether by election or by action of the annexing city's governing board. But the important fact is that the action of the freeholders in signing the request for annexation does not authorize annexation. Annexation depends wholly upon the favorable vote of the governing body of the annexing city. This is the crucial action and on that neither freeholders nor electors as such have a vote. Since the electors of the municipality of the area to be annexed are not given the right to vote under the challenged statute, the application of the statute poses no equal protection issue. (Emphasis added).

The court further distinguished each of the cases cit by plaintiffs as dealing solely with the elective franchis and inapplicable to a petition process leading to a legislative consideration:

"We find nothing in the several decisions dealing with restrictions on the right to vote (characterized by the plaintiff as cases touching on the burden of the right to vote) applicable in the context of the issue before us. In all those cases cited by the plaintiff, there was to be an election and the constitutional attack was directed by restraints upon the right to vote in that election. The procedure challenged by the plaintiff in this case, however, involves no election; in fact, it is a procedure which does not contemplate an election. Consequently, we are not concerned with any unconstitutional limitation upon the right to vote in an election." At p. 425. (Emphasis

added).

The New Mexico Supreme Court and Fourth Circuit Court of Appeals were clear in their rejection of arguments which would invalidate annexation on equal protection grounds, when such procedures involve legislative rather than election processes. Further, there does not appear to be a "voting right" present where the annexation decision is judicially, rather than legislatively determined. See Citizens Committee to Oppose Annexation v. City of Lynchburg, Virginia, 400 F.Supp. 68 (1976) affirmed in relevant respects 528 F.2d 816 (1976) application for injunction denied 96 S.Ct. 766, 423 U.S. 1043, 46 L.Ed.2d 632 (1976). Plaintiffs contend, without authority of law, that there is no constitutional difference between voting and petitioning. It seems obvious, however, to this writer and to apparently all courts which have ruled upon this particular annexation question, that although the elective process is "popular" the annexation process here under consideration is "legislative" in nature. That is, the decision as to whether to annex does not lie with the public at the ballot box, but with the elected representatives on the City Commission.

The Utah annexation process does not in any respect constitute an "election" has been made conclusively clear in Utah. Less than two months ago, in the Freeman case, supra,

held against a constitutional attack on our annexation statute focused on due process grounds. It was contended the plaintiff in that action that the annexaton statute is constitutionally defective because it failed to provide th those in the area to be annexed must receive notice of the annexation proceedings and the right to elect whether or n to have their property annexed. It was argued by the plaintiff that (because his property would be subject to t assessments, liens, and encumbrances imposed by the city through annexation), he was deprived of property without d process of law by the annexation.

In that action, this Court reaffirmed its reluctance t interfere in a fundamentally legislative process and stated as follows concerning the assertion that the petition process constituted an election:

> "In enacting §10-2-401 the Legislature established a means for annexation which calls for the consent of both the annexing municipality and a majority of the property owners in the area seeking annexaton. The initiation of the annexation process bv petition is not the equivalent of an election, nor need it be. It is only the triggering process for the concerned municipality to consummate the annexation procedure bv exercising its legislative power if it deems it appropriate to do so. (Emphasis added). Freeman v. Centerville City,

In holding that a petition process leading to a legislative determination does not constitute an election, this Court reaffirmed its longstanding holding in Patterick

v. Carbon Water Conservancy Dist., 145 P.2d 503 (Utah, 1944). In that case, this Court ruled against an equal protection challenge to a statutory procedure, which precluded owners of property whose assessed valuation was less than $300 from petitioning for creation of a proposed conservancy district. The Court summarized its decision upholding the statute as follows:

> "The legislature had the power to create a water conservancy district by its own fiat. It need not have given any individual or group the right to petition for the creation of a district. It was within its discretion to determine what qualification, if any, a petitioner for the creation of a district must have, since the petition for the formation or the formation of the district itself do not affect any property rights. Had the legislature created the district it could have provided for a tax on all property within the district to pay for the costs and maintenance of the project. See In re Proposed Middle Rio Grande Conservancy District, 31 N.M. 188, 242 P. 683, at page 689, in which the court in determining that a provision in its water conservancy act that only resident freeholders could sign the petition for the formation of the district was not unconstitutional quotes with approval the following statement of the Californa Supreme Court deciding a similar question in the case of In re Bonds of the Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L.R.A. 755, 27 Am. St.Rep. 106: 'It is objected to this, that it is placing in the hands of those not interested the power of imposing a burden upon the owners of the land, who may be a small minority of the electors within that district, or who may even be nonresidents of the district. This, however, is a matter which was addressed purely to the discretion of the Legislature. Whether such a petition should be made by the owners of a fixed proportion

> of the land, as was required in the reclamation law, or whether there should be any qualification to the petitioners, or whether there should be any limit to the expenses which they were authorized to incur for the purposes of the improvement, are questions which were solely for the consideration of the Legislature. * * * It must be observed, however, that this petition has no binding operation, but is merely the initiatory step which gives to the board of supervisors a jurisdiction to act upon the expediency or policy of authorizing the creation of the district.'" (Emphasis added) Id. at p. 512.

It is clear from the above that, under an elective process, the eligible citizenry is given authority to make final determination on a political issue. Exclusion from the process excludes a party from meaningful participation altogether. However, as stated by this Court, our annexation process differs fundamentally from an elective process. This is true because citizens do not effectuate the annexation; rather, they merely, by petition, permit the matter to be considered by the elected officials charged with responsibility for delivery of the municipal services.

In other words, annexation decisions in Utah are made by elected representatives of the public, they are not made directly by the public itself. This representative principle and process is fully compatible with fundamental constitutional principles.

Under Utah and most other state annexation procedure,

any interested person may appear personally or by petition before the elected officials of the city and have their views heard and considered. In fact, the voluminous record before the Court in this appeal demonstrates the great extent to which the views and expressions of all interested persons were solicited and considered by the City and its elected officials. In the words of Mayor Wilson:

> "I took pride in the fact I read almost every document word by word. I don't say I read everything, but I made an attempt to and took all of that into account when I made my own decision." (Mayor Wilson Deposition at 33).

Thus, the petition by a majority of property owners in the area proposed for annexation was not the means by which the decision to annex was made. The petition did provide the statutory means by which the City Commission assured itself that a need and desire for municipal services existed in the subject area prior to approving annexation.

The United State Supreme Court has recently joined other courts (cited herein) in halting attempts to unduly extend this "one man, one vote" doctrine articulated in Kramer beyond its intended scope. In Holt, supra, the Supreme Court considered the equal protection claim of certain residents of a small unincorporated community near the corporate limits of Tuscalousa, Alabama. The issues of that case focused on a statute which gave extraterritorial effect to municipal police and sanitary ordinances. It was

contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment, by extending such pow over persons residing outside municipal boundaries, with permitting such residents to vote in municipal elections. The Court therein rejected the contention that under Kra and cases wich followed in its wake, the state's denial o the franchise to police jurisdiction residents could sta only if justified by "a compelling state interest." On t contrary, the court concluded: "some rational relations to a legitimate state purpose" is all that is required. at p. 299 and p. 302.

The Court further summarized its holdings in all of voter-qualification cases, including Kramer. It articula the common characteristic existant in all such cases and stated:

> "From these and our other voting qualifications cases a common characteristic emerges: the challenged statute in each case denied the franchise to individuals who were physically resident within the geographic boundaries of the governmental entity concerned.
>
> * * *
>
> "No decision of this Court has extended the 'one man, one vote' principle to individuals residing beyond the geographic confines of the governmental entity concerned, be it the state or its political subdivision. On the contrary, our cases have uniformly recognized that a governmental unit may legitimately restrict the right to participate in its political processes to those who reside within its borders.

* * *

"The line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellant's case, like their homes, falls on the farther side." Id. at pp. 300-302. (Emphasis added).

Thus, in the case at hand, respondents' efforts to extend "voting rights" beyond the territorial limits of the municipality are without authority of law. Further, the case law is uniform in holding that a petition process, leading to legislative consideration of an annexation proposal is not in any respect an election; thus, such a petitioning process is in every sense constitutional.

C. SECTION 10-2-401, WHICH PERMITS THE INITIATION OF ANNEXATION PROCEEDINGS BY PETITION OF PROPERTY OWNERS, BEARS A RATIONAL RELATIONSHIP TO A LEGITIMATE STATE PURPOSE AND NO BASIS OF AN EQUAL PROTECTION CLAIM EXISTS IN THE FACE OF SUCH A RELATIONSHIP.

Stripped of its voting rights attire, the equal protection issue presented by respondents becomes whether the Utah annexation statute bears some rational relationship to a legitimate state purpose. Absent a showing of a voting right, the Supreme Court in Holt, supra, reasoned that the "Equal Protection Clause is offended only if the statute's classification rests upon grounds wholly irrelevant to the achievement of the state's objective." At page 302. Further, a court's inquiry is limited to the question of

whether "any state of facts reasonably may be conceived t justify" the challenged statute.

In the case of Adams v. City of Colorado Springs, 30 F.Supp. 1397 (D. Colo., 1970) the court denied an equal protection challenge to a Colorado annexation statute, th statute required an election for annexation where the perimeter of the territory was less than two-thirds contiguous with the municipality, and permitted a petitio but no election, in areas of more than two-thirds contiguity. The plaintiffs in that action conceded that t legislature was empowered to create annexation machinery, without granting the right to vote; however, they maintai that if the legislature extended the franchise to one gro it must extend the same right to another group absent a "compelling public reason." In rejecting plaintiffs' constitutional claim and the strict standard of review th proposed, the Court reasoned in part as follows:

> "We are unable to hold that the distinction recognized by the Assembly as to when the franchise may be exercised is unreasonable in light of the manifest purposes for the differentiation. Thus, where the area to be annexed has less than two-thirds contiguity with the annexing city, the interrelationship between the annexed areas and the city may not be great enough to warrant a politically undesirable unilateral merger. Where, however, the territory to be annexed has over two-thirds contiguity with the annexing city, the interrelationship between the two areas is or can be so close that the city should be allowed to annex despite the unwillingness of the residents of the annexed territory. The

law thus recognizes that a municipality such as Colorado Springs is severely handicapped by an annexation law which requires the approval of the property owners and qualified electors of an annexed area. It is unable to deal with groups of citizens who form small tax colonies on the border of the core city which is the economic base of the urban area and to which the colonies owe their very existence and yet pay nothing for the advantage which the city provides. These people would seldom consent to the annexation and their non-consent would threaten the very existence of the core city." (Emphasis added).

The New Mexico Supreme Court in Torres, supra, likewise applied only "minimum scrutiny" in upholding the constitutionality of that state's annexation petition statute. In that case the court, on its own, found rational basis for the initiation of annexation by property owners:

"There being no provision in our law for an election on this issue, we have even less need to apply strict scrutiny regarding the issue bearing on violation of the equal protection clause than was true in Adams, supra. Only minimum scrutiny need be applied to uphold the constitutionality of our statutes since they do not involve elections and therefore do not infringe upon the fundamental right to vote. Under this level of scrutiny a statutory discrimination of inequality will not be set aside if any state of facts reasonably may be conceived to justify it. [Citation omitted] The record need not show what the reasonable basis is since the appellate court may on its own find a reasonable basis. [Citation omitted] One obvious and rational basis for the initiation of the annexation by owners of a majority of the acreage is that taxes to support the Village will be partially apportioned in accordance with the amount of land owned by the new residents or landowners brought into the Village. Our statutes meet the test of

minimum scrutiny." (Emphasis added).

In determining whether a rational basis exists for t initiation of annexaton by property owners in our state, should be borne in mind that municipalities are subdivisi of the state and their purposes are statutory in nature. namely to deliver municipal services. The 1979 state legislature specifically stated such in Section 10-2-401 the newly adopted annexation law as follows:

> "10-2-401. The legislature hereby declares that it is legislative policy that:
>
> "(1) Sound urban development is essential to the continued economic development of this state;
>
> "(2) Municipalities are created to provide urban governmental services essential for sound urban development and for the protection or public health, safety and welfare in residential, commercial and industrial areas, and in areas undergoing development;"

The legislature further, in Subsection (3) of that section, delineated the policy upon which municipal annexations should be governed.

> "(3) Municipal boundaries should be extended, in accordance with specific standards, to include areas where a high quality of urban governmental services is needed and can be provided for the protection of public health, safety and welfare and to avoid the inequities of double taxation and the proliferation of special service districts;"

It is apparent from the foregoing that where urban services are needed, cities not only may, but should, e

their boundaries in accordance with legislative standard. Such is the purpose for which they were created and such is the purpose for which the Emigration Canyon Annexation was petitioned for and approved.

It must be borne in mind that annexation is largely the means by which development occurs within our state. Thus, where annexation is contemplated, the health of state citizens and the economic welfare of the state rest in the balance. To the extent that annexation machinery is complicated annexation is discouraged. When annexation is discouraged, either (1) development is retarded; (2) limited function entities proliferate; or (3) double taxation inequities are generated. Accordingly, a streamlined annexation mechanism is an essential element of state and municipal welfare.

It must also be considered, as the court in Adams, supra, was quick to point out, that an annexaton law which requires the approval of property owners and qualified electors of an annexed area, severely handicaps annexation efforts. Residents of "tax colonies" on the fringes of the core city pay nothing for the advantages the city provides and accordingly seldom consent to annexation. Further, the mobile nature of our modern urban communities make ascertainment of residency an often burdensome procedure.

Accordingly, the Utah legislature has established a

triggering mechanism for annexation within our state which does not attempt to determine actual ownership or residency. It has deferred, instead, to the County tax rolls for an ascertainment of persons qualifying to be tallied on an annexation petition count. The purpose of that count is not to allow property owners to "vote" or otherwise make a decision on the annexation. The petition merely provides the statutory means by which the City Commission assures itself that some need and desire for annexation exists within the subject area prior to approvir annexation.

Tax rolls were likely selected as the reference sourc because qualifications of petition signatories could be easily and finally determined therefrom. The long history of this process in Utah and its retention in the 1979 legislative revision are testimony of the legislatures acceptance of the mechanism as an effective means to addres its policy objectives.

It is possible to speculate on the existence of equall inexpensive and simple mechanisms for approximating local support for annexation; however, the political science question of the most "practical" approach, is a legislativ matter and is not before the court. As stated in Holt, supra, "Our inquiry is limited to the question whether 'an state of facts reasonably may be conceived to justify'" th

statute.

Armed with a general indication of support from the annexing area, the municipal legislative body proceeds to review the annexation in light of its resources and the equities of the matter and determine the advisability of the boundary proposal. During this review, each citizen is "given a voice" through the public hearing process. Such a process is efficient and fundamentally consistent with state policy and constitutional government. No basis for an equal protecton claim exists in the face of such a relationship.

CONCLUSION

The Supreme Court of Utah has very recently spoken in clear and decisive support of Utah's annexation statute as being constitutional. In doing so, it has stated that "[w]e find no basis in the Constitution for making the general annexation process subject to conditions beyond those stated in the statute." See Freeman v. Centerville City, supra. In that same case, this court stated that "[t]he initiation of the annexation process by petition is not the equivalent of an election," but "is only the triggering process for the concerned municipality to consummate the annexation procedure by exercising its legislative power if it deems it appropriate to do so." This Court concluded that:

> "[t]he Legislature was also clearly within its right to provide a mechanism for annexation which does not require an election by those affected."

Contrary to that ruling and the applicable case law from virtually every other jurisdiction, the lower court has taken an activist--and erroneous--position. It equated the annexation petition process, under Utah law, with the right-to-vote-in-elections process, under the equal protection clause of the federal and state constitutions. The wishful thinking of itinerant student writers in Law Review articles should not be the basis of upsetting long-established and sound legal principles pertaining to annexation, so recently reaffirmed by this court.

As cogently pointed out by the United States Fourth Circuit Court of Appeals in Berry v. Bourne, supra, with respect to the proposed elevation of the annexation process by the Harvard Law Review to a more lofty academic realm or the bootstraps of the equal protection clause:

> "Such an argument is supported by no authority and appears to us to be an extreme exercise in preciosity and without merit."

It is submitted that the decision of the lower court in this case is equally as ill-advised by the Utah Law Review and should be placed in proper constitutional perspective by a speedy reversal.

Respectfully submitted,

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