

1980

Peter Doenges, Miles Crockard, William Bowen,
Richard H. Watson, Carl Peterson, and Emigration
Improvement District v. 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 : Brief of Amicus
Curiae

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Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors. Walter R. Miller, Jack L. Crellin; Attorneys for Defendant-Appellant Salt Lake City Douglas J. Parry; Attorney for Defendant-Appellant Emigration Properties Ted L. Cannon, Kent S. Lewis, Gavin J. Anderson; Attorneys for Salt Lake County E. Craig Smay; Attorney for Plaintiff-Respondent Peter Doenges

Recommended Citation

Brief of Amicus Curiae, *Doenges v. Salt Lake City*, No. 16649 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

PETER DOENGES, MILES CROCKARD,
WILLIAM BOWEN, RICHARD H. WATSON,
CARL PETERSON, and EMIGRATION
IMPROVEMENT DISTRICT,

Plaintiff-Respondents,

-vs-

CITY OF SALT LAKE CITY, a municipal
corporation: EMIGRATION PROPERTIES
PARTNERSHIP, a Utah limited partner-
ship, BOWERS-SORENSEN CONSTRUCTION
COMPANY, a Utah corporation, and
FRED A. SMOLKA,

Defendant-Appellants.

Case No. 16649

APPEAL FROM JUDGMENT OF THE
THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
HONORABLE DEAN E. CONDER

BRIEF OF AMICUS CURIAE
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Defendant-Appellants.

Case No. 16649

THE NATURE OF THE CASE

Plaintiff-Respondents brought suit in the Third Judicial District Court, the Honorable Judge Dean E. Conder, seeking to have Utah Code Ann. 10-2-401 (1953, as amended, 1977) declared unconstitutional as a violation of the Equal Protection clause of both the United States and Utah Constitutions.

DISPOSITION BELOW

Lower court granted Plaintiff-Respondents' Motion for Summary Judgment and found Utah Code Ann. 10-2-401 (1953, as amended in 1977) unconstitutional.

NATURE OF RELIEF SOUGHT
POSITION AS AMICUS CURIAE

Amicus neither supports nor opposes this particular annexation, but contends that the Utah municipal annexation

law cited above, granting a petition right to real property owners but denying it to interested and affected non-property owners, is an unconstitutional denial of Equal Protection. Amicus prays the Supreme Court affirm the lower court's holding that the municipal annexation statute, 10-2-401 (as amended, 1977), is unconstitutional.

STATEMENT OF FACTS

Amicus concurs in Plaintiff-Respondents' statement of facts and hereby expressly incorporates it by reference.

ARGUMENT

I

SECTION 10-2-401 (AS AMENDED, 1977), BY GRANTING A RIGHT OF FRANCHISE BY PETITION TO OWNERS OF REAL PROPERTY IN THE ANNEXATION AREA, BUT DENYING THAT RIGHT TO INTERESTED AND AFFECTED NON-PROPERTY OWNERS IN THE SAME AREA, DENIES A FUNDAMENTAL RIGHT OF EQUAL PARTICIPATION IN POLITICAL AFFAIRS AND, BY SO DOING, VIOLATES THE EQUAL PROTECTION PROVISIONS OF THE UNITED STATES AND UTAH CONSTITUTIONS.

- A. THE QUESTION AT ISSUE DOES NOT CONCERN THE LEGISLATIVE GRANT OF POWER TO MUNICIPALITIES, OR THE MUNICIPALITIES' EXERCISE THEREOF; IT CONCERNS AN IMPROPER DISTINCTION BETWEEN PROPERTY OWNERS AND NON-PROPERTY OWNERS WHICH VIOLATES EQUAL PROTECTION.

It is essential, at the outset, to establish what exactly is at issue in this case. The issue does not revolve around the legislature's power to establish reasonable means whereby cities may annex unincorporated areas; rather, the issue is whether the legislature, after establishing an annexation procedure which grants a statutory franchise by petition to one set of interested annexees, may deny the same right of petition to another set of equally interested and

affected annexeess. It cannot be denied that this second set of annexeess--residents whose names do not appear on the latest property tax rolls--has a direct and substantial interest in the public facilities and services, and the costs therefor, which are involved in annexation into a municipal government and should be allowed to participate politically in the annexation to the same extent that property owners participate. The burdens of annexation do not rest exclusively or even primarily on property taxpayers, but are borne by every inhabitant, renter, and consumer in the annexed area. The U. S. Supreme Court has found on numerous occasions that the difference between the interests of property owners and non-property owners are not sufficiently substantial to justify excluding non-property owners from the political process and that any law which permits political participation by persons having only a remote interest in the affairs at issue, while excluding others who have a distinct and direct interest is a violation of Equal Protection. Phoenix v. Kolodziejwski, 399 U.S. 204, 209 (1970); Kramer v. Union Free School District, 395 U.S. 621, 632-633 (1969).

The cases cited by Appellants hit wide of the mark by raising issues, not of denial of equal participation in a petition process, but concerning the power of the legislature to pick reasonable annexation procedures which do not burden equal protection and of the power of cities to annex within those procedures. Here there is no issue as to whether an elective process must be established in the first place;

Amicus recognizes that the Supreme Court has never found a constitutional right to any election. The Court has, however, found that once an elective process is established, qualified individuals with a legitimate interest must be allowed to vote. For example, in Torres v. Village of Capitan, 92 N.M. 64 (1978), the New Mexico Supreme Court never reaches the question of whether a petition system is similar enough to an election to invoke equal protection, it only finds that the legislature has the power to establish an annexation system which has no election at all. Indeed, the question of discrimination against non-property owners which this court must resolve could not have been considered by the Torres court, as it had no non-property owners before it. Likewise, the California case of Weber v. City Council, 9 Cal.3d 950 (1973), only stands for the proposition that the legislature can establish an annexation process which has no voting or petitioning process, it says nothing about equal protection when a petition process has been established.

The cases of Hunter v. City of Pittsburgh, 207 U.S. 161 (1907); Child v. City of Spanish Fork, ___ Utah 2d ___, 538 P.2d 184 (1975); Bradshaw v. Beaver City, 27 Utah 2d 135 (1972); and Cottonwood City Electors v. Salt Lake County, 28 Utah 2d 121 (1972), all relied upon by Appellant, deal only with the power of the legislature to create municipal governments and confer authority on them, not at issue here. Indeed, the extensive reach of a municipality's power granted by the state and recognized in Hunter is still severely

limited by the reach of the Equal Protection clause. Curtis v. Board of Supervisors, 7 Cal.3d 942 (1972).

Lastly, the issue is not one that may be resolved under the Due Process clause. The case of Freeman v. Centerville City, ___ Utah 2d ___, 600 P.2d 1003 (1979), in examining 10-2-401, considered only the due process rights to notice and hearing, not the equal protection distinction between property owners and non-property owners. Appellants' due process argument that non-property owners may participate in the annexation hearings held before the City Commission has nothing to do with the equal protection issue now before the Court.

The equal protection standard which this Court must apply, and which controls the real issue that must be resolved, has been defined by Chief Justice Warren Burger as that protection which denies

"...to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
Reed v. Reed, 404 U.S. 71, 75-76 (1971).

- B. THE PETITION PROCESS, ESTABLISHING A MEANS BY WHICH INTERESTED AND AFFECTED LOCAL CITIZENS MAY EXPRESS APPROVAL OR DISAPPROVAL OF AN ANNEXATION, IS SO SIMILAR TO THE ELECTORAL PROCESS THAT EQUAL PROTECTION GUARANTEES MUST BE APPLIED.

The essence of Appellants' case lies in an artificial distinction between the petition process involved here and an election. It is clear that both systems are means by which the government determines if sufficient public support exists to elect a candidate, resolve an issue, or change a system of government. In this case the receipt or denial of substantial rights and services, to be granted by a large municipality, directed by elected representatives, and cloaked with general governmental authority and police power, hangs on this determination of popular support. The question then is whether this court will find that minor differences in the form and procedure of public participation in an election vis-a-vis the petition process are substantial enough to label the latter as less than a fundamental interest.

In proposing this artificial distinction, Appellants rely on dicta in the Freeman case that the petition is only a "triggering process". Though perhaps a "trigger", it is a trigger with all the force of an election in terms of the positive, substantial influence cast over the final decision by city government, this especially so considering that non-property owners are excluded from a political process which either confers or completely denies annexation powers to the municipality.

The fact that annexation is a two-tiered process, with the petition followed by a city commission decision is not dispositive because if it were an election triggering, but not binding, a city government decision, equal protection

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guarantees would clearly apply. This was the result in Phoenix v. Kolodziejski, where a two-step process--election followed by city government decision--controlled the issuance of general obligation bonds. 399 U.S. 204, 206 (1970). Kolodziejski held that in those circumstances, a restriction of the franchise to property owners violated equal protection.

Amicus would also submit that even if the petition is only a trigger, that it is equivalent to a candidate's obtaining of a place on a general election ballot in that it assures that a candidate (or an annexation) has at least a modicum of serious public support before binding elections (or hearings by the City Commission) are held. The Supreme Court has recognized an extension of the fundamental voting rights analysis to participation in political party primaries and to candidates' access to the ballot. Kusper v. Pontikes, 414 U.S. 51 (1973); Williams v. Rhodes, 393 U.S. 23 (1968). This fundamental rights analysis is aided by the consideration that in Utah there is only one means of annexation: city government action based on a determination of popular support. The cases of Torres v. Village of Capitan, supra, and Berry v. Bourne, 588 F.2d 422 (4th Cir. 1978), are thereby rendered less persuasive as they dealt with New Mexico and South Carolina statutes which allowed a city to complete an annexation by any of several means; that is, the city could still annex if there were no showing of local popular support--a significant difference from the Utah law.

Even if this Court found that the minor procedural

differences between an election and a petition rendered the right to equal participation in the petition process less fundamental than election participation, the Court's obligation of "active and critical analysis" is not limited to elections or electoral qualifications but extends to laws "touching upon" the right to vote or to participate in political affairs. Curtis v. Board of Supervisors, supra, 501 P.2d at 544. The United States Supreme Court has also recognized that fundamental rights analysis extends beyond the right to vote and includes the right to equally "participate in political affairs." Kramer, supra, at 626. The same equal protection standard of review used to test the constitutionality of limitations on voting rights should be used to test statutorily authorized petition rights. The application of this standard of review to classifications based on property ownership has been carefully explained by the Supreme Court in a series of three cases which extended the rights of non-property owners to participate fairly in political affairs dealing with property. In Kramer v. Union Free School Dist., supra, the right to vote for school board officials was extended to those other than parents and property owners. In Cipriano v. City of Houma, 395 U.S. 701 (1969), the Court invalidated a statutory restriction allowing only property owners to participate in revenue bond elections. Phoenix v. Kolodziejwski, supra, extended the Cipriano holding to elections approving general obligation bonds which were intimately tied to property tax and which could result in liens against real property.

These cases indicate a strong desire on the part of the Court to dispel archaic notions that local municipalities are supported only by property owners and to allow full participation in political affairs to all concerned and otherwise qualified citizens.

Analysis of the applicability of the Kramer line of cases is furthered by a comparison of those cases with the later case of Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973). In Salyer, the Court upheld a legislative scheme which restricted the vote in water district elections to property owners. This seeming departure from Kramer and its progeny was justified, however, by reason of the election's "special limited purpose and of the disproportionate effect of its activities on landowners as a group." 410 U.S. at 728. The considerations of limited authority and disproportionate effect, joined with the fact that there was no general governmental powers granted to the water district, were sufficient to find a substantial interest on the part of property owners and little or no interest in or effect upon non-property owners. Salyer's application to the matter here at issue is obvious: Although the city is literally annexing acres, rather than persons, it is not acres that are benefited and burdened by the annexation. The effect of annexation does not disproportionately fall on property owners but rather on all residents of the area, property owners and non-property owners alike. In addition, the governmental unit being extended to the annexation area

is not one of limited purpose, but is possessed of broad police powers and general governmental authority. Because of these reasons the same equal protection standard of review used in Kramer should be applied here to test the constitutionality of limiting the right of petition to property owners. The California Supreme Court, in examining the right to protest, by petition, an annexation, found that it could

"...discern no reason, and respondents suggest none, why landowners enjoy a greater interest, or nonlandowners a lesser interest, in the formation of a city of general powers than in its governance, or its issuance of general obligation bonds. Nor do we find a reason, and again respondents suggest none, why the interest of landowners becomes more compelling, more worthy of special protection, in a protest proceeding [by petition] than in an election.

We conclude that the principle established in Kramer, Cipriano, Kolodziejski, and other cases applies fully to the present case. Nonlandowners share an equal interest with landowners in the formation of a city which could provide police and fire protection, maintain roads, acquire and develop parks, and furnish other public services. Moreover, cities derive revenue from many sources besides property taxes. Property taxes are levied on land and improvements, not land alone, and their burden includes tenants as well as landowners." Curtis v. Board of Supervisors, supra, 501 P.2d at 550.

When 10-2-401 was originally enacted in 1898, the legislature must have intended that no annexation would proceed without the approval of the populace involved, otherwise there would have been no petition provision. Now, some 80

years later, when municipal revenues have shifted significantly away from property taxation and when cases like Kramer dictate that all qualified residents, not just property owners, have a legitimate right to participate in local government, this legislative intent that an annexation be based on an expression of popular support by those most affected stands to be frustrated. This frustration is brought about in two ways: first, the property owner restriction prohibits participation by a significant portion of the affected populace; second, the property owner restriction creates a major distortion of the size of the population to be considered and of the size of the majority required to sign. It is this dilution of representation and distortion of the "majority" which constitutes a violation of the one man-one vote strand of equal protection analysis.

By granting the petition right to land rather than to people, 10-2-401 ignores the observation of Reynolds v. Sims, 377 U.S. 533, 562 (1964), that government represents "people, not trees or acres. Legislators are selected by voters, not farms or cities or economic interests." Where, as here, the annexation area is controlled by a few large landowners, those landowners--be they ranchers, developers, entrepreneurs, or businesses--can, by gerrymandering, manipulate an annexation area to the point where the attitudes and interests of a majority of the landowners are completely adverse to those of the non-property owning residents.

"In addition to limiting the class of persons eligible to sign a petition to residents of a single area, states frequently bar certain groups of residents from signing. The class of eligible signers may be limited to property owners, freeholders, taxpayers, or inhabitants instead of voters. It would seem appropriate to apply the principles of the franchise restriction cases to these restrictions on eligible signers, for both forms of restriction give a particular economic group a veto on a proposition with which others are also substantially concerned. Viewed in this light, such signer limitations appear clearly unconstitutional. The Right to Vote in Municipal Annexations, 88 Harv. L. Rev. 1571, 1606-1607 (1975). (Emphasis added).

See also, Utah Law on Municipal Boundary Changes--Anarchy Among Modern City-States, 1977 Utah L. Rev. 697, 701-704, where serious questions are raised concerning the constitutionality of Section 10-2-401.

The U.S. Supreme Court has recently examined the right of equal participation in a petition process which was limited to property owners. The Court summarily reversed a lower court ruling that found no one man-one vote problems in the landowner classification. While it offered no ruling on the merits of the arguments there advanced by appellants, the Court observed that "it is fair to say that they are not insubstantial." Concerned Citizens of So. Ohio, Inc. v. Pine Creek Conservancy Dist., 429 U.S. 651, 653 (1977).

One last consideration: Appellants have not presented, nor can Amicus conceive of, a single rational reason to distinguish between an election and a statutory petition process. Both are expressions of popular support which

differ only in the procedures by which they are administered. There is no constitutional magic about the election process; elections themselves are not universally guaranteed by the Constitution. But the Supreme Court has found that equal participation in an election, even one which is not binding on the government's final decision, is a fundamental right. The same standards must be applied to the right of equal participation in political processes which influence, by popular determination, the form of a local representative government, even though those processes differ procedurally from the standard election system.

II

THE ANNEXATION STATUTE, BY DENYING A FUNDAMENTAL RIGHT OF EQUAL POLITICAL PARTICIPATION, MUST BE SUPPORTED BY A COMPELLING STATE INTEREST. THE STATUTE FAILS NOT ONLY THE COMPELLING STATE INTEREST TEST, BUT ALSO THE Milder REQUIREMENT OF SATISFYING A SUBSTANTIAL STATE INTEREST.

The requirement that a statute which restricts a fundamental right must be supported by a compelling state interest in the classification is well established. Kramer, supra. It is also well established that few, if any, statutes have ever survived the strict judicial scrutiny of the compelling state interest test. Amicus contends that the annexation statute does, indeed, infringe on a fundamental right of equal participation in political affairs and that thus the compelling state interest requirement would have to be satisfied. It should be obvious that the State can point to no interest so compelling that the strict scrutiny test

could be met: Appellants have not even attempted to establish that a compelling state interest justifies the property owner distinction. It is, furthermore, the contention of Amicus that the annexation statute is supported by no state interest not rational, reasonable, substantial, nor compelling.

Appellants advance several possible justifications for the classification between property owning and non-property owning petitioners and for the exclusion of the latter group. The most obvious justification might be that such a restriction, to property owners on the last tax rolls, makes it administratively more convenient for the city to act on a petition. But it is clear that administrative convenience is an insufficient justification for a restriction of voting rights. Carrington v. Rush, 380 U.S. 89, 96 (1965). This is especially so when there is an insubstantial savings for the city, where there are alternative means which are not markedly less convenient, and where there is a deprivation of important rights. Here, there are many reasonable and non-burdensome alternatives; for example, the simple expedient of allowing property owners and registered voters to participate, which would allow participation by all interested residents. Any increased burden, such as determining who are residents at a given point in time, would be no more substantial than in any election.

Other possible justifications are that property owners bear a disproportionate burden of supporting a municipality as compared to non-property owners. If that were a

sufficient justification, the Kramer - Cipriano - Kolodziejski line of cases would have been decided differently. Today, when a smaller percentage of city revenues is dependent on property tax and when that tax burden is passed on to renters, consumers, and other residents by the property owner, the burden of property tax is not disproportionate. The property owner distinction might also be justified as a protection of local interests, by leaving the annexation decision to property owners who are tied to the land. This justification is without merit where, as here, the property owners are those on tax rolls which may, because there is no outer time limit on an annexation proceeding, be several years old by the time annexation is completed. This justification also fails where the landowners are large businesses and entrepreneurs who have no interest more local than their own pocketbooks. The "tax colony" justification advanced by Appellants is obviously inapplicable where the annexation procedure requires some basis in local popular support and the classification distinguishes between property owners and non-property owners, both of whom would have the same interest in maintaining a tax colony. Lastly, the notion that such an unfair discrimination is supported by the fact that non-property owners have alternate means of representation is patently inapplicable here, where they are granted no vote; no petition right; no representation on the city council; and, as the 1977 law provided, no guarantee of a public hearing.

An imaginative court might still be able to con-

ceive of some possible rational basis for such a distinction and thereby satisfy a rational basis test. But analysis of equal protection guarantees has changed from the old rational basis test. It is clear that the U.S. Supreme Court requires more than some wishful, conceivable state interest. Today, even when not applying the strict scrutiny/compelling state interest test, the Supreme Court requires that governmental classifications or means must substantially further the statutory objective. Reed v. Reed, 404 U.S. 71 (1971); Craig v. Boren, 429 U.S. 190 (1976). Likewise, the Court will no longer hypothesize some conceivable legislative purpose in the absence of an articulated legislative purpose. McGinnis v. Royster, 410 U.S. 263 (1973).

The archaic nature of the distinction between property owners and non-property owners will simply not support a substantial state interest in today's world. Eighty years ago, when this distinction was hatched, renters were few and lifestyles and city revenues were different; property tax is no longer the only, or even a major source of city revenue. The Supreme Court's rationale in Kolodziejski supports this contention. There the Court recognized the reality of passing on of property taxes to renters and consumers (399 U.S. at 210) and stated that even if there were an increased burden on property owners it would be insufficient to overcome the inequities of not allowing interested non-property owners to participate (at p. 212). If the Kolodziejski result is sound, where the general obligation bonds were paid

by property taxes and became a lien on real property, then the connection between annexation and property ownership here is even more tenuous and can support no conceivable state interest. This result has been recognized by the California Supreme Court:

"In California and in many other states of the nation, provisions for municipal incorporation and for changes in the boundaries of local jurisdictions are archaic abominations dominated by the 'horse and buggy' concepts of our rural past.... Legislation in many states still reflects outdated patterns where the property tax was virtually the sole source of local government revenue and outdated beliefs that the people in an area, however small, should have virtually absolute control over their 'turf' as demarcated by city and other local government boundaries." Curtis v. Board of Supervisors, supra, 501 P.2d at 539.

A consideration that seems to have completely escaped the Appellants is the possibility that there exist alternatives by which the interests of all affected residents may be served without substantially increasing the burden on the city. The Supreme Court has recognized that where less burdensome alternatives exist they should be pursued; that significant rights must not be sacrificed on an altar of convenience. "By requiring classifications to be tailored to their purpose, we do not secretly require the impossible. Here there is simply too attenuated a relationship between the state interest...and the fixed requirement." Dunn v. Blumstein, 405 U.S. 330 (1972). It cannot be denied that the relationship between annexation and property ownership is

"simply too attenuated." This principle was also recognized in Kramer, supra, when the court ruled that the property owner distinction was simply too imprecise to allow participation by all interested and affected citizens. The Kramer court, in requiring a more precise classification, found that we "must consider the facts and circumstances behind the law, the interest which the state claims to be protecting, and the interests of those who are disadvantaged by the classification." Kramer, supra, at 626. Using this analysis, Amicus submits that after careful consideration of the circumstances behind the annexation petition process, of the negligible interests that the property owner classification claims to protect, and of the significant loss of the franchise by directly interested and affected non-property owners, that the property ownership classification is glaringly imprecise and begs correction.

III

THE UTAH SUPREME COURT IS NOT BOUND BY THE RIGIDIFIED TWO-TIERED EQUAL PROTECTION TEST UTILIZED IN THE PAST BY FEDERAL COURTS. IN EXAMINING VIOLATIONS OF UTAH'S EQUAL PROTECTION GUARANTEES, OUR COURTS MAY UTILIZE A MORE REALISTIC ANALYSIS ARISING BETWEEN THE EXTREMES OF THE RATIONAL BASIS TEST AND THE STRICT SCRUTINY TEST.

Even if this Court found that there were no violation of a fundamental right to equal participation in political affairs and that there is some state interest at stake in this case, Amicus would submit that the District Court's decision still must be affirmed. This Court is not limited to the two extremes of either the strict scrutiny test, which no

statute has passed, or the rational basis test, which no statute has failed. Those two tests are not mutually exclusive, but are, rather, two ends of a spectrum of possible approaches in equal protection cases. The tests are like looking at a nearby object through either end of a telescope-- both views are unrealistic and distorted, with one being grossly deferential and the other overly critical. Concerning this point, Justice Marshall has written:

"I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. [Citations omitted]. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review--strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in viewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn." Dissent, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-99 (1973).

Justice White has also found that "it is clear that we employ not just one, or two, but, as my brother Marshall has so ably demonstrated, a 'spectrum of standards'". Concurrency, Vlandis v. Kline, 412, U.S. 441, 458 (1973). While the Court has never embraced, in name, the spectrum approach

of Justices Marshall and White, it is clear from recent cases that the Court has recognized that intermediate levels of scrutiny exist. Beginning in 1972, the Court made a significant effort to formulate a single standard of review applicable to all equal protection cases and also utilized the spectrum approach in conjunction with a less burdensome alternatives test. Weber v. Aetna Casualty and Surety Co., 406 U.S. 164 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972). In 1974, the Court, in an eight to one opinion in Jimenez v. Weinberger, applied an intermediate level of scrutiny--more than rational basis, but without finding any suspect classification or fundamental right, either of which would require strict scrutiny. In the Jimenez case, dealing with the rights of illegitimate children, the Court specifically eschewed strict scrutiny analysis and, indeed, found that the government had a legitimate interest, but that implementation of that interest was unreasonable. Jimenez v. Weinberger, 417 U.S. 628, 636-637 (1974). Lastly, consider the Court's treatment of gender-based discrimination. Though the Court has never found sex to be a suspect classification (the nearest it has come is in Frontiero v. Richardson, when sex-as-a-suspect-class received four votes), it has found violations of equal protection in some cases and found none in others. The result is an intermediate level of review appearing at various points along the spectrum between rational basis and strict scrutiny. Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); Craig v. Boren, 429 U.S. 190

(1976). If any case requires a legislative justification of more than mere rationality, it is clearly this one.

In Justice Marshall's dissent he lists three considerations important when equal protection cases are reviewed under a spectrum approach. The court must examine the character of the classification which the statute makes; the importance of the rights which are restricted or denied because of the classification; and the importance of the interest which the state asserts. San Antonio School Dist. v. Rodriguez, supra, at 99. To indicate the degree of acceptance which Marshall's spectrum approach has received, the majority in Dunn v. Blumstein, supra, at 335, holds that "to decide whether a law violates the Equal Protection clause, we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." A careful review of the constitutionality of the statute in question requires an examination of those three considerations.

First, concerning the character of the classification between property owners and non-property owners, 10-2-401 makes a three-fold discrimination between property owners and non-property owners; between long-term property owners and new property owners, by virtue of the "last assessment rolls" provision; and between large property owners and small property owners, by virtue of requiring both a majority of persons and one-third of assessed value. The class of those denied the

right to participate in the petition includes many persons rightfully concerned, interested, and affected by the annexation, namely property owners who have purchased since the last assessment (which could, incidentally, be a long time, considering that the statute put no limit on the vitality of a petition between its signing and the completion of the annexation), contract buyers, renters and other adults who live with property owners, and any other inhabitant of the annexation area who may be an otherwise qualified voter, but whose name does not appear on the tax rolls. The property owners, on the other hand, who are permitted to petition, need not be registered voters; residents of the annexation area or of the state; adults; or even natural persons. The classification is based solely on property ownership of some duration, without regard for the interests of those who would be most intimately affected, interested, and knowledgeable about the annexation and the area which it involves. In short, the classification has no reasonable relationship to the goal of determining the wishes of those affected by an annexation.

Second, concerning the importance of the rights asserted by the disadvantaged class, it is unquestioned that the non-property owners have a substantial and proper interest in the public facilities and services, and the costs therefor which are involved in an annexation. Kramer, supra, teaches that a law which permits inclusion of those having only a remote interest in local affairs, while excluding many others

who have a distinct and direct interest, is a violation of equal protection. This Court must carefully examine such a law "because statutes distributing the franchise constitute the foundation of our representative society. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of our representative government." Kramer, supra, at 626. The potential for harm to non-property owners' interests when an annexation, bringing with it as it does, a representative government of broad powers and general authority, is railroaded through by a few big businesses or entrepreneurs is obvious.

The substantial impact which the petition, by itself, has on the decision of city government is undeniable and, together with the fact that existence of a two-tiered decision process does not save an unequal distribution of the franchise, indicates that access to the petition, even if it is only a trigger, is a fundamental right. The equal protection infirmities of 10-2-401 cannot be cured by asserting, as Appellants do, that non-property owners have a voice in later procedures; the same could be said of any denial of the franchise which is subject to review by judicial or administrative tribunals. Besides, the statute did not, at the time, even require that such later procedures be open to the public. Important rights of fair and equal participation in political affairs have been denied to non-property owners by the statute in question.

Third, concerning the importance of the interests which the state asserts, much of what has been argued above at Section II could be repeated here. Suffice it to say that Appellants' assertion that some wishful, conceivable state interest will save this statute is not enough; governmental means must be substantially related to governmental ends. Craig v. Boren, supra; Reed v. Reed, supra; McGinnis v. Royster, supra. No substantial interest has been here presented.

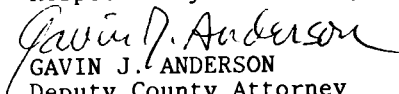
"We can discern no reason, and respondents suggest none, why landowners enjoy a greater interest, or nonlandowners a lesser interest, in the formation of a city of general powers than in its governance, or its issuance of general obligation bonds. Nor do we find a reason, and again respondents suggest none, why the interest of landowners becomes more compelling, more worthy of special protection, in a protest proceeding [by petition] than in an election." Curtis v. Board of Supervisors, supra, 501 P.2d at 550.

CONCLUSION

Appellants have not suggested, nor can Amicus conceive of, any reason to distinguish between an election and a statutory petition process which is created to serve as a method by which those who are most affected can vote to extend or deny annexation jurisdiction to a municipal government. The two-tiered nature of the annexation procedure; that is, petition followed by city commission approval, is not alone dispositive as in similar situations the guarantees of the Equal Protection clause have been extended. Non-prop

owners who are directly affected by and intimately concerned with an annexation have a right to participate in the annexation to the same extent that property owners participate. Any statute which unfairly distributes a right of franchise, even by petition, violates a fundamental right to equal participation in political affairs and, as such, must be supported by a compelling state interest. The statute here at issue is not supported by any state interest, not compelling, substantial, nor rational. Even if the petition right were construed as not fundamental and if it were found that the state has some interest, this Court is not bound by the gross deference of the rational basis test or the excessive severity of the compelling state interest test, but may forge a new test between those extremes, consisting of an examination of the nature of the rights restricted, the characteristics of the disadvantaged class, the nature of the state's interest, and the precision of the relationship between statutory means and ends. Such a test must be resolved in favor of equal political participation by all those affected and the result must be an affirmation of the District Court's finding that 10-2-401, Utah Code Ann. (1953), is unconstitutional.

Respectfully submitted,



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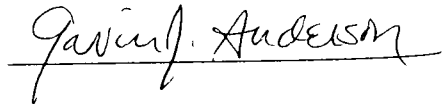
MAILING CERTIFICATE

I hereby certify that I mailed a copy of the foregoing Brief of Amicus Curiae, Salt Lake County, this 7th day of January, 1980, postage prepaid, to:

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