Fordham Urban Law Journal

Volume 4 4
Number 2

Article 2

1976

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Cover Page Footnote
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TOWARD EQUAL DELIVERY OF MUNICIPAL SERVICES IN THE CENTRAL CITIES

*Kenneth W. Bond**

I. Introduction

The gradual development of equality in America may have seemed a "providential fact"[1] over one hundred years ago. Indeed, access to the American frontier guaranteed all persons an equal opportunity to seek a better life. Further, this rural American society, imbued with a laissez-faire socio-economic philosophy, did not require government assistance in affording and preserving equality of opportunity.

With the closing of the frontier, rapid industrialization after the Civil War and the accompanying phenomenon of growth in the central cities, urban living became inevitable for most Americans. Correspondingly, the hand of government assistance has risen steadily to help the masses crowded in the urban complex. Legislation has been aimed at equalizing the opportunity for employment,[2] decent housing,[3] voting,[4] education,[5] basic social welfare,[6] and a host of other concerns considered elemental for the fulfillment of the "American dream."

Until recently, the courts have been slow to act affirmatively to remedy the inequities related to enforcement of such legislation. When the courts have intervened to insure plaintiffs' interests, their

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1. A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 5-6 (1956).

2. *E.g.*, Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, *amending* 42 U.S.C. §§ 2000e to -15 (1970) (codified at 42 U.S.C. §§ 2000e to e-17 (Supp. III, 1973)).

3. *E.g.*, Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451 (codified in scattered sections of 12, 15, 20, 38, 40 42, 49 U.S.C.).

4. *E.g.*, Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 (1970)).

5. *E.g.*, Act of Sept. 30, 1950, ch. 1124, 64 Stat. 1100 (codified at 20 U.S.C. §§ 236-44 (1970), *as amended*, (Supp. III, 1973)) (financial aid to local educational agencies affected by federal activities).

6. *E.g.*, Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified at 42 U.S.C. §§ 301-431 (1970), *as amended*, (Supp. III, 1973)).

decisions have often been grounded on the equal protection clause of the fourteenth amendment, providing equitable remedies where the effect of state and local action has been to discriminate invidiously against an identifiable class of persons deprived of a guaranteed right or important benefit generally enjoyed by society at large.[7]

Municipal services has been one interest which the courts have been slow to protect.[8] In *Milliken v. Bradley*[9] the Supreme Court reversed a multi-district, area-wide court order for school desegregation for the Detroit metropolitan area because it would abrogate local control and "disrupt and alter" the structure of public education in Michigan. A municipal zoning ordinance which narrowly defined the term "family," thus restricting persons who could live together in certain neighborhoods, was sustained on the strength of local police power in *Village of Belle Terre v. Boraas*.[10] The Texas financing scheme for public education was sustained in *San Antonio Independent School District v. Rodriguez*[11] by demonstrating that the state law was historically responsive to wide disparities in per student expenditures although such disparities persisted.

These cases suggest an attitude of benign complacency in the Supreme Court, allowing it to ignore critical socio-economic problems in the central cities even though lower federal courts are clearly focusing on these problems and the legal issues they raise.[12] In fact,

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7. *E.g.*, Goosby v. Osser, 409 U.S. 512 (1973); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Harper v. Board of Elections, 383 U.S. 663 (1966); Brown v. Board of Educ., 347 U.S. 483 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

8. Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); *see* 2 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.33 (3d ed. 1966).

9. 418 U.S. 717 (1974).

10. 416 U.S. 1, 9 (1974).

11. 411 U.S. 1, 59 (1973).

12. For example, in Mahaley v. Cuyahoga Metropolitan Housing Auth., 355 F. Supp. 1257, 1260 (N.D. Ohio 1973), *rev'd*, 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975), the court noted:

> To live in the inner city is all too often not a badge of slavery. Often it is a badge of poverty. Far too often, indeed quite regularly in this city [Cleveland], it is a badge or indicia of both slavery and poverty.

In Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1073 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975) (dissenting opinion), Judge Oakes pointed out that "at least partial solutions to many of urban America's problems may be found by breaking down

there is an increasing awareness that legislative, administrative, and political action at the state and local level is ineffective to remedy these problems, and that affirmative action calls for a judicial solution.[13] In the area of equalizing municipal service delivery in the central cities, there is a developing scenario which now calls for judicial intervention under the equal protection clause.

II. A Theory of Equal Delivery of Municipal Services

It is important to note that municipal service delivery functions differently depending on the size of the city. In small communities, for example, delivery tends to be uniform throughout the service area. The area is usually comprised of a homogeneous population, all factions of which are adequately represented in the political and administrative decisions relating to municipal services.[14]

In the central cities, however, there exists a heterogeneous amalgam of separate, sometimes distinctly identifiable, demographic elements which compete to enjoy municipal services from the same sources. In the present condition of most metropolitan centers, those sources are scarce as local revenues are increasingly unable to meet the mounting cost burdens for a vast array of services. The administration for delivering municipal services has, therefore, become susceptible to the charge that many persons in the central city are deprived of essential services. Particularly in low-income, and racial

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metropolitan income-group clustering, with the poor concentrated in certain political subdivisions, the 'central city.'" *See generally* Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

13. In *Rodriguez* Justice Marshall laments the Court's failure to provide a remedy:

> Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate 'political' solution sometime in the indefinite future . . . .

411 U.S. at 71.

14. Greenwich, Connecticut and San Mateo, California are examples of small communities where disparities in delivery of municipal services are negligible. These municipalities are essentially affluent, and all white. Competition between widely divergent income groups or racial and ethnic minorities for municipal services, therefore, does not exist in any measurable degree. By contrast, however, small rural communities in the South may be segregated into all-black and all-white neighborhoods, somewhat similar to demographic patterns in the central cities, thus providing the setting for discrimination in delivery of municipal services. *See* Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *reh. en banc*, 461 F.2d 1171 (5th Cir. 1972); Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970).

and ethnic minority neighborhoods, where there may be little or no access to the powers controlling city-wide administration, the proper setting exists for discrimination and resulting inequity in service delivery.[15]

Two recent cases have raised the question of whether an equal protection claim alleging such discrimination can prevail. In *Beal v. Lindsay*,[16] plaintiffs sought to compel the City of New York to maintain a park servicing a low-income minority neighborhood in the same manner as it maintained parks in adjacent areas. In *Towns v. Beame*[17] plaintiffs sought to restrain the City of New York from closing fire companies in neighborhoods predominantly inhabited by blacks and other poor persons.

In both instances plaintiffs lost.[18] However, rather than finally disposing of the equal protection question, data illustrating the demographic, social, and political conditions in the central cities suggest that these cases and others[19] are but a prelude to a stream of litigation calling for the development of a theory of equal delivery of municipal services in the central cities.[20]

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15. The Advisory Commission on Intergovernmental Relations has noted:

> Taxable wealth and personal income are growing faster in suburban areas than in their central cities and the disparity continues to widen. As suburbs grow, central cities, for the most part, face the problems population loss; increasing concentrations of poor, nonwhite and elderly; ever-increasing obsolescence in housing; and above average crime rates.

ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 151 (1973).

16. 468 F.2d 287 (2d Cir. 1972).

17. 386 F. Supp. 470 (S.D.N.Y. 1974).

18. In Beal v. Lindsay, 468 F.2d 287, 292 (2d Cir. 1972) the Second Circuit found no discrimination against black and Hispanic residents by the defendant city in its provision of adequate maintenance for parks. The record showed that the city had provided equal or greater effort to maintain the parks in question, but could not achieve equal results because of continued vandalism. In Towns v. Beame, 386 F. Supp. 470 (S.D.N.Y. 1974), the district court was not persuaded by the data upon which the allegation of racial discrimination was based and found the city to have satisfactorily rebutted the prima facie case made out by the plaintiffs. The court found no violation of equal protection of the laws because fire protection is not a fundamental interest and because the city's decision to close certain fire companies was rationally related to the need for cutbacks in municipal services to solve a budget crisis. *Id.* at 472-75.

19. Other cases alleging discrimination in delivery of municipal services include Goldstein v. City of Chicago, 504 F.2d 989 (7th Cir. 1974); Davis v. Weir, 497 F.2d 139 (5th Cir. 1974); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975); Fine v. City of Winner, 352 F. Supp. 925 (D.S.D. 1972).

20. Although the current trend of court decisions is not encouraging for plaintiffs who seek

Recent data clearly indicates that over the past fifteen years living conditions in central city neighborhoods have deteriorated substantially as more affluent white persons have moved to the quieter, safer, and less congested suburbs.[21] Indeed, the central cities in many instances have become densely populated ghettos for the poor, non-white, and elderly.[22] Should these conditions continue unabated, the disparity in municipal service delivery could be expected to intensify.

The thrust of an equal delivery theory is to establish, with the aid of appropriate data, the existence of one or both of two elements: (1) an identifiable class composed of (a) racial or ethnic minority persons, which class can be deemed suspect or (b) persons qualifying as "functionally indigent" under the test for wealth as a suspect classification enunciated by the Supreme Court in *San Antonio Independent School District v. Rodriguez*;[23] and (2) a municipal service, which constitutes a fundamental interest determined with reference to a hierarchy of such services and their nexus to the exercise of a constitutionally guaranteed right, thus conferring "constitutional significance" on their delivery.

This method of financing a fundamental interest may be called one of "intermediate flexibility." Such a method would preserve the traditional two-tier method of judicial review, but require a court to employ its strict scrutiny when either of the two above elements

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to overcome the barriers to better living conditions in the cities, as Justice Douglas pointed out, "the American dream teaches that if one reaches high enough and persists there is a forum where justice is dispensed." Warth v. Seldin, 95 S. Ct. 2197, 2215 (1975), wherein the Supreme Court denied standing to plaintiffs to assert, inter alia, that an exclusionary zoning ordinance denied plaintiffs access to superior municipal services.

21. Between 1960 and 1970 in 72 selected metropolitan areas throughout the United States, each composed of a central city and outlying suburbs, forty of the central cities experienced decreases in white population while 67 of them experienced increases in non-white population. In 1970, central cities collectively had 42 percent more families earning less than $3,000 per year than the suburbs. Conversely, the central cities had 20 percent fewer families earning more than $10,000 per year than the suburbs. In 1970, the median value of owner-occupied housing in central cities was 84 percent of that located in the suburbs. The survey taken during that same year also showed that the crime rate in 71 central cities exceeded that of the suburbs. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION 91-120 (1973).

22. In 1970, eleven percent of the population in all central cities was age 65 or older, compared with eight percent of the population in the suburbs. U.S. BUREAU OF THE CENSUS, WE THE AMERICANS: OUR CITIES AND SUBURBS 5 (1973).

23. 411 U.S. at 19 (1973).

were established. The strict scrutiny of the court would then require a determination of whether the allegedly discriminatory state action is necessary to serve a legitimate governmental purpose or compelling state interest.

III. Origins of the Theory: From *Hawkins* to *Rodriguez* and Beyond

To appreciate the argument for a theory of equal delivery, it is necessary to consider the legacy of the equal protection clause as it has been applied in the courts to municipal services and related subjects which deal with close urban living.

Two early Fifth Circuit cases, *Hadnott v. City of Prattville*[24] and *Hawkins v. Town of Shaw*,[25] established the rule that a municipality may not discriminate in the delivery of services to black neighborhoods without acting in violation of the equal protection clause, whether the discrimination was intentional, or merely the result of an "arbitrary quality of thoughtlessness."[26]

These cases arose in small southern communities in which racial discrimination was acute and an historic pattern had developed where blacks and whites were separated into clearly indentifiable classes. The lines, however, are not so precisely drawn in metropolitan areas where there are usually various shadings from exclusive white enclaves to poor minority neighborhoods. Nevertheless, these cases are instructive as a point of origin for developing an equal delivery theory in that they provide two basic judicial guidelines: (1) a suspect classification based on racial discrimination in delivering municipal services will invoke a court's strict scrutiny; and (2) a court may invoke its broad discretion in applying an equitable plan of delivery equalization, a remedy no more extraordinary than the judicial remedies fashioned by the courts in cases[27] dealing with related issues.

The evolution of an equal delivery theory underpinned by *Hawkins* was stunted, however, by the seminal Supreme Court deci-

24. 309 F. Supp. 967 (M.D. Ala. 1970).

25. 437 F.2d 1286 (5th Cir. 1971), *reh. en banc*, 461 F.2d 1171 (5th Cir. 1972).

26. *Id.* at 1292, *quoting* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968).

27. Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 929 (2d Cir. 1968); Hobson v. Hansen, 269 F. Supp. 401, 407 (D.D.C. 1967), *aff'd sub. nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

sion in this area. *San Antonio Independent School District v. Rodriguez*[28] has been cited in subsequent municipal service delivery cases for the proposition that a municipal service is not a fundamental interest[29] and that between classes of poor persons and minorities, the badge of indigency, is not suspect.[30]

Rodriguez was the terminal case in a series of actions aimed at reforming state systems of financing public education through the courts. Beginning in the California Supreme Court,[31] plaintiffs in several cases developed a novel theory of equal protection in which "district wealth"[32] could be classified as suspect and public education raised to the level of a fundamental interest. Both notions were rejected by the Supreme Court. In applying the rational relation test to validate the Texas legislation, the Court put an end to any hope that the judiciary could be called upon to provide easy remedies to untangle the inequities of bureaucratic social and economic systems in the central cities.

Because *Rodriguez*, an education case, has been construed to limit the scope of applying equal protection analysis to inequities in municipal service delivery generally, it is appropriate to discuss a theory of equal delivery partially in terms of the Supreme Court's opinion. Moreover, because there have been few cases directly concerned with the delivery of municipal services, other recent deci-

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28. 411 U.S. 1 (1973).

29. The following municipal services and other rights have been held not to be fundamental interests: garbage collection, Goldstein v. City of Chicago, 504 F.2d 989, 991 (7th Cir. 1974); annexation in order to attain adequate municipal services, Wilkerson v. City of Coralville, 478 F.2d 709, 711 (8th Cir. 1973); healthful environment for commercial and residential units, Pinkney v. Ohio Environmental Protection Agency, 375 F. Supp. 305, 310 (N.D. Ohio 1974); fire protection, Towns v. Beame, 386 F. Supp. 470 (S.D.N.Y. 1974).

30. Citizens Comm. for Faraday Wood v. Lindsay, 507 F.2d 1065, 1068 (2d Cir. 1974), *cert. denied*, 421 U.S. 948 (1975); Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974); Brown v. Board of Educ., 386 F. Supp. 110, 122-23 (N.D. Ill. 1974); Amen v. City of Dearborn, 363 F. Supp. 1267, 1281 (E.D. Mich. 1973).

31. *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

32. The concept of "district wealth," as opposed to "personal income wealth," was developed under the principal of "fiscal neutrality" wherein disparities in classifications of assessed valuation of property between school districts could render the property wealth of a particular district suspect. *See generally* Coons, Clune & Sugarman, *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 384-86 (1969). District wealth had been held to be a suspect classification in Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 283 (W.D. Tex. 1971), *rev'd*, 411 U.S. 1 (1973); Van Dusartz v. Hatfield, 334 F. Supp. 870, 875-76 (D. Minn. 1971); Serrano v. Priest, 5 Cal. 3d 584, 591, 487 P.2d 1247, 1252, 96 Cal. Rptr. 601, 612 (1971).

sions regarding equal protection claims involving annexation,[33] residential zoning restrictions,[34] and housing project site selection and construction[35] contribute to the development of the theory.[36]

A. Indigency in the Central City: A Suspect Classification

It is clear that once discrimination in delivery based on race is demonstrated, the court will employ the strict scrutiny test;[37] but limiting suspect classifications to race would severely limit the application of a theory of equal delivery. Within the central city, race is not the only badge of discrimination.[38] To some extent certainly,

33. Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250 (9th Cir. 1974); Wilkerson v. City of Coralville, 478 F.2d 709, 711 (8th Cir. 1973).

34. Warth v. Seldin, 95 S. Ct. 2197 (1975); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Dailey v. City of Lawton, 425 F.2d 1037 (10th Cir. 1970); Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), *vacated*, 510 F.2d 976 (7th Cir. 1975).

35. Gautreaux v. City of Chicago, 480 F.2d 210 (7th Cir. 1973), *cert. denied*, 414 U.S. 1144 (1974); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974); Joseph Skillken & Co. v. City of Toledo, 380 F. Supp. 228 (N.D. Ohio 1974).

36. These cases are important to consider in a theory of equal delivery because they concern allowing persons to relocate to urban neighborhoods where there may be superior municipal service delivery. If improved delivery cannot be accomplished at the situs where its effect is discriminatory, persons deprived of such delivery have only one other alternative to alleviate the discrimination, which is to move out of the affected neighborhood and into a better one. However, because indigent and ethnic and racial minority persons are often locked into deteriorating central-city areas, the lowering of relocation barriers by allowing annexation, less restrictive zoning, and scattered-site housing provide an alternative remedy to equitable relief which may be granted under an equal protection claim.

37. Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *reh. en banc*, 461 F.2d 1171 (5th Cir. 1972).

38. The correlation between race and indigency has been recognized in the central city in several cases related to the delivery of municipal services. *See* Ybarra v. City of Town of Los Altos Hills, 503 F.2d 250, 253 (9th Cir. 1974); Mahaley v. Cuyahoga Metropolitan Housing Auth., 500 F.2d 1087, 1093 (6th Cir. 1974); United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974); Dailey v. City of Lawton, 425 F.2d 1037, 1039 (10th Cir. 1970); Brown v. Board of Educ., 386 F. Supp. 110, 122-24 (N.D. Ill. 1974). But not all indigent persons fall into discreet classes of racial and ethnic minorities. For example, although in 1973, 28 percent of all black families fell below the low-income level ($3,000 annually) compared to only seven percent of all white families, there were twice as many poor white families as black families in the central city in terms of absolute numbers. *See* SOCIAL & ECONOMIC STATISTICS ADMIN., U.S. BUREAU OF CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES, 1973, at 28. Thus, to attempt reaching persons affected by disparities in municipal services delivery through the equal protection clause with race as the only suspect classification aims wide of the mark in constructing a general theory of equal delivery. *See* Burner v. Washington, 399 F. Supp. 44, 48 (1975), wherein the court acknowledged there may be "other suspect classifications" besides race which suffer inequities in municipal service delivery.

"district wealth" defines a class of persons discriminated against. But the Supreme Court has pointed out in *Rodriguez* that the measurement of the class in terms of district wealth defies sufficiently clear identification because it expresses the indicia of discrimination in terms of comparative deprivation rather than absolute deprivation.[39] The type of wealth discrimination in the central city which could be labeled as suspect in the appropriate case is *personal income* poverty, sometimes referred to in the cases as "functional indigency."

To determine what level of indigency becomes functional and therefore suspect, the *Rodriguez* case enunciated a two-step test.[40] First, when the class' impecunity renders it completely unable to pay for some desired benefit and second, when the class consequently sustains an absolute deprivation of a meaningful opportunity to enjoy that benefit.[41]

In support of this test, the Supreme Court noted cases in which the plaintiffs were unable to pay a fee which was a condition precedent to enjoying an important benefit, such as having a transcript for use in an appeal,[42] having counsel appointed on appeal,[43] and having access to being placed in a ballot in a state election.[44]

It follows from the *Rodriguez* test that where indigency creates hardship but not an insurmountable barrier to enjoyment of desired benefits, such comparative indigency will not qualify as suspect. The Supreme Court refused to draw a fine line of comparative indigency for purposes of defining the class in traditional terms.[45] Thus, in *Rodriguez*, none of the plaintiffs were discretely cordoned off from the school grounds. All received some degree of education which the Court deemed "adequate" whether they resided in poor or rich districts in terms of the assessed valuation of taxable property.[46]

The distinction, however, between education which is not quantifiable in any traditional measurement, and municipal services which are quantifiable in terms of their delivery, is not an insignifi-

39. 411 U.S. at 19.
40. *Id.* at 19-20.
41. *Id.* at 20.
42. Griffin v. Illinois, 351 U.S. 12 (1956).
43. Douglas v. California, 372 U.S. 353 (1963).
44. Bullock v. Carter, 405 U.S. 134 (1972).
45. 411 U.S. at 22-25.
46. 411 U.S. at 24.

cant difference. The *Rodriguez* plaintiffs were not litigating the total absence of education, but rather the *qualitative* difference in their education, viewed against other more affluent school districts, measured in terms of a financing scheme. Because the delivery of basic municipal services is more quantifiable than "educational quality," the *Rodriguez* test for finding a suspect wealth classification is more easily met.

As the district court pointed out in the case of *Brown v. Board of Education*,[47] this test could be met by showing discrimination directed toward poor persons whose incomes fell below some identifiable level of poverty. Credible statistics, however, would have to demonstrate that persons whose annual incomes fall, for example, below the $3,000 poverty level are grouped together in deteriorating neighborhoods of the central cities, regardless of racial or ethnic considerations. Further, the statistics would have to show that these persons are unable to pay for the use of public transportation, water, sewerage, utilities, and other services financed through the payment of a fee or periodic charges, or that they cannot pay property assessments or incremental rent increases reflecting assessments for street paving, street lighting, sewers, traffic control apparatus, or similarly financed services.[48]

The difficulty, however, arises in the *absolute* deprivation of delivery to the functionally indigent because of and notwithstanding their inability to pay for services. This problem was illustrated in the case of *Ybarra v. City of Town of Los Altos Hills*.[49] The Ninth Circuit admitted that a minimum lot size zoning ordinance precluded poor persons from living in Los Altos Hills and from enjoying its municipal services. This fact met the first step of the *Rodriguez* test for finding the wealth classification suspect. However, the court

47. 386 F. Supp. 110, 122 (N.D. Ill. 1974).

48. Defining "inability to pay for municipal services" is subject to many interpretations. It could mean simply that a person has no funds whatever to pay for municipal services. However, this situation would arise rarely. A more plausiable definition would be to compare municipal service payments to total spendable funds. If payment for such services represented a prohibitively high proportion of spendable funds and also required allocating funds set aside to pay for food, health care, and other necessaries to be used for municipal service payments, then it could be argued that plaintiffs' poverty renders them functionally unable to pay for municipal services lest they forego essential items. Refined statistical data will be needed to make this argument.

49. 503 F.2d 250 (9th Cir. 1974).

pointed out that since plaintiffs did not prove that low-income housing was unavailable in the same county, they had not sustained the proof of absolute deprivation.[50] Thus, the second step of *Rodriquez* was never met.

The *Ybarra* case is distinguishable from the typical situation in the central cities. In *Ybarra*, plaintiffs were attempting to break into a white, high-income community in a largely surburban county within the San Jose metropolitan area. In the densely populated inner cities, however, indigent persons locked into deteriorating neighborhoods lack any real opportunity to relocate.[51]

With an immobile and identifiable class of functionally indigent persons, lacking any meaningful local options, the stage is set to satisfy the second step of the *Rodriguez* test. The payment required for delivery of municipal services may be so far beyond the means of persons in certain neighborhoods that such services are effectively placed outside their reach. If no alternatives exist, there may be an absolute deprivation of whatever services the city or special district may provide. Indeed this form of deprivation seems no less severe or absolute than that suffered by plaintiffs in *Griffin v. Illinois*[52] and *Douglas v. California*,[53] where the Supreme Court found a suspect wealth classification with reference to personal income levels.

A second form of absolute deprivation could occur if there is no delivery at all of a particular municipal service. The municipality may ignore or simply neglect to maintain municipal services in a deteriorating neighborbood inhabited by an identifiable class of indigent persons.[54] The second step of the *Rodriguez* test for the sus-

50. *Id.* at 254.

51. Justice White, in his dissenting opinion in *Rodriguez*, pointed out that there were no local options among persons who lack the economic capacity to purchase better services, in that case, public education. 411 U.S. at 64-67. For example, in 1970, over 30 percent of all suburban owner-occupied housing was valued at more than $25,000; less than 20 percent of all owner-occupied housing was so valued in the central cities. This proves that "a considerable part of [the suburban] housing market is most definitely beyond the reach of lower and lower-middle income families." ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, CITY FINANCIAL EMERGENCIES: THE INTERGOVERNMENTAL DIMENSION (1973).

52. 351 U.S. 12 (1956).

53. 372 U.S. 353 (1973).

54. *Cf.* Davis v. Weir, 497 F.2d 139 (5th Cir. 1974). In *Davis* the plaintiff's water service was terminated pursuant to a municipal ordinance requiring a prior tenant's arrears for water charges be paid by the new tenant before water service could be supplied. While the court ruled that the ordinance failed the rational relation test, *id.* at 144-45, the facts indicated

pectness of wealth, *i.e.*, absolute deprivation, would be satisfied and the court's strict scrutiny could be properly invoked. It should be noted, however, that the municipality's failure to maintain services in one neighborhood at the same level as in another may not meet the "absolute deprivation" requirement of the second step in the *Rodriguez* test. If some delivery of services which can be deemed adequate is provided, the deprivation may be merely comparative.[55] In that instance, given the Court's traditional leniency toward acts of local discretion, the municipality's conduct would usually satisfy the rational relation test on the grounds that determining the level of adequacy in delivery of municipal services is a legislative rather than a judicial function.[56]

B. Municipal Services as a Fundamental Interest

The *Rodriguez* case left open the question of what constitutes "adequate" delivery. That question is one of fact which will depend on the circumstances in each case. However, in defining the "adequacy" of delivery of any given municipal service a court may consider the effect of such delivery on the plaintiffs' ability to exercise a related constitutionally guaranteed right.

Recent cases have established a general rule that there is no fundamental right to the delivery of municipal services and that such services are not fundamental interests for the purposes of equal protection analysis. Courts have held that there is no fundamental right to education,[57] garbage collection,[58] fire protection,[59] and an-

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that defective plumbing which the city of Atlanta failed to repair, caused the arrearages to be exorbitant. *Id.* at 141. These facts suggest that the city's failure to make repairs was a cause of the plaintiff's inability to enjoy water service. However, the case did not reach the question of whether repairs were ignored because of plaintiff's indigency.

55. The *Rodriguez* case holds that a showing of only comparative deprivation is not enough to prove invidious discrimination in providing public education. 411 U.S. at 22-25. As long as a municipality delivers some services to all neighborhoods it would be difficult to argue that "absolute deprivation" has occurred. Thus, since Texas provided an "adequate" education for all students, there was no evidence of wealth discrimination in traditional terms. *See* Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975) wherein the court pointed out that the data relied upon by the plaintiffs and defendants at most demonstrated insignificant inequities in service delivery.

56. Lindsey v. Normet, 405 U.S. 56, 74 (1972).

57. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

58. Goldstein v. City of Chicago, 504 F.2d 989, 992 (7th Cir. 1974).

59. Towns v. Beame, 386 F. Supp. 470 (S.D.N.Y. 1974).

nexation to obtain better municipal services.[60]

These cases represent a withdrawal from the earlier direction of the Warren Court which created fundamental interests without specific authority from the Constitution where the interest in question was found colored with constitutional significance.[61] In *Rodriguez*, the Supreme Court said that it would not create substantive constitutional rights in the name of guaranteeing equal protection of the laws.[62] Yet, in defending its decision in *Shapiro v. Thompson*,[63] the Suprême Court stated simply that the right to interstate travel had long been recognized as a right of "constitutional significance."[64] In fact, as Justice Marshall pointed out in his dissenting opinion in *Rodriguez*, the Supreme Court has often created fundamental interests in view of their "constitutional significance."[65]

The *Rodriguez* decision, therefore, signals the more restrictive direction in which the Supreme Court has been moving in recognizing fundamental interests; indeed, the narrow test remains the overriding barrier to be overcome in demonstrating the fundamental interests in an equal delivery claim. What the *Rodriguez* Court feared in raising education to the status of a fundamental interest was the Court's becoming a "super-legislature" wherein it may be asked in subsequent cases to pick and choose which municipal services were fundamental interests through an ad hoc determination with reference to their social or economic importance.[66]

While considerations of social and economic notions are important for arguing that indigency is a suspect classification, such notions will fail to establish a fundamental interest and fail to merit a court's strict scrutiny. The Supreme Court has clearly indicated that the thrust of the fundamental interest argument must proceed along a narrower line of demonstrating a nexus between the delivery of a municipal service and the exercise of a constitutionally guaranteed right.[67]

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60. Wilkerson v. City of Coralville, 478 F.2d 709, 712 (8th Cir. 1973).

61. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right of privacy); Dunn v. Blumstein, 405 U.S. 330 (1972) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to interstate travel).

62. 411 U.S. at 33.

63. 394 U.S. 618 (1969).

64. 411 U.S. at 32.

65. *Id.* at 98-103 (Marshall, J., dissenting).

66. *Id.* at 32. *See also* Lindsey v. Normet, 405 U.S. 56 (1972).

67. Arguing that municipal service delivery may affect the exercise of a constitutional

Recent cases have been concerned with the effect of state action on the right to freedom of association and privacy protected under the first amendment[68] and the right to vote.[69] Following this line of cases, the deprivation of municipal service delivery may lend itself well to an argument that municipal services are essential to the ability to exercise such constitutional rights. When plaintiffs in *Rodriguez* asserted this argument with regard to education, the Supreme Court answered that it never "presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."[70] In other words, deprivation of education does not affect the right to speak or vote, but only its relative quality. The deprivation of municipal services, however, is not a qualitative notion, but deals with the quantitative issue of adequate delivery.[71]

Thus, the *Rodriguez* decision leaves open the question of whether municipal services may be considered as a fundamental interest if

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right is not a mere pretext to circumventing the difficulty in convincing a court of such delivery's fundamentality in terms of its social and economic impact. Rather, this argument acknowledges that the social and economic conditions in the central city, to which a deprivation of municipal service delivery may contribute, have reached such severe levels that they cause an infringement on constitutional rights and not merely hardship and inconvenience.

68. Recent cases indicate an expanding awareness by the Supreme Court that state action can infringe on rights guaranteed by the first amendment. In United States Dep't. of Agriculture v. Moreno, 413 U.S. 528, 538-45 (1974) Justice Douglas' concurring opinion pointed out that the right to join a household was protected by the first amendment and that where this freedom of association was infringed upon by restrictions in amendments to the Food Stamp Act, such amendments violated the equal protection of the laws. Similarly, Justice Douglas argued in his dissenting opinion in Lindsey v. Normet, 405 U.S. 56, 81-82 (1973) that forcible detainer laws violate a right of privacy since the home—whether rented or owned—is the very heart of privacy in modern America. Likewise, Justice Marshall, dissenting in Village of Belle Terre v. Boraas, 416 U.S. 1, 13-14 (1974), pointed out that local power to enact zoning ordinances cannot infringe on the fundamental rights of association and privacy, including modes of association that pertain to social and economic benefits. *See also* Police Dep't. v. Mosley, 408 U.S. 92 (1972).

69. Bullock v. Carter, 405 U.S. 134 (1972).

70. 411 U.S. at 36.

71. Municipal service delivery can be measured in terms of the input which comprises a particular municipal service, *i.e.*, number of police patrolmen per city block or number of fire calls per day per neighborhood. This is the approach taken in Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975) and Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972). Alternatively, a court could measure delivery in terms of the results of effort, i.e., number of arrests and convictions or the number of fires contained. By either measure, it seems clear that equal protection of the laws can be satisfied through applying a prospective standard of equal delivery which limits its inquiry to a quantitative measurement.

they significantly affect the exercise of constitutional rights.[72] In municipal service delivery cases, whenever the insufficiency of delivery causes a significant denial of the exercise of a constitutional right, that nexus lifts the municipal services themselves to the level of a fundamental interest.

In cases where the fundamental interest argument was denied, plaintiffs have not focused on the nexus between the municipal service and an affected constitutional right.[73] As a result, local acts have been sanctioned as rationally related to a governmental interest because of the long-standing maxim that it is within the discretion of the local legislative function to determine the societal significance of municipal services. However, once municipal service delivery is cast in the light of affecting constitutional rights, such abuse of discretion may violate the equal protection clause.

In any determination of whether a failure of municipal service delivery may deny the exercise of a constitutional right, the issue is best viewed in terms of a hierarchy of services. Essential services such as police patrol and water supply would be placed at the top of the list, with amenities[74] such as parks and recreational services at the bottom. Moreover, if delivery of municipal services were involved, their aggregate effect on the exercise of constitutional rights would correspondingly adjust their position within the hierarchy.[75]

Establishing a hierarchy of municipal services serves a useful pur-

72. To illustrate this point, consider the effect of education as opposed to water and sanitation service on first amendment rights. A poor education does not deny the right to privacy or association. Its infringements on these rights is, at best, very remote. But little or no water service, sewerage, and garbage collection can render an entire neighborhood unfit for habitation, create a health hazard, and, in effect, evict the inhabitants and deny their rights to privacy and association.

73. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Goldstein v. City of Chicago, 504 F.2d 989 (7th Cir. 1974); Wilkerson v. City of Coralville, 478 F.2d 709 (8th Cir. 1973); Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972). With the possible exception of *Rodriguez*, these cases all based their arguments of fundamentality on social and economic considerations of municipal services.

74. *See* Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. CIV. RIGHTS CIV. LIB. L. REV. 103, 163 (1972).

75. In United Farmworkers of Fla. Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) both water and sewerage were denied to plaintiffs who constructed a low-income housing project within the service boundaries of the municipality. Although the case was decided for plaintiffs on the basis of racial discrimination, the court recognized that denial of water and sewerage created a health hazard, *id.* at 809, which would place these municipal services in a high position within the hierarchy.

pose for equal protection analysis because it would provide the courts with a judicially manageable standard for testing the existence of a fundamental interest. The higher a particular municipal service was positioned within the hierarchy, the more likely deprivation of its delivery could be expected to affect a constitutional interest, thereby conferring constitutional significance.

Of course, plaintiffs would bear the burden of demonstrating the nexus between municipal service delivery and a constitutional right. But unlike the *Rodriguez* case, where plaintiffs' statistics failed to prove that the quality of education was materially affected by tax revenues or that education, per se, had a significant or even a measureable nexus to the exercise of a constitutional right,[76] municipal service delivery can be statistically measured from the facts in each case which are subject to traditional judicial review. The hierarchy of municipal service would serve as an analytic tool to guide the court in understanding the significance of a particular municipal service, from which it would in turn determine the nexus between the service and the exercise of a constitutional right.

The hierarchy and nexus analysis together provide a flexible test for determining the fundamentality of a particular municipal service or aggregate of services in the appropriate case.[77] This analysis may ultimately lead a court to establish a general rule for a minimum level of delivery which must be achieved to preclude the court's intervention with an equitable remedy.

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76. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 15 (1973). There was only a partial correlation between median family income and revenue per student expenditures. Thus, the Court had insufficient data with which to measure the effect of education on the exercise of constitutionally guaranteed rights.

77. The *Rodriguez* case also left open the question of what would be an "implied" constitutional right, and thus a fundamental interest. The Court provided no guidelines for determining when such a right may be implied. However, this may be an area where social science and economic data will convince a court of the fundamentality of a municipality service without laboring through the "nexus" analysis. One commentator has suggested that the following data may be useful to demonstrate an implied constitutional right: (1) the present inequities are not the result of happenstance, but are part of a history of deliberate or negligent economic segregation; (2) the poor are politically impotent to force the legislative and administrative powers to act in their behalf; (3) there is a stigma of living in urban poverty which results in an effective boycott by governmental sources; (4) there is no mobility from the central cities. *See* Trachtenberg, *Reforming School Finance Through State Constitutions: Robinson v. Cahill Points the Way*, 27 RUTGERS L. REV. 365, 376-77 (1974).

IV. Toward a Flexible Standard of Judicial Review: The Intermediate Method

Thus far the standards of judicial scrutiny in determining whether there has been a violation of equal protection of the laws have been discussed in terms of the two traditional tests of judicial review: strict scrutiny or rational relation.[78] However, such neat categorization has been criticized as too severe in practical application, allowing glaring disparities in legislative schemes to pass untouched through equal protection analysis.[79] The current posture of such analysis allows acts of local discretion which may substantially deprive central city residents of essential services to withstand judicial review because such acts bear some rational relation to a governmental interest.

To develop a more flexible standard of judicial review, some cases have looked to the legislative means to examine their rationality to a legitimate governmental purpose.[80] Such an approach allows the court to employ variations in degree of care in scrutinizing discrimination without the necessity of first finding the existence of a suspect classification or a fundamental interest. Thus, in one case involving the discriminatory effects of a zoning ordinance, the judge stated that he was to consider (1) the nature of the unequal classification, (2) the nature of the adversely affected rights, and (3) the governmental interest urged in support of the classification to determine the rationality of the ordinance.[81]

This approach to relaxing the rigid test of strict scrutiny has been

78. The operation of the two tests of judicial review is crucial to the outcome of equal protection cases. If a fundamental interest or suspect classification is found to exist, the governmental entity whose action is allegedly discriminatory against a discernible group bears the burden of proving that such action is necessary to promote a compelling state interest. Hence the court employs its strict scrutiny and in most cases the governmental entity has failed to meet this heavy burden. If, on the other hand, no fundamental interest is found to be infringed upon or if the classification scheme is not found to be suspect, then the governmental action is presumably valid and the state need only show its classification has some rational relationship to a legitimate state interest. Under this test it is much easier for the state to justify differential treatment and more difficult to strike down such treatment on equal protection grounds.

79. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 98-110 (1973) (Marshall, J., dissenting).

80. *See* Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

81. Timberlake v. Kenkel, 369 F. Supp. 456, 465 (E.D. Wis. 1974), *vacated*, 510 F.2d 976 (7th Cir. 1975).

partially abandoned by the Supreme Court. For example, the *Rodriquez* case puts to rest any notions that the degree of care the courts will employ in scrutinizing alleged discrimination may vary with the affected interest's societal or economic importance. *Village of Belle Terre v. Boraas*[82] puts the same notion to rest in the instance of zoning ordinances.

The difficulty the courts have experienced in applying this "modest interventionist approach," as Professor Gunther has termed it,[83] is that by discarding the preliminary requirement of first finding a suspect classification or fundamental interest, the burden is effectively shifted to the state to come forward with evidence of the rationality of its action. Thus, the traditional presumption of legislative validity in the rational relation test would be weakened, and, depending on rather informal and imprecise assertions of the social and economic impact of discrimination on the class affected, a presumption of legislative *invalidity* could arise. In practice a court could produce the same result that the strict scrutiny test would render without ever having met any of its preliminary requirements. If adopted, this approach to relaxing the tests for judicial review would indeed have granted a legislative license to the courts.

Courts have sustained discriminatory state action affecting socio-economic interests as rationally related to a governmental interest precisely because such interests are generally remote from constitutional guarantees.[84] For example, it is accepted that where wealth classifications are involved, the courts have never required mathematically precise distribution or precisely equal advantage to satisfy equal protection of the laws.[85] However, as Justice Marshall pointed out in his *Rodriquez* dissent, "the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved."[86]

That "different situation" can be found in the area of municipal

82. 416 U.S. 1 (1974).

83. Gunther, *supra* note 80, at 24.

84. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

85. *See* Mayer v. City of Chicago, 404 U.S. 189 (1971); Draper v. Washington, 372 U.S. 487 (1963); Lindsley v. Natural Carbonic Gas. Co., 220 U.S. 61 (1911).

86. 411 U.S. at 109.

service delivery. As this Article has suggested, the gravity of depriving a segment of central city residents of essential municipal services goes far beyond mere social and economic inconvenience.[87]

The focus in creating a flexible method of judicial review in the area of municipal services delivery should not be directed at the rationality end of the spectrum, but rather at the fundamentality of municipal services in order to apply the strict scrutiny test. In this perspective, a preliminary spectrum of judicial review which examines the nexus between municipal services delivery and constitutional rights would provide the necessary flexibility to apply equal protection analysis realistically in determining whether the strict scrutiny test can fashion an equitable remedy. By constructing a hierarchy of municipal services the traditional two-test method of judicial review remains intact because the court would first evaluate the nexus between the municipal service and the constitutional right. Where the nexus is found to be strong enough, the municipal service would become a fundamental interest because of its "constitutional significance." Once the fundamental interest was established, the court could employ its strict scrutiny test in the usual manner.

This approach to judicial review does not require the courts to employ the "means scrutiny" method of flexibility which perverts the presumption of legislative validity of the rational relation test. Yet it does not put the strict scrutiny test out of reach to render an equitable remedy in the appropriate case because the court would have available a flexible method of determining when a municipal service becomes a fundamental interest. Thus, this "intermediate method"[88] creates no more substantive rights under the equal pro-

87. Although the Court in Village of Belle Terre v. Boraas, 416 U.S. 1, 7-9 (1974) rejected the argument that the zoning ordinance infringed upon first amendment rights, the case was decided largely on the validity of the police power and local discretion to zone established under Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Justice Brennan's dissenting opinion in the *Belle Terre* case suggests that reversal should have been based on the mootness of the action since the plaintiffs had moved from the neighborhood and therefore no longer had an associational or economic interest to be vindicated by invalidating the zoning ordinance. 416 U.S. at 10.

88. The intermediate method is expressed in part by Justice Marshall in his dissenting opinion in *Rodriguez*: "As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental . . . ." 411 U.S. at 102-03. However, it stops short of Justice Marshall's further proposition that "the degree of judicial scrutiny applied when the interest is infringed on a

tection clause than the opinions in those cases which elevated the right to a transcript on appeal, or the right to vote, or the right of privacy to the status of fundamental interests.

V. Applying the Theory of Equal Delivery

A. Realistic Goals

The theory of equal delivery proposed in this Article should in no sense be construed as an attempt at equalizing municipal service delivery throughout a metropolitan region. That kind of wide-ranging reform is still the proper province of the legislature. Rather, the theory is aimed at assisting the indigent, racial, and ethnic minorities rooted in the central cities who, but for recourse to litigation, lack the power to gain effective remedies through the normal channels of access to local and state government.

As this Article is being written, the author acknowledges that there is little available data which can be brought before a court to make the arguments presented herein come to life.[89] There is clearly much work to be done by statisticians and social and political scientists to build the evidence which will prove the equal protection claim. The recent municipal service delivery cases which have followed *Rodriquez* clearly indicate that casual assertions of discrimination without weighty statistical proof of actual injury will not prevail. However, some of the general data presents a clear picture

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discriminatory basis must be adjusted accordingly." *Id.* at 103. Under the intermediate method the "adjustment" comes at the point of recognizing the municipal service to be a fundamental interest, and the "infringement" is on the constitutional guarantee due to the disparity in delivery of the municipal service which therefore renders it to be of constitutional significance.

89. Some pioneering efforts to collect data which measure municipal service delivery include a series of working papers prepared by the Maxwell School of Citizenship and Public Affairs, Syracuse University, Syracuse, New York. *See* D. Phares & E. Morley, The Measurement of Public Sector Activity in New York City with Reference to Health and Hospital Service (1973); D. Phares & E. Morley, The Measurement of Public Sector Output in New York City with Reference to Sanitation, (1973). The Urban Institute, Washington, D.C., has also published a series of papers involving case studies of particular cities. *See* P. Block, Equality of Distribution of Police Services—A Case Study of Washington, D.C. (1974); D. Fisk & C. Lancer, Equality of Distribution of Recreation Services—A Case Study of Washington, D.C. (1974). These two papers were employed by the court in Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975) to adjudicate plaintiff's claims. Efforts to collect and analyze data measuring municipal services delivery is also being conducted by the Lawyer's Committee for Civil Rights Under the Law, Washington, D.C. Telephone interview with David C. Long, Esq., member of the Lawyer's Committee for Civil Rights Under the Law, Washington, D.C., Aug. 15, 1975.

of decay in the central cities. What is needed now is to continue probing deeper to uncover new data which will identify those central city neighborhoods possessing the characteristics required to argue the theory of equal delivery successfully.

Unlike the school finance reform cases, in particular *Rodriguez*, the theory of equal delivery does not probe beyond the data of municipal service delivery to evaluate the effect of certain inputs, such as financing, on such delivery. In this respect, the statistical correlations between race or wealth and delivery are subject to direct comparison to argue the theory without the handicap experienced by the school finance reformers of having to compare financing (input) to race or wealth and then back to service delivery (output), *i.e.*, educational quality. Of course, the nexus between delivery and the exercise of a constitutional right may be subject to proof by direct correlation as well. But, with the proper data, the nexus can be demonstrated by direct comparison between two sets of statistics.

B. Remedies

In the usual case contemplated by the theory, plaintiffs would request the court's exercise of ordinary equity powers. The order would be directed to a municipal officer, enjoining him from delaying in taking action to provide the denied service, or ordering him to take the appropriate action requested by the plaintiffs. This type of "stop and go" relief is the most rudimentary form of equitable relief and should be an adequate remedy in most instances.

Where the deprivation of delivery is so severe that simple equitable relief is inadequate, a broader, more sophisticated remedy is available whereby the court could order the municipality to enact a plan of equal delivery over which the court would retain supervisory jurisdiction. However, such a plan can be enforced against a municipality only if the action is brought on a claim of violation of the equal protection clause.[91] If the action is brought on a claim of class discrimination under a federal civil rights statute, it has been held that there is no subject matter jurisdiction over the municipality, thus precluding this broader remedy.[92]

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90. *See* Burner v. Washington, 399 F. Supp. 44 (D.D.C. 1975).

91. In Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *reh. en banc*, 461 F.2d 1171 (5th Cir. 1972) the action was brought on equal protection grounds and a plan of equalization was implemented.

92. If the action is brought under 42 U.S.C. § 1983 (1970) alleging a civil rights violation,

C. Regional Discrimination

An additional problem in applying the theory would arise where there may be discriminatory delivery which crosses municipal corporate boundary lines. For example, a regional special district may supply water to an area within the corporate limits of two municipalities where the discrimination is alleged to exist. The Supreme Court decision in *Milliken v. Bradley*[93] leaves little doubt that the courts will not impose an equitable remedy across local district boundaries if some remedy *within* a district is feasible. This policy is in keeping with the judicial heritage of respecting the integrity of local jurisdictional boundaries. As long as the plaintiffs' request for relief is limited to simple equitable orders, the plaintiffs need only name the proper defendant to avoid involving a particular municipality with delivering services beyond its own boundaries.[94] However, if the area for which the municipal service is provided crosses the boundary lines of several communities, the most effective remedy for discriminatory delivery of such services may require an interdistrict solution. The situation may call for separate suits against each service district rather than one consolidated claim against the municipality unless, distingushing *Milliken*, no remedy *within* a district is possible and the only recourse to an equitable remedy would be an interdistrict remedy.[95] The validity of Justice Douglas' comment in his dissenting opinion in *Milliken* (that the Supreme Court would have no difficulty in affirming an interdistrict remedy

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then the municipality will not be a "person" for purposes of having personal jurisdiction for the court to order an equitable remedy. *See* City of Kenosha v. Bruno, 412 U.S. 507 (1973). Likewise, without such personal jurisdiction, a court may not order the municipality to draft a plan of equalization. *See* Mahaley v. Cuyahoga Metropolitan Housing Auth., 500 F.2d 1087 (6th Cir. 1974), *cert. denied*, 419 U.S. 1108 (1975).

93. 418 U.S. 717 (1974).

94. In United Farmworkers of Fla. Housing Project v. City of Delray Beach, 493 F.2d 799 (5th Cir. 1974) the municipality was ordered to provide water and sewerage beyond its corporate boundaries, but within an area which it had previously contracted to extend its water service and sewer system.

95. In Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 96 S. Ct. 381 (1975) (mem.), the court found that segregated schools in the Wilmington School District of Delaware resulted from an historic pattern of inter-district segregation within New Castle County, including state involvement in inter-district segregation. The court distinguished the decision in *Milliken*, which ordered the parties in that case to submit alternative Wilmington-only and inter-district plans to eliminate segregation. *Id.* at 432.

to provide equal sewers, rather than equal educational opportunities)[96] remains to be seen.

D. Mootness

A further problem in applying the theory involves dismissals for mootness on a showing by the defendant that remedial action is underway to alleviate the alleged discrimination. Several actions have been dismissed on the strength of this defense.[97] This is a disturbing development because efforts of good faith do not necessarily satisfy equal protection of the laws. The discrimination the equal protection clause is intended to remedy includes patterns of deprivation which persist despite such efforts.[98]

The problem imposed by the mootness defense is that it provides an attractive pretext for a court to embrace in dismissing the action rather than undertake the difficult and sometimes frustrating task of scrutinizing the evidence to determine if a justiciable equal protection claim is present;[99] and if so, whether the defendant's remedial action will alleviate the discrimination. Admittedly, there are few guidelines for a court to follow in examining the merits of an equal protection claim in a municipal service delivery case. In this respect, perhaps a theory of equal delivery may be helpful.

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96. Milliken v. Bradley, 418 U.S. 717, 758 (1974).

97. *See* Brown v. Board of Educ., 386 F. Supp. 110, 126 (N.D. Ill. 1974); Fire v. City of Winner, 352 F. Supp. 925, 928 (D.S.D. 1972); *cf.* Burner v. Washington, 399 F. Supp. 44, 51 (D.D.C. 1975).

98. As Justice Marshall put it in his dissenting opinion in *Rodriguez*:

> [T]his Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action.

411 U.S. at 89. But in Fire v. Winner, 352 F. Supp. 925, 928 (D.S.D. 1972), the court said: "[W]hen a city recognizes a disparity in providing services to its residents and makes a good faith effort to correct such disparity . . . then the municipality has met its constitutional responsibility." The district court's statement is based on the validity of local control and mere rationality.

99. Justice Brennan pointed out in his dissenting opinion in Warth v. Seldin, 95 S. Ct. 2197 (1975) that dismissal for lack of standing can also be such a pretext:

> I can appreciate the Court's reluctance to adjudicate the complex and difficult legal questions involved in determining the constitutionality of practices which assertedly limit residence in a particular municipality to those who are white and relatively well-off, and I also understand that the merits of this case could involve grave sociological and political ramifications. But courts cannot refuse to hear a case on the merits merely because they would prefer not to . . . .

Id. at 2216.

E. Exposing the Fiction of Local Control

A valuable dividend from the development of an equal delivery theory would be to destroy the myth of local control. In numerous cases the privileged position of city administrators, land use planners, city councils, and state legislatures has allowed gross inequities to stand unaltered. That these inequities are societal and economic in nature does not mean that they may not also significantly infringe upon the exercise of constitutional rights. In such cases, the defense of local control must be removed as a permanent barrier to effecting an equitable remedy.

In small communities the theory of equal delivery would be inapplicable because the result of local discretion does not produce the kind of discrimination in municipal service delivery which the theory addresses. The obvious exception is where racial discrimination exists, as in the case of *Hawkins v. Town of Shaw*[100] and *Hadnott v. City of Prattsville*.[101] However, it is a long way from Prattsville, Alabama or Shaw, Mississippi to Chicago or New York. These and other metropolitan areas are no more "localities" than many state governments in terms of their fiscal expenditures and services offered.[102] Furthermore, the major metropolitan areas have increasingly been supplied with revenue from the state and federal levels of government.[103] Correspondingly, the major cities have increasingly yielded their local control to higher levels of government.[104]

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100. 437 F.2d 1286 (5th Cir. 1971), *reh. en banc*, 461 F.2d 1171 (5th Cir. 1972).

101. 309 F. Supp. 967 (M.D. Ala. 1970).

102. In Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), *aff'd*, 96 S. Ct. 381 (1975) (mem.) the court found that the Wilmington School District limits have "frequently been disregarded" and were not "meaningfully separate and autonomous" as evidenced by the state legislature's subsidizing inter-district transportation of private and parochial as well as public school students across the Wilmington district lines. *Id.* at 436.

103. Intergovernmental revenues received from the federal government by state and local governments increased from almost zero in 1902 to almost 20 percent as a portion of their total revenue. In 1972, state and federal revenue received by municipalities comprised 25 percent of their total revenue. 3 U.S. BUREAU OF THE CENSUS, CENSUS OF GOVERNMENTS, VOL. 6, NO. 5, GRAPHIC SUMMARY OF THE 1972 CENSUS OF GOVERNMENTS 25, 48 (1972).

104. At this writing it is impossible to suggest where the high water mark of state and federal takeover of municipal government will be found. Certainly the present fiscal crisis in New York City may be a prelude to a new era of state boards monitoring fiscal power of municipalities, federal guaranteed loans, or even municipal bankruptcy, as the unabated deterioration of central cities makes internally financed municipal services increasingly difficult.

The theory of equal delivery itself focuses on the real abuses of state action which may call for a court's strict scrutiny. By providing a workable method to identify suspect classifications and significant infringements in the exercise of a constitutional right, the theory discounts the credibility of local control in the light of the current crises in urban America.