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Notice of Claim Provisions an Equal Protection Perspective

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NOTE

NOTICE OF CLAIM PROVISIONS: AN EQUAL PROTECTION PERSPECTIVE

Municipalities and other state governmental subdivisions commonly have notice of claim provisions embodied in their ordinances, statutes, or enabling legislation.[1] Although these provisions may vary in their specific schemes,[2] they generally require, as a condition precedent to the initiation of a lawsuit against a governmental entity, that notice of all tort claims be delivered to a designated public official.[3] Since the time periods within which such notice must be filed are usually quite short,[4] these provisions

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[1] *See generally* 18 E. McQUILLIN, MUNICIPAL CORPORATIONS §§ 53.151-.152 (3d ed. F. Ellard 1963; cum. supp. J. Latta & D. Parnell 1972) [hereinafter cited as McQUILLIN]. No attempt is made here to list the many widely varying notice of claim provisions in all jurisdictions. Some states have a more or less unified system of notice of claim provisions. For example, in New York notice of claim requirements for claims against counties, towns, cities, villages, school districts, and other municipal corporations are governed entirely by N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965). *See* Liff & Humburg, *Section 50-e, General Municipal Law Re-examined*, 45 N.Y.B.J. 401 (1973). But in Texas each city of more than 5,000 inhabitants has the right, under "home rule" legislation, to promulgate its own notice requirements. TEX. REV. CIV. STAT. ANN. arts. 1165, 1175(6) (1963); *see, e.g.*, Brantley v. City of Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973), *cert. denied*, 415 U.S. 983 (1974); J. ANDRUS, MUNICIPAL TORT LIABILITY IN TEXAS 26-46 (1962).

[2] Although there is considerable variation among provisions, the following are seven standard features of most notice provisions. The notice must: (*1*) be in writing; (*2*) be given to a named official; (*3*) be given within a specified time from the date of the occurrence giving rise to the claim; (*4*) state the place of the occurrence; (*5*) state the time of occurrence; (*6*) state the circumstances surrounding the occurrence; (*7*) state an intention to seek recovery. McQUILLIN § 53.152. These basic requirements are subject to legislative and judicial modifications and exceptions. *See* notes 41-47 and accompanying text *infra*.

[3] 3 E. YOKLEY, MUNICIPAL CORPORATIONS § 448(a) (1958). *See, e.g.*, Clark v. City of Compton, 22 Cal. App. 3d 522, 99 Cal. Rptr. 613 (1971); Fox v. City of Overland Park, 210 Kan. 16, 499 P.2d 524 (1972); Barchet v. New York City Transit Authority, 20 N.Y.2d 1, 228 N.E.2d 361, 281 N.Y.S.2d 289 (1967); Short v. City of Greensboro, 15 N.C. App. 135, 189 S.E.2d 560 (1972); Dias v. San Antonio, 488 S.W.2d 522 (Tex. Civ. App. 1972).

[4] *See generally* McQUILLIN § 53.161. The time periods usually commence from the date of the occurrence giving rise to the claim. The periods vary greatly, but they are almost always shorter than the periods imposed by the pertinent statutes of limitations. In California, for example, notice of tort claims against local public entities must be filed within 100 days (CAL. GOV'T CODE § 911.2 (West 1966)), and the applicable period of limitations is either two years or six months (CAL. GOV'T CODE § 945.6 (West Supp. 1974)); in Illinois local public entities must be given notice within one year, and the applicable period of limitations is two years (ILL. ANN. STAT. ch. 85, §§ 8-101, -102 (Smith-Hurd Supp. 1974)); in Iowa cities under special charter must be notified within 30 days and the pertinent statute of limitations is three months (IOWA CODE ANN. § 420.45 (1949)) (under IOWA CODE ANN. § 614.1 (Supp. 1974), two year statute of limitations for ordinary tort claims); in Minnesota municipalities

frequently operate much like abbreviated statutes of limitations for plaintiffs injured by governmental tort-feasors.[5]

General dissatisfaction with notice of claim provisions has been voiced from all quarters.[6] One of the most glaring inequities engendered by these provisions is a favoring of governmental over private tort-feasors, in that governmental tort-feasors are exposed to suit for a considerably shorter period of time.[7] In 1972 the Supreme Court of Michigan, in *Reich v. State Highway Department,*[8] held a state notice of claim statute unconstitutional on equal protection grounds,[9] and in 1973 the Supreme Court of Nevada followed suit in *Turner v. Staggs*[10] when it invalidated a county notice of claim statute for identical reasons.[11] These decisions represent the first time that such provisions have been successfully challenged on broad constitutional grounds.[12] Together, *Reich* and

must be notified within 30 days (MINN. STAT. ANN. § 466.05 (1963)), and the applicable period of limitations is either two or six years (MINN. STAT. ANN. §§ 541.05 and 541.07 (Supp. 1974)); New York prescribes a 90-day notice period for claims against municipal corporations (N.Y. GEN. MUNIC. LAW § 50-e(1) (McKinney 1965)), and the applicable period of limitations is one year and ninety days (N.Y. Gen. Munic. Law § 50-i (McKinney 1965) (under N.Y. CIV. PRAC. LAW § 214 (McKinney 1972), and N.Y. EST., POWERS & TRUSTS LAW § 5-4.1 (McKinney 1967) two or three year statute of limitations for ordinary tort claims); in Texas each city establishes its own notice periods, which are often as short as 30 days (*see, e.g.,* note 1 *supra;* Barrett v. City of Dallas, 490 S.W.2d 605 (Tex. Civ. App. 1973)), and the applicable period of limitations is two years (TEX. REV. CIV. STAT. ANN. art. 5526 (1958)).

[5] *See* McQUILLIN § 53.154. There are numerous cases supporting this proposition. *See, e.g.,* City of Barnesville v. Powell, 124 Ga. App. 132, 183 S.E.2d 55 (1971); Salavea v. Honolulu, 517 P.2d 51 (Haw. 1973); Brandner v. City of Aberdeen, 78 S.D. 574, 105 N.W.2d 665 (1960). The court in *Salavea* opined that because the notice of claim provision was in fact a statute of limitations, it thereby was in conflict with the statute of limitations enacted by the Hawaii legislature. According to the Supreme Court of Hawaii, "[a]lthough some may denominate such statutory provisions a condition precedent to liability, . . . the notice of claim requirement operates, in reality, as a statute of limitations." 517 P.2d at 53 (citations omitted).

[6] *See, e.g.,* Salavea v. Honolulu, 517 P.2d 51 (Haw. 1973); Lorton v. Brown County Community Unit School Dist. No. 1, 35 Ill. 2d 362, 220 N.E.2d 161 (1966); Liff & Humburg, *supra* note 1; Note, *Torts—Governmental Immunity—Special Procedural Requirements Unconstitutional,* 17 DE PAUL L. REV. 236 (1967); Note, *Delay in Notice of Tort Claim Against a Governmental Agency,* 20 CLEV. ST. L. REV. 23 (1971).

[7] *See, e.g.,* McCann v. City of Lake Wales, 144 So. 2d 505 (Fla. 1962); King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970); Lunday v. Vogelmann, 213 N.W.2d 904 (Iowa 1973); Zipser v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Court 1972), *rev'd,* 75 Misc. 2d 489, 348 N.Y.S.2d 18 (Sup. Ct. 1972). *See also* note 69 and accompanying text *infra.*

[8] 386 Mich. 617, 194 N.W.2d 700 (1972).

[9] *See* notes 80-87 and accompanying text *infra.*

[10] 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied,* 414 U.S. 1079 (1974).

[11] *See* note 88-91 and accompanying text *infra.*

[12] There have been a plethora of constitutional attacks upon notice of claim provisions. Until *Turner* and *Reich,* challenges asserting *general* unconstitutionality were wholly unsuccessful, although challenges based upon *specific* grounds (notably infancy and other disabilities) had occasionally been upheld. *See* notes 53-57, 68-79 and accompanying text *infra.*

Turner may herald a judicial reassessment in this area; at the very least, they indicate that a new and hard examination should be given to the constitutionality of notice of claim provisions in today's legal climate.

I

BACKGROUND

A. *Sovereign Immunity*

The origins and underlying purposes of notice of claim provisions are rooted in the doctrine of sovereign immunity. This doctrine, embodying the notion that the government should be free from tort liability, was transposed from the English common law into the American judicial system.[13] Although the doctrine has been fully embraced by national and state governments,[14] state subdivisions and local governmental units have not as uniformly acquired the immunity principle.[15]

Immunity from tort liability at the level of municipalities and

[13] The Supreme Court first applied the doctrine of sovereign immunity to the federal government in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). *See generally* W. PROSSER, LAW OF TORTS 971-94 (4th ed. 1971). Similarly, the state courts adopted this doctrine to preclude claims against the state and its subordinate governmental entities. Two early examples are Mower v. Inhabitants of Leicester, 9 Mass. (8 Tyng) 247 (1812), and Black v. Rempublicam, 1 Yeates 140 (Pa. 1792). In 1793 the Supreme Court declared that it had jurisdiction in suits against states by private citizens of other states. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793). The eleventh amendment quickly took away this jurisdiction. *See* Note, *Private Suits Against States in Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

There are two classic justifications for this doctrine in the United States. The first has no logical basis, but rather is simply a carry-over from the English common-law precept that "the King can do no wrong." *See* Morgan v. United States, 81 U.S. (14 Wall.) 531 (1871); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925). The second, more reasoned justification was articulated by Justice Holmes:

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). A definitive treatment of the origins and development of this doctrine is found in Borchard, *Governmental Responsibility in Tort, VI*, 36 YALE L.J. I (1926).

[14] In addition, the acceptance of immunity by state governments often meant an automatic extension of immunity to state agencies. *See* Note, *The Applicability of Sovereign Immunity to Independent Public Authorities*, 74 HARV. L. REV. 714 (1961). For example, a highway department, or even a town or county, might be considered simply a branch of the state government, and thus enjoy the immunity of that state. *See, e.g.*, Lincoln County v. Luning, 133 U.S. 529 (1890); Murphy v. Ives, 150 Conn. 723, 196 A.2d 596 (1963); Albany County v. Hooker, 204 N.Y. 1, 97 N.E. 403 (1912); James & Yost, Inc. v. State Bd. of Higher Educ., 216 Ore. 598, 340 P.2d 577 (1959).

[15] *See generally* Borchard, *Governmental Liability in Tort, I-III*, 34 YALE L.J. 1, 129, 229 (1924).

other state governmental subdivisions has been achieved in at least four ways. First, courts have characterized some governmental units as being extensions or agencies of the state, and thereby have entitled them to share the state's immunity.[16] Second, American courts have often relied on the rationale announced in the eighteenth century English precedent, *Russell v. The Men of Devon,*[17] that "*quasi* corporations, created by the legislature for purposes of public policy, . . . are not liable to an action for . . . neglect, unless the action be given by some statute."[18] Under this view, certain local units, usually counties and towns, possess their own inherent immunity, just as federal and state governments do.[19] Third, some municipal corporations, such as cities and villages, have received a kind of half measure of immunity which protects them from tort liability only to the extent that such liability arises from a "governmental" as opposed to a "proprietary" function.[20] Although difficult to define and distinguish, this dichotomy has been created to immunize municipal corporations only where they are acting as a state agency or in a general governmental, as opposed to a private, capacity.[21] Finally, these governmental units, particularly

[16] *See* note 14 *supra.*

[17] 2 T.R. 667, 100 Eng. Rep. 359 (K.B. 1788).

[18] Mower v. Leicester, 9 Mass. (8 Tyng) 247, 250 (1812).

[19] *See, e.g.,* Western Pennsylvania Nat'l Bank v. Ross, 345 F.2d 525 (6th Cir. 1965); Carter v. Wilds, 8 Houst. 14, 31 A. 715 (Del. Super. 1887); DeKalb County v. Deason, 112 Ga. App. 721, 146 S.E.2d 382 (1965); City of Grenada v. Grenada County, 115 Miss. 831, 76 So. 682 (1917). *See also* Weyrauch, *The Taxpayer's Stake in Municipal Tort Liability,* 42 NIMLO MUNICIPAL L. REV. 379 (December 1953).

[20] *See, e.g.,* Day v. City of Berlin, 157 F.2d 323 (1st Cir. 1946); McCann v. State Dep't of Mental Health, 47 Mich. App. 326, 209 N.W.2d 456 (1973); Heitman v. Lake City, 225 Minn. 117, 30 N.W.2d 18 (1947); Seaman v. Big Horn Canal Ass'n, 29 Wyo. 391, 213 P. 938 (1923). *See generally* MCQUILLIN §§ 53.23-.24.

Originally, municipal corporations were treated as equivalent to private corporations and therefore enjoyed no tort immunity whatsoever. It would appear that the governmental-proprietary distinction is purely an American judicial invention, probably first expounded in Bailey v. Mayor of New York, 3 Hill 531, 38 Am. Dec. 669 (N.Y. 1842). The development of this test of municipal tort liability is discussed fully in Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Law Tort Liability of Municipal Corporations,* 16 ORE. L. REV. 250 (1937).

[21] For an excellent treatment of this dichotomy see E. YOKLEY, *supra* note 3, § 446. The purpose of the distinction is to hold a municipal corporation liable when it acts in some sort of private capacity, much like any private corporation. But when the municipality is deemed to have acted in a public way, promoting in some way the public welfare, it will be deemed immune. As expressed in Bolster v. City of Lawrence, 225 Mass, 387, 390, 114 N.E. 722, 724 (1917), "[t]he underlying test is whether the act is for the common good of all without the element of special corporate benefit or pecuniary profit." This test is easier to state than to employ; predictably, the courts have had great difficulty in its application, and the resulting decisions have lacked consistency. *See, e.g.,* Trenton v. New Jersey, 262 U.S. 182 (1923); Kamau v. Hawaii County, 41 Haw. 527 (1957); Parker v. City of Hutchinson, 196 Kan. 148,

municipal corporations, have also achieved immunity through express statutory or constitutional provisions.[22]

In these ways local governmental units have achieved a large degree of tort immunity. In the twentieth century, however, the doctrine of sovereign immunity has been severely criticized.[23] Since sovereign immunity eliminates suits against the state for torts, which, if committed by private parties, would probably be actionable, it has been characterized as both unjust and incompatible with the American governmental-legal system.[24] This characterization is bolstered by three important facts. First, the United States is not governed by a monarch (who the English have said can do no wrong).[25] Second, the American sovereign power belongs not to the government, but to the people. Third, and most important from a legal standpoint, some jurisdictions have openly acknowledged that private citizens have a fundamental right to seek redress in tort from whomever inflicts a wrong, including the state.[26]

Gradually, the legislatures and courts have responded to these criticisms so that today there exists a partial or total abrogation of the doctrine in a number of jurisdictions.[27] But even where this

410 P.2d 347 (1966); City of Hazard v. Duff, 287 Ky. 427, 154 S.W.2d 28 (1941). This murky distinction has heen much criticized. *See, e.g.,* Borchard, *supra* note 15; Fuller & Casner, *Municipal Tort Liability in Operation,* 54 HARV. L. REV. 437 (1941).

[22] The common law in this area has undergone considerable change in recent years due to the promulgation of statutory and constitutional provisions. *See* W. PROSSER, *supra* note 13, at 983-84. *See also* notes 27-31 and accompanying text *infra.*

[23] *See, e.g.,* Bernardine v. City of New York, 294 N.Y. 361, 62 N.E.2d 604 (1945); Haney v. Lexington, 386 S.W.2d 738 (Ky. 1964); Britten v. Eau Claire, 260 Wis. 382, 51 N.W.2d 30 (1952); W. PROSSER, *supra* note 13, at 984; Fuller & Casner, *supra* note 21; Greenhill & Murto, *Governmental Immunity,* 49 TEXAS L. REV. 462 (1971); Stason, *Governmental Tort Liability Symposium,* 29 N.Y.U.L. REV. 1321 (1954); Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu,* 15 STAN. L. REV. 163 (1963).

[24] *See, e.g.,* Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89, (1961), *modified sub nom.* Corning Hosp. Dist. v. Superior Ct., 57 Cal. 2d 488, 370 P.2d 325, 20 Cal. Rptr. 621 (1962); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Riss v. City of New York, 22 N.Y.2d 579, 592, 240 N.E.2d 860, 867, 293 N.Y.S.2d 897, 907 (1968) (dissenting opinion): Mikva, *Sovereign Immunity: In a Democracy the Emperor Has No Clothes,* 1966 U. ILL. L. FORUM 828; note 23 *supra.*

[25] *See* Barry, *supra* note 13, at 349-58.

[26] Wendler v. Great Bend, 181 Kan. 753, 759, 316 P.2d 265, 279 (1957).

[27] *See, e.g.,* Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968) (abolition of municipal governmental immunity; reinstated by Arkansas legislature in ARK. STAT. ANN. § 12-2901 (Supp. 1971)); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied,* 362 U.S. 968 (1960); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Willis v. Dep't of Conservation, 55 N.J. 534, 264 A.2d 34 (1970).

The following are examples of statutes which waive, in varying degrees, state tort immunity: ALASKA STAT. § 09.65.070 (Supp. 1972); CAL. GOV'T CODE §§ 900-905.8 (West

piecemeal approach has succeeded in abrogating or substantially limiting the doctrine of sovereign immunity, it has failed to curtail or eliminate some of the doctrine's most troublesome vestiges, among them notice of claim provisions.[28] In fact, statutory notice of claim provisions have been viewed as at least a partial substitute for sovereign immunity.[29] Although they have sprung from a doctrine of dubious legal and social value,[30] it is clear that notice of claim provisions have become a universal mainstay in the structure of state and local government.[31]

B. *Traditional Justifications and Purposes*

Over the years a plethora of rationales have been offered to justify the need for notice of claim provisions. An examination of the case law reveals that nearly all the stated purposes and objectives of these provisions fit within four general categories.

1966); ILL. REV. STAT. ch. 85, §§ 8-101 to -103 (Supp. 1972); NEV. REV. STAT. §§ 41.031-.038 (1965); WIS. STAT. ANN. § 895.43 (1966).

As the dates of the cases and statutes cited above indicate, the trend toward true abrogation is a recent one. In limited and well defined ways, however, states and their subdivisions have permitted tort suits for many years. W. PROSSER, *supra* note 13, at 975-76. Thus, today "[i]n all of the states, . . . consent [to be sued] has been given, to a greater or lesser extent." *Id.* at 975.

[28] *See* McQUILLIN § 53.03. Since the state and local governments have, by statute, charter or judicial fiat, allowed suit against themselves and their subdivisions, they can therefore be sued only on their own terms. One commentator has summarized some of the limitations frequently imposed:

> In the states which have waived sovereign immunity, the judicially and legislatively created exceptions to government tort liability are of five types: (1) preservation of immunity for torts arising out of "governmental activities"; (2) preservation of immunity for governmental functions for which by statute or judicial interpretation there is no duty of proper performance running from government to individuals; (3) preservation of immunity for claims based upon discretionary or high-level decisions of government officials; (4) preservation of immunity for specifically named classifications of torts or activities; and (5) limitations on the governmental units and employees subject to liability *and on the time, procedure, and amounts recoverable.*

Henke, *Oregon's Governmental Tort Liability Law From a National Perspective,* 48 ORE. L. REV. 95, 101 (1968) (emphasis added). *See* note 29 and accompanying text *infra.*

[29] As one writer has stated, upon the abrogation of sovereign immunity as a means of protection against tort liability,

> [o]ther techniques were devised to bring about similar results. Some communities, and some entire states, for example, were protected by laws which set ceilings on the amounts recoverable by tort claimants. More widely adopted was a requirement that, as a condition precedent to suit after injury is suffered, the plaintiff must file with the municipality a notice of his claim for damages. Some municipalities demanded highly technical conformity with their local laws, setting precise forms, precise times and precise manners of compliance, for breach of which action was barred.

Weyrauch, *supra* note 19, at 386-87 (footnotes omitted).

[30] *See* notes 23-26 and accompanying text *supra.*

[31] *See* notes 1-5 and accompanying text *supra.*

First, by far the most common justification is that notice of claim provisions enable the governmental unit to investigate promptly the incident giving rise to the claim, thereby facilitating an immediate assessment of potential liability.[32] The obvious reasoning is that fraudulent and meritless claims are more difficult to detect where considerable time is allowed to elapse and render the facts surrounding the incident stale and less readily ascertainable.[33] The second justifying rationale, closely akin to the first, encompasses the viewpoint that notice of claim provisions protect against the cost of needless litigation by increasing the likelihood of early adjustment of disputes and out-of-court settlements.[34] Although most courts have relied heavily upon these two stock explanations, others espouse a third rationale, explaining that early notice of accidents serves to prevent future accidents (and of course concomitant additional expense) by enabling the governmental unit to make any necessary repairs or remedies as quickly as possible.[35] Finally, a few cases have suggested that advance notice of possible liability aids public entities in determining their future taxes and in planning their fiscal budgets.[36] In general, the emphasis in all of these categories appears to be on the protection of the public coffers, and the avoidance of additional expense, with perhaps an ancillary concern for public safety.

C. *Legislative and Judicial Treatment*

A series of problems is generated by the general tendency of notice of claim provisions to be replete with technical require-

[32] Yokley views the investigative purpose as the sole object of these provisions. 3 E. YOKLEY, *supra* note 3, at § 448(b). *See, e.g.*, Lutsch v. Chicago, 318 Ill. App. 156, 159, 47 N.E.2d 545, 546 (1943); Dias v. Eden Township Hosp. Dist., 57 Cal. 2d 502, 503, 20 Cal. Rptr. 630, 631, 370 P.2d 334, 335 (1962); Zack v. Borough of Saxonburg, 386 Pa. 463, 470, 126 A.2d 753, 756 (1956); Portsmouth v. Cilumbrello, 204 Va. 11, 129 S.E.2d 31 (1963); Brigham v. Seattle, 34 Wash. 2d 786, 210 P.2d 144 (1949).

[33] The New York State Judicial Council stated:

> The requirement of notice is one of the safeguards devised by the law to protect municipalities against fraudulent and stale claims for injuries to person and property. It is designed to afford the municipality opportunity to make an early investigation of the claim while the facts surrounding the alleged claim are still "fresh."

NEW YORK STATE JUDICIAL COUNCIL, TENTH ANNUAL REPORT 265 (1944).

[34] *See, e.g.*, City of Anniston v. Rosser, 275 Ala. 659, 158 So. 2d 99 (1963); Taylor v. King, 104 Ga. App. 589, 122 S.E.2d 265 (1961); Aaron v. City of Tipton, 218 Ind. 227, 32 N.E.2d 88 (1941).

[35] *See, e.g.*, Cornett v. City of Neodesha, 187 Kan. 60, 353 P.2d 975 (1960); Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972).

[36] *See, e.g.*, King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970); Lunday v. Vogelmann, 213 N.W.2d 904, 907-08 (Iowa 1973).

ments and to afford the claimant a relatively brief period within which to comply.[37] Most striking is the obvious potential created for plaintiffs to be precluded harshly and unfairly from prosecuting their claims; and this potential is all too often realized.[38] For example, the Supreme Court of Georgia once dismissed a litigant's suit for failure to comply with the City of Calhoun's notice of claim provision where it was conceded that the city had actual knowledge of the claim within the prescribed six month filing period.[39] The plaintiff had orally notified the city clerk a few days after her automobile was forced off the road due to defective highway conditions.[40] The city clerk and mayor inspected the site, and within three weeks of the accident the plaintiff, who had been permanently injured, appeared before the city council and orally presented her claim. The city council twice informed the plaintiff that her claim would be acted upon as soon as her doctor sent her a medical statement. The plaintiff presented the actual written notice of claim approximately seven months after her accident, and eventually the trial court dismissed her suit. In a terse decision, the Georgia Supreme Court stated that the Calhoun city council had no right to waive the six month period established by the Georgia legislature, and that the plaintiff's failure to comply with the notice of claim provision, albeit a minor and technical shortcoming, nevertheless required affirmance of the trial court's dismissal.

Not surprisingly, many legislatures and courts have acted to alleviate these injustices. Numerous states have written clauses into their notice of claim statutes excusing failure of strict compliance for certain reasons therein enumerated.[41] Although it has been criticized for not being liberal enough,[42] section 50-e of the New

[37] *See* notes 2-5 and accompanying text *supra.*

[38] There are numerous cases reflecting harsh results due to enforced strict compliance with notice provisions. *See, e.g.,* Allbritton v. Birmingham, 274 Ala. 550, 150 So. 2d 717 (1963); Goodwin v. City of Bloomfield, 203 N.W.2d 582 (Iowa 1973); Workman v. City of Emporia, 200 Kan. 112, 434 P.2d 846 (1967); Stowe v. City of Elmira, 31 N.Y.2d 814, 291 N.E.2d 586, 339 N.Y.S.2d 463 (1972); Santiago v. Board of Educ. of City of New York, 41 App. Div. 2d 616, 340 N.Y.S.2d 491 (1st Dep't 1973); Brantley v. City of Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973). *See also* note 6 and accompanying text *supra.*

[39] City of Calhoun v. Holland, 222 Ga. 817, 152 S.E.2d 752 (1966).

[40] The facts of this case are set forth in the opinion of the Georgia Court of Appeals. Holland v. City of Calhoun, 114 Ga. App. 51, 150 S.E.2d 155, *rev'd,* 222 Ga. 817, 152 S.E.2d 752 (1966).

[41] *See, e.g.,* MINN. STAT. ANN. § 466.05 (1963) (claims against municipalities not barred for failure to demand compensation or other relief); PA. STAT. ANN. tit. 53, § 5301 (1972) (court may allow reasonable excuses for failure to comply); WIS. STAT. ANN. § 895.43 (1966) (action not barred if plaintiff can show municipality had actual notice and not prejudiced).

[42] *See* Liff & Humburg, *supra* note 1; Note, *Renewed Recommendations for Revisions of Section 50-e of the General Municipal Law,* 24 ST. JOHN'S L. REV. 318 (1950).

York General Municipal Law[43] is a good example. This section permits the court, in its discretion, to excuse delays in filing notice against municipalities due to infancy, incapacity, death of the claimant during the filing period, and justified reliance upon the settlement representations of an authorized representative.[44] It also permits the court to allow good faith mistakes in notices of claim to be corrected at any time through the trial.[45]

Similarly, the courts in a large number of jurisdictions have cut broader and more extensive in-roads toward mollifying the harshness of notice provisions. Frequently, as in New York, this has been accomplished through the exercise of the discretion which the state legislatures have given the courts in this area.[46] Although court action in this respect has been varied and seemingly inconsistent,[47] most of the judicial approaches may be categorized into one or more of three general classifications: (*1*) infancy and other incapacity; (*2*) substantial compliance; and (*3*) waiver and estoppel.

1. *Infancy and Other Incapacity*

Many jurisdictions have recognized that it is excusable to fail to comply with notice of claim provisions due to infancy and/or physical or mental incapacity.[48] Most courts so holding have relied

[43] N.Y. GEN. MUNIC. LAW § 50-e (McKinney 1965).

[44] *Id.* § 50-e(5).

[45] *Id.* § 50-e(6).

[46] *See* Notes 41-45 and accompanying text *supra*; notes 51, 52 and accompanying text *infra.*

[47] For example, compare the Georgia Supreme Court's opinion in City of Calhoun v. Holland, 222 Ga. 817, 152 S.E.2d 752 (1966) (*see* notes 39-40 and accompanying text *supra*), with the opinion of that same court six years earlier in Aldred v. City of Summerville, 215 Ga. 651, 113 S.E.2d 108 (1960). In *Aldred* claimant was injured as a result of defective highway conditions. The Georgia court found sufficient compliance where plaintiff's notice failed to describe the precise negligence which caused the accident, and instead stated: "I am sure the Mayor and Council are familiar with the facts . . . consequently, I will not try to go into further deatil." 215 Ga. at 652, 113 S.E.2d at 109. *Compare* Olivier v. St. Petersburg, 65 So. 2d 71 (Fla. 1953), *with* Magee v. City of Jacksonville, 87 So. 2d 589 (Fla. 1956). In *Olivier* notification of the time and date as well as brief facts of the accident was held to be insufficient compliance with the notice provision. In *Magee* a similar notice requirement was satisfied by a notice which stated the time and date, brief facts, and the approximate place of the accident. The court in *Magee* distinguished *Olivier* on the tenuous ground that in the latter case "[t]he street itself was never mentioned." 87 So. 2d at 592.

[48] For illustrative cases establishing infancy as an excuse for noncompliance, see McDonald v. Spring Valley, 285 Ill. 52, 120 N.E. 476 (1918); Lazich v. Belanger, 111 Mont. 48, 105 P.2d 738 (1940); Murphy v. Ft. Edward, 213 N.Y. 397, 107 N.E. 716 (1915); Webster v. Charlotte, 222 N.C. 321, 22 S.E.2d 900 (1942); Simpson v. City of Abilene, 388 S.W.2d 760 (Tex. Civ. App. 1965).

For illustrative cases establishing mental or physical disability as an excuse for noncompliance, see Colorado Springs v. Colburn, 102 Colo. 483, 81 P.2d 397 (1938); Forsyth v.

upon the theory that it is essentially unjust and inequitable for the law to set requirements with which it is impossible to comply. According to one court,

> [I]t would be basically unfair to deprive [the claimant] of recourse to the courts if the injuries suffered prevented him from complying with the notice requirements. . . . To permit such a situation to occur would make it possible for the city to take advantage of and benefit from its own wrong. This would not be consistent with our traditional conception of fair play and substantial justice.[49]

However, there are a great number of jurisdictions which refuse to excuse strict compliance on such grounds.[50] Furthermore, in those jurisdictions which do permit some degree of noncompliance on grounds of incapacity, it is usually a question of fact whether the excuse of infancy or other disability is valid in that particular case.[51] This highly fact-oriented approach is devoid of predictability and is susceptible to inconsistent and acrimonious results.[52]

It is therefore not surprising that the failure of many states to excuse noncompliance due to infancy and other incapacity has been challenged on constitutional grounds. The usual constitutional objection centers on the argument that it is violative of the

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City of Oswego, 191 N.Y. 441, 84 N.E. 392 (1908); Tulsa v. Wells, 79 Okla. 39, 191 P. 186 (1920); Born v. Spokane, 27 Wash. 719, 68 P. 386 (1902). For a cataloguing of cases on this general topic, see McQUILLIN § 53.158-.159.

[49] Maier v. City of Ketchikan, 403 P.2d 34, 37 (Alas. 1965).

[50] *See, e.g.*, Fox v. Overland Park, 210 Kan. 16, 499 P.2d 524 (1972); Fry v. Willamalane Park & Recreation Dist., 4 Or. App. 575, 481 P.2d 648 (1971); Waite v. Orgill, 203 Tenn. 146, 310 S.W.2d 179 (1958); Daniel v. Richmond, 199 Va. 490, 100 S.E.2d 763 (1957).

[51] *See, e.g.*, Williams v. San Diego Unified School Dist., 143 Cal. App. 2d 564, 299 P.2d 916 (1956); Hestbeck v. Hennepin County, 297 Minn. 419, 212 N.W.2d 361 (1973); Blecker v. City of New York, 24 App. Div. 2d 714, 263 N.Y.S.2d 348 (1st Dep't 1965).

[52] For example, in Fornaro v. Town of Clarkstown, 44 App. Div. 2d 596, 597, 353 N.Y.S.2d 516, 518 (2d Dep't 1974), the court stated: "A 13-year old child cannot reasonably be required to press his claim when his attorney fails to do so." Yet in Santiago v. Board of Educ. of City of New York, 41 App. Div. 2d 616, 340 N.Y.S.2d 491 (1st Dep't 1973), the court held insufficient a ten year old infant's notice of claim which had been filed five days late.

Such inconsistencies could be ameliorated by the enactment of specific legislative guidelines. Vague terms such as "incapacity" could be given concrete meaning in statutes. Such guidelines have been developed by many states which have general provisions extending their statutes of limitations for plaintiffs suffering from a disability and similar standards should be applied in the notice of claim context. *See, e.g.*, IDAHO CODE §§ 5-230, -235 (1948) (normal period of limitations commences after disability—*e.g.*, infancy or insanity—ends); MD. CTS. & JUD. PRO. CODE ANN. § 5-201 (1974) (normal period of limitations commences after gaining capacity, *e.g.*, attaining age 18); OKLA. STAT. ANN. tit. 12, §§ 94, 96 (1960) (plaintiff has either one or two years to sue after disability ends).

due process clause of the fourteenth amendment to bar claimants from bringing suit because of their incapacity.[53] In one case, for example, the plaintiffs unsuccessfully contended "that imposing such a requirement upon a minor does not comport with . . . ideas of fair play and therefore violates due process."[54] In another case, the court agreed with the claimant's argument that such provisions deprived infants of a vested right—the right to seek redress in tort—without due process of law.[55] Other constitutional attacks have been founded on equal protection grounds[56]—that disabled persons are being denied equal protection because of inability to assert their claims. In general it can be said that these constitutional attacks have only occasionally been successful.[57]

2. *Substantial Compliance*

More widely accepted than excuse-for-incapacity is the doctrine of substantial compliance.[58] Instead of demanding precise and technical fulfillment of the requirements of a given notice provision, courts usually require only that the notice "inform the . . . officials with reasonable certainty of the time, place, cause and nature of the accident and the general nature and extent of the injuries . . . ."[59] Quite obviously if, within the specified time period, a governmental unit receives *informally* all the information it would

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[53] *See, e.g.*, Goncalves v. San Francisco Unified School Dist., 166 Cal. App. 2d 87, 332 P.2d 713 (1958) (minor's due process claim rejected); Touhey v. City of Decatur, 175 Ind. 98, 93 N.E. 540 (1911) (no violation of 14th amendment where claimant mentally and physically unable to file notice); City of Waxahachie v. Harvey, 255 S.W.2d 549 (Tex. Civ. App. 1953) (where plaintiff severely disabled, preclusion of claim unreasonable and violative of due process); Ocampo v. City of Racine, 28 Wis. 2d 506, 137 N.W.2d 477 (1965) (minor plaintiff's due process argument rejected).

[54] Goncalves v. San Francisco Unified School Dist., 166 Cal. App. 2d 87, 90, 332 P.2d 713, 715 (1958).

[55] Grubaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970).

[56] *See, e.g.*, Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952) (unsuccessful equal protection attack by minor); Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972) (rejection of infant's assertion that 30-day notice provision denied equal protection); Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974) (successful equal protection and due process attack by minor).

[57] *See* notes 53, 56 and accompanying text *supra*.

[58] McQuillin reports that "a substantial compliance with the statute, *according to the weight of authority*, is all that is required." MCQUILLIN § 53.163 (emphasis added). Most states adhere to this doctrine, in one form or another. *See, e.g.*, Galbreath v. Indianapolis, 253 Ind. 472, 255 N.E.2d 225 (1970); Travis v. Kansas City, 491 S.W.2d 521 (Mo. 1973); Zamel v. Port of New York Authority, 56 N.J. 1, 264 A.2d 201 (1970); Sandak v. Tuxedo Union School Dist., 308 N.Y. 226, 124 N.E.2d 295 (1954); Heller v. Virginia Beach, 213 Va. 683, 194 S.E.2d 696 (1973); Higginbotham v. Charleston, 204 S.E.2d 1 (W. Va. 1974).

[59] Aaron v. City of Tipton, 218 Ind. 227, 230-31, 32 N.E.2d 88, 89 (1941).

have acquired from the filing of a *formal* notice of claim, it has not been prejudiced or harmed to any great degree.

This judicial construct differs from the incapacity notion in one key respect. Substantial compliance pertains to the manner and sufficiency of the notice filed with the governmental entity. On the other hand, the excuse-for-incapacity doctrine relates to the timeliness of filing the notice. But just as the courts differ widely as to whether a delayed filing of notice was the result of an excusable disability,[60] they also vary in their judgments as to what constitutes sufficient compliance in any given case. This kind of disagreement is due, in part, to variations in the requirements of particular notice provisions. For example, under the Georgia substantial-compliance doctrine it is not necessary that the plaintiff state any amount of damages whatsoever.[61] A Texas court, however, held that there was not substantial compliance with a city charter provision requiring a statement of the amount of damages sustained when the claimant's notice stated only that she was willing to settle her claim for $3,000.[62] Such decisions provide little guidance for future litigants, however, since they are generally limited to the facts of the particular case and courts often fail to articulate reasons why a certain course of conduct may or may not constitute substantial compliance.[63] Thus, unless the meaning of substantial compliance is laid out, either by statute or by the courts, consistency and predictability under the doctrine will be difficult to achieve.

3. *Waiver and Estoppel*

Occasionally, the courts have shown a willingness to find that a public entity, through the actions or inactions of its agents and employees, has waived, or should be estopped from asserting, a defense based upon failure to give proper notice.[64] As with the

[60] *See* notes 51-52 and accompanying text *supra*.

[61] Gainesville v. Moss, 108 Ga. App. 713, 134 S.E.2d 547 (1963); Maryon v. Atlanta, 149 Ga. 35, 99 S.E. 116 (1919).

[62] Gardner v. Houston, 320 S.W.2d 715 (Tex. Civ. App. 1959). This decision, however, is not indicative of the attitude of all Texas courts with regard to substantial compliance. *See, e.g.*, Ostrewich v. Houston, 419 S.W.2d 247 (Tex. Civ. App. 1967).

[63] There are numerous examples where the courts have simply given a summary or pertinent quote from the notice of claim, and, without analysis, concluded that there either has or has not been compliance with the applicable provision. *See, e.g.*, City of Acworth v. McLain, 99 Ga. App. 407, 108 S.E.2d 821 (1959); Brown v. City of South Bend, 148 Ind. App. 436, 267 N.E.2d 400 (1971).

[64] The Supreme Court of Florida, for example, finds "waiver or estoppel . . . when there is an investigation followed by action in relation to the claimant that would lead a reasonable person to conclude that further notice is unnecessary . . . ." Rabinowitz v. Town

excuse-for-disability construct, the waiver-estoppel rule pertains more to the problem of delay in filing than to the sufficiency of notice. The jurisdictions are currently divided on the question of whether waiver and estoppel principles should be applied in this context.[65] But even among those jurisdictions which employ this technique there is considerable variation as to the nature of the factual pattern appropriate for a finding of a waiver or the imposition of an estoppel.[66] In addition, courts will occasionally find that there can be no waiver or estoppel where the person who waives or whose actions would amount to estoppel does not have the proper authority to do so.[67] Such reasoning is not consonant with the underlying objective of this principle, which is to protect citizens where they have justifiably and reasonably relied upon official behavior to their detriment.

II

CONSTITUTIONALITY OF NOTICE OF CLAIM PROVISIONS

A. *Judicial Response to the Constitutional Question*

Notice of claim provisions have often been subject to constitutional challenge on due process grounds for their failure to take

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of Bay Harbor Islands, 178 So. 2d 9, 13 (Fla. 1965). In *Rabinowitz* the court found this waiver or estoppel where, after the Town had conducted an extensive investigation of the accident, the Town's insurance investigator informed plaintiffs that the Town did not own the property involved. Relying on this information, plaintiffs negotiated with the insurer's attorney and did not learn that the Town actually did own the property until the time for filing had passed.

[65] Courts in the following cases have refused to employ waiver or estoppel: Schaefer v. Mayor and Council of City of Athens, 120 Ga. App. 301, 170 S.E.2d 339 (1969); Frowner v. Chicago Transit Authority, 25 Ill. App. 2d 312, 167 N.E.2d 26 (1960); Forseth v. City of Tacoma, 27 Wash. 2d 284, 178 P.2d 357 (1947).

Courts in the following cases, however, have readily employed waiver or estoppel: Scibilia v. Niagara Falls, 44 App. Div. 2d 757, 354 N.Y.S.2d 229 (4th Dep't 1974); Roessing v. City of Erie, 57 Pa. D. & C. 377, 29 Erie 152 (1945); Dias v. San Antonio, 488 S.W.2d 522 (Tex. Civ. App. 1972).

[66] For example, although Florida adheres to the waiver-estoppel doctrine (*see* note 64 *supra*), in O'Conner v. Town of Pass-A-Grille Beach, 107 So. 2d 192 (Fla. Dist. Ct. App. 1958), representations by adjusters of a town's insurer that the insurer would make a fair settlement with plaintiff, and that retaining an attorney would only retard the procedure, created no estoppel or waiver. In Kern v. Central Free School Dist., 41 Misc. 2d 288, 245 N.Y.S.2d 213 (Sup. Ct. 1963), a New York court found waiver or estoppel under much the same circumstances. There a school district's insurance carrier and the carrier's agent sent letters to the claimant requesting her to forward her medical bills and advising her that payments would be considered and made.

[67] *See, e.g.*, City of Calhoun v. Holland, 222 Ga. 817, 152 S.E.2d 752 (1966); Rottschafer v. East Grand Rapids, 342 Mich. 43, 69 N.W.2d 193 (1955).

into account the infancy or other disability of the claimant.[68] Perhaps even more frequently there has been a second kind of constitutional attack based upon the notion that notice provisions operate to deny due process and equal protection to private tort-feasors and victims of governmental tort-feasors in that they expose private tort-feasors to a greater risk of liability than governmental tort-feasors, and render it more difficult for the victim of a governmental tort to recover than the victim of a private tort.[69] However, whereas the more limited challenges dealing with disability have occasionally been successful,[70] these general constitutional assaults had met with absolutely no acceptance until the recent *Turner*[71] and *Reich*[72] decisions.[73]

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[68] *See* notes 53-57 and accompanying text *supra*.

[69] There are dozens of cases in which the issue of the general unconstitutionality of notice provisions has been raised. In McQUILLIN § 53.152, an extensive list of cases treating this question is catalogued. More recent cases include Gregory v. City of New York, 346 F. Supp. 140 (S.D.N.Y. 1972); Repaskey v. Chicago Transit Authority, 9 Ill. App. 3d 897, 293 N.E.2d 440 (1973); Harris County v. Dowlearn, 489 S.W.2d 140 (Tex. Civ. App. 1972). One court formulated the argument this way: the notice of claim provision is

> unfair in that it creates two separate and distinct classes of plaintiffs . . . . This is not justice. In the United States there should not be any second-class plaintiffs just as there should not be any second-class citizens . . . . This is a denial of due process and equal protection . . . .

Zipser v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494, 495 (White Plains City Ct. 1972), *rev'd*, 75 Misc. 2d 489, 348 N.Y.S.2d 18 (Sup. Ct. 1972).

As a practical matter, the argument that the victim of a governmental tort is denied due process and equal protection is more important than such an argument by a private tort-feasor since most constitutional claims arise where the victim of a governmental tort has failed to meet the technical requirements of a notice provision. *See, e.g.*, Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437 (1972); Brown v. Board of Trustees, 303 N.Y.2d 484, 104 N.E.2d 866 (1952).

It should be noted that in a number of cases notice provisions have been attacked on state constitutional grounds. For instance, in Parrish v. Mayor and Aldermen of Savannah, 185 Ga. 828, 196 S.E. 721 (1938), a Georgia state notice of claim statute was challenged as special legislation prohibited by the Georgia constitution. *See* Lorton v. Brown County Community Unit School Dist., 35 Ill. 2d 362, 220 N.E.2d 161 (1966); Peoples v. City of Valparaiso, 178 Ind. 673, 100 N.E. 70 (1912).

[70] *See, e.g.*, McDonald v. Spring Valley, 285 Ill. 52, 120 N.E. 476 (1918); Grubaugh v. City of St. Johns, 384 Mich. 165, 180 N.W.2d 778 (1970); Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974).

[71] Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied*, 414 U.S. 1079 (1974). *See* notes 88-91 and accompanying text *infra*.

[72] Reich v. State Highway Dep't, 386 Mich. 617, 194 N.W.2d 700 (1972). *See* notes 80-87 and accompanying text *infra*.

[73] *See* McQUILLIN § 53.152.

In 1972 a New York trial court found § 50-e of the New York General Municipal Law (*see* notes 42-45 and accompanying text *supra*) unconstitutional as violative of equal protection and due process. Zipser v. Pound, 69 Misc. 2d 152, 329 N.Y.S.2d 494 (White Plains City Ct. 1972). The case was reversed with little comment. Zipser v. Pound, 75 Misc. 2d 489, 348 N.Y.S.2d 18 (Sup. Ct. 1972).

1. *Traditional Reluctance to Invalidate Notice Provisions*

The question arises as to why courts have been so reluctant to completely invalidate notice provisions on equal protection and due process grounds. Although the reasons given are plentiful and diverse, they can, in general, be separated into two types of underlying rationales. Except for those decisions relying upon *stare decisis,*[74] the vast majority of these opinions are based upon either sovereign immunity[75] or the finding of a rational basis for the legislative classification.[76]

The sovereign immunity argument is based on the premise that since the state (or other governmental entity) has been properly and constitutionally endowed with complete sovereign immunity, the state legislature's decisions to allow the sovereign to be sued in tort may be accompanied by any terms and qualifying provisos which the legislature wishes to impose. One of those terms includes early notice of all claims against the state or any of its subordinate governmental entities.[77]

Other courts have refrained from emphasizing the sovereign immunity aspects of this issue and instead have taken the position that the fourteenth amendment has not been violated so long as a rational basis exists for the state's decision to prefer one class of victims or tort-feasors over another. In so doing the courts have amassed a plethora of reasons to support the finding of a rational basis. Not surprisingly, most of these reasons parallel those usually given as justifying the need for notice of claim provisions in general: the special need for prompt investigation, the need to achieve an early resolution of claims, the necessity of quickly repairing injury-causing defects, and the importance of accounting for potential liabilities in the tax and budget planning process.[78] A

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[74] *See, e.g.,* Housewright v. City of LaHarpe, 51 Ill. 2d 357, 282 N.E.2d 437 (1972).

[75] *See* Brown v. Board of Trustees, 303 N.Y. 484, 104 N.E.2d 866 (1952); Brantley v. Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973), *cert. denied,* 415 U.S. 983 (1974) (distinguishing *Reich* for reasons premised on sovereign immunity; *see* note 87 *infra*); Gallegos v. Midvale City, 27 Utah 2d 27, 492 P.2d 1335 (1972).

[76] *See* Bituminous Cas. Corp. v. Evansville, 191 F.2d 572 (7th Cir. 1951); Crumbley v. Jacksonville, 102 Fla. 408, 135 So. 885, *aff'd on rehearing,* 102 Fla. 408, 138 So. 486 (1931); King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970).

[77] As discussed previously (notes 20-22 *supra*) municipal corporations originally possessed no sovereign immunity. Therefore, cases upholding the constitutionality of notice provisions of municipal corporations have found either a rational basis for classification, or that the state has extended its own sovereign immunity to the municipal corporation by statute. For this latter reasoning see McCann v. Lake Wales, 144 So. 2d 505 (Fla. 1962).

[78] *See* notes 32-36 and accompanying text *supra.* Bituminous Cas. Corp. v. Evansville,

few courts have formulated other relatively unimportant reasons for finding the distinction between classes of litigants rational.[79]

2. *Recent Developments:* Reich *and* Turner

Set against this background, the 1972 decision in *Reich v. State Highway Department*[80] was revolutionary. *Reich* was a consolidation of three cases in which each of the plaintiffs challenged the sixty-day notice provision of Michigan's State Tort Claims Act[81] on equal protection grounds.[82] The court, in a brief opinion, found the notice provision unconstitutional.

In its discussion of equal protection, the majority opinion reasoned that the obvious purpose of the Act was to waive state immunity;[83] therefore, it was inconsistent with the purpose of this statute to put governmental tort-feasors on anything but an equal footing with nongovernmental tort-feasors. The court actually found two arbitrary and unreasonable classifications: the distinction between governmental and private tort-feasors, and the distinction between their victims. There was one dissent in *Reich,* which, in essense, relied upon the sovereign immunity rationale[84] as the basis for its opposition to the court's decision.

Reich's significance lies in the court's complete reliance upon a perceived legislative waiver of sovereign immunity as the basis for its finding that equal protection had been denied. The court stated that "[c]ontrary to the legislature's intention to place victims of negligent conduct on equal footing, the notice requirement . . . bars the actions of the victims of governmental negligence after

191 F.2d 572 (7th Cir. 1951), and King v. Johnson, 47 Ill. 2d 247, 265 N.E.2d 874 (1970), are good examples of court reliance on these traditional kinds of justifications in establishing a rational basis for classification.

[79] For instance, in Wilson & Co. v. Jacksonville, 170 F.2d 876 (5th Cir. 1948), the court asserted simply that municipalities are entirely different from private parties, noting, for example, that private parties are subject to property taxes, whereas municipalities generally are exempt. *See* Gregory v. City of New York, 346 F. Supp. 140 (S.D.N.Y. 1972).

[80] 386 Mich. 617, 194 N.W.2d 700 (1972).

[81] This notice provision, although no longer wholly valid, is found in MICH. STAT. ANN. § 3.996(104) (Supp. 1974).

[82] Two theories of unconstitutionality were actually asserted. The first was the due process claim that minority is a constitutionally protected justification for noncompliance. The Michigan high court agreed, relying on its own precedent in Grubaugh v. City of St. Johns, 384 Mich. 16, 180 N.W.2d 778 (1970) (*see* note 55 and accompanying text *supra*), and then proceeded to treat the more general and sweeping assertions of unconstitutionality on equal protection grounds.

[83] 386 Mich. at 622, 194 N.W.2d at 702.

[84] 386 Mich. at 625, 194 N.W.2d at 703. *See* notes 75, 77 and accompanying text *supra.*

only 60 days. The victims of private negligence are granted three years . . . ."[85] The *Reich* court did not give any consideration to the numerous factors traditionally relied upon by courts in justification of notice provisions.[86] As a result of this failure, the decision can be viewed as strictly limited: it relates only to the purposes and intent of the Michigan legislature. *Reich,* therefore, does not provide an equal protection argument that is broadly applicable to notice provisions in other jurisdictions without any reference to the legislative intent underlying the waiver of immunity.[87]

In addition to its limited scope, the *Reich* rationale has serious analytical flaws. These flaws are shared and perhaps more clearly illuminated by the 1973 decision in *Turner v. Staggs.*[88] Indeed, the facts and the law in *Turner* are substantially identical to those in *Reich.* Here infant children brought suit against Clark County, Nevada for the wrongful death of their mother. The mother had died from a kidney disorder allegedly resulting from medical malpractice at a county hospital. They failed to comply with the state statute requiring notice of claim within six months to all counties against which suit is brought.[89] The Nevada Supreme Court noted that "minority alone will excuse compliance," but went on to conclude that "the notice of claim requirements . . . deny equal protection guaranteed by the United States Constitution."[90] The court based its decision upon the *Reich* rationale that since the legislature had waived the immunity of governmental units,[91] it

[85] 386 Mich. at 623, 194 N.W.2d at 702.

[86] *See* notes 76, 78-79 and accompanying text *supra.*

[87] In Brantley v. Dallas, 498 S.W.2d 452 (Tex. Civ. App. 1973), *cert. denied,* 415 U.S. 983 (1974), a Texas court distinguished *Reich* for this very reason. The court held that the Texas legislature had *intended* to permit such provisions by granting cities, through "home rule" legislation, the authority to enact their own notice provisions. *Reich* was again distinguished for this reason by the Supreme Court of Washngton in Cook v. State, 83 Wash. 2d 599, 521 P.2d 725 (1974).

Reich has been extended, by subsequent decisions, to local governmental units in Michigan. *See* Crook v. Patterson, 42 Mich. App. 241, 201 N.W.2d 676 (1972) (applying *Reich* to county notice provision), and Friedman v. Farmington Township School Dist., 40 Mich. App. 197, 198 N.W.2d 785 (1972) (applying *Reich* to school district notice provision).

[88] 89 Nev. 230, 510 P.2d 879 (1973), *cert. denied,* 414 U.S. 1079 (1974).

[89] The superseded county government provision requiring notice was codified at NEV. REV. STAT. §§ 244.245, .250. The current provision, NEV. REV. STAT. § 244.245 (1973), no longer places a time limitation on notice.

[90] 89 Nev. at 234, 510 P.2d at 882. The court could have decided this case solely on the narrower constitutional grounds involved in the minority issue, directly overruling Barney v. County of Clark, 80 Nev. 104, 389 P.2d 392 (1964). The court clearly went out of its way to decide the more general constitutional question. 89 Nev. at 234 n.6, 510 P.2d at 882 n.6.

[91] *See* NEV. REV. STAT. § 41.031 (1973).

manifested an intent to put all tort-feasors on an equal footing. Since the notice provision operated contrary to that intent, it denied equal protection by setting up different classes of tort-feasors and tort victims.

Reich and *Turner* are open to criticism on two principal grounds. First, the logic behind the "legislative intent" theory is not sound. Quite clearly the Michigan and Nevada legislatures manifested a contrary intent by enacting the notice provisions in the first place. A second and even more fundamental flaw was partially uncovered by the dissent in *Turner*.[92] The right to equal protection under the laws is a fundamental constitutional, principle.[93] And this right to equal protection cannot be either created or destroyed by state legislation. Yet following the *Reich-Turner* reasoning, the Nevada and Michigan legislatures *created* the right to equality among governmental and private tort-feasors and their victims by abrogating sovereign immunity and *intending* to put these parties on equal footing. Legislative intent, however, has nothing to do with the question since equal protection is patently a matter of constitutional dimension. This constitutional factor turns upon the question of what legitimate state interest the classification promotes,[94] not upon whether or not the legislature intended to create the classification.

For these reasons *Reich* and *Turner* would perhaps have been better decided if the Michigan and Nevada courts had met the equal protection issue head-on. Their focus should have been on whether their legislatures had a rational basis for establishing this dual classification and allowing the discrimination which inevitably results.[95]

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[92] 89 Nev. at 239, 510 P.2d at 885.

[93] *See* notes 105-25 and accompanying text *infra*

[94] It is recognized that this issue borders on the stormy area of the constitutionality of sovereign immunity. *See* notes 23-26 and accompanying text *supra*. *Cf.* Note, *Equal Protection and State Immunity from Tort Liability*, 1973 WASH. U.L.Q. 716. It has been argued that the constitutional question ought to be resolved at the sovereign immunity level, and that if sovereign immunity is constitutionally permissible then it is permissible for a state to selectively lower its bar of immunity through devices such as notice provisions. This is the implicit argument of the dissent in *Reich*. 386 Mich. at 625, 194 N.W.2d at 703. However, such an argument overlooks the fundamental problem that notice provisions discriminate between two sets of parties: (*1*) between private and governmental tort-feasors, and (*2*) between parties injured by the government and those injured by private tort-feasors. From this viewpoint, it is perfectly valid to inquire whether such classifications of tort-feasors and tort victims violate equal protection, wholly independent of the sovereign immunity question. *See* notes 133-61 and accompanying text *infra*.

[95] Weber v. Aetna Cas. and Sur. Co., 406 U.S. 164, 173 (1972). *See* notes 105-25 and accompanying text *infra*.

B. *A Constitutional Framework for Evaluating Notice of Claim Provisions: The Preference for Equal Protection*

Although many cases have challenged the constitutionality of notice provisions on both due process and equal protection grounds,[96] *Reich* and *Turner* were decided solely on the basis of equal protection. Neither the Michigan nor the Nevada court articulated any reasons for this; nevertheless their choice of equal protection appears sound. Due process is an inappropriate vehicle of analysis for a number of reasons.

1. *The Due Process Argument*

The due process clause of the fourteenth amendment offers protection against any deprivations of life, liberty, and property committed by the state or one of its agencies.[97] Accordingly, an absolute prerequisite to the triggering of a due process argument is a finding of such a deprivation.[98] Although the Supreme Court has given the phrase "life, liberty and property" a broad meaning,[99] it is unlikely that any of the rights infringed by notice of claim provisions would fit within this formulation. First, the Court has recently retreated from a position which suggested that access to the courts might be considered a due process right to a stance which looks to the interest involved in the litigation, rather than to the right of access itself.[100] Second, the right of access in the

[96] *See* notes 69-73 and accompanying text *supra.*

[97] U.S. CONST. amend. XIV, § 1.

[98] As stated in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-70 (1972), "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protecuion of liberty and property. . . . [T]he range of interests protected by procedural due process is not infinite."

[99] For example, it was frankly admitted in Goldberg v. Kelly, 397 U.S. 254, 263 (1970), that whether or not due process is violated "is influenced by the extent to which [the aggrieved party] may be 'condemned to suffer grievous loss . . . .'"

[100] In Boddie v. Connecticut, 401 U.S. 371 (1971), the Court found that due process required that indigents' court costs and filing fees be waived in divorce litigation. It was hoped by some that this holding signalled the development of a basic right of access to the courts. *See, e.g.,* Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part I,* 1973 DUKE L.J. 1153, 1162. But two decisions subsequent to *Boddie* —Ortwein v. Schwab, 410 U.S. 656 (1973), and United States v. Kras, 409 U.S. 434 (1973)—have focused on the interests involved, rather than on the right to access. The Court in *Kras* relied on the language of Justice Harlan in *Boddie:* "We do not decide that access for all individuals to the courts is a right . . . gnaranteed by the Due Process Clause . . . ." (401 U.S. at 382), and found discharge in bankruptcy to be a lesser interest than marriage and divorce. 409 U.S. at 442. In like fashion the Court in *Ortwein* relied on *Kras,* finding the right to appellate review of welfare agency determinations of "less constitutional significance than the interest of the *Boddie* appellants." 410 U.S. at 659. Therefore, the inability of indigents to litigate these interests was not violative of due process.

present context is closely related to the sovereign immunity issue, and the Court has refused to tangle with this matter on any constitutional grounds.[101]

Due process, particularly substantive due process, is also the less appropriate mode of analysis because of its lack of clarity. It has been criticized as being too subjective in nature, and therefore too pliant a device in the hands of the judiciary.[102] The procedural-substantive dichotomy itself is clouded with uncertainty; indeed, substantive due process analysis is presently in a state of disrepute.[103] Equal protection, however, is substantive by nature,[104] and it has given rise to a well developed body of law which speaks directly to the disparate treatment afforded litigants under notice of claim requirements.

2. *The Present Equal Protection Formula*

In contrast to the methodology under the due process clause, equal protection analysis focuses predominantly on the permissibility of a legislative classification rather than on whether a recognized property interest has been denied.[105] The concept of equal protection presupposes that in order to function efficiently, states and their governmental subdivisions must classify and treat their citizens differently in various circumstances.[106] For this ob-

[101] *See* Hans v. Louisiana, 134 U.S. 1 (1890); Palmer v. Ohio, 248 U.S. 32 (1918). In later cases, the Court has accepted immunity with almost blind tenacity. *See, e.g.*, Honda v. Clark, 386 U.S. 484, 500-01 (1967); United States v. Shaw, 309 U.S. 495, 501-05 (1940).

[102] *See* Boddie v. Connecticut, 401 U.S. 371, 385 (1971) (Douglas, J., concurring); Note, *Boddie v. Connecticut and the Constitutional Rights of Indigents*, 45 TEMP. L.Q. 390, 397 (1972). *See also* Shaughnessy v. Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).

[103] *See* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048, 1057-60 (1968). Substantive due process is strongly criticized as taking policy-making out of the hands of the legislature. *See* Boddie v. Connecticut, 401 U.S. 371, 384-85 (1971) (Douglas, J., concurring); Oregon v. Mitchell, 400 U.S. 112, 247-48 (1970) (Brennan, White, & Marshall, JJ., dissenting); Ferguson v. Skrupa, 372 U.S. 726, 728-31 (1963).

[104] Procedural due process has been described as dealing with the "how" of governmental action, while substantive due process deals with the "what." A. BICKEL, THE LEAST DANGEROUS BRANCH 233 (1962). Equal protection deals more with the "what" than with the "how" of legislative action. Equal protection generally addresses itself more to the fairness or unfairness of the resulting classification than to the means by which the legislative purpose is accomplished. *See* notes 105-15 and accompanying text *infra*.

[105] For example, in Ortwein v. Schwab, 410 U.S. 656 (1973), it was asserted, albeit unsuccessfully, that even if the right of appellate review of welfare agency determinations was not protected by due process, the $25 filing fee was violative of equal protection because it unconstitutionally classified and discriminated against the poor. *Id.* at 660-61. *See* Griffin v. Illinois, 351 U.S. 12 (1956), and Lindsey v. Normet, 405 U.S. 56 (1972), where the Court did not find a denial of due process, but did find invidious classifications violative of equal protection.

[106] *See* Welch v. Henry, 305 U.S. 134, 146 (1938). In *Welch* the Court recognized the

vious reason not every legislative discrimination amounts to a denial of equal protection. The test for permissibility is a topic which has received extensive judicial treatment over the years.[107] In recent years, the Supreme Court has ostensibly employed a controversial[108] two-tiered test to review equal protection challenges.[109] In most situations the Court looks to the traditional question of whether the classification bears a "rational relationship" to the purpose of the legislation.[110] But the Court has also articulated a second, co-existing formula: if the classification encompasses "suspect criteria,"[111] or if it affects a "fundamental right,"[112] then only if there exists a "compelling state interest" for erecting the classification will it withstand equal protection attack.[113] The compelling state interest test, and with it the "close judicial scrutiny" given to the classification under attack,[114] is clearly a more difficult standard for the states to meet.[115]

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necessity for allowing the states to make discriminatory distinctions and stated that the equal protection clause is applicable only where the state discrimination has been "hostile or oppressive." *See also* Norvell v. Illinois, 373 U.S. 420, 424 (1963).

[107] It has been the subject of debate ever since the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), where the Supreme Court limited the operation of equal protection to unfair treatment of blacks. Today, of course, the clause pertains to any legislative action. *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

[108] *See generally* Gunther, *The Supreme Court 1971 Term,* 86 HARV. L. REV. 1, 17-18 (1972). Justice Marshall has probably been the most outspoken member of the Court in this regard. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 70 (1973) (Marshall, J., dissenting); Jefferson v. Hackney, 406 U.S. 535, 558 (1972) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marsball, J., dissenting).

[109] Many believe that the rigid two-tiered test is in the process of being abandoned, and that the Court today is merely giving it lip-service. *See* Gunther, *supra* note 108, at 20-21; notes 116-25, 131-32 and accompanying text *infra.*

[110] *See, e.g.,* Lindsey v. Normet, 405 U.S. 56, 71 (1972); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509 (1937); Note, *Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1087 (1969); Note, *The Equal Protection Clause and Exclusionary Zoning after Valtierra and Dandridge,* 81 YALE L.J. 61 (1971).

[111] *See, e.g.,* Brown v. Board of Educ., 347 U.S. 483 (1953) (race); notes 120-22 and accompanying text *infra. See also* Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection,* 1967 SUP. CT. REV. 39.

[112] *See* Bullock v. Carter, 405 U.S. 134 (1972) (voting); notes 117-19 and accompanying text *infra.*

[113] This test was well articulated in Shapiro v. Thompson, 394 U.S. 618 (1969), a decision premised in part on the fundamental right of interstate travel. According to the Court, "in moving from State to State . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Id.* at 634 (emphasis in original). *See also* Loving v. Virginia, 388 U.S. 1, 9 (1967); Korematsu v. United States, 323 U.S. 214, 216 (1944).

[114] *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); note 119 *infra.*

[115] In a 1972 case involving an equal protection attack upon Tennessee voting laws

The Burger Court has shown a decided disinclination to subject state legislation to the close scrutiny of the compelling state interest test.[116] At most, only three interests have been clearly deemed fundamental within the purview of this stricter formula: interstate travel,[117] criminal appeals,[118] and perhaps voting.[119] Furthermore, the suspect statutory classifications given close judicial scrutiny continue to be limited to the traditional ones of race,[120] national origin,[121] and alienage.[122] Recent decisions have declined to apply the compelling interest test to classifications involving wealth,[123] sex,[124] and illegitimacy.[125]

It would seem, therefore, that under the present formulation, taking into account current judicial attitudes, the classifications created by notice provisions would not be subjected to strict scrutiny. The Supreme Court has defined a suspect class as "a 'discrete and insular' minority for whom . . . heightened judicial solicitude is appropriate."[126] Neither private tort-feasors nor victims of governmental tort-feasors are likely to be viewed as a

prescribing periods of residency as a prerequisite to eligibility, Chief Justice Burger complained that "[t]o challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard." Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting).

[116] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Schlib v. Kuebel, 404 U.S. 357 (1971). *See* note 109 and accompanying text *supra.*

[117] Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

[118] Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956).

[119] Although the Court in Kramer v. Union Free School Dist., 395 U.S. 621 (1969), applied the strict scrutiny test to a voter qualifications statute, the Court in Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973), distinguished *Kramer* and declined to apply strict scrutiny to a statute which regulated the right to vote. For a discussion of this issue, see 59 CORNELL L. REV. 687 (1974).

[120] McLaughlin v. Florida, 379 U.S. 184 (1964); Bolling v. Sharpe, 347 U.S. 497 (1954).

[121] Korematsu v. United States, 323 U.S. 214 (1944).

[122] *In re* Griffiths, 413 U.S. 717 (1973); Graham v. Richardson, 403 U.S. 365 (1971).

[123] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[124] Reed v. Reed, 404 U.S. 71 (1971). But even though the Court here refused to find sex a suspect class it nevertheless invalidated as arbitrary and unreasonable an Idaho statute which granted preferences to males over females in probate administration. *See* notes 131-32 and accompanying text *infra.*

[125] Levy v. Louisiana, 391 U.S. 68 (1968). Here the Court did not find illegitimacy to be a suspect class but did invalidate a statutory classification scheme based on illegitimacy on the grounds that it was arbitrary and unreasonable. *See* notes 131-32 and accompanying text *infra.*

[126] Graham v. Richardson, 403 U.S. 365, 372 (1971) (citations omitted). *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) ("the traditional indicia of suspectness: the class is . . . saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection.").

"discrete and insular" class. Nor do they have a long history of discrimination based upon race, national origin, or alienage which would qualify them for this status.

Focusing on the other half of the strict scrutiny formulation, there is perhaps a better argument that the right to seek redress in tort is itself deserving of a status as "fundamental."[127] The Supreme Court has defined a fundamental right as one which "touches a sensitive and important area of human rights."[128] Although the Court has hinted that access to the courts is of a fundamental nature,[129] it has yet to hold so explicitly.[130] In light of the apparent reluctance of the Court to expand the strict scrutiny test beyond the limited range of currently recognized fundamental interests, it would seem highly unlikely that access to the courts, particularly in the notice of claim context, will be recognized as a fundamental right for equal protection purposes at this time.

Despite its reluctance to apply strict scrutiny, the Court has displayed a marked willingness to review state legislation in light of the more permissive rational relationship test.[131] Moreover, where, as here, the interest might be said to border on suspect status, the Court has been inclined to find an arbitrary and unreasonable distinction.[132] Thus, the rational relationship test would appear to be the most appropriate mode of constitutional analysis here.

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[127] *See, e.g.*, Krause v. State, 31 Ohio St. 2d 132, 149, 285 N.E.2d 736, 746 (1972), where the dissent argued that, in the context of sovereign immunity, the right of access to the courts is a fundamental right.

[128] Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536 (1942).

[129] In an early case, the Court indicated that access to the courts is central to the notion of equal protection. Barbier v. Connolly, 113 U.S. 27, 31 (1885). And in Chambers v. Baltimore & O.R.R., 207 U.S. 142 (1907), the Court gave another indication that it considered this right to be fundamental. *Id.* at 148 (dictum). In Boddie v. Connecticut, 401 U.S. 371 (1971), both Justices Douglas and Brennan in concurring opinions favored an equal protection approach to this access problem. *Id.* at 383, 386. *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[130] In the context of due process the Court has expressly declined to find access a fundamental right. *See* note 100 and accompanying text *supra*.

[131] *See* United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973); Roe v. Wade, 410 U.S. 113 (1973); James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Gunther, *supra* note 108, at 18-20. Gunther writes:

> After the years in which the strict scrutiny-invalidation and minimal scrutiny-nonintervention correlations were virtually perfect, the pattern has suddenly become unsettled. After an era during which the "mere rationality" requirement symbolized virtual judicial abdication, the Court . . . has suddenly found repeated occasions to intervene on the basis of the deferential standard.

Id. at 19.

[132] *See* Reed v. Reed, 404 U.S. 71 (1971) (sex classification); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Note, *A Question of Balance: Statutory Classifications under the Equal Protection Clause*, 26 STAN. L. REV. 155, 158 (1973).

C. *The Rationality of Notice Provisions*

Of the two broad avenues which the courts have taken in repelling constitutional attacks on notice of claim statutes—the rational relationship approach[133] and the sovereign immunity approach[134]—only the former is assessable in terms of equal protection. The latter, by its very nature, is violative of equal protection since it makes the illogical assumption that notice provisions are constitutional because a state may validly choose either to maintain or to waive its sovereign immunity protection, and that in the process any conditions, however, arbitrary, may be imposed. In reality, sovereign immunity has nothing to do with the ultimate classifications which notice provisions establish. Standing alone, therefore, this principle cannot be said to clothe the resulting distinctions with a semblance of rationality.[135] Rather, once sovereign immunity has been waived, any legislative classifications made pursuant thereto will be constitutional only if they conform to the rational relationship test. Thus, the appropriate question for consideration is: do the classifications erected through notice of claim provisions have some rational relationship to the state's legislative purposes, or do they rest "on grounds wholly irrelevant to the achievement of the State's objective"?[136]

It has been noted that the plentiful reasons espoused by courts and others in support of notice provisions have generally been classified into one or more of four categories[137] which implicitly rest upon two underlying notions of public welfare: protection of governments from unnecessary expenditure,[138] and protection of citizens from physical harm.[139] In light of these objectives, notice

[133] *See* notes 76, 78-79 and accompanying text *supra.*

[134] *See* notes 75, 77 and accompanying text *supra.*

[135] *See* note 94 *supra.*

[136] McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[137] *See* notes 78-79 and accompanying text *supra.*

[138] *See* Crumbley v. City of Jacksonville, 102 Fla. 408, 412, 138 So. 486, 489 (1931). Most cases treating this issue fail to express the rationale underlying notice provisions. It is tacitly understood that protection of public funds is behind the need for such things as quick and timely investigation or settlement. *See also* King v. Johnson, 47 Ill. 2d 247, 251, 265 N.E.2d 874, 876 (1970) (distinguishing between local public entities and private parties based upon monetary necessity of former for early notice); Wilson & Co. v. Jacksonville, 170 F.2d 877, 878-79 (5th Cir. 1948); notes 32-34, 36 and accompanying text *supra.*

[139] The courts have rarely done more than identify the need for legislative classification without exploring the underlying purpose. *See* Gallegos v. Midvale City, 27 Utah 2d 27, 30, 492 P.2d 1335, 1337 (1972) ("[d]eprivation of the city of an opportunity to make a prompt investigation . . . and if any defect is found to exist to remedy it . . . are sufficiently obvious not to require further elaboration.") *See also* notes 32-36 and accompanying text *supra.*

of claim provisions are vulnerable to a finding of irrationality since they typically fall far short of meeting their stated goals.[140]

In searching for irrationality, it must be remembered that the black-letter law mandates that "legislative solutions must be respected if the 'distinctions drawn have some basis in practical experience.' "[141] In practice, however, judicial outcomes clearly are tempered by existing interests and circumstances.[142] For example, the Supreme Court has recognized that interests guaranteed by the Bill of Rights are more important than those in the social and economic field,[143] and under the rational basis test a legislative scheme will be subjected to closer scrutiny when the former interest is involved.[144] Postulating that access to the courts is a relatively important interest,[145] it may be that the legislative purposes behind notice provisions should be examined under relatively close scrutiny. Under such scrutiny weak and tenuous legislative reasons would not be acceptable.

Obviously, there are significant general differences with respect to tort liability between local governmental units and private parties which call for state regulation and classification.[146] In striving for a valid objective, however, a legislature cannot "use a

[140] It is asserted that the notice provision scheme is an irrational one because not only is the scheme an inefficient one in terms of the two public welfare goals asserted above (*see* notes 138-39 and accompanying text *supra*), but also because it attempts to achieve these goals at too great a price to private tort-feasors and victims of governmental tort-feasors. Admittedly this argument is premised on the notion that the courts can and should factor the interests involved into the rational basis test. In some cases notice provisions can only be found wholly irrational if the effectiveness of the notice scheme is examined *in conjunction* with the detriment to the interests involved.

[141] McGinnis v. Royster, 410 U.S. 263, 276 (1973), *quoting* South Carolina v. Katzenbach, 383 U.S. 301, 331 (1966).

[142] The present two-tiered formula *requires* that the Court look at existing interests and circumstances:

> 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.

Dunn v. Blumstein, 405 U.S. 330, 335 (1972) (emphasis added). *See* Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[143] *See* Dandridge v. Williams, 397 U.S. 471, 483-87 (1970); Levy v. Louisiana, 391 U.S. 68, 71 (1968).

[144] The majority in Levy v. Louisiana, 391 U.S. 68, 71 (1968), stated: "In applying the Equal Protection Clause to social and economic legislation, we give great latitude to the legislature in making classifications. . . . However that might be, we have been extremely sensitive when it comes to basic civil rigbts." *See* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

[145] *See* notes 127-30 and accompanying text *supra*.

[146] *See* Henke, *supra* note 28, at 100-01.

cannon to kill a butterfly."[147] Where there is a less drastic means of achieving the same result an otherwise valid piece of legislation may be struck down. The Supreme Court has applied this principle in a variety of contexts,[148] including equal protection.[149] In light of this principle and the ready availability of less drastic means to protect the governmental interests at stake,[150] it is clear that the manifest injustices created by notice provisions[151] far outweigh the benefits to be gained by these requirements.

Notice provisions contain an element of "overkill" for two reasons. First, they only afford a governmental unit with notice in those cases where an injured person intends to sue. If the purpose of these provisions is truly to protect public funds *and safety* why not deal with this goal directly and require notice in all cases where a governmental body may have been responsible for an injury, regardless of whether the injured party intends to sue? Second, notice provisions are broad and indirect since they commonly negate a right rather than impose a duty. Example can be taken from the typical requirement in most states that motorists involved in automobile accidents file an accident report with the proper authority.[152] Generally, the driver of an automobile which is in-

[147] *In re* Tyson, Inc. v. Tyler, 24 N.Y.2d 671, 674, 249 N.E.2d 453, 454, 301 N.Y.S.2d 602, 604 (1969).

[148] In Shelton v. Tucker, 364 U.S. 479, 488 (1960), the Court asserted that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *See* Aptheker v. Secretary of State, 378 U.S. 500 (1964); Martin v. City of Struthers, 319 U.S. 141, 147 (1943).

[149] For example, in Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972), the Court found a Chicago ordinance which prohibited all picketing—except peaceful picketing of a school involved in a labor dispute—within a certain distance of school buildings to be violative of equal protection. The Court considered the ordinance to be too broad, stating that "[s]uch excesses 'can be controlled by *narrowly* drawn statutes' . . . focusing on the abuses and dealing even-handedly." *Id.* at 102, *quoting* Saia v. New York, 334 U.S. 558, 562 (1948) (emphasis added). Although the Court was applying the strict scrutiny test, Justice Marshall's majority opinion makes it very clear that the holding is applicable to the gamut of equal protection cases: "As in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." 408 U.S. at 95; *see* Gunther, *supra* note 108, at 17-18. *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972).

[150] *See* notes 152-60 and accompanying text *infra*.

[151] *See* notes 6-7, 37-40 and accompanying text *supra*.

[152] *See, e.g.*, CAL. VEHICLE CODE § 20008 (West 1971) (driver must report accident within 24 hours in case of injury or death); ILL. ANN. STAT. ch. 95 ½, § 11-406(a) (Smith-Hurd Cum. Supp. 1974) (driver must report accident within 10 days in case of injury or property damage in excess of $100; failure to do so results in suspension of license); N.Y. VEH. & TRAF. LAW §§ 605(a)-(c) (McKinney 1970) (driver must report accident within 10 days in case of injury, death, or property damage exceeding $200; failure to do so is misdemeanor and can result in suspension or revocation of driver's license); OHIO REV.

volved in an accident where there are injuries or property damage in excess of a certain sum must report the accident within a specified period of time.[153] Failure to do so will usually result in suspension of the driver's license.[154] The state's objective of being quickly apprised of motor vehicle accidents is far better achieved through this scheme than by one which deprives the noncomplying driver of a potential cause of action. By analogy, a simple provision requiring notice to be filed in all cases of substantial injury or property damage, with a direct and proportional penalty for failure to comply, would more efficiently effect notice to public entities.

The prevalence of liability insurance covering claims against governmental units[155] further militates against finding notice provisions to be rationally related to legitimate objectives. The concern of courts and legislatures to protect the public pocketbook from tort claims[156] is not well-founded in light of the kind of insurance coverage these governmental entities generally have or could easily obtain. In some respects, such insurance does have drawbacks[157]

CODE ANN. §§ 4509.06-.09 (Anderson 1973) (driver must report any accident within 30 days or face possible suspension of license).

[153] *See* note 152 *supra*.

[154] *Id.*

[155] Most states now have statutes or constitutional provisions allowing their governmental entities to purchase liability insurance covering various aspects of their activities. *See, e.g.*, FLA. STAT. ANN. § 240.191 (Supp. 1974) (State Board of Regents may provide general liability insurance for its employees and all educational institutions under its control); GA. CODE ANN. § 2-5902 (1973) (constitutional provision authorizing counties to purchase liability insurance for motor vehicles under their control); IOWA CODE ANN. § 368A.1(12) (Supp. 1974) (municipalities granted power to purchase liability insurance covering activities of employees using motor vehicles of municipality); PA. STAT. ANN. tit. 24, § 7-774(b) (Supp. 1974) (Boards of School Directors of all school districts may purchase insurance covering negligent acts of school district's employees); WIS. STAT. ANN. § 59.07(2) (1957) (counties given general power to obtain liability insurance). Furthermore, a survey in 1966 revealed that 86% of cities with a population greater than 10,000 carried general public liability insurance, and 96% of those cities carried motor vehicle public liability insurance. *Municipal Insurance Practices*, 3 MUNICIPAL YEAR BOOK 224 (1966).

Not only are various activities insured (*e.g.*, motor vehicle operation, acts of employees, and "general" activities), but there are also numerous methods of insuring. These methods include insurance through private carrier, state funding, and self insurance. For a discussion of this topic, see B. VAN DER SMISSEN, LEGAL LIABILITY OF CITIES AND SCHOOLS FOR INJURIES IN RECREATION AND PARKS 238-45 (1968).

[156] As discussed earlier, most courts are concerned more with the need of governmental entities to make prompt investigations and obtain early resolutions of claims, *i.e.*, protection of public funds, than the need to quickly remedy defects, *i.e.*, protection of the public safety. *See* notes 32-36 and accompanying text *supra*.

[157] It has been asserted that the existence of insurance increases the likelihood of suits and the amounts of jury verdicts. *See* B. VAN DER SMISSEN, *supra* note 155, at 238; Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government*, 1959 DUKE L.J. 588, 598. Further, it has been argued that it is a waste of public assets to have liability insurance for

and certainly does not constitute the perfect anodyne for tort liability in all cases.[158] Furthermore, its applicability is limited in many jurisdictions by its entanglement with notions of sovereign immunity.[159] Nevertheless, commentators agree that the availability of such insurance substantially lessens the tort liability concerns of state governmental bodies.[160] Certainly, to the extent that a governmental unit has adequate insurance coverage, notice provisions serve virtually no purpose with regard to the protection of public finances.

In summary, the equal protection argument asserted here is two-edged. First, notice provisions, to a great extent, do not rationally serve any legitimate state goals. The sovereign immunity rationale, utilized by many courts, is illogical, and by its very terms satisfies no valid governmental objective. The public safety is not adequately protected by notice provisions since they only effect notice when a claim is brought. And protection of public funds is not really served due to the ready availability, in most cases, of liability insurance to governmental bodies. Second, to whatever extent notice provisions do serve a legitimate state goal there is still a strong argument that these provisions are irrational because of the manner in which they achieve their objectives.[161] More narrow and direct methods, such as mandatory reporting of all accidents

certain exposures covered by other, privately acquired, insurance. *See* Van Alstyne, *Injury, Death and Taxes: The Decline of Governmental Immunity*, 39 STATE GOVERNMENT 28, 34 (1966).

[158] J. ANDRUS, *supra* note 1, at 85. For instance, a local governmental unit may be too small to bear the financial burden of fully insuring itself. *See* Borchard, *State and Municipal Liability in Tort—Proposed Statutory Form*, 20 A.B.A.J. 747, 751-52 (1934). Of course a simple solution to this particular problem might be state funding.

[159] The issue of whether a governmental entity, by purchasing insurance, *ipso facto* waives its immunity has been frequently debated. The cases are divided on this question. *Compare* Thomas v. Broadlands Community School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952), and Marshall v. City of Green Bay, 18 Wis. 2d 496, 118 N.W.2d 715 (1963), *with* Boucher v. Fuhlbruck, 26 Conn. Sup. 79, 213 A.2d 455 (1965), and McGrath Building Co. v. City of Bettendorf, 248 Iowa 1386, 85 N.W.2d 616 (1957). Some states have enacted statutes expressly waiving immunity to the extent of insurance. *See, e.g.*, N.D. CENT. CODE § 39-01-08 (1972); VT. STAT. ANN. § 29-1404 (1970). *But see* MICH. STAT. ANN. § 3.996(109) (1960) (existence of insurance coverage not waiver of any defense). Also, some cases have held that government entities cannot insure themselves because there is no liability against which to insure. *See, e.g.*, Ford v. Caldwell, 79 Idaho 499, 321 P.2d 589 (1958).

[160] *See* B. VAN DER SMISSEN, *supra* note 155, at 256-57; Henke, *supra* note 28, at 118-22; Weyrauch, *supra* note 19, at 17-18. A number of courts and jurists have taken an even stronger position than this, putting forward public liability insurance as the complete solution to this concern. *See* Thomas v. Broadlands Community School Dist., 348 Ill. App. 567, 109 N.E.2d 636 (1952); Spanel v. Mounds View School Dist., 264 Minn. 279, 291-92, 118 N.W.2d 795, 802-03 (1962); Williams v. Detroit, 364 Mich. 231, 258-59, 111 N.W.2d 1, 24 (1961) (dissenting opinion).

[161] *See* notes 141-51 and accompanying text *supra*.

and comprehensive insurance coverage, would achieve these stated aims without creating the invidious classifications that characterize notice provisions.

CONCLUSION

The notice of claim provision is a ubiquitous institution among state and local governments which inequitably, and arguably unconstitutionally, operates to shield those public entities from a large measure of tort liability to which they would otherwise be exposed. Due to its deep immersion in tradition and complicated entanglement with sovereign immunity, this important governmental advantage, utilized to the detriment of private citizens, has, until very recently, remained impervious to general constitutional assault. Although the courts have conceived ostensibly reasonable arguments in behalf of notice provisions, such arguments pale in light of the injustices created by them and the sound alternatives available.

It is suggested that a constitutional challenge, grounded upon equal protection, is convincingly meritorious. The high courts of Michigan and Nevada have lent support to this proposition.[162] It is hoped that as sovereign immunity and the underlying legal attitude toward governmental tort liability erode, this equal protection argument will find more substantial support in the courts and legislatures.

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[162] *See* notes 80-91 and accompanying text *supra*.