Florida Law Review

Volume 31 | Issue 3 Article 4

April 1979

Municipal Corporations: Extraterritorial Powers Without Voting Rights--Equal Protection Considerations

Christine A. Bay

CASE COMMENTS

MUNICIPAL CORPORATIONS: EXTRATERRITORIAL POWERS WITHOUT VOTING RIGHTS – EQUAL PROTECTION CONSIDERATIONS?*

Holt Civic Club v. City of Tuscaloosa, 99 S. Ct. 383 (1978)

Appellants, residents of an unincorporated Alabama community,[1] were subjected to the police, sanitary, and business-licensing ordinances of appellee, city of Tuscaloosa.[2] State "police jurisdiction" statutes granted municipalities limited extraterritorial authority over areas within three miles of corporate boundaries but did not require concurrent extension of municipal voting rights.[3] Contending their disenfranchisement violated the equal protection clause,[4] appellants sought an injunction in federal court against enforcement

---

*EDITOR'S NOTE: This case comment was awarded the *George W. Milam Award* as the outstanding case comment submitted by a Junior Candidate in the Winter 1979 quarter.

1. Appellants were an unincorporated civic association and seven individual residents of Holt, a small community on the outskirts of Tuscaloosa. Tuscaloosa contains 65,733 residents, while its contiguous police jurisdiction contains between 16,000 and 17,000 residents. Brief for Appellants at 4-5, Holt Civic Club v. City of Tuscaloosa, 99 S. Ct. 383 (1978).

2. The range of Tuscaloosa's police and sanitary ordinances applicable to its police jurisdiction is broad and includes all building, fire, gas, plumbing, and electrical codes; obscenity and nuisance ordinances; traffic regulations; criminal ordinances; lodging, beer, and cigarette taxes. Residents of this contiguous area are also subject to the criminal jurisdiction of the city's courts. Brief for Appellants, addendum A, *id.*, listing over sixty relevant sections of the Code of Tuscaloosa.

3. The thrust of appellants' complaint was directed at three statutes: ALA. CODE §§11-40-10, 12-14-1, and 11-51-91 (1975). Though suit was instituted in 1973 before the 1975 recompilation of the Code, §11-40-10 and §11-51-91 are in relevant part identical to their predecessors, ALA. CODE tit. 37, §§9 and 733 (1958), respectively. Section 12-14-1 replaced the recorder's courts provided for in ALA. CODE tit. 37, §585 (1958) with municipal courts maintaining similar extraterritorial jurisdiction, and conferred jurisdiction upon these municipal courts to enforce all city ordinances, civil or criminal, applicable to the police jurisdiction.

ALA. CODE §11-40-10 (1975) provides: "Police Jurisdiction; territorial – the police jurisdiction in cities having 6,000 or more inhabitants shall cover all adjoining territory within three miles of the corporate limits, and in cities having less than 6,000 inhabitants, and in towns, such police jurisdiction shall extend also to the adjoining territory within a mile and a half of the corporate limits of such city or town. Ordinances of a city or town enforcing police or sanitary regulations and prescribing fines and penalties for violations thereof, shall have force and effect in the limits of the city or town and in the police jurisdiction thereof, and on any property or rights of way belonging to the city or town."

ALA. CODE §11-51-91 (1975) in pertinent part provides: "Any city or town within the State of Alabama may fix and collect licenses for any business, trade or profession done within the police jurisdiction of such city or town but outside the corporate limits thereof; provided, however, that the amount of such licenses shall not be more than one-half the amount charged and collected as a license for like business, trade or profession done within the corporate limits of such city or town, fees and penalties excluded. . . ."

4. Appellants alleged that the statutes in question created a "pattern of disenfranchisement with regard to local matters in the police jurisdictions surrounding Alabama municipal-

of the city's extraterritorial ordinances.[5] The district court dismissed the claim as insubstantial,[6] but the Fifth Circuit Court of Appeals reversed and ordered the convening of a three-judge court to consider the statute's constitutionality.[7] On remand, the three-judge court again granted appellees' motion to dismiss, and held that the equal protection clause did not extend to such a claim.[8] On appeal, the United States Supreme Court affirmed and HELD, state statutes which grant municipalities limited extraterritorial powers without extending voting rights do not violate the equal protection clause,[9] because only actual residents have a fundamental right to vote and because states have a legitimate interest in regulating activities just beyond city borders.[10]

Regulation of territory adjacent to rapidly expanding urban areas is necessary to provide services to residents of unincorporated suburbs and to prevent conflicting land uses just beyond city borders.[11] State legislation delegating

---

ities" in violation of their constitutional rights. Holt Civic Club v. City of Tuscaloosa, 525 F.2d 653, 655 (5th Cir. 1975).

5. Appellants brought a state-wide class action pursuant to 28 U.S.C.A. §§2281-2284. Section 2281, before its repeal in 1976, provided for the convening of a three-judge federal court whenever a preliminary or permanent injunction was sought to restrain "the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute." 28 U.S.C.A. §§2281-2282 (*repealed by* Act of Aug. 12, 1976 Pub. L. No. 94-381, §§1, 2, 90 Stat. 1119).

6. 525 F.2d at 653 (referring to the lower court decision). In the United States District Court for the Northern District of Alabama, Judge Frank H. McFadden, presiding, appellants' application was rejected on the ground that the challenged statutes were enforced by locally-elected officials and lacked requisite statewide application. *Id.*

7. The Fifth Circuit Court of Appeals found the police jurisdiction statute embodied a "policy of statewide concern" and rejected the district court's ruling that appellant's claim was "wholly insubstantial" and "essentially frivolous." *Id.* at 656.

8. The three-judge district court ruled that extraterritorial regulation was not unconstitutional *per se* under the equal protection clause, and noted that appellants sought injunctive and declaratory relief rather than an extension of the franchise. The court also dismissed appellants' due process claim without comment. Holt Civic Club v. City of Tuscaloosa, No. 73-M-736 (N.D. Ala. June 7, 1977), *appeal docketed,* No. 77-515 (U.S. 1977).

9. Appellants also claimed that "government without franchise is a fundamental violation of the due process clause." However, the Court rejected this contention in a single paragraph, holding that appellants had been deprived of no right to vote since they were not bona fide city residents. 99 S. Ct. at 392-93. Since the Supreme Court has never invalidated any state statute authorizing extraterritorial powers on due process grounds, this comment focuses solely on appellants' equal protection claim. State courts have also consistently rejected due process challenges to such statutes. *See, e.g.,* Atlantic Oil Co. v. Town of Steele, 283 Ala. 56, 214 So. 2d 331 (1968) (upholding extraterritorial gasoline sales tax); White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932) (upholding extraterritorial liquor license fee); Board of Trustees v. Watson, 68 Ky. (5 Bush) 660 (1869) (upholding extraterritorial imposition of a license tax on a liquor retailer). *But see,* Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907) (striking down a statute authorizing vast extraterritorial powers within a 10 mile contiguous area). *See generally* Note, *The Constitutionality of the Exercise of Extraterritorial Powers by Municipalities,* 45 U. CHI. L. REV. 151, 158-60 (1977).

10. 99 S. Ct. 383 (1978).

11. Melli & Devoy, *Extraterritorial Planning and Urban Growth,* 1959 WIS. L. REV. 55, 56. *See generally* R. MADDOX, EXTRATERRITORIAL POWERS OF MUNICIPALITIES IN THE UNITED STATES (1955) (cited in the instant case, 99 S. Ct. at 391 (1978)); F. SENGSTOCK, EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA (1962).

extraterritorial authority varies widely, ranging from statutes granting broad police and zoning powers to those prohibiting only specific nuisances or health hazards.[12] Since courts have traditionally accorded states broad discretion in the exercise of their internal police powers,[13] such statutory grants of extraterritorial jurisdiction have long been upheld[14] on the theory that cities are merely agents of the state in local governmental matters.[15]

Recent Supreme Court equal protection decisions, however, have cast doubt on the constitutionality of these statutes.[16] While cities are given power to govern land beyond their boundaries,[17] the franchise in municipal elections is extended only to adults who live within corporate limits.[18] Thus, laws authoriz-

12. Thirty-five states maintain statutes authorizing municipalities to govern areas beyond their borders. Such statutes can be divided into five general types, depending upon the variety of power delegated: (1) full police power, (2) zoning, (3) regulatory authority over specific activities, (4) health and sanitary regulations, and (5) platting and subdivision control. For a list of the state statutes granting extraterritorial municipal jurisdiction, *see* Note, *supra* note 9, at 151-157.

13. One authority characterized state police power as the power "to govern the movement, acts, and words of persons and the use of things in the corporate area." 6 E. McQUILLIN, MUNICIPAL CORPORATIONS, §24.02, at 467 (3d ed. rev. vol. 1969). Such power cannot be used to circumvent a federally protected right. Gomillion v. Lightfoot, 364 U.S. 339 (1960); Graham v. Folsom, 200 U.S. 248 (1906). However, the Supreme Court has held that states have absolute discretion over the number, nature, and duration of powers delegated to municipal corporations as well as over the territory in which they are to be exercised. Hunter v. City of Pittsburg, 207 U.S. 161, 178 (1907).

14. The power of state legislatures to delegate extraterritorial powers was unquestioned until the end of the last century. Note, *supra* note 9, at 157. *See, e.g.*, Harrison v. Mayor of City Council of Baltimore, 1 Gill. 264 (Md. 1843) (upholding a health ordinance which could be enforced extraterritorially).

15. *See* 1 J. DILLON, MUNICIPAL CORPORATIONS §31(19), at 58-59 (5th ed. 1911); Anderson, *The Extraterritorial Powers of Cities* (Pt. 2), 10 MINN. L. REV. 564, 580-81 (1926); Goodman, *The Legal Basis of Extraterritorial Zoning in Oklahoma*, 4 TULSA L.J. 21, 27 (1967). For example, the Kentucky Court of Appeals upheld an extraterritorial liquor license tax imposed by a municipality, reasoning that because the state itself could police the sale of liquor, it could delegate that authority "to the local government of the community immediately interested." Board of Trustees v. Watson, 68 Ky. (5 Bush) 660 (1869). For a more recent application of this theory, see Walworth County v. City of Elkhorn, 27 Wis. 2d 30, 133 N.W.2d 257 (1965) (statutory scheme authorizing extraterritorial zoning upheld).

16. Note, *supra* note 9, at 165. The Supreme Court in a recent series of decisions has scrutinized restrictions imposed on the franchise much more closely than in previous cases. *Compare* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1960), *with* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) *and* Reynolds v. Sims, 377 U.S. 533 (1964).

17. *See* note 2 *supra*. Appellants challenged Tuscaloosa's extraterritorial governmental jurisdiction, as opposed to its power to provide services outside city limits. Commentators have distinguished between a municipality's ability to do business or provide services in its capacity as a corporation (its corporate power) and its capacity to exercise control or authority over an area and persons therein, such as police power, eminent domain, and taxation (its governmental power). *See* Anderson, *supra* note 15, at 564. *See, e.g.*, Hope v. City of Gainesville, 195 So. 2d 849 (Fla. 1967) (exercise of corporate power beyond city limits).

18. *See* Note, *supra* note 9, at 151. Extraterritorial powers without extensions of the franchise are often rationalized on the theory that since residents of these unincorporated areas are represented in the state legislatures, they implicitly consent to such statutes and thus are not deprived of a voice in their government. *See* Anderson, *supra* note 15, at 581; 99 S. Ct. at 393 (Stevens, J., concurring in the instant case).

ing extraterritorial jurisdiction create two classes of persons governed by the city.[19] Residents living within incorporated areas are subject to pervasive municipal authority, pay property taxes, and participate fully in electing law-making officials.[20] Inhabitants of contiguous zones are governed by a smaller number of city ordinances but are deprived of a voice in local elections.[21]

To determine the validity of such statutory classifications under the equal protection clause, the Supreme Court has articulated a two-tier test.[22] Generally, a state must only show a rational relation between the challenged statutory classification and a legitimate state interest.[23] Unless enforced arbitrarily, such legislation is consistently upheld where this lenient standard is applied.[24] However, the Court utilizes a strict scrutiny test[25] when it determines that a classification is based upon suspect criteria[26] or infringes upon a fundamental

---

19. A series of Alabama state cases, recognizing this dichotomy, have limited the municipal powers which can be exercised over residents of extraterritorial areas. *See, e.g.*, City of Birmingham v. Brown, 241 Ala. 203, 2 So. 2d 305 (1941) (a city cannot exercise eminent domain powers outside its limits without specific state grants); Alabama Gas. Co. v. City of Montgomery, 249 Ala. 257, 30 So. 2d 651 (1947) (a city cannot tax for revenue outside its limits); Roberson v. City of Montgomery, 285 Ala. 421, 233 So. 2d 69 (1970) (cities cannot zone extraterritorially); City of Leeds v. Town of Moody, 294 Ala. 496, 319 So. 2d 242 (1975) (extraterritorial powers must be specifically delegated by the legislature).

20. 99 S. Ct. at 389-90. In the instant case, the Court noted that Alabama municipalities do not have the "vital and traditional authorit[y] of cities and towns to levy ad valorem taxes" over residents of police jurisdictions, while city residents must pay such taxes. *Id.* at 391-92 n.8. In Kramer v. Union Free School Dist., 395 U.S. 621 (1969), however, the Court held that a classification restricting the franchise which was partially based on non-payment of property taxes could not withstand strict judicial scrutiny. *Id.* at 631-32. In Evans v. Cornman, 398 U.S. 419 (1970), the Court also found that a state could not constitutionally exclude residents from the franchise on grounds they did not pay property taxes. *Id.* at 425. For discussions of *Kramer* and *Evans*, see notes 43-51 & 65 *infra* and accompanying text.

21. 99 S. Ct. at 395. Although Alabama's police jurisdiction statute, quoted in full in note 3 *supra*, allows cities to enforce more regulations extraterritorially than do many other states, several states have broader statutes. *See, e.g.*, IDAHO CODE §50-606 (1967) (granting cities jurisdiction over areas within one mile of corporate limits "in all matters . . . except taxation"); FLA. STAT. §163.175 (1977) (authorizing zoning extraterritorially).

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

23. Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947). Under this test, the Supreme Court held that a classification must be "wholly irrelevant to achievement of the regulation's objectives" to violate the equal protection clause. *Id.* at 556. For a further explanation of this standard, see Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911).

24. McGowan v. Maryland, 366 U.S. 420 (1961). Those who challenge a statute under this test have the burden of proving that there is no rational basis for the classification and that it is essentially arbitrary: "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 426. *See generally* Note, *Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

25. For a general explanation of the emergence of the "strict scrutiny" test, see Shapiro v. Thompson, 394 U.S. 618, 655-63 (1969) (Harlan, J., dissenting); Comment, *Compelling State Interest Test and the Equal Protection Clause — An Analysis*, 6 CUMB. L. REV. 109 (1975).

26. McLaughlin v. Florida, 379 U.S. 184, 192 (1964). A model for determining classifications based on suspect criteria is given in Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 STAN. L. REV. 155, 163-64 (1973). *See* Sugarman

right.[27] Under this second test, the proponent must show that the statute is absolutely necessary to further a compelling state interest.[28] Since this burden of proof is rarely met, courts invariably negate legislation where the strict scrutiny standard is applied.[29]

In seeming disregard of this two-tier analysis, some recent Court decisions have implied emergence of a less rigid standard of equal protection review.[30] Several justices, voicing discontent with the inflexibility of the two-tier test,[31] have noted that the Court actually employs a spectrum of standards in evaluating statutory classifications.[32] Although no "intermediate" equal protection test has yet been expressly articulated, such analysis seems to involve a "dual inquiry" into the strength of the state interest furthered by a classification versus the importance of the fundamental personal right it endangers.[33]

Classifications which restrict equal access to the ballot have been subjected to strict scrutiny analysis in a series of voting rights cases.[34] The Supreme Court

---

v. Dougall, 413 U.S. 634 (1973), Graham v. Richardson, 403 U.S. 365 (1971); Turner v. Fouche, 396 U.S. 346 (1970).

27. Police Dep't v. Mosley, 408 U.S. 92, 101 (1972). Several rights have been determined to be fundamental by the Supreme Court. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (right to privacy); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

28. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). Justice Powell explained strict scrutiny as meaning that "the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification', that the State must demonstrate that its [statutory system] has been structured with 'precision' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives." *Id.* at 16-17.

29. Dunn v. Blumstein, 405 U.S. 330 (1972). "To challenge [statutory] 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, and I doubt one ever will, for it demands nothing less than perfection." *Id.* at 363-64 (Burger, J., dissenting).

30. *See* Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975). *See also* Gunther, *supra* note 22; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974).

31. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting); Vlandis v. Kline, 412 U.S. 441, 456 (1973) (White, J., concurring); Dunn v. Blumstein, 405 U.S. 330 (1972) (Burger, J., dissenting) (quoted in note 29 *supra*); Note, *supra* note 26, at 155. Even justices who prefer a two-tier test admit that the Court in practice employs varying levels of scrutiny. *See, e.g.*, Craig v. Boren, 422 U.S. 190, 210 n.* [*sic*] (1976) (Powell, J., concurring).

32. San Antonio Independent School Dist., 411 U.S. 1, 99-100 (1973). In *San Antonio*, Justice Marshall, dissenting, described this "spectrum" as "clearly comprehend[ing] variations in the degree of care with which the Court will scrutinize particular classifications." *Id. See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Reed v. Reed, 404 U.S. 71 (1971).

33. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972). In *Weber*, the Court stated: "The essential inquiry in all the foregoing cases is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id. See* 411 U.S. at 99.

34. *E.g.*, Reyonolds v. Sims, 377 U.S. 533 (1964). Citing Yick Wo v. Hopkins, 118 U.S. 356 (1886), the *Reynolds* Court held that the "right to exercise the franchise in a free and unimpaired manner" is fundamental because it is "preservative of other basic civil and

has ruled that restrictions on voting other than age, citizenship, or bona fide residence can be tolerated only if they are necessary to promote a compelling state interest.[35] First applied in a state apportionment case,[36] the strict scrutiny standard was later extended to local elections in *Avery v. Midland County*.[37] In *Avery*, the Court invalidated an apportionment scheme[38] which conferred greater weight in county elections to the vote of those living in rural areas.[39] The majority emphasized that equal protection standards do apply where a local governmental unit has power to make decisions which substantially affect all citizens,[40] and found no compelling state interest sufficient to justify dilution of urban residents' votes.[41]

---

political rights," 377 U.S. at 561-62. Thus "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* The right to vote for all government officials is not *per se* fundamental; however, whenever a state adopts "an elective process for determining who will represent any segment of the state's population," then every qualified voter has a fundamental right to participate in the election "on an equal basis with other qualified voters." San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973). For examples of cases invoking strict scrutiny to invalidate voting restrictions, *see, e.g.*, Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966). *See generally* Comment, *Equal Protection: Analyzing the Dimensions of a Fundamental Right — the Right to Vote*, 17 SANTA CLARA L. REV. 163 (1977).

35. Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969). States have always had "power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot." *Id.* at 625. *See* Pope v. Williams, 193 U.S. 621 (1904); Carrington v. Rash, 380 U.S. 89 (1965).

36. Baker v. Carr, 369 U.S. 186 (1962). *See also* Wesberry v. Sanders, 376 U.S. 1 (1964); Gray v. Sanders, 372 U.S. 368 (1963).

37. 390 U.S. 474 (1968). Although the Court has held that members of primarily administrative bodies can be appointed rather than elected, Sailors v. Kent Bd. of Educ., 387 U.S. 105 (1967), "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment," Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

38. 390 U.S. at 476. The Commissioner's Court of Midland County was composed of five members, elected in essence from four districts. The entire city of Midland, the county's urban center containing 95% of its population, was contained in one district. Thus the weight of the individual votes of residents of the other three primarily rural districts was substantially greater than that of Midland residents. *Id.*

39. *Id.* Midland County contended that its Commissioner's Court was primarily concerned with rural affairs, and that its function was primarily "administrative" under the rationale of Sailors v. Kent Bd. of Educ., 387 U.S. 105 (1967). 390 U.S. at 482. For an explanation of *Sailors*, see note 37 *supra*.

40. 390 U.S. at 484. Justice White, writing for the majority, reasoned that "while Midland County authorities may concentrate their attention on rural roads, the relevant fact is that [their] powers [include] the authority to make a substantial number of decisions that affect all citizens, whether they reside inside or outside the city limits of Midland." *Id.* The Court distinguished Sailors v. Kent Bd. of Educ., 387 U.S. 105 (1967), on the ground that since the Midland County Commissioner's Court performed some legislative and judicial tasks, it could not be classified as an administrative body for purposes of the franchise. 390 U.S. 482. See notes 37 & 39 *supra*.

41. *Id.* at 481-84. The Court reasoned that "a State's political subdivisions must comply with the Fourteenth Amendment" because "[t]he actions of local government *are* the actions of the State." *Id.* at 480. This theory uses essentially the same reasoning employed to reach an opposite result in earlier decisions. *See* text accompanying note 15 *supra*. *See, e.g.*, Fort Smith

Although *Avery* pertained to the election of officials with general governing powers, subsequent decisions extended *Avery's* holding to cases where the elected body's functions were more specialized and where entire classes of persons were excluded from the ballot.[42] In *Kramer v. Union Free School District*,[43] the Court invalidated a statute which limited voting in school board elections to those persons the state deemed primarily affected by the body's decisions.[44] The Court concluded that the state had not met its burden of proving that all those excluded were substantially less interested in the election's outcome than those permitted to vote.[45] While the Court did not deny that states might have a sufficient interest in limiting the ballot to members of political communities, it noted that statutory classifications must accomplish this end with exacting precision.[46]

In *Evans v. Cornman*,[47] the Supreme Court used the strict scrutiny test to invalidate a voting restriction based on an arbitrary state residency requirement.[48] Local officials prevented persons living in a federal research compound from registering to vote on the ground that they were not "bona fide residents."[49] Enumerating the ways compound residents were affected by state

---

Light & Traction Co. v. Bd. of Improvement, 274 U.S. 387 (1927); White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932). One commentator observed the use of this rationale in a slightly different context: "Many courts, when interpreting statutes governing the incorporation of municipalities or changes in their boundaries, rely on the concept that municipal corporations are creatures of the state which can be fashioned or altered at will. . . ." Note, *Incorporation, Property Ownership, and Equal Protection*, 7 URBAN L. ANN. 274, 278 (1974).

42. *See, e.g.*, Hill v. Stone, 421 U.S. 289 (1975) (invalidating Texas requirement of "rendering property" to vote in city bond elections); Phoenix v. Kolodziejski, 399 U.S. 204 (1970) (overturning a statute limiting vote on general obligation bonds to real property taxpayers); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (applying the one man-one vote rule to a junior college district); Cipriano v. City of Houma, 395 U.S. 701 (1969) (striking down a property requirement in a revenue bond election); Stewart v. Parish School Bd., 310 F. Supp. 1172 (E.D. La. 1970), *aff'd*, 400 U.S. 884 (1970) (overturning a statute limiting franchise in school board elections to landowners).

43. 395 U.S. 621 (1969). For a critical evaluation of the *Kramer* decision, see Lee, *Mr. Herbert Spencer and the Bachelor Stockbroker: Kramer v. Union Free School Dist. No. 25*, 15 ARIZ. L. REV. 457 (1973).

44. 395 U.S. 621. To be eligible to vote at annual school board elections, an "otherwise qualified district resident" had to be either (1) the owner or lessee of real taxable property in the district, (2) married to one who owned qualifying property, or (3) the parent or guardian of a child enrolled in a local school. New York argued that the requirements had been adopted to limit the franchise to those "primarily interested" in the elections. *Id.* at 623, 631.

45. *Id.* at 632-33. The Court acknowledged that a state might, in some circumstances, constitutionally limit the franchise to qualified voters who were also specially interested in the election, but whether the classification violated equal protection would depend upon "whether all those excluded are in fact less substantially interested or affected than those the statute includes." *Id.* at 632.

46. *Id.*

47. 398 U.S. 419 (1970).

48. *Id.* at 426.

49. *Id.* at 421. Before a previous state court decision holding that residents of a federal enclave were not residents of the state, persons living on the grounds of the National Institute of Health enclave had been permitted to vote in state elections. Royer v. Board of Election Supervisors, 231 Md. 561, 191 A. 2d 446 (1963). In *Evans*, the state argued that it had a com-

legislative actions,[50] the Court ruled that the state could not draw residency lines which denied the ballot to individuals who were equally as interested in electoral decisions as those persons who were otherwise allowed to vote.[51] The majority concluded that the impact of election results on those living in the enclave was not sufficiently different to justify their exclusion from the polls.[52]

In the wake of these recent developments in the voting rights field, a federal appellate court recently considered for the first time whether general extraterritorial government by a county was constitutionally sound.[53] In *Little Thunder v. South Dakota*,[54] the state law under challenge attached counties lacking organized governments to adjacent "organized" ones for purposes of government and administration.[55] While those living in organized counties

---

pelling purpose in insuring "that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them." 398 U.S. at 422. However, Justice Marshall, writing for the majority, stressed that the state's characterization of those living on the enclave as nonresidents was based only on the "fiction of a state within a state." *Id.* at 421.

50. *Id.* at 424. These included the state's power to invoke criminal sanctions against residents and to levy taxes.

51. *Id.* at 426. The Court held that Maryland had not met its burden of establishing a "degree of disinterest in electoral decisions that might justify a total exclusion from the franchise." *Id.* One commentator suggested: "A test based on objective criteria indicating attachment to the community may ultimately be the most acceptable, in light of the application of the close scrutiny analysis where the right to vote is involved." Comment, *Applying Equal Protection to Bona Fide Residence Requirements*, 59 IOWA L. REV. 671, 683 (1974).

52. 398 U.S. at 422. See notes 49-50 *supra*. However, in Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973), the Court subsequently created an exception to the mandatory application of strict scrutiny to all interest-based voting restrictions. The *Salyer* Court upheld a state statute limiting voting for the directors of a water storage district to landowners on the basis of disproportionate impact, ruling that a state could restrict voting in a special-purpose referendum. The majority distinguished the school board elections in *Kramer* as being of more general interest, and did not mention the strict scrutiny test or discuss voting as a fundamental right. One commentator suggested this decision was indicative of a trend away from the "strict dichotomy automatically providing fundamental and nonfundamental rights with different degrees of protection," and concluded that the effect of *Salyer* was "to cast an uncertain shadow over the constitutional protection to which voting is entitled." Comment, *Property Qualifications for Voting in the Special Purpose District: Beyond the Scope of 'One Man-One Vote'*, 59 CORNELL L. REV. 687, 701-03 (1974). For further evidence of this trend, *see* Town of Lockport v. Citizens for Community Action, 430 U.S. 308 (1977); Associated Enterprises v. Toltec Watershed Improvement Dist., 410 U.S. 743 (1973).

53. Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975). Although recent state cases have challenged the validity of grants of extraterritorial authority to local governments, recent equal protection developments have been disregarded. Note, *supra* note 9, at 165. *See, e.g.*, City of Carbondale v. Van Natta, 61 Ill. 2d 483, 338 N.E. 2d 19 (1975) (extraterritorial zoning regulations held within the scope of state enabling statutes); State *ex rel.* Pat Griffin Co. v. City of Butte, 151 Mont. 546, 445 P.2d 739 (1968) (city ordinance regulating gasoline businesses within three miles of corporate limits upheld as within scope of state enabling statutes).

54. 518 F.2d 1253 (8th Cir. 1975).

55. S.D. COMPILED LAWS ANN. §7-17-1 (1967) provides for "attachment of unorganized counties to adjacent organized counties." S.D. COMPILED LAWS ANN. §7-17-3 (1967) provides: "The county commissioners of any organized county to which any unorganized county attached shall have all of the jurisdiction, rights, powers, duties, and liabilities for the administration of the affairs of the unorganized county or counties which may be attached to sa

were allowed to vote for county officials, residents of unincorporated attached areas were denied a voice in choosing their governing authorities.[56] Persons living in these unorganized counties contended that their exclusion from the ballot[57] violated their rights under the equal protection clause.[58] The Eighth Circuit Court of Appeals found no compelling state interest sufficient to justify barring residents of unorganized counties from the polls.[59] Citing *Evans*,[60] the court struck down the statute, holding that a state's geographical limits on voting must bear a close relationship to the interests of the parties affected by the election's outcome.[61]

In the instant case, however, the Supreme Court did not closely scrutinize the relationship between municipal residency requirements for voting and the electoral interests of persons living in adjoining "police jurisdictions."[62] Distinguishing *Little Thunder*,[63] a case in which a local government had annexed outlying territory in all but name, thus invoking strict scrutiny analysis,[64] the Court found that the more limited extraterritorial powers exercised here did not warrant application of the compelling state interest test.[65] The majority also distinguished *Evans*[66] on the ground that residents of the federal compound lived within the state's geographical boundaries,[67] while in the instant

organized county as they may have in the organized county, excepting in cases where it is otherwise expressly provided by law."

56. 518 F.2d at 1254. See note 55 *infra*. The powers of organized county officials over the unorganized counties included zoning, supervision of fiscal affairs and levying of taxes, and law enforcement. 518 F.2d at 1256-57 (1975). See Bailey v. Jones, 81 S.D. 617, 139 N.W.2d 385 (1966) (South Dakota's supreme court summarized powers of organized county officials).

57. 518 F.2d at 1254. Unorganized county residents could vote only for school board members and highway officials. *Id.* at 1255.

58. *Id.* at 1254.

59. *Id.* at 1258. The state's asserted interest in imposing the restriction was to create a reasonable residency requirement designed to limit the franchise to those who shared the same interest in organized county government. South Dakota also contended that since residents could choose to organize or become attached to another county at any time, their present interest in any one county's government was vitiated. The Court rejected both arguments, holding that the issue was "whether residents of the unorganized counties presently [had] a voice in their government." *Id.*

60. *Id.* at 1256, *citing* 398 U.S. 419.

61. 518 F.2d at 1258. Thus under *Little Thunder* a state could not impose residency requirements so as to exclude a class or persons with a substantial interest in the outcome of the election. To compare this with the Supreme Court's distinction of *Evans* in the instant case, see text accompanying notes 66-69 *infra*.

62. 99 S. Ct. 383 (1978).

63. *Id.* at 391 n.8, *distinguishing* 518 F.2d 1253.

64. 99 S. Ct. at 391 n.8.

65. *Id.* at 383. Justice Rehnquist emphasized that Alabama's statute, unlike those enforced in some states, did not authorize cities to zone, levy ad valorem taxes, or invoke eminent domain extraterritorially. *Id.* at 391. *See, e.g.*, ARIZ. REV. STAT. §9-240-B-21(c) (Supp. 1975); MICH. COMP. LAW: §125.36 (1976) (two state statutes authorizing extraterritorial zoning).

In White v. City of Decatur, 225 Ala. 646, 144 So. 873 (1932), the Alabama Supreme Court upheld the police jurisdiction statute but ruled that the legislature could not authorize municipal corporations to levy taxes outside their corporate limits. For other cases limiting cities' extraterritorial powers in Alabama, see note 19 *supra*.

66. 99 S. Ct. at 389, *distinguishing* 398 U.S. 419.

67. 99 S. Ct. at 388-89.

case appellants' homes were located outside the corporate limits of Tuscaloosa.[68] Therefore, Alabama had not created a classification which restricted a fundamental right, but had merely authorized its cities to impose reasonable residency requirements.[69]

By reliance on this criterion of geographical residency, the Court detached the instant case from the context of the voting rights decisions and applied the more lenient rational relationship test.[70] The opinion stressed that states are traditionally given a wide latitude in forming political subdivisions and in conferring authority upon them.[71] The Court noted that since police jurisdiction residents are represented in the state legislature, they are not deprived of a voice in government, despite their exclusion from municipal elections.[72] The majority rejected appellants' suggestions of "constitutionally preferable" methods of governing unincorporated areas, such as management by county officials.[73] Judicial inquiry must not question Alabama's choice of alternatives, the Court noted, but merely examine whether its police jurisdiction statutes were rationally related to any legitimate state interest.[74] The Court concluded that the statute was a reasonable method of handling problems caused by the state's burgeoning cities.[75]

The majority also rejected the contention that the impact of city lawmaking on police jurisdiction residents was sufficient to require extension of residency

---

68. *Id.* at 390. The Court thus distinguished the instant case from previous decisions because "[t]he line heretofore marked by this Court's voting qualifications decisions coincides with the geographical boundary of the governmental unit at issue, and we hold that appellants' case, like their homes, falls on the farther side." *Id.*

69. *Id.* at 389-90. However, previous decisions did not uphold residency requirements which artificially restricted the franchise. See notes 47-52 *supra* and accompanying text. In Dunn v. Blumstein, 405 U.S. 330 (1972), the Court stated that "[a]n appropriately defined and uniformly applied requirement of bona fide residence may be necessary to preserve the basic conception of a political community, and therefore could withstand close judicial scrutiny." *Id.* at 343-44. Thus, state residency requirements are seemingly valid only insofar as they function to exclude persons not properly within a governmental unit's political community. *Cf.* Vlandis v. Kline, 412 U.S. 441 (1973) (striking down an irrebuttable presumption of nonresidency in the context of a residency requirement for in-state university tuition).

70. 99 S. Ct. at 390 (1978). See notes 23-24 *supra* and accompanying text.

71. 99 S. Ct. at 391. The Court extensively cited Hunter v. City of Pittsburgh, 207 U.S. 161 (1907), discussed in note 13 *supra,* but acknowledged that the broad control of states over municipal corporations had "undoubtedly been qualified" by holdings in the voting rights cases. *Id.*

72. *Id.* at 392. *See* Anderson, *supra* note 15, at 581. Past decisions suggest, however, that the representation of residents of areas subject to extraterritorial government in state legislatures is not dispositive of their right to vote in municipal elections. *See, e.g.,* Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 736-37 (1964); Avery v. Midland County, 390 U.S. 474 (1968) (discussed in notes 37-41 *supra* and accompanying text).

73. 99 S. Ct. at 392.

74. *Id.* Under the rational basis test applied by the Court in the instant case, Alabama was not required to demonstrate that it had selected the least drastic means for effectuating its objective, as it would have been if the Court had found the compelling state interest test applicable. See note 28 *supra.*

75. 99 S. Ct. at 391-92. *See also* Note, *Municipal Annexation: An Urban Dilemma,* 28 ALA. L. REV. 717 (1977): "With increased urbanization, Alabama has found itself beset by the myriad problems historically accompanying the growth of towns and cities." *Id.* at 718.

lines to include them.[76] The Court reasoned that corporate boundaries can never precisely define the influence of city decisions.[77] Thus indirect extraterritorial effects of internal municipal actions might have a heavier impact on surrounding environs than the direct regulations imposed by Tuscaloosa.[78] It would be senseless, the majority concluded, to mandate inclusion in the electorate of every person affected by any city action.[79] However, the opinion implied that if Alabama had delegated more intrusive powers to its municipalities, the Court would have reached the opposite conclusion.[80]

In a forceful dissent,[81] Justice Brennan criticized the majority's failure to examine Tuscaloosa's rationale for "arbitrary" residency requirements which disenfranchised police jurisdiction residents.[82] The dissent contended that the city's geographical residency lines denied interested citizens the ballot just as did other restrictions in the voting rights cases.[83] Listing over sixty Tuscaloosa ordinances enforced extraterritorially,[84] Justice Brennan characterized the municipality's powers over neighboring areas as extensive,[85] reasoning that exclusion of persons living in these areas does not serve to limit voting to members of the true political community, but instead "fractures its integrity" by disenfranchising residents substantially affected by city lawmaking.[86]

---

76. 99 S. Ct. at 390.

77. *Id. But see* Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969), discussed in text accompanying note 46 *supra.*

78. 99 S. Ct. at 389-90. While in his dissent Justice Brennan included an extensive list of ordinances enforced by Tuscaloosa within its police jurisdiction, Justice Rehnquist in the majority opinion noted that the "minute catalog" was "as notable for what it does not include as for what it does." *Id.* at 391 n.8. The dissent argued that a "crystal distinction" existed between residents of the police jurisdiction who were subject to Tuscaloosa's police and sanitary ordinances licensing fees, and recorder's courts, and persons who were merely affected by the indirect impact of city decisions. *Id.* at 398 (Brennan, J., dissenting).

79. *Id.* at 390. Since the indirect effect of city decisions on residents living beyond city's borders is often more "dramati[c]" than the direct effect of limited municipal powers on police jurisdiction residents, the majority reasoned, it would be irrational to say the latter requires an extension of the franchise when the former does not. *Id.* However, the dissent called this reasoning "a simple non sequitur." *Id.* at 398 (Brennan, J., dissenting).

80. *Id.* at 394. See notes 21 & 65 *supra.*

81. *Id.* at 394. Justice Stevens, in a concurring opinion, stressed that, while Alabama's statutes are not unconstitutional on their face, "[t]his holding does not make all exercises of extraterritorial authority by a municipality immune from attack" under the equal protection clause. He concluded that "it might well be that [Alabama's statutory scheme] or another much like it might sometimes operate to deny the franchise to individuals who share the interests of their voting neighbors." *Id.* at 393-94.

82. *Id.* at 398. Brennan, joined by Justices White and Marshall stated: "[T]he Court cedes to geography a talismanic significance contrary to the theory and meaning of our past voting rights cases." *Id.* at 396 (Brennan, J., dissenting).

83. *Id.* at 398. For example, Brennan saw as analogous previous state statutes restricting the franchise to property owners.

84. *Id.* at 396 n.10.

85. *Id.* at 397. The majority, on the other hand, pointed frequently to the limitations of Alabama cities' extraterritorial power. For example: "[t]he statutory limitation on license fees to half the amount exacted within the city assures that police jurisdiction residents will not be victimized by the city government." *Id.* at 392.

86. *Id.* at 398.

The Court's consideration of Alabama's extraterritorial statute apart from the voting rights context and its emphasis on geographic boundaries as the determinative factor in the instant case seem inconsistent with the underlying rationale of earlier decisions.[87] Local governments have unquestioned power to limit the franchise to bona fide residents.[88] Such residency requirements have always been justified because they preserve the reciprocal relationship between the processes of government and persons who live within its jurisdiction.[89] However, the instant Court did not examine whether appellants were substantially less affected by local electoral decisions than were those who obtained the franchise in *Evans*[90] and *Kramer*.[91] Given appellants' clear relationship to city government, precedent would seem to require strict scrutiny of their exclusion from municipal elections. Instead, the Court simply deferred to the city's residency lines and required Alabama to demonstrate only a rational basis for its extraterritorial statute.[92]

One possible explanation for the Court's willingness to distinguish the instant case from the voting rights decisions is its recent discontent with two-tier equal protection analysis.[93] The opinion suggests the majority was adverse to imposing the compelling state interest test applied in earlier cases, since that standard virtually demands the invalidation of all legislation restricting the vote.[94] Although the Court purported to adhere to the two-tier test, it appeared instead to apply an intermediate level of scrutiny by balancing the extent of the authority imposed upon Tuscaloosa's police jurisdiction residents against the municipalities' interest in regulating unincorporated areas.[95] After

87. Under Dunn v. Blumstein, 405 U.S. 330 (1972) (cited at 99 S. Ct. at 396, Brennan, J., dissenting), a state could impose bona fide residency requirements that were "appropriately defined and uniformly applied." 405 U.S. at 333. However, under these cases any classification limiting the franchise was subjected to strict scrutiny, and the governmental unit was required to show "all those excluded from voting were in fact substantially less interested or affected than those permitted to vote." Hill v. Stone, 421 U.S. 289, 296 (1975). See note 69 *supra*.

88. *See, e.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Pope v. Williams, 193 U.S. 621 (1904).

89. 405 U.S. 330, 344 (1972). *Cf.* Sugarman v. Dougall, 413 U.S. 634 (1973) (exclusion of aliens from voting is within a state's power to define its political community).

90. 398 U.S. 419 (1970).

91. 395 U.S. 621 (1969). See notes 43-52 *supra* and accompanying text for discussions of *Evans* and *Kramer*.

92. 99 S. Ct. at 390 (1978).

93. See notes 31-33 *supra* and accompanying text. *See generally* Gunther, *supra* note 22, at 17-20. In Avery v. Midland County, 390 U.S. 474 (1968), Justice Harlan, in a dissenting opinion, expressed concern that stringent application of the compelling state interest standard would freeze a necessary trend toward metropolitan consolidation. *Id.* at 492-93. In a separate dissent, Justice Fortas wrote: "[W]ith the growth of suburbia and exurbia, the problem of allocating local government functions . . . urgently requires attention . . . [and] it does not call for the hatchet of one man, one vote." 390 U.S. at 497. *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

94. See note 29 *supra* and accompanying text. *See also* Comment, *supra* note 52, at 700.

95. 99 S. Ct. at 392-93. The Court noted that the "denial of the franchise" in the instant case "does not have anything like the far-reaching consequences of the denial of the franchise" in Evans v. Cornman, 398 U.S. 419 (1970) or in Little Thunder v. South Dakota, 518 F.2d 1253 (8th Cir. 1975). 99 S. Ct. at 391 n.7-8. On the other hand, since "today's police jurisdiction may be tomorrow's annexation to the city proper," the state had a legitimate interest in enacting the statute at issue. *Id.* at 392.

finding the infringement upon appellants' rights to be insubstantial, the majority focused on the state's legitimate interest in controlling problems caused by rapid suburban growth, and upheld Alabama's extraterritorial statute.[96] The Court's implicit willingness to reach a different conclusion in the case of a more intrusive statute supports this analysis.[97]

The instant Court failed to articulate criteria for determining whether the many state statutes currently authorizing extraterritorial powers violate the equal protection clause,[98] and thus the standards to be used in making such determinations remain unclear. The Court did not resolve the underlying issue of precisely when geographical residency lines become arbitrary and unconstitutional.[99] The opinion suggests that a level of extraterritorial authority does exist which cannot be exceeded without a concurrent extension of voting rights;[100] however, lower courts and city governements are provided no guidelines for determining where on the scale of municipal powers this point is located.

Cities have an undeniable interest in providing services and assuring orderly growth in fringe areas, and extraterritorial powers provide one method of protecting this interest.[101] Nevertheless, there exist other means of governing unincorporated areas. For example, one commentator has suggested five alternatives ranging from local special-purpose governments to reversion of control over outlying areas to state legislatures.[102] Moreover, even if full voting rights were extended to police jurisdiction residents, extraterritorial statutes might raise other equal protection issues. Recent federal decisions indicate such a scheme might deny equal protection to city residents who are primarily affected

---

96. *Id.*

97. See notes 21, 65, & 81 *supra.*

98. Discussing the instant case while at the appellate level, one commentator observed that its facts "seem to provide the basis for an excellent test case." Note, *supra* note 9, at 168.

99. One writer discusses this underlying issue as follows: "The determination of residency, as well as the determination of sufficient interest to qualify as a voter in special purpose elections, turns on the purportedly different levels of interest held by those allowed to vote as opposed to those not so permitted. For either limitation to be valid, the excluded voters must be, in fact, substantially less interested than those included." Comment, *Applying Equal Protection to Bona Fide Residency Requirements,* 59 IOWA L. REV. 671, 682 (1974).

100. 99 S. Ct. 391 n.8. However, the dimensions of this standard will apparently be left for later determination, although the court suggests the statute in *Little Thunder* exceeded the maximum. *Id.* at 391 n.8, *citing* 518 F.2d 1253 (8th Cir. 1975). See notes 63-65 *supra* and accompanying text.

101. One commentator has suggested that extraterritorial controls are not a desirable method of meeting metropolitan needs, since their use may lead to "jurisdictional conflicts, bickering and hard feelings" between city governments and unincorporated areas. Jones, *The Organization of a Metropolitan Region,* 105 U. PA. L. REV. 538, 542 (1957). *See generally* C. ADRIAN & C. PRESS, GOVERNING URBAN AMERICA (4th ed., 1972).

102. An article cited by both the majority and dissenting opinions in the instant case suggests the following alternatives: a) reversion of control over unincorporated areas to the state legislature; b) active management by state officials; c) active management at the county level; d) management by special purpose government; e) management at the local level through limited self-government of unincorporated areas. Note, *supra* note 9, at 171-79, cited in 99 S. Ct. at 391, 399.

by municipal decisions.[103] However, the instant Court did not articulate any standard for determining the constitutionality of extraterritorial authority, but instead simply deferred to Alabama's legislative judgment and appellee city's residency requirements without requiring the state to examine any of the possible alternatives.

Although courts have long deferred to state delegations of extraterritorial authority, recent equal protection decisions require a reassessment of any legislation "severing the connection between the process of government and those who are governed in the place of their residency."[104] Alabama's statute, while representing one method of handling the state's metropolitan problems, does not exhaust the alternatives.[105] The instant decision postpones the consideration of innovative methods of local government which could control the growth of fringe areas and still allow suburban residents a voice in government.

CHRISTINE A. BAY

CONSTITUTION LAW: ILLEGITIMATE'S INTESTATE SUCCESSION AND EQUAL PROTECTION'S INTERMEDIATE STANDARD

Lalli v. Lalli, 47 U.S.L.W. 4061 (Dec. 11, 1978)

Claiming to be the illegitimate son of Mario Lalli who died intestate, Robert Lalli petitioned the New York Surrogate's Court for a compulsory accounting in Mario's estate.[1] The court denied Lalli's petition, ruling that having failed to establish paternity as required by statute, he was not a lawful distributee and lacked standing to petition.[2] Lalli had not availed himself of the benefits of section 4-1.2 of New York's Estates, Powers, and Trusts Law,[3]

---

103. *See* Locklear v. North Carolina State Bd. of Elections, 514 F.2d 1152 (4th Cir. 1975). *But see* Creel v. Freeman, 531 F.2d 286 (5th Cir. 1976), *cert. denied*, 97 S. Ct. 797 (1977); Clark v. Town of Greenburg, 436 F.2d 770 (2d Cir. 1971).

104. 99 S. Ct. 396 (Brennan, J., dissenting).

105. One author points out that state delegations of extraterritorial authority to municipalities result in "government without representation — a practice reprehensible to anyone who believes in democratic ideals." F. SENGSTOCK, *supra* note 11, at 72. Moreover, he argues that other solutions to metropolitan problems should be sought, because "the multiplicity of local governments within the metropolitan area, whose jurisdiction is prescribed by a single corporate boundary, is an impediment to the solution of metropolitan area problems; extraterritorial powers, whose purpose is to alleviate the harsh effects of definitely prescribed boundairies, have failed and will fail to overcome that impediment." *Id.*

1. The petitioner claimed that he was entitled to inherit from Mario Lalli as though he were Lalli's legitimate son. 99 S. Ct. 518, 521 (1978).

2. *In re* Estate of Lalli, Index No. 440/1974 (Sur. Ct., Westchester County, Nov. 26, 1974).

3. N.Y. EST., POWERS & TRUSTS LAWS §4-1.2 (McKinney 1967) (emphasis added) provides:

"(a) For the purposes of this article:

"(1) An illegitimate child is the legitimate child of his mother so that he and his issue inherit from his mother and from his maternal kindred.

"(2) *An illegitimate child is the legitimate child of his father so that he and his issue inherit from his father if a court of competent jurisdiction has, during the lifetime of the father,*

which provides that an illegitimate child must obtain a court order establishing paternity during the father's lifetime[4] to enable the child to inherit from his intestate father. The court also rejected Lalli's claim that the statute unconstitutionally discriminated against illegitimate children.[5] After the New York Court of Appeals affirmed the lower court's decision,[6] Lalli appealed to the United States Supreme Court. That Court vacated the opinion and remanded[7] for reconsideration in light of *Trimble v. Gordon*,[8] which had been decided while Lalli's appeal was pending. On remand, the New York Court of Appeals again upheld the constitutionality of the statute.[9] On second appeal, the United States Supreme Court affirmed and HELD, a statute requiring that illegitimate children obtain a judicial determination of paternity during the alleged father's lifetime in order to be eligible for paternal intestate inheritance does not violate equal protection.[10]

The United States Supreme Court has traditionally employed a two-tiered approach in equal protection analysis of legislative enactments.[11] The primary approach in social and economic legislation has traditionally been the rational basis test.[12] Deferring to the legislature,[13] the Court has stated that when de-

---

made an order of filiation declaring paternity in a proceeding instituted during the pregnancy of the mother or within two years from the birth of the child.

"(3) The existence of an agreement obligating the father to support the illegitimate child does not qualify such child or his issue to inherit from the father in the absence of an order of filiation made as prescribed by subparagraph (2).

"(4) A motion for relief from an order of filiation may be made only by the father, and such motion must be made within one year from the entry of such order.

"(b) If an illegitimate child dies, his surviving spouse, issue, mother, maternal kindred and father inherit and are entitled to letters of administration as if the decedent were legitimate, provided that the father may inherit or obtain such letters only if an order of filiation has been made in accordance with the provisions of subparagraph (2)."

4. In the instant case the Court stated that "[a]s the New York Court of Appeals has not passed upon the constitutionality of the two-year limitation, that question is not before us." 99 S. Ct. at 524 n.5. Because petitioner had never obtained an order of filiation, the New York Court of Appeals did not consider whether the statute could constitutionally require an illegitimate to obtain the order during the pregnancy of his mother or within two years of his birth. *Id.*

5. Robert Lalli conceded that he had failed to comply with the statutory requirement. However, he urged that illegitimate children who tender convincing proof of paternity unsanctioned by court order are unfairly discriminated against by the statute. He presented evidence, including a notarized consent form for his marriage, in which Mario Lalli referred to him as "my son" and affidavits which indicated that he had been openly acknowledged and at least partially supported by Mario. *Id.* at 522.

6. *In re* Lalli, 38 N.Y.2d 77, 340 N.E.2d 721, 378 N.Y.S.2d 351 (1975).

7. Lalli v. Lalli, 431 U.S. 911 (1977).

8. 430 U.S. 762 (1977).

9. *In re* Lalli, 43 N.Y.2d 65, 371 N.E.2d 481, 400 N.Y.S.2d 761 (1977).

10. 99 S. Ct. at 528. The instant case was a 3-2-4 decision. Justice Powell wrote the plurality opinion.

11. *See* Lorio, *Succession Rights of Illegitimates in Louisiana*, 24 LOY. L. REV. 1, 9-12 (1978), in which the author notes that the two-tiered approach has been employed since the 1960's. *See generally Developments in the Law — Equal Protection*, 82 HARV. L. REV. 1065 (1969).

12. Railway Express Agency v. New York, 336 U.S. 106 (1949).

13. One commentator has noted that the rational basis test has "[i]n reality, received little more than lip service: extreme deference to imaginable supporting facts and conceivable

termining rationality, "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."[14] Accordingly, in practice the rationality test has consisted of "minimal scrutiny in theory and virtually none in fact."[15]

At the opposite extreme lies the strict scrutiny approach. Strict scrutiny is given only to those narrow classes of legislation[16] for which a court finds that the legislative scheme either affects a fundamental right[17] or establishes a classification based on suspect criteria.[18] Strict scrutiny analysis presumes the challenged statute invalid unless the state shows that a compelling state interest is furthered by the legislation[19] and no less drastic alternative is available.[20] Compliance with this stringent constitutional standard is nearly impossible, making strict scrutiny "strict in theory and fatal in fact."[21]

Although attractive in its simplicity and ease of application,[22] this two-tier approach showed signs of dilution in the late 1960's.[23] While the Court adhered nominally to a bipolar approach,[24] it initiated analyses which appeared

---

legislative purposes was characteristic of the 'hands off' attitude . . . ." Gunther, *The Supreme Court, 1971 Term — Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 21 (1972).

14. McGowan v. Maryland, 366 U.S. 420, 426 (1961). *See also* City of New Orleans v. Dukes, 427 U.S. 297 (1976); Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955); United States v. Carolene Products, 304 U.S. 144 (1938).

15. Gunther, *supra* note 13, at 8.

16. *Id.* at 8-10.

17. Fundamental rights which have been considered by the Court include the right to vote, Dunn v. Blumstein, 405 U.S. 330 (1972); the right to interstate travel, Shapiro v. Thompson, 394 U.S. 618 (1969); and the right to an appeal in a criminal proceeding, Griffin v. Illinois, 351 U.S. 12 (1956). *See generally* Goodpastor, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973).

18. Several distinct classifications have been considered "suspect" by the Court. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (alienage); Loving v. Virginia, 388 U.S. 1 (1967) (race); Hernandez v. Texas, 347 U.S. 475 (1954) (national origin). *But see* Ambach v. Norwich, 99 S. Ct. 1589 (1979) (citizenship requirement applicable to teaching in a public school need bear only a rational relationship to a legitimate state interest); Foley v. Connelie, 98 S. Ct. 1067 (1978) (alienage not a suspect class when citizenship required for becoming a police officer).

19. *See* Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

20. *See* Note, *The Less Restrictive Alternative in Constitutional Adjudication: An Analysis, A Justification and Some Criteria*, 27 VAND. L. REV. 971, 996-1006 (1974).

21. Gunther, *supra* note 13, at 8.

22. *See* Note, *Illegitimacy and Equal Protection: Two Tiers or an Analytical Grab-Bag?*, 7 LOY. CHI. L.J. 754, 757 (1976).

23. *See* Gunther, *supra* note 13, at 17. Gunther's article notes the tension produced by analytical extremes and focuses on the Court's growing discontent with the rigidity of the bipolar system.

One commentator has noted that the bipolar system "[i]s rigid because in theory it permits only two widely variant levels of scrutiny with no gradations for rights of intermediate importance. It is deficient because, as Professor Freund once remarked, the world does not move on a 'binary principle'." Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 948 n.15 (1975).

24. First, the Court continued to give lip service to the approach. For example, in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973), the Court maintained that it would only determine whether strict scrutiny was applicable. If it was not, the Court

to signal the development of an intermediate standard.[25] Several interpretations of the new standard have been offered. One view regards the emerging standard as requiring that the statutory means bear a rational relation to the legislative end.[26] Although the legitimacy of the end itself is not judicially examined, the burden is on the state to demonstrate that the legislative purpose has an actual basis in fact.[27] This burden relieves the court from the task of embarking on an equal protection analysis founded on a purely conjectural state purpose, as required by the rational basis test.[28] Another view suggests that both the statutory means and the asserted state purpose are subject to judicial inquiry.[29] This perspective contemplates that a statutory scheme which bears a rational relation to the legislative end might violate equal protection due to the invalidity of the state's purpose.[30] Finally, a sliding scale test has been proposed under which classifications are subject to various degrees of equal protection scrutiny, depending upon the court's perception of the merits of the legislative design. Under this test, a court would balance the deleterious impact of a discriminatory legislative classification against the resulting public benefit.[31]

---

would apply a rational basis test. Secondly, the Court continued to use rationality and strict scrutiny as bases for some decisions. For example, in Lindsey v. Normet, 405 U.S. 56 (1972), while rejecting the contention that shelter was a fundamental right, the Court held that under a rational basis test Oregon could permit a landlord to expedite an action for possession under certain circumstances.

25. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Levy v. Louisiana, 391 U.S. 68 (1968). See text accompanying notes 37-42 and 47-58 *infra*.

One commentator has suggested that sex and illegitimacy are two classifications that are subjected to an intermediate standard. *See* Wilkinson, *supra* note 23, at 953 n.60. To trace the development of this standard in sex discrimination cases, *see, e.g.*, Stanton v. Stanton, 421 U.S. 7 (1975) (invalidated a statute which set the age of majority for females at 18 and for males at 21); Reed v. Reed, 404 U.S. 71 (1971) (rational basis test applied to strike down Idaho statute which mandated that if two people were equally entitled to administer an estate, preference would be given males over females). *See also* Getman, *The Emerging Constitutional Principle of Sexual Equality*, 1972 SUP. CT. REV. 157; Comment, *Gender-Based Discrimination and Equal Protection: The Emerging Intermediate Standard*, 29 U. FLA. L. REV. 582 (1977).

26. Having analyzed 15 equal protection cases of the 1971 term of the United States Supreme Court, Gunther suggested that the Court generally used a narrow ground for decisionmaking. Its analysis focused on the means used by the state to effect its purpose and not on the purpose itself. However, Gunther recognized that not all of the selected cases fit the model of means analysis. Gunther, *supra* note 13, at 20-26.

27. *See* Gunther, *supra* note 13, at 21.

28. *Id.*

29. "This process involves review of the asserted end of the legislation, as well as the means by which it furthers that end. Under this standard [the demonstrable basis standard] the Court would examine the evidence and uphold the classification only upon a showing of a demonstrated rational means of advancing an interest capable of withstanding analysis. When this relationship is not proved, the law must be invalidated." Nowak, *Realigning the Standards of Review under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1081 (1974).

30. *Id.*

31. Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting) (sliding scale model); Wilkinson, *supra* note 23, at 989-91 (balancing test). The criteria to be weighed are the same in both models: the nature of the classification, the importance of the class' rights and the magnitude of the state's interests. *See, e.g.*, Weber v. Aetna Cas. & Sur. Co., 406 U.S.

No single interpretation of the intermediate equal protection standard has received general acceptance,[32] but there is consensus that the standard is still evolving.[33] This evolution is illustrated by the cases of the past decade involving challenges to statutory classifications based on illegitimacy, in which the Supreme Court has refused to apply traditional equal protection analysis.[34] Statutory schemes[35] which retain common law burdens upon illegitimates have been at issue in these cases.[36]

In *Levy v. Louisiana*,[37] the Court invalidated a statute which preserved the common law prohibition against illegitimate children recovering for the wrongful death of their mother.[38] The theoretical grounds for the decision, however, were not clear.[39] Although the Court articulated the rational basis test as the

---

164 (1972). In *Weber*, the Court came close to articulating a balancing test but apparently grounded the decision in an analysis of the means used by the state. See the discussion of *Weber* in text accompanying notes 47-52 *infra*. For a discussion of the balancing of interests in family membership cases generally and illegitimacy cases in particular, *see generally* Alito, *Equal Protection and Classifications Based on Family Membership*, 80 DICK. L. REV. 410 (1975).

32. *See* Wilkinson, *supra* note 23, at 951; Nowak, *supra* note 29, at 1081.

33. *See* Lorio, *supra* note 11, at 11; Wilkinson, *supra* note 23, at 953; Nowak, *supra* note 29, at 1081. All equal protection illegitimacy cases do not fit into an evolutionary pattern. For an example of a digression, see text accompanying notes 43-46 *infra*.

34. This line of illegitimacy cases begins with Levy v. Louisiana, 391 U.S. 68 (1968) and continues through the instant case. *See also* Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

35. These laws are the state legislatures' responses to public opinion. For example, in a survey reported in 1971, "78% would give the illegitimate equality in terms of support rights. 64% would give the illegitimate equality in terms of inheritance rights. 95% would provide support for the child beyond the father's death . . . . 87% would grant equality under welfare statutes . . . . 96% feel that the law should not disadvantage a child by reason of its illegitimate birth." H. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY 173-74 (1971). The laws have differing impacts on illegitimates from state to state. For an in-depth analysis of the state of the law in this area, *see* Lorio, *supra* note 11, at 3-6.

36. At common law the illegitimate child was *nullius filius*, the child of nobody, and could inherit nothing. Krause, *Equal Protection for the Illegitimate*, 65 MICH. L. REV. 477, 478 (1967). For an excellent historical review of the inheritance rights of illegitimates, *see generally* Comment, *Constitutional Law — Equal Protection — Denial of Illegitimate Child's Right of Inheritance from Father Who Had Acknowledged But Not Legitimated Heir Does Not Constitute a Violation of Child's Equal Protection Rights Under the Fourteenth Amendment*, 47 NOTRE DAME LAW 392 (1971).

Although some ameliorative legislation had been enacted in Louisiana, other statutes in that state retained traditional burdens on illegitimates. For example, Louisiana did not allow illegitimates to recover for the wrongful death of their mother. LA. CIV. CODE ANN. art. 918 (West 1952).

37. 391 U.S. 68 (1968).

38. *See* LA. CIV. CODE ANN. art. 2315 (West 1952). In a companion case, Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968), the Court invalidated a statute which prohibited a mother from recovering for the wrongful death of her illegitimate child.

39. For example, in addition to rationality language the Court used language which suggested that illegitimacy was a suspect classification. 391 U.S. at 71. For a discussion of illegitimacy as a suspect classification, *see generally* Gray & Rudovsky, *The Court Acknowledges the Illegitimate*, 118 U. PA. L. REV. 1 (1969).

Other language in *Levy* indicated that the rights involved were fundamental in nature: "We have been extremely sensitive when it comes to basic civil rights . . . . The rights asserted here involve the intimate, familial relationship between a child and his own mother." 391

applicable standard, the result did not comport with typical rational basis test outcomes.[40] Moreover, no inquiry was conducted for a colorable purpose with which the statute could be justified.[41] Instead, the Court found the statutory discrimination to be irrational because no conduct of the disaffected class could influence either its birth status or the mother's injury.[42]

Three years later, the Court reviewed a Louisiana statute which excluded illegitimate children from paternal intestate succession in *Labine v. Vincent*.[43] However, the Court's approach was essentially the converse of that in *Levy*. The *Labine* Court expressly declined to apply the rational basis test,[44] yet upheld the statute using characteristic rationality language. The opinion did not scrutinize the legislative means; instead, the Court emphasized judicial deference to the states' constitutional power to regulate both family life and the disposition of local property.[45] Both the analysis and outcome of *Labine* reflected rational basis principles.[46]

U.S. at 71. Under the two-tiered model, either one of these criteria would have triggered strict scrutiny. Unlike strict scrutiny, the analysis in *Levy* did not focus on whether there was a compelling state interest sufficient to override the classification or the right.

40. 391 U.S. at 71. See text accompanying notes 12-15 *supra*.

41. The Court did not mention the state's interest in its tort recovery scheme, except to note that the Louisiana Court of Appeals based its decision upholding the constitutionality of the statute on the state's interest in discouraging the birth of illegitimate children. 391 U.S. at 70.

42. *Id.* at 72. The Court stated that the illegitimates suffered for the tort done to their mother: "These children, though illegitimate, were dependent on her . . . in her death they suffered wrong in the sense that any dependent would." *Id.* In an accompanying footnote, the Court observed that under Louisiana law parents had the legal duty to support their illegitimate children, thus linking dependency with the duty to support. *Id.* at 72 n.5. The state's purpose in allowing recovery for wrongful death is to provide needed support. Alito, *supra* note 28, at 417 n.36. Consequently, the Court may have performed a means analysis and concluded that the state's purpose in providing support was not served by excluding illegitimates. See note 26 *supra*.

The analysis took a similar turn in Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968). In *Glona*, the Court apparently inquired into the relationship between the statutory means used and the state's ends, by stating in an oft-quoted passage: "We see no rational basis . . . for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Id.* at 75.

43. 401 U.S. 532 (1971).

44. *Id.* at 536 n.6. The Court differentiated the majority's analysis in *Glona* by noting that the rational basis test was used in that case. See note 38 *supra*.

45. 401 U.S. at 538.

46. The *Labine* Court distinguished *Levy* (nominally termed a rational basis case) on the grounds that *Levy* sounded in tort and the statute in *Levy* created "an insurmountable barrier to the illegitimate child." *Id.* at 535, 539. The plurality maintained that the statute did not create such a barrier because the father could have left a will, legitimized the child by marrying the mother, or stated his wish to legitimize the child in an acknowledgment of paternity. However, in 1976 the Court recognized that this argument was insufficient. Trimble v. Gordon, 430 U.S. at 774. If one of these alternatives had occurred, there would no longer be an issue of intestate inheritance by an illegitimate child. By distinguishing *Levy* and refusing to apply the rational basis test, the *Labine* Court appeared to set different standards for illegitimates

During the following term, however, the Court was not willing to accord the judicial deference to state discrimination against illegitimates which characterized *Labine*. Without clarifying the basis for its decision,[47] the Court struck down a statute withholding workmen's compensation benefits from unacknowledged illegitimate children in *Weber v. Aetna Casualty & Surety Co.*[48] Stating that it would apply the rational basis test "at a minimum,"[49] the Court proposed a balancing test which compared the "personal rights" impaired by the classification with the state purpose furthered by the legislative scheme.[50] However, the Court primarily analyzed the legislative means, questioning the effectiveness of the challenged classification in promoting the presumably legitimate state purpose.[51] In *Weber*, the Court employed a judicial inquiry into the efficacy of statutory means which the rational basis test would prohibit as an improper encroachment upon legislative prerogative.[52]

Mathews v. Lucas[53] subsequently illustrated that the *Weber* analysis was not simply tacit application of the insurmountable strict scrutiny standard.[54]

---

recovering in a tort action and illegitimates attempting to participate in paternal intestate inheritance. *See* Note, *supra* note 22, at 760-61.

47. Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972). For example, in addition to language suggesting rationality and balancing, certain language indicated that the rights involved were fundamental. Although this would normally trigger strict scrutiny, the Court declined to go that far by stating that "[w]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." *Id.* at 172.

48. 406 U.S. 164 (1972).

49. *Id.*

50. The Court noted: "The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?" *Id.* at 173.

51. The Court did not question the state's interest in protecting legitimate family relationships; rather, the question was how the statute would promote that interest. The Court concluded that the means would not help accomplish that end. *Id.* Further recognizing the state's interest in limiting its problems of proof, the Court reasoned that the additional requirement of dependency on the deceased substantially lessened potential problems of locating illegitimate children and determining parenthood claims. *Id.* at 174. The means analysis in *Weber* concluded with the pointed summarization that "[t]he state interest in legitimate family relationships is not served by the statute; the state interest in minimizing problems of proof is not significantly disturbed by our decision. The inferior classification of dependent unacknowledged illegitimates bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve." *Id.* at 175. See note 26 *supra.*

52. See text accompanying note 45 *supra.*

53. 427 U.S. 495 (1976).

54. During the four-year period between *Weber* and *Mathews*, the Court apparently used the means analysis developed in *Levy* and *Weber* to invalidate three statutes which excluded illegitimates from benefits solely because of their illegitimacy. Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973). In *Gomez*, a statute denying illegitimates a judicially enforceable right to support from their fathers was held violative of equal protection. In a brief per curiam opinion citing both *Levy* and *Weber*, the Court called the right to support "an essential right" and directed that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. at 538. Although tending toward strict scrutiny, the Court recognized the state's interest in problems of proof but stated that such problems cannot be molded into a barrier which prevents illegiti-

The *Mathews* Court upheld social security provisions which discriminated against certain illegitimates by requiring them to prove dependency upon their father's death.[55] Legitimates and other illegitimates were entitled under the provisions to a presumption of dependency and automatic benefits.[56] Using the means analysis of *Weber*, the Court found the legislative classification justifiable.[57] Moreover, the Court acknowledged the intermediate nature of the applicable standard of review by describing the standard as less than strict scrutiny but not "toothless."[58]

This newly formulated level of scrutiny was reiterated and expanded in

---

mates from obtaining support. *Id.* The Court apparently investigated the relationship between means and ends, perhaps applying a balancing test. *See* Note, *supra* note 22, at 762.

The brief per curiam opinion in *New Jersey Welfare Rights Organization* struck down welfare legislation which limited benefits to households composed of a married couple and their legitimate or adopted children. Citing *Levy, Weber* and *Gomez*, the Court simply stated: "Those decisions compel the conclusion that appellants' claim of the denial of equal protection must be sustained, for there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate." 411 U.S. at 621.

Jimenez held that a statute which denied social security benefits to specified subclasses of illegitimates violated equal protection guaranteed by the due process clause of the fifth amendment. The Court rigorously examined the statutory means finding that the statute was both "overinclusive" because it benefited some illegitimates not dependent on the disabled parent and "underinclusive" in that it precluded benefits to some illegitimates who otherwise would have qualified for them. 417 U.S. at 637. Accepting the state's interest in limiting problems of proof, the Court concluded that the statutory means would not aid the prevention of spurious claims. *Id.* at 636. The Court did not reach the issue of whether illegitimacy was a suspect classification and consequently, subject to strict scrutiny. *Id.* at 631.

55. To prove dependency, an illegitimate had to prove that his father was living with him or was contributing to the child's support at the time of the father's death. 427 U.S. at 498.

56. Illegitimates entitled to a presumption of dependency included: (1) those capable of taking from their father by intestate succession under applicable state law; (2) those whose parents had participated in a marriage ceremony which was invalid due to some non-obvious legal defect; (3) those whose father had acknowledged as his children in writing; (4) those whose paternity had been adjudicated; or (5) those supported by their father under court order. *Id.* at 499.

57. The means analysis was expressed in various ways throughout the *Mathews* opinion. For example, the Court stated that "the matter depends upon the character of the discrimination and its relation to legitimate legislative aims." *Id.* at 504. The Court explained further that the burden was on those challenging the statute to show the failure of the legislature to meet the proposed legislative aim. *Id.* at 508 n.14. The Court found that "the statutory classifications are permissible . . . because they are reasonably related to the likelihood of dependency at death." *Id.* at 509.

58. *Id.* at 510. In attempting to articulate this standard, the Court declared that classifications based on illegitimacy were not "suspect" and therefore should not be subjected to strict scrutiny. In addition, the Court noted that illegitimates were not conclusively excluded from receiving benefits, because they had the opportunity to prove dependency and thus become eligible. *Id.* at 504-06. It was on this point of conclusive exclusion that Jimenez v. Weinberger, 417 U.S. 628 (1974), was distinguished. 427 U.S. at 512. See note 54 *supra*.

Further expounding on the ability of the illegitimate to overcome the statutory burden, the Court conveyed in dictum that the inequality of the burdens between those favored with a presumption and those not favored was of no consequence and that both are "required . . . to prove the facts upon which his statutory entitlement rests." 427 U.S. at 503-04 n.7.

Trimble v. Gordon.[59] *Trimble* invalidated an Illinois statute which allowed illegitimates to inherit by intestate succession only from their mothers. Writing for the majority,[60] Justice Powell introduced a new factor into the means analysis announced in *Weber* and developed from *Levy* through *Lucas*: investigation of the state's interest purportedly furthered by the statute.[61] After determining that the primary purpose of the statute was to ameliorate the common law rule by allowing illegitimates to inherit from their mothers,[62] the Court examined three secondary purposes asserted by the state.[63] The Court accepted as valid only the state's interests in establishing a method of property disposition[64] and in avoiding spurious claims. These interests were sufficient to allow statutory exclusion of "imprecise and unduly burdensome methods of establishing paternity."[65] However, the Court held the statute in *Trimble* unconstitutionally overinclusive because it excluded significant classes of illegitimate children whose inheritance rights could be recognized without jeopardizing[66] the state's interest in property disposition.[67] Thus, the statute was not "carefully tuned to alternative considerations."[68]

Despite *Trimble's* expanded level of scrutiny, the Court declined to overrule

---

59. 430 U.S. 762, 767 (1977). Elsewhere this new level of scrutiny has been described as applying a means analysis or a balancing test. *See, e.g.*, Note, Trimble v. Gordon: *Expanding the Illegitimate's Right to Inherit*, 32 ARK. L. REV. 120 (1978) (not an undiluted balancing test but one which weighed the state's interest against the means used); Note, *Constitutional Law — Equal Protection Illegitimacy Classifications Require Reasonably Strict Scrutiny*, 11 CREIGHTON L. REV. 609 (1977) (test used required a substantial relationship between the state's purpose and its means); Comment, *Constitutional Law: Equal Protection for Illegitimates*, 17 WASHBURN L. REV. 392 (1978) ("intensified means scrutiny"); *Constitutional Law — Fourteenth Amendment — Statute Denying Illegitimates the Right to Inherit by Intestate Succession from Their Fathers Held to Be Invidious Discrimination in Violation of the Equal Protection Clause of the Fourteenth Amendment*, 23 VILL. L. REV. 405 (1977) (a "sliding scale" type of balancing test).

60. The majority included Justices Powell, Brennan, Marshall, Stevens, and White. 430 U.S. at 768.

61. *Cf.* Fiallo v. Bell, 430 U.S. 787 (1977). In *Fiallo*, decided on the same day as *Trimble*, the overriding government interest in immigration resulted in complete judicial deference to the statute in question. *See generally "Legitimate" Discrimination Against Illegitimates: A Look at* Trimble v. Gordon *and* Fiallo v. Bell, 16 J. FAM. L. 57 (1977) (the statute should have been invalidated because the government's interest was no longer overriding).

62. 430 U.S. at 768.

63. The Court rejected the state's asserted interest in promoting licit family relationships after concluding that the statutory means would not help effect that purpose. *Id.* at 768-70. (This purpose was accepted by the *Labine* Court.) *Trimble* further rejected the appellees' contention that the state had an interest in carrying out the presumed intentions of its citizens. Noting that the Illinois Supreme Court had not relied on presumed intent, the Court stated: "We do not think that §12 was enacted for this purpose." *Id.* at 775.

64. *Id.* at 770 (quoting *In re* Estate of Karas, 611 Ill. 2d 40, 48, 329 N.E.2d 234, 238 (1975)).

65. 430 U.S. at 772 n.14.

66. *Id.* at 771.

67. The Court noted that at least two types of proof, "prior adjudication or formal acknowledgment of paternity," would not jeopardize the state's interest. *Id.* at 772 n.14. It further recognized that a more exacting standard of proof for illegitimates than for legitimates was permissible because of the greater problems of proof involved. *Id.* at 770.

68. *Id.* at 772 (quoting Mathews v. Lucas, 427 U.S. at 513).

Labine. Nevertheless, it effectively invalidated the analysis used in *Labine*,[69] reaffirming only that the state has a substantial interest in the intestate disposition of property.[70]

In a vigorous dissent, Justice Rehnquist criticized the majority's intermediate level of equal protection scrutiny.[71] Emphasizing its imprecision, he viewed the intermediate standard as a potential vehicle for judicial assumption of the legislative role. The dissent advocated a return to the rational basis test[72] for all but the suspect classifications of race, national origin and alienage,[73] and for certain fundamental rights.[74]

Writing for the plurality in the instant case,[75] Justice Powell relied heavily on *Trimble* in upholding the New York intestacy statute. After determining that the state had a valid and substantial interest in the accurate and efficient disposition of property through intestacy proceedings,[76] Justice Powell noted that paternal inheritance by illegitimates involved special problems of proof.[77] These problems could dictate different statutory solutions for illegitimates

69. The Court noted that cases subsequent to *Labine* have limited the precedential force of that opinion. *Id.* at 767 n.12. Furthermore, the *Trimble* Court stated that its more recent analysis must control. *Id.* at 776 n.17.

70. The Court stated: "We reaffirm that view, but there is a point beyond which such deference cannot justify discrimination." *Id.* at 767 n.12. On the whole, it appears that the strength of the state's interest has become an important overt factor in the new intermediate level of scrutiny applied in *Trimble*.

71. Justice Rehnquist interpreted this intermediate level "to involve some analysis of the relation of the 'purpose' of the legislature to the 'means' by which it chooses to carry out that purpose." *Id.* at 781 (Rehnquist, J., dissenting). He stated that the intermediate level was a "source of confusion, since the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject." *Id.* He further contended that by employing this level, the Court had succumbed to the temptation "to hold that any law containing a number of imperfections denies equal protection simply because those who drafted it could have made it a fairer or a better law." *Id.* at 779.

72. Justice Rehnquist concluded that he would affirm on the basis of the rationality test because the Illinois statute's distinction was not "mindless and patently irrational." *Id.* at 786.

73. The intent of the framers of the equal protection clause was central to Justice Rehnquist's argument. He perceived that intent to be directed only at blacks at the time of the fourteenth amendment's ratification, logically extendable only to those of another race or national origin and arguably extendable to aliens. *Id.* at 777, 780.

74. Justice Rehnquist's examples of fundamental rights were free speech, freedom from unreasonable search and seizure, and the right to a fair trial. *Id.* at 779.

75. The plurality was composed of Justices Powell, Burger and Stewart. Justices Blackmun and Rehnquist concurred in the judgment. Justice Stewart filed a separate concurring opinion, and Justices Brennan, Marshall, Stevens, and White dissented.

76. 99 S. Ct. at 524-26. The type or strength of the state's interest was a significant factor in the decision, for the Court distinguished previous cases on this ground. *See, e.g.*, Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 535 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, (1972); Levy v. Louisiana, 391 U.S. 68 (1968). 99 S. Ct. at 525 n.6. See note 70 *supra*.

77. 99 S. Ct. at 525-26. For example, the Court compared the difficulty of proving maternity with that of proving paternity. It is not difficult to establish maternity because birth is usually a recorded event and an infant is usually cared for by the mother. *Id.* at 525. In contrast, a child's father may not be aware of his child's birth; if aware, he may be unconcerned in the absence of ties to the mother. Consequently, proving paternity may be difficult when the father is not a part of the "formal family unit." *Id.*

inheriting from their fathers than for those inheriting from their mothers, or legitimate children inheriting from either parent.[78]

The Court then examined the statutory means, considering whether they were consistent with and in substantial furtherance of the state's interests.[79] First, the Court found that the statutory means furthered the state's interest in the accurate and efficient disposition of intestate estates.[80] Accuracy was achieved by subjecting male paternity claims to a judicial forum where the factfinding process was more reliable.[81] Efficiency was achieved by creating a judicial record of the existence of an illegitimate entitled to notice and participation.[82]

Secondly, the Court distinguished the statutory means invalidated in *Trimble* from the statute's means in the instant case. Recalling that the *Trimble* statute conclusively excluded all illegitimates from paternal intestate inheritance, thereby overreaching its justifiable purpose,[83] the Court observed that in the instant case the statutory opportunity to judicially prove paternity within the father's lifetime assured that the statute did not absolutely bar illegitimates from inheritance.[84]

Finally, the Court further delineated the standard of rationality employed. Denying that its focus was on the fairness of the statute,[85] the Court declared that it is incumbent upon the legislature to balance illegitimates' rights of inheritance with important state interests.[86] The judiciary's role was neither to measure whether that balance had been accurately achieved nor to suggest a more equitable alternative.[87] Rather, the judiciary's task was to investigate whether the statute manifested "evident consistency and substantiality"[88] in relation to the state's interests to be promoted.

---

78. The Court stated that such problems warned against treating illegitimate children in the same manner as other heirs of the intestate father. *Id.*

79. "Our inquiry . . . is . . . whether the discrete procedural demands . . . on illegitimate children bear an evident and substantial relation to the . . . state interest." *Id.* at 524. The Court held that the statute was substantially related to important state interests. *Id.* at 528. See text accompanying note 88 *infra.*

80. 99 S. Ct. at 526.

81. *Id.* The Court also noted that such a process "permits a man to defend his reputation." *Id.*

82. *Id.*

83. Comparing *Trimble* to the instant case, the Court observed that the statute in *Trimble* eliminated "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity." *Id.* at 524 (quoting Trimble v. Gordon, 430 U.S. at 770-71). The result of this "complete exclusion" and "total statutory disinheritance" was that "[t]he reach of the [*Trimble*] statute was far in excess of its justifiable purposes." 99 S. Ct. at 527. The instant Court thus reinforced *Trimble's* proposition that a statute which places heavy burdens on illegitimate children must be attuned to alternative considerations. *Id.*

84. Such a statutory requirement did not unnecessarily disqualify a large number of illegitimate children. *Id.* at 526-27. The Court noted that the state courts had interpreted the statute liberally and "in such a way as to enhance its utility to both father and child without sacrificing its strength as a procedural prophylactic." *Id.* at 527.

85. *Id.* at 527.

86. *Id.* at 528.

87. *Id.*

88. *Id.*

Concurring, Justice Blackmun advocated overruling *Trimble* as indistinguishable from the instant case.[89] He endorsed the principles and result of *Labine*.[90] Justice Rehnquist concurred in the judgment for the reasons stated in his dissent in *Trimble*.[91]

The four dissenters, who were members of the *Trimble* majority,[92] focused on the injustice of the results in the instant case, declaring that any formal acknowledgment of paternity should be sufficient proof for intestate inheritance.[93] They stressed that the state's interests would not be compromised by recognizing formal acknowledgment because there is no problem of proof or opportunity for fraud when a father has formally acknowledged his child. Therefore, they concluded that the means were not substantially related to legitimate state interests.[94]

Despite the divergence of the individual justices' opinions, the instant case appears to carefully redefine an intermediate equal protection standard when considered in conjunction with *Trimble*.[95] This *Trimble-Lalli* intermediate standard departs from past equal protection approaches to illegitimacy. Al-

89. *Id.* at 529 (Blackmun, J., concurring). He added: "If *Trimble* is not a derelict, the corresponding statutes of other States will be of questionable validity until this Court passes them, one by one, as being on the *Trimble* side of the line, or the *Vincent-Lalli* side." *Id.*

90. *Id.* See notes 71-74 *supra* and accompanying text.

91. *Id.* at 528 (Rehnquist, J., concurring).

92. See note 75 *supra*. The four dissenters, with the addition of Justice Powell, composed the *Trimble* majority.

93. 99 S. Ct. at 529. The dissent's application of formal acknowledgment to the evidence in the instant case is an anomaly. Generally, formal acknowledgment filed in the probate court for inheritance purposes refers to a sworn statement identifying the child in particular. However, in the instant case, the evidence consisted of a notarized, but unsworn, one-sentence "Certificate of Consent" required for the marriage of a minor. As the plurality points out: "The important state interests of safeguarding the accurate and orderly disposition of property at death . . . could be frustrated easily if there were a constitutional rule that any notarized but unsworn statement identifying an individual as a 'child' must be accepted as adequate proof of paternity regardless of the context in which the statement was made." *Id.* at 528 n.11.

94. *Id.* at 530.

95. What appears to be an intermediate standard may be the forerunner of a comprehensive equal protection standard. *But see* Note, *supra* note 22, at 779. Comparing the two-tiered model with the intermediate approach, the difference seems to lie in the relative importance of the individual factors. For example, under the rational basis test the power and responsibility of a state to tax and spend is an extremely important state interest. See text accompanying notes 12-15 *supra*. *See, e.g.*, San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Wilkinson, *supra* note 23, at 992. Because of that importance, the means and the classifications within the means must only be rationally related to plausible state ends. The burden is on the individual to show why his right is so important or his burden so unbearable that it overcomes the demonstrated rationality of the means. On the other hand, in a strict scrutiny analysis the individual's interest is paramount. See text accompanying notes 16-21 *supra*. Either a fundamental right is being burdened or a suspect classification is being promulgated by the means. The burden shifts to the state to show an overriding interest that will justify that means. Finally, in the intermediate approach none of the factors are dominant. The role of the court becomes one of analyzing each factor within the framework of determining whether the ends justify the means. This is not a balancing test; that task is for the legislature. See text accompanying notes 85-88 *supra*. The judiciary's role is to protect the individual from unreasonable burdens while allowing the states reasonable control over their own affairs. Trimble v. Gordon, 430 U.S. at 771.

though derived from the means analysis approach begun in *Weber* and culminating in *Lucas*, the new standard does more than simply analyze the relationship between the statutory means and the state's interest. The *Trimble-Lalli* standard abandons a narrow means analysis for a three-pronged approach.[96] This approach first considers the validity and importance of the state's interests and the potential problems in effecting those interests.[97] The means are then analyzed to determine whether they demonstrate a consistent and substantial relationship to the state's interests.[98] Finally, the statute is examined to determine if it overreaches by conclusively excluding illegitimates from exercising rights routinely granted to others.[99] Therefore, under the *Trimble-Lalli* test even important state interests will not justify discriminatory means unless the means substantially promote the interest and do not overreach by completely excluding illegitimates from statutory inheritance.[100]

The new *Trimble-Lalli* standard is more favorable to illegitimates than the old means analysis. It demands a more detailed inquiry requiring the state to justify both its interests and its means. The statute in the instant case was upheld because of the substantiality of the state's interest and because the Court determined that no exceptional burdens inevitably disqualified illegitimates from intestate succession.[101] This is not, as Justice Blackmun advocated,[102] an overruling of *Trimble*, but an application of the same standard to a different set of facts. In the instant case, the illegitimate had the right to prove he was entitled to participate in his intestate father's estate by showing that he had obtained adjudication of paternity before his father's death.[103]

In contrast to statutes which give illegitimates the right to prove entitlement to intestate succession are those which leave acknowledgment of the child's paternity to the father's discretion.[104] Whether these statutes which deny

96. The standard described is similar to that suggested by Justice Marshall. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 98-109 (1973) (Marshall, J., dissenting); Richardson v. Belcher, 404 U.S. 78, 90-91 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting). In his view, the classification involved has determined the level of scrutiny. Then the Court has examined "the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification." 411 U.S. at 99 (Marshall, J., dissenting) (quoting Dandridge v. Williams, 397 U.S. at 521 (Marshall, J., dissenting)). For a discussion hypothetically applying this model, *see* Wilkinson, *supra* note 23, at 991-95.

97. See text accompanying notes 76-78 *supra*.

98. See text accompanying notes 79-82 *supra*.

99. See text accompanying notes 83-84 *supra*.

100. See notes 79 & 83 *supra*.

101. See notes 83-84 *supra*.

102. See text accompanying note 89 *supra*.

103. The Court noted that New York courts had interperted the statute liberally: "[A] father of illegitimate children who is willing to acknowledge paternity can waive his defenses in a paternity proceeding . . . or even institute such a proceeding himself . . . . The courts have excused "technical" failures by illegitimate children to comply with the statute in order to prevent unnecessary injustice." 99 S. Ct. at 527. See note 84 *supra*.

104. *See, e.g.*, MICH. COMP. LAWS §702.83 (Supp. 1977). The Michigan statute provided for paternal intestate inheritance by illegitimate children only if they had been formally acknowledged in a voluntary manner by the father.

illegitimates the opportunity to prove their own entitlement will qualify under the new federal standard is questionable. Although the requirement of formal acknowledgment does not exclude all illegitimates, if restrictively intepreted[105] the requirement may so severely limit the number of illegitimates entitled to intestate inheritance that it will overreach state purposes.[106]

In redefining an intermediate equal protection standard of review, the plurality in the instant case demonstrated an understanding of the considerations relevant to preserving the proper role of the judiciary – to protect individual rights without undue intervention in a state's affairs.[107] Consideration of a state's interests, the means used, and the rights affected provides more flexibility than does a narrow means approach, enabling realistic evaluation of statutes which are not susceptible to the bipolar traditional equal protection analysis. The *Trimble-Lalli* standard appears to be reasonable and effective and should provide guidance for future decisions.

LESLIE S. HASWELL

---

105. A restrictive interpretation of the Michigan statute, MICH. COMP. LAWS §702.83 (Supp. 1977) was recently invalidated by the Supreme Court of Michigan in Easley v. John Hancock Mut. Life Ins. Co., 70 Mich. App. 451, 245 N.W.2d 785 (1976), *reversed*, 403 Mich. 521, 271 N.W.2d 513 (1978). Both the trial court and the court of appeals held that a court order of support was insufficient to satisfy the statutory requirement. Relying on *Trimble*, the Supreme Court of Michigan reversed and held that the illegitimate child and the legitimate child were entitled to participate equally in the distribution of the father's estate. 403 Mich. at 524, 271 N.W.2d at 515. Although it did not find the statute unconstitutional, the Supreme Court of Michigan interpreted the statute in such a manner as to give the illegitimate the right to prove his own entitlement by a court order of support.

106. Although the Court specified in dicta in both *Trimble* and the instant case that a statute could require formal acknowledgment, it has not discussed the additional burden it would place on the illegitimate. Nor has the Court been presented with a restrictive interpretation as has the Supreme Court of Michigan in Easley v. John Hancock Mut. Life Ins. Co., 70 Mich. App. 451, 245 N.W.2d 785 (1976), *reversed*, 403 Mich. 521, 271 N.W.2d 513 (1978). 99 S. Ct. at 528 n.11. See notes 103 & 105 *supra*.

Although not recognized by the Court, formal acknowledgment has been substituted for a court adjudication of paternity by at least one court under the New York statute. *In re* Estate of Casper Abbati, 178 N.Y.L.J. 9-26 (Sur. Ct.) (Dec. 30, 1977). In contrast to *Abbati*, the petitioner in the instant case was only informally acknowledged by his alleged father. 99 S. Ct. at 528 n.11. *See generally* Stenger, *The Supreme Court and Illegitimacy: 1968-1977*, 11 FAM. L.Q. 365 (1978).

107. 99 S. Ct. at 528.