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Equal Protection and Municipal Services

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a citizen's interest in the availability of public schools and his interest in the availability of public swimming facilites has no constitutional basis.[40]

V. CONCLUSION

Since *Wright* was not considered by the Supreme Court, and since *Wright* was decided after the Court had rendered its opinion in *Palmer*, the Court could not possibly have considered *Wright* in determining whether the closing of Jackson's pools violated its Negro citizens' rights to equal protection. However, the Court's failure to consider *Bush* in reaching its decision in *Palmer* leaves the observer somewhat confused. It is now clear that the *effect* of closing certain public recreational facilities is the controlling factor in determining whether racial discrimination is encouraged by such official conduct. However, the effect that must follow in order to present a case of unlawful discrimination is open to conjecture. The effects in *Bush* and *Palmer* seem indistinguishable. The only distinction between the two cases seems to be their opposite holdings.

Jay Garrett

Equal Protection and Municipal Services

Sixty percent of the population of Shaw, Mississippi, was black and ninety-seven percent of the black population lived in areas where no whites resided. Ninety-eight percent of all homes that fronted on unpaved streets and ninety-seven percent of the homes not served by sanitary sewers were in black neighborhoods. There were comparable statistics in relation to street lighting, surface water drainage, water mains, fire hydrants, and traffic control apparatus.[1] These municipal services were provided out of general revenues and without any special assessments. Black citizens of Shaw brought a class action against city officials, seeking to enjoin them from continuing to discriminate on the basis of race in the provision of these municipal services.[2] The federal district court

[40] Perhaps one further distinguishing factor between *Wright* and *Palmer* is that in the latter case the state was closing *all* its pools, while in the former the state was closing only *one* of its public schools.

[1] Street lighting in the black areas was provided by bare bulb fixtures. The more modern high-power mercury vapor street lights had been installed in white neighborhoods. White areas had either underground storm sewers or a continuous system of drainage ditches, while the black neighborhoods had a poorly maintained system of drainage ditches or no surface water drainage system at all. The two areas of the town in which water pressure was most inadequate were areas where sixty-three percent of the town's black population resided. Neither the opinion of the trial court nor the opinion of the appellate court disclosed the relative distribution of fire hydrants or traffic control devices, but the appellate court noted that the evidence indicated that the black areas were "severely disadvantaged" with respect to these services.

[2] The plaintiff sought relief under 42 U.S.C. § 1983 (1971):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

found that the services were provided on a rational basis without intentional racial discrimination; injunctive relief was denied.[3] *Held, reversed and remanded*: Statistical evidence of racial discrimination in the provision of municipal services will establish a prima facie case of racial discrimination; this denial of the right to equal protection of the laws could not be justified since a compelling state interest was not shown. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

I. The Rise of the New Equal Protection

There is a growing body of law that "constitutes an increasingly significant exception to the long-established rule that a statute does not deny equal protection if it is rationally related to a legitimate governmental objective."[4] In areas within this exception to the general rule a compelling state interest must be shown in order to justify the classification. The United States Supreme Court has recognized two kinds of situations that demand the imposition of this stricter test. The first kind involves any classification based on "suspect" criteria, such as classifications based on race.[5] The second type of situation is one involving a fundamental right, such as voting.[6]

Probably as a result of the historical origin of the equal protection clause,[7] the first classification to attract attention as a suspect criterion was one based on race.[8] In *Korematsu v. United States*[9] the Supreme Court stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] courts must subject them to the most rigid scrutiny."[10] In *Korematsu* the Court concluded that a compelling state interest requiring the racial classification was present. However, in many subsequent cases the Court applied this same standard to classifications based on race and was unable to find such a compelling state interest.[11] Recently, the Court has looked with close judicial scrutiny at classifications based on wealth.[12] This development in the law is now referred to as the "new equal protection."[13]

II. Equal Protection and Municipal Services

It was decided in an early case that to confer a greater benefit upon one citi-

[3] Hawkins v. Town of Shaw, 303 F. Supp. 1162 (N.D. Miss. 1969).

[4] Shapiro v. Thompson, 394 U.S. 618, 658 (1969). For a discussion of the traditional limited interpretation of the equal protection clause see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

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

[6] Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[7] The fourteenth amendment, one of the post-Civil War amendments, was adopted in 1868.

[8] The legislative purpose of the clause was discussed as early as the Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 72 (1873): "[I]n any fair and just construction of any section or phrase of these amendments [the thirteenth, fourteenth, and fifteenth amendments], it is necessary to look to the purpose which . . . was the pervading spirit of them all."

[9] 323 U.S. 214 (1944).

[10] *Id.* at 216.

[11] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[12] McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) (*semble*). However, in Boddie v. Connecticut, 401 U.S. 371 (1971), the majority of the Court appears to have ignored the plaintiff's claim that wealth is a suspect criterion under the fourteenth amendment.

[13] *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

zen than upon another by the institution of a public improvement did not deny the latter citizen equal protection of the laws.[14] So long as both citizens had access to the improvement, any incidental discrimination was considered to be a natural consequence of official decisionmaking.[15] Thus, a "reasonableness" test was applied to the official action to determine if there was a violation of a citizen's right to equal protection,[16] and a presumption of reasonableness attached to the discretionary acts of municipal officials.[17]

The courts have recently considered two cases involving discrimination in the provision of municipal services. In *Hadnott v. City of Prattville*,[18] the plaintiff sought a ruling that city officials had violated his right to equal protection in providing street paving, fire hydrants, lighting, and a sewerage system. As to lighting and fire hydrants, the court reached the factual conclusion that they were not provided on a discriminatory basis.[19] With regard to street paving and sewerage systems, the court noted that such improvements were paid for by assessments and that the plaintiffs had never petitioned the municipal authorities requesting such improvements. Therefore, the plaintiffs were not denied their right to equal protection of the laws because "the equal protection clause of the fourteenth amendment to the Constitution was not designed to compel uniformity in the face of difference."[20] In *Coleman v. Aycock*[21] the plaintiffs alleged discrimination in the provision of sewerage systems and street paving. The court found that only slight discrimination existed, that this discrimination

[14] Fallbrook Irrigation Dist. v. Bradley, 164 U.S. 112 (1896).

[15] The general rule, therefore, is well settled that the exercise of discretionary power by the proper municipal authorities within the prescribed legal limits, relating to public improvements of the several kinds, concerning which reasonable differences of opinion may exist, in good faith, without fraud, oppression or arbitrary action, will not be reviewed by the courts.

13 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 37.25 (3d ed. 1971).

[16] Once any municipal improvement is made, the municipal authorities have much less discretion in limiting the right to use the improvement. For example, Brown v. Board of Educ., 347 U.S. 483 (1954), declared that public schools could not be segregated on the basis of race without violating the right to equal protection of the laws. Later decisions declared that a municipality could not discriminate on the basis of race in the provision of other kinds of public facilities. *See, e.g.*, Watson v. City of Memphis, 373 U.S. 526 (1963); Mayor & City Council of Baltimore v. Dawson, 220 F.2d 386 (4th Cir. 1955), *aff'd*, 350 U.S. 877 (1956). *But cf.* Palmer v. Thompson, 403 U.S. 217 (1971), which held that a city had not violated the equal protection clause when it closed its municipal swimming pools after it had been ordered to desegregate the pools.

[17] United States v. Chemical Foundation, 272 U.S. 1 (1926); Thompson v. Housing Auth., 251 F. Supp. 121 (S.D. Fla. 1966); Barnes v. City of Gadsden, 174 F. Supp. 64 (N.D. Ala. 1958), *aff'd*, 268 F.2d 593 (5th Cir. 1959).

[18] 309 F. Supp. 967 (M.D. Ala. 1970).

[19] *Id.* at 971. Apparently these services were provided with funds from the general revenues. The court held that the criteria upon which the decisions concerning the placement of street lighting and fire hydrants were based were reasonable. Therefore, there was no denial of the right to equal protection in the provision of these services. The opinion gives no indication of the statistical distribution of the street lights and fire hydrants. Under *Hawkins* if there was statistical evidence of racial discrimination in the provision of these services, this showing of reasonable criteria would seem to be insufficient to meet the strict scrutiny test which would be invoked.

[20] *Id.* at 970. In municipalities that make municipal improvements by assessment, the landowner petitions the local government for the improvement, the municipal government makes the improvement, and the landowner is assessed for the cost. When improvements are made from general revenues, the municipal government appropriates monies collected from sales, realty, and franchise taxes for making municipal improvements. Many municipalities use one method to supply one service and the other method to supply another service. *See* 14 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 38 (3d ed. 1971).

[21] 304 F. Supp. 132 (N.D. Miss. 1969).

was not based on race, and that the municipal authorities were acting "in good faith" to eliminate the discrimination. It followed that there was no violation of the plaintiffs' right to equal protection.[22]

III. HAWKINS V. TOWN OF SHAW

In *Hawkins v. Town of Shaw*[23] the federal district court concluded that the discrimination in the provision of municipal services was not based upon a racial classification.[24] That quantitative and qualitative differences existed between the services which the city provided to white residents and those which were provided to black residents was obvious. Thus, some form of discrimination existed. However, the district court decided that since there was no showing of *intent* to discriminate on the basis of race, the services were allocated on some presumptively rational basis. This finding ruled out the possibility that a suspect criterion was involved.[25] Therefore, the reasonableness test was applicable, making it unnecessary to examine the disparity with close judicial scrutiny.[26] The district court concluded that the city officials demonstrated a rational basis for the obvious inequalities such that the reasonableness test was satisfied.[27]

The Fifth Circuit applied a different test. The overwhelming statistical evidence prompted the court to recognize that "figures speak, and when they do courts listen."[28] The statistics demonstrated a prima facie case of racial discrimination.[29] Intent was simply not critical in demonstrating a classification based upon race. Because the court determined that a racial classification was involved, it proceeded to apply the compelling interest test.[30] The discretionary acts of the municipal officials could not meet the more stringent standard. Therefore, the court concluded that the petitioners were being denied their right to the equal protection of the laws.[31]

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[22] *Id.* at 146. Interestingly, the court relies upon the district court opinion in *Hawkins* to support its statement that a "good faith" effort is sufficient.

[23] 303 F. Supp. 1162 (N.D. Miss. 1969), *rev'd*, 437 F.2d 1286 (5th Cir. 1971).

[24] 303 F. Supp. at 1169.

[25] *Id.*

[26] Nor could plaintiff rely upon denial of a fundamental right to invoke close judicial scrutiny. It has never been held that there is a fundamental right to municipal services. *But cf.* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), in which the Supreme Court of California, in apparently holding the state property tax system of school financing unconstitutional, found a fundamental right to education.

[27] The district court concluded that the streets were paved according to use, that sewerage was provided to all except those who had not installed the proper receiving facilities, that the street lighting in black areas had not been shown to be inadequate, that traffic control apparatus and fire hydrants were provided equally, and that surface water drainage was a problem for both black and white residents. 303 F. Supp. at 1164-66.

[28] 437 F.2d at 1288, quoting Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966).

[29] The statistical evidence method of proof has apparently not been applied successfully in the municipal services area before. However, in the past it has been used to show discrimination in the extension of the right to vote, Gomillion v. Lightfoot, 364 U.S. 339 (1960); in the selection of a jury, United States *ex rel.* Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), *cert. denied*, 372 U.S. 915 (1963); and in the selection of teachers, United States v. Board of Educ., 396 F.2d 44 (5th Cir. 1968).

[30] *See* notes 5, 6 *supra*, and accompanying text.

[31] With respect to sewerage systems, which the court found were now being provided on a nondiscriminatory basis, the court said: "[T]he fact that extensions are now made to new areas in a non-discriminatory manner is not sufficient when the effect of such a policy is to 'freeze in' the results of past discrimination." 437 F.2d at 1290.

Having once determined that racial discrimination existed, it was necessary for the appellate court to devise a remedy. The district court had stated that it did not have the power to give the plaintiffs relief even if it found that racial discrimination existed. The Fifth Circuit ordered the town to submit a plan for the court's approval explaining how the town proposed to eliminate the results of the past discrimination. The court based its authority to promulgate such an order on section 1983, title forty-two.[32]

IV. THE IMPACT OF HAWKINS

The significance of *Hawkins* is not that the court recognized that there was a violation of the plaintiffs' rights under the equal protection clause. The manner in which the court arrived at that conclusion, however, makes the case noteworthy.

The Fifth Circuit looked to statistical evidence, an approach that had not previously been used in the area of municipal services.[33] A demonstration of intent to discriminate was unnecessary.[34] The statistical evidence itself established a prima facie case of racial discrimination, a classification that can be justified only by demonstrating a compelling state interest. The burden of proof was then shifted to the defendants to justify the discrimination by showing the existence of such an interest.[35]

The introduction of this approach into the area of municipal services will have far-reaching effects. In the past when racial discrimination was alleged, it was possible for the defendant to refute the charge by showing that there was no intent to discriminate on the basis of race. By showing that there was no intent to discriminate on the basis of race, the defendant was able to avoid the closer scrutiny which a racial classification invokes. Then, because of the presumption of reasonableness that attaches to the discretionary acts of municipal officials,[36] the defendant could usually satisfy the requirements of the rational basis test.[37] However, using the court's approach in *Hawkins*, intent to discriminate need not be directly proven.[38] Furthermore, evidence of lack of intent

[32] 42 U.S.C. § 1983 (1971). *See* note 2 *supra*. In Harkless v. Sweeney, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), the Fifth Circuit held that a municipality is a person under § 1983 for purposes of equitable relief. *Hawkins* was reheard by the Fifth Circuit, en banc, on October 21, 1971. The oral argument was directed to the issue of whether a municipality is a person for purposes of equitable relief under § 1983. There are a number of cases holding that a municipality is not a person for purposes of § 1983 relief. The leading case is Monroe v. Pape, 365 U.S. 167 (1961), in which the Supreme Court held that a municipality is not a person under the statute. In *Harkless* the court distinguished *Monroe* on the ground that in *Monroe* the plaintiff was seeking damages, while in *Harkless* equitable relief was sought. Should the court decide that a municipality is not a person for purposes of equitable relief under § 1983, equitable relief would still be available against officers of the municipality. Monroe v. Pape, 365 U.S. 167 (1961).

[33] *See* note 29 *supra*.

[34] This approach is not surprising in view of the decision in Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968). *See* note 40 *infra*.

[35] Rather than demonstrating a compelling state interest, the defendant might elect to refute the statistical evidence itself. For a discussion of the procedural implications of this case see Fessler & Harr, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 441 (1971).

[36] *See* note 15 *supra*.

[37] *See* note 4 *supra*, and accompanying text.

[38] 437 F.2d at 1292.

to discriminate is not sufficient to refute the charge.[39] By introducing statistical evidence establishing the fact of racial discrimination, the more stringent standard of the new equal protection is invoked. This is the better approach because when a racially discriminatory result is found, whether or not that result was intended seems irrelevant.[40]

Few could deny that the statistical evidence introduced in *Hawkins* clearly demonstrated a racially discriminatory effect in the provision of municipal services. The statistical evidence produced in subsequent cases may prove somewhat less shocking than the facts and figures presented to the court in *Hawkins*. It will remain for future courts to decide exactly what minimum standards statistical evidence must meet in order to establish discrimination based on race.

It should be noted that the result in *Hawkins* does not necessarily mean that all instances of disparity in the provision of municipal services can now be removed by simply introducing statistical evidence to demonstrate the disparity. This is so even if the disparity seems to be drawn on racial lines. The municipal services in the town of Shaw were provided from the general revenues.[41] Therefore, in communities in which special assessments are made for some or all of these services,[42] it would seem that, as to those improvements for which assessments are made, the citizen must still request that his property be assessed in order to provide the revenue for the improvement. If the citizen has not requested the assessment, he would not be in a position to allege discrimination in the provision of municipal services. Hence, the decision in *Hadnott v. City of Prattville*[43] would be unaffected by *Hawkins*. The source of the funds used to pay for the improvements would appear to be a legitimate point of distinction between the two cases.[44]

V. CONCLUSION

Because the decision in *Hawkins* will cause courts to look to the substantive results of an administrative decision rather than to the frame of mind of those making the decision, it may serve to remove a barrier that in the past has silently prevented black citizens from enjoying equal services from their municipal governments. It would seem that the analysis used in this case will apply

[39] In Billingsley v. Clayton, 359 F.2d 13 (5th Cir. 1966), *cert. denied*, 385 U.S. 841 (1966), the court looked to the defendant's intent and concluded that the absence of intent to discriminate rebutted the prima facie case of discrimination which plaintiffs had established with statistical evidence. However, in *Billingsley* plaintiffs were alleging intent to discriminate in the selection of jurors. In *Hawkins* plaintiffs were not alleging intent, as such, but were alleging racial discrimination in the result. This distinction may account for what appear to be inconsistent holdings.

[40] "[T]he arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme." Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920, 931 (2d Cir. 1968).

[41] 437 F.2d at 1294 (concurring opinion).

[42] *See* note 20 *supra*.

[43] 309 F. Supp. 967 (M.D. Ala. 1970). *See* notes 18-20 *supra*, and accompanying text.

[44] However, a community could not avoid the application of the *Hawkins* rationale by discontinuing the general revenue approach and initiating a special assessment scheme for all subsequent municipal improvements. The effect of such an action would be to "freeze in" the results of past discrimination. Since *Hawkins* expressly rejects this "freeze in" tactic, a town that had previously used a general revenue plan would probably be compelled to continue to use general revenues to remove the results of past discriminations. *See* note 31 *supra*.