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# Hawkins v. Town of Shaw: The Court as City Manager

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# COMMENTARY

# *HAWKINS v. TOWN OF SHAW:* THE COURT AS CITY MANAGER

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## I. INTRODUCTION

FOR over one hundred years Congress and the federal courts have pursued the goal of racial equality in the United States. In areas such as voting rights,[1] public accommodations,[2] and housing,[3] Congress and the courts have interacted closely, with broad judicial interpretations upholding major remedial legislation. Moreover, when confronted by official state sources of racial discrimination, courts have traditionally responded to the clear command of the equal protection clause of the fourteenth amendment without awaiting congressional action. *Brown v. Board of Education*[4] stands as perhaps the best known instance in which a court has, on its own, ordered the elimination of disparate treatment based on race.[5] Thus, when in *Hawkins v. Town of Shaw*,[6] the United States Court of Appeals for the Fifth Circuit ordered a small Mississippi Delta town to end discrimination in the quantity and quality of municipal services it provided its black citizens, the court acted in keeping with this tradition.

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1 Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973p (Supp. V, 1970). This statute was upheld in South Carolina v. Katzenbach, 383 U.S. 301 (1966). *See generally* Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051 (1965).

2 Civil Rights Act of 1964, §§ 201-207, 42 U.S.C. §§ 2000a to 2000a-6 (1964). This statute was upheld in Katzenbach v. McClung, 379 U.S. 294 (1964), and Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).

3 Civil Rights Act of 1866, § 1, 42 U.S.C. § 1982 (1964). This Reconstruction statute, long dormant, was broadly interpreted in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), despite the recent adoption of less sweeping housing legislation in the Civil Rights Act of 1968, 42 U.S.C. §§ 3601-19, 3631 (Supp. V, 1970).

4 347 U.S. 483 (1954).

5 There are other examples: Loving v. Virginia, 388 U.S. 1 (1967) (anti-miscegenation statute struck down); Watson v. City of Memphis, 373 U.S. 526 (1963) (integration of public park ordered); Holmes v. City of Atlanta, 350 U.S. 879, *aff'g mem.*, 223 F.2d 93 (5th Cir. 1955) (integration of municipal golf course ordered).

6 437 F.2d 1286 (5th Cir. 1971), *rev'g* 303 F. Supp. 1162 (N.D. Miss. 1969). (En banc hearing scheduled for the week of October 17, 1971).

The action in *Hawkins* was brought by a group of black citizens who alleged that the town of Shaw provided municipal services in a racially discriminatory manner. The services in issue included street paving, street lighting, surface water drainage, sanitary sewers, water mains, and fire hydrants. The complaint sought injunctive relief based on section 1983 of Title 42[7] against the town and various local officials.

After a three-day evidentiary hearing, the district court found in favor of the defendants.[8] The court recognized the established rule that classifications based on race must receive careful scrutiny[9] and apparently agreed that the municipal services actually provided the black residential areas of the Town of Shaw were inferior to those provided the white neighborhoods. Nevertheless, the district court accepted the town officials' assertions that the services were not provided in a racially discriminatory manner and found that substantial, rational bases existed to justify the disparities. In arriving at the conclusion that the town provided municipal services based entirely on non-racial considerations, the court emphasized the broad discretionary powers vested in a municipal government when it deals with local affairs[10] and relied on the presumption that local officials act in accordance with law and exercise honest judgment.[11]

The United States Court of Appeals for the Fifth Circuit reversed. By looking at the results of the administration of the various municipal

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7 42 U.S.C. § 1983 (1964). The statute reads:

> 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.

8 303 F. Supp. 1162 (N.D. Miss. 1969). In the trial court, plaintiffs had brought the action against the town of Shaw, and the town's mayor, clerk, and five aldermen. The district court, however, dismissed the town itself as a defendant after it concluded that a municipal corporation was not subject to injunctive relief under section 1983. *Id.* at 1163 n.1. The Fifth Circuit reversed, noting that under the holding of Avery v. Midland County, 390 U.S. 474 (1967), a municipal corporation is subject to the mandates of the equal protection clause. 437 F.2d at 1292.

9 303 F. Supp. at 1168. The district court recognized the cases of McLaughlin v. Florida, 379 U.S. 184 (1964), and Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968), as establishing this proposition.

10 303 F. Supp. at 1167. The court here relied upon McLaughlin v. Florida, 379 U.S. 184 (1964).

11 303 F. Supp. at 1167. Several cases were offered in support of this proposition: United States v. Chemical Foundation, 272 U.S. 1 (1926); Thompson v. Housing Authority, 251 F. Supp. 121 (S.D. Fla. 1966); Barnes v. City of Gadsden, 174 F. Supp. 64 (N.D. Ala. 1958).

services to the white and black communities in Shaw, the Fifth Circuit found that appellants had established a prima facie case of racial discrimination. Accordingly, a more stringent standard was applied to determine the constitutionality of the town's program for providing municipal services. This standard was whether the town could justify the disparities that existed by showing a compelling interest rather than merely a rational basis. Weighing all the evidence in the record, the Fifth Circuit concluded that no such compelling interest existed and hence the quantitative and qualitative differences in services violated the equal protection clause of the fourteenth amendment. The Fifth Circuit ordered the town to submit a plan to the court which would remove within a reasonable time the past effects of the discrimination and bring about the equalization of services.

Mindful that there existed no statutory set of specifications to guide a court in determining how many paved streets or what kind of sewage system a town like Shaw should have, the Fifth Circuit, as city manager, used what it deemed to be a manageable judicial standard—the quantity and the quality of the municipal services provided in the white areas of the town of Shaw.[12]

The decision in *Hawkins* has already drawn considerable public attention, with one popular periodical predicting that "the result may well approach the law's historic impact on racial discrimination in schools, jobs, housing and public accommodations."[13] While this prediction could ultimately prove to be correct, the *Hawkins* decision is more probably not the panacea for urban ghettos that some expect. Yet it undeniably involves the federal judiciary in a task reminiscent of its role in implementing the *Brown* decision.[14]

## II. The Decision in Perspective

Given the facts disclosed by the record, the Fifth Circuit's decision in *Hawkins* is hardly surprising. The population of the town of Shaw —1,500 black and 1,000 white residents—lived in almost completely racially segregated neighborhoods.[15] Municipal services such as paving,

12 437 F.2d at 1292.

13 Time, Feb. 22, 1971, at 59. More scholarly critiques of the decision have also appeared. *See* Fessler & Haar, *Beyond the Wrong Side of the Tracks: Municipal Services in the Interstices of Procedure*, 6 Harv. Civ. Rights—Civ. Lib. L. Rev. 441 (1971); Note, *Equal Protection: The Right to Equal Municipal Services*, 37 Brooklyn L. Rev. 568 (1971).

14 Implementation of *Brown* is by no means completed. Indeed, the recent "school-busing" cases, *e.g.*, Swann v. Board of Educ., 402 U.S. 1 (1971), have precipitated a new round of desegregation litigation in both the North and the South.

15 437 F.2d at 1288.

sewage, and other improvements were provided, without special property assessments, out of general funds derived from ad valorem taxes and revenues generated from the operation of the town's electrical and water systems.[16]

While the town had moved slowly, on a pay-as-you-go basis, in making municipal improvements, the disparity between the services provided the white and black residential areas by the town's officials was shocking. Nearly ninety-eight percent of all the homes that fronted on unpaved streets and almost ninety-seven percent of the homes not served by sanitary sewers were occupied by blacks.[17] All the improved street lights were installed in white neighborhoods, and other services such as surface water drainage, water mains, fire hydrants, and traffic control devices were furnished in a similarly unequal manner. The convergence of all these factors made the town of Shaw a natural choice as a defendant in a test case calling for the equalization of municipal services.

If the revelation of the facts was dramatic, the applicable legal principles are now familiar. Judge Tuttle's opinion, noting that "figures speak and when they do, Courts listen,"[18] began with the premise that the statistical disparities disclosed by the evidence in the services furnished by the town to whites and blacks established a prima facie case of racial discrimination. Such use of statistical evidence to make out a prima facie case of discrimination has long had the imprimatur of the Supreme Court,[19] and the Fifth Circuit has repeatedly approved the employment of this technique in jury exclusion[20] and voter registration[21] cases.

As originally developed in cases challenging the exclusion of blacks from juries, a disparity between the percentage of blacks on a county's tax digest (the source of potential juror names) and the percentage on its jury venire is deemed to establish a prima facie case, shifting the burden to the defendant to show that factors other than race explain the disparity.[22] Though in most municipal services equalization suits

16 *Id.* at 1294 (Bell, J., concurring).

17 *Id.* at 1288. It should be pointed out, however, that only 20% of the total black population was not served by a sanitary sewer system. *Id.* at 1290.

18 *Id.* at 1288. This apt phrase was borrowed from Chief Judge Brown in Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966).

19 *E.g.*, Whitus v. Georgia, 385 U.S. 545 (1967); Patton v. Mississippi, 332 U.S. 463 (1947); Norris v. Alabama, 294 U.S. 587 (1935).

20 *E.g.*, Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966) (en banc).

21 *E.g.*, Alabama v. United States, 304 F.2d 583 (5th Cir. 1962).

22 *See* note 19 *supra*.

a plaintiff may expect to encounter substantial difficulty in amassing data to demonstrate the disparity, there is no apparent reason why this technique is inappropriate once the facts are marshalled. Indeed, it may be the only means available to a litigant like Hawkins to prove discrimination in the face of an almost certain denial of improper motive by the officials in charge. It should be noted, however, that while the totality of the evidence presented in *Hawkins* was overwhelming, smaller disparities might be sufficient in future cases.

Having found a prima facie case of racial discrimination, the appellate court held that the district court had erred in using the traditional equal protection standard to judge the disparity in services. The traditional standard, labeled the "rational basis" test,[23] limits the inquiry to a determination of whether there is a reasonable basis upon which the classification in the action or statute in question can be justified. So long as any conceivable rational relationship between the classification and the purpose for which it was made can be discerned, the equal protection clause has not been violated. This test, designed to place relatively few restrictions on governmental action, is still utilized today.[24]

On the other hand, a new, more stringent standard is required where the discriminatory classification is attributable to race, and it was this "new equal protection" standard that the Fifth Circuit applied. This standard, called the "compelling state interest" test, has recently come to be applied in instances in which a fundamental right is being infringed[25] or in which a "suspect" classification is involved.[26] For many years, courts have recognized that classifications based on race are constitutionally suspect,[27] and within the last decade they have vigorously applied the more stringent compelling state interest standard to racial classifications.[28] This test is more stringent than the rational basis test

23 *See, e.g.*, Morey v. Doud 354 U.S. 457 (1957); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). For an authoritative study of traditional equal protection, see Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

24 *See, e.g.*, McDonald v. Board of Election, 394 U.S. 802 (1969) (traditional rational basis test applied to determine if state's failure to supply absentee ballots to unsentenced jail inmates denied equal protection); McGowan v. Maryland, 366 U.S. 420 (1961) (traditional standard applied to determine validity of state Sunday closing laws).

25 *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969) (fundamental right to travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (fundamental right to vote).

26 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (race).

27 Korematsu v. United States, 323 U.S. 214 (1944).

28 *E.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Jackson v. Godwin, 400 F.2d 529 (5th Cir. 1968).

for two reasons. First, it removes the presumption of constitutionality that generally inheres in all legislative (in this case, municipal) action.[29] Second, it shifts to the defendant governmental body the burden of proving an interest sufficiently compelling to justify the act in question.[30] Such an interest is very difficult to demonstrate, especially with regard to racial classifications, and the instant case was no exception.

After finding that a prima facie case of racial discrimination existed, the Fifth Circuit independently examined the evidence contained in the record to determine whether a compelling interest could account for the gross disparity in services. It found none. But the appellate court's examination of the record involved more than the application of a different standard of review. To paraphrase Justice Frankfurter,[31] this was a case where these judges of the Deep South could not be ignorant as judges of what they knew as men. For example, the district court had accepted the explanation that traffic needs and usage dictated extensive paving in white areas and thus justified the disparities in street paving. The Fifth Circuit refused to accept this proffered rationale, however, since the town's one engineer had never engaged in any survey to determine traffic usage. Furthermore, the court, finding that many white residential streets were paved, dismissed the transparent contention that paving the commercial areas of town had produced the disparities. Finally, the trial court's finding that many streets in black neighborhoods were too narrow to pave was belied by the existence of paved streets of the same narrow width in white sections.

The district court had dismissed the disparities in street lighting on the theory that the bare bulb fixtures in the black communities had not been shown to be inadequate. However, the appellate court thought it noteworthy that the newer, more preferable, mercury vapor lamps had been installed only in white neighborhoods. Hence, the court appropriately observed that "[i]mprovements to existing facilities provided in a discriminatory manner may also constitute a violation of equal protection."[32]

In countering the justifications offered for the disparities in sewer service, the appellate court utilized a variant of the "freezing doctrine" originally developed in the area of voting rights[33] and school desegrega-

29 McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964).

30 *Id.*

31 Watts v. Indiana, 338 U.S. 49, 52 (1949).

32 437 F.2d at 1290.

33 *E.g.*, United States v. Penton, 212 F. Supp. 193 (M.D. Ala. 1962). The Supreme Court,

tion.[34] The district court had found that the town's firm policy was now to install sewers in all newer subdivisions, regardless of racial composition. The appellate court pointed out, however, that this policy of nondiscrimination, if only applied prospectively, would do nothing to alleviate the lack of sewer service in the older, black sections. The effect, then, of the town's new policy was to freeze in the past discrimination, an impermissible result. The court was unpersuaded by the town's contention that the lack of sewers in some black areas was due to the absence of a proper housing code requiring indoor plumbing. The court thought it plain that if sewers were provided, indoor plumbing could be installed more easily.

To justify disparities in surface water drainage, the trial court had pointed to haphazard subdividing, the absence of zoning regulations, and insufficiently wide rights of way. The Fifth Circuit effectively demolished this argument, pointing out that substantially the same problems had been overcome in the town's white residential areas, and the court saw no reason why the problems should prove intractable in black areas.

Finally, the district court had found that both whites and blacks suffered from inadequate water pressure at times. The appellate court agreed but found that the inadequacy in the black communities was more severe. Once again relying on data contained in the record, the Fifth Circuit found that water pipes in black areas were noticeably smaller and less effective than those in white areas.[35]

The Fifth Circuit thus dismissed each of the alleged justifications for the disparities in services as insufficient to satisfy the compelling interest test. Arguably, the court's utilization of this test was premature since a statistical disparity creates only a prima facie case of racial discrimination. Though the burden of rebutting the presumption and of explaining the disparity does shift to the defendant, he need contradict the presumption only by direct and positive evidence establishing an alternative—and nonracial—explanation for the disparity. The burden of

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in Louisiana v. United States, 380 U.S. 145 (1965), clearly stated the purpose of the freezing doctrine when it said:

> We bear in mind that the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.

*Id.* at 154.

[34] Henry v. Clarksdale School Dist., 409 F.2d 682 (5th Cir. 1969).

[35] 437 F.2d at 1291. As to fire hydrants and traffic control devices, the district court made no findings.

proof resting on the defendant should not be tantamount to the burden of showing a compelling interest involved once a racial classification is *proved.* In *Hawkins,* the failure to make this distinction is probably immaterial since the town's proffered explanations of the disparities, as negated by the record, were insufficient to rebut even the prima facie case. However, by failing to articulate its rationale more fully, the Fifth Circuit faces the possibility of being misunderstood in a future case in which the municipality's justification is supported in the record. Thus, faced with a prima facie case, a municipality might well prevail by showing that legitimate traffic needs or considerations of street width actually formed the basis of its decision for providing certain municipal services. All that *Hawkins* unquestionably shows is that subsequent rationalizations on which the responsible officials never relied and presumptions of regularity and honest judgment will not be accepted at face value to defeat a prima facie case.

In this connection it should be noted that the record contained no direct evidence establishing bad faith, ill will, or an improper motive on the part of the town's officials in administering the programs. In a civil rights suit challenging racial discrimination, however, actual intent or motive need not be proved directly. As the Supreme Court has observed: "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."[36] In *Hawkins,* the Fifth Circuit found a violation of equal protection by looking at the *results* of the administration of the town's services over the years. Quoting extensively from the Second Circuit's decision in *Norwalk CORE v. Norwalk Redevelopment Agency,*[37] the Fifth Circuit agreed that "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[38]

Another important question raised in *Hawkins* concerns the propriety and the scope of the relief provided by the Fifth Circuit. In the district court, plaintiffs had submitted a detailed plan for expenditures on various services along with a final date, September 30, 1971, by which the requested improvements should be completed.[39] The Fifth Circuit refused to prescribe a fixed plan for the municipality to follow. Instead, the court said:

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36 Burton v. Wilmington Parking Authority, 365 U.S. 715, 725 (1961).

37 395 F.2d 920 (2d Cir. 1968).

38 *Id.* at 931, *citing* Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967).

39 303 F. Supp. at 1166-67 & n.8. *See* note 42 *infra.*

> We feel that issuing a specific order outlining exactly how the equalization of municipal services should occur is neither necessary nor proper in the context of this case. We do require, however, that the Town of Shaw, itself, submit a plan for the court's approval detailing how it proposes to cure the results of the long history of discrimination which the record reveals. We are confident that the municipal authorities can, particularly because they so staunchly deny any racial motivation, propose a program of improvements that will, within a reasonable time, remove the disparities that bear so heavily on the black citizens of Shaw.[40]

Hoping to avoid the problems inherent in judicially formulating an order that would specify in detail which streets should be paved, where new sewerage lines should be laid, or the size of water mains, the court cast the burden of devising appropriate remedial action on the town. Any proposal submitted by the town of Shaw is to be judged by its probable results according to a judicially manageable standard—"the quality and quantity of municipal services provided in the white areas of town."[41]

By ordering the town to equalize municipal services and thereby to make substantial expenditures,[42] the *Hawkins* decision perhaps exceeds any prior judicial intervention into the affairs of local government.[43] To support this broad-scale relief, the court pointed to three other recent cases involving equal protection challenges to the allocation of municipal resources. While these three decisions do lend support to the *Hawkins* rationale, none is as far-reaching. Of these, *Hadnott v. City of Prattville*[44] offers the strongest support. In that case, black residents of an Alabama city sought injunctive relief to compel local officials to equalize such municipal services as street paving, construction of sidewalks and gutters, and the installation of fire hydrants, street lights, sewerage lines and traffic lights in black neighborhoods. In rejecting the equal protection challenge, Judge Frank Johnson found that the disparity existing in these services was not attributable to racial discrimination but was explained by the city's practice of providing such services

40 437 F.2d at 1293.

41 *Id.* at 1292.

42 In the district court, the plaintiffs submitted an itemized plan for municipal expenditures: street paving—$146,000; sanitary sewer improvement—$10,000; street lighting—$3,100; and changes in water mains and fire hydrants—$105,000. 303 F. Supp. at 1167 n.8. The district court in its opinion cited the total as being an estimated $250,000. *Id.* at 1166. However, the actual sum is $264,100.

43 *See, e.g.*, Avery v. Midland County, 390 U.S. 474 (1968).

44 309 F. Supp. 967 (M.D. Ala. 1970).

only on the affirmative petition of at least fifty-one percent of the affected property owners who, in turn, pay for the improvement by special assessments on their property. On the other hand, the court concluded that the city had established and operated its municipal recreational facilities in a discriminatory manner by providing clearly superior facilities and equipment to the parks adjacent to white residential areas. Accordingly, Judge Johnson ordered the defendant city officials to equalize, within one year, the equipment, facilities, and services provided in the park used predominantly by blacks and to announce publicly by newspaper advertisements that all of the parks owned by the city were operated on a completely desegregated basis.[45] To equalize the facilities in this park, the city was ordered to construct a community house and a floodlit ball park, with stadium, to add a picnic area and landscaped grounds, and to perform regular maintenance services to the improved facilities. The opinion does not report the estimated cost of this renovation, but it is likely to be substantially less than the $250,000 estimated by the plaintiffs to equalize the municipal services at issue in *Hawkins*.[46]

The second case relied on by the *Hawkins* court was *Gautreaux v. Chicago Housing Authority*.[47] There the United States District Court for the Northern District of Illinois found that the Chicago Housing Authority had violated the equal protection clause by administering its public housing program to preserve racial segregation through unconstitutional site selection and tenant assignment policies. To remedy these defects, the court issued a detailed plan of relief designed to disestablish the segregated public housing system that these policies had created.

The final case cited by the Fifth Circuit in *Hawkins* was *Kennedy Park Homes Association v. City of Lackawanna*,[48] which involved an action by a non-profit organization of black citizens against a city in New York. The plaintiffs had been denied permission to construct a low-income housing subdivision on the ground that the municipal sewerage system could not adequately serve the proposed subdivision. The plaintiffs alleged that denying them the use of the sewerage facility was racially motivated since the city had been allowing predominantly white subdivisions to tie into the purportedly overburdened system. The Second Circuit agreed and ordered the city to allow the plaintiffs to tie into the municipal sewerage facilities.

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45 *Id.* at 975.

46 *See* note 42 and accompanying text *supra*.

47 296 F. Supp. 907, *judgment entered*, 304 F. Supp. 736 (N.D. Ill. 1969).

48 436 F.2d 108 (2d Cir. 1970).

These last two cases do lend some support to the *Hawkins* decision, but, again, certainly neither goes as far as does *Hawkins* in requiring the expenditure of large sums to equalize municipal services. Moreover, the relief ordered in *Hawkins* poses the possibility of further entangling the court in the city's fiscal affairs. Although the town of Shaw currently has no bonded indebtedness and, instead, a cash surplus of $145,000,[49] the elected officials might be forced to seek voter approval in order to increase taxes or to incur indebtedness to raise additional revenue for making the necessary improvements. What, then, if the voters refuse to approve a bond issue called for such purposes or fail to increase the millage rate to provide the needed tax revenues? There is, of course, language in the Supreme Court's opinion in *Griffin v. County School Board*[50] which suggests that a federal court may order local officials to exercise their power of taxation to raise the funds necessary for equalization. In *Griffin*, it will be recalled, a Virginia county had closed its public schools rather than operate them on a desegregated basis. In conjunction with the closing, the county provided tuition grants to the parents of children attending segregated private schools located in the county. Finding this to be violative of equal protection, the court affirmed the action of the district court in enjoining payment of the tuition grants and further noted that the district court would not only be authorized to order the reopening of the public schools, but, "if required to assure these petitioners that their constitutional rights will no longer be denied them,"[51] might also order the appropriate local officials to "exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia."[52]

Surely, ordering the reopening of a public school with adequate tax revenues to support it in order to comply with the dictates of equal protection is only a short journey removed from ordering a municipality to raise funds to pave streets and build sewers, and it is a journey that implementation of the *Hawkins* decree may make necessary.

Overall, *Hawkins* represents a commitment by the federal judiciary to make the constitutional guarantee of equal protection a viable, day-to-day reality at the level of government that most affects the lives of the mass of our citizens. Certainly, it requires no seer to predict that

49 303 F. Supp. at 1167.
50 377 U.S. 218 (1964).
51 *Id.* at 233-34.
52 *Id.* at 233.

many of the same pitfalls encountered by the federal judiciary during the last sixteen years in attempting to implement the *Brown* decision through court-ordered school desegregation plans may again be met in the *Hawkins* court's quest to insure equal treatment in the most basic services provided by local government. Critics of the decision, with some reason, will say that the undertaking is fraught with the dangers of entering a new "political thicket" not unlike that one from which the Supreme Court lately seems to be retreating.[53] Others will plausibly maintain that the correction of such inequities would have been better left to Congress which, if it deemed the problem sufficiently serious, could end such discrimination by appropriate legislation (including, perhaps, providing the necessary financial resources) pursuant to section two of the thirteenth[54] or section five of the fourteenth amendment.[55] Still others will argue that the correction of these problems should, in the interest of federalism, be left to the elected local officials who must surely grow increasingly responsive to the needs of newly enfranchised voters. In his concurring opinion in *Hawkins*, Judge Bell credits this argument by pointing out the "strengthening of the political system through the guarantee of the right to vote"[56] and by noting that substantial improvements had already been made in the services rendered blacks by the city officials of Shaw since black citizens had obtained the right to vote under the Voting Rights Act of 1965.[57]

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53 *See, e.g.*, Gordon v. Lance, 403 U.S. 1 (1971) (upholding West Virginia's requirement of a 60% affirmative vote before a political subdivision may exceed constitutional limits on bonded indebtedness and taxes); Ely v. Klahr, 403 U.S. 108 (1971) (allowing Arizona legislature a reasonable time after release of 1970 census figure to formulate a new reapportionment plan); Abate v. Mundt, 403 U.S. 182 (1971) (upholding a New York county's reapportionment plan, even though the plan creates 11.9% deviation from true population equality).

54 Section one of the thirteenth amendment, abolishing all forms of slavery, is enforceable by means of section two of the amendment:

> Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

55 That part of section one of the fourteenth amendment which guarantees equal protection of the laws is enforceable through section five of the amendment:

> Section 1. . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. CONST. amend. XIV, §§ 1, 5.

56 437 F.2d at 1294 (Bell, J., concurring).

57 42 U.S.C. §§ 1971, 1973-1973p (Supp. V, 1970). *See* note 1 and accompanying text *supra*.

In light, then, of the questionable propriety of judicial intervention, how was the Fifth Circuit able to come to its conclusion? Perhaps the best answer is that *Hawkins* posed a classic case of official racial discrimination with the almost inescapable conclusion that equal protection had been denied. As Chief Justice Warren once answered similar critics in the reapportionment battles, "a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[58] In short, it was to this great duty that the judges responded.

Judge Tuttle's opinion in *Hawkins* specifically recognized the potential controversy by noting that the court's action was subject to the argument that "the correction of this problem is not a judicial function."[59] Mindful of the "fundamental institutional problems involved" and aware "of the distinctions between the roles played by the coordinate branches of government,"[60] Judge Tuttle justified the decision to intervene by calling upon the doctrine of separation of powers with its presupposition of a system of checks and balances. Thus, to utilize "the power vested in this court to check an abuse of state or municipal power is, in effect, consistent with the separation of powers principle."[61] Despite the arduous task of implementation that probably lies ahead, *Hawkins* is in the highest tradition of federalism because it reaffirms that government at any level and in all of its activities is subject to the Constitution. Not, then, by any pretended expertise in municipal planning, but rather by discharging its duty to review and, if necessary, to compel local officials to follow the mandates of the Constitution, did the *Hawkins* court properly play its role as city manager.

## III. Implications of the Decision

If in retrospect *Hawkins* was an irresistible decision, what are its implications for future cases seeking to equalize municipal services? Quite clearly, the *Hawkins* rationale could extend comfortably to cover other related services such as police or fire protection so long as the plaintiffs are able to demonstrate a disparity in such services based on race.

However, in large metropolitan areas residential segregation increasingly tends to occur between the inner city and its surrounding suburban townships. In such cases, the quality of services provided the

58 Reynolds v. Sims, 377 U.S. 533, 566 (1964).
59 437 F.2d at 1292.
60 *Id.*
61 *Id.*

inner city residents can not be judged in comparison with that enjoyed by their suburban counterparts who reside *outside* the city limits. Even within the core city itself, *Hawkins* is limited. Although a marked disparity in services provided racially identifiable neighborhoods is encompassed by *Hawkins*, differences that relate to the relative prosperity of the neighborhood's inhabitants are not.

The complaint in the district court in *Hawkins* challenged the classification of services there as based on wealth as well as race, but this contention was dropped on appeal.[62] Nevertheless, could *Hawkins* also apply to the distribution of services according to the wealth of the recipient as measured by the amount of ad valorem taxes he pays? While there is dictum in *Shapiro v. Thompson*[63] that suggests that government may not consider prior tax contributions in providing essential services, and though the Supreme Court has on occasion characterized classifications based on wealth as "suspect,"[64] it would appear unlikely that a wealth classification is a per se denial of equal protection. First, in the past, when the compelling state interest test has been applied to classifications based on wealth, the classification has always been coupled with the denial of a fundamental right.[65] Since the right to a paved street or sanitary sewer system has not yet reached the level of a fundamental right, a classification based on wealth seems insufficient to invoke the compelling state interest test.[66] Moreover, as the concurring

62 *Id.* at 1287 n.1.

63 394 U.S. 618, 632-33 (1969):

> Appellants [Connecticut Welfare Department] argue further that the challenged classification [denying welfare payments to persons who have not resided in the state for one year] may be sustained as an attempt to distinguish between old and new residents on the basis of the contribution they have made to the community through the payment of taxes. We have difficulty seeing how long-term residents who qualify for welfare are making a greater present contribution to the State in taxes than indigent residents who have recently arrived. . . . Appellant's reasoning would logically permit the State to bar new residents from schools, parks, and libraries or deprive them of police and fire protection. Indeed it would permit the State to apportion all benefits and services according to the past tax contributions of its citizens. The Equal Protection Clause prohibits such an apportionment of state services.

64 *E.g.*, Boddie v. Connecticut, 401 U.S. 371, 386 (1971) (Douglas, J., concurring); *see* note 66 *infra.*

65 *E.g.*, Harper v. Virginia Board of Elections, 383 U.S. 663 (1966) (joined with the fundamental right to vote); Douglas v. California, 372 U.S. 353 (1963) (joined with the fundamental right to appeal a conviction).

66 *Compare* James v. Valtierra, 402 U.S. 137 (1971) (upholding, against an equal protection challenge, a California constitutional provision requiring approval by local referendum of low-cost housing projects) *with* Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating, under the auspices of equal protection, a racially discriminatory housing

opinion of Judge Bell specifically points out[67] in distinguishing the factual situation in *Hawkins* from that in *Hadnott v. City of Prattville*,[68] *Hawkins* does not purport to reach disparities in services attributable to special property assessments made at the request of the owners. Thus, a blueprint for avoiding the strictures of *Hawkins*—by means of a thinly veiled wealth classification—is readily available for those cities which provide services or make improvements to existing facilties based on the desire and ability of the property owners to pay extra for the resulting benefits.

## IV. Conclusion

The decision reached in *Hawkins v. Town of Shaw* was correct if simply because any other result would have entailed too much of a repudiation of what the courts have been so long in building. Predictably, the decision will have its greatest impact in other Southern towns like Shaw—where racial discrimination was for years an accepted and customary part of the existing order. Here the effect should be salutary in eliminating the remnants of an official code of discrimination.

However, the occasion of *Hawkins* also stands as a grim reminder that the malaise afflicting most American cities cannot be cured by the courts, however willing. Where an inadequate level of basic services is the end product of the city's lack of revenue rather than of a policy of racial discrimination, *Hawkins* provides no answer. Where the defect complained of is poor police-community relations rather than a failure to offer police protection, the solution must come from sources outside the courts. While *Hawkins* decries "the arbitrary quality of thoughtlessness," by what standard does a court review or overturn the decision of city officials to erect a new symphony hall instead of promoting a program of neighborhood arts festivals? And to what court can a poor black complain because the city denies him and his affluent white neighbor across town an effective rat control program?[69]

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referendum requirement). *See generally Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1124 (1969).

67 437 F.2d at 1294.

68 309 F. Supp. 967 (M.D. Ala. 1970).

69 The recent Supreme Court decision in Palmer v. Thompson, 403 U.S. 207 (1971), typifies this dilemma. There the Court upheld the closing of the municipal swimming pools of the city of Jackson, Mississippi, saying that such action violated neither the thirteenth amendment nor the equal protection clause of the fourteenth amendment. The city, faced with a declaratory judgment that the continued operation of segregated pools violated the fourteenth amendment, Clark v. Thompson, 206 F. Supp. 539 (S.D. Miss. 1962), had closed its public pools on the claim that they could not be operated safely or economi-

cally if integrated. In effect, the Supreme Court held that no discrimination was involved since access to the pools was being denied to both whites and blacks alike.

The same conclusion was reached by the Supreme Court in Evans v. Abney, 396 U.S. 435 (1970). After the holding of the Court, in Evans v. Newton, 382 U.S. 296 (1966), that a park devised in trust to the city of Macon, Georgia, for the enjoyment of white persons only could not continue to be operated on a racially discriminatory basis, the Supreme Court of Georgia found that "the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated," Evans v. Newton, 221 Ga. 870, 871, 148 S.E.2d 329, 330 (1966), and upheld the trial court's decision that the park reverted, therefore, to the heirs of the grantor. Evans v. Abney, 224 Ga. 826, 165 S.E.2d 160 (1968). In the majority opinion upholding the Georgia supreme court decision, Mr. Justice Black addressed himself to the equal protection problem created by the closing of the park:

> Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

396 U.S. at 445.

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