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Equal Protection As a Means of Securing Adequate Municipal Services

EQUAL PROTECTION AS A MEANS OF SECURING ADEQUATE MUNICIPAL SERVICES

Generally municipalities are allowed almost complete discretion in distributing such services as paved streets, sidewalks, gutters, sewers, traffic signals and streetlights. However, a recent line of cases, culminating in *Hawkins v. Town of Shaw*,[1] narrowed the scope of such discretion, both in theory and in practice. *Hawkins*, a class action suit by the black citizens of Shaw, Mississippi, sought an injunction against the city and its officials, forbidding what they alleged to be discrimination in the provision of municipal services in violation of 42 U.S.C. § 1983.[2] Despite a convincing array of statistical evidence, the district court decided against the plaintiffs.[3] The court applied the traditional equal protection standard and found that the actions of the local officials were based upon rational considerations and thus there were no unreasonable distinctions made between any classes of citizens. The court of appeals reversed,[4] finding that plaintiffs had made a prima facie showing of racial discrimination and that the town had failed to carry its resultant heavy burden of demonstrating a compelling state interest to justify the disproportionate distribution of municipal services between the black and white residents of Shaw.[5]

Providing municipal services has traditionally been within the police power of the municipality and therefore exclusively under the discretion of its officials. There are three basic reasons for this local

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1. 437 F.2d 1286 (5th Cir. 1971).

2. 42 U.S.C. § 1983 (1970) provides:

> 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 persons 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.

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

4. 437 F.2d 1286 (5th Cir. 1971).

5. *Id.* at 1292. The lower court erred in applying the traditional equal protection standard because with a prima facie case of racial discrimination the equal protection and due process clauses of the fourteenth amendment require a more stringent standard of review. *Id.* at 1288.

discretion: (1) it is considered a necessary aspect of the allocation of limited resources; (2) the ultimate review of the exercise of this discretion is at the polls; (3) good public administration requires freedom to innovate and to apply local knowledge and expertise to unique local problems. Thus, courts have not attempted to substitute their views for those of elected or appointed officials absent strong and clear evidence of an abuse of their discretion.[6] The general rule has been:

> no act of a municipal corporation within the sphere of its powers, which is free from fraud or collusion, and which involves the exercise of administrative or legislative discretion on the part of municipal authorities will be restrained by injunction, unless there is an abuse of discretion resulting in damage or oppression to an individual, or his property or his rights therein.[7]

However, even where an abuse of discretion has been shown, some authorities have held that the resulting damage or oppression must be shown to have been intentional on the part of the municipality or its officials, and not simply an incident of some otherwise valid action.[8] Thus, the basic view of municipal power and the wide discretion of municipal officials acts as an impediment to successful litigation by parties injured by the exercise of this authority.

Another impediment to successful action against a municipality for discrimination was the interpretation given section 1983 of the Civil Rights Act[9] by the Supreme Court in *Monroe v. Pape*.[10] Plaintiff in that case was seeking money damages from the city of Chicago and its officials for the invasion of his constitutional right to freedom from unwarranted searches. The Court held that damage suits might be brought against individual city officials, but municipal corporations were not "persons" within the meaning of the statute, so that suits against municipalities could not be brought under the statute.

Recent federal court decisions have chipped away at the formidable

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6. 2 E. McQuillin, The Law of Municipal Corporations § 10.33 (3d ed. 1955).

7. 17 E. McQuillin § 49.51.

8. Snowden v. Hughes, 321 U.S. 1 (1944); Civil Rights Cases, 109 U.S. 3 (1883).

9. 42 U.S.C. § 1983 (1970).

10. 365 U.S. 167 (1961).

wall raised by prevailing notions of municipal power and earlier court decisions involving plaintiffs like Hawkins and their municipal corporations. The first major breakthrough came in *Loving v. Virginia*,[11] when the Supreme Court held that the equal protection clause requires that any racial classification created by any governmental body be subjected to the most rigid scrutiny and that it be struck down unless necessary to effectuate an overriding public policy.[12]

The court in *Jackson v. Godwin*[13] stated that, although normally the discretion allowed state officials is wide and courts never interfere without a finding of arbitrary or unreasonable governmental action, any type of racial classification creates an entirely different situation. Because the purpose of the fourteenth amendment is to eliminate all racial discrimination by public officials, equal protection and due process require that racial classifications be regarded as constitutionally suspect and subject to the most rigid judicial scrutiny.[14]

The result of *Loving* and *Jackson* is to make the presumption of valid and proper state action more easily rebuttable if a plaintiff is able to demonstrate the existence of a racial classification. The fact that the classification may be incidental rather than intentional will not harmonize it with the fourteenth amendment.

In a recent series of cases the federal courts have expanded the scope of section 1983 and utilized injunctive relief to specifically prohibit or require different types of governmental action. For example, *Adams v. City of Park Ridge*[15] involved a suit for an injunction against the municipality to prohibit the enforcement of an ordinance that required a license in order to solicit charitable contributions. Plaintiffs charged that the city was discriminatorily administering the ordinance in violation of their civil rights. The city claimed immunity from suit under the holding in *Monroe v. Pape*.[16] The court rejected that argument, holding that *Pape* only prohibited suits for damages against municipal corporations. The reasons supporting municipal immunity from damage suits—unauthorized misconduct of officials, lack of municipal power to indemnify plaintiffs for misconduct and

11. 388 U.S. 1 (1966).
12. *Id.* at 11.
13. 400 F.2d 529 (5th Cir. 1968).
14. *Id.* at 538.
15. 293 F.2d 585 (7th Cir. 1961).
16. 365 U.S. 167 (1961).

municipal governmental immunity in the exercise of its police power —were found inapplicable to suits for injunctive relief. The court could find no apparent reason why a city should not be restrained from prospectively violating the civil rights of its citizens.[17]

Thus, courts have demonstrated a willingness to do more than just prohibit discriminatory activity by state and local governments. They have, on their own initiative, gone forward and ordered the immediate elimination of the results of past discrimination through affirmative action intended to restore equality.

Hadnott v. City of Prattville,[18] a case quite similar to *Hawkins*, was a class action by the black citizens of the city to restrain the city and its officials from continuing the alleged policy of providing municipal facilities and services on a discriminatory basis and to provide a remedy for the effects of the policy. Although the court found against plaintiffs as to municipal services because these were provided only upon a condition precedent of a petition signed by 51 per cent of the affected property owners and the willingness and ability of the same to finance the improvements, the court did find that municipal parks in the black sections of town, which were not provided only upon the above condition precedent, were inferior to those in the white areas. Additionally, the black residents were openly and actively discouraged from utilizing the park facilities in white neighborhoods.[19]

In a vivid demonstration of specificity in affirmative injunctive relief, the court in *Hadnott* ordered the town to equalize "equipment, facilities, and services" by "equipping appropriate picnic areas, constructing a community house and a floodlit ball park, with a stadium

17. *See* Holmes v. City of Atlanta, 350 U.S. 879 (1955); City of Greensboro v. Simkins, 246 F.2d 425 (4th Cir. 1957). *See also* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968), as an example of how far a federal court has been willing to go by way of injunctive relief to protect the constitutional rights of citizens against improper governmental action. The court found that defendants were guilty of a systematic effort to drive black and Puerto Rican citizens from the city by failing to follow in a non-discriminatory manner the relocation standards of 42 U.S.C. § 1455(c) (1970) which qualified a HUD grant. The court issued an injunction against the agency which required: (1) that no more residential structures in the project area be demolished until the residents had been relocated in safe and decent housing at a rent they could afford; and (2) that a plan for moderate income housing be replaced by one for low-income housing on the same parcel of land.

18. 309 F. Supp. 967 (N.D. Ala. 1970).

19. *Id. See also* Kennedy Park Homes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970).

and complete maintenance."[20] The court also ordered the town to advise its black citizens, by advertising in a paper of local circulation, "that there is no ordinance or custom or practice or policy or usage that requires Negroes to submit to any segregation solely because of race in the use of parks."[21]

Unlike *Hadnott, Hawkins* presented a clear case of racial, rather than economic discrimination in providing municipal services. The municipal services in Shaw were not financed by assessments but by general community funds. Also, the discrepancies between black and white areas were easy to point out because the segregation in the town was so complete as to create, in effect, two smaller communities, one black and one white. Ninety-eight per cent of the homes fronting on unpaved streets were in black neighborhoods,[22] as were 33 of the 35 unpaved streets.[23] There were no storm sewers in the black community, while 51 per cent of the streets in white neighborhoods were so equipped.[24] All of the newly acquired mercury vapor street lights were placed in white areas.[25]

The town's argument that services were provided on the basis of need and usage was rejected by the court because the town engineer was unable to provide the court with any statistics or information upon which such a determination might have been made by the officials.[26] Plaintiffs, however, provided the court with reliable statistical evidence that the exact opposite was true. Heavily traveled streets in black areas were without paving and modern street lights, storm sewers and traffic signals, while lightly traveled streets in white areas had all of these.[27]

The future application and possible extension of *Hawkins* may be closely related to the case of *Serrano v. Priest*,[28] which held that inferior schools resulting from the disparity in local property taxes

20. 309 F. Supp. at 975.

21. *Id.*

22. Brief for Appellants at 5, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

23. *Id.* at 6.

24. *Id.*

25. *Id.* at 7.

26. 437 F.2d at 1289.

27. *Id.*

28. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

invidiously discriminate against the poor. One could reasonably argue by analogy that inferior municipal services resulting from the economic disparity of citizens is also an invidious discrimination. Thus, by applying the reasoning of *Serrano* to *Hawkins,* economic as well as racial classifications could be deemed suspect in the future. Indeed, despite the recent decision of *James v. Valtierra,*[29] other recent Supreme Court opinions have indicated that this well may be the case.[30]

Arguably, municipal services are as important to a citizen as his right to vote and quality education for his children. The denial of any of these by the government on the basis of race, religion or economic status could be considered invidious discrimination constituting a denial of equal protection and therefore subject to strict judicial scrutiny.[31]

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29. 402 U.S. 137 (1971). The Court seems to ignore the problem of classifications based on wealth in upholding the constitutionality of article XXXIV of the California Constitution, which requires a local housing authority's selections of low-income public housing sites to be approved in community referenda.

30. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969) states: "Careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand more exacting judicial scrutiny." *Id.* at 807. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) states: "Lines drawn on the basis of wealth, like those of race . . . are traditionally disfavored." *Id.* at 668.

31. *See also* Comment, *James v. Valtierra: Housing Discrimination by Referendum,* 39 U. CHI. L. REV. 115 (1971). *See generally* Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969); Abascal, *Municipal Services and Equal Protection: Variations on a Theme by Griffin v. Illinois,* 20 HASTINGS L.J. 1367 (1969); Note, *Equal Protection: The Right to Equal Municipal Services,* 37 BROOKLYN L. REV. 568 (1971); Note, *Injunctive Relief Against Municipalities Under § 1983,* 119 U. PA. L. REV. 389 (1970).