Potholes, Lampposts and Policemen: Equal Protection and the Financing of Basic Municipal Services in the Wake of Hawkins and Serrano

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COMMENTS

POTHOLEs, LAMPPOSTs AND POLICEMEN: EQUAL PROTECTION AND THE FINANCING OF BASIC MUNICIPAL SERVICES IN THE WAKE OF HAWKINS AND SERRANO

The most concrete fact of the ghetto is its physical ugliness—the dirt, the filth, the neglect. In many stores walls are unpainted, windows are unwashed, service is poor, supplies are meager. The parks are seedy with lack of care. The streets are crowded with the people and refuse... Everywhere there are signs of fantasy, decay, abandonment, and defeat. The only constant characteristic is a sense of inadequacy. People seem to have given up in the little things that are so often the symbol of the larger things.1

[T]he poor always have bad roads whether they live in the city, in towns or on farms... 2

I. INTRODUCTION

The inadequacy of basic municipal services in poor and black areas has been long recognized and little documented.3 Unlike education, which is national priority number two in terms of aggregate spending and state and local government priority number one by any index,4 municipal serv-

3. See Ratner, Inter-Neighborhood Denials of Equal Protection in the Provision of Municipal Services, 4 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1 (1968). The documentation of these inadequacies can be effectively accomplished only at the local level. See, e.g., the documentation presented in Hawkins v. Town of Shaw, 437 F.2d 1286, 1288-91 (5th Cir. 1971) ; notes 29-32 and accompanying text infra.
4. In fiscal year 1969, for example, the following expenditure categories were the most heavily funded according to federal, state and local figures combined:
   - National Defense $84,496 (in millions)
   - Education 50,377
   - Interest on General Debt 16,992
   - Highways 15,738
   - Public Welfare 14,730
   - Police and Fire

BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, Table: EXPENDITURES OF ALL GOVERNMENTS BY FUNCTION AND LEVEL OF GOVERNMENT, cited in TAX FOUNDATION, INC., FACTS AND FIGURES ON GOVERNMENT FINANCE 16 (16th biennial ed. 1971) [hereinafter cited as FACTS AND FIGURES].

Combined state and local spending in the same year revealed the following priorities:
   - Education $47,238 (in millions)
   - Highways 15,417
   - Public Welfare 12,110
   - Health and Hospitals 8,520
   - Police and Fire 5,694

BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, Table: STATE AND LOCAL DIRECT GENERAL EXPENDITURES BY FUNCTION AND STATE, cited in FACTS AND FIGURES, supra at 132.

It should be noted that the state and local expenditures do not necessarily indicate the amount of revenues collected, because intergovernmental transfers are
ices of the not merely nice-to-have but necessary variety have been slow to receive national attention and concern primarily because they are a peculiarly local function, supported and therefore administered almost totally without the assistance of the federal or state governments. Until recently, another reason for the lack of active concern may well have been the habitual inability of observers and residents alike to distinguish the effects of governmental inaction and indifference from the overall squalor and decay which by definition constitute slum areas.

With the advent of the War on Poverty and the widespread racial unrest of the 1960s came the final loss of innocence regarding the causes of poverty and racial strife, and in recent years the mandate of the fourteenth amendment that no state shall "deny to any person . . . the equal protection of the laws" has operated to require government to recognize and, as far as possible, to correct that share of the problem for which it is responsible. However, in the field of municipal services this develop-

5. This Comment is primarily concerned with those services which provide the basic necessities of urban existence and which are funded in whole or in part out of general municipal revenues. Included in this category would be services such as police and fire protection, street and sidewalk paving, lighting and maintenance, traffic control, surface drainage facilities and water conduits, and sewerage and sanitation, including garbage removal. Generally not included are services provided by means of privately-owned public utilities because such entities are separate from local government and subject to special regulation. See generally 12 E. McQuillan, The Law of Municipal Corporations (3d ed. 1970); A. Priest, Principles of Public Utility Regulation (1969). But see note 123 infra. Health and hospitals also present many distinct and intricate questions which are beyond the scope of this Comment.

The recreational and cultural services provided by local governments will not be specifically discussed because, although they are extremely beneficial to the community, such services are not as essential as the more basic services aforementioned, and they do not therefore command favored treatment by the courts. See Palmer v. Thompson, 403 U.S. 217 (1971), noted in 17 Vill. L. Rev. 159 (1971) (a 5–4 decision upholding a local government's decision to close municipal swimming pools rather than operate them on an integrated basis). Mr. Justice Blackmun stated in Palmer: "[t]he pools are not part of the city's educational system. They are a general municipal service of the nice-to-have but not essential variety, and they are a service, perhaps a luxury, not enjoyed by many communities." 403 U.S. at 229 (Blackmun, J., concurring). Notwithstanding this view, much of the theory concerning basic services developed in this Comment would be readily applicable to attempts to equalize recreational and cultural services as well.

6. See note 75 infra.
7. See, e.g., text accompanying note 1 supra.
ment has been slow, and it seems that one reason for the snail's pace has been judicial uncertainty as to how current equal protection theories should be applied in this area which has traditionally been entrusted to the sole discretion of local officials. Another important reason has been the general lack of knowledge about the practical and financial conditions under which local governments operate.

To date the landmark and still model decision in the area is Hawkins v. Town of Shaw, in which the United States Court of Appeals for the Fifth Circuit found an equal protection violation where certain municipal services financed out of general ad valorem property tax revenues were being provided on a racially discriminatory basis. However, explosive developments in the closely-related field of education indicate that in the near future the courts will be confronted with challenges which attack the very methods by which those services are financed. Moreover, as in the case of education, with each step of this development the fine balance which preserves the separation of powers in our federal system must be carefully maintained.

The purpose of this Comment, therefore, is to consider, in the light of recent equal protection decisions, the distinct but by no means unrelated


11. As one commentator has observed:

Courts have always been reluctant to enter the field of local government because of traditional concepts of separation of powers and the courts' general feeling of incompetence to provide a better result than locally elected officials.


12. There is a growing body of commentary on the problem of unequal municipal services; however, none of the studies to date have attempted to present and analyze the relevant financing aspects of local government. See Abascal, Municipal Services and Equal Protection: Variations on a Theme by Griffin v. Illinois, 20 Hastings L.J. 1367 (1969); Ellington & Jones, Hawkins v. Town of Shaw: The Court as City Manager, 5 Ga. L. Rev. 734 (1971); 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); Ratner, supra note 3; Comment, Equal Protection in the Urban Environment: The Right to Equal Municipal Services, 46 Tul. L. Rev. 496 (1972); Note, supra note 11; Comment, Administration of Municipal Services in Light of the Equal Protection Clause, 6 U. Richmond L. Rev. 141 (1971); Note, Equal Protection: The Right to Equal Municipal Services, 37 Brooklyn L. Rev. 568 (1971); Note, The Right to Adequate Municipal Services: Thoughts and Proposals, 44 N.Y.U.L. Rev. 753 (1969); 49 J. Urb. L. 432 (1971).


14. Id. For a full discussion of Hawkins, see notes 16-61 and accompanying text infra.

15. See, e.g., Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), discussed at notes 78-88, 98 & 142 and accompanying text infra. There, the California public school financing system, based in part on property tax revenues, was held to be a denial of equal protection because it created a classification on the basis of wealth which adversely affected the "fundamental interest" of education; the quality of a child's education was made to depend upon the wealth of the taxpayers in his school district.
problems of (1) unequal distribution of municipal services on the basis of wealth, and (2) the so-called “benefit” methods of financing those services which may result in either racial or pecuniary discrimination. Proceeding from the most settled to the most problematic in terms of policy as well as law, the issues which present themselves are the following:

(1) Does racial classification in the provision of municipal services where those services are financed out of general revenues violate equal protection?

(2) Does classification according to wealth in the provision of municipal services where those services are financed out of general revenues violate equal protection?

(3) Does racial classification which results when municipal services are financed out of user charges or special assessments violate equal protection?

(4) Does classification on the basis of wealth which results when municipal services are financed out of user charges or special assessments violate equal protection?

In addition, at every point the problem must be further analyzed in terms of specific services, for all municipal services are not of equal importance in determining the quality of a neighborhood, and traditionally different services have been financed by different methods, a fact which must be borne in mind in attempting to analyze the legal implications.

At the outset, it must also be noted that due to the breadth and variety of the services and issues involved, only a grossly oversimplified analysis would produce a blanket rule for all possible situations. Instead it is hoped that by separating the problem into its component parts and attempting to indicate some of the legal and practical factors which must be considered, the processes of scholarly analysis and reasoned judicial decision-making will be assisted.

II. HAWKINS v. TOWN OF SHAW — THE MODEL SERVICE EQUALIZATION SUIT

A. Facts

Plaintiffs, poor Negro citizens of Shaw, Mississippi, brought a class action in federal district court under 42 U.S.C. § 1983 seeking

16. The original complaint had alleged discrimination on the basis of wealth as well as racial discrimination, but on appeal the claim of wealth discrimination was abandoned, 437 F.2d at 1287 n.1. Nevertheless, Judge Tuttle, who wrote the Fifth Circuit opinion, noted that wealth as well as race renders a classification highly suspect and thus deserving of exacting judicial scrutiny. Id., citing McDonald v. Board of Election Comm’rs, 394 U.S. 802 (1969). For a discussion of wealth classifications in supplying municipal services, see notes 62-111 & 152-68 and accompanying text infra.

17. The class action was authorized under rule 23 of the Federal Rules of Civil Procedure. The alleged denial of equal protection was actionable under 42 U.S.C. § 1983 (1970), which provides a civil remedy for deprivation of any individual’s
injunctive relief against the town,\textsuperscript{18} the town's mayor, clerk and aldermen, for alleged inequality in the provision of various municipal services including street paving and lighting, sanitary sewers and surface water drainage, water mains, fire hydrants and traffic control signs.\textsuperscript{19} The trial court found for the defendants on the ground that since, in its opinion, the evidence failed to support the claim of a classification based upon race, the strict standard for equal protection was inapplicable, and under the permissive standard the classification could not be found to be wholly “without rational basis.”\textsuperscript{20} On appeal, the decision was reversed on the grounds that appellants' statistical evidence made out a prima facie case of racial discrimination, and that under the applicable more stringent equal protection standard, the defenses offered by the appellees did not establish a compelling state interest sufficient to rebut the presumption against them.\textsuperscript{21} Accordingly, the court ordered the appellees to cure the constitutional rights and privileges. The basis of original federal jurisdiction was 28 U.S.C. § 1343 (1970). On appeal, the case was heard by a three-judge panel comprised of Judges Tuttle, Bell and Goldberg.

\textsuperscript{18} In Monroe v. Pape, 365 U.S. 167, 191-92 (1961), the Supreme Court had held that municipal corporations were not “persons” within the meaning of 42 U.S.C. § 1983, although municipal officers could be held personally liable for damages under that section. The district court in Hawkins dismissed the claim against the town on the ground that, apparently following Monroe, injunctive relief was not available against a municipality. Hawkins v. Town of Shaw, 303 F. Supp. 1162, 1163 n.1 (N.D. Miss. 1969). On appeal, however, the circuit court followed its own precedent of Harkless v. Sweeny, 427 F.2d 319 (5th Cir. 1970), cert. denied, 400 U.S. 991 (1971), in holding that a municipality is a person within the meaning of section 1983 for purposes of injunctive relief. 437 F.2d at 1293 & n.2. Nevertheless, the issue does not appear to be entirely settled. See Note, Equal Protection: The Right to Equal Municipal Services, 37 BROOKLYN L. REV. 568, 581-82 (1971).

\textsuperscript{19} 437 F.2d at 1288. Among the basic municipal services not involved in Hawkins were police and fire protection (except as the adequacy of fire hydrants and water pressure is related to fire protection), and garbage and refuse collection. The latter two services had been included in the original complaint but were equalized before trial. 303 F. Supp. at 1163 n.2. Sidewalks had also been included in the original complaint but they were removed from issue before trial because they were financed by means of special assessments and not out of general tax revenues. \textit{Id.} See Abascal, supra note 12, at 1369 & n.10, citing Answers to Interrogatories of Plaintiffs, Feb. 12, 1968, Hawkins v. Town of Shaw, 303 F. Supp. 1162 (N.D. Miss. 1969). Thus, all of the services at issue in Hawkins were financed out of general revenues. 437 F.2d at 1294 (Bell, J., concurring). For a discussion of inequalities which may result when services are financed by means of special assessments or user charges, see notes 134-68 and accompanying text infra.

\textsuperscript{20} 437 F.2d at 1288. The district court reviewed the various defenses asserted (see notes 41-55 and accompanying text infra), and concluded that those reasons, rather than any elements of racial discrimination, explained the disparity in services established by the plaintiffs. See text accompanying notes 26 & 27 infra. Therefore the trial court never considered whether the defenses would amount to “compelling state interests” under the strict equal protection standard. Instead, the court, in concluding that the town's actions were to be judged under the rational relation test, indulged in “all legitimate deductions to be made from the evidence running counter to statistical racial disparity.” 303 F. Supp. at 1168. For a discussion of the two-level equal protection approach, see note 21 infra.

\textsuperscript{21} 437 F.2d at 1288, 1292. The Supreme Court has tended to employ a two-level approach in reviewing claims of discrimination under the equal protection clause. In the area of economic regulation the Court has followed a policy of restraint under which a legislative classification enjoys a presumption of constitutionality and the distinctions created by a challenged statute are only required to bear some rational relation to an legitimate state interest. See, e.g., Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911). On the other hand, in cases involving “suspect classifications” such as race (see, e.g., Yick Wo v. Hopkins, 118
results of the discrimination by submitting an acceptable plan for the equalization of the services in question within a reasonable time.\textsuperscript{22}

\section*{B. The Prima Facie Case}

Although it was preceded by a growing line of cases in which courts forsook their traditional restraint\textsuperscript{23} and struck down discriminatory actions of local governments,\textsuperscript{24} \textit{Hawkins} was the first successful broad-ranging challenge to racial discrimination in the provision of municipal services.\textsuperscript{25}

To establish their prima facie case appellants introduced the stark and unfutref statistical evidence that:

\begin{enumerate}
\item In the town of 2,500 people, residential racial segregation was almost total — 97 per cent of the dwelling units occupied by blacks were located in neighborhoods in which no whites resided.
\item Nearly 98 per cent of all homes fronting on unpaved streets were occupied by blacks.
\item 97 per cent of the homes not served by sanitary sewers were in black neighborhoods; a total of 20 per cent of the black population did not have any sewer facilities.
\item The town had acquired a significant number of medium and high intensity mercury vapor street lighting fixtures, not one of which had been installed in black neighborhoods; such neighborhoods were served only by much weaker bare bulb fixtures.
\end{enumerate}

U.S. 356 (1886)), or in cases touching upon “fundamental interests” (see notes 62-71 and accompanying text \textit{infra}), the presumption of validity is reversed, and the court subjects the classification to the most rigid scrutiny. Under the strict scrutiny approach, the state must establish not only that it has a compelling interest which justifies its classification, but also that the distinctions drawn by the legislation are necessary to accomplish that interest. See, e.g., Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (Virginia statute prohibiting interracial marriages held violative of the fourteenth amendment). See generally \textit{Developments in Equal Protection}, supra note 10, at 1077-1104. Since “[t]he actions of local governments are the actions of the State,” Avery v. Midland County, 390 U.S. 474, 480 (1968) (emphasis supplied by the Court), the constitutional mandate of equal protection applies to the legislative determinations of municipal governments as well as to those of state governments.

\textsuperscript{22} 437 F.2d at 1292. For a discussion of the type of relief selected by the \textit{Hawkins} court, see notes 56-61 and accompanying text \textit{infra}.

\textsuperscript{23} See note 11 supra.

\textsuperscript{24} See, e.g., Arrington v. City of Fairfield, 414 F.2d 687 (5th Cir. 1969) (held that it is impermissible for a city to knowingly and actively participate in commercial real estate development which would result in dislocation of disadvantaged groups); Norwalk CORE v. Norwalk Rede. Agency, 395 F.2d 920 (2d Cir. 1968) (equal protection violation found where defendant did not attempt to relocate non-white residents displaced by public urban renewal project); Kennedy Park Homes Ass'n v. Lackawanna, 318 F. Supp. 669 (W.D.N.Y.), aff'd, 436 F.2d 108 (2d Cir. 1970), cert. denied, 401 U.S. 1010 (1971) (city prohibited from interfering with private plan to build low-income subdivision in an all-white ward); Gautreaux v. Chicago Housing Authority, 304 F. Supp. 736 (N.D. Ill. 1969) (desegregation order issued concerning administration of public housing program).

\textsuperscript{25} In Hadnott v. City of Prattville, 309 F. Supp. 967 (M.D. Ala. 1970), on a complaint as all-encompassing as that in \textit{Hawkins}, plaintiffs were successful only in obtaining an order forbidding discrimination in the operation and maintenance of municipal parks. For a full discussion of the \textit{Hadnott} case, see notes 134-51 and accompanying text \textit{infra}.
(5) Although drainage was a significant problem since the town was located in a delta area, the black neighborhoods had been provided with a poorly maintained system of drainage ditches or, on many streets, nothing at all; while the white community had either underground storm sewers or a continuous system of drainage ditches.

(6) Water pressure in many black areas was always insufficient since those areas were served by obsolete four, two or 1\(\frac{1}{4}\) inch water mains, while the bulk of the white community was served by six inch mains. 26

(7) Fire hydrants were sparsely furnished in black areas (which, when combined with the low water pressure, created substantial fire hazards), and there were no traffic control signs in the black neighborhoods. 27

Finally, appellants alleged that this disparity was the result of a long history of racial discrimination. 28 Judge Tuttle agreed that "[s]urely, this was enough evidence to establish a prima facie case of racial discrimination." 29

Perhaps the greatest difficulty in applying the statistical advocacy technique of Hawkins in other cases will be the sheer magnitude of the task involved when the setting shifts from Shaw, Mississippi, population 2,500, to a city of 250,000 or 2\(\frac{1}{2}\) million people. 30 At the same time, however, it is in the densely populated urban environment where municipal services acquire their most vital importance and, therefore, it is in these areas that service equalization suits would seem to be most strongly indicated. Accordingly, judicial tolerance of some mathematical inexactitude is to be expected in the framing of such cases. The Fifth Circuit, for example, has developed the subrule that the mere fact that some individuals within the allegedly disadvantaged group have received some of the services in question does not prevent a prima facie showing of discrimination, if the statistical evidence nevertheless demonstrates a

26. Brief for Appellants at 8, 10-11, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).
27. 437 F.2d at 1288.
28. 437 F.2d at 1288-91.
29. Id. at 1288. The plaintiffs' statistical method of proof was crucial to the Hawkins decision, for the court stated that "figures speak and when they do, Courts listen." Id., quoting Brooks v. Beto, 366 F.2d 1, 9 (5th Cir. 1966), cert. denied, 386 U.S. 975 (1967). With respect to establishing a prima facie case of discrimination by means of statistical proof, see generally Fessler & Haar, supra note 12. On appeal in Hawkins, the authors of that article submitted a brief as Amicus Curiae under the auspices of the Joint Center for Urban Studies of the Massachusetts Institute of Technology and Harvard University.
30. 437 F.2d at 1288. A serious practical problem which arises in attempting to employ statistics as the basis for proving discrimination in supplying services to a large city is that the cost of collecting and analyzing the mass of statistical data needed could be prohibitive, especially for the disadvantaged clients seeking relief. One possible solution is suggested by the technique used in Hawkins — contracting for the services of a recognized city planning expert who could then enlist the aid of his students in compiling the raw data. Brief for Appellees at 20, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). In future cases the expert could be compensated but preferably would be a volunteer, having student assistants who could be given academic credit for their contribution.
very substantial overall disparity in the level of services provided.\textsuperscript{81} The converse of that proposition should also be true; i.e., the fact that some members of the allegedly \textit{advantaged} group are \textit{lacking} the enumerated services should not detract from the overall showing of discrimination.\textsuperscript{82}

One further problem which must be resolved in the process of alleging a prima facie case of discrimination is the standard of equality to be applied. Plaintiffs in \textit{Hawkins} claimed that they were the victims of numerical, or so-called “input” inequality.\textsuperscript{3} However, there are two other possible standards: (1) a level of minimally adequate performance,\textsuperscript{4} and (2) a level of benefit determined according to needs (“output” or proportional equality).\textsuperscript{35} Although the courts have not enunciated clear rules to govern this question, to date the standard of “input” equality appears to be judicially favored both in measuring discrimination and in framing remedies in the area of municipal services.\textsuperscript{36}

\begin{enumerate}
\item In fact, the \textit{Hawkins} court took this position with regard to several services which the town claimed had been inadequately provided to some of the white neighborhoods as well as to the black neighborhoods; \textit{e.g.}, surface drainage facilities and water mains. 437 F.2d at 1290–91.
\item According to the concept of numerical equality, each individual should receive or bear numerically identical amounts of the benefit being distributed or the burden being imposed, without regard to other inequalities in the private situations of the recipients. For a general discussion of the concepts of numerical and proportional, or “output” equality, see \textit{Developments in Equal Protection, supra} note 10, at 1159–69. Although in practice the distinction between the two concepts may sometimes become blurred (see note 36 infra), it is fairly clear that the complaint in \textit{Hawkins} requested only substantial numerical equality. 437 F.2d at 1292 (Relief).
\item Fessler & Haar, \textit{supra} note 12, at 461. It was also argued by the defense in \textit{Hawkins} with regard to street lighting. See note 53 infra. However, it is doubtful that equality of minimally adequate performance can truly be considered “equality” by any standard, and accordingly the \textit{Hawkins} court rejected such a concept in favor of the numerical standard. 437 F.2d at 1292.
\item In contrast to the standard of numerical equality, the principle of proportional, or “output,” equality recognizes differences among men and may require numerically different treatment because of such differences. See \textit{Developments in Equal Protection, supra} note 10, at 1166–69.
\item In addition to the choice of the numerical standard in \textit{Hawkins}, similar choices were made by the courts in \textit{Haddott v. City of Prattville}, 309 F. Supp. 967, 972–73 (M.D. Ala. 1970), and \textit{Serrano v. Priest}, 5 Cal. 3d 584, 596–18, 487 P.2d 1241, 1263–66, 96 Cal. Rptr. 621, 623–25 (1971). In \textit{Serrano}, the court refused to follow \textit{McInnis v. Shapiro}, 293 F. Supp. 327 (N.D. Ill.), aff’d mem. sub nom. \textit{McInnis v. Ogilvie}, 394 U.S. 322 (1969), in which relief was denied on facts very similar to those in \textit{Serrano}, for the precise reason that plaintiffs in \textit{McInnis} had steadfastly contended that only an “educational needs” standard of equality would satisfy the demands of equal protection. Id. at 615–16, 487 P.2d at 1263–64, 96 Cal. Rptr. at 623–24.
\item Notwithstanding judicial preference for the “input” standard of equality, there are certain types of municipal services for which such a standard would be inapplicable and some version of an “output” standard would appear to be required. For example, where higher population densities tend to result in intensified degrees of risk, police and fire protection goals must be allocated on a basis of equality of protection rather than mere numerical equality of men and equipment on a simple per capita basis. \textit{See} notes 94–96 and accompanying text infra.
\item Moreover, in the case of some municipal services the distinction between numerical and proportional equality is difficult to maintain because, in addition to the simple numerical measures (\textit{e.g.}, per square foot of residential area or per capita), other variables must be considered, such as traffic usage in the case of street paving or natural topography in the case of drainage facilities. Thus, an element of “need”
\end{enumerate}
C. Defenses

Once the plaintiffs have established, by the above procedure, a prima facie case of racial discrimination in providing municipal services, the burden of producing evidence shifts to the defendants who, under the strict standard for equal protection, bear a "very heavy burden of justification." It has been suggested that the defendants at this juncture may proceed by one or more of the following approaches. They may first challenge the scope or legal sufficiency of the mandate for equality which plaintiffs have invoked; second, they may dispute the accuracy or completeness of plaintiffs' statistical evidence; or finally, they may offer proof of a rationale for the disparity in services which, if accepted, would overcome the established inference of discrimination. Since the first two approaches were largely foreclosed to defendants in *Hawkins*, their rebuttal evidence consisted primarily of explanations for the discriminatory situation, which the court examined in light of the "compelling state interest" test.

Defendants first contended that Shaw was a small community with an extremely static population and limited financial resources and, over the years, had maintained a cautious fiscal policy and shown little popular interest in modern improvements. This type of argument had been rejected as insufficient by the Supreme Court just two years previously, and was accorded an even less favorable reception by the court in *Hawkins*. Although the defendants enumerated more specific limitations, both practical and administrative, as justifications for the town's criteria is unavoidably injected into an otherwise "numerical" standard. Clearly, however, such an inevitable blurring of the distinction between the two standards of equality should not justify numerical inequality nor defeat attempts to frame feasible equalization orders. See, e.g., notes 56-61 & 92-94 and accompanying text infra.

38. See Fessler & Haar, supra note 12, at 447.
39. See notes 26-29 and accompanying text supra.
40. Appellees addressed the permissive "reasonable relationship" test rather than the strict "compelling state interest" test. Brief for Appellees at 36-46, *Hawkins* v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). However, having determined that the strict standard was applicable, the court undertook its own independent review of the evidence rather than remanding to the trial court for reargument. 437 F.2d at 1288. When questions of equal protection are at issue such independent review is fully authorized. See *Coleman* v. Alabama, 389 U.S. 22, 23 (1967); *Smith* v. Texas, 311 U.S. 128, 130 (1940). See generally Fessler & Haar, supra note 12, at 445. Perhaps then the municipality should have anticipated that possibility in its brief, notwithstanding the fact that "[o]nce the strict review standard has been attained ... the compelling interests which would sustain [the] governmental action seem to exist only in theory." *Id.* at 444.
41. Brief for Appellees at 4-5, *Hawkins* v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971). According to the district court in *Hawkins*, "[t]hat was, apparently, the kind of local government preferred by Shaw's citizens." 303 F. Supp. at 1168.
42. See *Shapiro* v. Thompson, 394 U.S. 618, 633-34 (1969) (state residency requirement for welfare eligibility held violative of equal protection; state interest in conserving the public fisc did not constitute a compelling governmental interest).
43. 437 F.2d at 1288. The Fifth Circuit did not even pause to discuss the question of administrative or financial infeasibility, evidently having satisfied itself that such a defense was not colorable in the particular circumstances. *But see* notes 47-49 and accompanying text infra.
policies, the court continually returned to two basic objections. First, said the court, while the alleged limitations might well explain a general inadequacy of services throughout the town, they could not justify the demonstrated wide disparities between services provided in the black and the white neighborhoods. More importantly, the court insisted that even assuming that the asserted explanations could be considered compelling state interests, the record simply did not establish that the town had actually and consistently followed the limiting criteria it claimed had been controlling.

It has been strongly suggested that in future similar actions this "actual and consistent use" requirement may assume importance at least equal to the "compelling state interest" test, since it precludes the necessity of elaborating upon the latter test. This development, it appears, can cut two ways. On the one hand, it increases the already near-insurmountable burden borne by the government. On the other hand, however, if actual reliance on the asserted justification can be established, the lack of strong negative precedent relating to the compelling governmental interest test may facilitate a judicial finding that such an interest is present in a proper case. This could be a highly salutary development, especially in the local government area where critical practical limitations are often decisive.

In the course of their argument the defendants also offered an explanation with respect to the town's sanitary sewer system to the effect that the town had been forced to bypass the older black residential areas because of its "firm policy" to extend the service promptly into the newly-built subdivisions developed for both races. In concluding that

44. For example, the defendants asserted that streets were paved and street lights provided according to traffic needs and usage, both of which were low in Negro areas, and that in addition, many of the streets on which the blacks lived were too narrow to pave. They also pointed to the serious drainage problems caused by the town's flat, nonporous soil as a justification for the demonstrated inadequacy of drainage facilities in plaintiffs' neighborhoods. 437 F.2d at 1289-91.

45. For example, the court observed that although narrow streets in the black areas had not been paved, streets of the same width in white neighborhoods were paved. Similar observations were made with reference to the differing quality of drainage facilities in the black and the white sections.

46. In addition to observations noted above (note 45 supra), the court remarked that the town's engineer had no actual knowledge of traffic density or usage in the black areas, and that while commercial areas in the white part of town had high intensity mercury vapor street lighting, commercial areas in the Negro sections were not similarly supplied, indicating the inconsistent application of the town's asserted servicing policies if such policies existed at all.

47. See Fessler & Haar, supra note 12, at 445.

48. See notes 21 & 40 supra.

49. Financial limitations especially are of critical importance at the local government level, particularly with respect to services which are not subsidized by intergovernmental transfers. See notes 112-20 and accompanying text infra. In this connection it should be noted that considerations which cannot be deemed compelling governmental interests at the national or state levels because of the flexibility of their resources may in fact constitute compelling interests at the local level because of the severe financial and political limitations under which local governments operate.

50. Brief for Appellees at 31-32, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).
such a “subdivision capture policy” did not constitute a compelling jus-
tification, the court said that even assuming the doubtful proposition
that such a firm policy existed, “the 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.”
This ruling, while important in Hawkins, may be even more significant
when considered in the context of the “benefit” financing of certain
services.

A final defense intimated by appellees was that since the evidence
did not support a finding of any bad faith or intent to discriminate, no
discrimination should be inferred. It is by now settled law that in a
strict scrutiny application of the equal protection guarantee such pro-
testations are of absolutely no value and only a discriminatory result
need be shown. Consequently, Judge Tuttle had little trouble disposing
of the matter.

D. Relief

Since it was treading a relatively novel path of encroachment upon
local governmental interests, the Hawkins court approached the question
of relief “not unaware of the fundamental institutional problems in-
volved.” Said the court:

The need for judicially discoverable and manageable standards as
well as an awareness of the distinctions between the roles played
by the coordinate branches of government must, of course, be fore-
most in our mind. Nevertheless, having carefully considered the
problems involved, we feel this case warrants judicial intervention.

With respect to the question of judicially manageable standards, the
court explained that although it had no statutory guidelines or official
regulations which clearly defined the exact level of each service to be re-
quired, it had what it considered to be a very reliable yardstick, namely, the
quantity and quality of services provided to the white residents of Shaw.
This yardstick could be used with confidence because, as the court ob-

51. 437 F.2d at 1290.
52. See notes 145–51 and accompanying text infra.
53. Brief for Appellees at 8, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th
Cir. 1971).
54. See, e.g., Williams v. Illinois, 399 U.S. 235, 242 (1970); Griffin v. Illinois,
351 U.S. 12, 17 n.11 (1956); Jackson v. Godwin, 400 F.2d 529, 538-39 (5th Cir. 1968);
See generally Abascal, supra note 12, at 1381-82.
55. 437 F.2d at 1291-92. Appellees relied upon two additional defenses: (1)
since the street lights in the black sections were adequate, there was no equal pro-
tection violation; and (2) the disparity in sewerage facilities was due to the lack
of proper zoning regulations requiring residents to have indoor plumbing. To the
first argument the court replied that “[i]mprovements to existing facilities provided
in a discriminatory manner may also constitute a violation of equal protection”
(437 F.2d at 1290 (emphasis supplied by the court)); and regarding the second
argument the court stated that it was simply circular reasoning, and no justification,
To assert that since indoor plumbing was not required, sewers were not provided. Id.
56. 437 F.2d at 1292.
57. Id.
served, the black and white areas in Shaw did not differ significantly in need or expectations. Clearly, however, so simple a standard could not be applied in a large metropolitan area, where population densities, property uses, and even topography and degree of development can differ widely in various sections. Therefore, as the number of service equalization suits proliferates, so also will the variety of remedies devised, and this should prove to be an area in which imaginative advocacy can be utilized to great advantage.58

The problem of separation of powers, which is critical in cases such as Hawkins,59 is basically the question of whether a public decision is to be made by the bench or through the ballot. In remanding the case with directions for the town officials to submit an equalization plan for court approval, the court struck a neat balance between legislative and judicial interests, preserving as much of the former as possible. To Judge Bell, concurring, it was this aspect of the decision which was most meritorious for, rather than seeking a political resolution of the whole problem of the unequal distribution of municipal services as the district court had done,60 the decision of the court of appeals provided ample opportunity for the democratic process to function without sacrificing basic constitutional guarantees.61

E. Summary

The constitutional significance of Hawkins v. Town of Shaw is that it has satisfactorily answered the question whether a racial classification in furnishing municipal services requires the application of the restrictive standard of equal protection, assuming such discrimination can be estab-

58. See, e.g., Note, The Right to Adequate Municipal Services: Thoughts and Proposals, 44 N.Y.U.L. Rev. 753, 763 (1969). The author suggests that formulas could be developed for each specific municipal service similar to the "one man, one vote" formula employed in reapportionment cases. Such formulas would take into account the various factors which are properly considered in the distribution of each service. While imaginative solutions are needed, the problem posed by judicial reluctance to employ a "needs" standard of equality must also be kept in mind. See note 36 supra.

59. See cases cited notes 24 & 25 supra. The cases cited therein demonstrate the courts' concern with the separation of powers problem.

60. 303 F. Supp. at 1169. Apparently the district court was strongly influenced by the fact that the black population of Shaw was not a minority but had voting power approximately equal to that of the whites. Id. However, Judge Bell observed that the Negroes did not obtain the vote until the enactment of the Voting Rights Act of 1965, 42 U.S.C. § 1971 (1970), and that the first Negro official had been elected to city council only within the past year. 437 F.2d at 1295 (Bell, J., concurring).

61. 437 F.2d at 1294-95 (Bell, J., concurring). The wisdom of taking such a middle-line approach to relief is emphasized by the fact that the main cause of inequality in supplying municipal services has been the political impotence of the disadvantaged groups. "As a generalization, it seems safe to say that the inadequacy of municipal services in large areas of both rural and urban communities is a result of the ineffective or non-existent political representation of those who live in those areas." Ahascal, supra note 12, at 1368. In the town of Shaw there was a newly-formed bi-racial planning committee, and as Judge Bell approvingly noted, the requirement of an equalization plan would give the governing authorities, as assisted by the planning committee, the opportunity to arrive at a constitutionally acceptable plan through the participatory process. 437 F.2d at 1295 (Bell, J., concurring).
lished and the services are financed out of general tax revenues. The practical significance of *Hawkins* is that it is a true test case, providing the basic prototype upon which future litigants can structure their lines of attack and defense. It has been discussed in full detail in this section because in the succeeding sections the focus shifts to the initial question of whether certain other factual situations can qualify for strict scrutiny review. If that question can be answered in the affirmative, the model of *Hawkins* can provide the starting-point for litigation of those cases as well.

III. We All Classifications — Tax Financing

A. General Theory

Although it appears that courts and commentators generally agree on the proposition that a classification which amounts to a “suspect classification” or adversely affects a “fundamental interest” must be subjected to the “most rigid scrutiny,” there is almost equally general disagreement as to what the relationship is or ought to be between “suspect classifications” and “fundamental interests” in order to qualify for application of the strict equal protection standard. Thus, a showing of racial discrimination by a state is always sufficient to require strict scrutiny without consideration of the fundamental interest factor, but although some decisions have suggested that the same might be true of wealth classifications, the actual holdings have not gone that far. It appears that even

62. See note 21 supra. The “most rigid scrutiny” language is from *Korematsu v. United States*, 323 U.S. 214, 216 (1944), which involved wartime restrictions upon persons of Japanese lineage.

63. Compare *Developments in Equal Protection*, supra note 10, at 1120-21 (proposing a gradient approach to the interrelationship between the two concepts), with *Michaelman, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 25-28 (1969) (arguing that the wealth classification decisions to date can all be explained simply as statements as to the importance of the interests involved rather than as holdings creating a separate doctrine forbidding pecuniary discrimination).


There, the Supreme Court stated:

> [A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . a factor which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.


Judicial confidence in the propriety of legislative and administrative judgments is often misplaced when the vital interests of the poor and of racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes . . . because of the abiding danger that the power structure . . . may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities, and the poor, than would otherwise be necessary. 269 F. Supp. at 507-08 (footnotes omitted).

66. For example, *Harper* involved the “fundamental interest” of voting as well as a wealth classification (see note 67 infra), while *Hobson* was primarily a case of
though wealth classifications are indeed considered suspect, they must also adversely affect a “fundamental interest” before strict scrutiny will be applied.\textsuperscript{67} For some time, it appeared that the “fundamental interest” category might be limited primarily to interests in the criminal justice system and voting rights,\textsuperscript{68} but in a current wave of cases beginning with \textit{Serrano v. Priest}\textsuperscript{69} public education has been held to constitute a “fundamental interest” for purposes of equal protection. In the wake of these decisions the question arises with more insistence than before: Are there not other traditional municipal services financed out of general revenues which can be deemed “fundamental interests” and which therefore may not be provided in a manner which discriminates according to wealth?

The initial question to consider in making the above inquiry is, what is a “fundamental interest?” Although it is possible at this time to catalogue the interests which have been held “fundamental” in the equal protection context,\textsuperscript{70} it is much more difficult to discover a unifying theory to explain such determinations. Indeed, the courts themselves have treated the cases on an ad hoc basis without formulating such a theory, and it seems that the only common thread in those decisions is the courts’ belief that the favored interests are simply more important than others because of the severity of the detriment incurred when such interests are abridged.\textsuperscript{71} Despite the fact that such an approach is too imprecise to be considered a legal standard, it may nonetheless afford at least an initial guideline which can then be augmented by the reasoning in \textit{Serrano} in examining the question of municipal services as “fundamental interests.”


\textsuperscript{70} \textit{See note 67 supra.}

\textsuperscript{71} \textit{See Developments in Equal Protection, supra} note 10, at 1130.
B. Fire and Police Protection

In terms of importance to the individual and to society and the corresponding severity of detriment when denied, it is clear that education, voting and interests in the criminal process are primary concerns. But is it not also true that adequate food, clothing, housing, gas, water, electricity and fire and police protection are the basic elements of survival, especially in a dense urban environment, and are therefore equally important interests? Why, then, should they not all be considered “fundamental interests?” The obvious answer is that the organization of American society is in the form of a “free enterprise democracy,”72 where most of the necessities of life are to be acquired in the marketplace by means of the pricing principle and where, in theory at least, each individual or family is expected to earn sufficient income to provide for their basic needs in that manner.73 There is no constitutional “right” of survival. Nevertheless, there are some necessities which have been removed from the competition of the marketplace, either by the courts or by governments themselves, and which have been required to be provided out of public revenues without reference to the wealth of the recipients. Such is the case with the interests which have been deemed “fundamental” in the equal protection decisions.74 Such is also the case with fire and police protection, which next to education are the traditional mainstay of municipal services, and which are nearly always provided, at great expense, wholly out of the public coffers.75

73. See Michaelman, supra note 63, at 12.
74. See generally Michaelman, supra note 63, at 9-13.
75. Municipal fire and police departments were firmly established at the beginning of this century. See, e.g., State v. Evans, 161 Mo. 95, 61 S.W. 590 (1901) (discussing the importance of the police force and its origins in the common law); 16 E. McQuillan, THE LAW OF MUNICIPAL CORPORATIONS § 45.02, at 630 n.33 (3d ed. rev. 1963). The McQuillan treatise notes that “[i]n 1902 it was estimated that in proportion to population the fire force of this country was nearly four times that of Germany or France, and about three times that of England.” Id.

Raw expenditure figures show that throughout this century fire and police have constituted a major share of the local government budget:

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<td>1940</td>
<td>2,263</td>
<td>780</td>
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<td>1948</td>
<td>4,298</td>
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<td>1956</td>
<td>11,082</td>
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<td>3,358</td>
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<td>1,898</td>
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<td>1965</td>
<td>22,382</td>
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<td>3,317</td>
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<td>1969</td>
<td>34,934</td>
<td>5,003</td>
<td>5,646</td>
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Bureau of the Census, U.S. Dept of Commerce, Table: Local Direct Expenditures for Own Functions, Selected Fiscal Years 1902-1969, cited in Facts and Figures, supra note 4, at 222. Moreover, in view of the fact that unlike fire and police services, the amounts available for highways, public welfare, and health and hospitals as well as education include heavy federal and state subsidies (see Advisory Comm’n on Intergovernmental Relations, State and Local Finances — Significant
Thus, fire and police protection can be distinguished from such necessities as housing and electricity because the latter are distributed on the pricing principle (although government is often heavily involved). On the other hand, fire and police protection are also distinguishable from other municipal services such as street paving, lighting and cleaning, sewers and drainage, traffic control and garbage collection for two reasons. First, while in the aggregate such “other services” are necessary for urban existence and are therefore extremely important, individually their absence would not create a detriment as severe as loss of fire or police protection. Secondly, these other services have often been provided on a quasi-pricing principle, indicating the somewhat lesser public priority accorded them by municipal governments themselves. In sum, there is a strong analogy between education and fire and police services, both in their actual importance to the individual and to society and in the priority accorded them by municipal governments, as reflected in their similar levels and methods of funding.

Considered in conjunction with the “severity of the detriment” approach, the reasoning in Serrano supports the conclusion that at least police protection, and probably fire protection as well, should be classed with education as “fundamental interests.” For example, one of the Serrano court’s techniques was to compare the purposes and importance of other “fundamental interests” with those of education. Thus, it ob-

76. For a general discussion of benefit financing, see notes 120-33 and accompanying text infra. Special assessments are often levied to finance local street services such as original grading, construction and paving, widening, curbing and guttering, and for the original construction and sometimes the maintenance of sidewalks. 14 E. McQuillan, THE LAW OF MUNICIPAL CORPORATIONS § 38.12, at 68 (rev. vol. J. Lattal ed. 1970). In addition, where local law permits, special assessments have been charged for street sprinkling and cleaning (id. § 38.22, at 91), for the construction of local sewers, drains and ditches, and for the replacement of such facilities should they become inadequate (id. §§ 38.24 to 38.25a, at 93-102), for the erection of street lights (id. § 38.26, at 102), and for the installation of water pipes for the purpose of distributing water to a particular area. Id. § 38.27, at 103-06.

User charges are imposed for all manner of municipal services, including especially sanitation services such as sewerage disposal, waste collection, street cleaning and snow removal. See G. Boyle, USE OF SERVICE CHARGES IN LOCAL GOVERNMENT 16-30 (Nat'l Industrial Conference Bd., Studies in Business Economics, No. 68, 1960). Although it is true that no charges are collected for the primary functions performed by the education, fire and police departments, Boyle notes that charges have been levied for peripheral functions such as school lunch programs or essentially private services such as police details at private affairs and refilling fire extinguishers. Id. at 20-21.

77. To state that such services are of lesser importance than education, fire and police protection does not, however, mean that they may not command a special degree of judicial scrutiny. See notes 95-111 and accompanying text infra.

78. See notes 72-77 and accompanying text supra.
served that although an individual's interest in his rights as a criminal defendant are certainly unique, from a larger perspective education may have far greater social significance because it directly affects many more people, it indirectly reduces the crime rate, and it also supports every other value of a democratic society, including participation, communication and social mobility. While these statements may not be immediately applicable to fire protection, they relate very strongly to local law enforcement, which affects literally everyone in society, directly reduces the crime rate, and provides the basic framework of law and order without which none of the other values of a democratic society would be attainable.

Similarly, the Serrano court concluded that education is even more analogous to voting than to protections during the criminal process, because both education and voting are "crucial to participation in, and the functioning of, a democracy." Quoting from Reynolds v. Sims, the Serrano court emphasized that voting is regarded as a fundamental right because it is "preservative of other basic civil and political rights . . .," including that of free speech. It stands to reason, however, that just as law making through voting is preservative of all other political rights, so also is law enforcement, which at the local level is accomplished through the police force, and for that reason as well police protection should be considered a "fundamental interest."

Of course it is true, as the court observed in Serrano, that only education provides the instruction and cultural enrichment which equip an individual for economic and social success and for participation in political and community life, so to that extent the analogy between education and other municipal services is incomplete. However, from a more pessimistic perspective it is equally true that it is impossible to instruct or enrich people unless they can move freely and without fear

79. 5 Cal. 3d at 584, 487 P.2d at 1257-58, 96 Cal. Rptr. at 618.
80. It appears that in its zeal to emphasize the importance of education the Serrano court may have created a few minor distortions regarding other services. For example, the court remarked that "not every person finds it necessary to call upon the fire department or even the police department in an entire lifetime . . . ." Every person, however, benefits from education . . . .", 5 Cal. 3d at 610, 487 P.2d at 1259, 96 Cal. Rptr. at 619, quoting Coons, Clune & Sugarman, Educational Opportunity: A Workable Constitutional Test for State Financial Structures, 57 CALIF. L. REV. 305, 388 (1969). Clearly, the primary purpose of police protection and a major purpose of fire protection is to provide preventive services which will render it unnecessary to call upon those departments. Fire and police protection benefit all citizens throughout their lives regardless of whether or not they ever develop a need for specific assistance.
81. Particularly appropriate in this connection is Hobbes' famous statement about the human condition in the absence of laws and law enforcement:
[In a time of anarchy] there is no place for industry, because the fruit thereof is uncertain, and consequently no culture of the earth; no navigation; nor use of the commodities that may be imported by sea; no commodious building; . . . no arts; no letters; no society; and, which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short.
T. HOBBES, LEVIATHAN 64 (2d ed. 1886) (emphasis added).
82. 5 Cal. 3d at 608, 487 P.2d at 1258, 96 Cal. Rptr. at 618.
83. Id. at 608-09, 487 P.2d at 1258, 96 Cal. Rptr. at 618, quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964).
84. Id. at 609 n.25, 487 P.2d at 1258 n.25, 96 Cal. Rptr. at 618 n.25.
within their own community. Recognition of this fact abounds in the current flood of literature decrying "crime in the streets" and calling for stronger law enforcement. Moreover, while police protection does not "mold the personality" in the positive sense as does education, a lack of that protection and the physical danger and insecurity which result must surely leave permanent and ugly scars on the personality — scars which can impair the ability to utilize the advantages offered by education.

At first glance fire protection might seem to be a much less important service than police protection. However, that impression may exist because fires are easier to prevent and control than crime. Despite its low visibility the fire department also performs functions which are absolutely indispensable to the community and which cannot be obtained privately. For this reason, local government has traditionally recognized its duty to provide fire as well as police protection out of general revenues without resorting to "benefit" financing, and to provide them at consistently high levels of expenditure. Therefore, if police protection is deemed to be a "fundamental interest" for the reasons outlined

85. The situation in Philadelphia is typical:

On any given school day last fall about 13,000 Philadelphia public high school pupils were not in school.

That is a 25 per cent absentee rate.

It's only an average, however. In some high schools, like Thomas Edison and Benjamin Franklin [situated in some of the worst ghetto sections], over a third of the pupils were absent each day.

. . .

Superintendent of Schools Mathew W. Costanzo proposed two measures to improve what he termed "dropping attendance figures and rising dropout rates . . . ."

One is safe corridors to guarantee safe pupil access to and from schools in gang areas.

[The other is to increase the number of truancy workers and make further studies of the problem.]

THE SUNDAY BULLETIN (Philadelphia), Jan. 30, 1972, at 1, col. 5 (emphasis added).


87. 5 Cal. 3d at 610-11, 489 P.2d at 1259, 96 Cal. Rptr. at 619.

88. Id. at 611, 487 P.2d at 1259, 96 Cal. Rptr. at 619. Here again the Serrano court appeared to indulge in a bit of hyperbole when it stated that unlike education, police and fire protection (as well as garbage collection and street lights) are essentially neutral in their effect on the individual psyche. On the contrary, high crime rates are inextricably linked with a pervasive atmosphere of insecurity, which in turn inevitably impairs human development capacities. "Because most middle-class Americans live in neighborhoods [with relatively low crime rates], they have little comprehension of the sense of insecurity that characterizes the ghetto resident." RIOT COMM'N REPORT, supra note 8, at 267. "Nothing is more fundamental to the quality of life in any area than the sense of personal security of its residents, and nothing affects this more than crime." Id. at 266.

89. See 16 E. McQUILLAN, supra note 75, § 45.02, at 629-31. The author suggests the critical nature of fire protection:

Fire is one of the foremost foes of cities and towns. At one time or another it has caused great devastation in urban centers in nearly every country in the civilized world. The burning of Rome in the year 64 A.D., the many fires in London, including "The Great Fire" in 1666, the numerous fires in the United States as the Boston fire in 1872, the St. Louis fire in 1851, the Chicago fire in 1871, the most disastrous of modern times, and the San Francisco fire in 1906, are all matters of history. To combat this danger, fire companies, public or voluntary, exist in practically every populous center in the United States.

Id. at 629-30 (footnotes omitted).

90. See notes 4 & 75 and accompanying text supra.
above, it would seem that the two services should be linked together and police and fire protection should be accorded “fundamental interest” treatment.91

It should be noted, however, that in evaluating fire and police protection under the equal protection clause, the problem of determining the appropriate standard of “equality” is particularly troublesome since “numerical” equality in areas with differing crime rates would obviously not result in equality of protection.92 Indeed, there is evidence that according to the numerical standard fire and police services are provided at least equally if not more intensively in disadvantaged areas.93 However, the stronger evidence indicates that disparities do exist which should be deserving of constitutional redress.94

C. Other Basic Services — Proposed Theory

As can be ascertained from the foregoing analysis,95 it is unlikely that basic municipal services other than fire and police can reasonably be categorized as “fundamental interests,” despite their collective importance to urban residents. Nevertheless, when poor neighborhoods are underserviced the hardship to the residents is as great as when racially segregated neighborhoods are underserviced.96 Must the fact that such essential services as street paving and lighting, garbage collection, sewerage and drainage do not quite qualify for “fundamental interest” status inevitably result in there being no viable equal protection remedy where such services are being provided unequally to economically disadvantaged areas? The commentators on this question almost unanimously agree that wealth classifications in supplying these services should be actionable as denials of equal protection with good chances of success.97 Indeed,

91. It also appears that fire hydrants and water pressure (as provided by means of adequate water conduits) should be classified as part of fire protection (see text accompanying note 26 supra), rather than as one of the lesser municipal services. See notes 95–111 and accompanying text infra.
92. See Note, supra note 58, at 763 n.47 (stating that the police force must vary with the crime rate as well as according to population); note 36 supra.
93. RIOT COMM’N REPORT, supra note 8, at 267. Statistics for five Chicago police districts showed that in the high-income white district there were approximately 93 patrolmen assigned per 100,000 residents, while in a very low income Negro district there were 291 patrolmen per 100,000 residents. Id.
94. For example, when considered in light of the crime rate, the figures cited above (note 93 supra), take on a different character. In the affluent white district there were only 80 major crimes against persons and 1,038 major crimes against property per 100,000 population, but in the poor black district the number of crimes was 2,820 and 2,630 against persons and property respectively. RIOT COMM’N REPORT, supra note 8, at 267. Thus if the crime rate is used as the measure of police protection, such protection in the poorer district was only about 63 per cent as adequate as in the well-to-do district. See also Ratner, supra note 3, at 8–10; Note, supra note 58, at 763.
95. See notes 77 & 78 and accompanying text supra.
96. On the seriousness of the losses that result when basic municipal services are inadequately provided, see generally Ratner, supra note 3, at 19–21.
97. See Abascal, supra note 12, at 1383, 1388; Fessler & Haar, supra note 12, at 464; Ratner, supra note 3, at 31–32; Comment, Equal Protection in the Urban Environment: The Right to Equal Municipal Services, 46 Tul. L. Rev. 496, 507–11 (1972); Comment, Administration of Municipal Services in Light of the Equal
the courts which decided both *Hawkins* and *Serrano* indicated concern about the problem and a disposition toward seeing the law in the area develop further. If the strict scrutiny approach is not available to litigants alleging discrimination according to wealth in furnishing many municipal services, there are two alternatives open to the courts if they wish to remedy the situation on equal protection grounds. First, they could alter the traditional permissive test by increasing the burden of proof on the government, requiring perhaps not only a truly rational justification for the classification but also proof of actual and consistent reliance upon the justification. Secondly, they could use an unweighted balancing test for equal protection, eliminating both the presumption in favor of the plaintiffs which obtains under the restrictive approach and the presumption for the government under the permissive approach. Although the Supreme Court's recent reaffirmation of the traditional test in *Dandridge v. Williams* seems to foreclose any modification of that test in the near future, the suggestion was most strongly urged there by Mr. Justice Marshall in dissent that in certain classes of cases the Court should eschew the traditional test in favor of an unweighted balancing approach.

Plaintiffs in *Dandridge* were welfare recipients with large families who challenged the maximum per family ceiling which Maryland had placed on welfare benefits, arguing that the ceiling penalized families with more than five children and thus created an invidious discrimination in violation of equal protection. The Supreme Court upheld the Maryland financing scheme under the traditional test, stating that wel-
fare benefits were within the category of "economics and social welfare" for which there was a presumption of legitimacy in favor of the government. In reaching its decision, however, the majority expressed severe misgivings about relying on "traditional test" precedents which primarily involved state regulation of business or industry, when it recognized the "dramatically real factual difference" between the cited cases and the one before it, which involved "the most basic economic needs of impoverished human beings."

Justice Marshall in his dissenting opinion did not assert that welfare benefits constitute a "fundamental interest" in the equal protection sense, in the same manner that the foregoing analysis in this Comment did not attempt to argue in favor of "fundamental interest" treatment for the basic municipal services other than fire and police protection. Instead, he emphasized the admitted incongruity of measuring a state's welfare policies by the same equal protection standard as has traditionally been applied to state industrial and commercial regulations, and urged that the Court utilize an unweighted balancing test when serious individual interests were at stake:

In my view, equal protection analysis of this case is not appreciably advanced by the a priori definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, 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.

Further, it should be noted that although the majority in Dandridge could not find a satisfactory rationale for departing from the traditional test, the case lacked a clear-cut "suspect classification" as well as a colorable "fundamental interest." Therefore, it appears that the holding in Dandridge would not foreclose the possibility of utilizing an unweighted equal protection test in a case which presented a "suspect classification" according to wealth and individual interests as important as the interest in obtaining essential municipal services other than fire and police protection.


107. 397 U.S. at 485.

108. Id.


110. The discrimination claimed by plaintiffs was not racial discrimination, as the Court noted (id. at 485 n.17), nor was it discrimination on the basis of wealth; plaintiffs argued that the financing scheme discriminated against them merely because of the size of their families. Id. at 475. Moreover, welfare benefits have never been considered "fundamental interests." See note 67 supra; cf. Goldberg v. Kelly, 397 U.S. 254 (1970).

111. For further discussion and application of the unweighted balancing test, see notes 152-68 and accompanying text infra.
D. Summary

Judging on the basis of the "severity of the detriment" analysis as well as the reasoning in Serrano, it is difficult to escape the conclusion that fire and police protection should be considered "fundamental interests" and should, therefore, compel strict scrutiny review when provided in a manner which discriminates according to wealth. Although other necessary municipal services do not appear to constitute "fundamental interests," the courts and commentators have indicated strong policy reasons for their not being the subject of wealth classifications. Furthermore, the "unweighted" balancing approach provides a fair and legally feasible solution to the apparent dilemma.

IV. Benefit Financing

A. Background

For a proper appreciation of the issue of "benefit" financing as it relates to racial and wealth classifications in municipal services, it is necessary to understand at least in outline the development and present configuration of local government finances. The following discussion, therefore, is presented as a general background for the ensuing sections, with further information to be added where relevant.

It is a universally recognized fact that local governments generally, and the great urban centers in particular, are in the throes of an ever-deepening struggle for financial survival. The roots of the problem can be traced to the period between 1900 and 1930, when the movement of large numbers of people into the cities produced great demands upon city governments to provide the expanded services necessitated by urban concentration. This burden could be supported by the cities at that time because their tax bases were able to grow apace with the burgeoning prosperity of the community. However, with the exodus of residents and businesses to the suburbs beginning in the 1930s, the large city lost much of its strong tax base and found itself confronted instead with a dual problem: the high costs of servicing, educating and "welfaring" the low-income residents who continued to migrate to the cities, and the further strain caused by the commuting population, which still required most of the services it had formerly enjoyed but was no longer paying taxes to the city. In many cases the situation of the suburban government has not been appreciably better because the rapid development of new areas has created the necessity for immediately supplying many services, such as

new sewers, streets and schools. In addition, the relative lack of business and industry in these areas has resulted in an inadequate tax base in suburbia as well. Finally, the slow financial death of the rural communities left behind in the successive population shifts completes the picture of fiscal crisis affecting many, but not all, local governments.

This growing fiscal crisis has prompted local governments increasingly to seek needed revenues from sources in addition to the local property tax, which has traditionally provided the bulk of municipal funds. Intergovernmental transfers from the federal and state governments have provided the largest share of the needed revenue, but such funds do not represent the complete solution because they are generally earmarked for services such as education, highways and welfare which have significant "spillover" effects beyond the municipal boundaries. Virtually no intergovernmental funds are available to help finance what are regarded as purely local services such as fire and police protection, local street paving and drainage, and traffic control and sanitation. In their quest for revenues, therefore, local governments have also implemented sales and income or wage taxes, where permitted by state law, and have increasingly concentrated on so-called "benefit" financing methods, which include user charges and special assessments.

Id. The plight of many of the suburban areas is graphically illustrated in Serrano where all but the highest-income or most heavily industrialized school districts had anemic tax bases which could not adequately support the tax burdens they were obliged to bear, even when the communities made extraordinary tax efforts. The town of Shaw, Mississippi, is in fact one of the myriad rural communities which have been slowly atrophying due to population shifts. Brief for Appellee at 2, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971).

For discussions of the increasing inadequacy of the property tax as presently administered and suggestions of alternative and additional revenue sources, see, e.g., Intergovernmental Relations — The Federal System, supra note 112, at 17-18; J. de Torres, supra note 113, at 6-12; Kaloglis, supra note 75, at 164-86; J. Maxwell, Financing State and Local Governments 157-78 (rev. ed. 1969).

See J. de Torres, supra note 113, at 6-9.

See note 75 supra.


See G. Boyle, supra note 76, at 11-12 (quoting Census Bureau statistics): The combination of a demand for expanded services and a relatively inelastic source of revenue has fostered the development of nonproperty tax sources. These include an increased use of taxes levied on sales and gross receipts, and individual and corporate incomes, and license fees.

However, the greatest increase, both absolute and relative, has occurred in charges and miscellaneous revenues [of which service charges tend to account for approximately 70 per cent of the combined total (id. at 12 n.2), and special assessments are a rather small portion of the total (see note 130 infra)]. In special, the general revenues of local governments from their own sources totaled $5,007 million; by 1957 they had increased to $18,018 million. During this period property tax receipts declined as a share of this total from 83% to 70%, while nonproperty taxes increased from 7% to 11% of this total. Charges and miscellaneous revenues, accounting for 10% of the total in 1940, represented 20% of "general revenue from own sources" in 1957, nearly a sixfold increase in absolute amounts.

Id. (footnotes omitted). A good short summary of the use of special assessments during this century can be found in Advisory Comm'n on Intergovernmental Relations, State Constitutional and Statutory Restrictions on Local Taxing Powers 50-51 (No. A-14, 1962) [hereinafter cited as Intergovernmental Rela-
A user or service charge can be defined as a payment received by the government from the public for the performance of specific services benefitting the person charged. Special assessments are defined as "special and local impositions upon the property in the immediate vicinity of municipal improvements, which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to have derived therefrom." Both types of financing require state legislative authorization and are subject to certain traditional minimum constitutional and statutory requirements. The main distinction between the two types of fee turns on whether a service or improvement primarily benefits the person or the property affected. Their chief similarity is that theoretically both are levied in proportion to the amount of benefit conferred (hence the appellation of "benefit" financing), and as such are allocational in effect rather than redistributional as is the case with general taxation. To the municipality, "benefit" financing has the advantage of not being subject to tax or debt limitations, thus enabling the municipality to offer governmental services which it might not otherwise be able to provide. The primary advantage to the individual "consumer" is that the use of either service charges

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122. 14 E. McQuillan, supra note 76, § 38.01, at 10.
123. Regarding the power to levy special assessments, see 14 E. McQuillan, supra note 76, § 38.06, at 43-50. For the specific constitutional and statutory requirements which special assessments must satisfy (basically concerning reasonableness and relationship of benefit to burden), see 14 E. McQuillan, supra §§ 38.03 to 38.05, at 23-43. At present the law of user charges appears to be largely undeveloped, thus presenting interesting questions outside the scope of this Comment. However, with respect to the question of municipal authorization to levy such charges and the basic limitations to which they are subject, the law of user charges is treated as a part of the body of law relating to public utilities. See 12 E. McQuillan, supra note 5, §§ 35.37(a) to 35.37(k), at 479-97. Therefore, where a municipality owns its own servicing facilities; e.g., sewerage lines or garbage collection equipment, it has the right to charge consumers who use those services under the same principle that authorizes a privately owned public utility to charge for its services. Id. § 35.37, at 479-83. Also, according to traditional law, the rates charged by the municipality must be fair, reasonable, just, uniform and nondiscriminatory, with certain qualifications, and the burden is on the objecting party to prove unreasonableness or discrimination. Id. §§ 35.37(a) & 35.37(b), at 483-88.
124. See G. Boyle, supra note 76, at 14 (user charges); 14 E. McQuillan, supra note 76, § 38.02, at 18-21 (special assessments).
125. "Allocational" in this context means that the benefits received are roughly proportional to the payments contributed, as, for example, in the case of goods privately purchased. "Redistributioanl," on the other hand, usually refers to tax appropriations, and means that goods or services are provided according to some criteria other than consideration of the relative amount contributed by the various participants. See generally Kafoglis, supra note 75, at 164-66.
126. Special assessment obligations are universally held not to be included within municipal debt limitations. See 15 E. McQuillan, The Law of Municipal Corporations § 41.32, at 567-70 (3d ed. 1970). Nor are they subject to local tax limits. See Intergovernmental Relations — Restrictions on Local Taxing, supra note 120, at 50. Despite the apparent lack of well-developed law concerning user charges (see note 123 supra), they would also appear to be without such limitations. See generally S. Sato & A. Van Alstyne, State and Local Government Law 761-70 (1970).
or special assessments assures the service recipient of benefits at least equal to the contribution made,\(^{127}\) in contrast to the redistributional effects of taxation. In the majority of cases, the benefit received greatly exceeds the amount of the contribution, for after the initial installation special assessment-financed improvements are ordinarily maintained by means of general revenues,\(^{128}\) and service charges usually represent a relatively small proportion of the total cost of providing a “charge-financed” service.\(^{129}\)

In practice, special assessments have extremely limited applicability and hence afford little prospect of producing increased revenues for under-financed municipal governments.\(^{130}\) On the other hand, service charges are already widely used,\(^{131}\) and economists have advocated experimentation with increased and more efficient utilization of the service charge principle, primarily to augment local revenues but also to promote economy of operation.\(^{132}\) Acutely aware of equity considerations, the economists have also suggested that such a development could be arranged so as to be beneficial rather than detrimental to low income families.\(^{133}\) In summary, then, it can be seen that a great deal of benefit financing is currently in use, and since higher levels of benefit financing may be necessary because of municipal financial realities, local voters and officials need considerable discretion to determine the combination of revenue devices most appropriate for their particular situation.

\(^{127}\) See G. Boyle, supra note 76, at 14 (user charges); 14 E. McQuillan, supra note 76, \S\ 38.02, at 18 (special assessments).

\(^{128}\) See 14 E. McQuillan, supra note 76, \S\ 38.16, at 79. In addition, in many cases only part of the cost of a local improvement is covered by the special assessment; the remainder will then be paid out of general revenues. Id. \S\ 38.12, at 73-74.

\(^{129}\) See J. Maxwell, supra note 116, at 177, 257 (Table A-19). There, the author demonstrates that user charges commonly constitute from 30 per cent to 75 per cent of total expenditures for given services (e.g., 30.7 per cent in the case of sanitation services in 1966), with the remainder of the necessary funds provided out of the general revenues. The explanation for the “subsidy” is found in considerations either of equity or of spillovers of benefits or costs. Id. at 174.

\(^{130}\) Despite the relatively broad range of improvements for which special assessments are generally authorized, (see note 76 supra), their applicability is in fact quite restricted since they are usually authorized only for the initial improvements and not for maintenance. See note 128 and accompanying text supra. On the other hand, since user charges are imposed on a consumption basis, they have a much greater revenue-raising potential. These facts are reflected in local government revenue figures. For example, in fiscal year 1967-68 total local government revenues from current charges amounted to $6,894,000,000, while in the same period special assessments produced the relatively small sum of $366,000,000. Bureau of the Census, U.S. Dept of Commerce, Governmental Finances in 1967-68, cited in Inter-governmental Relations -- Significant Features, supra note 75, at 30.

\(^{131}\) See note 130 supra.

\(^{132}\) See, e.g., authorities cited note 116 supra. In addition to the revenue-raising function of user charges, placing of municipal services on a quasi-pricing basis where appropriate helps to encourage economical consumption. See J. de Torres, supra note 113, at 91.

\(^{133}\) Since service charges tend to be flat rates per unit of service, their effect is generally regressive, burdening most heavily the lower income groups. However, this need not necessarily be the case, for sometimes charges are differentiated or even excused according to what economists call the “welfare,” or ability to pay principle. See G. Boyle, supra note 76, at 41. There is also the possibility that in some communities the increased efficiency which results from the charge-financing of certain services would reduce the total cost of providing such services and thus benefit all residents, including those with low incomes. See Kafoglis, supra note 75, at 184.
B. Racial Classifications — Benefit Financing

The issue of benefit financing as it relates to racial classifications was raised in the pre-\textit{Hawkins} case of \textit{Hadnott v. City of Prattville}.\textsuperscript{134} However, it is submitted that in light of the holdings in \textit{Hawkins} and \textit{Serrano}, the disposition of that issue in \textit{Hadnott} requires re-examination.

The \textit{Hadnott} case was a class action by the Negro residents of Prattville, Alabama, to enjoin city officials from continuing a long-standing policy of providing municipal facilities on a discriminatory basis, and to require the defendants to remedy the effects of their past discrimination.\textsuperscript{135} The complaint was similar to the one in \textit{Hawkins}; plaintiffs requested, \textit{inter alia}, equalization in the areas of street paving, construction of sidewalks and gutters, and installation of fire hydrants, sewerage lines, street lights, street signs and traffic signs. Unlike \textit{Hawkins}, all of these services except the last three were traditionally provided by means of special assessments,\textsuperscript{136} but just as in \textit{Hawkins} the statistical evidence revealed marked disparities along strictly racial lines,\textsuperscript{137} and there was an admitted history of racial discrimination in distributing all municipal services.\textsuperscript{138} With respect to the services provided by means of special assessments, the court concluded that there was no discrimination on the basis of race because the Negro community had an equal opportunity to petition (and pay) the city for the services, and the difference between the conditions in black and white neighborhoods was thus due not to discrimination but rather to the white landowners’ greater “ability and willingness to pay for the property improvements.”\textsuperscript{139}

\begin{itemize}
\item 134. 309 F. Supp. 967 (M.D. Ala. 1970).
\item 135. \textit{Hadnott}, like \textit{Hawkins}, was a class action under rule 23 of the Federal Rules of Civil Procedure. It appears, however, that plaintiffs' sole ground of complaint was the equal protection clause. 309 F. Supp. at 972-73.
\item 136. The services provided through special assessments were street paving and the installation of sidewalks, gutters, sewers and water lines; and the inadequacy of the water lines resulted in a lack of fire hydrants. 309 F. Supp. at 970-71.
\item 137. 309 F. Supp. at 970. For example, in Prattville only approximately 3 per cent of the white residents lived in homes which were located on unpaved streets, while approximately 35 per cent of the black homes fronted on unpaved streets. \textit{Id}.
\item 138. Although it appeared that the city had traditionally practiced racial discrimination in the provision of its generally-funded services such as garbage collection, street signs, street lights, traffic control signals and traffic control policemen, the \textit{Hadnott} court did not find any discrepancy at the time of trial because the city had apparently equalized those services while the suit was pending. 309 F. Supp. at 969-71. It should be noted, however, that such services tend to be relatively inexpensive to provide, in contrast to the durable facilities which were foreclosed to the blacks because they were benefit-financed.
\item 139. 309 F. Supp. at 970. However, based on the evidence presented, the court did find that the city had provided its public parks in a racially discriminatory manner. It was held that the city had an obligation to take affirmative action to desegregate all of its parks and to equalize the landscaping, equipment, cleaning and supervision of the one park located in a Negro area. \textit{Id} at 973.
\item Plaintiffs also established that there was a racially discriminatory pattern of employment in the fire and police departments. However, the court found no proof that the employment discrimination had resulted in disparities of fire and police
\end{itemize}
In the wake of *Hawkins* and *Serrano*, it appears that the *Hadnott* court's treatment of the benefit financing issue as it relates to racial classification may not have been correct. Following the *Hawkins* approach, a statistical demonstration of substantial disparities between services in black and white neighborhoods should create a prima facie case of a suspect classification according to race, regardless of any asserted justifications for the disparities. And as *Serrano* so strikingly demonstrated, the financing methods used for the provision of government services are not immune from invalidation under strict scrutiny, where such schemes contribute to a forbidden result. Indeed, the court in *Serrano* aptly observed that "[o]ne must be ever aware that the Constitution forbids 'sophisticated as well as simple-minded modes of discrimination'," and if benefit financing is being employed in a manner which results in a purely racial classification, it would seem that it is in fact nothing more than a "sophisticated mode of discrimination."

It must be emphasized that in order to qualify under the *Hawkins* rule the demonstrated disparities must establish a purely racial discrimination, and not merely a "discrimination" which adversely affects all of the poor in the municipality as well as the racial minorities. If the latter is the case the classification is at most a classification according to wealth which alone would not command strict scrutiny. However, if the statistical pattern in a community discloses a true racial classification, there is a strong policy reason for the application of the *Hawkins* rule even if benefit financing has contributed to the disparities.

Practically speaking, most statistical patterns of pure racial classification are found in the South, where a long history of educational and employment discrimination has resulted in a situation in which the blacks occupy the lower income brackets more predominantly than in other sections of the country. It is a significant fact, therefore, that while the property tax has always been the major source of local revenue in the services in black and white neighborhoods, and it therefore issued no equalization decree respecting those services. *Id.* at 974.

140. See notes 26-29 and accompanying text *supra*.

141. *Id.* at 607 n.24, 487 P.2d at 1257 n.24, 96 Cal. Rptr. at 617 n.24, *citing* Reynolds v. Sims, 377 U.S. 533, 563 (1964), *quoting* from *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Although the latter were reapportionment cases, the *Serrano* court clearly considered the quoted observation relevant in cases involving financial plans which potentially violate equal protection.

142. *Id.* at 607 n.24, 487 P.2d at 1257 n.24, 96 Cal. Rptr. at 617 n.24, *citing* Reynolds v. Sims, 377 U.S. 533, 563 (1964), *quoting* from *Lane v. Wilson*, 307 U.S. 268, 275 (1939). Although the latter were reapportionment cases, the *Serrano* court clearly considered the quoted observation relevant in cases involving financial plans which potentially violate equal protection.

143. *But see* notes 31 & 32 and accompanying text *supra*. Absolute lines of racial discrimination need not be shown; substantially racial disparities should be the test.

144. For a discussion of benefit financing resulting in wealth classifications in the provision of basic municipal services, see notes 152-68 and accompanying text *infra*.

145. The extreme degree of racial discrimination historically practiced in the South is still reflected in the poverty statistics for that region. These statistics show that as of 1969 approximately 40 per cent of the black families in the South had an income of under $4,000, while the national poverty rate thus defined was less than 15 per cent for all races combined. *See* *U.S. Dep't of Commerce, Statistical Abstract of the United States*, Table No. 505, at 318 (1971).

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overwhelming majority of municipalities, benefit financing by means of special assessments and user charges is the dominant form of local financing in many communities in the South. This situation, and the resultant non-servicing of black neighborhoods, has arisen because historically the blacks were denied the right to vote and therefore the whites could elect to finance municipal services by the method which would assure them of maximum individual benefits with virtually no redistributional "drawbacks." Against this background it is apparent that where a disparity in services exists along purely racial lines, the effect of a benefit financing policy is truly to "freeze in" the results of past discrimination—the very effect condemned in Hawkins—and such discrimination should not be permitted to persist.

C. Wealth Classifications—Benefit Financing

The problem of wealth classifications resulting from the benefit financing of municipal services is a difficult one because special assessments and user charges are types of public pricing mechanisms, and a pricing mechanism by its very nature discriminates at least in part on the basis of wealth. Nevertheless in many areas, especially large cities, distinct racial minorities are a part of a broader group of low income residents who have traditionally received inadequate municipal services, and benefit financing of some of those services may have been a contrib-

146. See note 116 and accompanying text supra.
147. See Kafoglis, supra note 75, at 164.
148. See, e.g., note 60 supra (description of the voting progress of Negroes in Shaw, Mississippi).
149. The allocative (i.e., non-redistributional) effect of benefit financing is one of its chief advantages from the (non-poor) "consumer's" point of view. See note 127 and accompanying text supra.
150. See text accompanying note 51 supra. Although the problem of strictly racial discrimination is somewhat less prevalent outside the South, the above reasoning would be equally applicable wherever such a pattern exists.
151. Unlike in cases of wealth discrimination (see pp. 667-76 supra and pp. 683-85 infra), in a case of racial discrimination resulting from benefit financing the defense of municipal financial limitations should be singularly unconvincing. This is so because such a pattern reflects a political decision on the part of the white residents of the community not only to provide only themselves with certain basic amenities of urban living, but also to spend much of the tax budget, which should be spent for the general welfare, on the maintenance of those privately-enjoyed facilities. See notes 128 & 129 and accompanying text supra. Thus, in starving the municipal budget by relying heavily on benefit financing, the politically more powerful residents ensure first, that there is not enough public money with which to originally install needed facilities in black neighborhoods, and secondly, that a large proportion of whatever general funds are collected will never be redistributed for the general good, but will instead be spent solely for the further benefit of the privileged group. See notes 167 & 168 and accompanying text infra.
152. The general rule of pricing is that any good can be sold if there is some means of excluding some of the consumers. Kafoglis, supra note 75, at 166. Having thus limited the supply of the commodity a seller can fix his price, and consumers will theoretically purchase the commodity in such quantities as they desire and can afford (i.e., up to the point of maximum marginal utility). Id.
153. See note 61 supra.
uting factor in the creation of the inadequacies. The question remains, however, whether equal protection provides a remedy in such a situation.

It would seem that if fire and police protection are fundamental interests, as suggested above, they may not be provided in a manner which is discriminatory according to wealth, and therefore may not be charge-financed. The soundness of this conclusion is borne out by the fact that these two services are never provided by local governments on the pricing principle. For this reason, however, such a rule would apparently have little applicability at the present time. Nevertheless, should local governments decide to provide fire and police protection on an ability-to-pay basis, strict scrutiny should then be applicable to prevent such an action.

Since strict scrutiny is probably not available with respect to necessary municipal services other than education, fire and police protection, the courts could apply the traditional test in considering such services and uphold a benefit financing scheme which results in a wealth classification on the basis of any conceivable justification advanced by the government. A better approach, however, would be to use the unweighted balancing test, especially where several services are unequal or lacking due to benefit financing, thus contributing to an overall picture of inadequacy. Under such a test, the plaintiffs would have to demonstrate a wealth classification in the distribution of necessary municipal services, and prove the severity of the detriment to them and their families from the deprivation or unequal provision of such services. The state would then be required to show that important governmental interests outweighed the interests asserted by the plaintiffs. Although in many cases the government's burden could be sustained by demonstrating the fiscal conditions under which it was operating and the advisability of using benefit financing for the enumerated services, the defendants would at least be put to the proof of their allegations since the presumption in favor of the government does not obtain under the unweighted balancing test.

According to the economic theory underlying benefit financing there are only certain situations in which this system is appropriate, and these elementary rules should be relevant in evaluating the defendants' asserted justifications for adopting such financing for the basic municipal services. The first rule concerns the incidence of the benefit of governmental services. If a service yields primarily private benefits, i.e., it has no significant collective or "spillover" benefits affecting the whole community, the

154. See pp. 669-73 supra.
155. See note 75 and accompanying text supra.
156. One area where such a rule might be presently applicable is in the provision of water conduits by means of special assessments, since water pressure is a component of fire protection. See text accompanying note 27 supra.
157. See notes 76, 77 & 95 and accompanying text supra.
158. For Justice Marshall's precise formulation of the factors to be considered in applying the unweighted test, see p. 675 supra.
159. See notes 112-33 and accompanying text supra.
service may be fully financed by means of charges. Examples are the services often provided by means of privately-owned public utilities such as electricity, gas and transportation. Some governmental services, on the other hand, produce both individual benefits and significant “spillover” benefits to society. Examples would be education and sanitation services. While these services need not be financed by charges at all, if they are they may not be financed entirely on a benefit principle, because such a scheme would unduly restrict consumption of a service in which the government has a proper interest in encouraging consumption. In other words, when there are significant “spillover” benefits, service charges are either usable only in part, or not at all. Moreover, the usual reason for imposing partial charges in such cases is not primarily to supplement government revenues but to prevent excessive consumption and waste, as in the case of imposing moderate charges for street cleaning in order to discourage littering. Finally, there are those services which are consumed collectively by the entire community. Such services can be financed only through taxation because their benefits cannot be limited to those who have paid for them. The classic example of a collective service is national defense. At the municipal level, it would appear that a city-wide air pollution control effort would constitute a collective good which could not therefore be financed by charges or special assessments. In sum, if a local government imposes charges in whole or in part where they are not economically justified, the mere showing of fiscal hardship should not be sufficient to sustain the government’s burden under the unweighted balancing test.

Another important limitation on the use of benefit financing is that a service which provides individual benefits but is also necessary to the community at large can only be charge-financed when the users show at least inferential ability to pay the charge. Such is the case on a regional level with toll financing of highways; the ability to pay the toll is inferred from the fact of automobile ownership and ability to purchase fuel. In contrast, if the individual recipients of a community-essential service do not evidence the ability to pay, economic theory dictates that the service must be provided free of charge and financed out of general revenues. In the case of education, for example, no inference of ability to pay can be drawn from the fact of having children, so since education is a community-essential service it is provided without cost. With regard to other basic municipal services such as sewerage, drainage and garbage collection, which in almost all urbanized areas are essential to the community, it would appear that the government would

161. Id. at 88–90.
162. Id. at 91.
163. Id. at 88.
164. See G. Boyle, supra note 76, at 16.
165. Id.

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be obliged to have at least inquired into the relationship between the intended level of charges and the recipients' potential ability to afford such charges. 166

A final factor which might be considered in evaluating the municipality's choice of benefit financing under an unweighted equal protection balancing test is the percentage of government subsidy involved in providing a partially charge-financed service. As noted previously, 167 the majority of charge-financed services involve heavy tax subsidies in addition to the amounts exacted as service charges or special assessments. While this "joint enterprise" type of financing has many advantages when properly implemented, there is a point along the range of public/private expenditure ratios at which the amount charged would be so miniscule in proportion to the amount of subsidy that there would be no adequate governmental justification for imposing charges at all, since the charge would in effect create a "closed circle" of affluent citizens receiving large amounts of general tax benefits which were denied to the poor because they could not afford to pay the "initiation fee." At such a point the government could not convincingly assert that the amount of the charges collected was necessary to finance the service despite the small proportion of total cost which it represented, because it could be demonstrated that elimination of the charge would only result in a very minor overall reduction in the adequacy of the service. 168

V. THE PROBLEM OF "BACKLASH"

When a municipality which has provided its services through general revenues, but in a manner discriminatory according to race or wealth, learns that it may be required to equalize those services, the question arises whether the city can or should switch to some form of

166. For example, Boyle postulated in his article that at the 1954 rate of local government spending if all sewerage expenditures were charge-financed rather than tax-financed, the charges would not be appreciably greater than the tax burden for the same services for, e.g., families with incomes between $2,000 and $7,500; and that neither financing method would cost such families more than .3 per cent of their income. However, the gap between the costs of the two financing methods widened drastically when education was considered. For families having incomes between $4,000 and $4,999, tax financing of education at that time required only 1.3 per cent and 1.9 per cent of income, respectively; but if charge financing were used instead, a family in that income bracket having six children would be forced to spend 8.0 per cent of its income on education. This level of charge financing would violate the "ability to pay" principle. The author's conclusion was that extended use of service charges for increasing varieties of municipal services would require continued consideration of the factor of ability to pay. Id. at 45-47.

167. See notes 128 & 129 and accompanying text supra.

168. For example, the amount of user charges collected for a "charge-financed" service has generally represented between 30 per cent and 75 per cent of the costs of providing that service. See note 129 supra. It would appear that if charges or special assessments were to drop to around the 10 per cent mark, where the service was thus at least 90 per cent subsidized out of general tax revenues, the de minimus point would be reached because without benefit financing the government could still provide the service at 90 per cent of the "charge-financed" level of adequacy.
benefit financing in order to avoid such a ruling. As shown above, local governments generally have considerable legal authority to take such action. If a municipality were to do so in the face of a Hawkins or Serrano-type equalization order, it is clear that it could be stopped immediately by means of the courts' contempt power.

If a municipality decided to change to benefit financing in anticipation of an equalization order, assuming no court action had yet commenced, the equal protection consequences should depend upon the nature of the classification and the nature of the services involved, as discussed above. A claim of racial discrimination, therefore, should still command strict scrutiny. A similar consequence should follow if the resulting wealth classification affected fundamental interests, arguably fire and police protection as well as education. If a wealth classification in furnishing lesser municipal services resulted, it might well be upheld under the unweighted balancing test in the interest of permitting local governments to use the most efficient means of distributing their varied services and in the interest of permitting experimentation toward that end. However, to meet the standards of an unweighted balancing test the government should be obliged to demand more than a de minimus contribution from its "customers," and if so it would have to weigh the disadvantages of increasing the municipal "cost of living" against the disadvantages of being required to equalize services provided out of general revenues and thus, predictably, suffering a loss in the overall quality of services which could be provided.

VI. CONCLUSION

This Comment has attempted to explore the equal protection avenues which may be open to litigants who desire to remedy the inequalities in basic municipal services which exist in their communities. It has been postulated that while the equal protection considerations vary

169. See notes 76 & 123 and accompanying text supra.
171. See pp. 680–85 supra.
172. See notes 134–51 and accompanying text supra.
173. See notes 154–56 and accompanying text supra.
175. See notes 167 & 168 and accompanying text supra.
176. One of the greatest inhibiting factors upon local government revenue increases is the fact that most local governments are engaged in a struggle to maintain "competitive" tax (and charge) positions in their region: Local policymakers competing in a metropolitan arena are keenly sensitive to inter-community tax rate differentials. There is a constant fear that an above average tax rate will act as a powerful deterrent to economic development within the local jurisdiction. Because of the desire to "stay in line," the relatively low level of taxation that is possible in the more affluent jurisdictions tends to serve as a brake on higher taxes throughout the metropolitan area . . . despite the fact that higher taxes may be urgently needed in other jurisdictions.

INTERGOVERNMENTAL RELATIONS — THE FEDERAL SYSTEM, supra note 112, at 13.
depending upon whether the inequalities are along the lines of race or wealth, and whether the services are financed completely out of tax revenues or are financed in whole or in part by means of special assessments or user charges, there are strong indications that equal protection can and should provide a ground for relief. While additional grounds may also be available in certain limited situations,\textsuperscript{177} it appears that equal protection is the preferable approach in most instances. Therefore it is hoped that the suggestions made herein will further the development of appropriate equal protection standards for municipal services — standards which give due regard to the vital personal and governmental interests at stake in each type of case.

\textit{Mary Bowen Little}

\textsuperscript{177} See Abascal, \textit{supra} note 12, at 1370–74, (suggesting the common law theories of abuse of discretion and the public utility doctrine, as well as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (1970)); Note, \textit{supra} note 58, at 756–61 (proposing a theory of fiduciary duty in the provision of municipal services).