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Constitutional Law -- Equal Protection -- Mandatory Referendum on Low-Income Housing -- James v. Valtierra

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CASE NOTES

Constitutional Law—Equal Protection—Mandatory Referendum on Low-Income Housing—*James v. Valtierra*.[1]—Citizens of both San Mateo County and the City of San Jose, California, eligible for low-income public housing, had been placed on the public housing lists by their respective local housing authorities for periods ranging from three months to thirty-three months.[2] More than 2,779 families in San Mateo County and the City of San Jose shared this list. The majority of the people were members of racial minorities: those in San Mateo were predominantly black and those in San Jose were predominantly Mexican-American.[3] To meet the housing needs of these families, the housing authorities of San Mateo and San Jose sought to obtain federal funds made available through the Department of Housing and Urban Development (HUD). However, the local housing authorities were unable to apply for federal funds to construct low-rent public housing because proposals for such housing units had been defeated in mandatory public referenda pursuant to Article XXXIV of the California State Constitution, which provides that:

> No low rent housing project shall hereafter be developed, constructed, or acquired in any manner by any state public body until, a majority of the qualified electors of the city, town or county, as the case may be, in which it is proposed to develop, construct, or acquire the same, voting upon such issue, approve such project by voting in favor thereof at an election to be held for that purpose, or at any general or special election.[4]

Unable to occupy public housing, the low-income citizens of San Mateo County and San Jose sought a declaration that Article XXXIV was unconstitutional, and that the defendants[5] be enjoined from complying with its requirements.

A three-judge federal court for the Northern District of California held Article XXXIV to be violative of the Equal Protection Clause of the United States Constitution and issued the injunction.[6] In making

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1 402 U.S. 137 (1971).

2 Brief of Appellees at 22, James v. Valtierra, 402 U.S. 137 (1971).

3 Id. at 25.

4 Cal. Const. art. XXXIV § 1.

5 The defendants in *Valtierra* were The Housing Authority of the City of San Jose, The City Council of San Jose and The Department of Housing and Urban Development (HUD) and its Secretary, George Romney. HUD and Secretary Romney were dismissed as party defendants by the district court. 313 F. Supp. 1, 3 (1970).

6 Valtierra v. Housing Authority of the City of San Jose, 313 F. Supp. 1 (N.D. Cal. 1970).

this determination, the court relied primarily on the decision of the United States Supreme Court in *Hunter v. Erickson.*[7] In *Hunter*, the Supreme Court had held constitutionally invalid an amendment to the City Charter of Akron, Ohio, which required a referendum before any fair housing ordinance could be enacted. The Court found that the amendment, by treating racial housing matters differently from other housing matters, created an explicit racial classification which subjected persons interested in such housing to a greater procedural burden than those concerned with other types of real property legislation, and was therefore violative of the Equal Protection Clause. The district court in *Valtierra*, applying this rationale, reasoned that "[h]ere, as in the *Hunter* case, the 'special burden' of a referendum is not . . . required; here, as in the *Hunter* case, the impact of the law falls upon minorities."[8] The court concluded that, even though federal assistance to housing was a privilege that California was not obligated to seek, "the requirements of equal protection must still be met."[9] The Supreme Court, however, found that the district court had erred in its reliance on *Hunter* and, in reversing, HELD: the California referendum procedure is not violative of the Equal Protection Clause. The Court found that, unlike the Akron referendum in *Hunter*, California's referendum did not rest on "distinctions based on race" because Article XXXIV applied to all low-income housing projects, not just those to be occupied by a racial minority.[10] In addition, the Court stressed that the referendum procedure gave all the people "a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."[11]

In *Valtierra*, the Supreme Court appears to have ignored the potential for racial discrimination posed by Article XXXIV. Racial minorities represent a disproportionately large percentage of low-income families,[12] so that any legislation which subjects proposals for

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[7] 393 U.S. 385 (1969).

[8] 313 F. Supp. at 5.

[9] Id.

[10] 402 U.S. at 141. Compare the Supreme Court's reasoning with the lower court's determination that:

> Although Article XXXIV does not specifically require a referendum for low-income projects which will be predominantly occupied by Negroes or other minority groups, the equal protection clause is violated if a "special burden" is placed on those groups by the operation of the challenged provision, if "the reality is that the law's impact falls on the minority."

313 F. Supp. at 4, citing Hunter v. Erickson, 393 U.S. at 391.

[11] Id. at 143.

[12] "Low income families . . . usually—if not always—are members of minority groups." Southern Alameda Spanish Speaking Organization (SASSO) v. City of Union City, 424 F.2d 291, 296 (9th Cir. 1970). As of 1968, 56% of the nation's nonwhite families lived in central cities and two-thirds of those so situated lived in neighborhoods with substandard housing. Report of the Nat'l Advisory Comm'n on Civil Disorders 467 (1968).

low-income housing to a mandatory referendum necessarily provides an electorate the opportunity to frustrate racial minority interests.[13] Moreover, the *Valtierra* Court not only refused to recognize the "use of economic measures as a subterfuge for racial discrimination,"[14] but tacitly approved economic discrimination as a basis upon which housing opportunities for the poor may be legally denied.

In 1937, Congress responded to the housing needs of the poor by instituting a series of federal building programs to improve low-income housing conditions. In the Housing Act of 1937,[15] Congress declared that it was the policy of the federal government to employ its funds to assist state and local governments in remedying "the unsafe and insanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income . . . that are injurious to the health, safety, and morals of the citizens of the Nation."[16] In 1949, Congress amended its national housing policy to include "a decent home and a suitable living environment for every American family. . . ."[17] One of the newly stated congressional objectives was "the development of well-planned, integrated, residential neighborhoods. . . ."[18] In 1968, Congress reaffirmed that objective and recognized that to achieve such a goal the nation needed, within a decade, construction or rehabilitation of six million housing units to serve the needs of low- and moderate-income persons.[19] To implement these policies, federal legislation authorized the use of federal funds for the construction and operation of public housing projects,[20] and offered federal financial assistance to local housing authorities for planning and developing low-income housing. The Department of

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Further, 41% of nonwhite families were considered to be in poverty in 1966 as compared to only 12% of the white population. Id. at 258.

[13] A recent study has concluded that the "desire to keep the poor physically at a distance" and "deep racial prejudice" are two factors which substantially influence the electorate when voting on low-income housing matters. National Comm'n on Urban Problems Report (Building the American City), H.R. Doc. No. 34, 91st Cong. 1st Sess. 129 (1968).

[14] Remarks of President Nixon, quoted in The Wall Street Journal, June 14, 1971, at 6, col. 1.

> When such an action [*i.e.*, the use of economic discrimination as a subterfuge for racial discrimination] is called into question . . . we will study its effect. If the effect . . . is to exclude Americans from equal housing opportunity on the basis of their race, religion or ethnic background, we will vigorously oppose it by whatever means are most appropriate—regardless of the rationale which may have cloaked the discriminatory act.

Id.

[15] 42 U.S.C. §§ 1401 et seq. (1970).
[16] 42 U.S.C. § 1401 (1970).
[17] 42 U.S.C. § 1441 (1970).
[18] 42 U.S.C. § 1441 (1970).
[19] 42 U.S.C. § 1441a (1970).
[20] 42 U.S.C. §§ 1409-11 (1970).

Housing and Urban Development (HUD) was authorized to provide: (a) preliminary loans to local public housing authorities to assist in the planning of low-rent projects;[21] (b) loans to assist in the development, acquisition, and administration of low-rent projects;[22] (c) annual contributions to assist in achieving and maintaining the low-rent character of the housing projects;[23] and (d) in special circumstances, capital grants.[24]

In 1938, the California Legislature enacted the Housing Authorities Law[25] to make the benefits of the federal Housing Act available to those of its counties and cities where a need for low-income housing had been declared. This statute provided that a local housing authority was to be formed in each county and city. The authority, however, could not exercise its powers until the governing body of each county and city declared that there was a need for low-income housing.[26] Essentially, under this state law, once a need for low-income housing was recognized and a housing authority activated, the local governing body could proceed with the construction of a housing project after applying for a preliminary federal loan to finance the project,[27] and agreeing with the local housing authority to provide the requisite local cooperation.[28]

Prior to enactment of the California Housing Authorities Law, a general referendum power had been vested in the California electorate by the state constitution. This right reserved to the people "the power to propose laws and amendments to the Constitution, and to . . . *adopt or reject any act* . . . passed by the Legislature."[29] However, in 1950, the Supreme Court of California held that the acts of a local governing body and housing authority under the Housing Authorities Act of

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[21] 42 U.S.C. § 1415(7)(a) (1970).

[22] 42 U.S.C. § 1409 (1970).

[23] 42 U.S.C. § 1410 (1970).

[24] 42 U.S.C. § 1411 (1970).

[25] Cal. Health and Safety Code §§ 34200 et seq. (West 1954). The statute contained, inter alia, specific legislative findings that insanitary and unsafe dwelling accommodations exist in places within the state where persons of low income are found to reside; that there is a shortage of safe and sanitary dwelling accommodations available at rents which low-income people can afford; and that such conditions constitute a menace to the health, safety, morals and welfare of the residents of the state. Cal. Health and Safety Code § 34201 (West 1954).

[26] Cal. Health and Safety Code § 34240 (West 1954).

[27] 42 U.S.C. § 1415(7)(a)(i) (1970). This loan, however, will not be approved by HUD unless the local housing authority demonstrates that there is a need for such low-rent housing which is not being met by private enterprise. 42 U.S.C. § 1415(7)(a)(ii) (1970).

[28] 42 U.S.C. § 1415(7)(b)(i) (1970).

[29] Cal. Const. art. IV § 1 (emphasis added). The legislative initiative and referendum thus granted the electorate was adopted in California and 21 other states as part of the progressive reform program during the early 1900's. See Comment, The Scope of the Initiative and Referendum in California, 54 Calif. L. Rev. 1717 (1966).

California were not subject to the electorate's referendum power because they were "executive and administrative" in nature rather than "legislative."[30] The state constitution was then amended by referendum to include Article XXXIV, which specifically required prior referendum approval for the construction or acquisition of low-income housing.[31] It was this specific requirement of Article XXXIV which the Supreme Court in *Valtierra* upheld as constitutional.

The Court determined that Article XXXIV was not racially discriminatory. It noted that "the record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."[32] However, since low-income families "usually—if not always—are members of minority groups,"[33] it is submitted that the Court should have considered the "utimate effect" of Article XXXIV in order to recognize that this provision provides a "sophisticated means of invidious discrimination."[34] In failing to consider the discriminatory effect of Article XXXIV, the Court ignored its earlier decision in *Reitman v. Mulkey*,[35] which provided the judicial touchstone for appraising the constitutionality of statutes and official acts that are allegedly discriminatory.

In *Reitman*, a husband and wife alleged that the owner of an apartment complex had violated California's open housing statutes[36] by refusing to rent an apartment to them on account of their race. The

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30 Housing Authority v. Superior Court, 35 Cal. 2d 550, 219 P.2d 457 (1950).

31 It should be noted that the general referendum provisions of Article IV of the California Constitution merely provide a review referendum. Only when a designated percentage of the electorate signs a petition in opposition to a legislative enactment is that enactment submitted to the voters for review at the polls. Cal. Const. art. IV § 1.

By comparison, Article XXXIV requires mandatory prior approval of the electorate before any low-rent housing is constructed. The only other class of governmental decision-making subject to this type of referendum is the decision of a county, city, or school district to assume any long-term indebtedness under a general obligation bond. Cal. Const. art. XIII § 40.

32 402 U.S. at 141.

33 See note 12 supra.

34 Ranjel v. City of Lansing, 293 F. Supp. 301, 306 (W.D. Mich. 1969). One commentator has noted that:

> An "invidious" classification or trait is one which combines . . . three qualities: (1) a general ill-suitedness to the advancement of any proper governmental objective; (2) a high degree of adaptation to uses which are oppressive in the sense of systematic and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence; (3) a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness.

Michelman, The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 20 (1970).

35 387 U.S. 369 (1967).

36 Cal. Health and Safety Code §§ 35700-44 (West 1967); Cal. Civ. Code §§ 55-52 (West Supp. 1971).

apartment owner claimed that the open housing statutes were nullified by the subsequent enactment of Proposition 14, which provided, in pertinent part, that:

> Neither the State nor any subdivision or agency thereof shall deny, limit or abridge, directly or indirectly, the right of any person, who is willing or desires to sell, lease or rent any part or all of his real property, to decline to sell, lease or rent such property to such person or persons as he, in his absolute discretion, chooses.[37]

The Supreme Court held Proposition 14 unconstitutional—a violation of the Equal Protection Clause. In making this determination, the Court did not merely consider the wording of the enactment, but also considered its immediate objective, ultimate effect and historical context.

The Court held that the "ultimate effect" of the enactment was more than a repeal of open housing legislation; that the provision amounted to state encouragement and authorization of private discrimination,[38] and, as such, was violative of the Fourteenth Amendment. In marked contrast, the *Valtierra* Court, in examining the effect of Article XXXIV, did not employ the "ultimate effect" test of *Reitman*. If this test had been applied to Article XXXIV, *Valtierra* might have been decided differently. The California referendum procedure at issue pertains solely to low-income housing, which is a matter of peculiar interest to the indigent faction of our society. Since that segment of society is primarily composed of racial minorities, it would appear that the "ultimate effect" of the referendum is an encouragement and authorization of private discrimination.

More recently, in *Hunter v. Erickson*,[39] the Supreme Court provided a narrower test upon which *Valtierra* could have been decided. In *Hunter*, the Supreme Court struck down the requirement of an Akron city charter that all open housing legislation be submitted to a referendum.[40] The Court abandoned the "ultimate effect" approach of *Reit-*

[37] Proposition 14 is reprinted in 387 U.S. at 371.

[38] When Proposition 14 was submitted to the voters it was passed by a vote of 4,526,460 to 2,395,747. Mulkey v. Reitman, 50 Cal. Rptr. 881, 892, 413 P.2d 825, 836 (1966). For the conclusion that the result was attributable to racial prejudice, see Wolfinger and Greenstein, The Repeal of Fair Housing in California: An Analysis of Referendum Voting, 62 Am. Pol. Sci. Rev. 753 (1968).

[39] 393 U.S. 385 (1969).

[40] The city charter provided that:

> Any ordinance enacted by the Council of The City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the base of race, color, religion, national origin or ancestry must first be approved by a majority of the electors voting on the question at a regular or general election before said

man and adopted an "equal burden" test. The Court ruled that the Akron referendum requirement violated the Equal Protection Clause because it subjected persons interested in open housing legislation to a greater procedural burden than it did those concerned with other types of real property legislation. Furthermore, the Court specifically found that the referendum was inherently a greater burden for racial minorities. Speaking for the majority, Mr. Justice White stated:

> [T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot . . . [the open housing referendum requirement] places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.[41]

It is submitted that the equal burden test in *Hunter* should prohibit legislation which subjects racial minorities interested in access to government-assisted housing to the burden of a referendum. This is not to say that equal protection is denied racial minority groups merely because their ranks are fewer in number. Rather, equal protection is denied when the state places a greater procedural burden on persons interested in government-assisted low-income housing—usually racial minorities—than on persons interested in other kinds of government-assisted housing. The *Valtierra* Court, however, eschewed the procedural burden approach adopted in *Hunter* on the grounds that the Akron amendment had explicitly applied to racial minorities, whereas the provisions of Article XXXIV made no mention of race. However, in so distinguishing *Hunter*, the *Valtierra* Court failed to recognize *Hunter's* implication that the Court should not uphold a state's distribution of legislative power if it places a procedural burden on racial minorities and impedes their access to housing.

The *Valtierra* Court failed to rectify the potential inequities of local rule by refusing to invalidate a referendum which could substantially restrict equal housing opportunities for minority groups. However, recent lower federal court decisions *have* enjoined referenda which would prevent equal access to housing even though a deliberate legislative intent to exclude economic and racial minorities was not expressed. In *Otey v. Common Council of the City of Milwaukee*,[42]

ordinance shall be effective. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approval by the electors as provided herein.

Akron, Ohio, Charter § 137, cited in 393 U.S. at 387.

41 393 U.S. at 391.

42 281 F. Supp. 264 (E.D. Wis. 1968).

the plaintiff, a black resident of Milwaukee, sought to enjoin the City Council from submitting the following resolution to the electorate for referendum approval:

> BE IT RESOLVED:
> That the Common Council of the City of Milwaukee SHALL NOT enact any ordinance which in any manner restricts the right of owners of any real estate to sell, lease, or rent private property.[43]

Although the proposed resolution did not serve to repeal any open housing laws, the federal district court applied the ultimate effect test espoused in *Reitman* and determined that the proposal was discriminatory.[44] In reaching this decision the court noted the existing racial housing patterns in Milwaukee, the failure of previous attempts to obtain open housing in that city, and the existing hostile racial climate. The court decided that, in light of the racial tension which permeated the local citizenry, the purpose and ultimate effect of the resolution was to encourage private discrimination. In marked contrast to the *Valtierra* Court's assertion that "referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice,"[45] the *Otey* court disregarded the "fallacious assumption that the 'will of the electorate' should invariably prevail. . . ."[46]

In *Ranjel v. City of Lansing*,[47] the district court relied on *Reitman* and *Otey* and also invoked the Supremacy Clause to enjoin a referendum intended to repeal a zoning ordinance permitting the construction of a HUD-sponsored low-rent housing project within an all-white neighborhood. The district court relied on both Title VI of the Civil Rights Act of 1964[48] and HUD regulations in determining that federal law required the selection of low-income sites outside areas of racial concentration. In addition to determining that the referendum, if

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[43] Reprinted in 281 F. Supp. at 267.

[44] In a similar case, the District Court for the Eastern District of Michigan employed the *Reitman* rationale to strike down a referendum on open housing. In Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968), the city council of Detroit had enacted open housing legislation in 1967. In 1968, a petition for referendum to repeal that legislation was circulated and listed for the following election. Black residents of Detroit sought to restrain the submission of the housing law to the electorate. In enjoining the referendum, the court reasoned that the "ultimate effect" of the repeal would be to create the impression that it was lawful to discriminate. Further, the court felt that arguments against open housing which assume "that rights guaranteed by the Federal Constitution still remain debatable in this community, cannot avoid having a detrimental effect upon the attempted exercise of constitutional rights." Id. at 996.

[45] 402 U.S. at 141.

[46] 281 F. Supp. at 275.

[47] 293 F. Supp. 301 (W.D. Mich. 1969), rev'd, 417 F.2d 321 (6th Cir. 1969).

[48] 42 U.S.C. §§ 2000 et seq. (1970).

passed, would frustrate federal policy, the court observed that the referendum was racially motivated. The court stated:

> If referenda of this type were consistently permitted, it would be possible for racially motivated people to totally prevent implementation of the congressional policy of building low cost housing outside the ghettos of our cities in order to ease racial tension and secure a better life for many of our citizens.[49]

On appeal, the Sixth Circuit reversed on the grounds that HUD regulations "do not rise to the dignity of federal law,"[50] and, that there was insufficient evidence to show that the referendum encouraged racially discriminatory practices. The court was satisfied that "if the electors had a legal right to a referendum, their motive in exercising that right would be immaterial."[51] The court emphasized the irrelevance of motive in a referendum and, unlike the Supreme Court in *Reitman*, did not examine its possible effect.[52]

Valtierra, however, went further than *Ranjel*, in that it did consider the effect of the referendum but still upheld its constitutionality. The majority stated that the referendum procedure represents a "devotion to democracy," reasoning that, even though this procedure "disadvantages" a particular group, "equal protection was not denied."[53] Mr. Justice Marshall, in a brief but vigorous dissent, criticized this rationale and argued that the Court treated the *Valtierra* referendum "as if it contained a totally benign, technical economic classification."[54] He noted that the guarantee of equal protection was not peculiar to racial and ethnic discrimination, but that it also pertained to differentiations based on wealth or poverty. Justice Marshall stated that:

> It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination. . . . [S]ingling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.[55]

The dissenting opinion is supported by the fact that in California, low-

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49 293 F. Supp. at 311.

50 417 F.2d at 323.

51 Id. at 324.

52 One commentator has criticized the *Ranjel* decision as a mechanical acceptance of "the right of suffrage . . . regardless of the consequences of its use." Cutler, Legality of Zoning to Exclude the Poor: A Preliminary Analysis of Evolving Law, 37 Brooklyn L. Rev. 483, 494 (1971).

53 402 U.S. at 142.

54 Id. at 145.

55 Id.

income housing decisions are the only land use decisions subject to a mandatory prior approval referendum.[56] By requiring the proponents of low-income public housing to bear the special burden of obtaining not only local legislative and HUD approval, but also the prior approval of the electorate, Article XXXIV is clearly within the ambit of the "increased legislative burden" rule of *Hunter*. Furthermore, by ignoring Article XXXIV's explicit economic classification, the majority in *Valtierra* failed to consider the trend of recent cases concerning equal protection for the poor.

The means of providing equality for the poor has been the "new equal protection"[57] standard which prescribes that only a compelling state interest can justify legislative classifications made on the basis of wealth or race when such legislation infringes upon certain fundamental rights of citizens. The Supreme Court, in applying the "new equal protection" standard, has required that the state show not only a compelling interest which justifies the law, but that the distinctions drawn by the law are necessary to further its purpose.[58] In its solicitude for the rights of indigents, the Supreme Court has determined that the right to travel,[59] the right to vote,[60] and the right to criminal appeal[61] are fundamental rights, and, that classifications which infringe on these rights cannot be made to turn on one's wealth or property. Although the Court has never specifically indicated that the the right to equal housing opportunity is fundamental, the importance of decent housing and a suitable living environment has been recognized explicitly by Congress[62] and implicitly by the Supreme Court.[63]

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[56] Other public decisions significantly affecting fiscal spending and land use in California are not subject to the mandatory prior approval of the electorate. For example, a group may obtain government authorization without prior referendum approval if it wishes to participate in federal programs securing grants for the construction of highways, 23 U.S.C. §§ 101 et seq. (1970); hospitals, 42 U.S.C. §§ 291 et seq. (1970); public mental health centers, 42 U.S.C. §§ 2681 et seq. (1970); libraries, 20 U.S.C. §§ 352 et seq. (1970); and grants to educational institutions providing housing for students and faculty, 12 U.S.C. § 1749 (1970).

[57] The term "new equal protection" has been used by various commentators to represent the Supreme Court's recent application of a more strict standard to the Fourteenth Amendment protection. For an excellent discussion contrasting the "new equal protection" standard with the traditional standard see Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 Stan. L. Rev. 767-80 (1969); and Comment, Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

[58] Kramer v. Union School District, 395 U.S. 621, 626-28 (1969); Williams v. Rhodes, 393 U.S. 23, 30-33 (1968). See also Westbrook v. Mihaly, 2 Cal. 3d 765, 785, 471 P.2d 487, 500-01 (1970) where a state court evaluates how the Supreme Court reviews economic classifications.

[59] Shapiro v. Thompson, 394 U.S. 618 (1969).

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

[61] Griffin v. Illinois, 351 U.S. 12 (1956).

[62] See text at notes 15-17 supra.

[63] See Block v. Hirsh, 265 U.S. 135, 156 (1921); Buchanan v. Warley, 245 U.S. 60

In this regard, the rationale of a recent California Supreme Court decision which held education to be a fundamental right provides a persuasive analogy for a determination that the right to housing is similarly fundamental.

In *Serrano v. Priest*,[64] the court ruled invalid the state's program of school financing through local property taxes. The court noted that "education is a major determinant of an individual's chances for economic and social success in our competitive society" and that it has "a unique influence on a child's development as a citizen and his participation in political and community life."[65] Although there was no precedent for finding that public education is a fundamental right, the *Serrano* court found ample justification for such a determination in the recognition given education by the Supreme Court in *Brown v. Board of Education*.[66] The Court there stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.[67]

Determining that the right to public education is fundamental, the *Serrano* court concluded that local control of public education did not provide a sufficient "compelling state interest" to justify the resultant inequality of education between communities.[68]

Like education, decent housing and a suitable living environment are major determinants "of an individual's chances for economic and social success in our competitive society. . . ."[69] The importance of the equal opportunity to acquire adequate housing may be seen in the interrelationship between housing and the availability of other private and public services. Frequently, the location of a family's home determines the quality of education, recreation and work that will be available to the family members.[70] Since access to adequate housing is often vital in the acquisition of at least one fundamental right, education, it appears that the right to housing should similarly be considered fundamental. With such a determination, the economic justification for

(1917); Shelley v. Kraemer, 334 U.S. 1 (1948); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

64 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

65 Id. at 615-16, 487 P.2d 1255-56.

66 347 U.S. 483 (1954).

67 Id. at 493.

68 96 Cal. Rptr. at 619-20, 487 P.2d at 1259-60.

69 Id. at 616, 487 P.2d at 1256.

70 See, Toward Better Housing for Low Income Families, Report of the President's Task Force on Low Income Housing 14 (1970).

requiring a referendum on government assisted low-income housing would not appear to be a state interest sufficiently compelling to warrant procedural distinctions between low-income and other types of housing.

In upholding California's referendum on low-income housing, the *Valtierra* decision runs counter to a number of recent, lower federal court decisions which indicate that communities may have an affirmative duty to provide for the housing needs of their poor. In *Southern Alameda Spanish Speaking Organization (SASSO) v. Union City*,[71] the Spanish Speaking Organization had obtained a city ordinance authorizing the rezoning of an area of land in order to construct a federally financed low-income housing project. The ordinance was repealed, however, in a subsequent citywide referendum. SASSO brought an action challenging both the legality of the state's submission of zoning matters to referendum and the referendum result. The court sustained the validity of the referendum since no discriminatory motive had been shown, but in dictum noted that:

> If, apart from voter motive, the result of this zoning by referendum is discriminatory in this fashion, in our view a substantial constitutional question is presented. . . . Given the recognized importance of equal opportunities in housing, it may well be, as matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan as initiated or as it develops accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.[72]

This language not only reiterates the *Reitman* rationale that the *effect* of a referendum is the critical factor in determining constitutionality, but goes beyond to suggest that a municipality may have an affirmative duty to plan for the housing needs of low-income families.

The affirmative duty to plan for low-income housing was judicially imposed in *Kennedy Park Homes Ass'n v. City of Lackawanna*.[73] In that case, the city rezoned for public park purposes an area which had been zoned for low-income housing. The plaintiffs, indigents who had intended to purchase the low-cost dwellings to be built on the site, brought an action against the city, charging that the rezoning constituted a violation of the Equal Protection Clause. The city claimed that the zoning change was necessitated by sewage problems that would become uncontrollable and costly if housing were to be con-

[71] 424 F.2d 291 (9th Cir. 1970).
[72] Id. at 295-96.
[73] 318 F. Supp. 669 (W.D.N.Y. 1970).

structed on the site. The court held that the rezoning was unconstitutional because it denied equal protection of the law to the plaintiffs. Since the city had never considered alternate methods of dealing with the sewage problem, which would permit the construction of the low-income housing, the court further held that the rezoning had not been prompted by a compelling local interest justifying the infringement of the plaintiffs' rights. Although *Kennedy Park Homes* did not involve the submission of a zoning decision to referendum approval, as did *SASSO*, the *Kennedy Park Homes* court cited that decision to support its determinination that city officials had an affirmative duty to consider alternative means of accommodating low-income housing in their community.

Clearly, *Valtierra* has not overturned these decisions since the issue as to whether local governments had an affirmative duty to plan for the housing needs of the poor was not decided by the Court. Nevertheless, *Valtierra* sanctions a procedure which precludes independent "affirmative" action by local governmental officials in providing for the housing needs of the poor. It is to be hoped that *Valtierra* constitutes only a temporary delay in the establishment of a fundamental right to housing. Unfortunately, however, the decision is an obstacle to any future Supreme Court determination that local officials have an affirmative duty to consider low-income housing in community planning.

The *Valtierra* decision may also be suggestive of the Supreme Court's negative response to state decisions which have held that citizen concern over increased municipal expenditures does not justify exclusionary residential zoning. In *National Land and Investment Co. v. Easttown Bd. of Adjustments*,[74] the Supreme Court of Pennsylvania held a four-acre minimum lot zoning requirement unconstitutional. The court found the zoning ordinance unlawful because it excluded from the community those who were unable to purchase that much land. In rejecting the argument that the zoning requirement was intended to restrict the size of the community in order to limit the need for costly public services, the court noted that when the primary purpose of a zoning ordinance "is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities [it] can not be held valid."[75]

The municipal cost justification for a minimum lot size zoning restriction was again rejected by the Pennsylvania Supreme Court in *In Re Kit-Mar Builders Inc.*[76] In that case, the court invalidated two- and three-acre minimum lot zoning requirements, stating that towns

[74] 419 Pa. 504, 215 A.2d 597 (1965).
[75] Id. at 532, 215 A.2d at 612.
[76] 439 Pa. 466, 268 A.2d 765 (1970).

cannot choose to "keep out people rather than make community improvements."[77] Although this type of exclusionary zoning was not in issue in *Valtierra*, the Supreme Court has essentially repudiated the Pennsylvania court's reasoning that increased public spending should not be determinative in matters that directly affect housing. The *Valtierra* Court clearly indicated that the consideration of increased local government expenditures for public services was a justifiable basis for the exclusion, through use of the referendum, of low-income housing projects.[78]

While it is true that increased costs for community services are a necessary element of local governmental decision-making, the ultimate effect of these cost decisions must be considered. The Supreme Court in *Shapiro v. Thompson*,[79] which held that state residency requirements for welfare eligibility constituted a denial of equal protection, ruled that:

> [The state] may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a state may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.[80]

Similarly, a local government, by its own action or by submission to a referendum, should not be permitted to limit expenditures for public services by barring low-income families from its community, or by failing to provide housing for its own low-income residents. The *Valtierra* Court's indication that the construction of low-income housing may be lawfully prevented by taxpayers wishing to limit local government expenditures serves to reinforce the legality of economic discrimination. In light of the fundamental importance of adequate housing, however, the local interest in limiting public expenditures does not appear compelling in view of the critical shortage of housing for low-income groups.

The Supreme Court's determination in *Valtierra* that issues regarding low-income housing may be submitted to the referendum process substantially limits the protection afforded low-income minorities under the Fourteenth Amendment. The Court's refusal to recognize the right to adequate housing as fundamental permits local

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[77] Id. at 474, 268 A.2d at 768.

[78] "This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues." 402 U.S. at 143.

[79] 394 U.S. 618 (1969).

[80] Id. at 633.

governing bodies to implement subtle schemes of economic discrimination; it also ignores the relationship between the location of a person's home and the availability of public and private services fundamental to the attainment of economic and social equality. For the foregoing reasons, the Supreme Court should reconsider the rationale of *Valtierra*. The federal low-income housing policy and future construction of low-income housing will be jeopardized if, by referendum, a community can exclude all federally assisted low-income housing projects. The implications of such a proposition are far-reaching for, without federal funds, the housing needs of the poor will never be met. It is therefore urged that decisions pertaining to low-income housing, like the open-housing legislation in *Hunter*, should be removed from the requirements of mandatory referenda approval.

THOMAS J. MIZO

Consumer Law—Class Actions—Waiver of Defense Clauses—*Vasquez v. Superior Court of San Joaquin County*.[1]—The petitioners, purchasers of food freezers and frozen food plans, brought a class suit, on behalf of themselves and all other purchasers similarly situated, against the seller and several assignee finance companies,[2] seeking rescission of the sales contracts and damages. The petitioners charged common law fraud[3] and violations of the California Retail Installment Sales Act (Unruh Act).[4] They alleged that salesmen of the seller, using a memorized sales presentation, had fraudulently represented that (1) the seller's freezers were guaranteed for life; (2) the freezers were being sold at reasonable retail prices; and (3) the frozen food plans provided a seven-month food supply at one-seventh the normal retail price. The petitioners contended that a class action[5] for fraud was appropriate because identical misrepresentations concerning the price and quality of the goods sold had been made to all class members and because all class members had suffered similar damage.[6]

[1] 4 Cal. 2d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

[2] The installment sales contracts of the defendant meat company had been routinely assigned to three finance companies named as defendants. Id. at 806, 484 P.2d at 966-67, 94 Cal. Rptr. at 798-99.

[3] See Ach v. Finkelstein, 264 Cal. App. 2d 667, 674, 70 Cal. Rptr. 472, 477 (1968), for discussion of the California requirements for a fraud action.

[4] Cal. Civ. Code §§ 1801 et seq. (West Supp. 1971). This statute regulates consumer financing practices and prescribes specific civil penalties for violations. The violation alleged in the principal case was that the seller had required the execution of two sales documents, a practice prohibited by § 1803.2 of the Unruh Act, which requires that every retail installment contract be contained in a single document.

[5] Cal. Code Civ. Pro. § 382 (West 1954). This section authorizes a representative action in California.

[6] In addition, the petitioners contended that a class action was the only suit they could feasibly bring because of the small size of each individual claim. 4 Cal. 3d at 816, 484 P.2d at 974, 94 Cal. Rptr. at 806.