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DISCRIMINATION THROUGH EXCLUSIONARY HOUSING REFERENDA:

*JAMES v. VALTIERRA*¹

The right of the poor to secure adequate housing is undoubtedly among the more bitterly debated legal and social issues confronting our society. The public housing question raised in *James v. Valtierra*² brought to a boil the conflict between the philosophy of social change engineered for two decades by the Warren Court and the new equal protection concepts formulated by the present Court. In *Valtierra* the Supreme Court was asked to decide whether the Equal Protection Clause of the Fourteenth Amendment³ vitiated a California constitutional amendment which required referendum approval prior to local filing for federal low-income housing funds. By holding the amendment constitutional,⁴ the Court not only left intact a roadblock to future reduced-cost housing projects but also countenanced an equal protection standard which brings to a halt the journey begun by the prior Court.

The Housing Act of 1937,⁵ also known as the Wagner-Steagall Act, established the United States Housing Authority,⁶ which was authorized to provide funds to state agencies in the form of loans and grants to promote low-rent public housing projects.⁷ Soon thereafter the California legislature created in each city and county a local housing

1. 402 U.S. 137 (1971).

2. *Id.*

3. U.S. CONST. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

4. 402 U.S. at 143.

5. Act of Sept. 1, 1937, ch. 896, §§ 1-30, 50 Stat. 888-99, *as amended*, 42 U.S.C. § 1401 *et seq.* (1970). The low-rent housing provisions are contained in 42 U.S.C. §§ 1401-30 (1970).

6. 42 U.S.C. § 1403 (1970).

7. Under the program, construction is normally financed through the sale of bonds issued by a local housing authority. The federal government contracts to cover all interest and principal on the bonds, while local governing bodies must agree to cooperate with the venture, and to supply municipal utilities, police and fire protection, and school services. 402 U.S. at 143 n.4. The local governing body must forego all property taxes applicable to the project. 42 U.S.C. § 1410(h) (1970). For a general discussion of the purposes, operation, accomplishments and failures of the Wagner-Steagall Act, see Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966).

authority⁸ empowered to apply for federal funds under the Wagner-Steagall Act and to disburse the proceeds for the construction and maintenance of public housing within the authority's jurisdiction.⁹

In 1950, a California group sought to oppose, through a city-wide referendum, the Housing Authority of the City of Eureka's request for federal public housing funds. Their attempt was thwarted, however, by the California Supreme Court in *Housing Authority v. Superior Court*.¹⁰ There, the Court held that the referendum provisions of the California Constitution¹¹ reserve to the people only the power to test legislative acts,¹² and thus are inapplicable to the Housing Authority's request for Wagner-Steagall funds, which was a purely administrative action.¹³

As a result of this decision, Proposition 10 was placed by a voter initiative on the November, 1950, state election ballot. Passing with a vote of only 50.6% of the electorate,¹⁴ Proposition 10 added Article XXXIV to the state constitution. This article requires that before federal funds for any low-income public housing project may be sought by any state, city, or county housing authority, approval by a majority of the voters of the city or county concerned must be secured through the device of a popular referendum.¹⁵ By its terms the article applies only to "low rent housing project[s]" designed as accommodations "for persons of low income. . . ." Such persons are defined as "persons or families who lack the amount of income which is necessary . . . to enable them,

8. CAL. HEALTH & SAFETY CODE ANN. § 34240 (West 1967). The governing body of the city or county concerned must first resolve that there is a need for a housing authority to function within its jurisdiction. *Id.*

9. *Id.* §§ 34312-30. Section 34327 sets forth the nature and scope of the power of the local authorities to obtain funds from the federal government.

10. 35 Cal. 2d 550, 219 P.2d 457 (1950).

11. CAL. CONST. art. IV, § 1. In 1966 the California Constitution was amended and renumbered. The referendum provisions are now found in Article IV, Sections 23-25 of the California Constitution.

12. 35 Cal. 2d at 557, 219 P.2d at 460-61.

13. *Id.* at 558-59, 219 P.2d at 461-62. However, an equally plausible view would be to characterize the local housing authority as a mere creature of the legislature, thus deeming the acts of that authority as acts of the legislature itself. Such a result would expose the decisions of the local authority to referendum approval.

14. The statewide vote was 1,526,209 for passage, with 1,489,799 against. L.A. Times, Nov. 10, 1950, at 7, col. 1.

15. CAL. CONST. art. XXXIV, § 1, which provides in part:

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.

without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding."¹⁶

Mrs. Anita Valtierra¹⁷ was a resident of Santa Clara County and of the city of San Jose, and a person "of low income" within the meaning of Article XXXIV.¹⁸ She was determined by the Housing Authority of the City of San Jose to be eligible for public housing, and, since no units were available for occupancy at the time of her application, her name was placed on an appropriate waiting list.¹⁹ One cause of the paucity of low-income housing in Santa Clara County was the defeat by the county's voters in 1968 of an Article XXXIV referendum seeking approval of the Housing Authority's application for federal housing funds.²⁰ Mrs. Valtierra brought an action before the United States District Court for the Northern District of California, sitting as a three-judge court, seeking (1) an equitable decree declaring Article XXXIV to be repugnant to the Federal Constitution, and (2) an injunction forbidding the Housing Authority of the City of San Jose, its members in their official capacity, the City Council of San Jose, and its members in their official capacity, from relying on Article XXXIV and its referendum provisions as a justification for failure to obtain federal public housing funds.²¹ Mrs. Valtierra's complaint, which was founded upon the federal civil rights statute,²² alleged that Article XXXIV was unconstitutional in three respects: (1) it violated the Supremacy Clause²³ in that

16. *Id.*

17. *Valtierra v. Housing Authority of San Jose*, 313 F. Supp. 1 (N.D. Cal. 1970), *rev'd sub nom. James v. Valtierra*, 402 U.S. 137 (1971), involved numerous parties plaintiff and appellees, respectively, all of whom were "persons of low income." Throughout this Note all references to "Anita Valtierra" or to "Mrs. Valtierra" should be understood to include all parties plaintiff in *Valtierra v. Housing Authority of San Jose*, *supra*, and all appellees in *James v. Valtierra*, *supra*.

18. *Valtierra v. Housing Authority of San Jose*, 313 F. Supp. at 3.

19. *Id.*

20. *Id.*

21. *Id.* at 2-3. The Federal Department of Housing and Urban Development, and its Secretary, George Romney, were also joined as defendants. Since Mrs. Valtierra's complaint had sought no relief against the federal defendants, and since their joinder was not necessary in order to grant the relief requested, the complaint as to them was dismissed. 313 F. Supp. at 3.

22. 42 U.S.C. § 1983 (1970). This statute authorizes a civil action arising out of the deprivation, under color of state law, of any right, privilege, or immunity guaranteed by the United States Constitution. The federal district court is granted original jurisdiction of such actions (28 U.S.C. § 1343 (1970)), and where plaintiffs seek to enjoin local officials from enforcing a state statute or state constitutional provision on the grounds of that provision's repugnance to the Federal Constitution, the action must be heard by a federal district court of three judges, convened in accordance with the terms of section 2284 of title 28. 28 U.S.C. § 2281 (1970).

23. U.S. CONST. art. VI, cl. 2.

it evidenced California's attempt to frustrate or otherwise qualify the manifest will of Congress expressed in the Wagner-Steagall Act,²⁴ (2) it denied her certain privileges and immunities of United States citizenship,²⁵ and (3) it invidiously discriminated against her on the basis of wealth in violation of the Equal Protection Clause of the Fourteenth Amendment.²⁶

The three-judge court, in a unanimous opinion delivered by Judge Peckham, found plaintiff's Supremacy Clause argument "unpersuasive,"²⁷ and failed to reach her claim under the Privileges and Immunities Clause.²⁸ The court determined, however, that Article XXXIV violated the Equal Protection Clause on the grounds that its enforcement resulted in "the unequal imposition of burdens upon groups that are not rationally differentiable in the light of any legitimate State legislative objective."²⁹ The court observed that "[i]t is no longer a permissible legislative objective to contain or exclude persons simply because they are poor."³⁰ Relying on *Hunter v. Erickson*,³¹ the court found Article XXXIV defective on three conjunctive points: (1) the referendum was a "special burden" since it was not a prerequisite to re-

24. 42 U.S.C. § 1401 (1970):

It is declared to be the policy of the United States to promote the general welfare of the Nation by employing its funds and credit . . . to assist the several States and their political subdivisions to alleviate present and recurring unemployment and to remedy the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income, in urban, rural nonfarm, and Indian areas, that are injurious to the health, safety, and morals of the citizens of the Nation. . . . It is the policy of the United States to vest in the local public housing agencies the maximum amount of responsibility in the administration of the low-rent housing program. . . .

Similar sentiments are expressed in CAL. HEALTH & SAFETY CODE ANN. § 34201 (West 1967).

25. U.S. CONST. amend. XIV, § 1.

26. See note 3 *supra*. The provisions of the Fourteenth Amendment are applicable, under its terms, only to actions sanctioned by a state or any instrumentality of a state. Civil Rights Cases, 109 U.S. 3 (1883). In addition, the statute (42 U.S.C. § 1983 (1970)) on which Mrs. Valtierra's cause of action was founded extends only to situations in which "state action" is present. See note 22 *supra*. In *Valtierra* the alleged discrimination took place under the auspices of a local housing authority, created and acting under the terms of both a state statute and a state constitutional provision. See notes 8-9, 15 *supra*. Hence "state action" was clearly present and was not an "issue" in the district court.

27. 313 F. Supp. at 4.

28. *Id.*

29. *Id.*, citing *Rinaldi v. Yeager*, 384 U.S. 305 (1966); *Baxstrom v. Herold*, 383 U.S. 107 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *McLaughlin v. Florida*, 379 U.S. 184 (1964); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

30. 313 F. Supp. at 4, citing *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

31. 393 U.S. 385 (1969).

quests by most other state agencies seeking federal funds;³² (2) "the impact of the law falls upon minorities . . .";³³ and (3) in response to the defendants' contention that the referendum is a manifestation of equality under the law rather than discrimination, the court stated:

"[I]nsisting that a State may distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects may generally be true, but these principles furnish no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. Nor does the implementation of this change through popular referendum immunize it. . . . The sovereignty of the people is itself subject to . . . constitutional limitations. . . ."³⁴

The court recognized that while California is not compelled to seek federal housing funds, it is nevertheless bound by the strictures of the Equal Protection Clause once it chooses to do so.³⁵ Apparently assuming that Article XXXIV was not the product of unconstitutional motivations, the court noted that "lack of bad motive has never been held to cure an otherwise discriminatory scheme."³⁶ Accordingly, the court declared Article XXXIV unconstitutional and enjoined defendants from relying upon its terms as a reason for not requesting federal assistance with which to finance low-income public housing.³⁷

32. 313 F. Supp. at 5. The court noted several specific examples of projects for which federal funds may be secured without a required referendum. These included highways, urban renewal, hospitals, colleges, universities, secondary schools, law enforcement assistance, and model cities. *Id.*

33. *Id.* In support of this finding the court specifically noted the affidavit of Mr. Franklin Lockfield, Senior Planner for the Santa Clara County Planning Department, in which he described the recent low-income housing difficulties in Santa Clara County:

The low income areas are closely related to the areas of concentration of minority residents and high income areas are closely related to the nearly all white sections of the community. * * * In 1960, only 5% of the units occupied by white-non-Mexican-Americans were in delapidated or deteriorated condition, while 23% of the units occupied by Mexican-Americans and 20% of the units occupied by non-whites were in delapidated or deteriorated condition. Minorities were thus over represented in the less than standard housing by greater than four to one, and occupied nearly one-third of the deteriorating and delapidated housing in the County in 1960. *Id.* n.2.

34. 313 F. Supp. at 5, quoting *Hunter v. Erickson*, 393 U.S. 385, 392 (1969). The *Hunter* Court cited *Lucas v. Colorado Gen. Assembly*, 377 U.S. 713, 736-37 (1964), as support. In *Lucas*, a state legislative reapportionment scheme, adopted by the voters of Colorado through referendum, was held contrary to the Equal Protection Clause under the doctrine of *Reynolds v. Sims*, 377 U.S. 533 (1964). In response to the argument that the people of the state had consented to any violation of the so-called "one man-one vote" rule, Chief Justice Warren, writing for the *Lucas* Court, declared: "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." 377 U.S. at 736-37 (footnote omitted).

35. 313 F. Supp. at 5.

36. *Id.* at 6. It is not entirely certain, however, that Article XXXIV is devoid of "unconstitutional motivations." See text accompanying note 135 *infra*.

37. 313 F. Supp. at 6.

The City Council of San Jose and Mrs. Virginia C. Shaffer, a member of that council, each appealed the judgment to the United States Supreme Court,³⁸ which reversed the district court's order and remanded the two cases for dismissal.³⁹ In so doing, the Court turned aside the hopes of many legal writers,⁴⁰ civil rights advocates,⁴¹ and thousands of the nation's urban poor, and simultaneously placed tenuous contours on the application of the Equal Protection Clause to statutory discriminations based solely on wealth. While referendum requirements similar to Article XXXIV exist in other states,⁴² the number of such jurisdictions will very likely increase as a result of the instant decision.⁴³

Mrs. Valtierra's Supremacy Clause argument centered on her assertion that the Housing Act of 1937 represented a statement of commitment on the part of the federal government to eradicate slums and other inadequate housing from the cities of the nation. She contended that where a state constitutional provision conflicts with the expressed will

38. Both appeals were taken pursuant to 28 U.S.C. § 1253 (1970), which allows for a direct appeal to the Supreme Court from any three judge district court decree. Probable jurisdiction was noted in *James v. Valtierra*, 398 U.S. 949 (1970), and in *Shaffer v. Valtierra*, 399 U.S. 925 (1970). Because of the substantial identity of issues, the two appeals were argued and decided together.

39. *James v. Valtierra*, 402 U.S. 137, 143 (1971). Joining Justice Black in the opinion of the Court were the Chief Justice and Justices Harlan, White and Stewart. With Justice Marshall in dissent were Justices Brennan and Blackmun. Justice Douglas did not take part in the decision.

40. See, e.g., Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 207 (1970); Roisman, *The Right to Public Housing*, 39 GEO. WASH. L. REV. 691 (1971); Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971); Note, *Exclusionary Zoning and Equal Protection*, 84 HARV. L. REV. 1645 (1971).

41. See, e.g., Wilkins, *Supreme Court Housing Ruling Closes Suburb Doors to Blacks*, L. A. Times, May 10, 1971, § 2, at 7, col. 3. While Mr. Wilkins' constitutional theory may be disputed, his comments noted in the Los Angeles Times crystallize the initial reaction of the black community to the *Valtierra* decision.

42. See, e.g., 26 MINN. STAT. ANN. ch. 462, § 465(2) (1966); NEB. REV. STAT. ch. 71, § 1509 (1966) (limited to municipal housing authorities only); VA. CODE ANN. tit. 36, § 19.4 (repl. 1966) (limited to cities between 70,000 and 90,000 in population). No state, other than California, has as yet raised such a provision to state constitutional status. The legislatures of Minnesota, Nebraska, and Virginia, unlike their California counterpart, retain control over the future of their respective state public housing programs.

43. At least twenty-one states have initiative and referendum procedures similar to California's. Fordham & Leach, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495, 496 (1950). The way is thus paved in these states for enactment of statutory or constitutional provisions similar to California's Article XXXIV, without a wholesale reform of a given state's governmental processes.

of Congress acting under its enumerated powers, the Supremacy Clause should invalidate the contrary state provision.⁴⁴ The Federal Housing Act of 1937, however, does not specifically require the states to apply for the funds which the Act makes available. Rather, federal policy since 1937 has been to assist the states financially in what remains an essentially local program for the alleviation of poor housing conditions.⁴⁵ As such, the *Valtierra* Court apparently agreed unanimously that Article XXXIV was immune from attack on Supremacy Clause grounds.⁴⁶

Mrs. Valtierra's claim that Article XXXIV violated the Privileges and Immunities Clause was summarily dismissed by the Court as "without merit."⁴⁷ Such treatment is consonant, however, with the "dead-letter" status which the Privileges and Immunities Clause has enjoyed for some time. This Fourteenth Amendment clause, forbidding state invasion of fundamental rights of United States citizenship,⁴⁸ has long been overshadowed in legal significance by the Due Process and Equal

44. See *Taylor v. Thomas*, 89 U.S. (22 Wall.) 479 (1874); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

45. See note 24 *supra*. The Act does, however, require local public housing agencies to provide,

to the maximum extent consistent with the achievement of the objectives of this chapter, . . . low rent housing . . . where such housing . . . can be provided at a cost equal to or less than housing in projects assisted under other provisions of this chapter. 42 U.S.C. § 1421b(a)(1) (1970).

This provision does not apply where the local governing body has failed to approve these statutory terms by resolution. 42 U.S.C. § 1421b(a)(2) (1970). In *Valtierra*, the San Jose City Council supported the City Housing Authority throughout the litigation, and presumably made no section 1421b(a)(2) resolution, at least as to the project for which appellees had applied.

46. 402 U.S. at 140.

47. *Id.* Mrs. Valtierra asserted that a decent, safe and sanitary dwelling, free of overcrowding, is a privilege coextensive with United States citizenship. In her case, and in that of any member of the nation's rural or urban poor, the existence of such a right necessarily implies the right to secure the *construction* of such dwellings where they do not presently exist.

48. The sole inquiry under the Fourteenth Amendment Privileges and Immunities Clause is whether the privilege claimed is one which arises by virtue of the national citizenship of the claimant. *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled on other grounds*, *Madden v. Kentucky*, 309 U.S. 83 (1940). The first eight amendments of the Bill of Rights are not applicable to the states through this clause, however, since their ambit is not dependent upon the national citizenship of a claimant. *Maxwell v. Dow*, 176 U.S. 581 (1900); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). Thus, arguments based on the Privileges and Immunities Clause have rarely been successful before the Supreme Court. See note 52 *infra*.

Examples of privileges accorded protection under this clause are the right to pass freely between states, or to reside in any state, *Hess v. Pawloski*, 274 U.S. 352 (1927) (dictum), and the right to enter the public lands of the United States, *Twining v. New Jersey*, 211 U.S. 78 (1908) (dictum).

Protection Clauses which protect the interests of all "persons."⁴⁹ The early Fourteenth Amendment decisions were quick to conceive this distinction between the relative breadth and applicability of the Amendment's clauses.⁵⁰ A determination that the rights to secure decent housing and to compel local governments to construct such housing are so fundamental as to be deemed a privilege inherent in United States citizenship would of necessity compel a holding that such rights are protected by either or both the Equal Protection and Due Process Clauses. Hence the *Valtierra* Court adopted a course which would lead to the result of most general application,⁵¹ and rested the outcome of the case on its interpretation of the Equal Protection Clause.⁵²

In rejecting the appellees' equal protection claim, the *Valtierra* majority rested heavily upon a strict interpretation of its prior decision in *Hunter v. Erickson*.⁵³ There, the Court was called upon to decide the constitutionality of an Akron, Ohio, city charter amendment which required a majority referendum prior to the enactment of

[a]ny ordinance . . . which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property . . . on the basis of race, color, religion, national origin or ancestry. . . .⁵⁴

Finding that the charter amendment distinguished between those who sought protection against racial bias in the sale and rental of real

49. U.S. CONST. amend. XIV, § 1. See note 3 *supra*.

50. See, e.g., *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873). This case held for the first time that the restrictions on federal power contained in the Bill of Rights were not per se privileges and immunities of United States citizens for Fourteenth Amendment purposes. Although much of the case has subsequently been overruled, the Privileges and Immunities Clause has, since 1873, been for practical purposes a Constitutional dead letter. *Colgate v. Harvey*, 296 U.S. 404, 436 (1935) (Stone, J., *dissenting*).

51. This same process was followed in *Shapiro v. Thompson*, 394 U.S. 618 (1969). There, the Court considered statutes of two states and of the District of Columbia which imposed a one year residency requirement on welfare recipients prior to payment of welfare funds. While the Court recognized that these provisions impinged on the right of welfare recipients to travel freely between states, and thus considered itself able to overturn the regulations on privileges and immunities grounds, it preferred to rest its decision on the Equal Protection Clause.

52. See 402 U.S. at 140. Cf. *Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled on other grounds*, *Madden v. Kentucky*, 309 U.S. 83 (1940), wherein the Court utilized the Privileges and Immunities Clause to invalidate a state statute which restricted the right of a citizen resident in one state to contract in another. The dissenting opinion of Justice Stone in *Colgate* pointed out that of the at least 44 cases previously brought to the Supreme Court in which state statutes have been assailed on Fourteenth Amendment Privileges and Immunities grounds, *Colgate* was the first explicitly to hold any state action in violation of that clause. 296 U.S. at 445-46.

53. 393 U.S. 385 (1969).

54. *Id.* at 387, quoting Akron, Ohio, City Charter § 137 (Nov. 1964).

estate and those who sought to regulate real property transactions in the pursuit of other ends, the *Hunter* Court held Akron's scheme to be repugnant to the Equal Protection Clause.⁵⁵ The Court looked beyond the seemingly neutral language of the charter and perceptively recognized that

although the law on its face treats Negro and white, Jew and gentile in an identical manner, the 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.⁵⁶

Thus confronting reality, the Court encountered little difficulty in overturning a provision which, on its face, simply authorized a popular election based on a referendum right retained by the people.⁵⁷

Entwined in the *Hunter* facts, however, was an Akron fair housing ordinance passed prior to enactment of the charter amendment;⁵⁸ the enforcement of this ordinance was effectively barred by the referendum requirement of the challenged charter provision.⁵⁹ Justice Black, dissenting in *Hunter*, criticized the majority opinion for effectively compelling the city of Akron to retain and enforce the fair housing ordinance—an ordinance which the Court apparently wished to revive:⁶⁰

Although the Court denies the fact, I read its opinion as holding that a city that "wields state power" is barred from repealing an existing ordinance that forbids discrimination. . . .⁶¹

Voicing his well-sounded objection to a panacean application of the Due Process and Equal Protection Clauses,⁶² Justice Black further reproached the *Hunter* majority for its utilization of these clauses

55. 393 U.S. at 390-91, 393. Justice White's opinion for the majority stressed the existence of an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." *Id.* at 389.

56. *Id.* at 391.

57. *Id.* at 392.

58. *Id.* at 386-87. Akron, Ohio, Ordinance No. 873-1964 § 1 (July 14, 1964) set forth the city's policy to "assure equal opportunity to all persons to live in decent housing facilities regardless of race, color, religion, ancestry or national origin." Other sections of this ordinance, as amended by Akron, Ohio, Ordinance No. 926-1964, conferred on the office of the Mayor, through a Commission on Equal Opportunity in Housing, power to enforce the anti-discrimination sections of the ordinance through conciliation, persuasion, or, if necessary, executive order.

59. *Id.* at 387.

60. *Id.* at 396. Justice Black likened such action to the issuance by the Court of a writ of mandamus or an injunction in order to enforce what it favored as a fair housing law. *Id.*

61. *Id.*

62. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (equal

to strike down state laws that shock the Court's conscience or offend the Court's sense of what it considers to be "fair" or "fundamental" or "arbitrary" or "contrary to the beliefs of the English-speaking people. . . ."⁶³

Speaking for the majority in *Valtierra*, however, Justice Black was able to distinguish *Hunter* from the situation before the Court:

Unlike the Akron referendum provision, it cannot be said that California's Article XXXIV rests on "distinctions based on race." . . . [T]he record here would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority. . . . The present case could be affirmed only by extending *Hunter*, and this we decline to do.⁶⁴

However, while the *Hunter* plaintiffs relied on the racial classification implicit in the Akron charter provision, the statute also fostered discriminations grounded on several other motivations.⁶⁵ In fact, a liberal interpretation of *Hunter* would broaden its mandate to statutes discriminating on the basis of any "suspect classification."⁶⁶ Additionally, while the original motivation behind Article XXXIV was economic rather than racial,⁶⁷ statistical studies have manifested that statutes

protection) (Black, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (due process) (Black, J., dissenting).

63. 393 U.S. at 396.

64. 402 U.S. at 141.

65. 393 U.S. at 390 ("racial, religious, or ancestral discriminations").

66. State statutes which discriminate on the basis of certain classifications are subject to rigid scrutiny by the courts. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964); and *Strauder v. West Virginia*, 100 U.S. 303 (1879) (race); *Graham v. Richardson*, 403 U.S. 365 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948); and *Oyama v. California*, 332 U.S. 633 (1948) (alienage); *Korematsu v. United States*, 323 U.S. 214 (1944) (ancestry); *Sherbert v. Verner*, 374 U.S. 398 (1963) (religion); *Griffin v. Illinois*, 351 U.S. 12 (1956) (poverty); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (class or caste).

67. See generally Friedman, *Public Housing and the Poor: An Overview*, 54 CALIF. L. REV. 642 (1966). The Wagner-Steagall Act was passed during the Great Depression, and thus its principal target was the submerged middle class temporarily experiencing poverty. *Id.* at 646. The rarified economy of World War II ended this condition, and, in fact, left a severe suburban housing shortage after the termination of hostilities. As general prosperity continued, this submerged middle class was released, and its place in the housing program was taken by the "problem poor." *Id.* at 650. Choice suburban land was reserved for veterans' housing, while the low-income program became boxed into the inner cities. Since by 1950 non-whites were not yet disproportionately represented in existing low-income projects, restrictions such as California's Article XXXIV were adopted in order to control incursions of the permanently poor into the suburbs. *Id.* at 651. Nevertheless, Article XXXIV was to some extent directed against inner city developments. Since the Housing Act of 1937 required local authorities to waive all taxation of project property, one objective of Article XXXIV was to require approval by the electorate of the long-term removal of land from the county tax rolls. 52 OP. CAL. ATT'Y GEN. 133, 134 (1969).

which discriminate against potential low-income tenants effectively restrict the housing opportunities of racial and ethnic minorities.⁶⁸ Apparently then, *Hunter* would require a careful examination not only of those statutes which discriminate on the basis of race, but also of those whose impact in reality falls on a minority.⁶⁹

It has long been recognized that classifications are necessary for virtually all legislation.⁷⁰ Since "legislation may impose special burdens upon defined classes in order to achieve permissible ends," legislative discrimination per se is not unconstitutional.⁷¹ However, where the statutory discrimination becomes "invidious" in nature, it violates the mandates of the Equal Protection Clause.⁷² Generally, a statute is presumed constitutional, and the party asserting an equal protection violation bears the burden of showing its unconstitutionality.⁷³ Should a provision bear a rational relation to the attainment of a legitimate governmental objective, it will, under the traditional doctrine, be held in accord with the Equal Protection Clause.⁷⁴ However, where a legisla-

68. See, e.g., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 468 (1968) (unofficial rept.): "Nationwide, 25 percent of all nonwhites living in central cities occupied substandard units in 1960 compared to 8 percent of all whites."

69. See *Hunter v. Erickson*, 393 U.S. at 391.

70. See *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Thompson v. Kentucky*, 209 U.S. 340 (1908).

71. *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966).

72. "Invidious discrimination," that discrimination to which the Court, for various reasons, attaches some measure of constitutional opprobrium, generally results where the classification is one which has 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 (1969).

73. *Morey v. Doud*, 354 U.S. 457, 464 (1957), quoting *Lindsley v. Carbonic Gas Co.*, 220 U.S. 61, 78-79 (1911):

When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. . . . One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

74. *Anderson v. Martin*, 375 U.S. 399 (1964); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). In *Anderson, supra*, the Court overturned a Louisiana statute requiring that all nomination papers and election ballots state the race of each candidate. The Court, finding no rational relation between the requirement and any legitimate state interest, characterized the issue as whether the statute operated to "require or encourage" racial discrimination. 375 U.S. at 402.

Often the Court is faced with a legislative provision which is fair on its face, or arguably applicable to all persons equally, but is nevertheless discriminatory because of

tive scheme either involves a sufficient "suspect classification" or frustrates the exercise of a "fundamental interest," the burden of establishing its justification will shift. This counterplay has been variously denominated as a "rigid scrutiny," an "active review," or the "compelling state interest test."⁷⁵ Its object is to determine whether a given statute is *necessary*, and not merely rationally related, to the attainment of an overriding purpose.⁷⁶

Certain classifications, such as race or religion, are suspect and will independently demand a search for a compelling state interest by the reviewing court.⁷⁷ However, whether a classification based on wealth is suspect so as to independently invoke the compelling state interest test is yet unsettled.⁷⁸ In *Harper v. Virginia Board of Elections*,⁷⁹ the Court declared that indigents could not be deprived of the right to vote in state elections because of their inability to pay a poll tax. Recognizing the discrimination based upon wealth, the Court stated: "Lines drawn on the basis of wealth . . . are traditionally disfavored."⁸⁰ It

the historical context of the statute's enactment, its biased purpose, or its oppressive administration. *E.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (the denial of laundry licenses to Chinese applicants solely on the basis of racial hostility violated the Equal Protection Clause).

75. The first case to apply, though only inferentially, the more stringent compelling interest test was *Korematsu v. United States*, 323 U.S. 214 (1944). There, an American citizen of Japanese ancestry challenged an order by a commanding general of the United States Army, issued pursuant to a more general Executive Order, requiring the exclusion of all "persons of Japanese ancestry" from a described West Coast area. Justice Black, writing for a 5-3 Court, held that the racial classification compelled "the most rigid scrutiny." *Id.* at 216. The Court upheld the order, however, finding a "compelling interest" due to the exigencies of war: "[H]ardships are part of war, and war is an aggregation of hardships." *Id.* at 219.

76. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1086-90 (1969).

77. See cases cited note 66 *supra*.

78. In the area of "economic and social welfare," a state still retains a broad discretion to classify so long as its classification has a reasonable basis. *Dandridge v. Williams*, 397 U.S. 471, 485 (1970). If a classification on the basis of wealth is no more than economic regulation, then such a classification should not be considered suspect. *Cf. Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509-10 (1937) (distinctions emanating from taxation schemes need only rest upon a rational basis). However, it is submitted that where the area is one other than economic regulation, or where a wealth classification impairs a "fundamental interest," such a classification will indeed be deemed "suspect". Throughout this Note, the term "wealth classification" or "classification based on wealth" is used to describe a statute or ordinance which classifies, and hence discriminates against, certain persons or groups of persons on the basis of their economic wealth.

79. 383 U.S. 663 (1966).

80. *Id.* at 668.

was not until *McDonald v. Board of Election Commissioners*,⁸¹ however, that the Court deemed wealth to be "suspect." There, in upholding the denial of absentee ballots to non-sentenced jail inmates, the Court opined in dictum:

[C]areful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.⁸²

The *Valtierra* majority chose not to recognize these earlier declarations of the Court and failed to apply any scrutiny at all to the apparent classification grounded in wealth. In his dissent Justice Marshall criticized this judicial "oversight" and emphatically asserted that wealth is "a suspect classification which demands exacting judicial scrutiny. . . ."⁸³ For decisional authority, the Justice called upon *Harper*, *McDonald*, and *Douglas v. California*.⁸⁴ However, while *McDonald* offers some support for Justice Marshall's assertion,⁸⁵ neither *Harper* nor *Douglas* indicate that a wealth classification, taken alone, would invoke exacting judicial scrutiny. Rather, both of these decisions turned most heavily on the denial of the fundamental interests involved.⁸⁶

The unwillingness of the *Valtierra* majority to accord wealth a status equivalent to race may have an explanation not expressed in the opinion. A discrimination against the "poor" is often more difficult to perceive and determine than one directed toward a racial or ethnic minority. Differences in wealth are matters of degree,⁸⁷ while race is a distinction in

81. 394 U.S. 802 (1969).

82. *Id.* at 807. A recent California Supreme Court decision has declared that a legislative scheme discriminating on the basis of wealth is "suspect" and requires the state to justify the scheme by showing that it is necessary to the achievement of a compelling state interest. *Serrano v. Priest*, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1250, 96 Cal. Rptr. 601, 610 (1971). In so holding, the court relied upon various United States Supreme Court decisions, including *McDonald*. *Serrano* held that if the allegations in the complaint were true, the California public school financing system which obtained revenue for the operation of public schools primarily through real property taxes, invidiously discriminated against the poor because it made the quality of a child's education a function of the wealth of his parents and neighbors. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604. The court's declaration that wealth classifications are suspect must be considered, however, in light of the court's complementary conclusion that the school financing scheme also impaired a "fundamental interest," namely education. *Id.* at 604-09, 487 P.2d at 1255-58, 96 Cal. Rptr. at 615-18.

83. 402 U.S. at 145.

84. 372 U.S. 353 (1963).

85. See text accompanying notes 81-82 *supra*.

86. See notes 93-96 and accompanying text *infra*.

87. See Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 437-38 (1967).

kind. Men with blue eyes are easily separated from those with brown, but no two men can agree as to what level of wealth distinguishes the indigent from his more prosperous fellows. Race is congenital and unalterable. Poverty is often transitory and always, in theory, curable. It can be overcome by an individual without judicial aid, and a statute discriminating on the basis of wealth would thus be rendered ineffective as to him. The same reasoning is inapplicable to a racial classification. Furthermore, statutes resulting in unequal treatment of persons on the basis of wealth are extremely common. Any provision which sets a uniform fee for the performance of some public service, such as the issuance of a marriage license or approval of a building construction permit, necessarily places a heavier burden on the poor than on the rich.⁸⁸ In the racial discrimination area, the compelling state interest test has been held applicable even where the individual interests denied as a result of the discrimination were relatively trivial, such as a right of access to a public beach and bathhouse,⁸⁹ or to a public amphitheater.⁹⁰ If an analogous approach were available to invalidate a statutory provision discriminating by degrees of wealth, the entire social and economic framework of the nation might be shaken.⁹¹

It is submitted, however, that none of these traditional arguments adequately explains the exclusion of wealth from consideration as a suspect classification. Unlike race, the state of poverty itself bespeaks inequality. The poor are "second-class" citizens even where free from *de jure* discrimination:

One is poor not because he has no money, but because, possibly owing to lack of money, he lacks also access to the social instrumentalities that make humanly significant action possible.⁹²

A second factor which mitigates for judicial application of the compelling state interest test, and one not mentioned by the *Valtierra* majority, is the nature of the individual interest or right deprived by

88. See, e.g., CAL. GOV. CODE ANN. § 26840 (West 1968) (marriage license procurement fees); CAL. FISH & GAME CODE ANN. § 7149 (West Supp. 1972) (sport fishing license procurement fees); CAL. ELECTION CODE ANN. § 6552(c) (West 1964) (filing fee for nomination papers of state legislative candidates).

89. *Mayor and City Council v. Dawson*, 220 F.2d 386 (4th Cir. 1955), *aff'd mem.*, 350 U.S. 877 (1955).

90. *Muir v. Louisville Park Theatrical Ass'n*, 220 F.2d 275 (6th Cir. 1953), *vacated mem.*, 347 U.S. 971 (1954).

91. See generally Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 21 (1969).

92. Haworth, *Deprivation and the Good City*, in POWER, POVERTY, AND URBAN POLICY 27, 39 (1968).

enforcement of the statute in question. If the asserted interests being denied are characterized as fundamental, regardless of whether their deprivation is coupled with a suspect statutory classification, such a denial will give rise to an application of the compelling state interest test.⁹³

The plaintiffs in both *Hunter* and *Valtierra* asserted the existence and deprivation of a fundamental right, *i.e.*, the right to secure access to housing. In *Hunter* the housing was privately owned, had previously been built, and was to be paid for by those desiring it. Plaintiffs' right to purchase or rent the realty free of racial discrimination was guaranteed to them under applicable state law prior to enactment of the city charter amendment at issue.⁹⁴ On the other hand, the plaintiffs in *Valtierra* sought public housing which did not presently exist, and which depended upon general community funds for its construction.⁹⁵ Further, no statute existed in California in 1950 which would have secured to Mrs. Valtierra her asserted right to the construction of suitable low-income housing. While numerous statutory policy statements and federal executive studies support the proposition that the right to secure the construction of "decent, safe, and sanitary" housing warrants as much significance as any interest previously deemed fundamental by the Court,⁹⁶ the *Valtierra* majority chose not to recognize the stature of such an interest.

93. *See, e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969) (right to interstate travel); *Id.* at 658 (Harlan, J., dissenting): "[S]tatutory classifications which either are based upon 'suspect' criteria or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest." *Anders v. California*, 386 U.S. 738 (1967) (equal access to appellate review); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote).

94. *See* note 58 *supra*.

95. 402 U.S. at 143.

96. *E.g.*, 42 U.S.C. § 1441:

The Congress declares that the general welfare and security of the Nation and the health and living standards of its people require housing production and related community development sufficient to remedy the serious housing shortage, the elimination of substandard and other inadequate housing through the clearance of slums and blighted areas, and the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family, thus contributing to the development and redevelopment of communities and to the advancement of the growth, wealth, and security of the Nation.

See also 42 U.S.C. §§ 3531-37 (1970). A strong argument can be made for the proposition that adequate housing for all Americans is inextricably tied to the maintenance of the freedoms which the Fourteenth Amendment was designed to protect. *Cf.* 1 REPORT OF THE PRESIDENT'S COMMISSION ON URBAN HOUSING, TECHNICAL STUDIES 27 (1967); REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 260 (1968) (unofficial report). *But see* *Ranjel v. City of Lansing*, 293 F. Supp. 301 (W.D. Mich. 1969), *rev'd* 417 F.2d 321 (6th Cir. 1969), *cert denied*, 397 U.S. 980 (1970). In *Ranjel* the district court was petitioned to enjoin a referendum which

A further point of comparison between *Valtierra* and *Hunter* may be found in Justice Harlan's concurrence in the latter decision. There, Justice Harlan viewed the Akron city charter amendment as one of a group of laws defining "the powers of political institutions. . . ." ⁹⁷ This approach enabled the Justice to classify such laws, for equal protection purposes, into two groups: (1) those statutes having "the clear purpose of making it more difficult for racial and religious minorities to further their *political* aims . . ." ⁹⁸ and which could not stand in the absence of "state interests of the most weighty and substantial kind . . ." ⁹⁹, and (2) codifications designed to provide "a just framework within which the diverse political groups in our society may fairly compete and are not enacted with the purpose of assisting one particular group. . ." ¹⁰⁰ Justice Harlan placed the Akron referendum requirement in the former category, finding it "a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve *legislation* that is in their interest." ¹⁰¹ The Justice not only underscored the racial bias inherent in the Akron charter amendment, but also emphasized the statute's effect on the political structure of the community. The resultant infringement of political rights operated to render it more difficult for minorities to achieve beneficial legislation.

Perhaps this is not the situation in *Valtierra*. The Akron city charter amendment in *Hunter* catholically frustrated the minority's objective, while in *Valtierra* only one avenue of securing the minority's goal—federal support of public housing—was threatened. Where in *Hunter* the sole means of obtaining legislation on the housing question favorable to racial minorities was impeded, the *Valtierra* plaintiffs have several avenues other than public financing of low income developments open to them. ¹⁰² Nevertheless, federal support of local public housing through

attempted to repeal the city's rezoning law. The law was enacted to allow construction of a low-income housing project on a 20-acre parcel in a predominantly white neighborhood. The district court granted the injunction, holding that the failure to allow minorities to secure equal access to housing was a vestige of slavery. Applying the enabling clause of the Thirteenth Amendment, the court concluded that the referendum could not be allowed to frustrate the federal purpose of removing the "badges and incidents of slavery." 293 F. Supp. at 310. The sixth circuit reversed, holding that a state referendum based on neutral principles should be immune from federal court constraints. 417 F.2d at 324. *Accord*, Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968).

97. 393 U.S. at 393.

98. *Id.* (emphasis added).

99. *Id.*

100. *Id.*

101. *Id.* at 395 (emphasis added).

102. Consider, *inter alia*, privately funded housing projects, private donations, low-interest loans or interest-free grants from community self-help organizations or civil

Wagner-Steagall funds is the fastest and most realistic method available to provide construction of low-income units. Therefore, the net effect of Article XXXIV on the indigent tenant may arguably be as serious as that of the city charter amendment in *Hunter*, since the only practical means open to the low-income minority to cure its housing needs is the repeal of Article XXXIV, which must also be accomplished through referendum.¹⁰³ This apparent similarity was not enunciated by the *Valtierra* majority, and the decision may rest primarily upon the failure of Article XXXIV to literally constrain the ability of low-income persons to legislate their housing objectives.

Such an analysis of the *Valtierra* and *Hunter* results is clearly contrariwise to the Court's earlier decision in *Reitman v. Mulkey*.¹⁰⁴ Although neither the *Valtierra* majority nor dissent utilized *Reitman*, the vitality of that decision is certainly denigrated by the *Valtierra* result. In *Reitman*, the Court was called upon to decide the fate of Article I, section 26 of the California Constitution. Adopted in November, 1964, by a voter initiative and referendum, section 26 provided in part that neither the state nor any 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.¹⁰⁵

Prior to the enactment of section 26, the California legislature in 1959 passed the Unruh Act which committed the state to the principle of equal opportunity for all persons in the enjoyment of public accommodations.¹⁰⁶ The enforcement of this Act, however, was effectively barred by operation of section 26.¹⁰⁷

rights groups. In *Hunter*, the plaintiffs could enforce their rights only through recourse to governmental action, since this was the only effective method available to break the barrier of private discrimination. California's Attorney General has held that the provisions of Article XXXIV are inapplicable to projects where the eventual aim of the builders is private ownership, with full payment of appropriate property taxes. 52 OP. CAL. ATT'Y GEN. 133, 135 (1969).

103. CAL. CONST. art. XVIII, § 1. While further legislation in the low-income housing area is not made impossible by Article XXXIV, the state constitution does prevent construction of any low-income housing project by any state governmental agency without compliance with the terms of the Article.

104. 387 U.S. 369 (1967).

105. CAL. CONST. art. I, § 26. This section was submitted to the people of California as Proposition 14 on the November, 1964, statewide ballot. 387 U.S. at 371. The provision was limited by its terms to non-state-owned residential property. *Id.*

106. CAL. CIV. CODE §§ 51-52 (West 1970).

107. Although the respondents in *Reitman* brought an action based upon the provisions of the Unruh Act (Civil Code sections 51 and 52), the Court, in finding section

The *Reitman* Court held section 26 to be violative of the Equal Protection Clause.¹⁰⁸ Justice White's majority opinion examined the provision in light of its "immediate objective, ultimate effect, historical context and the conditions existing prior to its enactment . . ."¹⁰⁹ and concluded that section 26 established "a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action be involved* . . ."¹¹⁰ The requisite state action was demonstrated in the Court's assessment of the ultimate effect of section 26:

Unruh and Rumford were thereby *pro tanto* repealed [by section 26]. But the section struck more deeply and more widely. Private discriminations in housing were now not only free from Rumford and Unruh but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.¹¹¹

While section 26 did not command discrimination, its effect was to encourage discrimination to an unconscionable degree, thereby resulting in state involvement to an unconstitutional extent.¹¹² Section 26, though concededly neutral on its face, was different because of the combined effect of the section's enforcement and the preferred status it accorded the right to discriminate.

26 unconstitutional, took notice of the Rumford Fair Housing Act (CAL. HEALTH & SAFETY CODE ANN. §§ 35700-44 (West 1967)), which prohibits racial discrimination in the sale or rental of any private dwelling containing more than four units. *Id.* at §§ 35710, 35720. The enforcement of this statute also was tolled by operation of section 26.

108. 387 U.S. at 373. Justice White authored the majority opinion, joined by Chief Justice Warren and Justices Brennan and Fortas. Justice Douglas concurred, and Justice Harlan wrote a dissenting opinion, joined by Justices Black, Clark, and Stewart.

109. *Id.*

110. *Id.* at 374.

111. 387 U.S. at 377.

112. *Id.* at 375-76. An alternative to the "state action" rationale espoused by the *Reitman* Court, and a view which has received greater approval by commentators than by the courts, is that of characterizing official inaction (the failure to provide needed housing) as a basis for state action. "The state is responsible for what it could prevent, and should prevent, and fails to prevent." Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473, 483 (1962). "Denying includes inaction as well as action, and denying the equal protection of the laws includes the omission to protect, as well as the omission to pass laws for protection." *United States v. Hall*, 26 F. Cas. 79, 81 (No. 15,282) (C.C.S.D. Ala. 1871).

Dissenting in *Reitman*, Justice Harlan argued that the effect of section 26 was merely to place California in a neutral position on the housing discrimination question by the *pro tanto* repeal of the Rumford and Unruh Acts. He added, however, that

[t]he fact that such repeal was also accompanied by a constitutional prohibition against future enactment of such laws by the California Legislature cannot well be thought to affect, from a federal constitutional standpoint, the validity of what California has done.¹¹³

Even though *Hunter* involved a statute far more discriminatory on its face than did *Reitman*, the dramatic shift in Justice Harlan's view concerning the emphasis to be afforded the political effect of the challenged statutes during the two years between the cases presents an intriguing query.¹¹⁴ Section 26 barred *all* future open-housing legislation, as opposed to merely placing referendum burdens on the designated class. Nevertheless, neither Justice Harlan nor Justice Stewart recognized a "political effect" issue in *Reitman*, while both espoused the same in their later concurrences in *Hunter*. Similarly, the failure of the *Valtierra* majority to expressly recognize the political effect aspect of Article XXXIV in light of Justice Harlan's concurring opinion in *Hunter* is noteworthy, and perplexing.

The *Valtierra* decision certainly places a limitation upon *Reitman*. If a state statute exists which guarantees the right of all low-income persons to secure safe, sanitary housing, and if a state constitutional amendment similar to California's Article XXXIV were subsequently enacted, it is doubtful, in light of *Valtierra*, whether the doctrine espoused in *Reitman* could operate to render the amendment unconstitutional. *Valtierra* thus evidences the contours of a new equal protection attitude by the Court: wealth classifications are not, independently, to be accorded suspect status, and the formulation of new fundamental interests not founded directly under the Constitution is to be restricted by ill-defined criteria within the Court's discretion.

The process of redefining protectable interests recently began in *Dandridge v. Williams*,¹¹⁵ where the Court refused to overturn a state regulation which imposed a maximum per family allowance on per-

113. 387 U.S. at 389.

114. See text accompanying notes 97-102 *supra*. The political effect issue is perhaps even more strongly presented in *Reitman* than in *Hunter*. Section 26 took "[o]ut of ordinary politics, out of the day-to-day process of legislative struggle and compromise, the striving of Negroes and other racial minorities for the law's aid in clearing access to decent housing, the thing they need the most." Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 76 (1967).

115. 397 U.S. 471 (1970).

sons receiving funds under the Aid to Families with Dependent Children program. In *Dandridge* the majority implied that application of the Equal Protection Clause to discriminatory wealth classifications shall henceforth be limited to situations where the discrimination frustrates or otherwise impairs asserted individual interests explicitly guaranteed by the Constitution.¹¹⁶ Stressing that the guarantees of the Bill of Rights deserve special consideration, Justice Stewart, speaking for the Court, stated:

For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history. . . .¹¹⁷

The position taken by the *Dandridge* Court, however, differs sharply from the attitudes expressed in earlier cases.¹¹⁸ For example, in *Harper v. Virginia Board of Elections*,¹¹⁹ the Court cogently observed:

In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality, any more than we have restricted due process to a fixed catalogue of what was at a given time deemed to be the limits of fundamental rights. Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do* change.¹²⁰

While the *Valtierra* majority failed to consult *Dandridge*, its reluctance to inquire into Mrs. Valtierra's asserted rights, to determine whether a fundamental interest was being impaired, bespeaks approval of that earlier decision. Though the right to secure the construction of decent housing may be fundamental,¹²¹ it is not explicitly guaranteed by the

116. *Id.* at 484. The *Dandridge* Court further implied that, even in the absence of an infringement of a fundamental constitutional right, a statutory classification on the basis of race is sufficiently suspect to invoke rigid judicial scrutiny. *Id.* at 485 n.17. In so doing, however, the Court apparently denied that other classifications (e.g., wealth, religion, caste) were sufficient in themselves to evoke strict scrutiny. *See id.* at 484-85.

117. *Id.* at 484-85. (citations omitted).

118. Numerous decisions stand for the proposition that historic notions concerning the scope of constitutional protections are subject to modification in light of present experience. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 483-84 (1965); *Malloy v. Hogan*, 378 U.S. 1, 5-6 (1964); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Brown v. Board of Educ.*, 347 U.S. 483, 492 (1954).

119. 383 U.S. 663 (1966).

120. *Id.* at 669 (citation omitted) (holding that the imposition of a poll tax in state elections is unconstitutional).

121. *See* note 96 and accompanying text *supra*.

Constitution as required by *Dandridge*. However, demanding that there exist a literal constitutional source before a right may be deemed "fundamental" within the equal protection jargon may be too rigid an interpretation of *Dandridge*. Recently, in *Weber v. Aetna Casualty & Surety Co.*,¹²² decided subsequently to *Valtierra*, the Supreme Court asserted that "when state statutory classifications approach fundamental personal rights, this Court exercises a stricter scrutiny. . . ."¹²³ Thus, fundamental personal rights appear sufficient *now* to command rigid judicial scrutiny. Nevertheless, since the *Valtierra* Court was unable to find a constitutionally founded right, it applied the rational relationship test in evaluating Article XXXIV. Clearly the provision complied with this equal protection criterion:

[Article XXXIV] 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. It gives them a voice in decisions that will affect the future development of their own community.¹²⁴

The Court observed that at the local level the supplying of necessary local services represents the primary cost factor of low-income housing.¹²⁵ However, the Court failed to recognize that higher community costs were to some extent at least the implicit result of prior decisional mandates abrogating state barriers to equal housing opportunities. In *Shelley v. Kraemer*,¹²⁶ the Court held that the Fourteenth Amendment prohibited state courts from enforcing racially restrictive covenants in private deeds to real property. Since alterations in the racial and economic components of any area usually result in high dollar costs to its local government,¹²⁷ the application of *Shelley*, of the Unruh Act in *Reitman*, and of Akron's open housing statute in *Hunter* invariably necessitated profound changes in the social and political milieu of the com-

122. 92 S. Ct. 1400 (1972) (holding that Louisiana's denial of equal recovery rights under the state's workmen's compensation laws to dependent unacknowledged illegitimates violates the Equal Protection Clause).

123. *Id.* at 1405, citing *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). See also *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971).

124. 402 U.S. at 143 (footnote omitted).

125. The state is concerned basically with the increased costs of police, fire and utility services, together with the construction and supply costs for new schools. These costs must be borne primarily by the local government without recourse to any form of property tax on the project premises. See note 7 *supra*.

126. 334 U.S. 1 (1948).

127. *Cf.* REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 475-82 (1968) (unofficial report).

munities concerned. As such, the *Valtierra* result counteracts the cost increasing results of these prior decisions, and perhaps impedes the judicial trend in favor of individual needs over community goals.

While the balancing of competing rights in an equal protection setting is a judicial function,¹²⁸ the *Valtierra* Court accorded little weight to the asserted right of indigents to the construction of decent housing, relying on the democratic nature of the referendum process. In what will undoubtedly be *Valtierra's* most often quoted passage, Justice Black declared: "Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."¹²⁹ With this somewhat unrealistic characterization of Article XXXIV the Justice concluded that the political effect of the Article is merely a "disadvantage" to a potential low-income housing tenant:

[The plaintiffs] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimination because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a lawmaking procedure that "disadvantages" a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.¹³⁰

Certainly, however, Article XXXIV wreaks more than a "disadvantage" upon particular groups.¹³¹ Since low-income persons, by definition, are virtually unable to obtain construction funds through any means other than governmental aid, the only viable alternative lies in the repeal of Article XXXIV or similar enactments. In California, since this must be accomplished through mandatory referendum,¹³² such a choice should be entitled to a more complimentary description than a

128. See generally Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 437-38 (1967).

129. 402 U.S. at 141.

130. *Id.* at 142.

131. Since Article XXXIV was enacted in 1950, almost fifty percent of all low-income housing units proposed have been rejected through the required referendum. As a result, only 4 percent of the nation's low-income housing units may be found in California, notwithstanding that 8 percent of all low-income Americans reside in this state. N.Y. Times, June 9, 1970, at 28, col. 5.

132. CAL. CONST. art. XVIII.

mere "disadvantage." The majority's analysis is sound only if the presumption is made that the interest asserted by the *Valtierra* appellees is not so fundamental as to be constitutionally protected, and that a discriminatory classification based on wealth alone is not constitutionally suspect. Otherwise, the proponents of Article XXXIV would have the burden of showing a compelling state interest in the enforcement of that article—a burden which would be difficult to establish in light of existent alternative measures which would preserve the valid interests of the state.¹³³ Additionally, should the compelling interest test be invoked, an examination of the motivations behind the enactment of Article XXXIV would be in order.¹³⁴ Though Article XXXIV did not operate to repeal any previous statutory guarantees of adequate housing, a partial motivation for its passage may be evidenced by contemporary newspaper editorials drawing a relationship between low-income housing projects and declining property values.¹³⁵

While Justice Douglas did not take part in the *Valtierra* decision, his previously expressed view on the sanctity of referenda is noteworthy:

Wherever the real power in a government lies, there is the danger of oppression. In our Government the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to. . . .¹³⁶

Herein lies the ultimate weakness in Justice Black's approach. The

133. For example, one method of removing the legislative burden on the poor imposed indirectly by Article XXXIV would be to *allow* referenda on the construction of low-income housing, rather than to *require* them. The *Valtierra* appellants submitted that Article XXXIV was adopted "not to create a special procedure for housing but to bring housing within the traditional controls [through referenda]." Brief for Appellant at 34, *Shaffer v. Valtierra*, Docket No. 226 (U.S., filed June 5, 1970). This contention is sound in view of *Housing Authority v. Superior Court*, 35 Cal. 2d 550, 219 P.2d 457 (1950). See notes 10-13 and accompanying text *supra*. But the Article XXXIV scheme countenanced a far more extreme position. If a referendum were not *required* (e.g., where repeal of a normal act of the Legislature is sought), opponents of low-income housing may have been unable to obtain the signatures necessary to compel a statewide vote on *every* proposed project. See CAL. CONST. art. IV, § 22. See Note, *Low-Income Housing and the Equal Protection Clause*, 56 CORNELL L. REV. 343 (1971).

134. See *Reitman v. Mulkey*, 387 U.S. 369, 373 (1967) (recognizing that a statute's effective repeal of prior statutes guaranteeing constitutional rights evidences a pernicious motive).

135. See, e.g., L.A. Times, Nov. 3, 1950, § 2, at 4, col. 3.

136. *Reitman v. Mulkey*, 387 U.S. at 387 (Douglas J., concurring), citing 5 WRITINGS OF JAMES MADISON 272 (Hunt ed. 1904).

exclusionary housing scheme countenanced by Article XXXIV has a direct effect only upon a particular segment of the community. Though the *Valtierra* majority cited several examples of other situations in which a referendum is required by California law,¹³⁷ these required referenda operate upon the community equally or proportionally and are not restricted in their impact to a specific minority. These are merely state constitutional provisions of general application, which "may affect the poor more harshly than [they do] the rich," or which merely reflect an "effort to redress economic imbalances."¹³⁸ The persons disadvantaged by these referenda requirements vary with the shifting winds of the political process. It is difficult to perceive the relevance of any one of these examples to the explicit limitations of Article XXXIV.

A majority of the Court appears clearly unwilling to accept the *McDonald* view hinting that a statutory classification discriminating on the basis of wealth would independently invoke the compelling state interest standard of judicial review.¹³⁹ The majority is equally reluctant to accord constitutionally protected status to a right to secure the development of low-income housing. These two views, operating together, severely limit the principles established in *Hunter* and place doubts upon the continuing validity of *Reitman's* inquiries into the discriminatory effect of a statute neutral on its face. For the present, potential low-income tenants are compelled to rely in the courts upon the crutch of racial discrimination, and can well be faced, as were the *Valtierra* appellees, with difficult problems of proof. The Court has effectively closed one of its doors to the housing advocate, commanding him to return to his legislature for further moves in the public housing field. But in California the door to that body was shut tightly in 1950 through use of a constitutionally sanctioned mandatory referendum. Thus, the responsibility passes as it must in any democracy worthy of the name to the voter, who must find in his conscience the ultimate answer.

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137. CAL. CONST. art. XVIII (approved of state constitutional amendments); CAL. CONST. art. XIII, § 40 (issuance of general obligation long-term bonds by local governments); CAL. CONST. art. XI, § 2(b) (certain municipal territorial annexations); and CAL. CONST. art. IV, § 24(c) (the repeal of any statute first enacted by voter initiative).

138. 402 U.S. at 144 (Marshall, J., dissenting) (emphasis added), citing *Douglas v. California*, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting).

139. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802 (1969).