

Journal Staff

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

Recommended Citation

Journal Staff, 56 Cornell L. Rev. 342 (1971)

Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss2/3>

This Journal Staff is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL LAW REVIEW

Volume 56

January 1971

Number 2

OFFICERS

WARREN E. GEORGE, JR.
Editor-in-Chief

RICHARD H. GILDEN
CHARLES F. RECHLIN
Managing Editors

SAMUEL C.V.D. KILBOURN
BARRY M. PORTNOY
Article & Book Review Editors

CRAIG BOWMAN
Research Editor

DOUGLAS MEIKLEJOHN
JACK L. SMITH
Note & Comment Editors

JAY W. WAWS
Business Manager

EDITORS

DAVID L. BOEHNEN
JAMES C. GALLAGHER
RALPH GORDON
BRUCE W. KEIHNER
KENNETH R. KUPCHAK

CHARLES MATAYS
JOAN I. OPPENHEIMER
STEPHEN T. OWEN
ROBERT M. RADER
STEVEN K. WEINBERG

ASSOCIATES

JAMES BALLER
GEORGE W. BRANDT
TERRY CALVANI
KENNETH M. COLE III
ROBERT N. COWEN
KARL J. EGE
JOHN J. GALLACHER
ANTHONY O. GARVIN
ELLEN S. GEORGE

ARTHUR D. GOLDBERG
ROBERT A. HILLMAN
PAUL G. HUGHES
KENNETH G. KLUSS
ROBERT L. OSAR
DOUGLAS K. SMITH
STEPHEN M. SNYDER
CHRISTOPHER C. WHEELER
THOMAS E. WILLETT

Mrs. MAHLON H. LORD
Secretary

The Board of Editors is pleased to announce that as a result of a recently completed writing competition James A. DeMent, Jr., Derek W. Hunt, Dominick A. Mazzagetti, Richard B. Sullivan, and John L. Zenor have been selected as Associates for Volume 56.

NOTE

LOW-INCOME HOUSING AND THE EQUAL PROTECTION CLAUSE

The acute shortage of suitable housing for low-income and minority groups is one of America's most intractable and fundamental domestic problems. One in eight American families is housed in dwelling units considered to be substandard.¹ Exclusionary zoning and building codes effectively fence the poor out of affluent communities;² the growth of public housing programs has been sporadic and inadequate.³ In many jurisdictions, the development of equal housing opportunities has been further impeded by the additional burden of a public referendum.⁴

In a number of recent cases, disadvantaged groups have attempted to overturn laws that have been used to block the construction of low-income housing, arguing that the denial of equal access to housing opportunities to minority groups and the poor constitutes a denial of equal protection.⁵ The right to equal housing opportunities can be interpreted in two different ways: it can mean either a right not to be excluded from areas in which low-income housing units can be built or a right to have such units built. Thus, it can form the basis of challenges both to exclusionary zoning practices and to laws that

1 PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, BACKGROUND PAPERS 338 (1970). "Substandard" housing is defined to include both units that are dilapidated and those that are not dilapidated but lack separate sanitary facilities; there are 8 million substandard housing units in the United States. 1 REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, TECHNICAL STUDIES 9 (1967).

2 Dietsch, *Cracking the Suburbs*, THE NEW REPUBLIC, Sept. 5, 1970, at 8; Graham, *Court Tests of Zoning Against the Poor*, N.Y. TIMES, June 14, 1970, § 4 (News of the Week in Review), at 11, col. 5.

To date, housing programs serving low-income groups have been concentrated in the ghettos. Nonghetto areas, particularly suburbs, for the most part have steadfastly opposed low-income, rent supplement, or below-market interest rate housing, and have successfully restricted use of these programs outside the ghetto.

REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 263 (1968). See generally Aloï, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 TOLEDO L. REV. 65 (1969); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

3 L. FREEDMAN, PUBLIC HOUSING: THE POLITICS OF POVERTY 15 (1969). For a detailed discussion of the exceptional vulnerability of public housing programs to frustration by legislative action and inaction ("legislative harassment") on both the federal and local levels, see *id.* at 4-55.

4 *Id.* at 5, 45, 47-48; see note 110 and accompanying text *infra*.

5 See notes 49-56, 107-12 and accompanying text *infra*.

restrict public housing development. The resolution of these challenges will depend largely on the standard of review applied by the courts.

I

THE STANDARD OF REVIEW

A. *The Sliding Scale*

The standard of review in equal protection cases depends upon both the nature of the classification and the importance of the interest affected. In most situations, equal protection requires only that the legislation bear a reasonable relation to a legitimate governmental objective.⁶ Where a classification is based upon a "suspect" trait or where fundamental interests are affected, however, the legislation is subjected to a stricter standard of review, to a more "rigid scrutiny."⁷ In these cases, an overriding social justification must be established before equal protection requirements are satisfied.⁸

Classifications based upon race are unquestionably suspect and, at least where unbenign,⁹ are subject to rigid scrutiny.¹⁰ Although a

⁶ *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Tigner v. Texas*, 310 U.S. 141 (1940); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344 (1949); *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1087 (1969).

⁷ *Loving v. Virginia*, 388 U.S. 1, 9 (1967); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); Tussman & tenBroek, *supra* note 6, at 356; *Developments in the Law—Equal Protection*, *supra* note 6, at 1088.

⁸ *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 194 (1964). Under this test, the burden is on the state to establish that the public interest involved outweighs the disadvantages imposed on the affected groups. *Chambers v. Hendersonville City Board of Educ.*, 364 F.2d 189, 192 (4th Cir. 1966); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716, 734 (1969).

⁹ Racial classifications may be used to achieve equality by giving preferential treatment to groups that have suffered discrimination in the past. Where racial classifications are employed to promote rather than to deny equality, they may be characterized as "benign." See generally Hellerstein, *The Benign Quota, Equal Protection, and "The Rule in Shelley's Case,"* 17 RUTGERS L. REV. 531 (1963); Kaplan, *Equal Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment*, 61 NW. U.L. REV. 363 (1966); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan*, 56 CORNELL L. REV. 84 (1970); Navasky, *The Benevolent Housing Quota*, 6 HOW. L.J. 30 (1960).

¹⁰ *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964). Thus, racially exclusionary zoning provisions have been struck down as violative of the fourteenth amendment. *Buchanan v. Warley*, 245 U.S. 60 (1917). (The case was decided before the expansion of equal protection and rested on a due process theory. *Id.* at 82. More recent decisions (e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948)), indicate that such measures are also violative of equal protection.)

suspect classification alone is enough to activate the strict standard of review, a classification that is only "traditionally disfavored," such as wealth,¹¹ is not.¹² When a disfavored classification infringes upon a fundamental interest, however, the strict standard of review is elicited. For example, in *Harper v. Virginia Board of Elections*,¹³ the Supreme Court held that a poll tax of \$1.50 violated the equal protection clause because the affluence of the voter was an unconstitutional condition to the exercise of the franchise, a fundamental interest.¹⁴

By itself, infringement of an interest may be insufficient to elicit "rigid scrutiny"; if that is the case, the concurrence of *both* a fundamental interest and a disfavored classification is necessary. Thus, denial of the right to vote to felons and to the insane¹⁵ and to those who fail literacy tests¹⁶ does not violate equal protection. And in *McDonald v. Board of Election*,¹⁷ the Court's conclusion that Illinois's failure to provide absentee ballots for unsentenced inmates awaiting trial did not violate equal protection was based upon a less exacting scrutiny because there was no classification on the basis of wealth.¹⁸

¹¹ See notes 20-22 and accompanying text *infra*.

¹² For example, racial segregation of public amphitheaters (*Muir v. Louisville Park Theatrical Ass'n*, 202 F.2d 275 (6th Cir. 1953), *vacated mem.*, 347 U.S. 971 (1954)), public beaches and bathhouses (*Dawson v. Mayor & City Council*, 220 F.2d 386 (4th Cir.), *aff'd mem.*, 350 U.S. 877 (1955)), and public motor buses (*Browder v. Gayle*, 142 F. Supp. 707 (M.D. Ala.), *aff'd mem.*, 352 U.S. 903 (1956)) has been held to be an invidious discrimination. It is highly unlikely, however, that the requirement of a fee from persons desiring to use these facilities would elicit "rigid scrutiny," even though the poor might thereby be disqualified from their use. The reason is that the use of such public facilities is not a sufficiently fundamental interest to activate the strict standard of review when a non-suspect classification is involved. The more restrained standard of review is therefore appropriate, and, since the imposition of such fees bears a reasonable relation to the legitimate purpose of raising money to maintain these facilities, there would be no violation of equal protection.

¹³ 383 U.S. 663 (1966).

¹⁴ *Id.* at 667. The Court's reasoning, that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax" (*id.* at 666), was ostensibly based upon the restrained standard of review. Yet, as Justice Black pointed out in his dissenting opinion, the fee requirement did have a reasonable relation both to the collection of state revenue and to the state's belief that voters who pay a tax will be more interested in furthering the state's welfare than those who do not. *Id.* at 674. In reality, then, the Court used a strict rather than a restrained standard of review. See Sager, *supra* note 2, at 778-79.

¹⁵ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 673 (1966) (Black, J., dissenting).

¹⁶ *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959).

¹⁷ 394 U.S. 802 (1969).

¹⁸ *Id.* at 807. Alternatively, the Court believed that the Illinois scheme had no impact on the inmates' ability to exercise their right to vote because it was not the right to vote itself but the right to absentee ballots that was denied. This position seems to ignore the reality of the situation; where inmates are unable to leave prison to go to the polls, the denial of absentee ballots has an obviously adverse impact on their ability to vote.

The equal protection decisions evince a sliding scale approach to the determination of the invidiousness of a particular discrimination.¹⁹ The more suspect the classification or the more fundamental the interest, the more likely it is that an invidious discrimination will be found. Conversely, the less suspect the classification or the less important the interest, the less likely it is that the court will find an invidious discrimination. The remaining issues, then, are the constitutional status of the wealth classification and the constitutional importance of equal access to housing.

B. *Wealth as a Disfavored Classification and Housing as a Fundamental Interest*

In *McDonald*, the Supreme Court observed that lines drawn on the basis of wealth "would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."²⁰ Although not on a par with classifications based upon race,²¹ classifications based upon wealth or property are "traditionally disfavored."²²

In combination with wealth classifications, the courts have characterized voting,²³ equal access to the criminal process,²⁴ procreation,²⁵ and the right to interstate travel²⁶ as fundamental interests. In suspect classification cases, the courts have indicated that, apart from the nature

Voting has recently been treated by the Supreme Court as an interest sufficiently important to independently activate the strict standard of review. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Cipriano v. City of Houma*, 395 U.S. 701 (1969). Both cases, however, to a certain extent involved classifications based upon property.

¹⁹ Cox, *Constitutional Adjudication and the Promotion of Human Rights, Foreword to The Supreme Court, 1965 Term*, 80 HARV. L. REV. 91, 95 (1966); Karst, *supra* note 8, at 739-40, 744; *Developments in the Law—Equal Protection*, *supra* note 6, at 1120-21. See also Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities: Some Constitutional Considerations*, 2 LAW IN TRANS. Q. 1 (1965).

²⁰ 394 U.S. at 807.

²¹ Some commentators predict that "distinctions based on wealth—at least those that run against the poor—will no doubt be assimilated to the race cases." Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CR. REV. 39, 75. *But see* Sager, *supra* note 2, at 785-87.

²² *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

²³ *Id.*

²⁴ *Anders v. California*, 386 U.S. 738 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

²⁵ *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942). In *Skinner*, the Supreme Court struck down a law requiring sterilization for certain criminal offenders. Although *Skinner* stressed the importance of the procreation interest, the classification based upon wealth (white-collar crimes were exempted) may also explain the decision. See Karst, *supra* note 8, at 733-34.

²⁶ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

of the classification, voting,²⁷ the right to earn a living,²⁸ housing,²⁹ marriage,³⁰ and education³¹ are fundamental interests.

To determine the constitutional status of housing as a fundamental interest, the courts may seek guidance in the history and background of the Constitution and in prior Supreme Court decisions.³² The policies expressed in federal legislation and the social milieu are also important considerations:

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.³³

The crucial importance of housing has been recognized in federal legislation³⁴ and executive studies.³⁵ The Supreme Court has proclaimed

²⁷ *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965).

²⁸ It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure.

Truax v. Raich, 239 U.S. 33, 41 (1915). See *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410 (1948).

²⁹ *Hunter v. Erickson*, 393 U.S. 385 (1969); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948).

³⁰ *Loving v. Virginia*, 388 U.S. 1 (1967).

³¹ *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

³² Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 439 (1967).

³³ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) (emphasis in original).

³⁴ The Housing Act of 1949, 42 U.S.C. § 1441 (1964), declared as a national objective "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family . . ." *Accord*, Housing and Urban Development Act of 1968, 42 U.S.C. §§ 3531-37 (Supp. V, 1970). On September 23, 1970, the Senate approved a comprehensive \$4 billion housing bill, some provisions of which are designed to deal with the problem of urban concentration. N.Y. Times, Sept. 24, 1970, at 1, col. 2. The Fair Housing Act of 1968, 42 U.S.C. §§ 3601-31 (Supp. V, 1970), seeks to increase housing opportunities by making discrimination in the sale, rental, and financing of housing illegal.

³⁵ PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, *supra* note 1, at 337-49; REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 257, 260 (1968); REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, *supra* note 1, at 27.

that "[h]ousing is a necessary of life."³⁶ The rationale of the reapportionment cases, that the franchise is "preservative of other basic civil and political rights,"³⁷ has a counterpart in the housing area:

Equality in the enjoyment of property rights was regarded . . . as an essential pre-condition to the realization of other basic civil rights and liberties which the [Fourteenth] Amendment was intended to guarantee.³⁸

In *Brown v. Board of Education*,³⁹ the Supreme Court's assessment of the importance of education⁴⁰ was based largely on the relationship between education and the achievement of other fundamental objectives.⁴¹ Similarly, equal access to housing opportunities plays a vital role in securing other fundamental interests; increasingly, jobs and educational opportunities are moving away from the cities, where disadvantaged groups are largely concentrated, to the suburbs.⁴² Thus, to block the poor from access to more affluent communities is to deny them an equal chance to earn a living and acquire a decent education.⁴³

Housing is, therefore, a fundamental interest. Even if the housing interest is not sufficiently important to independently elicit rigid scrutiny, the combination of this interest and the wealth classification should be found to constitute an invidious discrimination that will activate the overriding justification test.

³⁶ *Block v. Hirsh*, 256 U.S. 135, 156 (1921). Other cases in which the Supreme Court recognized the importance of housing include *Hunter v. Erickson*, 393 U.S. 385 (1969); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Buchanan v. Warley*, 245 U.S. 60 (1917).

³⁷ *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

³⁸ *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948).

³⁹ 347 U.S. 483 (1954).

⁴⁰ "Today, education is perhaps the most important function of state and local governments." *Id.* at 493.

⁴¹ Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id.

⁴² M. HARRINGTON, *THE ACCIDENTAL CENTURY* 287-88 (1965); REPORT OF THE NATIONAL ADVISORY COMM'N ON CIVIL DISORDERS 260 (1968); Herbers, *Aide Quits H.U.D. and Calls It Biased*, N.Y. Times, Sept. 19, 1970, at 17, col. 4; Sanders, *James Haughton Wants 500,000 More Jobs*, N.Y. Times, Sept. 14, 1969, § 6 (Magazine), at 30, 126.

[The isolation of the poor in the slums] has corrupted the quality of life of the entire society. It accounts for the class and racial segregation in the American educational system and the principle that those who most need training shall have the least chance to get it. It has been a factor in the institutionalization of racism and in the promotion of riots.

M. HARRINGTON, *supra* at 288.

⁴³ There are additional adverse effects of residential isolation:

II

EXCLUSIONARY ZONING

Zoning laws⁴⁴ that discriminate against minorities⁴⁵ and the poor⁴⁶ severely handicap these groups in their efforts to obtain decent housing. Under the strict standard of review, such restrictions should be invalidated, absent conditions of long-term emergency.⁴⁷ The courts seem

One predicate for the proposition that separate treatment is inherently unequal is the vulnerability of a traditionally disadvantaged group to discrimination once its members are separated from the protective company of those who command governmental respect. This is certainly applicable to residential circumstance. Residents of ghettos are highly vulnerable to second-rate municipal services of all sorts, to disadvantage in the process of education, to functional emasculation of their franchise through gerrymandering, to selective and adverse police practices, and to the abusive tactics of private merchants.

Sager, *supra* note 2, at 782.

For a discussion of the social and economic consequences of residential segregation, see COMMISSION ON RACE & HOUSING, *WHERE SHALL WE LIVE?* 35-42 (1958).

⁴⁴ The zoning laws challenged in the cases herein discussed involve land-use classifications. Other types of zoning laws can, of course, result in racial or economic discrimination; for example, laws requiring that no house cost less than a certain amount, laws setting minimum floor space or acreage standards, and laws providing for the separation of districts for different types of housing. See generally Aloi, Goldberg & White, *supra* note 2, at 75-80; Sager, *supra* note 2, at 793-98. A separate discussion of these laws is unnecessary since the same considerations that determine the constitutionality of land-use classifications apply to these types of zoning laws as well.

⁴⁵ Zoning has long been used to contain racial groups inside the ghetto. G. MYRDAL, *AN AMERICAN DILEMMA* 600-01, 623-24 (1944); J. VANDER ZANDEN, *AMERICAN MINORITY RELATIONS* 216 (1963); Abrams, *The Housing Problem and the Negro*, in *THE NEGRO AMERICAN* 512 (T. Parsons & K. Clark eds. 1965).

When the courts held racial covenants unenforceable, subtler devices were ushered in, including overrigid zoning ordinances sternly enforced against Negroes but relaxed for whites. Condemnation for incinerator dumps or other public works is another current device, while building inspectors and other petty officials are always on hand to harass the Negro who ventures where he is not wanted. When, for example, a private builder announced he would sell a few of his houses to Negroes in Deerfield, Illinois, his site was promptly condemned for a park. When the Ford Motor Company moved its plant from Richmond, California, to Milpitas, and when the union tried to build houses for its Negro workers, the area was promptly rezoned for industrial use. Thereafter came a sudden strengthening of building regulations, followed by a hike of sewer connection costs to a ransom figure.

Id. at 516.

The courts are beginning to invalidate such exclusionary tactics. In *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), the city's refusal to permit a black low-cost housing project to hook up to the city sewer system was held to violate the equal protection clause.

⁴⁶ See note 2 and accompanying text *supra*. In *Southern Alameda Spanish Speaking Org. v. Union City (SASSO)*, 424 F.2d 291 (9th Cir. 1970), although plaintiffs alleged racial motivation, the court rejected this claim and characterized the issue in terms of discriminatory effect on "low-income residents of Union City." *Id.* at 295.

⁴⁷ Laws that expressly exclude minority groups have been upheld only in times of national crisis, where wartime emergency was the crucial factor. *Korematsu v. United States*,

to disagree, however, about what plaintiffs must prove to establish invidious discrimination.⁴⁸

A. Proof of Invidious Discrimination

In *Dailey v. City of Lawton*,⁴⁹ the Tenth Circuit held that the refusal of the planning commission and the city council to grant rezoning essential for construction of a privately sponsored low-income housing project was racially motivated⁵⁰ and therefore constituted arbitrary and unreasonable action in violation of the due process clause of the fourteenth amendment.⁵¹ The opinion's findings and reasoning would similarly support a holding of a violation of the equal protection clause.⁵² In *Ranjel v. City of Lansing*,⁵³ the district court held that a

323 U.S. 214 (1944). Moreover, the exclusion of Japanese and Japanese-Americans from certain areas of the West Coast was viewed as a temporary measure. *Id.* at 219-20. See also *Hirabayashi v. United States*, 320 U.S. 81 (1943). In *Buchanan v. Warley*, 245 U.S. 60 (1917), the preservation of the public peace and welfare was held insufficient to validate such an exclusion.

⁴⁸ Some commentators view the state action requirement as an obstacle to applying the equal protection clause to the problem of housing opportunities. See Aloï, Goldberg & White, *supra* note 2, at 96-102. They suggest that the obstacle can be overcome either on the theory that urban housing is a public function (*Reitman v. Mulkey*, 387 U.S. 369, 385-86 (1967) (Douglas, J., concurring)), or on the ground of significant state involvement through government financing of housing developments. *Id.* Although these arguments have merit, they are unnecessary. Zoning laws are promulgated by local governmental bodies whose actions are subject to the fourteenth amendment. *Peterson v. City of Greenville*, 373 U.S. 244 (1963). For discussions of the decreasing vitality of the concept of state action in the housing area, see Black, "State Action," *Equal Protection, and California's Proposition 14, Foreword to The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69 (1967); Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1962); Williams, *The Twilight of State Action*, 41 TEXAS L. REV. 347 (1963).

⁴⁹ 425 F.2d 1037 (10th Cir. 1970).

⁵⁰ *Id.* at 1039-40. The court may have found it unnecessary to examine the discriminatory effect, since evidence of motive revealed that the sole purpose of the city's action was to discriminate; this of course is not a legitimate governmental objective. See notes 57-59 and accompanying text *infra*.

⁵¹ 425 F.2d at 1040.

⁵² The *Dailey* court reasoned that the city's action was unfair and constituted an unreasonable zoning classification for the property. *Id.* Equal protection also requires a reasonable relation between the classification and the purpose of the law. See note 6 and accompanying text *supra*. Thus, even under the restrained standard of review, such an arbitrary classification would violate the equal protection clause as well as the due process clause.

Although an arbitrary classification may violate both due process and equal protection, the tests for both are not identical. Thus, in *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970), the court rejected plaintiffs' due process argument on the ground that, since social and environmental values could support the zoning determination, the result could not be said to be arbitrary. *Id.* at 294. Nevertheless, if the effect were discriminatory, there might still be a violation of plaintiffs' equal protection rights. *Id.* at 295.

⁵³ 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

proposed referendum on an ordinance rezoning a twenty-acre site in a white neighborhood from a one-family residential to a community plan was motivated by racial factors. The Sixth Circuit reversed, holding that the evidence was insufficient to establish discriminatory motivation.⁵⁴ In *Southern Alameda Spanish Speaking Organization v. Union City (SASSO)*,⁵⁵ the Ninth Circuit reviewed the repeal by referendum of a similar ordinance that rezoned a tract to allow construction of a housing project for low- and middle-income families, reaching a different result. The court held that if, apart from voter motive, the effect of the referendum was discriminatory, then "a substantial constitutional question is presented."⁵⁶

1. *What Must Be Proved*

There are situations where the terms of a statute or its practical effect point to only one conceivable purpose: discrimination. This was so, for example, in *Gomillion v. Lightfoot*⁵⁷ and *Reitman v. Mulkey*.⁵⁸ In such cases, the measure may be held unconstitutional because its sole purpose is illegitimate.⁵⁹ The more difficult question arises if no such discriminatory motive can be shown.

Although some earlier cases required intentional or purposeful discrimination,⁶⁰ more recent equal protection decisions tend to empha-

⁵⁴ 417 F.2d at 323-24. The Sixth Circuit's decision seems questionable on several grounds. First, the court failed to consider the background and social milieu. See notes 74-83 and accompanying text *infra*. Second, the court did not examine the effect of the referendum, as required by *Reitman v. Mulkey*, 387 U.S. 369 (1967). See notes 89-93 and accompanying text *infra*. Finally, the court's intimation that a referendum can never violate the fourteenth amendment is incorrect. See notes 72-73 and accompanying text *infra*.

The court did not discuss the effect of the referendum, but the reversal can be partially explained on this basis. Although repeal of the ordinance would have blocked construction of a five-story apartment for the elderly, 100 houses planned for poor black and Mexican-American families could still be built under the prior ordinance. 417 F.2d at 324.

⁵⁵ 424 F.2d 291 (9th Cir. 1970).

⁵⁶ *Id.* at 295.

⁵⁷ 364 U.S. 339 (1960). There, the apparent neutrality of a law redistricting the city of Tuskegee did not shield it from a finding of unconstitutionality when "for all practical purposes . . . the legislation [was] solely concerned with segregat[ion] . . ." *Id.* at 341.

⁵⁸ 387 U.S. 369 (1967). The Ninth Circuit in *SASSO* said of *Reitman*:

The only existing restrictions on dealings in land (and thus the obvious target of the amendment) were those prohibiting private discrimination. The only "conceivable" purpose, judged by wholly objective standards, was to restore the right to discriminate and protect it against future legislative limitation.

424 F.2d at 295.

⁵⁹ *Developments in the Law—Equal Protection*, *supra* note 6, at 1091.

⁶⁰ *Snowden v. Hughes*, 321 U.S. 1, 8 (1944); *MacKay Tel. & Cable Co. v. Little Rock*, 250 U.S. 94, 100 (1919); *Sunday Lake Iron Co. v. Township of Wakefield*, 247 U.S. 350, 353 (1918).

size the discriminatory effect of the law. Thus, the landmark cases of *Griffin v. Illinois*,⁶¹ *Harper v. Virginia Board of Elections*,⁶² and *Hunter v. Erickson*⁶³ were decided on the basis of effect, without reference to the issue of discriminatory motive.

This is clearly the more justifiable view. First, the determination of a discriminatory legislative motive would impugn the integrity of a coordinate branch of government,⁶⁴ and the courts have understandably shied away from such judgments.⁶⁵ The referendum situation involves still further difficulties; as the Ninth Circuit noted in *SASSO*, "a probing of the private attitudes of the voters . . . would entail an intolerable invasion of the privacy that must protect an exercise of the franchise."⁶⁶ Second, such a determination may be practically impossible. The motives of individual legislators or voters may well conflict; moreover, it is extremely unlikely that many defendants will be willing to parade their prejudices openly.⁶⁷ Third, in view of the refined discriminatory devices that have been used in the past,⁶⁸ it is clear that to require

⁶¹ 351 U.S. 12 (1956) (requiring that all indigent defendants be furnished with a free transcript).

⁶² 383 U.S. 663 (1966) (invalidating a \$1.50 poll tax).

⁶³ 393 U.S. 385 (1969) (invalidating a measure prohibiting open housing legislation without voter approval). Purposeful discrimination was also unnecessary in *Shapiro v. Thompson*, 394 U.S. 618 (1969) (invalidating residence requirements for welfare recipients); *Anders v. California*, 386 U.S. 738 (1967) (requiring appointed counsel to file a brief before he may withdraw from case); *Douglas v. California*, 372 U.S. 353 (1963) (requiring that indigent defendants have appointed counsel on appeal).

⁶⁴ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 131 (1810).

⁶⁵ See notes 61-63 and accompanying text *supra*.

⁶⁶ 424 F.2d at 295.

⁶⁷ The district court in *Dailey* explicitly recognized this difficulty. Because of its realization that most persons will not publicly admit their prejudices, the absence of both discussion of race at the public meetings and statements by city officials demonstrating an intent to discriminate was not deemed crucial. *Dailey v. City of Lawton*, 296 F. Supp. 266, 268 (W.D. Okla. 1969), *aff'd*, 425 F.2d 1037 (10th Cir. 1970).

Although improbable, public admissions by defendants are not impossible. See, e.g., *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969), where defendants' corroborating testimony regarding discriminatory intent in public housing site selection facilitated the court's finding of a denial of equal protection.

⁶⁸ The courts have struck down laws designed to minimize the black vote by imposing stringent registration requirements (e.g., *Louisiana v. United States*, 380 U.S. 145 (1965); *United States v. Mississippi*, 380 U.S. 128 (1965); *Lane v. Wilson*, 307 U.S. 268 (1939); *Guinn v. United States*, 238 U.S. 347 (1915); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949)); laws designed to dilute the minority vote in general elections by excluding such groups from voting in primaries (e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944)); and laws designed to circumvent school desegregation requirements (e.g., *Green v. County School Bd.*, 391 U.S. 430 (1968) (freedom-of-choice plan invalidated); *Poindexter v. Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833 (E.D. La. 1967), *aff'd*, 389 U.S. 571 (1968) (state financial assistance to students at private schools invalidated)).

direct proof of improper motivation is to emasculate the fourteenth amendment. The Supreme Court has proclaimed, however, that "[t]he Amendment nullifies sophisticated as well as simple-minded modes of discrimination."⁶⁹ Finally, whether the damage inflicted is the main purpose of a law or a subsidiary, even unintended, effect should make no difference. In *Burton v. Wilmington Parking Authority*,⁷⁰ the Supreme Court observed:

[N]o state may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them *whatever the motive* may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith.⁷¹

There is some confusion as to whether this analysis changes in a referendum situation. The *SASSO* decision implies that it does not. In *Ranjel*, the court of appeals disagreed: "Initiative and referendum is an important part of the state's legislative process. Being founded on neutral principles, it should be exempt from Federal Court constraints."⁷² This dictum, however, is mistaken. The Supreme Court made it clear in *Reitman* and *Hunter* that the referendum procedure does not immunize an otherwise unconstitutional state action.⁷³ If a poll tax similar to that struck down in *Harper* were enacted by the voters through initiative and referendum, it would remain unconstitutional. The answer to the argument that because the referendum procedure is neutral its results are irrevocable is that when its effect is neutral,

⁶⁹ *Lane v. Wilson*, 307 U.S. 268, 275 (1939).

⁷⁰ 365 U.S. 715 (1961).

⁷¹ *Id.* at 725 (emphasis added). In *Norwalk CORE v. Norwalk Redev. Agency*, 395 F.2d 920 (2d Cir. 1968), where defendant's failure to assure relocation for minority groups to the same extent it did for whites was held to violate the equal protection clause, the court observed:

"Equal protection of the laws" means more than merely the absence of governmental action designed to discriminate; as Judge J. Skelly Wright has said, "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."

Id. at 931, quoting *Hobson v. Hansen*, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969).

Making motive rather than effect determinative may lead to strange results when the motive is questionable but the effect is not discriminatory. *See, e.g.*, the Stennis Amendment, sponsored by Southern Senators who have not been known as champions of integration, which provided for equal application of federal school desegregation standards in all parts of the country. 116 CONG. REC. S 1444 (daily ed. Feb. 9, 1970).

⁷² 417 F.2d at 324 (dictum).

⁷³ [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.

Hunter v. Erickson, 393 U.S. 385, 392 (1969).

legislation by referendum is permissible, but when its impact is judicially determined to be discriminatory, such legislation violates the Constitution.

2. *Facts Necessary for Proof*

In *Reitman*, where the Supreme Court held that the repeal and prohibition of further enactment of open housing legislation violated the fourteenth amendment, great weight was placed on the "historical context and the conditions existing prior to . . . enactment."⁷⁴ In *Dailey*⁷⁵ and in the lower court's opinion in *Ranjel*,⁷⁶ the existing segregated housing patterns were an important factor.⁷⁷ The disadvantages suffered by those isolated in ghettos⁷⁸—substandard housing, a higher incidence of death and disease, and a lower level of municipal services to alleviate these conditions—may also be considered.⁷⁹ Peculiarities in

⁷⁴ 387 U.S. at 373.

⁷⁵ 425 F.2d at 1039.

⁷⁶ Although Lansing's population was only 10% black and Mexican-American, 65% of these groups were concentrated in a ghetto. One large section of this ghetto was 91% black. 293 F. Supp. at 303.

⁷⁷ Similarly, in *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), the court noted that the communities involved were historically racially segregated. See note 83 *infra*.

The courts have long used statistical patterns to prove discrimination. For example, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court found a violation of equal protection where San Francisco's Board of Supervisors refused permission to operate a laundry to 150 of the 240 Chinese laundry operators, but had not refused it to any of the 80 non-Chinese operators.

More recently, in *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N.D. Ill. 1969), the court found that the veto of over 99.5% of proposed housing sites located in white neighborhoods and only 10% of sites located in black neighborhoods could be plausibly explained only on the basis of racial discrimination. And in *Hicks v. Weaver*, 302 F. Supp. 619 (E.D. La. 1969), the court held that the location of public housing in all-black neighborhoods creates a rebuttable presumption of discriminatory site selection which, if unexplained, establishes a violation of equal protection.

⁷⁸ In *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), the court noted that blacks were concentrated in a highly industrialized and polluted area that had the lowest per capita income, the oldest and most deteriorated housing, and the highest density per unit in the city.

⁷⁹ Thus, in *Ranjel*, the district court considered one particular ghetto area that was 91% black: 75% of the dwellings were substandard or dilapidated; 1/3 of the units were overcrowded; the infant mortality rates were 50% higher than in other parts of the city; and the incidence of tuberculosis, heart disease, venereal disease, and chronic arthritis was also higher there than elsewhere. 293 F. Supp. at 303.

The Sixth Circuit, while proclaiming sympathy, dismissed this evidence rather summarily: "These conditions . . . concerning the plight of the poor, were not peculiar to Lansing nor indeed to the United States, but have existed for centuries in many places throughout the world." 417 F.2d at 322. The same could have been said about racial discrimination in the sale or rental of housing units in *Reitman v. Mulkey*, 387 U.S. 369

the local scene are relevant. For example, in *Dailey*, although the surrounding area was zoned R-4 for high density, the proposed building site had been reclassified from R-4 to PF for public facilities. Officials refused to change the site's designation back to R-4, even though it had never been used or planned for use as a public facility and was privately owned.⁸⁰ Such circumstances indicated a strong probability that social and environmental land-use considerations were not paramount in the city's zoning determination.⁸¹

The historical setting of the referendum is also important. Perhaps the referendum has been consistently used to block low-income housing.⁸² Or perhaps, as in *Ranjel*, although the referendum procedure is being used for the first time, numerous other community building plans providing almost exclusively for people of middle and upper income have not been subjected to a referendum.⁸³

The circumstances surrounding enactment may provide additional evidence. Thus, a blatantly racist campaign effort provides strong evidence of discrimination.⁸⁴ City planners and councilmen may testify as to feedback from their constituents; the Tenth Circuit, in *Dailey*, mentioned anonymous phone calls to the project's sponsors.⁸⁵ Although

(1967), but this did not prevent the Supreme Court from holding that such discrimination was unconstitutional. The pervasiveness of a problem should not be an excuse for inaction; it should rather be a strong incentive for alleviating the problem with whatever tools are at hand.

⁸⁰ 425 F.2d at 1038.

⁸¹ The court of appeals concluded that the city's action was arbitrary and unreasonable. *Id.* at 1040.

⁸² See *Valtierra v. Housing Authority*, 313 F. Supp. 1, 4 (N.D. Cal.), *prob. juris. noted sub nom.* *Shaffer v. Valtierra*, 399 U.S. 925, and *sub nom.* *James v. Valtierra*, 398 U.S. 949 (1970).

⁸³ 293 F. Supp. at 304-05. In *SASSO*, too, the city had never before experienced either an initiative or a referendum, despite "considerable recent residential growth and development, with a substantial percentage of new housing starts involving multi-family projects." Brief for Appellants at 33, *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970).

The situation in *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), was similar, although a referendum was not involved. There, a New York municipality had approved new subdivisions in predominantly white neighborhoods despite its awareness of overloaded sewer conditions. In light of this background, the city's subsequent refusal to permit a Negro housing corporation planning a low-cost project to hook up to the city's sewers was held to violate the equal protection clause.

⁸⁴ In *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd*, 336 U.S. 933 (1949), the court considered the following campaign material evidence of discrimination: "WARNING IS SOUNDED: BLACKS WILL TAKE OVER IF AMENDMENT LOSES." The court also mentioned editorials in the local newspaper which characterized the amendment as "a measure designed simply and solely to enable registrars legally to hold down the number of Negro registrants." *Id.* at 880.

⁸⁵ 425 F.2d at 1039.

the court of appeals in *Ranjel* held that discrimination may not be established by such "opinion evidence,"⁸⁶ it may still be helpful in depicting the social milieu. In a referendum context, if the signers of the petition were all white⁸⁷ or if the voting "broke down along . . . racial lines,"⁸⁸ such circumstances may also be considered.

The courts must next evaluate the potential impact or effect of the measure in light of this background.⁸⁹ Where a particular project has been blocked, courts should consider the availability of alternative sites.⁹⁰ Thus, an important factor in the district court's decision in *Ranjel* was that "all possible sites could be eliminated, leaving the displaced Black and Mexican minority groups with nowhere to go."⁹¹

⁸⁶ 417 F.2d at 323. The court of appeals objected to the strong weight given by the lower court both to a city planner's testimony that race was an important factor in that situation and to the testimony of a Dr. Goldner that, in general, race would be an important factor in similar situations. The court failed to consider, however, the existing patterns of segregation and the historical immunity of housing developments for middle- and upper-income groups from the burden of a referendum.

⁸⁷ *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970). Such circumstances may also be relevant in a nonreferendum context, where the action taken by the local governing body is influenced by a petition. Thus, a petition opposing a black housing project signed by residents of a predominantly white ward was a factor considered by the court in *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970).

⁸⁸ Brief for Appellants at 33, *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291 (9th Cir. 1970). A study of voting patterns in the California fair housing referendum (struck down in *Reitman v. Mulkey*, 387 U.S. 369 (1967)) indicated varying degrees of racial prejudice. Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 765-67 (1968).

The voting pattern may also, of course, indicate the absence of discrimination. On remand, the district court in *SASSO* noted that the vote in two predominantly Mexican-American precincts was evenly divided on the rezoning issue. *Southern Alameda Spanish Speaking Org. v. Union City*, No. 51590, at 2 n.1 (N.D. Cal. July 30, 1970).

⁸⁹ *Hunter v. Erickson*, 393 U.S. 385, 391 (1969); *Reitman v. Mulkey*, 387 U.S. 369, 376 (1967).

In *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), the court, relying on *Reitman* and *Hunter*, explicitly acknowledged its "duty" to consider not only the immediate objective but also the historical context and ultimate effect of the action, and to assess the reality of the law's impact.

⁹⁰ The availability of alternatives may be important in other contexts as well. For example, in *Kennedy Park Homes Ass'n v. City of Lackawanna*, — F. Supp. — (W.D.N.Y. 1970), defendant city placed a moratorium on subdivision construction on the ground of overloaded sewers, thus blocking a proposed low-income housing project for blacks. The court found that the reasons given for the moratorium were mere rationalizations since the city failed to consider alternatives, such as methods of improving the sewer system, and since the moratorium could not in fact solve the sewer problem. *Id.* at —.

⁹¹ 293 F. Supp. at 305. In contrast, the availability of alternative sites led the district court in *SASSO* to conclude, on remand, that the effect of the referendum was not discriminatory. *Southern Alameda Spanish Speaking Org. v. Union City*, No. 51590,

In view of the historical and social setting, the courts must determine whether the measure's ultimate impact will be to perpetuate residential segregation.⁹² Further, the opinions in *Reitman* and the post-*Reitman* cases have treated the authorization and encouragement of discrimination as independent grounds of violation of the fourteenth amendment.⁹³ Thus, even if the evidence is insufficient to demonstrate the inevitable perpetuation of discrimination, it may be sufficient to prove authorization or encouragement and hence to establish a violation of equal protection.

B. *Judicial Remedies*

Surely, if the environmental benefits of land use planning are to be enjoyed by a city and the quality of life of its residents is accordingly to be improved, the poor cannot be excluded from enjoyment of the benefits. Given the recognized importance of equal opportunities in housing, it may well be, as a matter of law, that it is the responsibility of a city and its planning officials to see that the city's plan . . . accommodates the needs of its low-income families, who usually—if not always—are members of minority groups.⁹⁴

The *SASSO* court thus sketched the possible future dimensions of state responsibility regarding equal access to housing. This view imposes on the community the affirmative duty of providing housing opportunities for disadvantaged groups in its plan, and on the courts the duty of reviewing such plans. The propriety of judicial intervention in the

at 20 (N.D. Cal. July 30, 1970). The court noted that 100 acres of vacant land currently zoned for multi-family use, and another "100 or so" acres that could be rezoned for multi-family use, would be suitable for low-income housing development. *Id.* at 5-7. The court impliedly rejected *SASSO*'s claim that the vacant areas presented terrain, construction, or parcel assembly problems or were otherwise unavailable for development. *Id.* at 8.

⁹² The denial of rezoning to *SASSO* plaintiffs on remand may have been influenced by the minimal effect of the proposed project on the city's poor. Although the project was to include 280 units, only 56 of those units were to be available for low-income families. *Southern Alameda Spanish Speaking Org. v. Union City*, No. 51590, at 18 n.6 (N.D. Cal. July 30, 1970).

⁹³ The California court's determination, in *Reitman*, that the ultimate impact of the provision repealing the state's fair housing legislation would be to encourage, and significantly involve the state in, private racial discrimination, was upheld by the Supreme Court. 387 U.S. at 376; *accord*, *Holmes v. Leadbetter*, 294 F. Supp. 991 (E.D. Mich. 1968); *Otey v. Common Council*, 281 F. Supp. 264 (E.D. Wis. 1968). *See generally* Seeley, *The Public Referendum and Minority Group Legislation: Postscript to Reitman v. Mulkey*, 55 CORNELL L. REV. 881 (1970).

⁹⁴ *Southern Alameda Spanish Speaking Org. v. Union City*, 424 F.2d 291, 295-96 (9th Cir. 1970) (footnotes omitted).

zoning area has broad ramifications;⁹⁵ however, the cases herein considered do not require so broad a rationale. In *Dailey*, for example, plaintiffs challenged the actions of the planning commission and city council in denying the building permit and zoning change that would have allowed construction of a low-income housing project;⁹⁶ they did

⁹⁵ If plaintiffs are planning no particular housing project, or if the project is so large that it covers a vast area, they may seek to challenge the entire city plan rather than the zoning classification of one relatively small site. In the former situation, the problem of standing may be presented.

In both cases, the courts may lack the expertise to engage in large-scale planning. This problem is not, however, insurmountable. Although a detailed examination of the issues cannot be undertaken here, some possible approaches can be indicated. An analogy can be made to the reapportionment and school desegregation cases where responsibility for devising a workable plan was given back to those bodies (legislatures, school boards) that had primary authority, but subject to the court's approval. *See, e.g.,* *Green v. County School Bd.*, 391 U.S. 430 (1968) (court review of school board's freedom-of-choice plan). So in zoning, the planning commission or city council could be directed to make a new plan, in accordance with equal protection requirements, subject to the court's approval.

Enforcement is another problem. Again, there is an analogy to education. The force behind desegregation orders stems mainly from the HEW threat of a cut-off of federal funds. An urban renewal panel has recently suggested that federal aid be withheld from communities that resist low-cost housing. Dietsch, *supra* note 2. Thus, enforcement of zoning orders could also be patterned after enforcement of school desegregation decrees.

Civil contempt might also be available for coercion of public officials who refuse to comply with judicial decrees to produce satisfactory plans. *See generally* Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183 (1970).

Although the district court in *SASSO*, on remand, heeded the Ninth Circuit's delineation of state responsibility for equal housing opportunities for the poor, it did not find it necessary to undertake a review of the entire city plan. Instead, the court ordered that "the City take steps necessary and reasonably feasible under the law to accommodate within a reasonable time the needs of low income residents of Union City." *Southern Alameda Spanish Speaking Org. v. Union City*, No. 51590, at 21 (N.D. Cal. July 30, 1970). The court required that such steps include the encouragement of privately sponsored low-income housing programs, as well as the development of public housing programs (which the city had previously declined to undertake (*id.* at 19)) requiring the exercise of the city's fiscal and eminent domain powers "if such be necessary and reasonably feasible . . ." *Id.* at 21-22. The court set a tentative deadline for accommodation at May 1, 1971, and required that the city report its progress to the court within three months after the decision and, after the first report, regularly at each three-month period. *Id.* at 22.

Although this approach apparently avoids the difficulties implicit in judicial review of zoning, it raises additional, perhaps more serious, problems. First, the requirement that the city undertake the construction of low-cost housing presupposes a constitutional right to such housing. Despite a tendency to provide increasing governmental protection for the housing interests of disadvantaged groups (*see* notes 34-43 and accompanying text *supra*), however, the courts have not yet gone so far as to proclaim the existence of a constitutional right to decent housing (*see* note 106 *infra*). Second, federal public housing legislation explicitly requires the local governing body to determine the need for public housing. *See* note 122 *infra*. Finally, judicial determination of the need for public housing may well subject the courts to the same criticisms concerning lack of expertise and involvement in political questions that are presented by judicial review of zoning plans.

⁹⁶ 425 F.2d at 1038.

not challenge the entire city plan. Where the zoning classification of a relatively restricted area is in issue, the courts need only adjudicate the discriminatory effect of *that* classification.⁹⁷ It could be argued that the court is still improperly engaged in zoning, even if on a smaller scale than that envisioned in *SASSO*. But to deny courts the authority to review zoning classifications is to deny relief to those discriminated against; moreover, the courts have long performed such a "zoning" function in nuisance cases.⁹⁸

In the referendum context, the courts need not engage in even such limited "zoning." The typical situation is that in *Ranjel*, where the electorate is attempting to repeal a zoning change, already approved by the city, which would permit construction of a housing project. In these cases, the local planning commission and city council have presumably considered the social and environmental land-use values; in *Ranjel*, action was taken only after extensive investigation and a public hearing.⁹⁹ Thus, if the court invalidates the referendum repeal and the city's classification is reinstated,¹⁰⁰ the court's lack of expertise presents no problem because the determination was originally made by a competent administrative body.¹⁰¹

The cases under consideration have arisen in situations where a

⁹⁷ Although it may be necessary for the courts to examine the character of the neighborhood where the site in question is located, such an inquiry is still far more restricted than a review of the entire city plan. Moreover, the courts have engaged in such examinations as a matter of course in nuisance cases. See Beuscher & Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 1955 WIS. L. REV. 440, 441-42. There are further similarities between nuisance cases and exclusionary zoning cases: both normally involve multiple plaintiffs, and injunctive relief is most often sought. *Id.* See also Roberts, *From Common Law Logic-Chopper to Land-Use Planner: Eulogy for the Lawyer as Social Engineer*, 53 CORNELL L. REV. 957 (1968).

⁹⁸ "The cases . . . reveal . . . judges examining the use character of a neighborhood in much the manner of a zoning board when preparing a zoning ordinance or amendment." Beuscher & Morrison, *supra* note 97, at 441-42.

⁹⁹ 293 F. Supp. at 304.

¹⁰⁰ Under some statutory provisions, a court has the authority to reverse, affirm, or modify the determination of the zoning body. See, e.g., *Landau Advertising Co. v. Zoning Bd. of Adjustment*, 387 Pa. 552, 128 A.2d 559 (1957). Under other provisions, the court may only quash the decision. See, e.g., *Newport Poster Advertising Co. v. City Council*, 84 R.I. 155, 122 A.2d 170 (1956).

¹⁰¹ Still another difficulty is whether it is proper to enjoin the referendum, or whether it is necessary to wait until after the referendum to review the provision. Although courts will not generally enjoin a referendum, some courts have done so if irreparable harm to the plaintiff may otherwise result. See, e.g., *Holmes v. Leadbetter*, 294 F. Supp. 991 (E.D. Mich. 1968); *Otey v. Common Council*, 281 F. Supp. 264 (E.D. Wis. 1968). See generally Note, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1724-34 (1966). Some student commentators have been critical of this approach. See Note, *Referendums and Judicial Intervention*, 30 OHIO ST. L.J. 189 (1969); 15 WAYNE L. REV. 1617 (1969). For a discussion of the propriety of injunctive relief in cases not involving referenda, see notes 102-05 and accompanying text *infra*.

particular housing project has been blocked. The most suitable remedy, therefore, is to enjoin defendants from prohibiting the construction of the project on the ground of a zoning violation. First, compensatory damages may well be unavailable.¹⁰² Even if money damages could be granted, such a remedy would not afford adequate relief to those injured by the discrimination. Plaintiffs would still be unable to reside in more desirable communities; moreover, money damages would provide insufficient compensation for the social and psychological detriments suffered by plaintiffs as a consequence of exclusion.¹⁰³ Therefore, injunctive relief, which has been a traditional remedy in similar equal protection cases,¹⁰⁴ is a "necessary and appropriate" remedy in exclusionary zoning cases.¹⁰⁵

III

PUBLIC HOUSING

As has been discussed, the concept of equal housing opportunities can signify the right not to be excluded from desirable residential communities; it can also denote a constitutional right to decent housing.¹⁰⁶

¹⁰² The courts have held that a governmental body is not liable in damages. *Sires v. Cole*, 320 F.2d 877, 879 (9th Cir. 1963); cf. *Monroe v. Pape*, 365 U.S. 167, 187-92 (1961). Although a plaintiff may sue the individual official involved, certain officials have been held immune from suit in similar situations, and some may lack the ability to pay substantial damages. *Developments in the Law—Equal Protection*, *supra* note 6, at 1135-36.

Furthermore, where damages are too speculative, compensatory relief will not be granted. *Id.*; *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1002-04 (1965). By analogy to nuisance cases, plaintiffs may seek to recover as damages the value of the use or enjoyment of the land of which they have been deprived. *Baltimore & P.R.R. v. Fifth Baptist Church*, 108 U.S. 317 (1883); W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 91, at 623-24 (3d ed. 1964). In addition, however, plaintiffs may wish to claim damages for such intangibles as the psychological harm of exclusion, the denial of educational opportunities, and the inconvenience of having to travel long distances to obtain suitable employment. The difficulty of assessing the value of such claims may well lead the courts to conclude that they are too speculative to be compensable.

¹⁰³ See notes 42-43 and accompanying text *supra*.

¹⁰⁴ *E.g.*, *Carter v. Jury Comm'n*, 396 U.S. 320, 336-37 (1970) (jury exclusion); *Baker v. Carr*, 369 U.S. 186, 198 (1962) (reapportionment); *Brown v. Board of Educ.*, 349 U.S. 294, 300 (1955) (education). The injunction is also a traditional remedy in nuisance cases. See *Beuscher & Morrison*, *supra* note 97, at 453-55. In some nuisance cases, the courts have enjoined uses permitted by the zoning laws. *E.g.*, *Sweet v. Campbell*, 282 N.Y. 146, 25 N.E.2d 963 (1940).

¹⁰⁵ *Dailey v. City of Lawton*, 425 F.2d 1037, 1040 (10th Cir. 1970). The district court had enjoined defendants from denying the building permit on the ground of a zoning violation. 296 F. Supp. at 269.

¹⁰⁶ The *SASSO* court characterized plaintiffs' equal protection contentions this way: "They assert that the effect of the referendum is to deny decent housing and an

Although the Supreme Court has never been confronted by this precise issue, a related question is presented in the context of public housing by *Valtierra v. Housing Authority*.¹⁰⁷

Article XXXIV of the California constitution requires approval by a majority of voters before any low-rent public housing can be built.¹⁰⁸ Other states have similar provisions.¹⁰⁹ In the two decades since Article XXXIV was enacted, almost fifty percent of the low-income housing units proposed were rejected by the voters.¹¹⁰ In *Valtierra*, plaintiffs, "persons of low income"¹¹¹ who were eligible for public housing, challenged the constitutionality of Article XXXIV. A three-judge district court held that the referendum requirement violated plaintiffs' equal protection rights.¹¹²

integrated environment . . ." 424 F.2d at 295. See generally Michelman, *The Advent of a Right to Housing: A Current Appraisal*, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 207 (1970); Note, *Decent Housing as a Constitutional Right—42 U.S.C. § 1983—Poor People's Remedy for Deprivation*, 14 HOW. L.J. 338 (1968). See also Michelman, *On Protecting the Poor Through the Fourteenth Amendment, Foreword to The Supreme Court, 1968 Term*, 83 HARV. L. REV. 7 (1969); Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199; Peters, *Civil Rights and State Non-Action*, 34 NOTRE DAME LAW. 303 (1959).

¹⁰⁷ 313 F. Supp. 1 (N.D. Cal.), *prob. juris. noted sub nom.* Shaffer v. Valtierra, 399 U.S. 925, and *sub nom.* James v. Valtierra, 398 U.S. 949 (1970).

¹⁰⁸ CAL. CONST. art. XXXIV, § 1, provides in pertinent 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.

¹⁰⁹ E.g., MINN. STAT. ANN. § 462.465(2) (1963); NEB. REV. STAT. § 71-1509 (Repl. 1966); VA. CODE ANN. § 36-19.4 (Supp. 1968).

¹¹⁰ N.Y. Times, June 9, 1970, at 28, col. 5. Although 8% of the nation's poor reside in California, that state has only 4% of the country's low-income housing; further, California has only 1/3 the number of low-rent dwelling units per poor family as exist in New York or Illinois. *Id.*

[The statistics on defeat of referenda tell] only a small part of the story. Many housing authorities never even bother to have referenda put on the ballot because they know they will be defeated. Referenda not only cost money . . . , but also create political hazards for candidates who are expected to take a position on such referenda.

Letter to the author from Myron Moskowitz, Chief Attorney, National Housing and Development Law Project, Berkeley, California, Sept. 21, 1970 (on file, *Cornell Law Review*).

¹¹¹ CAL. CONST. art. XXXIV, § 1, provides:

For the purposes of this article the term "low rent housing project" shall mean any . . . living accommodations for persons of low income

For the purposes of this article only "persons of low income" shall mean persons or families who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.

¹¹² 313 F. Supp. at 4-6.

The *Valtierra* court relied heavily on *Hunter v. Erickson*.¹¹³ There, the Akron city charter prohibited the enactment of fair housing legislation without approval of a majority of voters. The Supreme Court held that the provision distinguished between those seeking the enactment of laws to protect against racial, religious, or ancestral discriminations in real property transactions and those seeking regulations in pursuit of other ends, unjustifiably making it substantially more difficult to secure the former type of legislation than the latter.¹¹⁴ The measure violated the equal protection clause by placing special burdens on the access of minorities to the governmental process.¹¹⁵ The Court was not deterred by the argument that the referendum procedure was neutral:

Moreover, 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.¹¹⁶

Valtierra appears to fall squarely under the *Hunter* rule: the classification distinguishes between those seeking to obtain federal housing assistance for low-income groups and those seeking federal assistance on behalf of other groups;¹¹⁷ and the reality is that the law's impact falls on a minority group—the poor.¹¹⁸

The classification in *Hunter*, however, was based on race. Although non-white groups are disproportionately overrepresented among public

¹¹³ 393 U.S. 385 (1969).

¹¹⁴ *Id.* at 389-91.

¹¹⁵ *Id.* at 392.

¹¹⁶ *Id.* at 391. This language has suggested to one commentator the possibility that any referendum on minority group legislation violates equal protection: first, it is very likely that voting in such referenda will be based on prejudice, and, since the voter is responsible to no one, he can easily discriminate on the basis of race; then, either because the state cannot promote a system that facilitates the operation of private racial discrimination (*Anderson v. Martin*, 375 U.S. 399 (1964)) or because equal treatment of unequals does not provide equal protection (*Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956)), the referendum violates the fourteenth amendment. Seeley, *supra* note 93, at 901-05.

A less sweeping response to the political impotence of the disadvantaged would be to require a closer scrutiny of state actions having an adverse effect on such groups since those actions stem from a "power structure" that is unresponsive to the needs of minority groups and the poor. *Hobson v. Hansen*, 269 F. Supp. 401, 507 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); cf. Carlin, Howard & Messinger, *Civil Justice and the Poor: Issues for Sociological Research*, 1 LAW & SOC'Y REV. 9 (1966). Such a response could well supplement the disfavored-classification, fundamental-interest test. See notes 8-19 and accompanying text *supra*.

¹¹⁷ 313 F. Supp. at 5.

¹¹⁸ *Id.* at 4-5.

housing occupants,¹¹⁹ the *Valtierra* classification is based on wealth, not race. As has been shown, however, where the traditionally disfavored wealth classification is combined with an interest of fundamental importance, housing, the courts should apply the overriding justification test.¹²⁰

At the very least, the state should be required to choose a less onerous alternative, if one is available.¹²¹ If the state interest is that of local control, such control is already provided by the requirement of local legislative approval of each housing project.¹²² If the state interest involved is that of voter control, such control could be granted by a measure *allowing* referenda on public housing projects, in accordance with the state's usual procedural provisions, rather than *requiring* referendum approval before any public housing can be built.¹²³ The

¹¹⁹ Inside metropolitan areas, non-whites have a substandard occupancy four times higher than that of whites (28% versus 7%); outside these areas, 77% of the non-whites occupy substandard housing. THE REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING, *supra* note 1, at 11. Thus, it is not surprising that non-whites occupy 50% of all public housing units; they occupy an even larger percentage of non-elderly housing. THE PRESIDENT'S COMM'N ON INCOME MAINTENANCE PROGRAMS, *supra* note 1, at 339. At least in areas where the non-white occupancy of public housing is overwhelming (e.g., in Chicago, the family housing tenants are 99% black; *Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907, 910 (N.D. Ill. 1969)), the courts should recognize that a measure such as Article XXXIV denies equal protection to racial minorities as well as to the poor, since "the reality is that the law's impact falls on the minority." *Hunter v. Erickson*, 393 U.S. 385, 391 (1969).

¹²⁰ See Section I *supra*.

¹²¹ See, e.g., *Carrington v. Rash*, 380 U.S. 89 (1965); *McLaughlin v. Florida*, 379 U.S. 184 (1964). "Such a law . . . will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *Id.* at 196. See also Horowitz, *Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147, 1157-58 (1966).

¹²² 42 U.S.C. § 1415(7) (1964) provides for "local determination of the need for public housing." Subsection 7(a) requires that the local governing body approve by resolution the application of the public housing agency for a preliminary loan before such a loan can be granted. Subsection 7(b) requires that the local governing body enter into a cooperation agreement with the public housing agency before any contract can be made with the Public Housing Administration for loans (other than preliminary loans) or for annual contributions.

California law provides both for approval by resolution of the local governing body and for consultation with the school district in which the project is to be located. CAL. HEALTH & SAFETY CODE § 34313 (West 1967).

¹²³ In *Housing Authority v. Dockweiler*, 14 Cal. 2d 437, 94 P.2d 794 (1939), it was held that public housing programs could not be subjected to referenda under the applicable California statutory provisions. The appellant in *Valtierra* contends that Article XXXIV was adopted "not to create a special procedure for housing but to bring housing within the traditional controls." Brief for Appellant at 34, *Shaffer v. Valtierra*, Docket No. 226 (U.S., filed June 5, 1970). But Article XXXIV does not merely permit the submission of housing programs to referenda, it requires such submission. The burden imposed is heavier, because if a referendum were not required, its proponents might not be able

former measure would provide for the state's interest without unduly disadvantaging low-income persons; the latter unjustifiably imposes upon such persons a special legislative burden in violation of their equal protection rights.

Valtierra does not require the courts to assert the existence of a constitutional right to decent housing; it therefore does not impose on the states the affirmative duty to provide adequate housing for all persons regardless of wealth. *Valtierra* merely requires that the states not impose upon the poor any special legislative burdens in their efforts to secure such housing through the political process.

CONCLUSION

The inadequate housing of minority groups and the poor can be attributed both to the shortage of decent dwelling units and to the lack of access to an integrated environment. The Fair Housing Act of 1968¹²⁴ has not been successful in opening up white suburbs and other communities to minority groups.¹²⁵ As yet no serious attempts have been made to secure equal access to housing opportunities for the poor.¹²⁶ The equal protection clause provides an important vehicle for alleviating these problems. The difficulty of obtaining decent housing units, through public housing and other government programs, will be eased if the special burden of the referendum requirement is lifted. Moreover, the opportunities to build low-income projects in non-ghetto communities will be substantially increased if exclusionary zoning tactics can be invalidated. The courts have given protection to similar interests of similarly disadvantaged groups;¹²⁷ the same protection must be given to the housing interests of the poor.

Ellen S. George

to obtain the requisite number of petition signatures to warrant holding a referendum for every proposed project. Moreover, the deterrent effect that the referendum requirement has on housing authorities (*see* note 110 *supra*) might be decreased.

¹²⁴ 42 U.S.C. §§ 3601-31 (Supp. V, 1970). This measure makes it unlawful to discriminate in the sale, rental, or financing of housing.

¹²⁵ Herbers, *supra* note 42.

¹²⁶ *Id.*; Dietsch, *supra* note 2. An urban renewal panel has suggested that the President now has authority to withhold federal funds from communities that resist low-rent housing. HUD Secretary George Romney disagrees but has proposed a federal law barring local governments from using exclusionary zoning and building codes. *Id.*

A new housing bill recently approved by the Senate provides for federal subsidies to promote the development of "new cities," thereby alleviating the problem of urban concentration. N.Y. Times, Sept. 24, 1970, at 1, col. 2. Although the bill offers a partial solution, it does nothing to open up existing neighborhoods to low-income families.

¹²⁷ *See* notes 23-26 and accompanying text *supra*.