INITIATIVES AND REFERENDUMS: DIRECT DEMOCRACY AND MINORITY INTERESTS

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In recent years the significance of initiatives[1] and referendums[2] in state and local government has increased immeasurably.[3] These devices, characterized as forms of direct democracy, allow the electorate to by-pass the legislative and executive branches of government.[4] They entail either the adoption of enactments drafted by private citizens, or approval or repeal of existing constitutional provisions, statutes, and ordinances.[5] The primary objective of initiatives and

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1. An initiative is a device by which a prescribed number of voters in a state or community effectuate the placement of an amendment or proposal on the ballot for acceptance by the voters in that locality. G. BLAIR, AMERICAN LEGISLATURES: STRUCTURE AND PROCESS AT S.L.U. 392 (1967).

2. A referendum is the requirement that the voters of a state or community approve of specified legislative enactments before they become law. *Id.*

3. D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 1117 (1977). *See also* note 8 *infra*.

4. Note, *Constitutional Constraints on Initiative and Referendum*, 32 VAND. L. REV. 1143 (1979) [hereinafter cited as *Constitutional Constraints*].

5. Initiatives may be constitutional by allowing citizens to amend their state's constitution. They may also be statutory by permitting voters to compose and implement their own legislative schemes. Statutory initiatives may be direct as just described, or indirect. An indirect initiative affords the legislature an opportunity to determine the final disposition of a proposed measure. Comment, *Judicial Review of Laws Enacted by Popular Vote*, 55 WASH. L. REV. 175 n.1 (1979). [hereinafter cited as *Judicial Review*].

Referendums likewise fall within two basic categories. The first type entails the suspension of any previous legislative action on the subject until the electorate deter-

referendums is the promotion of government by the people.[6] The presumption exists that they constitute a purer form of democracy and expression of the will of the people than legislation by representative assembly.[7] Initiatives and referendums have become more prevalent recently,[8] largely due to the national publicity given to California's Proposition 13 in June, 1978.[9]

Although the concept of direct democracy appears quite attractive upon first glance, it does contain some inherently undemocratic elements.[10] The primary defect of direct democracy lies in its failure to

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mines the outcome of the proposed measure. In the second type, all legislative acts remain in effect until the decision of the electorate is final. *Constitutional Constraints*, *supra* note 4, at 1145.

6. Proponents of direct democracy contend that initiatives and referendums promote the value of government by the people because they increase voter involvement in the political process and reduce the errors in translation of majority will into legislation inherent in representative government. *Judicial Review*, *supra* note 5, at 189.

7. Criticism of direct democracy abounds, *see* note 10 *infra*, yet elements of this concept are worthy of preservation. Since initiatives and referendums address issues rather than political personalities, theoretically voters consider the issues with more objectivity than do members of the legislature. Such objectivity may go a long way toward refuting the charge that direct democracy constitutes mob rule. Furthermore, individual voters have the opportunity to become knowledgeable of the issues, for they need consider only a small portion of propositions in comparison to the vast number the legislature must consider. Also, initiatives and referendums reduce the flaws inherent in the representative system. They constitute corrective therapy for sincere but mistaken legislators as to the wishes of the people. The public may obtain their preferences without the necessity of voting good legislators out of office. In this way direct democracy serves as a check upon overzealous legislators. Other favorable factors include increased participation by public minded citizens and a better educated electorate. Note, *Initiative and Referendum—Do They Encourage or Impair Better State Government*, 55 FLA. ST. U. L. REV. 925, 938-39 (1977) [hereinafter cited as *Initiative and Referendum*].

8. Some of the new found popularity of initiatives and referendums is attributable to frustration with taxation, decline in effectiveness of political parties, increased activity of special interest groups, and heightened media coverage of public issues. *Judicial Review*, *supra* note 5, at 189. Statistics reveal the national trend of direct voter participation. In November, 1978, thirty-eight states held elections for over 200 issues. *Constitutional Constraints*, *supra* note 4.

9. *Judicial Review*, *supra* note 5, at 189.

Proposition 13 was a referendum designed to restructure property taxes in California. *See generally* Ehrman, *Planning Under Proposition 13 and its Progency—Duties, Dangers and Opportunities*, 1979 S. CAL. TAX INST. 613 (1979).

10. Inherent inadequacies pervade direct democracy. Representative government becomes more efficient as members of the legislature gain expertise in specialized areas. Also, the legislature makes itself accessible to the general public for petitioning and education. In addition, an increase in the advent of initiatives and referendums could produce a decline in the quality of representative government. A decrease in

protect the interests of numerous minority groups.[11] A number of initiatives and referendums adopted by the electorate completely ignore minority interests and in fact discriminate against minority groups.[12] Thus, litigants have initiated a multiplicity of equal protection challenges to citizen law-making power.[13] This Note will explore 1) limitations on the enactment of initiatives and referendums; 2) judicial responses to equal protection challenges, including trends set by the Supreme Court; and 3) safeguards which may prove useful for future protection of minority rights threatened by direct democracy.

I. LIMITATIONS ON THE USE OF INITIATIVES AND REFERENDUMS

Although initiatives and referendums originate with the electorate, constitutional doctrines circumscribe what the voters may execute through direct democracy. These restrictions similarly limit the state legislatures and fall into two categories: those imposed by state constitutions, and those imposed by the United States Constitution.[14]

A. *State Constitutional Limitations*

The first constitutional limitation on the state level confines initia-

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responsibility on the part of legislators could make it more difficult to attract capable persons for the positions. Moreover, the prospect of reversal by the electorate creates less incentive for legislators to fine tune their own enactments. Other factors suggest that the growth of direct democracy will not enhance the quality of government. It is possible for special interest groups to invade and influence the electorate in the same manner they have penetrated legislatures. Furthermore, light voter participation in an election permits a small percentage of the public to pass laws which will bind all. Also, it is very difficult for a nonexpert voter to make intelligent decisions on complex issues. Finally, a number of voters are inherently prejudiced. These factors point to the imperfections incident to direct democracy. *Initiative and Referendum*, *supra* note 7, at 940-41.

11. *Id.* Direct voter participation in lawmaking impedes democracy in that majorities tend to ignore the interests of racial and other minority groups. In this respect, initiatives and referendums can reduce minority input and voice in legislation.

12. Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal and State Courts—A Michigan Model*, 50 J. URB. L. 209 (1972). Direct democracy discrimination has been prominent principally in the area of open and fair housing. *See* James v. Valtierra, 402 U.S. 137 (1971) (exclusion of low income housing projects from middle class areas); Hunter v. Erickson, 393 U.S. 383 (1969) (frustration of minority efforts to obtain fair housing); Reitman v. Mulkey, 387 U.S. 369 (1967) (prohibition to all fair housing statutes without voter approval).

13. Olson, *supra* note 12.

14. *Id.* at 213.

tives and referendums to the authority of the legislative branch[15] of state government.[16] In other words, citizens may enact what legislatures may enact and no more.[17] Thus, initiatives and referendums must comply with the same constitutional and statutory standards governing state and local legislative bodies. A second limitation concerns the distinction between administrative and legislative functions of government.[18] As legislatures must restrict their endeavors to legislative functions, the electorate must confine initiatives and referendums to legislative functions as well.[19] A third classification which courts rely on to limit direct democracy concerns resolutions and ordinances in local government.[20] Initiatives may address only those areas subject to regulation by ordinance.[21]

A final constraint applies only to direct legislation proposed on a local level. Local initiatives or referendums are invalid if they relate

15. *Id.*

16. It follows that on the local level initiatives and referendums are confined to state grants of power to local legislative bodies.

17. *See, e.g.*, Hurst v. Burlingame, 207 Cal. 134, 277 P. 308 (1929) (where the court held that adoption by initiative of a local zoning ordinance was invalid because the ordinance did not comply with the appropriate procedures of the state zoning law).

18. Olson, *supra* note 12, at 213.

19. Generally legislative functions relate to subjects of permanent and general character while administrative functions are of temporary and special character. Often the distinction turns on whether the legislation concerns a new policy or plan, or one already in existence. Action addressing the former is legislative. *Id.* at 222-23. Also, legislative functions concern expression of opinion as to the conduct of particular business within the jurisdiction of the legislature. Administrative functions relate to ordinary ministerial duties and the administration of business. *Id.* at 219, *citing* Schrier v. Lander Roest, 380 Mich. 626, 158 N.W.2d 479 (1968). *See also* Kelly v. John, 162 Neb. 319, 75 N.W.2d 713 (1956) (rezoning from residential to commercial was an administrative function because the particular issue was specific rather than general).
See also notes 94-99 and accompanying text *infra*.

20. Olson, *supra* note 12, at 215. A resolution is a formal statement of opinion or policy, whereas an ordinance is an official legislative enactment having the force of law. *Id.*

21. To generalize, resolutions guide the implementation of ministerial functions of government and address matters of special temporary character. Ordinances are appropriate for more permanent matters. Characterized another way, resolutions generally embrace only items which are administrative in character, while a legislative function is the proper subject of ordinances. There are, however, no clearly established rules controlling the use of either. *Id.* at 219, *citing* Parr v. Fulton, 9 Mich. App. 719, 158 N.W.2d 35 (1968).

to statewide affairs.[22] This rule embodies the statewide versus local concern distinction.

B. *Federal Constitutional Limitations*

Paralleling state constitutional qualifications are those standards set by the United States Constitution. All laws must meet the demands of the Constitution, including those enacted by direct vote.[23] The constitutional provisions which most directly affect initiatives and referendums include the guarantee clause,[24] fourteenth amendment due process,[25] and fourteenth amendment equal protection.[26]

Litigants challenging direct democracy often base their claims on the guarantee clause.[27] Challengers have argued that a republican form of government embraces only representative regimes, and precludes citizens from enacting their own laws.[28] Courts in the past have rejected the notion that direct democracy conflicts with the guarantee clause,[29] and have prevented this provision from seriously limiting initiative and referendum enactments.

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22. Olson, *supra* note 12, at 225. Where neither enabling legislation nor home rule provisions confer power to a local government, the local government lacks power to deal directly with a particular subject matter. Furthermore, local governments always lack power to consider matters which are of statewide concern. Finally, if state statutes occupy a particular field or deal comprehensively with particular matters, local governments may not enact similar or related ordinances through initiative procedures due to the preemption doctrine. *Id.* at 228.

23. Comment, *The Application of the Equal Protection Clause to Referendum-Made Law:* James v. Valtierra, 1972 U. ILL. L.F. 408, 409 n. 8 (1972) [hereinafter cited as *Application of the Equal Protection Clause*]. *See also* Hall v. St. Helena Parish School Bd., 197 F. Supp. 649 (E.D. La. 1961), *aff'd*, 368 U.S. 575 (1962).

24. U.S. CONST. art. IV, § 4. "The United States shall guarantee to every State in this Union a republican form of government . . . ."

25. U.S. CONST. amend. XIV. "No State . . . shall deprive any person of life, liberty or property without due process of law . . . ."

26. U.S. CONST. amend. XIV. "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws."

It is important to note that each of these amendments refers to state as opposed to private action. Thus, it is necessary to focus attention upon state action only.

27. Pacific Telephone Co. v. Oregon, 223 U.S. 118 (1911), concerned such a challenge. The case involved a referendum, but the Supreme Court did not reach the main issue due to a nonjusticiable political question.

28. *Application of the Equal Protection Clause*, *supra* note 23, at 411. *See also Constitutional Constraints*, *supra* note 4; *Judicial Review*, *supra* note 5.

29. *See, e.g.*, State v. Roach, 230 Mo. 408, 130 S.W. 689 (1910); *Ex Parte* Wagner, 21 Okla. 33, 95 P. 435 (1908).

A second mode of attacking direct democracy relies on the due process clause of the fourteenth amendment.[30] Litigants basing their challenge on the fourteenth amendment argue that the requisite procedures in various jurisdictions for placing initiatives or referendums on the ballot violate the guarantee of due process.[31] Courts have responded with mixed results to due process arguments,[32] but many have treated due process and equal protection claims similarly.[33] Thus, a number of the limitations attached to direct democracy by way of the equal protection clause serve equally as due process limitations.

Finally, the equal protection clause imposes additional constraints upon direct democracy. Initiatives and referendums are particularly susceptible to encouraging discrimination and jeopardizing minority rights. A definite tension exists between promoting the will of the majority and protecting minority interests.[34] As a general rule, voters analyze issues from a personal perspective, and ignore the concerns of interested minority groups.[35]

Several attributes of initiatives and referendums serve to repress minority rights. First, direct elections alone can dilute minority vot-

30. *Judicial Review*, *supra* note 5, at 197.

31. If a procedural requirement unreasonably burdens a particular group, it may violate the fourteenth amendment. *See* Eubank v. City of Richmond, 226 U.S. 137 (1912), and Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), where the Supreme Court held that zoning ordinances which delegate zoning decisions to property owners violate the due process clause.

The procedural due process arguments raised in various cases are separate from claims that a particular initiative or referendum substantively violates due process.

32. *Eubank* and *Roberge* clearly protect individuals from abuses and deprivations of procedural due process. The Supreme Court limited the effect of these decisions in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), where it held that the people at large may constitutionally exercise zoning power. Thus, a mandatory referendum requirement does not unduly burden individuals procedurally who wish to apply for zoning charges. *Judicial Review*, *supra* note 5, at 198-99. *See* note 102 *infra*.

33. The *Eastlake* decision for example, although a due process case, has significant implications in the area of equal protection. The lack of procedural protections awarded in the zoning area could also affect the rights of minorities. *Judicial Review*, *supra* note 5, at 200.

See also notes 101-06 and accompanying text *infra*.

34. *Judicial Review*, *supra* note 5, at 181-82.

35. *Id.* at 25. Initiatives and referendums are essentially at-large elections on legislative issues. Just as multi-member district voting dilutes or cancels the strength of particular minority groups, direct democracy produces the same effect.

ing strength in the same way elections at large do.[36] In addition, whereas legislatures respond to the intensity of a particular viewpoint in the community, voters in initiatives and referendums do not.[37] Matters of extreme consequence to minorities, but of marginal importance to the majority, remain utterly dependent upon perception of the issues by the majority. This dilution of voting strength coupled with the intensity problem often preclude meaningful participation by minority groups in initiatives and referendums.[38] Furthermore, when the issues of direct democracy are clear-cut and emotional, such as gun control, pornography, or race, the potential for abuse of minority rights becomes enhanced.[39] Arousal of emotional fervor often signals a reduction in the care with which voters evaluate the issues. It is not uncommon for public campaigns to evoke prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems.[40]

Finally, direct democracy eliminates the procedural safeguards which protect minority rights in representative government. The replacement of legislative hearings and debates with media-oriented campaigns provides reviewing courts with no record indicating the intent of the drafters. Also, once the citizenry has enacted an initiative or referendum, a number of problems associated with overruling the voice of the public arise. Reluctance on the part of legislators to do so presents one problem; statutory restraints pose another.[41] Thus, many of the factors designed to protect minority rights by virtue of corrective legislation by elected officials are lacking in direct democracy. Our next line of inquiry examines how the judiciary has dealt with the vulnerability of initiatives and referendums to equal protection challenges.

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36. *Judicial Review*, *supra* note 5, at 191.

37. *Id.*

38. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 25 (1978).

39. *Id.*

40. *Id.* at 19.

41. *Judicial Review*, *supra* note 5, at 183.

II. JUDICIAL RESPONSE TO EQUAL PROTECTION CHALLENGES

A. Reitman v. Mulkey

The first[42] major equal protection challenge to direct democracy arose in *Reitman v. Mulkey*.[43] The case involved submission of a constitutional amendment known as Proposition 14 to the voters of California. The amendment prohibited state interference with the right of any person to sell his or her property to whomever he or she might choose.[44] The Supreme Court struck down the amendment subsequent to electoral approval on the ground that Proposition 14 specifically authorized discrimination in housing.[45] The case recognizes that state[46] neutrality alone with respect to private discrimination violates the fourteenth amendment. Insofar as state action authorizes or encourages discrimination, it offends the constitution.[47]

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42. In the first case to consider equal protection problems raised by direct democracy, Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713 (1964), the Supreme Court struck down a referendum which approved a new reapportionment plan for the Colorado Legislature. The Court found the referendum jeopardized the fundamental right of an individual to an equally weighted vote, and thus failed to meet equal protection standards.

The significance of *Lucas* lies in the Court's demonstration of its willingness to invoke the equal protection clause and to invalidate unconstitutional laws irrespective of voter approval. The case concerns the fundamental rights branch of the equal protection clause as opposed to that of unreasonable classifications based on race or other suspect criteria.

43. 387 U.S. 369 (1967).

44. *Id.* at 371.

45. *Id.* at 381.

46. Initiatives and referendums do involve state action. The state must implement or at least abide by the mandates of the public. More important, however, is the fact a constitutional amendment was the subject of the case. *See generally* Black, *Forward: 'State Action,' Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

47. Otey v. Common Council of City of Milwaukee, 281 F. Supp. 264, 268 (E.D. Wis. 1968). Upon examination of *Reitman*, the *Otey* court reached the same conclusion. It found that the neutral position of the government did encourage and authorize discrimination, as did its compulsory repeal of existing housing legislation in conflict with the amendment. It did not establish the requirement that states must affirmatively command private discrimination in order to invoke the safeguards of its holding. Merely permitting discrimination will suffice. *Application of the Equal Protection Clause*, *supra* note 23, at 413.

Plaintiffs in *Otey* raised an additional equal protection argument on their facts as well. They alleged that the amendment subjected persons interested in adopting real property regulation to greater procedural burdens than those interested in other types of legislation. The *Otey* court gave no indication, however, that it actually relied

B. *Lower Court Opinions*

Shortly after the *Reitman* decision a United States District Court handed down a decision involving a fair housing ordinance for Milwaukee, Wisconsin. In *Otey v. Common Council of City of Milwaukee*,[48] citizen organizers had completed the requisite procedures for placing an initiative on the ballot. Opponents to the initiative brought suit, however, challenging its constitutionality. The initiative prohibited the city council from enacting any legislation which would restrict the right of property owners to dispose of their interests as they saw fit.[49] The court found the facts indistinguishable from *Reitman*,[50] and held the initiative unconstitutional.[51] *Otey* goes further than *Reitman*, however, for the court enjoined the election and precluded even the opportunity for adoption of the measure.[52] Thus, the court awarded relief before any actual discrimination had resulted from the planned election.

A third decision in the same year, *Holmes v. Leadbetter*,[53] involved a similar fact pattern, namely a referendum for the repeal of Detroit's Fair Housing Ordinance. The *Holmes* court followed *Otey* in its refusal to submit the referendum to the voters, but in so doing achieved a broader result than had the courts in either *Otey* or *Reitman*. The previous decisions reasoned that repeal of existing fair housing legis-

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upon this argument. Seeley, *The Public Referendum and Minority Group Legislation: Postscript to* Reitman v. Mulkey, 55 CORNELL L. REV. 881, 884 (1970).

Additionally significant, *Reitman* involved a constitutional amendment. Adoption of the amendment would have precluded judicial interference with any legislation arising in connection with it. Moreover, legislatures hesitate to tamper with direct democracy and what they deem to be the will of the electorate. Thus, virtual insulation of the initiative from governmental interference without a similar mandate from voters would have resulted.

48. 281 F. Supp. 264 (E.D. Wis. 1968).

49. The proposed initiative read:

" 'Be it resolved: That the Common Council of the City of Milwaukee *shall not* enact any ordinance which in any manner restricts the right of owners of real estate to sell, lease or rent private property.' " *Id.* at 267.

50. *Id.* at 269.

51. The court stated its holding as follows: "[w]e hold that the resolution, if enacted, would significantly . . . encourage such discrimination, and it therefore constitutes State action proscribed by the fourteenth amendment." *Id.* at 273.

52. *Id.* at 278-79. The court reasoned that an election would have served no purpose. An election would have entailed a waste of time and money, for if the measure were adopted it would have been unconstitutional. Moreover, an election in and of itself would have been discouraging to minorities.

53. 294 F. Supp. 991 (E.D. Mich. 1968).

lation encouraged and authorized discrimination. The *Holmes* court, however, relied on the encouragement rationale alone. Moreover, *Reitman* held that any repeal by referendum is unconstitutional only after passage. *Otey* merely enjoined an election because holding it could serve no purpose. *Holmes* held, however, that repeal in and of itself can constitute unconstitutional state action.[54] Debates and activities surrounding the election conducted by the state legislature may represent unconstitutional encouragement of discrimination. Therefore, *Holmes* held not only that repeals which encourage discrimination are unconstitutional, but also that state activity related to balloting for such repeals, even absent repeal itself, violates the fourteenth amendment if the activity encourages discrimination.[55]

Following *Holmes* with its broad protection for minority rights came *Ranjel v. City of Lansing*.[56] The City of Lansing, Michigan had approved a spot zoning variance authorizing construction of low cost, multiple housing units in a single family residential area. Petitioners met the procedural requirements for placing a referendum on the ballot seeking repeal of the variance. The city clerk refused to accept the requisite petition, and petitioners filed a writ of mandamus to compel the city to accept it.

The district court[57] found the referendum unconstitutional, but the court of appeals reversed. The appellate court found insufficient evidence that the referendum would encourage discrimination, as it was impossible to identify a motive to discriminate behind the referendum petition.[58] The court overlooked, however, an important aspect of the *Reitman* encouragement test. The court failed to perceive that the effect and impact of the referendum, the most essential factors, operate entirely independent of the motivation behind it.[59] One commentator remarked that this opinion questions the validity of all of the encouragement theories originating from *Reitman*.[60] Thus, *Ranjel* represents a loss in momentum or at least a deviation from the

54. Seeley, *supra* note 47, at 888.

55. *Id.* at 889.

56. 417 F.2d 321 (6th Cir. 1969), *cert. denied*, 397 U.S. 980 (1970).

57. 293 F. Supp. 301 (W.D. Wis. 1969).

58. 417 F.2d 321 (6th Cir. 1969). A motive to discriminate became an important element of equal protection analysis in later years. *See* notes 110-11 and accompanying text *infra*.

59. Seeley, *supra* note 47, at 891.

60. *Id.*

trend of court-awarded protection of minority rights jeopardized through direct democracy.

The Fourth Circuit's opinion in *Spaulding v. Blair*[61] also deserves consideration. In *Spaulding*, subsequent to the passage of an open housing statute by the Maryland General Assembly but before the enactment could take effect, petitioners brought an action challenging a proposed referendum to prevent the legislation from ever taking effect. The court upheld the referendum, reasoning that mere repeal of anti-discrimination legislation is permissible.[62] The *Spaulding* court rested its decision on the conclusion that absent state authorization of or immunization from discrimination, there can be no encouragement. As in *Ranjel*, the *Spaulding* court entirely overlooked the essence of the encouragement rationale. Although, technically, rejection of state fair housing laws provides no less protection to minorities under federal laws, *Reitman* and its progeny require an inquiry into whether the *practical effect* of state action results in encouragement of racial discrimination.[63] Therefore, *Spaulding* departs from the principles established by the Supreme Court in *Reitman* and expanded upon in later decisions.[64]

C. Hunter v. Erickson

Following *Spaulding*, the Supreme Court in *Hunter v. Erickson*[65] struck down a second referendum on the basis of equal protection. In *Hunter*, the Court simultaneously narrowed and expanded the safeguards established by the previous decisions. *Hunter* involved a challenge to an Akron, Ohio city charter amendment requiring mandatory referendums for all fair housing ordinances.[66] The facts differ from the prior cases, however, in that the Akron city council

61. 403 F.2d 862 (4th Cir. 1968).

62. *Id.* at 864-65.

63. Seeley, *supra* note 47, at 893.

64. *See* note 71 *infra*.

65. 393 U.S. 385 (1969).

66. The amendment reads as follows:

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

Id. at 387.

cast the amendment in language explicitly classifying housing matters on the basis of race. The amendment required submission to the electorate of all fair housing regulations related to race, color, religion, national origin or ancestry.

The Court employed traditional equal protection analysis,[67] and concluded that the amendment created an unreasonable racial classification. The charter amendment clearly distinguished between racial and nonracial housing regulations, but subjected only the former to the procedural burden of the mandatory referendum.[68] After careful review the Court found no compelling reason for creation of an explicitly racial classification, and struck down the amendment as unconstitutional.[69]

Hunter expands the scope of equal protection in initiatives and referendums in one important respect. The case demonstrates the Supreme Court's willingness to apply traditional equal protection analysis to direct democracy litigation in instances beyond the encouragement rationale of *Reitman*. The court made no mention of practical encouragement of discrimination at all. The Court limited its opinion in several respects as well. It applied the straight line analysis only to the situation of the mandatory referendum. Typical initiatives or referendums invoked by petition do not implicate the strict scrutiny review afforded by the *Hunter* Court, even when such citizen action fails to safeguard minority rights.[70] Thus, *Hunter* provides an additional weapon for minorities, but only for a limited set of factual circumstances.[71]

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67. The Court has applied traditional straight line equal protection analysis to all cases not involving a fundamental interest or suspect criteria. This analysis is also known as the rational relation test, and involves inquiry into two factors. The challenged classification must be reasonable with respect to the purpose and must promote a legitimate governmental purpose. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

When a classification affects a fundamental right (e.g., voting) or is based on a suspect criterion (e.g., race), however, the Court has not deferred to the legislature, and has imposed a strict test. In order to sustain the constitutionality of the legislation under strict scrutiny, the classification must promote a compelling state interest and must be necessary for the effectuation of that interest. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

68. Hunter v. Erickson, 393 U.S. 385, 390 (1969).

69. *Id.* at 392.

70. *Judicial Review*, *supra* note 5, at 195-96.

71. It has been suggested that *Hunter sub silentio* overrules *Spaulding v. Blair*. After *Hunter*, all legislation which subjects anti-discrimination laws to special procedural hurdles are prima facie unconstitutional. *Spaulding* involves, however, the sub-

D. James v. Valtierra

The Supreme Court had a second opportunity to consider the effect of mandatory referendums in *James v. Valtierra*.[72] In *Valtierra* California voters adopted a constitutional provision known as Article XXXIV which prohibited construction of low cost housing without approval by a majority of a community's voters.[73] The Court found no denial of equal protection. It concluded that no classification based on race existed because all low cost housing projects mandated electoral approval, without limitation to those occupied by racial minorities.[74] Procedural burdens to particular groups alone do not effectively deny equal protection, for all referendums disadvantage some group. It is clear, therefore, that *Valtierra* suspended any forward movement in the struggle for minorities to obtain protection of their rights in the initiative and referendum processes.

Commentators have strongly criticized the *Valtierra* decision, usually over the Court's refusal to find a racial distinction.[75] Based upon the district court's findings,[76] the Supreme Court acknowledged that the law effectively disadvantaged minorities, yet refused to classify it as a racial distinction.[77] Furthermore, the Court offered no explanation for this conclusion.[78]

A second major criticism of *James v. Valtierra* concerns the creation by Article XXXIV of an unreasonable classification based on wealth,[79] an equally intolerable result under the fourteenth amend-

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jection of a proposed open housing statute to referendum. In this respect, *Hunter* may preclude the result of *Spaulding*. Seeley, *supra* note 47, at 889.

72. 402 U.S. 137 (1971).

73. *Id.* at 139.

74. *Id.* at 141-42.

75. *See, e.g.*, Bosselman, *Commentary on* James v. Valtierra, 23 ZONING DIG. 117 (1971); Note, *The Equal Protection Clause and Exclusionary Zoning After* Valtiera *and* Dandridge, 81 YALE L.J. 61 (1971).

76. The district court in *Valtierra* found that the mandatory referendum requirement had a disproportionately adverse effect on racial minorities. The Court relied on statistics showing that the public approved fifty-two percent of all referendums required under article XXXIV. The court then equated minorities with the poor and concluded that article XXXIV adversely affected racial minorities. Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970).

77. Comment, *Application of the Equal Protection Clause*, *supra* note 23, at 423.

78. *Id.* at 417-18.

79. *See* James v. Valtierra, 402 U.S. 137, 144-45 (1971) (Marshall, J., dissenting). *See also* Comment, James v. Valtierra: *Housing Discrimination by Referendum?*, 39 U. CHI. L. REV. 115, 120-24 (1971) [hereinafter cited as *Housing Discrimination*].

ment.[80] Justice Marshall, in a scathing dissent, raised the point that the impact of Article XXXIV fell entirely upon the poor. The majority refused, however, to respond to this argument,[81] or to apply strict scrutiny.[82]

In *Valtierra*, the Court refused to apply strict scrutiny because it found no racial or other suspect distinction in Article XXXIV. In holding that the referendum met the requirements of the rational relation test, the Court pointed to other legislative actions subject to compulsory referendums like annexations and general obligation bonds. The only common aspect between open housing and these additional items is referendum, and opponents of each of these items are not similarly situated with respect to the referendum. Thus, the Court concluded that no unreasonable classification based upon open housing legislation existed for purposes of equal protection analysis.[83]

In addition, the *Valtierra* Court asserted its conviction that direct democracy is a desirable and legitimate end which courts must encourage.[84] This reasoning is defective, however, in several respects. While providing communities with a voice in the expenditure of tax dollars is a legitimate purpose, depriving indigents of an equal voice in governmental affairs is not. Moreover, even conceding that the purpose of Article XXXIV is permissible, the mandatory referendum may fall short of satisfying the rational relation test because the cate-

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80. Wealth is an equally suspect criterion for legislative classification, and therefore compels strict scrutiny. *See* McDonald v. Board of Election Comm'rs., 394 U.S. 802 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

81. *Housing Discrimination*, *supra* note 79, at 122.

82. Courts invoke the strict scrutiny test for infringement of fundamental rights and classifications based on suspect criteria. The test demands a compelling state interest and only those means necessary to protect the state interest. *See* note 67 *supra*.

83. James v. Valtierra, 402 U.S. 137, 142 (1971).

84. In *Valtierra* the Court pronounced its endorsement of direct democracy:

> The people of California have . . . decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community.

Id. at 142-43.

See also Note, *Constitutional Law—Public Housing for Low Income Families—Mandatory Referendum Requirement*— James v. Valtierra, 1972 WIS. L. REV. 268, 269 (1972) [hereinafter cited as *Mandatory Referendum Requirement*].

gory singled out is under-inclusive with respect to the purpose. There is no rational basis for subjecting subsidized housing to public approval given the numerous other areas in which citizens have no voice in expenditures.[85] These arguments suggest that notwithstanding the availability of strict scrutiny, the Court should have declared Article XXXIV invalid.[86]

Another basis for criticism of the *Valtierra* decision is the Court's praise for, and commitment to, direct democracy. The Court emphasized that the referendum is a "procedure for democratic decisionmaking . . . [and that] . . . provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice."[87] This unmitigated endorsement of initiatives and referendums conflicts with the fourteenth amendment's protection of minority interests[88] because of the particular problems they pose for minorities.[89]

The *Valtierra* decision seriously limits the holdings of both *Hunter* and *Reitman*. It is possible to distinguish these cases on the ground that *Reitman* and *Hunter* concern repeal of substantive rights while *Valtierra* does not.[90] Also, it is possible to reconcile the cases on the basis of the encouragement rationale of *Reitman*.[91] If a statute al-

85. *Housing Discrimination*, *supra* note 79, at 126-28. Such additional areas in which citizens have no voice concerning tax expenditures include welfare payments and salaries for public officials.

86. Moreover, more critics suggest that housing is a fundamental interest which merits strict scrutiny in and of itself, although the Supreme Court has never recognized it as such. These critics suggest that when state action threatens both a fundamental interest and suspect criterion like wealth, the highest level of scrutiny is necessary. The Court has failed, however, to adopt this analysis. *Mandatory Referendum Requirement*, *supra* note 83, at 274.

87. 402 U.S. at 141, 143.

88. *Housing Discrimination*, *supra* note 79, at 117. In addition, the Court's blanket approval of initiatives and referendums is inconsistent with its prior decision in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 736-37 (1964) (*See* note 42 *supra*).

> *Lucas* . . . appears to stand for the principle that when the people act as a legislative body in a referendum, the Constitution imposes upon them the same responsibilities as it imposes upon a representative legislature, and that voter legislation, even if it does "demonstrate devotion to democracy," or citizen majority rule, is not given any greater presumption of validity for that reason.

Housing Discrimination, *supra* note 79, at 118.

89. *See* notes 34-41 and accompanying text *supra*.

90. *Housing Discrimination*, *supra* note 79, at 140. It is noteworthy that the *Valtierra* Court failed to even mention *Reitman* in its opinion.

91. *See* note 47 and accompanying text *supra*.

though neutral on its face encourages discrimination, the statute violates equal protection. The same holds true if a statute creates an explicitly racial classification and imposes particular burdens almost exclusively on minorities. If, however, a statute is neutral on its face, courts need not find a fourteenth amendment violation so long as the state action does not encourage discrimination even if the impact falls primarily upon minorities.[92] This proffered explanation appears strained; perhaps the only explanation is that the cases are irreconcilable.[93]

E. City of Eastlake v. Forest City Enterprises, Inc.

In the wake of *Valtierra*, the Supreme Court's next opportunity to consider initiatives or referendums arose in *City of Eastlake v. Forest City Enterprises, Inc.*[94] In *Eastlake*, the equal protection question arose in a different context, as a zoning ordinance was the subject matter of the litigation. The City of Eastlake, Ohio adopted a charter provision which required voter ratification of all proposed land use changes by a fifty-five percent majority. A real estate developer challenged the provision by claiming violation of due process,[95] but the Supreme Court found none in overturning the decision of the Ohio Supreme Court.[96] The Ohio court declined to characterize this particular zoning ordinance as a proper exercise of legislative power, thereby declaring it an inappropriate subject for referendums.[97] On

92. Regarding this explanation,

> [t]he matter would thus seem to be one of employing the correct key word—if the statute is neutral, the lower court should use "encouragement" language; if the statute makes an explicitly racial classification, although treating everyone alike, the lower court should use "special burden" language.

Housing Discrimination, *supra* note 79, at 141.

93. *Id.* at 141-42.

94. 426 U.S. 668 (1976).

95. *Id.* at 670.

96. City of Eastlake v. Forest City Enterprises, Inc., 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975).

97. Although the court maintained the position that zoning ordinances can be legislative as opposed to administrative functions, it held that the exercise of the legislative power by the people must be consistent with the same restrictions imposed on legislatures. *See* notes 16-17 and accompanying text *supra*. The court then found that the mere exercise of unrestricted zoning power by the people, whatever zoning decision be so made, was arbitrary and unreasonable. *Id.* at 191, 198, 324 N.E.2d at 744, 747. The issue the court finally addressed was "whether Eastlake's mandatory referendum provision allows the exercise of legislative power by the voting public, such that zoning regulations might be imposed which are arbitrary and unreasona-

the other hand, Chief Justice Burger refused to classify zoning ordinances as legislative functions or otherwise. He based this holding on the assumption that a referendum could never represent an unconstitutional delegation of power to the people because all power derives initially from the people. The people may reserve the power to manage any matter the legislature ordinarily considers,[98] including zon-

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ble." *Id.* at 191, 324 N.E.2d at 744. As it is improper for legislatures to behave arbitrarily and unreasonably, the Ohio Supreme Court found the mandatory referendum requirement unconstitutional.

98. 426 U.S. at 668. Chief Justice Burger read the Ohio Supreme Court's opinion as assuming the arbitrariness of the referendum requirement was due to a delegation of legislative power to the people without sufficient standards to guard against unreasonableness. In response, the Supreme Court held that referendums entail no legislative delegation whatsoever, as people can reserve for themselves power to deal with any legislative matter.

There is sharp criticism for the Court's discussion of the delegation issue at all. The parties barely addressed delegation, and rather focused upon the objection that the referendum permitted voters to determine zoning policy on a lot by lot basis without reflection or reason. Sager, *Insular Majorities Unabated:* Warth v. Seldin *and* City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373, 1410-11 (1978).

An additional point of criticism concerns the Court's quick characterization of zoning ordinances as legislative functions despite the controversy over this very issue in a number of courts. In Arnel Dev. Co. v. City of Costa Mesa, 98 Cal. App. 3d 567, 159 Cal. Rptr. 592 (1979), the California Court of Appeals drew a distinction between various zoning ordinances. The court held that comprehensive zoning ordinances are legislative in character and thus subject to initiative and referendum processes. On the other hand, regulation which affects few people and which applies specifically to particular situations or individuals is adjudicatory in nature. 159 Cal. Rptr. at 594, 596-97. Applying this holding to the facts in *Eastlake*, the power of the voters to affect individual zoning decisions would have the adjudicatory characterization, and would be an improper subject for direct democracy. This California decision, however, is presently on appeal. Moreover, under California law there is vacation of lower court opinions as soon as the appeal is docketed. Thus, *Arnel* is of little precedential value. 33 LAND USE LAW & ZONING DIGEST 9, 10 (1980).

One added consideration regarding the *Eastlake* case is the Court's failure to discuss the extraordinary majority requirement of 55% in the referendum election. The Court of Common Pleas upheld the requirement and the parties did not separately address the issue before the appellate court. *See* 10 AKRON L. REV. 557, 558 n.6 (1977). It is, however, possible to argue that the 55% majority requirement is in itself a violation of equal protection. This requirement relates to the fundamental interest in voting rights, and gives the minority vote greater weight than the majority. Fewer voters can defeat a referendum issue than adopt one. The Supreme Court did discuss a similar issue in Gordon v. Lance, 403 U.S. 1 (1971), where a referendum on a tax increase called for a sixty percent majority. The Court, however, refused to strike down the extraordinary majority requirement without the singling out of an identifiable minority group. *Id.* at 7. Thus, under the *Gordon* rationale, unless it is possible to identify a particular group singled out by the referendum requirement in *Eastlake*, justification is available for the Court's failure to review the issue.

ing. Furthermore, the Eastlake charter provision does not deny due process because the requirement that a Congressional delegation of power be accompanied by discernible standards did not apply since the Court held the initiative did not constitute a delegation of power.[99]

Although *Eastlake* falls squarely within the category of due process cases, its result has significant implications for future equal protection litigation. Moreover, due process and equal protection issues are often closely related.[100] Thus, *Eastlake* expands the range of citizen law-making power by contracting prior due process and adjudicative limitations.[101] As the safeguards for minority rights differ in direct democracy and legislature-made laws, *Eastlake* clearly marks a defeat for minority concerns.[102]

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99. Petitioners also argued that the *Eastlake* referendum requirement unduly restricted their efforts to obtain a change in the existing zoning patterns by inviting popular veto of their requests. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675 (1976). The Court found, however, no undue burden. It distinguished two prior cases, Eubank v. City of Richmond, 226 U.S. 137 (1912), and Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928), both of which involved delegations of power to small groups of property holders to veto proposed changes in zoning. The *Eastlake* Court refused to recognize a similarity between a "standardless delegation of power to a limited group of property owners . . . and decisionmaking by the people through the referendum process." *Id.* at 678. The final holding dispelled any doubt that referendums *per se* do not violate due process.

100. In Bolling v. Sharpe, 347 U.S. 497 (1954), which held that racial segregation in public schools violates fifth amendment due process, the Court read an equal protection clause into the fifth amendment. In so doing it made the following statement: "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive . . . . [D]iscrimination may be so unjustifiable as to be violative of due process." *Id.* at 499.

101. *See* notes 18-25 and accompanying text *supra*.

102. One commentator provides an excellent description of the relationship between *Eastlake* and other equal protection cases.

> The Court's decision in *Eastlake* thus substantially limits the force of any due process challenge to direct democracy. In addition, *Eastlake*, like *James*, reflects the Court's deferential posture toward direct democracy. In rejecting the due process challenge to the referendum provision, the Court characterized the referendum as "an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives," and "a classic demonstration of devotion to democracy." As a result of this posture, judicial prohibition of the use of initiatives or referenda as violative of either the equal protection or due process clause of the fourteenth amendment is an unlikely source of protection for those threatened with majoritarian abuse of direct democracy.

Judicial Review, *supra* note 5, at 200 (footnotes omitted).

The *Eastlake* Court reiterated the approval for initiatives and referendums that it had expressed in *Valtierra*.[103] *Eastlake* represents, however, an even greater commitment by the Court to direct democracy. *Valtierra* at least concerned the general public interest in providing low cost housing and tax expenditures. *Eastlake*, on the other hand, endorsed direct democracy for matters in which there is little interest for the public in general, namely zoning decisions for individual private developments.

III. Framework for Analysis

An overview of the relevant decisions reflects the lenient approach courts have taken toward safeguarding minority rights jeopardized through initiatives and referendums. The *Reitman* court required nothing more than state encouragement of discrimination for a finding of conflict with the fourteenth amendment. *Otey* and *Holmes* reduced the necessary level of encouragement for invocation of the equal protection clause. The *Holmes* decision with one exception[104] represented the height of equal protection scrutiny,[105] for shortly thereafter followed *Ranjel* and *Spaulding*. These decisions placed a damper on the encouragement rationale because *Ranjel*[106] required a motive to discriminate and *Spaulding*[107] required state authorization of the discrimination. There is evidence to suggest, however, that *Hunter* overrules *Spaulding*.[108] With *Hunter*, the Supreme Court made straight line equal protection analysis available to direct democracy, but only to explicit racial classifications and mandatory referendums.[109] The Court then dealt a severe blow to minority rights in *Valtierra*,[110] and accentuated the trend in *Eastlake*.[111] Thus, a clear pattern of movement away from the liberal protection provided by the Court in *Reitman* is evident.

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103. 426 U.S. at 668-69; *see* notes 86-88 and accompanying text *supra*.

104. The one exception is Seattle School District v. Washington, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd* 633 F.2d 1338 (9th Cir. 1980). *See* notes 123-26 and accompanying text *infra*.

105. *See* notes 53-55 and accompanying text *supra*.

106. *See* notes 56-60 and accompanying text *supra*.

107. *See* notes 61-64 and accompanying text *supra*.

108. *See* note 71 and accompanying text *supra*.

109. *See* notes 65-70 and accompanying text *supra*.

110. *See* notes 72-92 and accompanying text *supra*.

111. *See* notes 94-102 and accompanying text *supra*.

A. *Motive to Discriminate*

Similarly, an easily detectable pattern of fewer protections for minority rights has emerged in other areas of equal protection law. The Court has formulated the requirement of a clear intent to discriminate before it will hold a state action unconstitutional.

The Court first made this discriminatory intent requirement explicit in *Washington v. Davis*,[112] when it concluded that a statute, the impact of which falls disproportionately on minority groups, constitutes *per se* discrimination. The Court requires a showing that the statutory purpose is discriminatory. Disproportionate impact serves only as some evidence of a culpable motive, but is inconclusive. Only additional evidence may clearly establish an intent to discriminate on the part of the state.[113]

A year after *Washington v. Davis*, the Supreme Court clarified its intent to discriminate requirement in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[114] The Court listed four factors of inquiry to serve as a guide in determining whether invidious discrimination in part motivated particular legislation. These include the historical background of the decision; the departures from the normal procedural sequence; the legislative or administrative history; and the impact of the official action on particular racial groups.[115] Thus, under *Washington v. Davis* and *Arlington Heights*, a minority group must show that an intent to discriminate was a moti-

112. 426 U.S. 229 (1976). The City of Washington, D.C. required all members of its police force to obtain a specified score on a written test before they were eligible for promotion. A disproportionately large number of black candidates failed the examination compared to their white counterparts. *Id.* at 233.

113. *Id.* at 239.

114. 429 U.S. 252 (1977). A development corporation petitioned defendant City, a white middle class suburb, to rezone a parcel of land from a single-family to a multiple-family classification. The development corporation planned to construct townhouses for low to moderate income tenants. The City denied the petition. Plaintiff alleged discrimination because the impact of the action would adversely affect racial minorities.

115. *Id.* at 266-68. The Court found no purpose to discriminate on the facts of this case. It relied on the administrative history which exposed very legitimate and overriding reasons for the denial of the petition apart from any racial motivations. *Id.* at 269-70.

Also, in a recent decision, Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979), the Court upheld the intent requirements of *Washington v. Davis* and *Arlington Heights*. *Feeney* presented a challenge to a Massachusetts statute which gave preference to veterans in their applications for civil service positions. The Court found that the impact of the statute disproportionately affected women adversely, but

vating factor behind the initiative or referendum. Challengers must rise to a difficult burden of proof[116] unless the sole effect of the law or its administration is blatantly discriminatory.[117]

The Court's requirement of an intent to discriminate is consistent with its posture in the direct democracy cases. Arguably, the Court's failure to find a purpose to discriminate in *Valtierra* explains its decision to uphold the mandatory referendum requirement. The district court asserted that the absence of an invidious motive would not have overcome the discriminatory effects of the referendum requirement.[118] The Supreme Court failed, however, to affirm the lower court opinion.[119] Moreover, the motive requirement interpretation of *Valtierra* does not conflict with the Court's actual holding. If the Court had intended to base its holding solely on the effect of the law without consideration of motive, it would have discussed effect.[120] In short, if the Court finds neither the encouragement of discrimination present in *Reitman*, nor the blatant classifications of *Hunter*, it must find a purpose to discriminate before it will invoke the equal protection strict scrutiny test. This characterization may well prove to be invalid under *Washington v. Davis* and *Arlington Heights*, however, unless the Court finds that the state encouragement of discrimination is intentional as opposed to merely effectual.

Requiring proof of a purpose to discriminate in direct democracy indeed raises another barrier to protection of minority interests. It is especially difficult to establish the existence of an invidious intention with initiatives and referendums. An examination of motivations behind individual voters presents an extremely difficult task to administer and would offend a number of persons.[121] Furthermore, a reviewing court must reach a decision without the benefit of any leg-

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nevertheless upheld the statute because there was no purpose to discriminate. *Id.* at 276-78.

116. *Application of the Equal Protection Clause*, *supra* note 23, at 419.

117. *See* Yick Wo v. Hopkins, 118 U.S. 356 (1886).

118. Valtierra v. Housing Authority, 313 F. Supp. 1 (N.D. Cal. 1970).

119. *Application of the Equal Protection Clause*, *supra* note 23, at 419.

120. *Id.* at 422.

121. *Id.* at 420. Additional difficulties arise upon examination of discriminatory motives in voters. A significant issue centers around the competence of any individual to make the determination as to motive. Furthermore, so many factors contribute to a voter's decision, including property values. Thus, defining a discriminatory intent is indeed difficult. Also, there is need for guidelines to judge the percentage of racially motivated voters necessary to invalidate an election. *Id.* at 420-21.

islative or administrative history. In addition, direct democracy departs from the normal sequence of lawmaking.[122] Finally, such inquiry could represent an inappropriate "intrusion into the workings of other branches of government."[123] Thus, the standards of *Washington v. Davis* and *Arlington Heights* may prove too burdensome for any minority member seeking equal protection from the majority of voters to meet.[124]

One court, however, did not find the burdens of *Washington v. Davis* too onerous to overcome. In *Seattle School District v. Washington*,[125] a federal district court applied the four *Arlington Heights* factors to an initiative designed to counter major desegregation plans for several Washington school districts. The initiative prohibited school boards from requiring students to attend any school but that geographically nearest to the students' homes.[126] The court found the voters indeed had discriminatory motivations in adopting the initiative. In view of the first *Arlington Heights* factor, the impact of the official action, the *Seattle* court found the original desegregation plans were designed to remedy an existing condition whereby minorities were receiving an inferior education. Thus, the adverse impact of the initiative fell primarily upon minorities, as minorities were the primary beneficiaries of the defeated desegregation proposals. In addition, voters could foresee and must have intended the consequences of the initiative in relation to minority concerns.[127]

The second factor announced in *Arlington Heights* is the historical background and sequence of events leading up to the adoption of the initiative. The *Seattle* court determined that the initiative "was con-

122. *Constitutional Constraints*, *supra* note 4 at 1164.

123. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 n.18 (1977), *citing* Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1819).

124. Application of the *Arlington Heights* criteria is nearly impossible regarding proof of discriminatory intent in the area of zoning. A legislative or administrative history rarely exists with zoning enactments; when it does, the record generally lacks a clear showing of intent to discriminate. Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 ECOLOGY L. Q. 51, 67 (1978).

125. 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd* 633 F.2d 1338 (9th Cir. 1980).

126. In reviewing the lower court decision, the Ninth Circuit found it unnecessary to reach the racial motivation issue. This court struck down the initiative on the basis of Hunter v. Erickson, 393 U.S. 385 (1969). It concluded that the initiative represented an impermissible legislative classification based on racial criteria. Seattle School District v. Washington, 633 F.2d at 1342.

127. Seattle School District v. Washington, 473 F. Supp. at 1015.

ceived, drafted, advocated and adopted for the specific purpose of overriding the decision of the Seattle School Board to balance Seattle schools racially by means of student assignments."[128] In regard to the third *Arlington* factor, the initiative represented a procedural departure from the norm because usually school boards, and not the public, make desegregation decisions.[129] As to the final factor enunciated in *Arlington Heights*, the *Seattle* court had no legislative history from which to discern the electorate's intent. Thus, the court was able to invalidate the initiative as motivated by a design to discriminate without considering the intentions of the individual voters.

Although the *Arlington Heights* analysis seems appropriate and assisted the court in the *Seattle* case, the same approach would prove unavailing in *Valtierra*.[130] First, whereas the district court in *Valtierra* found the impact of the low cost housing referendum fell disproportionately upon minority groups, it is difficult to discern what possible racial effect voters could have foreseen.[131] The historical background does not supply any clues either. The provision responded to a state court ruling that the state's referendum law did not apply to selections of low-income public housing sites.[132] The referendum departed procedurally but initiatives and referendums generally represent a departure from the usual legislative process. Finally, a court cannot rely on a legislative history unless public statements at the time of passage of the referendum indicate clear racial bias. In *Valtierra*, the plaintiffs presented no such statements to the court.[133] Thus, although the *Arlington Heights* analysis was helpful in *Seattle* where all the circumstances pointed to racial bias, it can provide little service in the closer case of *Valtierra*. Furthermore, special problems

128. *Id.*

129. *Id.* at 1016. The court stated alternatively that, without a clear design to discriminate, it is possible to invalidate the ordinance upon application of the traditional rational relation test. The initiative is overinclusive in that it prohibits school assignments to achieve racial balance in school districts with *de jure* segregation. The initiative even fails to provide an exception for those districts under court order to adopt new school assignments.

130. Apart from *Eastlake's* due process analysis, *Valtierra* was the only decision in which the Supreme Court upheld a referendum under equal protection attack.

131. *Housing Discrimination*, *supra* note 79, at 132.

132. *Id.*

133. *Id.* at 132-33. There are plausible explanations for the statute in *Valtierra* apart from an intention to discriminate. Economic and land use considerations are important. Multiple concerns and factors often coincide, however, and exist both independent of and in connection with racial motives. *Id.* at 120.

arise solely in connection with initiatives and referendums, which render *Arlington Heights* analysis difficult and awkward to apply.[134] Thus, one may easily conclude that the Supreme Court's requirement of a motive to discriminate places additional burdens on minority groups seeking application of strict scrutiny to initiative and referendum processes.

IV. CONCLUSION

Although direct democracy and citizen lawmaking embody values which courts have desired to uphold, initiatives and referendums commonly usurp minority rights. The courts have fallen short of adequately limiting the ability of majority voters to disregard minority concerns, particularly in the area of equal protection. In fact, the courts have increased the barriers to minorities seeking invocation of the fourteenth amendment.

Perhaps a satisfactory solution would entail an automatic heightened level of scrutiny when lawmaking procedures deprive minority groups of fundamental safeguards. In *U.S. v. Carolene Products Co.*,[135] the Supreme Court announced the policy of stricter judicial review in situations in which the political processes fail to adequately safeguard various interests.[136] Pursuant to this policy, the Court could except initiatives and referendums from the requirements of *Washington v. Davis* and *Arlington Heights*. Under this solution, disproportionate impact upon minorities alone would trigger strict scru-

134. *See* notes 121-24 and accompanying text *supra*.

135. 304 U.S. 144 (1938). Here, Justice Stone established the principle that the fourteenth amendment requires the judiciary to examine political processes. When the political processes fail to function properly, heightened judicial scrutiny is appropriate.

> [L]egislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, [may] be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. . . .
>
> [S]imilar considerations [may] enter into the review of statutes directed at particular religious . . ., or national . . ., or racial minorities . . .: . . . prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

Id. 152-53 n.4.

136. *See Constitutional Constraints*, *supra* note 4, at 1151; *Judicial Review*, *supra* note 5, at 204.

tiny. No showing of an intent to discriminate would be necessary. The only alternative would entail development of a second set of guidelines from which the Court could draw a presumption of discriminatory intent. Such guidelines would apply in lieu of those established in *Arlington Heights* to direct democracy only. Because of the delicate problems associated with initiatives and referendums,[137] however, courts will not resort to this second alternative.

137. *See* notes 121-24 and accompanying text *supra*.