7-1-1971

Mandatory Referendum and Approval for Low-rent Housing Projects: A Denial of Equal Protection?

Gary S. Sotor

for the person whose rights were violated by a federal officer and against whom no criminal charges had been preferred.

The Court thus concluded that absent an explicit congressional mandate to the contrary, Webster Bivens was entitled to redress his injury through a particular remedial mechanism available in the federal courts, namely money damages. Thus, twenty-five years after the Court first addressed itself to this question in *Bell*, the Court ruled that the violation of fourth amendment rights by a federal agent acting under color of federal authority states a federal claim for money damages upon which relief may be granted.[34]

JOSEPH P. KLOCK, JR.

MANDATORY REFERENDUM AND APPROVAL FOR LOW-RENT HOUSING PROJECTS: A DENIAL OF EQUAL PROTECTION?

The United States Housing Act of 1937[1] established a federal housing agency authorized to offer aid in the form of loans and grants to state agencies for slum clearance and low-rent housing projects. California was one of many states to take advantage of the Federal Housing Act through the creation of local agencies.[2] However, two of California's local agencies were prohibited from applying for funds[3] under the federal act by operation of a California constitutional provision[4] requiring ap-

34. Apart from the practical problem of finding a jury that will award money against federal officers while engaged in their official capacities, a more serious problem may face Webster Bivens on remand, namely the defense of immunity from prosecution. In response to the federal district court's ruling that it would bar the action (*Bivens*, 276 F. Supp. at 15), Petitioner argued extensively in his brief that the sovereign immunity defense ought not to be permitted. However, the Supreme Court noted the Second Circuit had not ruled on the point and declined to consider it.

In 1946, the Court in *Bell* reversed a district court for dismissing a fourth amendment damage claim for lack of subject matter jurisdiction. The Court did not, however, determine whether such a claim was actionable because that point was not before the Court. On remand, the lower court dutifully accepted jurisdiction, but dismissed the cause on the grounds that an actionable claim had not been presented.

Twenty-five years later, the *Bivens* Court has advanced the argument begun in *Bell*, and ruled that such a claim is actionable. The Court, however, failed to address itself to the defense of immunity because, like *Bell*, the issue was not before it. Whether Webster Bivens will get his day in court and a remedy for his injuries is yet to be seen.

1. 42 U.S.C. § 1401 (1970).

2. *See* CAL. HEALTH AND SAFETY CODE § 34240 (West 1970).

3. This occurred twice in San Mateo County in 1966 and once in Santa Clara County in 1968.

4. 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,

proval of all low-rent housing projects by mandatory referenda.[5] Suits were brought in federal district court[6] by parties, predominantly black, who had low incomes and who were eligible for public housing. The parties were denied the availability of public housing because the two agencies were prohibited from applying for funds to clear and build. The plaintiffs alleged the California constitutional provision violated: (1) the supremacy clause; (2) the privileges and immunities clause; and (3) the equal protection clause of the United States Constitution. On motions for summary judgment and application for injunctive relief, the three judge court held the provision violative of the equal protection clause and enjoined its enforcement.[7] On appeal,[8] the Supreme Court of the United States, *held*, reversed: The California constitutional provision requiring approval of all low-rent housing projects is not violative of federal constitutional rights. *James v. Valtierra*, 91 S. Ct. 1331 (1971).[9]

The United States Supreme Court has frequently reiterated that the purpose of the fourteenth amendment to the United States Constitution[10] is "to eliminate all official state sources of invidious racial discrimination. . . ."[11] This basic concept emanates from the *Slaughter House Case*.[12] The Court has no less fervently applied the fourteenth amendment where the "petitioners . . . have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color."[13] It is well settled that such racial classifications must be

---

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.

5. California is one of some twenty-two states that instituted the initiative and referendum as direct legislative devices during the progressive reform programs of the early 1900's. *See* Fordham and Russell, *The Initiative and Referendum in Ohio*, 11 OHIO ST. L.J. 495 (1950) for a complete listing; Comment, *The Scope of the Initiative and Referendum in California*, 54 CAL. L. REV. 1717 (1966) for a comprehensive study on the California Initiative and Referendum.

6. Valtierra v. Housing Authority and Hayes v. Housing Authority were consolidated for decision, 313 F. Supp. 1 (N.D. Cal. 1970).

7. *Id.*

8. The Court noted probable jurisdiction of two appeals taken from the judgment, one by the San Jose City Council and the other by a single member of the council in James v. Valtierra, 91 S. Ct. 1331, 1333 (1971).

9. Justice Black wrote the majority opinion for the Court. Justice Marshall wrote the dissenting opinion in which Justices Brennan and Blackmun joined.

10. U.S. CONST. amend. XIV, § 1 provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11. Loving v. Virginia, 388 U.S. 1, 10 (1967); *See also* McLaughlin v. Florida, 379 U.S. 184 (1964); Strauder v. West Virginia, 100 U.S. 303 (1879); *Ex Parte* Virginia, 100 U.S. 339 (1879).

12. 83 U.S. (16 Wall.) 36 (1873).

13. Shelley v. Kraemer, 334 U.S. 1, 20 (1948).

scrutinized more carefully[14] and that they must bear "a far heavier burden of justification" than other similar classifications.[15]

In *Hunter v. Erickson*, the Court found "an explicitly racial classification which treated racial housing matters differently from other racial and housing issues."[16] In *Hunter*, a city charter amendment prohibited enactment of any ordinance dealing with racial, religious, or ancestral discrimination in housing without approval of a majority of the voters.[17] The city's characterization of the amendment as a public decision to move slowly in the area of race relations was held insufficient to justify the "real, substantial, and invidious denial of the equal protection of the laws."[18] However, where a referendum seeks a consensus on a question of broad legislative policy rather than a consensus on a specific legislative act, the rule of *Hunter v. Erickson* has been distinguished.[19]

The *Hunter* principle has been applied at the federal level only to instances of explicit racial classification which are created "whenever [the state] differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area."[20]

The Court has expanded the equal protection concept to eliminate racial discrimination, even when it is clothed in a seemingly neutral statute. As early as 1960, the Court in *Gomillion v. Lightfoot*[21] found that an otherwise lawful redrawing of the city's boundaries became unlawful when done to accomplish an exclusion of most of the black voters from certain electoral districts.

In *Reitman v. Mulkey*,[22] the Court adopted a "three factor test" to determine the question of racial discrimination in housing matters through the use of a neutral provision. In that case, a California constitutional provision[23] limiting the state's power to infringe upon the ab-

14. Loving v. Virginia, 388 U.S. 1 (1967); Bolling v. Sharpe, 347 U.S. 497 (1964).

15. McLaughlin v. Florida, 379 U.S. 184, 194 (1964).

16. 393 U.S. 385, 389 (1969) [hereinafter cited as *Hunter*].

17. The Akron City Charter § 137 has been amended to provide:

> Any ordinance enacted by the Council of the City of Akron which regulates the use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property of any kind or of any interest therein on the 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. Any such ordinance in effect at the time of the adoption of this section shall cease to be effective until approved by the electors as provided herein.

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

19. Southern Alameda Spanish Speaking Organization v. Union City, 314 F. Supp. 967 (N.D. Cal. 1970) where California's general referendum statute was upheld when invoked by community opponents to block a zoning variance necessary for the building of a federally funded low income project.

20. Lee v. Nyquist, 318 F. Supp. 710, 718 (W.D.N.Y. 1970).

21. 364 U.S. 339 (1960).

22. 387 U.S. 369 (1967).

23. CAL. CONST. art. I, § 26 provided in part:

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

solute right of a person to dispose of his real estate was invalidated on the basis of (1) the historical context and the conditions which existed prior to its enactment, (2) its immediate objective, that is, its immediate design and intent, and (3) its ultimate effect.[24] The intent and effect of the provision was to repeal existing anti-discriminatory legislation and prohibit re-enactment of similar legislation. The effect of the *Reitman* decision in the federal district courts was that the courts considered the actual impact upon minority groups as controlling even though the law might appear neutral on its face.[25]

Structural limitations placed upon the political power of minority groups, as a new standard of equal protection developed by the Court in *Hunter*,[26] has been rejected by the Court in the principal case.[27] The formulation of the new standard required going outside the factual situation of the case.[28] Some authors had already observed that a new trend was indicated by cases where majority groups attempted to stymie minority efforts to obtain favorable legislation.[29]

The rejection of the standard in the case noted herein precludes the possibility of further expansion of the equal protection doctrine to effectively curb the more subtle varieties of discrimination. The social effect of the instant case was not only to deny the benefits of low-cost housing to the low income group, including many Blacks, but also to retain the instrument that caused that result. This is not to say that the tools to invalidate a discriminatory referendum law are no longer available.

If the civil rights advocate were to construe the decision in the in-

---

24. Reitman v. Mulkey, 387 U.S. 369, 373 (1967). For a discussion of equal protection and Proposition 14, see Black, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 69, 82 (1967) where it was said:

> The rule which I would propose, then, as a basis for the *Reitman* decision, is that where a racial group is in a political duel with those who would explicitly discriminate against it as a racial group, and where the regulatory action the racial group wants is of full and undoubted federal constitutionality, the state may not place in the way of the racial minority's attaining its political goal any barriers which, within the state's political system taken as a whole, are especially difficult of surmounting, by comparison with those barriers that normally stand in the way of those who wish to use political processes to get what they want.

25. Otey v. Common Council, 281 F. Supp. 264 (E.D. Wis. 1968). Here, a proposed resolution prohibiting enactment of any ordinance restricting the absolute right of owners to dispose of their property in effect denied Negro residents living in segregated housing the right to occupy other housing. In Keyes v. School Dist. 313 F. Supp. 61 (D. Colo. 1970) repeal of a board program denied Negroes the relief from segregated programs.

26. 393 U.S. 385, 393 (1969), where JJ. Harlan and Stewart concurring noted that

> [where] a statute may have the clear purpose of making it more difficult for racial and religious minorities to further their political aims . . . such a law cannot be permitted to stand . . . .

In so doing, they were in effect developing further the notion of structural limitations as a standard.

27. James v. Valtierra, 91 S. Ct. 1333, 1334 (1971), where the Court said,

> Under any such holding, [referring to the holding in *Hunter*] presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

28. *See* Note, 47 TEX. L. REV. 1454 (1969).

29. *Id.*

stant case as a rejection of explicit and implicit racial classifications as standards to invalidate state action on equal protection grounds, he would not be entirely correct. The Court was clear in stating that the facts of the principal case did not meet the requirements of either an explicit or implicit racial classification.[30] This clarity of expression by the Court precludes misinterpretating this decision as a justification for continued enforcement of existing law which would otherwise be unconstitutional or interpreting the instant case as a license to frame laws that perpetuate the ghetto.[31]

GARY S. SORTOR

SUPREME COURT DECLINES ORIGINAL JURISDICTION IN LAKE ERIE POLLUTION CASE

As water pollution problems continue to mount, citizens and states are seeking effective remedies. The State of Ohio sought to invoke the original jurisdiction of the United States Supreme Court in a complaint praying for an injunction against three non-resident chemical companies,[1] located in Michigan and Canada, which had allegedly created a public nuisance by dumping poisonous mercury into Lake Erie and its tributaries. The Supreme Court *held*, Ohio's motion for leave to file a bill of complaint denied. Discretionary original jurisdiction was declined because the issues were bottomed on local nuisance principles involving no federal law. Furthermore, the majority of eight reasoned that even with the aid of a court appointed special master, they would be ill equipped to act as a trial court. Several competent governmental agencies were already involved in the problem of the pollution of Lake Erie, and, if Ohio still wishes to seek injunctive relief and damages, Ohio courts can obtain jurisdiction.[2] *Ohio v. Wyandotte Chemicals Corp.*, 91 S. Ct. 1005 (1971).

30. James v. Valtierra, 91 S. Ct. 1331, 1333 (1971), where the Court noted that California's article XXXIV does not rest on "distinctions based on race . . . [and that the record] . . . would not support any claim that a law seemingly neutral on its face is in fact aimed at a racial minority."

31. By this point in history it should be obvious that discrimination is a major cause of the problems facing ghetto inhabitants. *See* Comment, *Decent Housing as a Constitutional Right, 42 U.S.C.* § 1893 *Poor People's Remedy for Deprivation*, 14 How. L.J. 338 (1968); Comment, *Tenant Interest Representation: Proposal for a National Tenants' Association*, 47 TEX. L. REV. 1160 (1969).

1. The defendant companies were Wyandotte Chemicals Corporation, Dow Chemical Company, and Dow Chemical Company of Canada, Ltd.

2. Justice Douglas filed a lone dissent, arguing a special master with the aid of a panel of scientific advisors could overcome the difficulties presented by the complex technical facts. Ohio v. Wyandotte Chemicals Corp., 91 S. Ct. 1005, 1013-17 (1971) [hereinafter cited as *Wyandotte*].