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THE PUBLIC REFERENDUM AND MINORITY GROUP LEGISLATION: POSTSCRIPT TO *REITMAN v. MULKEY*

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Among the most troublesome conceptual problems emerging from the Supreme Court during the sixties are the issues first framed in the often praised or condemned, but little understood, opinion in *Reitman v. Mulkey*.[1] Since the 1967 holding in *Reitman* that repeal of open housing legislation violated the fourteenth amendment, a number of cases presenting similar or related issues have arisen in the lower federal courts. The factual contexts from which these cases evolved present useful vehicles for exploring the development of *Reitman* to its logical extreme and positing additional situations that would evoke its equal protection doctrines. The recent Supreme Court decision in *Hunter v. Erickson*,[2] which struck down another attempted open housing repeal on substantially different grounds, provides an important addendum against which the *Reitman* theory must be evaluated anew. The involvement of the public referendum in *Reitman* and subsequent cases raises serious though perhaps only academic questions under the republican form of government guarantee[3] and

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1 387 U.S. 369 (1967). For the suggestion that *Reitman* stands for the proposition that states have an affirmative duty to enact fair housing laws to avoid involvement by acquiescence in state action violative of the equal protection clause of the fourteenth amendment, see Black, *"State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967), and Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39 [hereinafter cited as Karst & Horowitz].

2 393 U.S. 385 (1969).

3 U.S. CONST. art. IV, § 4. A brief history of the Supreme Court's refusal to examine the republican form of government guarantee because of its political nature is contained in Baker v. Carr, 369 U.S. 186, 218-26 (1962).

the equal protection clause concerning the submission of pro-minority group legislation to the body politic for ultimate ratification. This article will attempt to evaluate the continuing utility of *Reitman v. Mulkey* and its attendant theories in light of post-*Reitman* developments.

I

THE *Reitman* OPINION

The logical point of departure is necessarily a brief analysis of *Reitman* itself.[4] Proposition 14 amended the California constitution to provide:

> 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.[5]

The amendment was placed on the ballot for referendum by petition of the electorate and passed by almost a two to one margin.[6] The open housing issue had been the subject of considerable public debate and the campaign that surrounded the introduction and approval of Proposition 14 was clearly directed toward repeal of the then recently enacted California open housing laws,[7] the Rumford[8] and Unruh[9] Acts. *Reitman* arose after passage of the constitutional amendment

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4 For a detailed, insightful, and extensive analysis of *Reitman*, see Karst & Horowitz. *See also* Horowitz & Karst, *The Proposition Fourteen Cases: Justice in Search of a Justification*, 14 U.C.L.A.L. REV. 37 (1966); Miller, *Mulkey v. Reitman: A Brave but Futile Gesture?*, 14 U.C.L.A.L. REV. 51 (1966); Williams, *Mulkey v. Reitman and State Action*, 14 U.C.L.A.L. REV. 26 (1966); Note, *The Unconstitutionality of Proposition 14: An Extension of Prohibited "State Action,"* 19 STAN. L. REV. 232 (1966); 33 BROOKLYN L. REV. 125 (1966); 2 CAL. WEST. L. REV. 109 (1966); 5 DUQUESNE L. REV. 201 (1966-67); 55 GEO. L.J. 377 (1966); 65 MICH. L. REV. 777 (1967); 6 SANTA CLARA LAW. 241 (1966); 42 WASH. L. REV. 285 (1966); 18 W. RES. L. REV. 328 (1966).

5 CAL. CONST. art. I, § 26 (1964).

6 The exact vote was 4,526,460 to 2,395,747. Mulkey v. Reitman, 64 Cal. 2d 529, 545, 413 P.2d 825, 836, 50 Cal. Rptr. 881, 892 (1966).

7 *See* Karst & Horowitz 41.

8 CAL. HEALTH & SAFETY CODE §§ 35700-44 (West 1967).

9 CAL. CIV. CODE §§ 51-52 (West Supp. 1970). This Act proscribed racial discrimination by business establishments, but had been interpreted by the California Supreme Court to include all businesses selling or leasing residential housing (Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962) (sale of housing); Lee v. O'Hara, 57 Cal. 2d 476, 370 P.2d 321, 20 Cal. Rptr. 617 (1962) (rental of housing)), thereby becoming essentially another open housing statute.

when the plaintiffs sought, under the Unruh Act, to enjoin a refusal to rent to them on the basis of race. They were, of course, faced with the argument that use of the Unruh Act was precluded by Proposition 14. The California Supreme Court upheld the application of the Unruh Act to open housing by reasoning that the Act had survived the attempted repeal because Proposition 14 was violative of the equal protection clause of the fourteenth amendment, and was therefore void.[10] The California court looked to both the immediate objective and the ultimate effect[11] of Proposition 14 in light of its historical background and the social milieu surrounding its adoption. It found the intent to be the facilitation of discrimination through repeal of existing open housing legislation and the effect to be the placing of state authorization behind private discrimination, thus involving the state in activity encouraging discrimination.[12]

Justice White, writing for the United States Supreme Court, found "no persuasive considerations indicating that these judgments should be overturned,"[13] but refrained from wholesale adoption of the California court's opinion. Considerable deference was paid to the "fact finding" concerning the design and intent behind Proposition 14 and its ultimate impact of encouraging discrimination in the total social milieu. The Court was careful to point out that it did not read the California opinion as indicating that mere repeal of open housing legislation violated the fourteenth amendment.[14] Clearly, repeal plus something more was required,[15] and that "something more" was to become a critical factor in post-*Reitman* opinions.

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10 Mulkey v. Reitman, 64 Cal. 2d 529, 413 P.2d 825, 50 Cal. Rptr. 881 (1966).

11 *Id.* at 533-34, 413 P.2d at 828, 50 Cal. Rptr. at 884.

12 *Id.* at 541-43, 413 P.2d at 834, 50 Cal. Rptr. at 890. The court reasoned, somewhat problematically, that the state had acted affirmatively to change its laws from a situation where discrimination was legally proscribed to one wherein it was "encouraged." Critics of the decision, however, who saw it as standing for the proposition that civil rights legislation once passed could not be repealed, read "encouraged" as "permitted." In fairness, the language of the amendment on its face more readily lends itself to that interpretation. The critical position, however, overlooks the consideration given by the court to the practical effect of the amendment within the social milieu. Judicial fact finding in support of this conclusion was unfortunately sketchy.

13 387 U.S. at 381.

14 *Id.* at 376.

15 The requirement that something more than mere repeal be present satisfies two logical objections raised by the critics: (*1*) that if there was no constitutional violation in failing to have an open housing statute on the books, there could be none in returning the situatiou to the status quo; (*2*) that a constitutional impediment upon the repeal of any law once passed would constitute an intolerable stifling of the developing legislative process and would serve as a strong argument against the passage of any law that supposedly could not later be repealed.

The Court found its "something more" in *Reitman* in the following facts: (*1*) Proposition 14 by intent and effect expressly authorized discrimination in the purchase or sale of real property; (*2*) as a constitutional amendment, Proposition 14 immunized housing discrimination from legislative, executive, or judicial regulation; and (*3*) repeal itself had the practical effect of encouraging discrimination.[16] State encouragement of private discrimination by the various means mentioned here was the ostensible basis for the decision.[17]

The immunization of discrimination from legislative, executive, or judicial regulation raises an additional equal protection consideration not clearly elucidated in the opinion. The argument that may be developed runs along traditional equal protection lines: the state may not, without a rational reason closely related to a valid state interest, treat one group of persons differently from another group. In context, the argument is that the state cannot subject persons interested in passage of laws regulating real property to any greater legislative burden, such as the overcoming of a constitutional amendment, than that to which others interested in other types of legislation are subjected. This "increased legislative burden" argument[18] has been recognized as a basis underlying the *Reitman* opinion;[19] however, actual reliance upon it by the Court is a speculative point at best.

II

THE POST-*Reitman* CASES: ENCOURAGEMENT OF DISCRIMINATION BY REFERENDA

Sensitivity to the "something more" in *Reitman* is particularly useful in understanding the lower federal court opinions that have purported to follow its reasoning. The first of these, *Otey v. Common Council*,[20] involved immunization and authorization without the repeal aspects present in *Reitman*. *Otey* arose in a period when serious

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16 Points one and three probably overlap, since, at least in the California context, it is difficult to conceive of how an authorization to discriminate could fail to be also an encouragement.

17 387 U.S. at 380-81.

18 The increased burden idea appeared in the Brief for the United States as Amicus Curiae at 26-30, and later became a basis for the decision in Hunter v. Erickson, 393 U.S. 385 (1969).

19 *See* Karst & Horowitz 50-51.

20 281 F. Supp. 264 (E.D. Wis. 1968). This case is noted in 82 HARV. L. REV. 1550 (1969) and 1969 WIS. L. REV. 327.

racial disturbances threatened the city of Milwaukee.[21] A number of open housing ordinances had been proferred, but none had received sufficient support for passage. Against this factual backdrop, the following resolution was filed for approval by the city council or submission to the electorate:[22]

> 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.[23]

The city council, unwilling to enact the provision on its own, decided to submit the issue to the voters. At this juncture, suit was filed in the federal district court to enjoin the submission of the resolution to a referendum on the ground that the provision, if passed, would deny plaintiffs equal protection of the law.

The absence of one of the prime elements of *Reitman*'s "encouragement"—repeal of existing legislation—was no impediment to the district court's use of the same rationale. Although the constitutionality of the proposed law was not squarely before the court since it had not yet been passed, that question was the major subject of inquiry. Again, the law's immediate objective, ultimate impact, and historical context were deemed highly important. The objective identified was the prevention of open housing legislation, and the result to be accomplished was the securing of a "right" to discriminate. The court concluded

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21 281 F. Supp. at 270-72.

22 Wisconsin provides for the popular initiation of municipal legislation:

> (1) A number of electors equal to at least 15% of the votes cast for governor at the last general election iu their city may sign and file a petition with the city clerk requesting that an attached proposed ordinance or resolution, without alteration, either be adopted by the common council or referred to a vote of the electors. . . .
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> . . . .
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> (4) The common council shall, without alteration, either pass the ordinance or resolution within 30 days following the date of the clerk's final certificate, or submit it to the electors at the next election . . . .
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> (8) City ordinances or resolutions adopted under this section shall not be subject to the veto power of the mayor and shall not be repealed or amended within 2 years of adoption except by a vote of the electors. The common council may submit a proposition to repeal or amend the ordinance or resolution at any election.

WIS. STAT. § 9.20 (1967).

23 *Quoted in* 281 F. Supp. at 267.

that the resolution, if enacted, would "unquestionably encourage"[24] discrimination, and that it therefore was violative of the fourteenth amendment. The increased burden affixed to the passage of open housing laws was not assessed under the equal protection clause, although the factual context provided grounds for that approach.[25] The court's analysis was well within the framework of *Reitman*, absent the repeal aspect, with one noteworthy exception. Not only was the proposed ordinance found unconstitutional, but the referendum procedure itself was enjoined.[26]

The rationale for enjoining the referendum began with the assertion that the court should disregard the "fallacious assumption that the 'will of the electorate' should invariably prevail."[27] It moved through an inspection of the tense racial situation of the Milwaukee summer and concluded that the scheduling of the referendum and the resulting political campaign would encourage further deterioration of the social climate and jeopardize the plaintiffs' opportunity to obtain housing free from discrimination.[28] Although the constitutionality of the proposed statute received the major thrust of the opinion, the independent "encouraging" effect of the referendum itself and incident debate was at least a secondary factor. Where in *Reitman* the Court looked to the encouraging effect of the law as passed, the *Otey* court considered that effect prospectively, and the related encouraging effect of merely presenting the law for public vote.

Holmes v. Leadbetter[29] once again presented the *Reitman* repeal

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24 *Id.* at 273.

25 It could have been argued that other forms of housing legislation were not subjected to a "non-action period" of two years, as open housing laws would have been under the ordinance (*see* WIS. STAT. § 9.20 (1967)), and that there was no rational basis close to any valid state interest to justify the distinction.

26 Prior to *Reitman*, the California conrt expressly declined the opportunity to enjoin the submission of Proposition 14 to the electorate. Mulkey v. Reitman, 64 Cal. 2d 529, 535, 413 P.2d 825, 829, 50 Cal. Rptr. 881, 885 (1966).

Judicial authority is somewhat split on the propriety of enjoining referenda on unconstitutional legislation. Where the proposed law is unconstitutional on its face, however, most courts would be inclined to issue the injunction. *See* Tolbert v. Long, 134 Ga. 292, 67 S.E. 826 (1910); State *ex rel.* Steen v. Murray, 144 Mont. 61, 394 P.2d 761 (1964); Caine v. Robbins, 61 Nev. 416, 131 P.2d 516 (1942). *See also* Goldner v. Adams, 167 So. 2d 575 (Fla. 1964); Gray v. Winthrop, 115 Fla. 721, 156 So. 270 (1934); Schneider v. Lansdale, 191 Md. 317, 61 A.2d 671 (1948). *But see* Anderson v. Byrne, 62 N.D. 218, 242 N.W. 687 (1932); State *ex rel.* Marcolin v. Smith, 105 Ohio St. 570, 138 N.E. 881 (1922); State *ex rel.* Carson v. Kozer, 126 Ore. 641, 270 P. 513 (1928); Annot., 19 A.L.R.2d 519 (1951).

27 281 F. Supp. at 275.

28 *Id.* at 277-79.

29 294 F. Supp. 991 (E.D. Mich. 1968).

question in the context of an attempt to enjoin a referendum. The authorization and immunization of a right to discriminate present in *Reitman* and *Otey* were absent here, and the constitutionality of repeal was considered without these additional elements of encouragement. In *Holmes*, the city council of Detroit had already enacted a fair housing ordinance,[30] as had been the case in *Reitman*. A petition for referendum to repeal[31] the ordinance was properly filed, and the issue was listed for the next election. In granting a permanent injunction against submission of the issue to the electorate, the court relied most heavily upon the "encouragement" rationale. The argument that repeal was a mere return to the status quo was quickly brushed aside with the observation that there could be no such return in light of federal and state antidiscrimination provisions.[32] Agreeing that, as a theoretical matter, repeal of a provision forbidding discrimination did not mean that discrimination was thereby approved by law, the court moved on to consider the effect of repeal. Plaintiffs' assertion that repeal would create the impression that it was lawful to discriminate, and thereby encourage such conduct, was apparently adopted directly from oral argument as part of the opinion.[33] *Holmes*, therefore, could be characterized as holding that the "something more" required by *Reitman* to invalidate repeal of open housing legislation under

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30 *Id.* at 992.

31 It is not exactly clear from the *Holmes* opinion whether actual repeal was involved. According to the referendum provision of the city charter, ordinances passed by the council were "subject" to a referendum if before they took effect a proper petition was filed. *Id.* at 992 n.2. The ordinance in question was to take effect December 31, 1967. Although it would seem from the facts and the language of the referendum provision that the ordinance never became law since it was "subject" to approval by referendum, the court and counsel treated it as an actual repealer. *Id.* at 996. Both apparently construed the referendum provision to mean that laws passed by the council for which referenda were requested nonetheless became laws, but were subject to future repeal by a referendum requested before their effective date.

Whether or not actual repeal of fair housing legislation was involved was investigated more closely in Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968), where the court concluded that the distinction was irrelevant.

32 294 F. Supp. at 993-95. This observation by the court perhaps missed the point of defendants' argument, since the status quo they were talking about appeared to be the situation where no local ordinance was in effect, rather than a situation where discrimination itself was legal. *Id.* at 993. Recognition by both the court and defendants that repeal would not in fact return the situation to one where discrimination was legal serves to lessen the importance of the repeal element and lends increased weight to the "encouragement" aspect of the case arising from the holding of the referendum, regardless of its result.

33 *Id.* at 996. Factual evidence from which this conclusion was drawn was not set forth in the opinion.

the fourteenth amendment may be found in encouragement arising from the repeal itself.

The decision, however, rested on additional and alternative grounds taking it well beyond the bounds of *Reitman*. Although in *Reitman* the repealer was declared unconstitutional after the referendum, whereas in *Holmes* conduct of the referendum was enjoined as unconstitutional state action, it was implicit in *Holmes* that any repeal passed by the referendum would have been unconstitutional. However, additional language about the effect of the referendum itself suggests that its very occurrence could be a substantial element of the encouragement found to violate the fourteenth amendment:

> In summary, the arguments against open housing are no longer valid arguments. Their appeal is to a proscribed result, offensive to the equality of all our people. Their mere formulation and broadcast, embracing, as they do, the assumption that rights guaranteed by the Federal Constitution still remain debatable in this community, cannot avoid having a detrimental effect upon the attempted exercise of constitutional rights.[34]

This language implies that the conduct of the referendum and the incident debate would be so colored with state action effectively encouraging discrimination as to run afoul of the equal protection clause.[35] Although the court seemingly sought to modify its stance,[36] it did not disclaim the position that state-conducted referenda and

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[34] *Id.*

[35] The statement could be read to apply as easily to debate on the floor of the state legislature or to any state-related discussion expressing a negative view toward antidiscrimination legislation. The first amendment problems arising from such an idea are staggering. For a discussion of legislative attempts to regulate racially defamatory speech, see Seeley, *Article 20 of the International Covenant on Civil and Political Rights: First Amendment Comments and Questions*, 10 VA. J. INT'L L. — (1970). There the conclusion is reached, either under a "clear and present danger" or "balancing" test, that a substantial threat of an evil, as great in magnitude as violence, must be likely before such speech may be proscribed. *See also* Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950); Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595 (1947).

The possible difference between referenda and other legislative deliberations is one of degree. A full-blown referendum campaign would no doubt have more of an encouraging effect than would private discussions within the state legislature. On this basis, the former might be precluded under the free speech tests while the latter might not.

[36] There being nothing useful to be gained from further debate in the community upon this issue, it being settled by the cases interpretive of the applicable constitutional provisions, together with legislation (both state and federal) in implementation thereof, we do not place decision upon, nor do we reach, the issue of what is conceded to be the "substantial" exacerbation of public and private emotions which would arise out of the campaigning for the repeal of, as well as the retention of, the Fair Housing Ordinance.

294 F. Supp. at 996.

incident debate were unconstitutional encouragements of discrimination. Thus, the *Holmes* decision can be characterized as a strong assertion that (*1*) repeals which encourage discrimination are unconstitutional, and (*2*) state-related activity surrounding the question of repeal, although not constituting the act of repealer, may nevertheless violate the fourteenth amendment if its effect upon the public is encouragement of discrimination.

A unique twist was added to the referendum question by the district court opinion in *Ranjel v. City of Lansing*.[37] *Ranjel* did not involve authorization or immunization of the right to discriminate as did *Reitman* and *Otey*, or repeal of existing open housing laws as did *Reitman* and *Holmes*. Rather, the plaintiffs sought to enjoin a publicly petitioned referendum to repeal a zoning amendment enacted by the city council; that amendment permitted the construction of a low-rent housing project in a white, middle class suburb. Working in cooperation with HUD, the city council had selected the area after careful study of the alternatives. The necessary rezoning to allow multi-family dwellings was proposed, public hearings were held, and the amending ordinance was properly passed by the council. A properly filed petition calling for a public referendum on the zoning change was presented and the issue was listed for a public vote. At this point, an injunction against the holding of the referendum was issued by the federal district court.

Besides relying on the precedents of *Reitman*, *Holmes*, and *Otey* to find state encouragement of discrimination, the court held that the referendum would violate the supremacy clause of the Federal Constitution.[38] The district court invoked the supremacy clause because the proposed housing project was authorized under a statute of the United States and planned under the supervision of the Department of Housing and Urban Development.[39] The opinion noted that a major policy behind the federal public housing laws, as well as the regulations of HUD, was the encouragement of racially integrated residential neighborhoods outside the ghetto,[40] and that this policy implemented the thirteenth amendment through eradication of one of the badges of slavery. Although the thirteenth amendment did not by its language abolish the badges of slavery, it did authorize Congress

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37 293 F. Supp. 301 (W.D. Mich.), *rev'd*, 417 F.2d 321 (6th Cir. 1969).

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

39 The project was to be constructed as part of the HUD "turnkey program." 293 F. Supp. at 304.

40 *Id.* at 309.

to do so by legislation. Congress, in passing public housing legislation, and HUD, serving as an arm of Congress in promulgating its regulations, were acting to eradicate one of the badges of slavery—segregated housing. State action, repeal of a zoning amendment by referendum, could not be permitted to interfere with this federal legislation under traditional supremacy clause doctrines.

Even if it is assumed that the referendum would have interfered with federal legislation implementing the thirteenth amendment, other state legislative deliberation regarding the construction of federal low-rent housing might have had a similar result. Would the court have enjoined the vote of the city council on the amendment because it might have refused the rezoning and thereby interfered with the federal housing program? Would the court have enjoined the city council from refusing federal funds for its project, thereby interfering with federal housing? Since state participation in the federal housing programs is voluntary and viewed as a cooperative enterprise, as was recognized by the court,[41] it is highly unlikely that either question would be answered in the affirmative.[42] Since the city council apparently could have disapproved the amendment or failed to seek funds, the referendum must have been viewed by the court as different from the ordinary legislative process. The referendum here could not properly be called an "increased legislative burden"[43] to which only open housing legislation was subjected,[44] since all legislation was potentially subject to the procedure. The unarticulated difference was that the referendum procedure offended notions of equal protection or republican form of government. "If referenda of this type were consistently permitted, it would be possible for racially motivated people to totally prevent implementation of the congressional policy of building low cost housing outside the ghettos . . . ."[45]

The Sixth Circuit reversed the holding in *Ranjel*[46] because there

41 *Id.* at 304, 310-11.

42 Indeed, the court's conclusion that the city council had properly approved the project and had worked in close cooperation with HUD in the planning was a strong point, almost a necessary link, in its argument that the later referendum was an interference with federal law:

> We find that the federal government has fully complied with its self-imposed obligation to work within the framework of local plans. However, the proposed referendum at this point unduly impedes implementation of federal policy under the supremacy clause and must be enjoined.

Id. at 310-11.

43 *See* notes 18 & 25 and accompanying text *supra.*

44 This was the case in *Reitman, Otey,* and Hunter v. Erickson, 393 U.S. 385 (1969); and the lack of an increased burden was the justification for permitting the referendum in Spaulding v. Blair, 403 F.2d 862 (4th Cir. 1968).

45 293 F. Supp. at 311.

46 417 F.2d 321 (6th Cir. 1969).

was insufficient evidence to support a finding that the referendum would encourage discrimination, and because the HUD regulations relied upon by the district court as paramount federal law were not included in the Federal Register and therefore did not deserve the status of federal law for supremacy clause purposes.[47] Although the reversal may have been predicated strictly on factual difficulties, the opinion demonstrates some hostility to the theories established in prior cases. The court went to great lengths to establish that there was insufficient evidence of motivation to discriminate behind the referendum petition, but it entirely overlooked the second aspect of the *Reitman* encouragement test—the effect and impact of the referendum—which is a matter entirely separate from the motivation behind it. Indeed, the court seemed to raise the question of whether a popular referendum should ever be enjoined: "[I]f the electors had a legal right to a referendum, their motive in exercising that right would be immaterial."[48] Apparently detecting the hint of an attack on the referendum procedure in the district court opinion, the court of appeals pointed out that the referendum was grounded in neutral principle and was not discriminatory by nature.[49] In short, this opinion casts considerable doubt on the vitality of all the encouragement theories emanating from *Reitman*—a doubt that may necessitate additional Supreme Court clarification.

III

RETREAT FROM *Reitman*

The first clear indication of retreat from *Reitman* and the cases following it appeared in *Spaulding v. Blair*.[50] *Spaulding* involved an

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47 *Id.* at 322-25.

48 *Id.* at 324. The statement of the *Ranjel* court that motive is irrelevant flies directly in the face of the Supreme Court's declaration in *Reitman* that motive and impact in the historical context are crucial factors. Perhaps the language can be interpreted as meaning that the *referendum* should never be enjoined, regardless of motive, but that motive may nevertheless be a critical element in later evaluation of the legislation passed. The court's approval of the approach in *Reitman*, wherein the California courts abstained from applying the test until after the referendum was held, supports this suggestion.

49 *Id.* The court relied upon the concurring opinion in *Hunter v. Erickson* for this assertion. The majority in that case, however, found the referendum involved to be a more difficult burden for a minority group to overcome, thereby suggesting that it was less than a neutral procedure. 393 U.S. at 390. The *Ranjel* court overlooked this conflict with the majority decision in *Hunter*, and went so far as to assert that even if actual federal legislation were involved, the Lansing referendum procedure was sufficiently neutral to avoid a supremacy clause problem. 417 F.2d at 323.

50 403 F.2d 862 (4th Cir. 1968). This case is noted in 1969 DUKE L.J. 185.

action to enjoin a referendum to consider an open housing law passed by the Maryland General Assembly. The issue was being submitted to referendum in accordance with a provision of the Maryland constitution that allowed a referendum on any legislation to be called by petition of a certain percentage of the electorate.[51] Plaintiffs argued that holding the referendum would create a potential for repeal of open housing legislation and thus would be a practical encouragement of discrimination denying them the equal protection of law guaranteed under the fourteenth amendment. The court refused to issue the injunction and affirmed the district court's dismissal of the case.

Reitman was distinguished on several grounds. First, it was noted that no attempt to pass unconstitutional legislation, such as Proposition 14, was involved. The argument that the referendum would encourage discrimination was less than satisfactorily dismissed by contrasting some key factors of *Reitman* and *Spaulding*. The court noted that Proposition 14 authorized and immunized a right to discriminate in the California constitution and made future legislation impossible, whereas the Maryland referendum had neither characteristic. It was further observed that true repeal was not involved; since a petition for referendum had been filed, under the Maryland constitution the act had never become law. In light of the absence of the true repeal aspect, the court might have argued that discrimination was not being authorized or immunized, but it rejected that tack. Rather, it concluded that even if a real repeal were involved it would not issue the injunction[52] since under *Reitman* "mere repeal" was not enough to violate the fourteenth amendment.[53]

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[51] No law enacted by the General Assembly shall take effect until the first day of June next after the session at which it may be passed . . . . If before said first day of June there shall have been filed with the Secretary of State a petition to refer to a vote of the people any law or part of a law capable of referendum, as in this Article provided, the same shall be referred by the Secretary of State to such vote, and shall not become a law or take effect until thirty days after its approval by a majority of the electors voting thereon at the next ensuing election held throughout the State for Members of the House of Representatives of the United States.

MD. CONST. art. XVI, § 2.

[52] The court argued by analogy that if a state legislator's vote against the act or the governor's veto could not be enjoined, then neither could the referendum. 403 F.2d at 864. This argument overlooks the different characteristics of the referendum that would tend to make it more of an encouragement of discrimination than the other decision-making methods cited. The referendum involves a large public campaign before a totally anonymous decision-making body that can better afford to be irresponsible in campaigu methods and invidious in its vote.

[53] *Id.* at 864-65. Certainly the court was aware of the social milieu approach from its citation of *Reitman* and the lack of authority in the area other than *Otey* and *Holmes*,

Thus, although several of the elements present in the prior decisions—encouragement by repeal, encouragement by holding of the referendum—were at least arguably existent in *Spaulding*, and only encouragement by authorization and immunization was lacking, the court seized upon this distinction to justify its finding that the referendum would not promote discrimination. The court asserted further that, since open housing is firmly established under federal constitutional and statutory provisions, rejection of state law through the referendum "cannot diminish the rights of any individual or minority group."[54] This contention entirely overlooks the essence of the encouragement rationale. Although repeal or rejection of state open housing laws cannot technically detract from the protection available under federal law, if the *practical effect* is state encouragement of racial discrimination, then rights guaranteed under the equal protection clause are being violated.

The latest revision of the referendum-repeal doctrine was provided by the Supreme Court in *Hunter v. Erickson*.[55] Although *Hunter* was factually similar to the earlier cases, the Court substantially iguored them and decided the case along more traditional lines. Akron, Ohio, passed a fair housing ordinance in 1964. Subsequently, an amendment to the city charter, section 137, was enacted by referendum:

> 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.[56]

The plaintiff in *Hunter* sought enforcement of the fair housing ordinance by mandamus after the city's refusal to provide relief because of the charter amendment. The Supreme Court held the charter amendment unconstitutional under the fourteenth amendment. Although in effect a repeal of existing legislation had been accomplished,

although neither was cited. (*Ranjel* was decided after *Spaulding* and distinguished it on the ground that no factual finding of encouragement was made in the Maryland case.) The court may have consciously avoided the encouragement approach, thus foreshadowing the Supreme Court's decision in *Hunter*. *See* note 63 and accompanying text *infra*.

54 403 F.2d at 865.

55 393 U.S. 385 (1969). This case is noted in 20 SYRACUSE L. REV. 990 (1969).

56 AKRON, OHIO, CHARTER § 137, *cited in* 393 U.S. at 387.

the Court expressly declined to hold that the repeal violated the fourteenth amendment.[57] The opinion included a brief observation of the factual background against which the charter amendment was enacted,[58] but the practical encouragement of discrimination was not a factor relied upon in the decision. Further, although the referendum procedure provided by the amendment might have effectively encouraged discrimination, that aspect of the referendum's existence was similarly by-passed by the Court. Instead, a straight equal protection approach was taken.

The Court reasoned that imposition of a referendum procedure drew a distinction between those seeking legislative protection against racial, religious, or ancestral discriminations in the purchase or sale of real estate and those who sought to regulate real property transfers in other ways. The former group was required to have its legislation submitted to referendum while the latter was not, and no rational basis for the distinction could be posed.[59] In addition, the group subjected to a greater burden was at least partially determined by a racial classification. Thus, increased procedural burden, which was a speculative basis of *Reitman* and had been ignored since, became the touchstone that supplanted the other theories.

The Court's use of this ground alone creates serious questions about the continued vitality of the other approaches that might have been taken under the *Hunter* facts. Repeal in a factual situation where patterns of discrimination were present could have been found to implicate the state in practically encouraging discrimination. The courts in *Reitman* through *Hunter*, however, have found basically unpalatable the proposition that legislation once passed cannot be repealed. Thus, they continually offer reminders that "mere repeal is not enough";[60] when confronted by a situation of repeal, the court must search for "something more." In *Reitman*, the establishment of a right to discriminate in the state constitution, as well as the en-

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57 393 U.S. at 390 n.5.

58 [T]he population of Akron consists of "people of different race, color, religion, ancestry or national origin, many of whom live in circumscribed and segregated areas, under sub-standard, unhealthful, unsafe, unsanitary and overcrowded conditions, because of discrimination in the sale, lease, rental and financing of housing."

Id. at 391, *quoting* the preamble to the open housing ordinance that was suspended by § 137.

59 The Court was unimpressed with the state's justification of "mov[ing] slowly in the delicate area of race relations." *Id.* at 392.

60 *Id.* at 390 n.5; Reitman v. Mulkey, 387 U.S. 369, 376 (1967); Spaulding v. Blair, 403 F.2d 862, 864-65 (4th Cir. 1968).

couragement of discrimination arising from the public vote and the repeal, provided the additional elements. The practical encouragement of discrimination in situations of repeal,[61] as well as in those independent of repeal,[62] has been the basis in post-*Reitman* cases for enjoining public votes and finding the legislation unconstitutional. Yet whether state action effectively operates to encourage discrimination has now become an issue that the Supreme Court apparently would prefer to avoid.[63]

Another aspect of the *Hunter* rationale, however, opens the door to exploration of an area traditionally avoided by the Court. The majority found that the referendum provision violated equal protection because it subjected those with an interest in the passage of open housing legislation to a greater procedural burden than those concerned with other types of real property legislation. Thus far the equal protection attack was not racially based, for it was only the difference in procedures that created the problem. The opinion went on, how-

61 Holmes v. Leadbetter, 294 F. Supp. 991 (E.D. Mich. 1968).

62 Otey v. Common Council, 281 F. Supp. 264 (E.D. Wis. 1968).

63 *See, e.g.*, Evans v. Abney, 396 U.S. 435 (1970), where the majority gave no consideration to encouragement of discrimination resulting from the Georgia courts' voiding of a trust and returning the trust property to the heirs when a racially-restrictive purpose could not be carried out. Only Justice Brennan in dissent called attention to the applicability of the encouragement rationale. *Id.* at 457-58.

The Court's reluctance is perhaps reasonable, for the encouragement approach could raise grave difficulties in other areas of application. For instance, what of a prosegregation campaign for re-election being conducted by an incumbent state governor? Obviously, the discourse surrounding such a campaign would be as encouraging to discriminators as would the referendum campaigns enjoined in prior cases. Would not this public position being assumed by a governor place the authority of the state behind it? If one is satisfied that the campaigning governor can be viewed as acting outside his official capacity, what of public statements by a state attorney general or other officer against the implementation of civil rights legislation? Or, carrying out the referendum analogy, what should be done about statements by state legislators on or off the legislative floor in opposition to the passage or enforcement of antidiscrimination provisions? Or what of a resolution emanating from a state legislature condemning integrationist policies? *E.g.*, MISS. CODE ANN. § 4065.3 (1957); Miss. S. Con. Res. 125, ch. 466, [1956] Miss. Laws 741-44. The point to be made is simply that state officials, by virtue of their status as public fignres and the realities of politics, are often in a position where the stance they assume on a matter becomes the stance behind which the authority of the state comes to rest. Yet the right to assume such positions, and to fully debate their relative merits is traditionally a sacred area under the first amendment. Were the Court to become involved in regulating speech carrying with it the aura of state authority because such speech encouraged racial discrimination, myriad political campaigns, legislative debates, and perhaps even HEW requests for delays of desegregation deadlines might fall under its scrutiny. *See* Alexander v. Holmes County Bd. of Educ., 396 U.S. 19, 21 (1969). Recognizing the infinite possibilities for conflict with first amendment freedoms, the Court, it is suggested, will take pains to avoid future use of the encouragement rationale unless the factual situation is one devoid of free speech implications.

ever, to evaluate the nature of a referendum itself and suggested that a referendum is inherently a greater burden for a racial minority:

> [T]he reality is that the law's impact falls on the minority. The majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that. Like the law requiring specification of candidates' race on the ballot, . . . § 137 places special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others.[64]

The clear suggestion of this language is that section 137 was found unconstitutional not only because one group was subjected to an additional procedural burden without justification, but also because that burden, the referendum, was by its nature a greater hurdle for minority groups to overcome. Thus, subjecting minority group legislation to referenda violated the equal protection clause, even when in theory all legislation could be subjected to the same procedure, since it imposed upon the minority group a greater burden than that resulting from the realities of numbers alone. Justices Harlan and Stewart concurred in the result, but found that the referendum by its inherent nature did not offend the equal protection clause. It was only because the Akron provision applied a specially burdensome procedure to open housing legislation that it violated the fourteenth amendment.[65] The majority analysis of the nature of referenda certainly raises some unique equal protection points that might be better based upon the Constitution's guarantee of a republican form of government.

IV

THE DEVELOPING THEORIES

A. *The Intent-Effect Analysis*

A survey of the case authority[66] warrants a conclusion that the isolated act of repeal does not violate the fourteenth amendment. Instead, the circumstances that surround the act are determinative. If the intent behind the repeal is to encourage racial discrimination, and the state allows that intent to be carried out, some courts would

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64 393 U.S. at 391.

65 *Id.* at 562 (concurring opinion).

66 The following chart hopefully will be helpful in keeping track of the various theories developed in the treatment of the cases:

find state action violative of the fourteenth amendment.[67] Although in all of the opinions considering both intent and effect a greater emphasis was given to the former,[68] without exception the effect of encouraging discrimination was also found. Therefore, no authority can be said to exist for the proposition that intent without effect is enough. The converse is not necessarily true, however. The *Holmes* court considered that repeal in effect would be "taken by many as an invitation to further unlawful and unconstitutional discrimination,"[69] and made no appraisal of the intent involved. This analysis of *Holmes*, when combined with the critical importance of the effect of encouraging discrimination in *Reitman* and *Otey*, could lead to a conclusion that the state may not involve itself in repeals or other activities that actually have the effect of encouraging racial discrimination, regardless of the intent behind the acts.[70] Perhaps fear of such an interpretation has prompted the courts to reiterate that mere repeal is not a fourteenth amendment violation.

To resolve the intent versus effect quandary, substantial weight was given to intent in determining effect in all of the opinions that followed *Reitman*, except *Holmes*. Thus, where intent can be estab-

	Encouragement by Repeal	Authorization of Right to Discriminate	Encouragement by Holding Referendum	Increased Legislative Burden	Discriminatory Nature of Referendum
Reitman	✓	✓		x	
Otey		✓	✓	x	x
Holmes	✓		✓		x
Ranjel (D.C.)	✓		✓		x
Ranjel (C.A.)	x	o	o		o
Spaulding	x	o	x		o
Hunter	x		x	✓	✓

✓—element present and relied upon by the court
x—element arguably present but not relied upon
o—element expressly found absent or rejected

67 *E.g.*, Otey v. Common Council, 281 F. Supp. 264, 273 (E.D. Wis. 1968).

68 An easy explanation for the emphasis is that although considerable evidence concerning the motives and activities of the proponents of repeal was available, factual evidence regarding an effect that had not yet occurred was difficult to obtain.

69 294 F. Supp. at 995.

70 Under this rationale would a repeal of ineffective state antidiscrimination laws in order to facilitate use of federal procedures without the requisite exhaustion of local remedies run afoul of equal protection? This problem is more than hypothetical, because the exhaustion aspects of the Open Housing Act of 1968, §§ 810(c), 812(a), 42 U.S.C. §§ 3610(c), 3612(a) (Supp. IV, 1969), might turn an ineffective state procedure into an impediment to accomplishing open housing. *See* Frakt, *Administrative Enforcement of Equal Opportunity Legislation in New Jersey*, 21 RUTGERS L. REV. 442 (1967).

lished, effect, with the resultant fourteenth amendment violation, is likely to be found.[71] Where no demonstrable intent to encourage discrimination is present, but rather a good faith motive is involved, a court certainly would be less inclined to find an encouraging effect. Of course, this cannot be taken as an absolute. Where a motive is not offensive but the likelihood of encouraging discrimination is great, state action should probably be enjoined. However, the judicial fact finding concerning effect has thus far been less than rigorous. Stipulations and arguments of counsel,[72] determinations as to motive,[73] and great reliance upon almost nonexistent lower court findings[74] have been the factual considerations upon which findings of effect have been based. The judicial approach has been to assume the effect from the intent and the factual milieu. Only in *Otey* was the testimony of professional sociologists as to effect relied upon by the court.[75] Not

71 *Spaulding*, *Hunter*, and the court of appeals's disposition of *Ranjel* should also be considered in assessing the intent-effect analysis. In those cases the courts entirely ignored the *effect* of the repeal and the holding of the referendum, and only *Ranjel* considered the intent element. Emphasis upon the effect of repeal or other related state action presents extremely difficult problems of proof. Before the requisite effect can be found, what portion of the public must interpret the state's action as encouragement of discrimination? Must that interpretation result from some factor for which the state is responsible, or may it be caused by misinformation emanating from private sources? A public misunderstanding of the repeal was one of the factors considered as an encouragement in *Holmes*. 294 F. Supp. at 996. Can the state, by circulating its own information, counteract the effect of an erroneous public interpretation? By what realistic means can a court purport beforehand to assess the effect that a repeal or referendum will have on a majority or, for that matter, on any segment of the public?

72 *Id.* at 995.

73 Ranjel v. City of Lansing, 293 F. Supp. 301, 306-08 (W.D. Mich. 1969).

74 Reitman v. Mulkey, 387 U.S. 369, 378-79 (1967).

The lower court opinion in *Reitman* made the following evaluation of the facts:

> The question of the fact of discrimination, by whatever hand, should give us little pause. The very nature of the instant action and the specific contentions urged by the defendants must be deemed to constitute concessions on their part that article I, section 26, provides for nothing more than a purported constitutional right to *privately* discriminate on grounds which admittedly would be unavailable under the Fourteenth Amendment *should state action* be involved.

64 Cal. 2d at 536, 413 P.2d at 830, 50 Cal. Rptr. at 886 (emphasis by the court).

75 The following detailed testimony was heard in *Otey*:

> In regard to the pre-referendum period, Dr. Hauser testified as to the detrimental effect of unnecessary political debate, in and of itself, on the psyche of disadvantaged minority group members. Moreover, in context of probable harm to the community, Mr. Ben Barkin, an eminent local public relations man active in community affairs, testified that prospect of a vote on the referendum question would further galvanize public opinion and elicit heated polemicizing, which in turn would be augmented by fund raising, billboard advertising, and all the other trappings of a full-fledged election campaign. The issue itself is so volatile as to be explosive if sparked by campaign bally-hoo. To schedule the referendum, Dr. Hauser concluded, would thus be the "equivalent of throwing a lighted

until the reversal of *Ranjel* did a court demand a strict standard of proof, and that was applied in regard to the finding of intent.[76] Obviously, judicial standards are required and a more intense fact-finding effort is necessary if the effect of encouraging discrimination is to continue as a basis for fourteenth amendment violation.[77]

B. *The Increased Legislative Burden Analysis*

After *Hunter*, any system which on its face subjects the passage of antidiscrimination laws to an additional legislative hurdle, regardless of what that hurdle is, will be found prima facie to violate the fourteenth amendment.[78] However, the problem of *Spaulding v. Blair* must be reconsidered. In light of *Hunter*, is the Maryland constitutional procedure by which antidiscrimination legislation was subjected to referendum now unconstitutional? Certainly *Hunter* can be read to exclude that result since the Akron ordinance specifically subjected only open housing legislation to the additional procedure, while the Maryland provision allowed all new laws to be so reviewed.

Suppose, however, that the Akron anti-integration forces, after a careful reading of *Spaulding*, came forth with an amended proposal subjecting all new city ordinances to referendum review on petition by a certain percentage of the electorate. Would the legislative history surrounding this supposedly neutral proposal be sufficient to taint it under the fourteenth amendment? The intent analysis of the prior decisions lends some weight to that position, and the Supreme Court's

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fuse into a keg of gunpowder." Dr. Hauser's testimony as to the explosiveness of the present climate was corroborated by Mr. Barkin and Dr. O'Reilly, Professor of Social Work, University of Wisconsin.

281 F. Supp. at 278.

76 417 F.2d 321, 324 (6th Cir. 1969).

77 Fact finding in this area is a particularly difficult endeavor. Nevertheless, empirical methods, such as those utilized by social scientists in the Proposition 14 study, are available to litigants. *See* note 84 *infra*.

78 In Valtierra v. City of San Jose Housing Authority, 38 U.S.L.W. 2528 (N.D. Cal. March 23, 1970), *cert. granted sub nom.* James v. Valtierra, 38 U.S.L.W. 3487 (U.S. June 8, 1970), the federal district court followed *Hunter* in voiding, under the equal protection clause, article 34 of the California constitution. The invalidated provision had required referendum approval before state agencies could seek federal funding for low-income housing projects, while such approval was not required for participation in other federally-supported programs. The referendum requirement was found to be a "special burden" imposed upon the poor and minorities without any legitimate state legislative objective. The city's argument that no discriminatory intent was involved was quickly dismissed by the court's observation that lack of bad motive does not cure an otherwise discriminatory scheme. 38 U.S.L.W. at 2529; *see* text at notes 71-77 *supra*.

Adopted in 1950, the California provision may explain that state's unusually small increase in low-rent housing. Although 8% of the American poor reside in California,

citation in *Hunter* of *Anderson v. Martin*[79] provides additional support. In that case the Court looked at the purpose and the legislative background[80] of Louisiana's requirement that the race of a candidate be included on the ballot to overcome the state's contention that the provision was neutral since it applied equally to all races. Although the Louisiana provision contained a racial reference on its face that the hypothetical act is lacking, language in *Anderson* precludes the state from providing a "vehicle by which . . . prejudice may be so aroused as to operate against one group because of race."[81] Even when the state's abstract position is neutral, *Anderson* could be applied to the nominally color-blind referendum provision. Thus, some problems exist for those who would enact a Maryland-type provision for a racially-discriminatory purpose, at least so long as that purpose can be factually established.

But what of a jurisdiction, such as Maryland, that has a long-standing referendum procedure that was not enacted for a discriminatory purpose? In *Otey* and *Holmes* use of such a procedure was not permitted where it would factually encourage discrimination. Failure to find factual encouragement in *Spaulding,* the reversal of *Ranjel,* and the avoidance of that entire approach in *Hunter,* however, place the rationale upon shaky ground. Can it be concluded, therefore, under *Spaulding,* at least where no finding of encouragement is made, that every piece of antidiscrimination legislation passed by a state can be subjected systematically to a "neutral" referendum procedure, when no other type of legislation as a practical matter is so reviewed? This question immediately calls to mind *Yick Wo v. Hopkins*[82] and the proposition that a law fair and impartial on its face cannot, under the fourteenth amendment, be applied in a manner that discriminates

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they are provided with only 4% of this country's low-income housing. During the duration of article 34, 48% of the low-income projects proposed had been rejected, leaving California with only ⅓ the number of low-rent units per poor family as exist in New York or Illinois. N.Y. Times, June 9, 1970, at 28, col. 5.

79 375 U.S. 399 (1964).

80 "This addition to the statute in the light of 'private attitudes and pressures' towards Negroes at the time of its enactment could only result in that 'repressive effect' . . . ." *Id.* at 403 (footnote omitted).

81 *Id.* at 402.

82 118 U.S. 356 (1886). *Yick Wo* involved an ordinance that forbad the operation of a laundry without the consent of a board of supervisors. This consent was systematically withheld from Chinese laundrymen. *See also* Ho Ah Kow v. Nunan, 12 F. Cas. 252 (No. 6546) (C.C.D. Cal. 1879), which involved a requirement that all prisoners' hair be cut short as applied against Chinese wearing the traditional queue. As to them, it was found to operate as cruel and unusual punishment.

against any particular group.[83] Thus, even where the referendum procedure is neutral on its face and was not passed for a discriminatory purpose, it cannot systematically be utilized only to review antidiscrimination legislation. Such use practically applies an increased legislative burden in violation of the equal protection doctrine of *Yick Wo*. The hypothetical abuse of the referendum procedure differs from the available precedents because, in the latter, a state officer was responsible for the discriminatory application of the law, whereas in the referendum situation, the voters by their petitions would be applying the law unequally. This discrepancy can be overcome by the findings in *Otey* and *Holmes* that the referenda were sufficiently colored by state action to fall within the ambit of the fourteenth amendment despite their basic nature as "acts of the people."

V

Equal Protection and the Nature of Referenda

After this examination of encouraging referenda, expressly and practically burdensome referenda, and referenda created for a discriminatory purpose, some consideration must be given to the referendum itself as an abstract legislative method. Does submission of minority group legislation to a referendum violate equal protection because of the inherent nature of the procedure itself? The *Spaulding* court, the court of appeals in *Ranjel*, and Justices Harlan and Stewart concurring in *Hunter* thought not, but the majority in *Hunter* at least raised that possibility.

It is difficult to contend that a referendum denies equal protection to racial minority groups because those groups are smaller in number and thus have less political power in a public vote; all groups suffer from the same weakness in selecting their legislative representation. A voting system that affords a relatively weaker position to a group because of size does not thereby deprive that group of equal

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[83] The Court noted more recently in Swain v. Alabama, 380 U.S. 202 (1965), that while the peremptory jury challenge was a neutral device aimed at removing bias for or against the parties, a systematic case by case exclusion of blacks from jury service by the prosecutor might support the inference that the system was being used to deny an equal right to participate in the judicial process. In Louisiana v. United States, 380 U.S. 145 (1965), a unanimous Court held unconstitutional a provision of the Louisiana constitution requiring that every voter be able to understand and interpret the state or Federal Constitution when read by the registrar because registrars were applying the test more stringently to Negroes.

protection. There must be something special, therefore, about racial minorities and referenda that offends the concept of equal protection.

Within the current social milieu it is predictable that referendum voting by non-members of a racial minority will be in opposition to legislation favorable to that minority because of prejudice.[84] This factor does not affect other interest groups, since they may expect to win or lose a referendum through a vote by a basically neutral majority. Thus, the referendum differs from other legislative methods because it provides a procedure whereby legislative decisions can be made exclusively along the lines of racial prejudice. Although some automatic opposition on the basis of race might be expected in a state legislature, representatives must take a public position for which they are responsible. They must debate and discuss issues along somewhat rational lines if they hope to be re-elected by the public.[85] The referendum decision-making process is totally different. There, the individual voter is responsible to no one for his decision. Indeed, that individual's decision may never be known. He need not be informed on the merits, and he may vote along whatever irrational lines sway him. In short, he can easily discriminate on the basis of race.[86]

The unique situation of the racial minority group gives rise to equal protection arguments along two lines. The first can be drawn

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84 For an analysis of the voting patterns in the Proposition 14 election, see Wolfinger & Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753 (1968). The authors carefully analyzed the voting results to demonstrate that voter error or misunderstanding was not the source of Proposition 14's passage. Rather, they conclude that varying degrees of racial prejudice were involved. *Id.* at 764. Assessing the referendum as a legislative tool, they present the view of contemporary political scientists as follows:

> [I]t is more common to assume that asking voters to pass judgment on substantive policy questions strains their information and interest, leading them to decisions that may be inconsistent with their own desires. The consequence is subversion of representative government and the exercise of undue influence by groups that can afford to gather the signatures to qualify a measure for the referendum ballot and then wage a publicity campaign that will have an impact on voters.

Id. at 767.

85 Effective minority group voting power has become a significant restraint on local legislative irresponsibility. *See, e.g.*, Note, *The Voting Rights Act of 1965: An Evaluation*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 357, 373-75 (1968).

86 Graphic examples of the gap between acts of the elected representatives of the people and the voters themselves are presented by *Reitman* and *Hunter*. In both cases legislative representatives had enacted antidiscrimination legislation. The referendum votes for repeal in *Reitman* outnumbered negative votes by over two to one. Note 6 *supra*. Yet after Proposition 14 was struck down, no successful attempts to weaken civil rights laws were carried out within the legislature. The Akron ordinance was likewise passed by the city council and then effectively overturned by the voters.

from *Anderson v. Martin*.[87] The state cannot promote a system that facilitates the operation of private racial discrimination. In *Anderson*, it was the indication of race on the ballot. In *Nixon v. Condon*,[88] it was a state statute allowing the qualifications for membership in a political party to be set by the party's executive committee, when that committee utilized race as a membership criterion. In *Shelley v. Kraemer*,[89] it was the judicial enforcement of privately agreed upon racial covenants. It can reasonably be contended that the state is likewise precluded from utilizing a legislative method for considering pro-minority group legislation that facilitates reliance upon racial prejudice in determining its passage or defeat. Just as in *Condon*, where the state was not permitted to allow a body that discriminated on the basis of race to decide party membership, the state should not be permitted to allow a group that will use racial prejudice as a critical factor to decide the passage or rejection of legislation. This does not mean that a referendum can never be used without impairing the rights of racial minorities. It is only when the law being considered is one that is susceptible to racial bias, and the social milieu is such that it is highly predictable that referendum voting will be on the basis of race, that the procedure can be said to violate equal protection as a state-provided vehicle for discrimination.

A second equal protection argument can be drawn from such cases as *Griffin v. Illinois*[90] and *Douglas v. California*[91] in which the state was required to supply trial transcripts and appellate counsel to convicted indigents: equal protection is not always provided by equal treatment. Equal imposition of fees upon rich and poor alike was not satisfactory in *Griffin* or *Douglas*. Rather, the fourteenth amendment required that unequals be treated unequally to ensure ultimate fairness in the judicial process.[92] Racial minority groups, it can be argued, are similarly unequal and therefore entitled to unequal treatment in the legislative process. They are unequal because the proposal of legislation in their behalf provokes a host of irrationalities related to racial prejudice that other interest groups seeking legislation do not face. Thus, to say that a referendum procedure is fair because it applies equally to all groups does not take into account the inherent

87 375 U.S. 399 (1964).
88 286 U.S. 73 (1932).
89 334 U.S. 1 (1948).
90 351 U.S. 12 (1956).
91 372 U.S. 353 (1963).
92 *See* Karst & Horowitz 65.

disadvantages of racial minorities, apart from small numbers, in the present political and social environment.

The equal protection clause obviously does not require the state to provide special treatment to account for inequalities in all situations. Flat licensing fees, sales taxes, and numerous other state-imposed charges fail to take account of the economic inequalities recognized in *Griffin* and *Douglas*. Yet where highly important rights such as access to the criminal appeal process or to the civil courts[93] are involved, unequal treatment is necessary to assure ultimate fairness under the equal protection clause. It can be argued that access to the legislative process is no less important a right than access to the judicial system, and that special treatment necessary to afford fair access is required by the fourteenth amendment. Thus, legislation protecting racial minorities should not be submitted for ratification to a body likely to respond solely on the basis of irrational prejudice. Submission to a representative legislature is the preferable alternative.[94]

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[93] *See* Suber v. Suber, 38 U.S.L.W. 2169 (N.J. Super. Aug. 25, 1969), holding that the state may not, under the equal protection clause, deny access to the divorce courts to those who cannot pay the publication fee.

[94] The presence of the legislature as a viable alternative is an important qualifier to the equal protection theory here expounded. For example, if carried to extremes, the theory would proscribe the holding of an election in which one of the candidates was subject to racial bias in the vote. In this situation the election would be a state-provided vehicle for the expression of racial discrimination, and the candidate subject to racial bias would be faced with an inherently greater burden in the election process than one not so subject. Yet what would be the appropriate remedy? The courts could hardly enjoin the election and name the winner since no prior stage of legislative approval was present, nor would they be likely to enjoin the holding of the election and allow the public office to remain vacant. This latter remedy would be a possibility if the court viewed the majority vote election system as so discriminatory as to violate the fourteenth amendment, and therefore deemed it necessary for the state to devise a constitutional alternative or do without the election.

This conclusion is unnecessary, however, for the election system differs substantially from the referendum problems examined herein. First, with the referendum problem, a very viable and in fact more traditional means of passing upon legislation is readily available in the state legislature, whereas no other traditional method of candidate selection is present. Secondly, a usual prerequisite for the enjoining of a referendum is a discriminatory purpose or motive behind it. Where a minority group candidate enters a political race, motives of promoting or encouraging discrimination are not involved. In addition, referenda involve particular legislation that can be identified as discriminatory, while candidates do not present the same easily identifiable narrow characteristics but rather put together positions on myriad public issues unrelated to race.

Even though all of these distinctions can be drawn to separate the election from the referendum, they are not entirely satisfactory. Perhaps the result compelled by the equal protection theory of inherent burden is that a majority vote system must somehow take account of the disadvantages it works upon racial minorities—*i.e.*, weighted voting.

These equal protection arguments, it must be granted, extend beyond traditional lines and at least to some degree torture the precedents. This is not surprising, however, because the equal protection clause is not the best means of treating the problem with which this discussion is concerned. The protection of minority groups from the capriciousness of pure majority rule was afforded separate constitutional protection in the guarantee of a republican form of government.

VI

REFERENDA AND THE REPUBLICAN FORM OF GOVERNMENT[95]

Inherent in the concept of a republican form of government is protection of the minority from capricious majority rule through a system of representative government. The republican form of government argument is raised here because the referenda involved in the cases under discussion were, as a legislative method, the antithesis of *representative* government. A fear of direct democracy has often been characterized as the moving force of the Constitutional Convention, and the entire idea of republican or representative government was a product of that apprehension; one need only examine the convention debates for myriad references contrasting democracy with republicanism.[96] James Madison was perhaps the greatest proponent of re-

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It is highly doubtful that a court would ever try to impose such a requirement, however, or that it would be desirable to do so. The theoretical problems developing at this stage point up the difficulty of attempting to treat under the equal protection clause problems that were afforded an entirely different constitutional protection under the republican form guarantee.

95 The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. IV, § 4.

96 *See generally* J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (Ohio Univ. ed. 1966). See in particular the debates for June 9-12. A brief summary of the drafters' concept of republican form is provided in Adrienne Koch's introduction to this work:

> Both terms, "democracy" and "Republic," prove to be double-barreled if one takes a closer look. As Madison never tired of repeating, there is direct democracy, feasible only for small communities like the ancient city-states, for example, where simple majority rule holds sway and where all who are citizens cast their vote, in congregatious of the whole people (or as many as present themselves). One must grant that there were few if any "democrats" of this persuasion—theoretical or practicing—in the Convention. For Madison, *"simple"* democracy of this type was irrelevant to an "extensive" country and pernicious wherever it might be applied because of its failure to provide protection for the rights of minorities. He distrusted this simple or direct democracy for its

publicanism, and, fittingly, his writings have been used by the courts to justify some recent referendum decisions[97] in what may be deemed cryptic references to a republican form of government rationale:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to . . . .[98]

The judicial history of the republican form guarantee is a matter that warrants attention. The guarantee clause was first considered by the Supreme Court in *Luther v. Borden*,[99] a case arising out of a Rhode Island political conflict between two factions, each claiming to be the lawful government of the state. The Court was faced with deciding which of the two governments was in fact the lawful one. Justice Taney, writing for the Court, found that the issue was not one for the judiciary to decide. He reasoned that Congress must decide which is the government and whether it is republican upon admitting a state to

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> *minimal* use of deliberative judgment, exercised in a favoring atmosphere of limited powers with opportunities for debating, rethinking, and reasonably deciding intricate issues of moment. At the mercy of this type of simple direct democracy were especially the propertied few (compared to the propertyless many) and wise and honest leaders who would tend to be cast aside in favor of demagogues . . . .
>
> On the other hand, *representative* democracy was in fact what Madison was prepared to endorse. Because of the need for adjectival qualification, he preferred to use the term "Republic"—especially since a strong tradition of political thought which was opposed to monarchy and centered in the doctrine of human equality had appealed to Americans since the rise of the Revolutionary sentiment. The maxim "he who wears the shoe, knows best where it pinches" was the ancient and honorable cardinal principle of Republicanism. Thus the consent of the governed is the only legitimate basis of government, for it alone abolishes the prescriptive subordination of men in society into super and subordinate classes. Madison himself in innumerable contexts defined what he meant by a Republic, and each definition makes it clear that he meant a *democratic* republic or a *representative* democracy.

Id. at xix-xx (emphasis in original).

The *Federalist Papers* also define representative government as one of the elements of republicanism. *See* THE FEDERALIST No. 10, at 60 (Ford ed. 1898) (J. Madison). Thomas Jefferson and Patrick Henry apparently concurred. *See* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 526 (1962).

97 Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Douglas, J., concurring); Otey v. Common Council, 281 F. Supp. 264, 275 (E.D. Wis. 1968).

98 Reitman v. Mulkey, 387 U.S. 369, 387 (1967) (Douglas, J., concurring), *quoting* 5 J. MADISON, WRITINGS 272 (Hunt ed. 1904) (emphasis in original).

99 48 U.S. (7 How.) 1 (1849).

the union, and that either Congress or the President is authorized to provide the protections of the guarantee. Interference by the judiciary was found to be unwarranted in light of the power granted to the political departments.

Although in its first encounter with the guarantee clause the Court in essence found a nonjusticiable issue, it did not summarily dismiss the next cases brought under the clause on that basis. In *Minor v. Happersett*,[100] it considered whether a denial of the franchise to women violated the guarantee clause and concluded that the forms of government of the states at the time of admittance to the union were "unmistakable evidence of what was republican in form."[101] In *In re Duncan*,[102] the Court evaluated the recognized Texas government against its definition of republican form:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in *representative bodies*, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the *sudden impulses of mere majorities*.[103]

In 1912, however, with *Pacific States Telephone & Telegraph Co. v. Oregon*,[104] the Court closed the door on republican form of government claims by returning to the rationale of *Luther v. Borden* that such claims were nonjusticiable political questions.[105] *Pacific States* involved the very issue that lies at the heart of the present consideration: whether state initiative and referendum provisions are violative

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100 88 U.S. (21 Wall.) 162 (1874).

101 *Id.* at 176.

102 139 U.S. 449 (1891).

103 *Id.* at 461 (emphasis added).

Again in Downes v. Bidwell, 182 U.S. 244 (1901), the Court considered the guarantee in ruling that Congress could legitimately appoint officials in the territories,

> [n]otwithstanding its duty to "guarantee to every State in this Union a republican form of government," . . . by which we understand, according to the definition of Webster, "a government in which the supreme power resides in the whole body of the people, and is exercised by *representatives* elected by them" . . . .

Id. at 279 (emphasis added).

104 223 U.S. 118 (1912).

105 The Court summarily stated: "'It was long ago settled that the enforcement of this guarantee belonged to the political department.'" *Id.* at 149, *quoting* Taylor v. Beckham, 178 U.S. 548, 578 (1900).

of the guarantee clause. Although the Court made no comment on the merits, its holding was presumed to foreclose the possibility of future republican form claims and has been consistently followed.[106] Thus, while the discrimination-prone referendum arguably violates the guarantee clause principle of representative government as a protection against pure majority rule, it might be that this claim will never be heard in other than an academic forum. Recent Supreme Court cases, however, indicate that there may yet be some vitality in the guarantee clause.

Until the decisions in *Baker v. Carr*[107] and *Reynolds v. Sims*[108] the clause indeed seemed a dead letter. In *Baker*, however, the Court embarked upon a detailed review of the guarantee clause and concluded that claims under it "involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."[109] Factors thought to identify the guarantee clause as a political matter were drawn from *Luther v. Borden* as follows:

> [T]he commitment to the other branches of the decision as to which is the lawful state government; the unambiguous action by the President, in recognizing the charter government as the lawful authority; the need for finality in the executive's decision; and the lack of criteria by which a court could determine which form of government was republican.[110]

As was the case in *Baker*, only the final factor is relevant to the referendum challenge since no question of competing governments or validity of an entire state government is involved.[111] It is true that "republican form," even as defined by reference to constitutional

106 Denver v. New York Trust Co., 229 U.S. 123, 141 (1913); Marchall v. Dye, 231 U.S. 250 (1913); O'Neill v. Leamer, 239 U.S. 244, 248 (1915); Ohio *ex rel.* Davis v. Hildebrant, 241 U.S. 565 (1916); Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Ohio *ex rel.* Bryant v. Akron Metropolitan Park Dist., 281 U.S. 74 (1930); Highland Farms Dairy, Inc. v. Agnew, 300 U.S. 608 (1937); Coleman v. Miller, 307 U.S. 433, 454-56 (1939).

107 369 U.S. 186 (1962).

108 377 U.S. 533 (1964).

109 369 U.S. at 218.

110 *Id.* at 222.

111 The question as to *which* is the valid government of a state and whether that government *is* a valid one is a determination made by Congress in its decision to admit a state to the union. There is a need for finality here, since a large number of transactions, and virtually every official act of the state could later be found invalid if the entire government were subject to periodic challenge. This is not the case with testing the validity of the referendum in reference to a *single legislative act.* In making this determination there is no question as to which is the government or whether it is a valid one, but only the narrow issue of whether a particular legislative method can be used in a particular situation.

history and the early decisions, does not have a clearly delineated meaning. In the reapportionment situation of *Baker*, it would have been difficult indeed to apply this nebulous standard to test the representativeness of the government there involved. But one element in the definition of republican form is clear—the government must be a *representative* one. Although testing degrees of representation in legislative apportionment cases may be impossible under the guarantee clause for lack of a standard, and therefore a political question, evaluating whether or not a governmental system is representative at all is a far easier matter.[112] The *Baker* Court suggested that "the political question barrier was no[t] absolute"[113] in exactly this context when it observed that a military government would be subject to challenge under the clause; a military government would be so obviously nonrepresentative and therefore non-republican that it could be identified as such even under an imprecise standard. A system that subjects prominority group legislation already passed by representative government[114] to approval by absolute majority vote is similarly an obvious denial of a republican form of government. It is not representative at all, and it subjects the minority to exactly the kind of capriciousness that the guarantee clause was intended to prevent.[115] Thus, the discrimination-prone referendum should not be liable to political question objections for lack of an applicable standard.[116]

Other encouraging language appears in the observation in *Reynolds v. Sims*[117] that "some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards."[118] The implication is that where the issue is not political, and where there is no clear absence of a manageable standard, guarantee clause claims may be

112 "[I]f the guaranty clause intrinsically raises political questions, this cannot be because it 'is not a repository of judicially manageable standards.' Its standards are not any more nebulous than those of the equal protection clause in this context." McCloskey, *The Reapportionment Case*, 76 HARV. L. REV. 54, 63 (1962) (footnotes omitted). *See also* Bonfield, *Baker v. Carr: New Light on the Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245, 250 (1962); Bonfield, *supra* note 96, at 526.

113 369 U.S. at 222 n.48.

114 This was the situation in *Reitman, Holmes, Ranjel, Spaulding,* and *Hunter.*

115 *See* text at note 103 *supra.*

116 The justiciability of the referendum question gains support from this analysis in *Baker*; however, the actual holding in the case affirmed the position that republican form claims were indeed political questions. Although the claim before it might have been brought under the guarantee clause, the *Baker* Court refused to allow this to affect its justiciability under the fourteenth amendment.

117 377 U.S. 533 (1964).

118 *Id.* at 582.

treated by the courts. It certainly can be argued that challenges to the referendum procedure as a legislative method are not colored by the political aspects of recognizing state governments, which is committed to another branch. Nor is there a need for a single, final voice as in the foreigu relations or war power areas. Furthermore, the test of whether a system is representative at all is not without any manageable standard.[119]

CONCLUSION

In order to avoid the political question doctrine, referendum challenges, like the apportionment cases, must rely on the equal protection clause. Arguments might be made to take the referendum situation outside the political question area, but it is unlikely that the Court will abandon its traditional view of the guarantee clause. This is unfortunate because the republican form of government guarantee, defined by its constitutional and judicial history to mean representative government as a protection against majority rule, is exactly the constitutional right being violated by the discrimination-prone referendum.

If the courts are to continue to scrutinize referenda on minority group legislation, it is likely that their approach will be along the lines of either express or operative legislative burden, or evaluation of the nature of the referendum, rather than a "practical encouragement" rationale. The extensions of that analysis are simply too fraught with first amendment difficulties, and the findings of fact to support it are too speculative for responsible judicial application.[120]

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119 The *Reynolds* language must be read in context, however, and the Court's point was that a state government's admission as "republican" in form did not insulate it from later attack under the equal protection clause.

120 As for the question of "repeal plus something more," it remains to be seen whether practical encouragement resulting from the repeal itself will be a sufficient additional element to constitute a fourteenth amendment violation. It will be recalled that in the post-*Reitman* cases involving enjoining of the referenda; the campaigns, the debate, and the holding of the vote were considered to be unconstitutional encouragement. *Reitman* required repeal plus encouragement, but a substantial portion of its encouragement resulted from the act of repeal itself. Use of the encouragement rationale with campaigns or referenda creates broad first amendment problems that are not present when only the validity of the act of repeal itself is heing considered. However, to assume encouragement from every act of repeal is to foreclose the legislative process. If the repeal-encouragement analysis is to have continued vitality, honest and diligent judicial investigations of the actual long term effect of repeal on the public will have to be made. Intensive study of sociological data by professionals would seem to be a prerequisite to such proof.