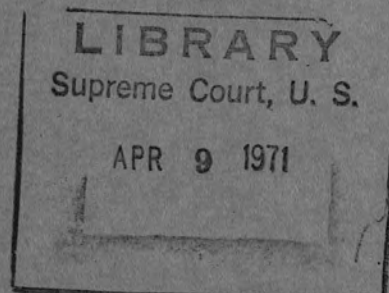


# Supreme Court of the United States

OCTOBER TERM 1970



In the Matter of:

VIRGINIA C. SHAFFER,

Appellant

vs.

ANITA VALTIERRA, ET AL.,

Appellees

Docket No. 226

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ORAL ARGUMENT OF:

P A G E

Mrs. Moses Lasky, Esq. on behalf of Appellant

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Archibald Cox, Esq. on behalf of Appellees

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## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1970

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VIRGINIA C. SHAFFER,

Appellant

vs

No. 226

ANITA VALTIERRA, ET AL.,

Appellees  
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The above-entitled matter came on for argument at  
10:35 o'clock a.m. on Thursday, March 4, 1971.

## BEFORE:

WARREN E. BURGER, Chief Justice  
HUGO L. BLACK, Associate Justice  
WILLIAM O. DOUGLAS, Associate Justice  
JOHN M. HARLAN, Associate Justice  
WILLIAM J. BRENNAN, JR., Associate Justice  
POTTER STEWART, Associate Justice  
BYRON R. WHITE, Associate Justice  
THURGOOD MARSHALL, Associate Justice  
HARRY A. BLACKMUN, Associate Justice

## APPEARANCES:

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San Francisco, California 94104  
On behalf of Appellant

ARCHIBALD COX, ESQ.  
Cambridge, Massachusetts  
On behalf of Appellees

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 226: Schaffer against Valtierra.

Mr. Lasky.

ORAL ARGUMENT BY MR. MOSES LASKY, ESQ.

ON BEHALF OF APPELLANT

MR. LASKY: Do I understand that I am or am not to have an argument?

MR. CHIEF JUSTICE BURGER: Yes; yes. For our purposes we have these listed separately, and I want to make this point -- you were probably in court yesterday when I announced earlier, prior to the beginning of the argument in 154 that Mr. Justice Marshall reserves the right to participate in this case on the basis of the transcription and the oral arguments in all these cases.

You may proceed.

MR. LASKY: Mr. Chief Justice and may it please the Court:

This, of course, is the identical case of 154. It is here separately because of the belief of the Appellant Shaffer, who is one of the City Councilmen of the City of San Jose, that the other Appellees have actually appealed, not to get a reversal but in order to get the stamp of approval on a judgment which would relieve them from any obligation of the state constitution.



1 Now, as counsel has just mentioned to you, this  
2 case was decided on summary judgments without trial, on the  
3 most meager record: affidavits which merely identified who the  
4 plaintiffs were and some opinion evidence that there was a need  
5 for low-income housing.

6 Counsel has said that the City Council had no  
7 opportunity to prepare. Objectively it appears that the case  
8 was, in fact, the same case. The principal Appellant is the  
9 Housing Authority of San Jose and the Housing Authority is not  
10 only not an appellant, but has filed a brief to this Court  
11 seeking a voidance(?) of the judgment against it.

12 The case was consolidated with a similar suit:  
13 Hayes versus San Mateo \_\_\_\_\_ we did not contest.  
14 In the brief I filed for this Court I submitted that this case  
15 lacked that immediacy of controversy which justified the Court  
16 acting at all and I tried to express it a combination of --  
17 in terms of standing, of likeness, of further suits, of state  
18 actions and I think the principles I was trying to stress were  
19 more succinct than summed up just ten days ago or so in \_\_\_\_\_  
20 versus Harris and that -- plus your cases.

21 However, I leave that and move on to the merits  
22 of this case. It involves two of the outstanding expressions  
23 of American democracy. One is the Equal Protection Clause and  
24 the other is the right of the people to vote for on matters  
25 that concern them.

1           And here we have in one case the Equal Protection  
2 Clause used to destroy the other. Now, that's an unreasonable  
3 result. Granted, if there is an issue to be decided that there  
4 can be a situation in which the Equal Protection Clause can be  
5 used to destroy the right of the people to vote on any section  
6 of the law. This is not that kind of case.

7           Hunter versus Harrison was an expression of that  
8 sort of thing. It was a wholly different case, and all one  
9 needs to do, if the Court please, is to examine this whole  
10 thing in the context of California history and the structure of  
11 government in California and I submit that no one who was con-  
12 versant with California history and the California structure  
13 of government could have made the argument that has been made  
14 on behalf of the Appellees.

15           It has been somehow intimated that the mandatory  
16 referendum was some strange -- thing and the fact of the matter  
17 is that it's the first and original form of referendum in  
18 California. The petition referendum did not come into exis-  
19 tence until the time of Governor Hiram Johnson in 1910, but for  
20 120 years direct democracy has been at the very bone and  
21 marrow of California government. In no other state has that  
22 been so true. There is not an election in California but what  
23 the public votes on 15 to 20 to 30 measures.

24           Now, the legal matter on the initiative of a  
25 referendum in California in Crouch, as written, that the

1 electorate of this state has been accustomed to expressing  
2 itself when matters of state and local policies in the state  
3 government was first established. Now, it is because of this  
4 historical fact that our adversaries have sought to draw this  
5 distinction between what they call the "review" or "petition"  
6 referendum and the automatic or mandatory referendum. And  
7 they have conceded that there would be no constitutionality if  
8 Article XXXIV had a petition referendum. That distinction will  
9 not hold.

10 Q If it had what?

11 A Pardon me?

12 Q If it had what?

13 A A petition referendum rather than an  
14 automatic referendum. I understand the Appellees have con-  
15 ceded they would have no case. I understand that they now  
16 predicate the case on the fact that the referendum Article  
17 XXXIV requires is mandatory.

18 Q I'm not sure he went quite that far.

19 A Well, it --

20 Q I thought counsel said it would be a much  
21 different case.

22 A Let me read you something from the brief  
23 of Housing Authority as an Appellee. "It is this unique  
24 automatic referendum requirement that makes Article XXXIV  
25 offensive to the Equal Protection Clause." At least the

1 Housing Authority has gone that far.

2 The automatic referendum is not unique. Califor-  
3 nia has had both kinds of referendum and the automatic form  
4 is the older. Crouch, whom I referred to a moment ago, says:  
5 "Three types of referendum are found in state practice and that  
6 used with greatest frequency is known as the compulsory  
7 referendum. This type has been used since the beginning of  
8 state government in California.

9 Now, examine the situations in which the automatic  
10 referendum has been used and you will find they classify into  
11 three classes that all constitute one. First: matters having  
12 to deal with the disposition of public property. Second:  
13 creation of fiscal burdens on the general taxpayer. And third,  
14 the distribution of the powers of the powers of the sovereign  
15 people among their several agencies.

16 In short, wherever the government may be said to  
17 be acting upon itself, California has insisted upon the automa-  
18 tic referendum.

19 Counsel yesterday referred to the city charter of  
20 San Jose, but no park can be disposed of without a mandatory  
21 referendum. Franchise cannot be granted without mandatory  
22 referendum. And here, we have all three: disposition of public  
23 property. We are dealing with what the public does on housing.  
24 Here we are dealing with the imposition of burden on the  
25 general taxpayer.



1           Now, there has been some contest in the briefs  
2 about that but what happens is that in order to get a low-  
3 income housing project the city or the county must raise taxes  
4 for 40 years and commit itself to provide all municipal ser-  
5 vices and the calculations have been that the contribution of  
6 the city or county to that project is equal to at least 50  
7 percent of the contribution of the Federal Government. And  
8 that's a burden on the general taxpayer.

9           Secondly, it has to do with the disposition of  
10 public property and it certainly has to do with the distribu-  
11 tion of government powers. And this, it will be observed at  
12 once, that the automatic referendum of Article XXXIV is ap-  
13 plied to the very kind of subject matter to which it has been  
14 traditional in California.

15           Now, turn our attention --

16           Q       Mr. Lasky, I take it part of your argument  
17 then is that the subject matter of this automatic referendum  
18 indicates that this scheme is not a discrimination against the  
19 poor --

20           A       Yes.

21           Q       -- any more than, for example the automatic  
22 referendum on municipal bonds?

23           A       Exactly so, and I will come to that and  
24 develop it a little more fully. I would like to point out the  
25 nature of the petition referendum which came in under

1 Hiram Johnson. That has to do generally with the exercise of  
2 the police power. Wherever the government regulates the con-  
3 duct of private parties, not themselves, that's what the  
4 petition referendum deals with.

5 But here we have a situation where a gap is dis-  
6 covered. When the Housing Act was first enacted it was thought  
7 in California that projects were subject to the automatic  
8 referendum relating to bond issues. And in 1937 to nine the  
9 Supreme Court of California said: "No," and they did it upon  
10 the basis that a housing authority is not a city or county.  
11 And the constitution was cast in terms of a city or county.

12 Well, this is another example where the words of  
13 the 1879 constitution have been eluded by new and ingenious  
14 devices. But the people of California were in trouble because  
15 they thought: We at least have a petition referendum that will  
16 apply. And then in 1950 the Supreme Court of California said:  
17 "No, the petition referendum doesn't apply because it applies  
18 only to legislative acts and we construe this as administrative  
19 and executive.

20 Thus, the people finally had no referendum and  
21 at the very next election in 1950 this -- was adopted. Now,  
22 what motivated it? We have in the record the official ballot  
23 arguments. In California the ballot goes to the people with  
24 official arguments and it's in the record; it's in the briefs;  
25 and if you read you will find it's all summed up in all kinds

1 of expression, and I'll quote: "To restore to the people,  
2 strengthen local self-government and restore to the people the  
3 right to determine its own future course." "Restore to the  
4 citizens" the right to decide. And they refer to the tradi-  
5 tional right of California to pass on matters of this general  
6 character.

7 So here is the gap: California \_\_\_\_\_ it had  
8 two vessels as to the type of referendum it should adopt. It  
9 had the old precedent of the mandatory referendum; it had the  
10 later precedent of the petition referendum and it shows the  
11 one and not the other. And I submit there was nothing in the  
12 14th Amendment that bent California's arm and said: "You must  
13 adopt the one instead of the other, particularly in view of the  
14 fact that this situation is akin in all its nature to the  
15 things in which the mandatory referendum was the characteristic.

16 Now, let's ask this question: Was there any  
17 problem here in the adoption of Article XXXIV? It has been  
18 conceded that the record shows no such and I go further. I go  
19 further. This case was decided on summary judgment and this  
20 Court has repeatedly decided: Palmer versus CBS, the Faulkner(?)  
21 case, that when summary judgment adverse imputations of motive  
22 can never be taken; therefore there can be no imputation of  
23 an improper motive in the adoption of XXXIV.

24 Nor, can there be any imputation of improper  
25 motive of the voters in voting on housing projects. I would

1 submit that the very thought of courts requiring you to vote  
2 on motives would be intolerable. Since there can be no deter-  
3 mination as to the proper motive, let's inquire as to effect.

4 The record contains and it came in by judicial  
5 notice -- it wasn't offered as evidence -- the figures and  
6 votes on project from 1950 to '68 and it's in the record at  
7 the appendix at page 34 and you will find several pages showing  
8 all the elections.

9 The court below said when it showed that 48  
10 percent of the units were turned down, but what it showed was  
11 that 69 percent of the elections carried and the reason there  
12 was a disparity on the units was that a monstrous 10,000 unit  
13 in Los Angeles had been turned down, the kind of project which  
14 the housing authorities now are ashamed of.

15 If you take the same judicial notice you will find  
16 that of all the projects voted on from 1968 through 1970, 85  
17 percent were carried. And the record also shows that of the  
18 11 elections that occurred on the ballot of California on that  
19 same day, same -- as this; all but the San Jose carried.

20 Well, you cannot take those statistics and say that  
21 the voters of California had been using this law as a method of  
22 discriminating against race or against poverty. The statistics  
23 in the record are just the contrary.

24 Consequently, I submit to the Court that this  
25 amazing judgment will be affirmed and the Federal power can be



1 used to upset the structure of state government if, and only  
2 "if," on a bare comparison of the face of Article XXXIV of the  
3 14th Amendment is absolutely unwarranted.

4 Now, that's the precise kind of treatment this  
5 Court, ten days ago or eight days ago, in Younger versus  
6 Harris, said should be indulged in very cautiously, indeed, and  
7 I quote from Younger versus Harris: "Procedures for testing  
8 the constitutionality of a statute on its face and for failing  
9 to join in all actions to enforce the statute, are fundamen-  
10 tally at odds with the function of the Federal Courts and our  
11 constitutional plan."

12 Now I come to the question, Mr. Justice White,  
13 that you put to me a few moments ago. On what basis is  
14 Article XXXIV said to deny equal protection? Will this dis-  
15 criminate against? Will this discriminate in favor? There is  
16 no claim that it discriminates among the subjects to which it  
17 relates. That subject is low-income housing. All are treated  
18 alike.

19 There is no claim; there can be no claim that  
20 California treats low-income housing differently from housing  
21 -- its other housing, for one reason: California doesn't have  
22 anything but low-income housing. Now, there has been, I think,  
23 statements in the brief and in argument that middle income  
24 housing is favored by loans from the Federal Government. That's  
25 the Federal Government. The Federal Government has the power

1 to deal directly with the people as it wishes, or to deal  
2 through the states. On middle income housing the Federal  
3 Government chooses to go directly to the people. California  
4 has nothing to do with that.

5 On low-income housing the Federal Government chose  
6 to say to the State: "I offer you dollar assistance if you  
7 choose to take it." And California says: "We choose to take  
8 it only on a vote of the people." And so California treats all  
9 housing it deals with alike, with one possible exception in the  
10 case of blighted areas under urban renewal after the places  
11 have been torn down; other housing is possible and it's never  
12 been done; it's never been done. And the time to talk about  
13 discrimination might arise if we have sometime in the future  
14 something like that happen.

15 So, what does the claim come to? The claim comes  
16 to this: that there is no mandatory referendum is required  
17 of some of the kinds of government activity.

18 Now, I submit that this is one more claim that it  
19 unconstitutional to require a mandatory referendum of any-  
20 thing unless it is required of everything. That, of course,  
21 flies in the face of numerous decisions of this Court, includ-  
22 ing this Court's decision in 1970 in Dandridge versus Williams,  
23 where the Court said that/when we are dealing with social and wel-  
24 fare matters, the usual way of handling the protection applies.  
25 Any rational justification of the classification will hold.

1 And I give more than rational justification. I submit I have  
2 given overwhelming justification.

3 That brings me to Hunter versus Erickson, which  
4 of course must be dealt with. And I say that the resemblance  
5 between this case and Hunter is the most superficial claim,  
6 based upon a mere catch-word of an automatic referendum. And  
7 I say that once you get over the hurdle of whether you can  
8 strike down the right to vote at all, Hunter versus Erickson  
9 is an obvious case, and for this reason: in the first place the  
10 motive in Hunter was racial discrimination. The City of Akron  
11 had an ordinance prohibiting racial discrimination in housing  
12 and the very purpose of the charter amendment there is to re-  
13 peal that and subject legislation about racial discrimination  
14 to special treatment.

15 And this Court said in its opinion that there was  
16 an explicitly racial classification. That does not exist here.  
17 Secondly: Akron already had a general referendum statute which  
18 was applicable. The petition, the voters already had a voice  
19 and the charter changed that to make it more honest. The pur-  
20 pose of the amendment was to apply to antidiscrimination  
21 legislation a different procedure.

22 Here, California had no voice of the people before  
23 Article XXXIV. It had to adopt something and I come back to my  
24 statement: it had the right to go on either of the two pre-  
25 cedents and it chose one and not the other. And the choice was

1 rational. It was rational, not only because we were dealing  
2 with the \_\_\_\_\_; it was rational because we were dealing  
3 with questions of the whole environment in which people live.  
4 Housing projects can change that environment forever and  
5 certainly people ought to have a right to have a voice.

6 Now, counsel has said housing people are now  
7 spreading the units out and are no longer indulging the mass in-  
8 stitutional stuff which all people now condemn. For over 20  
9 years they were using a mass institutional to housing and the  
10 people were wiser and rejected projects; they were wiser than  
11 the experts and the experts have just caught up.

12 Now, I'm not arguing in favor of one kind of  
13 housing or another; I think these are the kinds of considera-  
14 tions which justify bringing to the people who are the ones to  
15 be affected, a decision on what they want.

16 Q Mr. Lasky, if you were to prevail on this  
17 case what disposition do you think this Court should make of  
18 it?

19 A I think this Court should order a dismissal  
20 of this suit and I think if the opposition wishes to test this  
21 question further they should do it in a traditional way. The  
22 Housing Authority should refuse to issue bonds and someone  
23 should mandamus them, or the Housing Authority should try to  
24 float bonds and someone should try to enjoin them or it should  
25 try to float bonds and then sue the banks that refuse to take



1 them because of a lack of vote. Then you could get this  
2 question decided in the context of a real controversy. That  
3 would be my submission to your question of the proper dis-  
4 position of this case.

5 Q You say "this case." Would you mind  
6 stating as precisely as you can what you think this question  
7 is?

8 A Yes. The question before the Court?

9 Q Yes, sir.

10 A The question before the Court is whether  
11 the Equal Protection Clause requires California's referendum  
12 requirement on housing to be validated on the theory that some-  
13 how it discriminates improperly against something or somebody.

14 Q Does that relate entirely to the referen-  
15 dum?

16 A I think so --

17 Q You said "referendum." Does it relate  
18 entirely to the referendum?

19 A Well, it relates to the question of whether  
20 you can -- the constitutionality of submitting these -- of  
21 requiring these questions to be voted on by the public.

22 Q Is that the total issue. Does it require  
23 any denial of equal protection in the way the law will operate  
24 if it's adopted?

25 A No, Your Honor; that is not involved here.

1 That is not --

2 Q Well, what is the precise question, as you  
3 see it? Congress it is claimed that a submission of this  
4 matter to the people is unconstitutional, is unlawful dis-  
5 crimination.

6 A The question, as we have phrased it in our  
7 brief --

8 Q Well, I'd rather you just state it because  
9 I have heard a lot of argument. I have difficulty in under-  
10 standing it completely.

11 A The question is whether California's con-  
12 stitutional provision stating that there may be no housing  
13 project without first an affirmative vote of the people,  
14 violates the Equal Protection Clause of the 14th Amendment.  
15 That's the question.

16 Q That's the only question?

17 A The only question. Another question has  
18 been raised about the Supremacy Clause, but no -- the opposi-  
19 tion has not chosen to argue that, so I don't see any need of  
20 discussing it orally.

21 Q Well, suppose the state legislature had  
22 passed a law to build a housing project, just exactly as this  
23 one would have been built, if the election should have passed  
24 that way, the referendum. Would there be any claim, as you  
25 understand it that that law denied equal protection?

1 A If the --

2 Q If the legislature had passed the law to  
3 put into effect precisely the thing that would be put into  
4 effect if the people vote affirmatively here. Would that deny  
5 -- is that argument --

6 A I think that's implicit in the argument of  
7 my adversary, if I understand your question. If the require-  
8 ments of Article XXXIV were imposed by state statute?

9 Q Yes.

10 A My adversaries would argue that that's  
11 unconstitutional.

12 Q He would?

13 A Yes.

14 Q Then it's not altogether then on the fact  
15 that it's a referendum?

16 A Well, I --

17 Q I'm trying to find out exactly what it is.  
18 I have not been able to detect it yet in either argument.

19 A Well, as I understand the contention which  
20 was adopted below, it is that when elected representatives of  
21 the people, whether state or local, adopt a project it must go  
22 into effect and it's unconstitutional to say it must also have  
23 affirmative vote of the people. Now, that's what I understand  
24 the contention to be. And I understand the court below to  
25 have held.

1 Q You're saying that that argument pre-  
2 supposes that the agent has more power than the principal?

3 A Exactly so. In other words, California has  
4 said: We delegate to our agent, the local city council, the  
5 power to initiate projects, but we reserve to ourselves the  
6 final word and we are being told that it's unconstitutional for  
7 the principals to reserve that because, foresooth, in other  
8 matters, such as highways, schools, hospitals, they haven't  
9 reserved anything except the petition referendum.

10 Now --

11 Q Well, what has -- the arguments have been  
12 based on the fact that this is discrimination against the poor.

13 A Yes.

14 Q Whatever the poor is.

15 A Yes, sir.

16 Q I don't exactly know that that's been  
17 defined in the law, but they say it's a discrimination against  
18 the poor. Is the discrimination the referendum?

19 A Yes.

20 Q On the law that would be passed?

21 A No, no; they claim the discrimination  
22 against the poor is requiring the referendum.

23 Q Why?

24 A Well, that's what I have never been able to  
25 see: why. But their argument runs like this: --



1 Q There is some argument, of course.

2 A Their argument is that the other people,  
3 presumably the rich, don't have to go through a referendum.  
4 If somebody wants a highway or he wants a hospital or he wants  
5 public education assistance he doesn't need to do this. But,  
6 there is no discrimination here because this subject deals with  
7 the poor. Poverty is a sociological and political and economic  
8 circumstances that warrants government action. Now, when the  
9 government turns its attention to that problem certainly the  
10 state governments have the widest discretion as to how they  
11 should handle it, how far they should go and what they should  
12 do and what preliminaries are necessary before anything is  
13 done --

14 Q Mr. Lasky, let's assume that California had  
15 no referendum law before, except an automatic referendum with  
16 respect to public housing projects. Based on your argument I  
17 would think that you would say the state was perfectly en-  
18 titled to do that.

19 A I think so. In other words, if we wipe the  
20 slate of history clean and this is the first time California  
21 went for a referendum, the question would be: must the state  
22 structural government treat everything alike?

23 Now, my answer to that is this: if equal--

24 Q Well, you would say then that certainly  
25 they were treating certain subject matters different?

1                   A       Treated subject matters different; yes.

2       But I concede --

3                   Q       Well, do you know any state that doesn't  
4       treat subject matters different?

5                   A       Pardon?

6                   Q       Do you know any State of the Union that  
7       doesn't treat subject matters differently?

8                   A       No. What the Court is being asked to do  
9       here is to take a microscope and micrometer and to take the  
10      whole corpus of legislation and look at each one and to deter-  
11      mine how the differences are between the one and the other.

12                  Q       What would you say if California had no  
13      referenda at all and suddenly it required that anti-racial  
14      discrimination measures be subjected to a referendum and no  
15      other subject matters are required to do so?

16                  A       I would say thoroughly unconstitutional.  
17      Why? Because the 14th Amendment directs its thrust at racial  
18      discrimination and because the 14th Amendment hassingled out  
19      racial discrimination --

20                  Q       What if the law said, instead of saying  
21      "racial," anything that has to do with welfare or pocr relief  
22      must have an automatic referendum?

23                  A       Then I think that would be perfectly con-  
24      stitutional. In other words, if --

25                  Q       How would it work? What if it were

1 constitutional. You are in a little trouble here -- in some  
2 trouble here.

3 A No; you have asked me a question that  
4 might not be State of California history and I am --

5 Q Yes.

6 A But, if this Court were to take that case  
7 -- I would say you can't wipe out the legislative history. I  
8 think of a decision Your Honor may have written: Carter versus  
9 the Jury Commission. It was remarked that here was a device  
10 of ancient vintage and that it had not been used with any the  
11 improper motives. And that's exactly this case: we are deal-  
12 ing with a device of ancient vintage and it cannot be demon-  
13 strated that there is any improper motive.

14 Now, let me add one thing further: to talk about  
15 discrimination of the poor as if the poor was a -- is, to my  
16 respectful submission: nonsense. Highways, hospitals, benefit  
17 the whole public. They benefit the poor as much as anybody  
18 else. Low-income housing benefits the whole public and that's  
19 why it's justified constitutionally. And to say that this  
20 forces upon the poor a burden is more nonsense, because the  
21 people who back low-income projects are a veritable poverty  
22 industrial complex.

23 And if you look at the mass of people who sought  
24 to file amicus briefs in this Court from the other side, you  
25 will find: AFL-CIO, National Association of Architects,

1 Building materials manufacturers. If you had the record taken  
2 in evidence in this case you would find this project, the  
3 election of more money was put up for than against and most of  
4 it was put up by tire companies and unions.

5 Q What does the low-rent housing project  
6 cost the State of California? As a state, out of its tax  
7 funds.

8 A These projects are done locally; not by the  
9 state.

10 Q Yes. Well, I have included all of the --

11 A And the burden comes in upon the fact that  
12 the services, municipal services have to be supplied and taxes  
13 are way up. And the closest anyone has ever been able to  
14 estimate is that the burden on the California taxpayer is  
15 equal to 50 to 60 percent of the total amount of money the  
16 Federal Government itself contributes. And beyond that I have  
17 no figures.

18 Q But no additional tax. There is no appro-  
19 priation of tax monies except for what --

20 A No; there is no appropriate of tax monies  
21 because the bonds which are issued are --

22 Q Are Federal --

23 A Are essentially paid by the Federal Govern-  
24 ment which supplies the money.

25 Q Let me be sure I understand this factual



1 situation here. You say there is no other type of public  
2 housing or any kind of housing which can be submitted to a  
3 referendum in California?

4 A California has no other kind of public  
5 housing, except low-income housing, with the exception I  
6 mentioned. The law would permit some when you restore a  
7 blighted area --

8 Q Under a different act entirely?

9 A Different act. And then under, I think,  
10 agricultural labor, there is some provision about providing  
11 housing for agricultural labor but this obviously benefits the  
12 poor, too. So, this is all California has.

13 Now, if there is discrimination against then there  
14 must be discrimination in favor of someone. But the question  
15 is: who does this discriminate in favor of? You can't find the  
16 answer to it. It doesn't discriminate in favor of anybody.  
17 This is an attack on the structure of the government, and I  
18 submit that Equal Protection Clause primarily has to do with the  
19 application of the law. It says the law should be -- the  
20 lash of the law should be laid on the backs of everyone  
21 equally; the privileges of the law should be given to everybody  
22 equally.

23 This case presents a different kind of question,  
24 which is: is the structure of government such that everyone has  
25 an equal opportunity to obtain advantages? Now, I am not

1 prepared to say that that question can never be asked, but I  
2 do submit that it must be an extraordinary case, an extra-  
3 ordinary case indeed, county or local courts, a record of  
4 evidence that would justify the intrusion of the court into  
5 that field.

6 And, although my time has not expired, this is  
7 what I have. I submit that this judgment should be reversed.

8 Q Mr. Lasky. Do you have any comment about  
9 Reitman against Mulkey; do you think that has any implications  
10 to the disposition of this lawsuit?

11 A Not whatever. Reitman versus Mulkey was  
12 a case that came to this Court upon a construction of constitu-  
13 tional provision there which said, as so construed, that the  
14 right to discriminate was now to be constitutionally protected  
15 in California. It was from that construction that I read this  
16 Court's decision to go on.

17 So, I don't think that Reitman versus Mulkey has  
18 the slightest application. The only case I think one has to  
19 consider here is Hunter versus Erickson and I think that's  
20 clearly distinguishable.

21 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Lasky.

22 Mr. Cox.

23 ORAL ARGUMENT BY ARCHIBALD COX, ESQ.

24 ON BEHALF OF APPELLEES  
25

1 MR. COX: The precise question in these cases, as I  
2 understand it, is whether the state may require local govern-  
3 ment action which provides public housing for the poor, for  
4 persons of low income.

5 Q Who are the poor?

6 A Under the standards in the Federal statute  
7 one can take roughly the \$4,000 level of income as eligible  
8 for low-income housing. There are five standards that are set  
9 forth in the statute. The question is whether the state -- or  
10 whether if the state may require local government action pro-  
11 viding low-rent housing for the poor to run the gauntlet of an  
12 automatic referendum not required in the case of governmental  
13 action, in behalf of any other group in the community.

14 And we think because of the fact that this is hous-  
15 ing for the benefit of persons of low income that Article XXXIV  
16 was limited to that group; that this is a situation where one  
17 combines a disposition of the processes of government with an  
18 invidious classification, which distinguishes a great many  
19 other cases.

20 Q Then it is in the referendum alone?

21 A It is the referendum.

22 Q Alone?

23 A And the special referendum for these people  
24 which we complain of as the unconstitutional discrimination in  
25 this case; yes.

1 Q Suppose that had been referred to a county?

2 A Well, action normally is taken by the county  
3 or by the city and there can be no low-rent housing without  
4 at least two-thirds of the vote by the category of supervisors  
5 or the city council. Indeed, that's the way we contend that it  
6 should be done.

7 Q What about it?

8 A This extra obstacle --

9 Q What about a stock law that refers to a  
10 county. All the people that do not own the stock can't vote.

11 A Oh, excuse me --

12 Q I think of that because I have seen some very  
13 hot elections over stock laws, county stock laws.

14 A By now I understand what you mean by stocks,  
15 but I don't understand the question; I'm sorry.

16 Q My question is: suppose you had a state that  
17 would pass a county option law on the stock laws --

18 A We're not complaining in any way of local  
19 option. Not in the least. There is no complaint about this  
20 being a matter of local option. This, indeed, is a matter  
21 determined by local self-government --

22 Q I gathered you were doing it because they  
23 referred to the people the right to vote on some things but do  
24 not refer to on other things. Is that it?

25 A That do not -- and they set up the



1 classification in invidious terms. In terms of this being a  
2 benefit for people of low income. I'm not suggesting that  
3 there can be no neutral classification or no neutral principles  
4 that would call for a referendum in certain kinds of cases.

5 The bond issue case, it seems to me would be required  
6 required to conform to the neutral principle. I would think  
7 the referendum was called for in one or two cities in California  
8 for -- on any question of giving away parkland, rests upon  
9 the neutral principle of disfavoring the disposition of open  
10 parks and properties.

11 Q What do you mean by "neutral principle?"  
12 That's another expression I have ever been able to wholly  
13 understand.

14 A Well, I'm referring, of course, to the  
15 opinion of Justice Stewart and Justice Harlan in Hunter and  
16 Erickson. I mean one that is noninvidious, one that does not  
17 rest upon decisions against disfavored classes. Race is the  
18 one involved there. We say that that case is identical with  
19 this case except that here this presence --

20 Q Can you really go that far to say that this  
21 case is controlled by Hunter and Erickson?

22 A Except for the fact that in the first instance  
23 the disfavored class here is the poor, rather than in terms of  
24 race. I do think there is no other difference, Justice Harlan  
25 that --

1 Q Well, there is also a considerable other  
2 difference, I would say, apart from the mechanics of the thing.  
3 Do you know of any cases -- you keep talking about the word  
4 "poor." Do you know of any case in which that characterization  
5 on an equal protection case is referred to other than to  
6 indigents in the most technical sense of the term? What other  
7 case can you think of?

8 A Well --

9 Q The language of Harper against Virginia, the  
10 polling tax cases, rhetorical language, but give me another  
11 case where the word "poor," which is the premise of your  
12 argument, is -- has been held to include people whose income  
13 is, by your own statement, \$4,000 a year.

14 A Well, much of it often welfare money, of  
15 course.

16 Q Sir?

17 A Much of it often welfare money.

18 Q Yes.

19 A Of the \$4,000.

20 Q Which, being nontaxable, I may suggest, is  
21 more than \$4,000 a year for use.

22 A Well, it might be. It doesn't -- if you read  
23 the affidavits in the record of the conditions under which these  
24 people are living I suggest that they are indigents in the most  
25 realistic sense of the word. But, I'll point out, too, that the

1 Court, Mr. Justice Harlan, has referred to property classifica-  
2 tions, classifications of wealth in Cramer, in Cipriano, in  
3 the Phoenix case and others, as classifications that are sus-  
4 pect and in some cases have drawn that kind of line.

5 Q May I ask, Mr. Cox: do I correctly understand  
6 that what you are attacking is not that there is a referendum,  
7 but that California has said that the referendum in this in-  
8 stance must be mandatory whereas, as in other subject matter  
9 it permits a petition.

10 A Precisely. That is the relationship is just  
11 the same as in other matters.

12 Q But I suppose then, if this particular subject  
13 matter were subject to a petition referendum that no other  
14 subject matter is subject to any referendum?

15 A Then we would be making this same argument.  
16 As you suggested earlier, if this provided that there must be  
17 votes by five successive boards of supervisors we would be  
18 making the same thing.

19 Q But, since California does have a petition  
20 referendum for a lot of subjects, if this also were subject only  
21 to a petition referendum then you would not be here.

22 A Then I could not make the argument that I am  
23 making now, and the Chief Justice stated it very precisely  
24 earlier. I'm saying there could be no argument; I could not  
25 make the same argument I am making today.

1 Q You might be here, but on different grounds.

2 A It would have to be on different grounds.

3 That is correct.

4 Q Would you care to suggest what that might be,  
5 just --

6 A Yes. I think it would be -- but we would  
7 probably take it to the Supreme Court of California. and we  
8 would rely chiefly on an opinion that I should refer to on this  
9 case in the San Francisco Unified School District against  
10 Johnson in 92 California \_\_\_\_\_ 309.

11 I refer to that case -- it doesn't deal with Article  
12 XXXIV; I don't want to mislead you, but it does indicate that  
13 the Supreme Court of California might well invalidate Article  
14 XXXIV on the grounds that it permits and even invites people to  
15 vote against low-cost housing on racial grounds. And that the  
16 California Court says that inviting people to vote in referenda  
17 -- or to take action generally -- it was there speaking of  
18 parents refusing to allow their children to be assigned outside  
19 a neighborhood school --

20 Q Are you suggesting there are unresolved issues  
21 of California constitutional law in this case?

22 A No, no; simply there is Federal constitutional  
23 law. There is no question of California constitutional law  
24 because this is in the California Constitution. There is no  
25 question of California constitutional law, I believe, in that



1 case. It was decided under Federal --

2 Q So the California decision was an Equal  
3 Protection issue?

4 A Yes, yes. So, that's one ground and would  
5 probably be the primary ground of attack here. Let me elabor-  
6 ate at a little more length the matter of the mandatory refer-  
7 endum. Mr. Lasky says that there were other instances of  
8 mandatory referenda and of course he's right. He describes one  
9 as the disposition of public property. What he means, of  
10 course, is the occasional provision in the city charter which  
11 deals with the disposition of park property. There is certainly  
12 nothing in common between that case and this one.

13 He speaks of burdens on the general taxpayer. The  
14 only exception he refers to is the provision of the California  
15 constitution which requires a referendum when an issue of bonds  
16 or order of general debt chargeable against the government --  
17 the state and local government -- is involved.

18 And we point out, as I suggested yesterday: many  
19 instances where land is taken off the tax rolls and there may  
20 be some increased demand for municipal services which does not  
21 require a referendum in California -- incidentally, Justice  
22 Harlan, I believe that that case involving the California bond  
23 issue and the requirement of a two-thirds vote, is presently  
24 before the Court in Westbrook and Mihaly. I don't know whether  
25 it has been argued yet, but the matter is here.

1           Then, the third category that he refers to is  
2 changes in the boundaries or constitution of local government.  
3 There is nothing in common between this case and that. This  
4 case has the characteristics that I referred to before: the  
5 built-in disadvantage, the invidious classification and the  
6 inability to explain it by any neutral principle.

7           I would like --

8           Q       I was going to ask you a question, Mr. Cox.  
9 What would you have said about a California statute that said  
10 all social welfare legislation had to be submitted to a two  
11 thirds vote by the legislature?

12          A       Well, I would wish to know what social wel-  
13 fare legislation meant, Mr. Justice Harlan.

14          Q       Well, I am using it deliberately because it  
15 seems to me the term is more apt to your classification of poor  
16 than it is to what I have always understood the Equal Protec-  
17 tion classification of poor meant.

18          A       Well, I don't like to evade questions. I  
19 really do find it difficult to know just what you mean by  
20 "social welfare legislation" because our unemployment insurance  
21 laws --

22          Q       I'll take it and narrow it and say "Fair  
23 Housing legislation. Low-cost housing legislation.

24          A       Well, then I have Hunter and Erickson.

25          Q       It's the same case you've got here; isn't it?

1           A        I think Hunter and Erickson is the same case  
2 we have here; yes.

3           Q        Well, it's the same case on fair housing;  
4 is it the same case on low housing?

5           A        Maybe I didn't --

6           Q        I'm not sure you followed Justice Harlan's  
7 question.

8           A        I didn't. I thought he said fair housing and  
9 I'm very sorry. If it said that all low-rent housing and said  
10 nothing more I would then have virtually the same case I have  
11 now except that this is facial discrimination, which I do not  
12 find particularly offensive, somehow, but I think it would be  
13 in substance the same case and probably that difference is my  
14 foible rather than the real one.

15          Q        Well, may I alter it to pursue Justice  
16 Harlan's point to a more specific question: suppose the pro-  
17 visions applying a two-thirds vote for any programs for aid to  
18 Dependent Children or people of comparable categories; state  
19 welfare, as we know the word?

20          A        I say I think I would give the answer that I  
21 gave before, Mr. Chief Justice, that singling out interests of  
22 the poor, whether they are defined as social welfare and  
23 that's all that one means, and saying that they must be treated  
24 differently in the process of reaching decisions in government,  
25 apparently just because it is the poor are those who need the

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22 the poor, whether they are defined as social welfare and  
23 that's all that one means, and saying that they must be treated  
24 differently in the process of reaching decisions in government,  
25 apparently just because it is the poor are those who need the



1 protection of social welfare legislation, is invidious.

2 Now, here I would have, and I don't want to give  
3 away too much -- here we do have some closer comparisons to  
4 make. Let me devote myself for a few minutes to the argument  
5 of: what is the discrimination; what are the two things that  
6 there is discrimination between? And there are four points I  
7 would like to make in this matter.

8 The first is that California draws a much nicer line  
9 than much of the Appellants' argument supposes. Under urban  
10 renewal projects it is very common for a public authority to  
11 acquire a site, clear it and sell it at less than cost to a  
12 private operator, who constructs a multi-unit housing upon the  
13 tract, such as high-rise apartments. And the selling at less  
14 than cost, is clearly a form of public subsidy. There is upper  
15 income housing on urban renewal sites at Santa Monica Shores,  
16 Bunker Hill, which I found to my amazement, was in Los Angeles,  
17 not Boston, Massachusetts; Seaside, Diamond Heights and Point  
18 Anemone(?) for example.

19 Now, another thing that has has done --

20 Q Well, are they subject to a referendum?

21 A No, sir.

22 Q Well, is the original urban renewal?

23 A No, sir. It may be -- I guess it is subject  
24 to a petition referendum -- I'm not certain of that, but I  
25 know it is not subject to an automatic referendum.

1 Q I had that impression from what Mr. Lasky  
2 said that by petition it could be submitted.

3 A Right. And again, of course, our case would  
4 be entirely different --

5 Q What is the difference between mandatory and  
6 a petition?

7 A Oh, the difference is --

8 Q For these purposes.

9 A The differences are three. One is that those  
10 who oppose this step must go out and get the five or eight  
11 percent of the votes and have the burden of carrying it.

12 A second difference, which may be somewhat formal,  
13 but which I think has psychological significance: under a  
14 mandatory referendum you can't do anything until an affirmative  
15 vote has been held; whereas in the petition referendum, in  
16 effect says: shall we overturn what our local authorities have  
17 done?

18 And then the third point, as I suggested yesterday:  
19 the mandatory referendum under Article XXXIV works only one  
20 way. Now, there are other kinds of housing --

21 Q Well, the State of California might, I would  
22 assume, might provide the petition referendum to be initiated  
23 by the signatures of 100 registered voters and that would be  
24 almost a formality; wouldn't it?

25 A Well, if it was cut down to that small number

1 then there might be a different case, but I suggest that five  
2 to eight percent is not a mere formality. Again, of course, I  
3 set Hunter and Erickson as authorities for that proposition.

4 I think those who try to get five to eight percent  
5 of the voters on a signature would agree that it is not just a  
6 formality.

7 Now, to go a little further on the matter of housing:  
8 not only is it a matter of transferring the sites at less than  
9 cost under urban renewal, but there are occasions when the  
10 construction itself is subsidized by FHA conventions which re-  
11 duce the interest that the real estate developer has to pay  
12 because the FHA pays the difference between what he can pay in  
13 the way of interest from the rest and what a mortgagee would  
14 require. And sometimes there are rent supplements paid in such  
15 cases.

16 If the sponsor is a nonprofit institution and there  
17 are projects being developed this way, then the interest rate  
18 is lower. And often there is, what in fact is an important  
19 aid, in that the Federal Government takes the mortgage when  
20 no one else will.

21 Now, I am talking about things that the California  
22 municipalities are involved in because of urban renewal land.  
23 And in these cases I really don't see any relevant difference  
24 between the middle income housing projects and the low-rent  
25 projects at which Article XXXIV is aimed. Both are housing;

1 both have at least some attributes of government projects and  
2 both are publicly subsidized and I have not yet heard anyone  
3 suggest why the difference in where the title resolved publicly  
4 should justify a difference in their treatment from local  
5 government.

6 Q Does middle-income housing involve a waiver  
7 of all taxes?

8 A No; there is that difference, but I point out  
9 again the very large number of instances in which land is taken  
10 off the tax rolls by public or private action and California  
11 doesn't require an automatic referendum there.

12 The second point that I would emphasize simply by  
13 way of recalling it, is as I pointed out yesterday: other  
14 government actions having all the characteristics of low-rent  
15 housing, except the involvement of the poor, is not required to  
16 go to an automatic referendum in California.

17 In other words, no matter what comparison you make  
18 other groups are treated the same.

19 Q What are the sort of things that the three-  
20 judge court talked about?

21 A Yes, but not just Federal; also state. Yes.

22 Q But, well, if you want to say that they are  
23 comparative, but there is no other kind of housing that's sub-  
24 ject to legislation is there in California?

25 A I just described the closest --



1 Q Urban renewal is the closest?

2 A Yes. But then I think this -- a further  
3 point, Mr. Justice Stewart -- I think the Appellant's argument  
4 and our inability to point to some exact comparisons where the  
5 only difference is the involvement of the poor, is that that  
6 difficulty is brought out by Hunter and Erickson.

7 Merely to claim that we can't show that discrimina-  
8 tion against the poor results from Article XXXIV because we  
9 can't show any high-income housing owned by the government just  
10 like this is sort of a pale copy of the argument that the  
11 Akron Charter Amendment was nondiscriminatory because whites as  
12 well as Blacks and protestants as well as catholics who were  
13 seeking fair housing legislation had to go to the referendum.

14 But here, as there, the reality is that the law's  
15 impact falls on the minority.

16 Q Mr. Cox, would you have the same argument if  
17 California had simply said: all changes in voting laws must be  
18 submitted to an automatic referendum. That's the only category  
19 of laws that submitted the automatic referendum. Everything  
20 else is by --

21 A Then if a public housing project -- we would,  
22 because if a public housing project was --

23 Q Then the property owner comes along and says:  
24 this is a classification strictly on property owners; it's no  
25 different than a poor classification and it's just as invidious

1 as you were arguing about a couple of years ago in the Poor  
2 case.

3 A But I don't -- I would submit that it wasn't  
4 as invidious.

5 Q You mean you can have some classification  
6 based on property owners rather than --

7 A I think property development and zoning laws  
8 affecting property development do much less --

9 Q You can't have a classification based on non-  
10 property owners?

11 A Well, I wouldn't say that there never could  
12 be any classification based on nonproperty owners. I would  
13 want to know in what context it arose and also what subject it  
14 related to.

15 Q Well, this context --

16 A Well, in this context I feel that it is a  
17 discriminatory classification.

18 Q If this case involved both a law subjecting  
19 zoning laws to the automatic referendum and the subject matter  
20 that's here now, you would sustain the one and strike down the  
21 other? If this case had both issues in it. The provision,  
22 the California constitutional provision subjected to the  
23 automatic referendum -- low referendum -- low-rent housing and  
24 all changes in zoning laws.

25 A I would think that one could be sustained and

1 nonwhites -- well, 32 percent of thenonwhite are poor; and  
2 only 12 percent of the general population is nonwhite.

3 In Santa Clara one finds, looking not at the Black  
4 population, but at the Mexican-Americans, that 15.2 percent of  
5 all households have anincome below \$4,000 but 26.8 percent of  
6 the Mexican-Americans have income below \$4,000.

7 And, as the opinion below points out -- I won't stop  
8 to read it -- in the footnote, it's the minorities who have the  
9 intense need for housing. Indeed, the President's Commission  
10 on Housing pointed out that the need for housing among  
11 minorities is three times as intense. Minorities, of course,  
12 form the great block of the people who are the occupants of  
13 low-rent public housing.

14 And when people vote on these questions, as the  
15 affidavits in the record make clear: there is not much doubt  
16 that what is on the agenda is the unwise poor, the minorities  
17 whose housing is more notably inadequate than everyone else's.

18 There are two other consequences which I can't say  
19 are written into the statute and which I don't make our case  
20 turn exclusively on with other points, but I think they are  
21 important consequences in deciding whether this is an invidious  
22 classification. They go very closely together.

23 The great problem in housing, the great problems  
24 that result from it, come from the difficulties that persons of  
25 low income have in moving to communities where the better jobs

1 are; where there is opportunity for self-help and advancement.  
2 And I suppose that two no better examples anywhere in the  
3 country, in San Mateo County, is one that goes down on the  
4 peninsula in California, and San Jose down at the end of the  
5 bay. And the problem is that there is no housing for people  
6 who move into those areas. So that here there is an indirect  
7 restraint -- I don't liken it to Shapiro and Thompson -- there  
8 is an indirect restraint on freedom of movement to go and help  
9 themselves and there is also, of course, a resulting built-in  
10 preservation of the ghetto because this kind of obstacle makes  
11 it difficult to build the necessary public housing units in  
12 counties like Santa Clara and San Mateo and that, too, results  
13 in racial discrimination.

14 It seems to me, as I say, that in deciding whether  
15 this is an invidious classification, the distinction against  
16 persons of low income who can't afford decent housing, that  
17 these consequences are properly taken into account.

18 But the heart of my case rests on the combination,  
19 as I have said too many times, I am afraid, of the built-in  
20 disadvantage not required on any other kind of interest of any  
21 other group; the express classification of persons of low  
22 income. And the other absence of any neutral principle which  
23 California can be said to have followed in setting up the  
24 classes of those required to go to an automatic referendum.

25 Taking those together, Mr. Chief Justice, we submit



1 that there is a denial of the equal protection of the law.

2 Q Let me ask you just one more question on  
3 this category of the minorities or the -- relating to your  
4 classification of the poor for purposes of this case.

5 Suppose a given county in California, a small county,  
6 had a bond issue up for \$20 or \$30 million to construct high  
7 schools and it was subject to a referendum, which I gather  
8 many of them are; would there be an equal protection clause or  
9 discrimination factor involved because the principal bene-  
10 ficiaries, the students, couldn't vote on the bond issue?

11 A Well, I would -- because the students  
12 couldn't?

13 Q The students wouldn't vote.

14 A Well, I guess you took care of that in --

15 Q I'm talking about high schools now: 14 to  
16 18 as deliberately putting it under the 18 group because lately  
17 we --

18 A I think that the character of the bond issue  
19 provisions is one which is a general one, relating to all bond  
20 issues, is one that cuts against one group today and the other  
21 group tomorrow and therefore one can say that this category is  
22 set up according to a uniform rule that doesn't point the  
23 finger at any group in the community; that says: "While they  
24 are incurring long-term debt," the kind of thing, of course,  
25 which in the history of the country frequently resulted in

1 the insolvency of the cities and counties. When we are talking  
2 about long-term debt we want to go more slowly so we will set  
3 up a separate governmental manner of dealing with that group  
4 of issues, but that doesn't seem to involve any invidious  
5 classification.

6 We do have the question here whether two-thirds  
7 should be required. The Supreme Court of California held that  
8 two-thirds could not constitutionally be required. Of course  
9 we are not -- I am just recalling that for the Court's benefit  
10 -- we're not involved in that and I'm certainly not arguing  
11 the merits of that question.

12 MR. CHIEF JUSTICE BURGER: Thank you Mr. Cox; thank  
13 you Mr. Lasky.

14 The case is submitted.

15 (Thereupon, at 11:45 o'clock p.m. the argument in  
16 the above-entitled matter was concluded)