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Referendums and voter initiatives as potential barriers to needed new housing for low- and moderate-income Americans

Referendums are a "basic instrument of democratic government." [1] They sometimes are generated by voter initiatives—another "direct democracy" process.[2] Approximately 26 states have a statewide initiative process, referendum process, or both.[3]

However, numerous referendums have defeated affordable housing proposals, including proposals that local governments had approved or were considering. Constitutional challenges to the results of those referendums have been rejected in court, absent proof that an unlawful, discriminatory *purpose* was part of the motivation behind the referendum.

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[1] *E.g., Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976). *See also, e.g., Cuyahoga Falls, Ohio v. Buckeye Community Hope Foundation,* 538 U.S. 188, 196-97 (2003) (referendums involve core First Amendment rights such as freedom of speech and the right to petition the government).

[2] A voter "initiative" procedure enables a specified number of voters by petition to propose a law and secure its submission to the electorate or to the legislature for a vote *See, e.g.,* Merriam-Webster.com Dictionary, "Initiative," https://www.merriam-webster.com/dictionary/initiative. A referendum is the submission to a popular vote of measures passed on or proposed by a legislative body or by popular "initiative." *See, e.g.,* Merriam-Webster.com Dictionary, "Referendum," https://www.merriam-webster.com/dictionary/referendum.

[3] Ballotpedia, *States with initiative or referendum*, posted at https://ballotpedia.org/States_with_initiative_or_referendum#States_with_initiative_and_referendum (accessed Nov. 7, 2023). Most of those states are west of the Mississippi River. However, a number of eastern states also have some form of citizen-initiated ballot measure provision, including Maine, Massachusetts, Maryland, Florida, Mississippi, Ohio, West Virginia, Michigan, and Illinois. In addition, state law in Ohio and West Virginia requires a local referendum where a formal protest petition is filed to a rezoning application. *See, e.g.,* Mercatus Center, *Rezoning Protest Petitions Are Ripe for Reform* ("Mercatus"), pp. 3-4, Table 1 (2022), posted at: https://www.mercatus.org/research/policy-briefs/rezoning-protest-petitions-are-ripe-reform.

This memorandum follows up on the brief discussion of "direct democracy" processes in EHI's recent report, *Supermajority vote requirements and related barriers to adding needed housing* (May 2023). We mentioned there that: "Because of the special status of such "direct democracy" initiatives in the American system, they deserve an extended analysis that is beyond the scope of this memorandum." *Id.,* p. 5.

> One of the areas where direct democracy's failure to protect minority interests is apparent is at the local government level in the provision of low or moderate- income housing projects. Suburban residents have learned how to use the referendum to block rezoning, which in effect, helps to maintain the practical exclusion of the poor, the elderly, and minorities from their communities.[4]

The proposed Economic Fair Housing Act (EFHA)[5] would provide a remedy for the problem of "direct democracy" processes leading to unjustifiable barriers to housing opportunities for low- and moderate-income Americans.

U.S. Supreme Court precedents

The U.S. Supreme Court has upheld the Constitutionality of several referendums that defeated proposals to add or encourage housing for low-income people:

- *Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003) (local referendum that rejected development permits for low-income housing development was Constitutional, even though City Council had approved site plan for that development).
- *Eastlake v. Forest City Enterprises, Inc*., 426 U.S. 668, 677 and n. 11 (1976) (recently-enacted city charter provision that required proposed land use changes to be ratified by 55% of votes cast in referendum, and that resulted in defeat of low-income housing project, did not violate Constitutional due process).
- *James v. Valtierra*, 402 U.S. 137, 138-139 (1971) (recent amendment to California law, created through initiative and referendum, requiring that local referendum be held on any proposed low-rent public housing project, was Constitutional).

The reasonableness of the affordable housing efforts in those cases is suggested by the fact that: (1) in *Cuyahoga Falls* and *Eastlake*, the low-income housing project had been approved in the local government's rezoning process, and (2) in *James*, local referendums had prevented at least two local governments from even pursuing a low-rent public housing project. [6]

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[4] Michaell Crews-Yancey, *Should disparate impact claims be allowed against municipal corporations in its use of initiative and referendum power as to low or moderate-income housing projects?*, 4 J.L. Soc'y 415, 419 (Winter 2003), citing Louis J. Sirico, Jr., *The Constitutionality of Initiative and Referendum*, 65 Iowa L. Rev. 637, 640 (1980). *See also generally* Priscilla F. Gunn, *Initiatives and referendums: direct democracy and minority interests*, 22 Urb. L. Ann. 135, 137 n. 12 (1981) ("Direct democracy discrimination has been prominent principally in the area of open and fair housing") (citing earlier U.S. Supreme Court precedents on that issue).

[5] A copy of that proposal for the federal level is posted on the Equitable Housing Institute's (EHI's) website at https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EFHA--EHI_draft_9-2023-anno-S-web.pdf. That proposal could be readily adapted for use at the state (or even local) level.

[6] The low-income housing projects that were defeated in Supreme Court cases, including public housing projects, may have been development types that have been problematic and no longer are being produced. The current approach, exemplified by the federal low-income housing tax credit (LIHTC) program, focuses

However, the Court has also invalidated the results of two housing referendums as unconstitutionally discriminatory:

- *Reitman v. Mulkey*, 387 U.S. 369 (1967) (1964 amendment to California Constitution, approved through initiative and referendum, provided that state government shall not limit landowner's discretion to discriminate in the sale or lease of any part of that land "in his absolute discretion;" Court held that amendment invalid under Fourteenth Amendment to U.S. Constitution, as it would authorize private discrimination in real estate transactions).
- *Hunter v. Erickson*, 393 U.S. 385 (1969) (voters amended city charter to require that any ordinance regulating real estate on basis of race, color, religion, or national origin could not take effect without approval by majority in city election; Court found amendment unconstitutional under Fourteenth Amendment, as it would put special burdens on racial minorities within the governmental process). [7]

In order to find that a zoning ordinance violates the federal Constitution, the Court holds that the evidence must show that an unlawful, discriminatory *purpose* was part of the motivation for the zoning decision.[8] "Showing racially discriminatory intent in a case where the actors were voters acting through the ballot box is extraordinarily difficult."[9] However, where the result of a referendum is contrary to a statute of a higher level of government, that result is unenforceable. We discuss that subject next.

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on mixed-income developments, which avoid issues of concentrated poverty that made older affordable housing projects unpopular. A federal statute enacted in 1999 limits the number of public housing units that may receive federal funds to the number that a Public Health Authority owned, assisted, or operated as of October 1, 1999. *See, e.g.,* HUD PIH, *Faircloth Limit FAQs*, June 2020 (discussing that statute, the Faircloth Amendment to the United States Housing Act of 1937).

[7] *See also City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432 (1985) ("It is plain that the electorate as a whole, whether by *referendum* or otherwise, could not order city action violative of the Equal Protection Clause,") (citing authorities; emphasis added).

The Supreme Court's declaration that "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice," *James v. Valtierra*, 402 U.S. 137, 141 (1971), does not mean that actual referendum results are free from unlawful discrimination.

[8] *E.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-66 (1977).

[9] Damian Kelly, ed., 1 *Zoning and Land Use Controls* § 3.01 [2] (2023) (discussing *Eastlake*, 538 U.S. at 196-197 (required showing of discriminatory intent)).

> Application of the [Supreme Court's criteria for finding discriminatory purpose] is nearly impossible regarding proof of discriminatory intent in the area of zoning. A legislative or administrative history rarely exists with zoning enactments; when it does, the record generally lacks a clear showing of intent to discriminate.

Gunn, *supra* n. 3, at 156 n. 124 (quoting Jeff C. Wolfstone, *The Case for a Procedural Due Process Limitation on the Zoning Referendum:* City of Eastlake *Revisited*, 7 Ecology L. Q. 51, 67 (1978).) *See also generally* Crews-Yancey, *supra* n. 3, at 435

Effect of federal statute

The result of a referendum that is inconsistent with the federal Fair Housing Act[10] is invalid. A federal Court of Appeals has invalidated a local ordinance that required all proposals for low-income housing to be submitted to a referendum, because it violated that statute.[11]
The court noted: "Zoning decisions which have a racially discriminatory *effect* have been held to violate the Fair Housing Act."[12] The U.S. Supreme Court now has confirmed that a violation of the Fair Housing Act may be based on a housing practice that, regardless of its intent, has a disparate impact on members of a protected group—unless that practice has a justifiable purpose and is properly limited scope.[13]

The Supreme Court also has found various state and local laws to be preempted because a federal law addresses the same subject.[14] The Fair Housing Act does not yet address economic discrimination *per se.* It only prohibits disparate impacts or treatment based on race and certain other non-economic, protected categories.[15] But if that statute were amended as we propose, it could solve the problem of direct democracy processes creating unjustified discrimination against affordable housing efforts, nationwide.

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[10] 42 U.S.C. §§ 3601-3619.

[11] *United States v. Parma,* 661 F.2d 562, 573 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). *See also, e.g., Edwards v. Johnston County Health Dep't*, 885 F.2d 1215, 1221 n. 14 (4th Cir. 1989) ("Governmental bodies are bound to uphold and obey the provisions of the Fair Housing Act's clear congressional mandate"), quoting *Smith v. Town of Clarkton*, 682 F.2d 1055, 1068 (4th Cir. 1982); *United States v. City of Black Jack, Missouri*, 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied,* 422 U.S. 1042, 45 L. Ed. 2d 694, 95 S. Ct. 2656 (1975).

[12] *Parma, supra* n. 9, 661 F.2d at 575 (citing authorities) (emphasis added). That decision also relied on evidence that the specific ordinance in question was "motivated, at least in part, by a desire to exclude minorities." *Id.*

[13] *Texas Dep't of Hous. and Comm'ity Affairs v. Inclusive Communities Project, Inc. ("Inclusive Communities"),* 576 U.S. 519 (2015).

[14] Examples include:

- *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992) (federal worker safety and health regulation ("standard") preempts any state law or regulations on the same specific issue, unless the State has obtained the Secretary of Labor's approval for its own plan).
- *Felder v. Casey*, 487 U.S. 131 (1988) (state statute that made preliminary steps mandatory before lawsuit could be filed in state court against state or local government defendant was preempted by federal law, where alleged violation was of federal statute).
- *Perez v. Campbell*, 402 U.S. 637 (1971) (state statute that required persons to pay judgment debt arising from a car accident, regardless whether they were discharged in bankruptcy, was preempted because it conflicted with federal Bankruptcy Act).

See, e.g., U.S. Const. Art. VI, Cl 2 ("Supremacy Clause") (federal Constitution and laws are "the supreme Law of the Land"). *See also, e.g., Felder v. Casey*, 487 U.S. at 138 (Under the Supremacy Clause, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield") (quoting *Free v. Bland*, 369 U.S. 663, 666 (1962)).

[15] *See, e.g., Inclusive Communities, supra* n. 11, 576 U.S. at 533-534 (quoting Fair Housing Act §§ 804(a), 805(a).

Our proposed amendment is the federal Economic Fair Housing Act (EFHA).[16] It would prohibit the whole range of economic discrimination in housing resulting from zoning and other government regulations ("regulatory barriers to housing opportunities").

Effect of state law

A local referendum also is preempted to the extent that it would violate its state's law. For example, an amendment to a locality's general land use plan, adopted by initiative, is "subject to the same constitutional limitations and rules of construction" as other local laws.[17] Thus, a general plan amendment adopted by initiative in California will not be permitted to create a violation of the state's planning and zoning statute. *Id.*

Also: "Initiatives may address only those areas subject to regulation by ordinance."[18] An Economic Fair Housing Act (EFHA) at the state level would set forth anti-discrimination principles that would prevent local direct democracy processes causing unjustified discrimination against affordable housing efforts in that state.

Conclusions

Although referendums and voter initiatives are a basic instrument of democratic government, they have been used numerous times to defeat projects that were intended to relieve deficient housing supply and conditions for low-income Americans. Challenges to the results of such "direct democracy" processes, based on the federal Constitution, have failed unless it is proven that an unlawful, discriminatory purpose was a motivating factor in the zoning decision. That is an extremely difficult showing to make, where the decision-makers are the voters in a local referendum.

However, the results of a local or state referendum are preempted to the extent that they would result in a violation of federal law. For example, a federal Court of Appeals has invalidated a local ordinance that required all proposals for low-income housing to be submitted to a referendum, because the ordinance violated the Fair Housing Act.

A violation of the Fair Housing Act may be based on a housing practice that, regardless of its intent, has a disparate impact on members of a protected group—unless that

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[16] A copy of that proposal is posted on EHI's website at https://www.equitablehousing.org/images/PDFs/PDFs--2021-/EFHA--EHI_draft_9-2023-anno-S-web.pdf.

[17] *Lesher Communications, Inc. v. City of Walnut Creek*, 52 Cal.3d 531, 540 (1990). *See also, e.g.,* Gunn, *supra* n. 3, at 137-138 ("initiatives and referendums must comply with the same constitutional and statutory standards governing state and local legislative bodies"), citing Olson, *Limitations and Litigation Approaches: The Local Power of Referendum in Federal and State Courts-A Michigan Model*, 50 J. Urb. L. 209, 213 (1972). "[L]ocal level initiatives and referendums are confined to state grants of power to local legislative bodies." Gunn, *supra* n. 3, at 138.

[18] Gunn, *supra* n. 3, at 138. In addition, constitutional limitations on the state level confine initiatives and referendums to the subjects appropriate for the legislative branch of state government. "In other words, citizens may enact what legislatures may enact and no more." *Id.* and n. 16.

practice has a justifiable purpose and properly limited scope. An Economic Fair Housing Act (EFHA) at the federal level would be an effective remedy for the overall problem of direct democracy processes resulting in restrictions that amount to economic discrimination regarding affordable housing efforts.

Also, a state EFHA would be an effective way to solve the problem of local direct democracy processes resulting in unjustified discrimination against affordable housing efforts in that state. A local referendum is not permitted to provide a basis for violating state law.

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