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The Emperor's new Clothes: Exposing the Failures of Regulating Land Use through the Ballot Box

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ARTICLES

THE EMPEROR'S NEW CLOTHES: EXPOSING THE FAILURES OF REGULATING LAND USE THROUGH THE BALLOT BOX

*Marcilynn A. Burke**

This Article analyzes the recent trend of regulating land use through ballot initiatives. Most of this activity occurs in jurisdictions west of the Mississippi River, and as the West becomes the new political battleground, the significance of these initiatives continues to grow. Supporters tout ballot initiatives as a positive mechanism of direct democracy, but this Article makes two normative claims to the contrary. First, regulation of land use from the ballot box produces a deliberative failure. Second, such regulation leads to a planning failure. To prove these claims, the analysis focuses on three areas of land use law at both the state and local levels: private property rights; traditional

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land use regulations; and environmental law. This examination highlights the negative impacts of replacing traditional land use planning and decision-making implemented by elected officials with ballot measures decided by an uninformed and oft-manipulated electorate. In so doing, the Article exposes the reality behind the rhetoric of direct democracy. Following this multivariate analysis, the Article makes four proposals for mitigating the harmful effects of legislating at the ballot box. This Article is the first step in a larger project of defusing the rhetoric, with the ultimate aim of making land use law more efficient, ethical, and democratic.

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[The] portrayal of legislatures as forums for “systematic analysis, in-depth research [and] critical compromise” is pure fantasy. On the most controversial issues, lobbyists backed by big campaign contributors block major reforms.

....

... [W]hen the going gets tough, the politicians often freeze up. But in the 23 states with a state-wide initiative process, the voters have the power to make government responsive even when the politicians aren't.

—David D. Schmidt (1990)¹

Direct legislation, the creation of progressives of another era, today poses more danger to social progress than the problems of governmental unresponsiveness it was intended to cure.

—Derrick A. Bell, Jr. (1978)²

INTRODUCTION

Over the past few decades, citizens have voted in state and local plebiscites on a number of controversial public policy issues, including abortion,³ affirmative action,⁴ education,⁵ environmental law,⁶

1 David D. Schmidt, Letter to the Editor, *Voter Referendums Bypass Legislative Gridlock*, N.Y. TIMES, May 23, 1990, at A28 (second alteration in original). Schmidt was the Director of the Initiative Resource Center.

2 Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 17–18 (1978).

3 E.g., Proposition 73 sec. 3, § 32 (Cal. 2005) (requiring a waiting period and parental notification for minors seeking abortions); Measure 43 § 2 (Or. 2006), available at http://www.sos.state.or.us/elections/nov72006/guide/meas/m43_text.html (requiring waiting period and parental notification for minors seeking abortions).

4 E.g., Proposition 209 § 31 (Cal. 1996) (codified at CAL. CONST. art. I, § 31), (prohibiting discrimination against or granting preferential treatment “to any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting”); Proposal 2 § 26 (Mich. 2006) (codified at MICH. CONST. art. I, § 26) (banning the use of affirmative action for public employment, education, or contracting purposes; entitled the “Michigan Civil Rights Initiative”).

5 E.g., Proposition 203 (Ariz. 2000) (codified at ARIZ. REV. STAT. ANN. §§ 15-751 to -757 (2002)) (attempting to end bilingual education and requiring English-only education); Proposition 227 sec. 1, §§ 300–340 (Cal. 1998) (codified in scattered sections of CAL. EDUC. CODE) (bilingual education); Proposition 13 art. 13 (Cal. 1978) (codified at CAL. CONST. art. XIII A); Amend. 39 (Colo. 2006) (requiring 65 percent of school spending spent on classroom instruction). One of the country's most famous initiatives is arguably California's Proposition 13 of 1978 which capped property tax rates, thereby affecting funding for public schools.

6 E.g., Proposition 106 sec. 2, art. X (Ariz. 2006), available at <http://www.azsos.gov/election/2006/Info/PubPamphlet/english/Prop106.htm> (proposing “Conserv-

same-sex marriage,⁷ medical marijuana,⁸ smoking,⁹ term limits,¹⁰ and taxes,¹¹ to name just a few. Twenty-four states and the District of Columbia and about one-half of all U.S. cities authorize the use of ballot initiatives and/or referenda,¹² and approximately eighty percent of those jurisdictions are west of the Mississippi River. The exercise of this form of direct democracy heated up in the 2006 election year cycle. In that year, there were more ballot initiatives and refer-

ing Arizona's Future" to preserve 694,000 acres of state trust land as open space); Amend. 37 sec. 2, § 40-2-124 (Colo. 2004) (codified as amended at COLO. REV. STAT. ANN. §§ 40-2-124 to -125 (West 2004 & Supp. 2008)) (requiring utilities to produce ten percent of their electricity by using renewable fuels); Proposal 1 § 41 (Mich. 2006) (codified at MICH. CONST. art. IX, §41) (barring diversion of state conservation funds for other purposes).

7 *E.g.*, Proposition 107 sec. 1, art. XXX (Ariz. 2006), *available at* http://www.azsos.gov/election/2006/Info/PubPamphlet/Sun_Sounds/english/Prop107.htm (proposing "Protect Marriage Arizona" to preserve marriage as only the union between one man and one woman and prohibiting the creation of any legal status for unmarried persons that is similar to marriage); Amend. 43 sec. 1, § 31 (Colo. 2006) (codified at COLO. CONST. art. II, § 31) (specifying that only a union of one man and one woman will be recognized as marriage in the state); Ohio Issue 1 § 11 (2004) (banning gay marriage).

8 *E.g.*, Proposition 215 sec. 1, § 11362.5 (Cal. 1996) (codified at CAL. HEALTH & SAFETY CODE § 11362.5 (West 2007)); Measure 4 (S.D. 2006), *available at* <http://www.sdsos.gov/electionsvoteregistration/electvoterpdfs/2006SouthDakotaBallotQuestionPamphlet.pdf> (allowing medical use of marijuana).

9 *E.g.*, Proposition 201 secs. 4-5, § 36-601.01 (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. § 36-601.01 (West 2003 & Supp. 2007)) (proposing "Smoke-Free Arizona Act" to prohibit smoking in public places); Question 4 (Nev. 2006) (banning smoking in public places except bars and restaurants); Initiative Measure No. 901 secs. 2-3, §§ 70.160.020-.030 (Wash. 2005) (codified at WASH. REV. CODE ANN. §§ 70.160.020-.030 (West 2002 & Supp. 2006)) (banning indoor smoking in public places and outside within a certain perimeter).

10 *E.g.*, Proposition 140 § 4 (Cal. 1990) (codified in scattered sections of CAL. CONST. arts. IV, V, IX, XIII, XX); Initiative 90 sec. 1, § 27 (Colo. 2006) (proposing to reduce terms of office of justices of the supreme court and judges on the appellate courts); Or. Measure 45 (2006), *available at* http://egov.sos.state.or.us/division/elections/nov72006/guide/meas/m45_text.html (proposing to restore term limits for legislators that the courts had previously stricken).

11 *E.g.*, Constitutional Initiative 97 (Mont. 2006), *available at* <http://sos.mt.gov/Elections/archives/2006/CI/CI-97.asp> (proposing to impose Taxpayer Bill of Rights (TABOR) spending restrictions); Initiative 423 (Neb. 2006) (proposing to limit growth of state spending); Measure 48 (Or. 2006), *available at* http://www.sos.state.or.us/elections/nov72006/guide/meas/m48_text.html (proposing to impose TABOR spending restrictions).

12 JOHN G. MATSUSAKA, FOR THE MANY OR THE FEW 1, 47 (2004).

enda up for consideration than any year in the country's history with the exception of only two years.¹³

In 2006, land use regulation was the "signature issue" for ballot measures,¹⁴ and it figured prominently in the 2008 election cycle as well.¹⁵ It has become a hot button topic, particularly in the West. The concentration of these measures in that region were significant in the 2008 presidential election, as the West continued to develop into the new political battleground.¹⁶

13 Only in 1914 and 1996 did voters face more ballot initiatives. See Posting of Louis Jacobson to The Rothenberg Political Report, <http://rothenbergpoliticalreport.blogspot.com/2006/10/2006-ballot-measures-national.html> (Oct. 11, 2006, 12:05). In 1914, the people of thirty-two states voted upon 291 initiatives and referenda. Robert E. Cushman, *Recent Experience with the Initiative and Referendum*, 10 AM. POL. SCI. REV. 532, 532 (1916). In 1996, there were eighty-seven initiatives on the ballot. See Jennie Drage Bowser, *Taking the Initiative: Land Use Measures Steal the Show in Upcoming Ballot Measures*, ST. LEGISLATURES, OCT–NOV. 2006, at 28, 29. The author speculates that those were banner years because by the end of 1912, eighteen states had adopted laws to allow plebiscites, see THOMAS E. CRONIN, *DIRECT DEMOCRACY* 51 (1989), and in 1996, conservatives elected in the 1994 election cycle championed term limits as the leading issue in the 1996 election cycle, Edward J. López, *Term Limits: Causes and Consequences*, 114 PUB. CHOICE 1, 6 (2003).

14 Jacobson, *supra* note 13; see also Bowser, *supra* note 13, at 28 ("Land use, a real snoozer on the surface, is causing heated battles, particularly in the West.").

15 Initiatives that states certified for the November 2008 elections include familiar as well as new issues. As had others before them, voters in Michigan considered and approved the medicinal use of marijuana for critically ill patients. See Proposal 1 (Mich. 2008) (codified at MICH. COMP. LAWS ANN. §§ 333.26421–26430 (West Supp. 2009)) (presenting voters with the "Coalition for Compassionate Care Initiative"). Voters in South Dakota considered and rejected a ban on all abortions except those to terminate pregnancies as a result of rape or incest or to protect the mother's health. See Initiated Measure 11 (S.D. 2008). Finally, voters in Colorado considered and rejected a civil rights/anti-affirmative action measure. See Amend. 46 (Colo. 2008). Gaining in popularity are initiatives that require public utilities to produce a certain amount of its energy from renewable sources by a target date. *E.g.*, Proposition 7 (Cal. 2008). Californians considered and approved the somewhat novel Prevention of Farm Animal Cruelty Act, which would prohibit the tethering or confinement of farm animals in a way that prevents them from turning around freely, lying down, standing up, and fully extending their limbs. See Proposition 2 (Cal. 2008) (codified at CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West Supp. 2009)).

16 See Anne Ryman, *West Emerges As New Battleground Region: With More Dems in Region, GOP Looks to Hold Sway in Presidential Race*, ARIZ. REPUBLIC, Aug. 10, 2008, at A1, available at <http://www.azcentral.com/arizonarepublic/news/articles/2008/08/10/20080810westernstates0810.html> (explaining how the demographic shift since the 1990s has both parties targeting the West). The more salient the ballot initiatives in those states, the more they will influence voter turnout and perhaps outcomes. For example, in Colorado in the 1990s, new residents gravitated towards the Republican party and the conservative populist movements, supporting ballot initiatives imposing

Two events—one out West and one back East—precipitated the recent whirlwind of activity surrounding land use issues. First, in November 2004 Oregonians passed Measure 37 which promised landowners “just compensation” whenever application of land use regulations decreased the value of their land.¹⁷ The second significant event was the eminent domain decision of the United States Supreme Court in *Kelo v. City of New London*¹⁸ in June 2005. In *Kelo*, the Supreme Court held that the Fifth Amendment did not prohibit the taking of private property in furtherance of New London’s redevelopment scheme.¹⁹ Writing for the majority, however, Justice John Paul Stevens noted that the states were free to limit further their use of eminent domain as a matter of public policy.²⁰ Many state legislatures took Justice Stevens’ cue, yet most of them did not satiate the public’s appetite for stricter controls.²¹

Though Oregonians revised Measure 37 with the passage of Measure 49 in 2007,²² several states—including Arizona, California, Idaho, Nevada, North Dakota, and Washington—followed Oregon’s lead with varied success.²³ Some attempted to prevent transfer of property

term limits and the “Taxpayers’ Bill of Rights.” Ryan Lizza, *The Code of the West: What Barack Obama Can Learn from Bill Ritter*, NEW YORKER, Sept. 1, 2008, at 62, 64.

17 Measure 37 § 1 (Or. 2004) (codified as amended at OR. REV. STAT. ANN. § 195.305 (West 2007 & Supp. 2008)).

18 545 U.S. 469 (2005).

19 See *id.* at 484.

20 See *id.* at 489.

21 See, e.g., Marcilynn A. Burke, *Much Ado About Nothing: Kelo v. City of New London, Babbitt v. Sweet Home, and Other Tales from the Supreme Court*, 75 U. CIN. L. REV. 663, 691–702 (2006) (arguing that much of the legislative response was symbolic); Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 MINN. L. REV. (forthcoming June 2009) (manuscript at 3), available at http://ssrn.com/abstract_id=976298 (arguing that “widespread political ignorance . . . enables state and federal legislators to pass off primarily cosmetic laws as meaningful ‘reforms’” and offering “a tentative explanation for the seeming paucity of effective reform laws”). But see Andrew P. Morriss, *Symbol or Substance? An Empirical Assessment of State Responses to Kelo*, 17 SUP. CT. ECON. REV. (forthcoming June 2009) (manuscript at 20–22), available at <http://ssrn.com/abstract=1113582> (arguing that some states did adopt substantive reforms when the costs of restricting the use of eminent domain, in terms of revenue and spending, was not prohibitive).

22 Measure 49 § 195.300 (Or. 2007) (codified at OR. REV. STAT. ANN. §§ 93.040, 195.300, 197.352 (West 2002 & Supp. 2008)).

23 In several states, including Missouri and Oklahoma, the initiatives did not make it onto the ballot. In Missouri, the Secretary of State rejected the ballot measure because she could not validate the signatures on the petition due to insufficient recordkeeping. See Jim Davis, *Carnahan Rejects Petitions on Eminent Domain*, KAN. CITY BUS. J., May 26, 2006, <http://kansascity.bizjournals.com/kansascity/stories/2006/05/22/daily30.html>. The Oklahoma Supreme Court held that the “Protect Our Homes

from one private party to another through eminent domain (*Kelo* initiatives). Others tried to go further and restrict state and local governments' ability to regulate property by defining many regulatory actions as takings (*Kelo*-plus initiatives).

The negative public reaction to *Kelo*, the varied responses of state legislatures to the case, and the passage of Measure 37 whipped up a "perfect storm" for private property rights advocates' efforts to regulate land use through ballot initiatives. In their attempts to persuade, campaigns championing private property rights often emphasize the basic fairness of the propositions, which is appealing to the electorate. Yet, the voters are often ill-equipped to appreciate the full ramifications of these measures.²⁴

Elected officials also may try to manipulate the voters. Politicians play a partisan role and try to "educate" citizens to their points of view. For example, Governor of Alaska and 2008 Republican nominee for Vice President, Sarah Palin, recently opposed two state environmental ballot initiatives.²⁵ Ballot Measure 2 would have prohibited aerial shooting of bears and wolves, and Ballot Measure 4 would have pro-

Initiative" was unconstitutional because it addressed more than one public policy issue: eminent domain and regulatory takings. See *In re Initiative Petition No. 382*, State Question No. 729, 142 P.3d 400, 408 (Okla. 2006). In Colorado, the sponsor of the initiative withdrew it as part of a political compromise. See Am. Planning Ass'n, Regulatory Takings Ballot Measures Across America: Attack of the Measure 37 Clones, (Feb. 17, 2009) <http://myapa.planning.org/legislation/measure37>. Consequently, the legislature enacted an eminent domain measure in its stead. See COLO. REV. STAT. ANN. § 38-1-101 (West 2007). The Montana Supreme Court invalidated the "Protect Our Homes" initiative, I-154, because it determined that the process of gathering signatures for the petition was fraudulent. See *Montanans for Justice v. State*, 146 P.3d 759, 777 (Mont. 2006). The court's ruling, however, came late in October 2006 after election officials had printed the ballots. Thus, the court ordered the officials not to count the votes "to the extent that this is technically feasible. If the votes must be counted, they will have no force or effect." *Id.* at 778.

24 As Patricia Salkin and Amy Lavine observed,

[T]he combined effect of *Kelo* and Measure 37's success has been to create a legal and emotional backdrop ripe for the propagation of regulatory takings initiatives. Ballot measures provide a nonpartisan forum where proponents can characterize their measures in as positive a light as possible, excise the deliberation of elected officials, and voters rarely live up to the expectation that they will educate themselves as to the full import of ballot proposals. . . .

The overall result is that regulatory takings laws are presented to an electorate unequipped with the legal education or motivation to truly understand them amid a barrage of positive depictions.

Patricia E. Salkin & Amy Lavine, *Measure 37 and a Spoonful of Kelo: A Recipe for Property Rights Activists at the Ballot Box*, 38 URB. LAW. 1065, 1070 (2006) (footnotes omitted).

25 See Jason Lamb, "Governor's Hat" Off, *Palin Blasts Clean Water Initiative*, KTUU, Aug. 22, 2008, <http://www.ktuu.com/Global/story.asp?S=8885438>.

tected the state's waters from pollution from heavy-metals mining.²⁶ A public interest group supporting Measure 2 filed a complaint with the Alaska Public Offices Commission (APOC), charging that Palin's administration distributed propaganda in an illegal attempt to influence the voters to vote against the measure.²⁷ One week later, Governor Palin spoke out against Ballot Measure 4. Critics charged that it was unethical for the Governor, even in her personal capacity, to express an opinion on the initiative.²⁸ The supporters of Measure 4 also filed a complaint with the APOC about the state's website. They argued that the site's content, posted just one week before the election, was unlawfully biased.²⁹ The APOC agreed that the site was neither fair nor neutral. It ordered the state to remove the content.³⁰

In view of this tidal wave of activity, this Article analyzes the growth of citizen-led initiatives³¹ in land use law in three areas: (1) private property rights (for example, eminent domain and regulatory takings); (2) traditional land use (for example, zoning and other development controls); and (3) environmental law (for example, pollution control and land conservation).

The Article reaches two normative conclusions. First, the use of initiatives to decide land use questions produces a deliberative failure. When confronted with initiatives, voters are unlikely to deliberate and are subject to manipulation.³² Even when deliberation occurs in this large group context, it is unlikely to increase social welfare, particularly when media campaigns, peppered with "anecdota,"³³ bombard and influence the voters. Ballot initiatives have been "discredited by

26 *Id.*

27 See Mary Pemberton, *Fight over Ballot Measure 2 Heats Up*, ANCHORAGE DAILY NEWS, Aug. 15, 2008, at A5.

28 See Posting of Kate Sheppard to Gristmill, <http://gristmill.grist.org/story/2008/8/30/20129/1935/> (Aug. 31, 2008, 16:33 EST). "Polls before her statement showed voters strongly in favor of the measure, but in the end nearly 60 percent of the public voted against it." *Id.*

29 See Elizabeth Bluemink, *Foes of Mining Measure Still Flush: Backlash: Palin Draws Criticism from the Vote Yes Side*, ANCHORAGE DAILY NEWS, Aug. 22, 2008, at A1, available at <http://www.adn.com/money/industries/mining/story/501779.html>.

30 See *id.*

31 This Article focuses on citizen-led ballot measures as opposed to those that originate in state legislatures and local decisionmaking bodies and are presented to the voters for approval as initiatives or referenda.

32 See Cass R. Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1785 (1995) ("[D]irect democracy is unlikely to provide successful governance, for it is too likely to be free from deliberation and unduly subject to short-time reactions and sheer manipulation.").

33 Anecdota are "these horror stories over which we try to construct theories about how something is or is not working." Justin Hughes, *Legal Pressures in Intellectual*

over-use and routinization” in states such as California where voters face multiple complex initiatives in every election.³⁴ The voters are “rationally ignorant”³⁵ and because they “hardly have the time or energy to sort out the implications of these proposals, the outcome has often been determined by misleading advertising campaigns and the capacity of special interests to mobilize their small armies of true believers.”³⁶ Moreover, if individuals are gravitating toward bad decisions, group deliberation only amplifies this tendency to err.³⁷

Second, the use of ballot initiatives to adopt land use regulation produces a planning failure. Successful land use planning requires technical expertise and long-term vision to advance the public interest, while protecting the rights of disadvantaged social groups. Ballot initiatives by their nature are limited in scope and interest-group centric. Even when initiatives attempt to provide for environmental goods such as the preservation of natural lands,³⁸ these two failures persist.

Unlike previous scholarship in this area,³⁹ this Article dissects initiatives on multiple levels. Its critique differentiates among broad policy decisions and site-specific ones, as well as statewide initiatives and local measures to reframe the issues that we have not comprehended fully in the land use context. Part I begins by placing ballot initiatives in the United States in historical context, as well as reviewing their modern usages. Following that brief historical discussion, Part II explores more specifically how ballot initiatives in the land use context fail to produce qualitatively and quantitatively adequate deliberative levels. That Part also examines the ways in which ballot initiatives

Property Law, in *THE ROLE OF SCIENTIFIC AND TECHNICAL DATA AND INFORMATION IN THE PUBLIC DOMAIN* 95, 97 (Julie M. Esanu & Paul F. Uhlir eds., 2003).

34 Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 666 (2000).

35 Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1294 (2004).

36 See Ackerman, *supra* note 34, at 666; see also Marcilynn A. Burke, *Klamath Farmers and Cappuccino Cowboys: The Rhetoric of the Endangered Species Act and Why It (Still) Matters*, 14 DUKE ENVTL. L. & POL'Y F. 443, 454–62 (2004) (analyzing the rhetoric of private property rights advocates).

37 See David Schkade et al., *What Happened on Deliberation Day?*, 95 CAL. L. REV. 915, 936 (2007) (“When individuals are leaning in a direction that is mistaken, the mistake will be amplified by group deliberation.”).

38 See *infra* Part III.C.2 (discussing Arizona’s Propositions 105 and 106 on state trust lands).

39 See, e.g., Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988) (examining ballot initiatives); Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293 (2002) (also examining local ballot initiatives).

may circumvent rational land use planning, leading to regulations that are neither efficient nor ethical. Part III analyzes several examples of these failures in three areas of land use law at the state and local levels. Despite the hazards associated with ballot initiatives in land use law, the Article acknowledges that they are a facet of democracy. Accordingly, Part IV suggests some mitigating measures to ameliorate their impact on land use law and policy.

I. THE DEVELOPMENT OF BALLOT INITIATIVES IN THE UNITED STATES

This Part will review briefly the development of ballot initiatives in this country. It begins with an exploration of the ideological origins and the pioneers' early efforts. A review of the modern usage of ballot initiatives and the continuing debate on their usefulness follows.

A. *Ideological Origins*

Direct democracy—in the form of initiatives, referenda, and recalls (together “plebiscites”)—as we experience it today developed out of the Populist and Progressive movements in the late nineteenth and early twentieth centuries.⁴⁰ These movements were influenced by some American journalists who observed the Swiss use of plebiscites in the 1800s and began to advocate their use in the United States.⁴¹ One such journalist, J.W. Sullivan, believed that direct democracy would have curative powers over the problems associated with representative democracy in this country. It would be an appropriate salve because

40 See DAVID B. MAGLEBY, *DIRECT LEGISLATION* 20–25 (1984); Todd DONOVAN & Shaun BOWLER, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS* 1, 1–3 (Shaun Bowler et al. eds., 1998).

41 See STEVEN L. PIOTT, *GIVING VOTERS A VOICE* 3–9 (2003) (describing the Swiss reforms' impact on some of the most influential American advocates of direct democracy such as J.W. Sullivan and Eltwed Pomeroy); see also J.W. SULLIVAN, *DIRECT LEGISLATION BY THE CITIZENSHIP THROUGH THE INITIATIVE AND REFERENDUM* (New York, True Nationalist Publ'g Co. 1893) (reviewing direct democracy in Switzerland and then describing its past uses in the United States and its possibilities for the future); Eltwed Pomeroy, *The Direct Legislation Movement and Its Leaders*, 16 *ARENA* 29, 29, 43 (1896) (surveying the growth of the direct democracy movement from Switzerland, where it had been “developed and firmly rooted,” to the United States where “the inner desire for power in the hands of the people themselves is coexistent with the founding of our social system, and has grown with its growth, and the disgust with the legislative action and inaction has been becoming more intense during a quarter of a century”).

"[d]irect legislation . . . stood firmly rooted in the American tradition of town meetings and the constitutional amendment process."⁴²

The Populists and Progressives proposed direct democracy as a reform to combat the capture of state and local government officials by narrow, special interest groups.⁴³ They believed that the citizens were capable of governing themselves and that direct democracy was superior to representative government.⁴⁴ "Initiatives are freer from special interest domination than the legislative branches of most states, and so provide a desirable safeguard that can be called into use when legislators are corrupt, irresponsible, or dominated by privileged special interests."⁴⁵ One noted political scientist described the initiative "as a device to correct legislative sins of omission."⁴⁶ Sullivan believed that direct democracy "would precipitate peaceful political revolution."⁴⁷

B. Early Development

In 1898, South Dakota became the first state to allow its citizens to vote in initiatives and referenda.⁴⁸ Four-fifths of the states that have authorized the use of ballot initiatives are west of the Mississippi River. "This geographically differentiated pattern can be explained primarily

42 PIOTT, *supra* note 41, at 5. *But see* Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 432 (1998) ("It would be useful to explode one myth—that direct democracy today is somehow analogous to the old New England-style town meeting."); Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 UCLA L. REV. 1735, 1744 (1998) ("[V]otes on ballot measures are cast in isolation, in carefully guarded privacy, and without obligation to hear anyone else or explain one's vote to anyone—in short, in a carefully constructed antithesis to the public process of making collective public decisions in the public interest and in antithesis, also, to the New England town meetings that are falsely held up as models for modern plebiscites.").

43 *See* PIOTT, *supra* note 41, at 1–15; JOSEPH F. ZIMMERMAN, PARTICIPATORY DEMOCRACY 69 (1986); DONOVAN & BOWLER, *supra* note 40, at 2.

44 *See* JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT? 28–33 (2001); MAGLEBY, *supra* note 40, at 21.

45 CRONIN, *supra* note 13, at 11. *Contra* THOMAS GOEBEL, A GOVERNMENT BY THE PEOPLE 198 (2002) ("As a tool to create a government able to withstand the influence of corporate interests, it has been a conspicuous failure.").

46 GEORGE S. BLAIR, AMERICAN LEGISLATURES 392 (1967).

47 PIOTT, *supra* note 41, at 6. Others have reasoned that "[t]he direct citizen's initiative would be the 'gun behind the door' that would force state legislatures to be responsive to the public's will. Taking this western metaphor further, advocates argued that insulated legislatures needed the 'spur in the flanks' of the initiative" DONOVAN & BOWLER, *supra* note 40, at 2.

48 PIOTT, *supra* note 41, at 16.

by the specific political opportunity structure in place in the western United States and the stronger antimonopoly sentiments there. The region was marked by weaker political parties, greater shifts in voting behavior, a stronger anti-party spirit, and more effective nonpartisan movements.⁴⁹ Reformers, though lacking in resources, “were able to exploit factional divisions inside the major parties” and move direct democracy onto political agendas.⁵⁰ In the East, by contrast, political parties were stronger and able to resist the reforms, and the dominance of the Democratic Party in the South was able to keep the focus on white supremacy rather than democratic reform.⁵¹

C. *The Continuing Debate*

There are many claims today about ballot initiatives’ ability to educate voters, stimulate voter turnout, and engage the citizenry, for example.⁵² Proponents of direct democracy make similar claims about referenda. A referendum, as opposed to a ballot initiative, occurs after a local elected body adopts or proposes new law.⁵³ The citizens are then given the opportunity through the referendum to approve or reject the new provision.⁵⁴ One of the most prominent cases involving a referendum was *City of Eastlake v. Forest City Enterprises*⁵⁵ in which the City Council of Eastlake, Ohio, approved a request to reclassify or rezone the landowner/respondent’s property. The question before the U.S. Supreme Court was whether the referendum constituted an unlawful delegation of legislative authority from the City Council to the voters. The Court reasoned that it could not characterize the referendum as a delegation of power because “[i]n establishing legislative bodies, the people can reserve to themselves

49 GOEBEL, *supra* note 45, at 5; see also DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 10–14* (1989) (offering three reasons for the concentration in the west of states permitting direct initiatives); Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11 (1997) (discussing the development of plebiscites, particularly in the western states, and their impact on the nation as a whole).

50 GOEBEL, *supra* note 45, at 5.

51 *Id.* at 5–6.

52 E.g., DANIEL A. SMITH & CAROLINE J. TOLBERT, *EDUCATED BY INITIATIVE 141–43* (2004). See generally Daniel A. Smith et al., *The Educative Effects of Direct Democracy: A Research Primer for Legal Scholars*, 78 U. COLO. L. REV. 1371 (2007) (providing a survey of legal and nonlegal research as well as new empirical evidence on direct democracy).

53 42 AM. JUR. 2d *Initiative & Referendum* § 1 (2008).

54 *Id.*

55 426 U.S. 668 (1976).

power to deal directly with matters which might otherwise be assigned to the legislature."⁵⁶ Furthermore, in Ohio's constitution the people "specifically reserved the power of referendum to the people of each municipality within the State."⁵⁷ Accordingly, the Court upheld the referendum.

In the three decades since that decision, many scholars have analyzed the Court's reasoning in *Eastlake* and the use of referenda to make land use law, particularly zoning decisions.⁵⁸ For instance, commentators have argued that though the referendum may be constitutional, it also may impede zoning and comprehensive planning. Ronald Rosenberg studied referenda over a twenty-year period in another Ohio municipality, Cuyahoga County, and concluded that the Supreme Court's support of the use of referenda as expressed in *Eastlake* "reflects an unrealistic view of local government affairs and the value of local democratic expression."⁵⁹ He found that the use of referenda in this context presents three primary difficulties. First, it "limits public debate on complex public issues . . . and decentralizes public responsibility for important decisionmaking."⁶⁰ Moreover, he argues that there are less drastic ways of controlling local elected officials, with the most direct method being removal of undesirable ones through the next regularly scheduled election.⁶¹ Finally, Rosenberg argues that the referendum "reduces the incentive for thorough project evaluation" by city planners and planning commissioners by circumventing a system that draws upon planning expertise.⁶²

Though some of the analysis of the use of referenda to make land use law applies with equal force to the use of ballot initiatives, some problems may be more acute with ballot initiatives and there are

56 *Id.* at 672.

57 *Id.* at 673.

58 See, e.g., David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53 (1991); L. Lynn Hogue, *Eastlake and Arlington Heights: New Hurdles in Regulating Urban Land Use?*, 28 CASE W. RES. L. REV. 41 (1977); James R. Kahn, *In Accordance with a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011 (1979); Aaron J. Reber & Karin Mika, *Democratic Excess in the Use of Zoning Referenda*, 29 URB. LAW. 277 (1997); Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381 (1983); Lawrence Gene Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978); Selmi, *supra* note 39; Jonathan S. Paris, Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819 (1977).

59 Rosenberg, *supra* note 58, at 431.

60 *Id.* at 432-33.

61 See *id.* at 433.

62 *Id.*

important ways in which ballot initiatives and referenda diverge. For clarity of analysis, this Article singularly focuses upon ballot initiatives. The following discussion surveys the general arguments for and against ballot initiatives, and then the Article turns to the two primary failures of initiatives that are the focus of this analysis.

1. Support for the Use of Ballot Initiatives

Arguments in favor of the citizen-led initiative include that it is a means of popular control, essential to democracy, through which the citizens may make law directly when elected officials fail to do so.⁶³ The initiative also is believed to improve representative government by neutralizing the “undue influence of special interest groups”⁶⁴ and placing “pressure on legislators to be representative of the citizenry”⁶⁵ instead. It provides “an additional point of access” for “broad-based popular groups” and not just for narrow, special interests.⁶⁶

Today, the impetus for the increasing use of plebiscites—just as during the Populist and Progressive eras—germinates from impatience with and distrust of elected officials.⁶⁷ “One expression of that disdain has been the term-limits movement, which swept across the country during the last two decades, usually implemented by the mechanism of the initiative campaign.”⁶⁸ Another argument is that initiatives are necessary because for whatever reason, political survival or expediency or inability to determine the people’s will, legislators

63 See, e.g., HARLAN HAHN & SHELDON KAMIENIECKI, REFERENDUM VOTING 16–17 (1987); ZIMMERMAN, *supra* note 43, at 90; JOSEPH F. ZIMMERMAN, THE REFERENDUM 233–34 (2001).

64 ZIMMERMAN, *supra* note 63, at 234; see also HAHN & KAMIENIECKI, *supra* note 63, at 17 (“The referendum was seen as a way to eliminate the political corruption, include citizens in policymaking, and achieve genuine democracy.”).

65 ZIMMERMAN, *supra* note 43, at 90.

66 DONOVAN & BOWLER, *supra* note 40, at 3.

67 See DAVID S. BRODER, DEMOCRACY DERAILED 2–3 (2000) (“[P]ublic impatience with ‘the system’ has grown. . . . The trust between governors and governed, on which representative democracy depends, has been badly depleted.”). Conversely, early advocates of the use of plebiscites in the United States were impressed with the records of Swiss legislators who worked in the shadow of plebiscites.

During the last quarter of a century there has hardly been a single charge of corruption against a member of the Swiss National Council. What other country can show such a result? It has produced a set of lawmakers who are elected year after year, even by voters some of whom are directly opposed to their opinions. But they know that these men are experienced in drafting laws, and that, if at any time they pass a law which the people do not want, the people can defeat it.

Eltweed Pomeroy, *Direct Legislation Defended*, 6 INT’L J. ETHICS 509, 513 (1896).

68 BRODER, *supra* note 67, at 21.

avoid making difficult decisions.⁶⁹ Supporters of direct democracy also claim that opponents have idealized notions of the legislative process and exaggerated claims about the harms that may result when citizens directly decide policy matters.⁷⁰

There are also a number of longstanding reasons in political and legal theory for favoring plebiscites. Many advocates stress the educative value of plebiscites, that is, their "capacity to produce a more informed, hence more self-sufficient, citizenry."⁷¹ More specifically, one study has found "that it is voting on initiatives, rather than merely living in a state that allows them, that creates the increases in political knowledge."⁷² Perhaps an even loftier social objective is that participation in direct democracy "will create a communitarian atmosphere in which decisions transcend individual interests and reflect instead the interdependence of those who constitute the community."⁷³

69 See, e.g., CRONIN, *supra* note 13, at 11 ("[C]itizen initiatives are needed because legislators often evade the tough issues.").

70 As one commentator has observed,

Critics of the system have long declared that direct legislation would rob the state legislator of his dignity and destroy his sense of responsibility to the people. He would become a mere automaton and the important work of legislation would be carried on at the polls. Needless to say no such complete emasculation of state law-making bodies has anywhere occurred.

Cushman, *supra* note 13, at 533; see also Clayton P. Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609, 628–31 (1998) (arguing that deliberation in representative democracy is not necessarily better than in direct democracy).

71 Gillette, *supra* note 39, at 930; see also CRONIN, *supra* note 13, at 11 ("The initiative and referendum will produce open, educational debate on critical issues that otherwise might be inadequately discussed."); Pomeroy, *supra* note 67, at 513 ("This system makes the people take an interest in policies and principles, instead of in the history of parties and the *personnel* of candidates. This is highly educational.").

72 Mark A. Smith, *Ballot Initiatives and the Democratic Citizen*, 64 J. POL. 892, 900 (2002). In his 2002 study, political scientist Mark Smith of the University of Washington tested two hypotheses with respect to use of initiatives and political knowledge of citizens. See *id.* at 894. His first hypothesis was that heavy, sustained use of initiatives increases political knowledge but that no one election produces significant effects, and his second hypothesis was that voters, but not nonvoters, in states using initiatives, increase their political knowledge. See *id.* Controlling for other variables that could determine levels of political knowledge, Smith's results supported both hypotheses. See *id.* at 898–900.

73 Gillette, *supra* note 39, at 931; see also BENJAMIN R. BARBER, *STRONG DEMOCRACY* 197–98 (1984) (discussing "the development of a citizenry capable of genuinely public thinking and political judgment and thus able to envision a common future in terms of genuinely common goods"). Others argue to the contrary, however, that direct democracy is a means to accomplish selfish ends.

Schrag makes a persuasive argument that the initiative is not conducive to wise decisionmaking, but he also suggests a subtle and potentially more troubling point. The plebiscite may bring out not only the fool in each of

Another analysis found that “exposure to direct democracy increases favorable opinions about representative government, but very high use of the process decreases confidence in state government.”⁷⁴

Another claim is that direct democracy increases voter interest and election-day turnout.⁷⁵ Reviewing general elections from 1972 until 1996, one study found a positive relationship between the salience of initiatives and referenda and voter turnout.⁷⁶ The effect was found to be stronger in off-year elections than in presidential elections.⁷⁷

Beyond extolling the direct impacts of initiatives, supporters also tout the indirect results. Legislators feel the pressure to legislate on issues of popular concern for fear that the people will do so themselves.⁷⁸ Thus, proponents are able to use “one policy-making mechanism (i.e., the initiative process) to bring about an effect on policy . . . in another policy-making arena (i.e., the legislative process).”⁷⁹

2. Criticisms of the Use of Ballot Initiatives

To begin where the Progressives and Populists began, one modern critique of the initiative is that even if initiatives originally gave a

us, but the knave as well. Direct democracy is often lauded on communitarian grounds as a method of recalling people to their status and duty as citizens. It seems, however, that forcing voters to focus on issues one-at-a-time, and in isolation, leads to decisionmaking which is not only short-sighted but selfish, or worse.

Sherman J. Clark, *Direct Democracy in America*, 97 MICH. L. REV. 1560, 1575 (1999) (reviewing PETER SCHRAG, *PARADISE LOST* (1998)); see also Sherman J. Clark, *The Character of Direct Democracy*, 13 J. CONTEMP. LEGAL ISSUES 341, 352 (2004) (arguing that direct democracy may engender a narrow and selfish view of oneself as a citizen).

74 Smith et al., *supra* note 52, at 1393.

75 See, e.g., CRONIN, *supra* note 13, at 11; HAHN & KAMIENIECKI, *supra* note 63, at 18; SCHMIDT, *supra* note 49, at 26–27.

76 Mark A. Smith, *The Contingent Effects of Ballot Initiatives and Candidate Races on Turnout*, 45 AM. J. POL. SCI. 700, 700 (2001).

77 *Id.* at 702.

78 Eltwed Pomeroy wrote that

Desirable laws are not smothered, but are brought up for discussion and adoption because of the fear of an Initiative petition. . . . The Initiative and Referendum have produced far more than the direct results seen in the defeat or enactment of certain laws. They have produced lawmaking bodies which strive to get at and enact the will of the people

Pomeroy, *supra* note 67, at 513; see also Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of Initiatives: Two Forms of Indirect Influence*, in CITIZENS AS LEGISLATORS, *supra* note 40, at 191 (arguing that although initiatives have a low passage rate, they may be cost-effective means of indirectly influencing state legislatures).

79 Gerber, *supra* note 78, at 193.

voice to broad-based groups rather than special interest groups, “[a]n ‘initiative industry’ has evolved, seemingly supplanting the original ideal.”⁸⁰ It is not uncommon for proponents to spend in excess of \$1 million. One key contributor to the property rights initiatives is Americans for Limited Government, headed by New York real estate investor and Libertarian, Howard Rich.⁸¹ For Washington’s regulatory takings initiative, I-933, Rich’s group contributed a total of \$260,000 of the \$1.2 million that the coalition of supporters spent, for example.⁸² Thus:

What began as tools for the majority to liberate its democratic institutions from the clutches of a few powerful corporations has evolved into a bludgeon used by interest groups to thwart the legislative process. These devices entered prominence when “minorities” claiming “rights” meant railroad interests trying to obstruct the “general will” through protection of their property. The relevant minorities and meaning of “rights” have changed in the present era, however, as the full force of a capricious and ill-defined general will is brought to bear on racial and other minorities. With rallying cries such as “Save our State,” “Three Strikes and You’re Out,” or “The California Civil Rights Initiative,” interest groups in Western states have used the initiative process both to wound the most defenseless political groups in their states and to reorganize priorities on the national agenda.⁸³

Although the amount of money spent does not guarantee passage of any given initiative, it certainly structures the terms upon which the voters consider it. The axiom is “‘that big money can defeat an initia-

80 Donovan & Bowler, *supra* note 40, at 12; *see also* John Marelius, *Voters Savvy Enough to Negotiate Ballot Maze, Experts Say*, SAN DIEGO UNION-TRIB., Oct. 4, 2005, at A1, available at http://www.signonsandiego.com/uniontrib/20051004/news_1n4props.html (“Even if citizens haven’t been frozen out of the initiative process, they’ve almost certainly been marginalized.”).

81 *See* Press Release, Ctr. for Public Integrity, Tax-Exempt Group Backing ‘Takings’ Initiatives Operated Illegally (Oct. 25, 2006), available at <http://projects.publicintegrity.org/about/release.aspx?aid=74> (reporting that Americans for Limited Government contributed \$260,000 to the Property Fairness Coalition in connection with the Washington initiative); Public Citizen, Selected Affiliations of Howard Rich, http://www.stealthpacs.org/agent.cfm?agent_id=445 (last visited Mar. 29, 2009) (confirming Rich’s involvement in Americans for Limited Government).

82 *See* Ctr. For Public Integrity, *supra* note 80; *see also* Wash. Pub. Disclosure Comm’n, Statewide Ballot Initiatives, <http://www.pdc.wa.gov/QuerySystem/Default.aspx> (follow “Statewide Ballot Initiatives” hyperlink; then select “2006” as Election Year and “Property Fairness Coalition” as Committee Name) (last visited Mar. 29, 2009) (reporting expenditures totaling \$1.2 million).

83 Persily, *supra* note 49, at 40–41.

tive, but big money cannot pass one.’”⁸⁴ One way in which money plays a role today is that proponents of most statewide initiatives hire professional signature gatherers, often spending hundreds of thousands of dollars.⁸⁵ The signature gatherers are usually paid on a per-signature basis. Thus, the temptation to secure signatures by any means necessary may be difficult to resist.⁸⁶ As Derrick Bell explains, “[w]ith so much at stake it is not surprising to find direct voting procedures criticized for phrasing proposals deceptively, for abusing the signature gathering process, especially by professional signature gathering organizations, and for political sloganeering intended to obscure and confuse public discussion.”⁸⁷

Furthermore, no critique of direct democracy would be complete without reference to James Madison’s writings in the *Federalist Papers*. In *Federalist No. 10*, Madison warned of the “mischiefs of faction” or the will of an unchecked minority or majority.⁸⁸ He concluded that direct “democracies have ever been spectacles of turbulence and contention; *have ever been found incompatible with personal security or the rights of property*; and have in general been as short in their lives as they have been violent in their deaths.”⁸⁹ Hence, he advised that the new form of government should prevent majority factions from being able “to sacrifice to its ruling passion or interest both the public good and the rights of other citizens.”⁹⁰ Moreover, in *Federalist No. 51*, Madison declared that “[i]f a majority be united by a common interest, the rights of the minority will be insecure.”⁹¹ Of particular relevance to private property rights initiatives today, Madison continued, “[T]here are particular moments in public affairs when the people, stimulated

84 BRODER, *supra* note 67, at 86 (quoting Ken Masterton, Owner, Masterton & Wright Management Consulting Firm).

85 For example, Montanans for Justice spent \$633,000 for out-of-state signature gatherers. *Montanans for Justice v. State*, 146 P.3d 759, 764 (Mont. 2006).

86 The Montana Supreme Court upheld the district court’s ruling invalidating the signatures for the state’s *Kelo-plus* initiative, finding that the signatures “were obtained in a manner that did not comply with Montana statutes and were tainted by or associated with deceptive practices and misrepresentation.” *Id.* at 777. One key finding of fact was that five of the forty-three signature gatherers, who were paid on a per-signature basis, obtained more than half of the signatures from “far-flung areas of the state.” *Id.* at 771. Thus, the court concluded that those five signature gatherers could not have “circulated or assisted in circulating the petition” as they attested and as required by state law. *Id.* at 771 (quoting MONT. CODE ANN. § 13-27-302 (2005)); *id.* at 770–72.

87 Bell, *supra* note 2, at 20.

88 THE FEDERALIST NO. 10, at 78 (James Madison) (Clinton Rossiter ed., 1961).

89 *Id.* at 81 (emphasis added).

90 *Id.* at 80.

91 THE FEDERALIST NO. 51 (James Madison), *supra* note 88, at 323.

by some irregular passion, or some illicit advantage, or misled by the artful representations of interested men, may call for measures which they themselves will afterwards be the most ready to lament . . . ”⁹²

Arguably, Madison's conception of representative government and direct democracy applied to state and federal legislatures rather than locally elected bodies because locally elected bodies themselves can operate much like factions.⁹³ And perhaps not only does the size of the constituency matter but also the size or scale of the object of the decisionmaking process.⁹⁴ Decisions that are small-scale, piecemeal, or regarding individual parcels may be more suspect than those regarding “large-scale projects [which] have certain characteristics that tend to assure a relatively open process of local decisionmaking, and that therefore make them less subject to procedural criticism.”⁹⁵ Yet, these differences between legislatures and the “Hicksville Town Council”⁹⁶ do not militate necessarily in favor of direct democracy. As

92 THE FEDERALIST NO. 63 (James Madison), *supra* note 88, at 384. Madison then asks, “In these critical moments, how salutary will be the interference of some temperate and respectable body of citizens, in order to check the misguided career and to suspend the blow meditated by the people against themselves, until reason, justice, and truth can regain their authority over the public mind?” *Id.*

93 See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 855 (1983) (“A legislative body drawn from too small or too homogeneous a constituency may be dominated by a single interest or faction.”). A distinction may also be made between large, sophisticated municipalities and smaller, less sophisticated ones.

94 *Id.* at 856 (“However much or little local governments may structurally resemble the *Federalist* legislature in general, they are very unlikely to be restrained by the *Federalist* safeguards in making specific piecemeal land decisions.”).

95 Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1156 (1985).

96 In regard to takings jurisprudence, Carol Rose argues that courts could rather easily take into account the differences between levels of government, noting that “[u]ndoubtedly, some fiddles would have to be made to account for the state legislatures, which seem rather closer in size and character to Congress than to the Hicksville Town Council.” Carol M. Rose, *What Federalism Tells Us About Takings Jurisprudence*, 54 UCLA L. REV. 1681, 1693 (2007). But Rose does not appear to argue in favor of never treating local bodies like legislatures.

[I]n local government law, some state courts have pursued Madisonian doubts by effectively denying that local legislatures really are legislatures for some purposes, especially when they make small-scale land use decisions. These decisions then require local legislatures to jump through some extra decisionmaking hoops based on judicial process. These requirements, in my view, fit only very awkwardly with the actual processes of fair local decisionmaking.

Id. at 1694 (footnote omitted).

discussed in Part III.B of this Article, local governments have other constraints that limit potential abuses of private property rights.

The ballot initiative process also fails to capture the deliberative aspects of representative government⁹⁷ that admittedly may vary based upon the size and sophistication of the local decisionmaking body and the scale of the issue at hand. Part of the deliberation that is absent from the context of ballot initiatives includes “legislative logrolling.”⁹⁸ With ballot initiatives voters are unable to account for both their priorities and their preferences, largely because they are limited to single issues.⁹⁹

Voters also are limited to either a “yes” or “no” vote. The initiative can be a blunt, and thus inefficient, instrument for solving rather intricate problems. Conversely, elected representatives may take into account both variables and make deals for votes, trading off less important issues for ones of greater concern.¹⁰⁰ Moreover, scholars have noted that the legislative process “allow[s] minorities to engage in coalition building through logrolling and thus secure outcomes on particular high-priority issues.”¹⁰¹

[P]lebiscites, on the other hand, are one-shot, winner-take-all. The coalition process does not work in the sporadic and unwieldy world of citizen lawmaking. As Frank Michelman notes, you can’t dicker with an electorate for support now in exchange for your support on something else later. Majoritarian preferences cannot be softened or diluted by political compromise.¹⁰²

Further explaining this public choice argument against ballot initiatives, Michelman warns that the initiative process suspends “[t]he

97 See HAHN & KAMIENIECKI, *supra* note 63, at 21.

98 Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 456 (1998).

99 *Id.* at 456, 467.

100 This criticism is not to suggest that elected officials always account for the variables perfectly.

While politicians inevitably are imperfect in their calculations about intensity, voters are unlikely to make such judgments at all, particularly when their views are channeled through the referendum process. Nor are they likely to be disposed or able to make calculations about the possible ways in which a policy which they desire might detract from other of their preferences—such as for civil peace.

Raymond E. Wolfinger & Fred I. Greenstein, *The Repeal of Fair Housing in California: An Analysis of Referendum Voting*, 62 AM. POL. SCI. REV. 753, 769 (1968).

101 Clark, *supra* note 98, at 457.

102 Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1556 (1990) (citing Frank I. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 182 (1977–1978)).

transactional assurance—the assurance from log-rolling—of broadly distributed long-run net benefits from public action.”¹⁰³

A panel of the U.S. Court of Appeals for the Ninth Circuit also has expressed its concerns about initiatives and referenda as means of policymaking.

[D]irect ballot measures lack the kinds of critical, deliberative filters that the Framers contemplated and that, to some extent, the Constitution created as prerequisites to the passing of legislation. Before an initiative becomes law, no committee meetings are held; no legislative analysts study the law; no floor debates occur; no separate representative bodies vote on the bill; no reconciliation conferences are held; no amendments are drafted; no executive official wields a veto power and reviews the law under that authority; and it is far more difficult for the people to “reconvene” to amend or clarify the law if a court interprets it contrary to the voters’ intent. The public also generally lacks legal or legislative expertise—or even a duty (as legislators have under Article VI) to support the Constitution. It lacks the ability to collect and to study information that is utilized routinely by legislative bodies.¹⁰⁴

What is more, initiatives also have been said to impact negatively the rights of minority groups.¹⁰⁵ “In the context of affirmative action in particular, there is a danger that referendum outcomes will not be based on a careful assessment of facts and values, but instead on crude

103 Michelman, *supra* note 102, at 182.

104 *Jones v. Bates*, 127 F.3d 839, 859–60 (9th Cir. 1997), *rev'd en banc*, 131 F.3d 843 (9th Cir. 1997) (footnotes omitted).

105 Compare BRODER, *supra* note 67, at 219 (citing “English as the ‘official language’” measures as evidence that “in a pluralistic society, a majoritarian instrument like the initiative can often be wielded to the disadvantage of minority groups”), DAVID BUTLER & AUSTIN RANNEY, *REFERENDUMS* 36 (1978) (“It is no accident . . . that in many American states in recent years the legislatures have tended to adopt laws prohibiting discrimination against blacks and women, while referendums have tended to overturn them.”), Bell, *supra* note 2, at 23 (urging that courts should review with heightened scrutiny ballot initiatives on civil rights), and Clark, *supra* note 98, at 456 (arguing that legislative processes, unlike plebiscite voting, may protect minority groups), with Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *CHI.-KENT L. REV.* 707, 709–11 (1991) (disputing the argument that representative lawmaking processes rather than direct lawmaking processes better serve minorities), and Richard Briffault, *Distrust of Democracy*, 63 *TEX. L. REV.* 1347, 1364–67 (1985) (reviewing DAVID B. MAGLEBY, *DIRECT LEGISLATION* (1984) and challenging Magleby’s argument that legislatures are more sensitive to minorities than the initiative process).

'we-they' thinking."¹⁰⁶ Evidence also suggests that low-income residents are disadvantaged through the initiative process.¹⁰⁷

Yet another concern is the direct participation of uninformed, uneducated, and confused voters.¹⁰⁸ To assist voters in understanding the complexities of ballot initiatives, some states have developed voter information pamphlets.¹⁰⁹ However, data indicates that only a small fraction of the voters that receive the pamphlets actually read them.¹¹⁰ Moreover, they contain such technical language that few voters can understand the pamphlets.¹¹¹ Amidst that concern, however, is the argument "that confusing ballot language has as much chance to thwart decent legislation as it does to surreptitiously cause an undesirable law to be enacted."¹¹² Still others charge that initiatives oversimplify the issues.¹¹³ At the same time, these critics are frustrated by voters' unwillingness to examine critically the arguments for and against any given measure.¹¹⁴

106 Cass R. Sunstein, *Public Deliberation, Affirmative Action, and the Supreme Court*, 84 CAL. L. REV. 1179, 1196 (1996).

107 See Mai Thi Nguyen, *Local Growth Control at the Ballot Box: Real Effects or Symbolic Politics?*, 29 J. URB. AFF. 129, 129 (2007) (empirical study demonstrating that ballot measures to establish growth controls reduce growth in Hispanic and lower-income populations and "may also contribute to the sociospatial segregation of cities by race/ethnicity and income"). Blight exceptions to private transfers through eminent domain will disproportionately impact poor people. See, e.g., David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 NW. U. L. REV. 365, 378-82 (2007) (arguing the post-*Kelo* reforms addressed condemnations in middle-class areas and not condemnations of blight in low-income areas); see also *infra* Part IV.B.1(b) (discussing Disneyland's opposition to the city of Anaheim changing the zoning around the theme park to allow for new affordable housing).

108 See, e.g., CRONIN, *supra* note 13, at 70-75; MAGLEBY, *supra* note 40, at 118-19 (finding that based on readability, less than one-fifth of the adults in California, Massachusetts, Oregon, and Rhode Island can read and understand the ballot question and description); Eule, *supra* note 102, at 1508-09 (describing how even as a law graduate he found it challenging to understand the pamphlets provided by various levels of government in California to explain the 1988 ballot measures); David B. Magleby, *Let the Voters Decide?: An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 38-39 (1995).

109 MAGLEBY, *supra* note 40, at 136.

110 See *id.*

111 *Id.* at 137-38 (finding that based on readability, more than two-thirds of those who receive voter pamphlets cannot read and comprehend them).

112 Reber & Mika, *supra* note 58, at 277.

113 See, e.g., HAHN & KAMIENIECKI, *supra* note 63, at 20; ZIMMERMAN, *supra* note 43, at 94.

114 As one commentator has noted,

Voters willingly forfeit their ability to think analytically and critically. They give their electoral power to those who would tell them, "You don't

Other arguments against initiatives include lack of expertise,¹¹⁵ lack of administrative and research support,¹¹⁶ and poor draftsmanship.¹¹⁷ Drafting of initiatives is likely to be even more problematic at the local level than at the state level.¹¹⁸ Initiated measures also may be difficult to implement because they become part of a complex legal scheme with which they are not coordinated.¹¹⁹ Moreover, initiatives produce inflexible regimes because, in many states, laws enacted through this process may only be amended or repealed through the

have to think about complicated issues, I will reduce politics to the simplest denominator, . . . and I will think for you.”

Rather than surrender our electoral franchise to talk-radio personalities, we would do well to recall the warning of Jacob Burckhardt, the great Swiss historian of the Italian Renaissance, who said to beware the “terrible simplifier.”

Walter Rodgers, *How Not to Judge a Politician*, CHRISTIAN SCI. MONITOR, Nov. 14, 2007, at 9, available at <http://www.csmonitor.com/2007/1114/p09s02-coop.html>. Interestingly, the Populist and Progressive reformers who advocated the institution of plebiscites received inspiration from the Swiss. See THOMAS GOEBEL, *DIRECT DEMOCRACY IN AMERICA, 1890–1940*, at 29–31 (2002). They similarly did not heed Burckhardt’s cautionary word.

115 See HAHN & KAMIENIECKI, *supra* note 63, at 19–20; ZIMMERMAN, *supra* note 43, at 92; ZIMMERMAN, *supra* note 63, at 239 (“[C]ritics often draw a comparison between elected legislators and voters as law makers and conclude the former enact better quality statutes because they become experts in areas of the law.”).

116 See ZIMMERMAN, *supra* note 43, at 93; ZIMMERMAN, *supra* note 63, at 239.

117 See ZIMMERMAN, note 43, at 92 (“[I]nited laws often are poorly drafted by amateurs and create problems of implementation.”). *But see* Selmi, *supra* note 39, at 343 (“[I]n California, concern over drafting flaws has increasingly led citizen advocates to engage the help of planning professionals in drafting initiatives.”).

118 As David Cardwell has noted,

The language, if you think it’s bad at the statewide initiative level, is horrible at the local level, because it was either written in someone’s kitchen one night, or they refused to have a lawyer look at it, or it’s been rushed and they don’t understand how it fits in to the various city codes, so the language is very often a problem.

STANDING COMM. ON ELECTION LAW, AM. BAR ASS’N, INITIATIVES: PROGRAM PROCEEDINGS 77 (1991) [hereinafter ABA INITIATIVES PROGRAM PROCEEDING].

119 See ZIMMERMAN, *supra* note 43, at 92–93; ZIMMERMAN, *supra* note 63, at 239–40; see also, e.g., Margaret H. Clune, *Government Hardly Could Go On: Oregon’s Measure 37, Implications for Land Use Planning and a More Rational Means of Compensation*, 38 URB. LAW. 275, 286 (2006) (“Generally then, [Oregon] Measure 37’s likely result will be ‘an incoherent patchwork of land use regulations and a reluctance by state, regional, or local governments to undertake most new land use regulations.’” (quoting Edward J. Sullivan, *Oregon’s Measure 37: Crisis and Opportunity for Planning*, PLANNING & ENVT. L., Mar. 2005, at 3, 3)).

same process and even when legislatures are empowered to change such laws, they loathe doing so.¹²⁰

II. THE PRIMARY FAILURES OF BALLOT INITIATIVES IN LAND USE

Land use laws have been the subject of plebiscites in this country since the late nineteenth century,¹²¹ and since that time, the use of plebiscites in this context has been the subject of criticism. As one political scientist remarked following the surge of plebiscites in 1914, which included eminent domain measures:

[T]he ballot in the direct legislation States is being crowded with elaborate proposals of a highly technical character. They are not matters of slight importance or local concern. It is of great moment to the voters of any State . . . by what process land may be condemned for public use. But to submit these matters to popular vote is to strain the interest and intelligence of the citizen and invite the most haphazard results in the way of legislation. Surely if the debate, discussion, compromise and amendment which take place in legislative chambers and committee-rooms are needed anywhere they are needed in the drafting of these elaborate measures.¹²²

Almost a century later, land use law and policy often remain too technical and at other times too abstract to be achieved successfully through ballot initiatives.¹²³ One of the difficulties with formulating

120 See ZIMMERMAN, *supra* note 43, at 95.

121 For example, before 1900, many state constitutions required referenda to determine local boundaries, and between 1900 and 1920, many amendments to state constitutions required referenda for determining the location of state institutions. See PIOTT, *supra* note 41, at 5–6.

122 Cushman, *supra* note 13, at 538 (discussing 291 plebiscites in thirty-two states). *But see* Robert H. Freilich & Derek B. Guemmer, *Removing Artificial Barriers to Public Participation in Land-Use Policy: Effective Zoning and Planning by Initiative and Referenda*, 21 URB. LAW. 511, 514 (1989) (“[T]here are no persuasive public policy reasons or legal issues which justify preventing the electorate from holding an ultimate control over land-use policy.”); Selmi, *supra* note 39, at 296–97 (arguing that objections to the use of direct democracy in making local land use law are overstated).

123 In his critique of Mr. A. Lawrence Lowell’s attack on direct legislation, Eltweed Pomeroy—an early advocate of plebiscites in this country—argued that laws should not be so complicated that laypersons may not understand them:

“In a community,” says Mr. Lowell, “as complex as ours, legislation is a very intricate matter, and requires a great deal of careful study.” [Moritz] Rittinghausen [German advocate of direct democracy] tells how, during a discussion on the adoption of the National Referendum in Switzerland years ago, this same argument was brought up in a public meeting, and great stress was laid on the relations of the church and state, and the fact that the common people could not possibly understand the “Concordat.” A working-man raised his hand, and being given an opportunity to speak, said, “Let

this law and policy through initiatives arises because of the difference between popular notions and legal theories of property ownership and use.

Laura Underkuffler explains property and property law through two different lenses. One view is the “common conception” of property, which revolves around the simple idea of absolute ownership.¹²⁴ Property “is that which identifies and protects individual interests against collective power.”¹²⁵ In other words, “My home is my castle.”¹²⁶ Property law or the institution of property, however, is a complex, complicated bundle of rights, which may be limited over time to protect the rights of others (owners and nonowners) and the public at large.¹²⁷ “[T]he operative conception of property [is one] in which property represents individual interests, fluid in time, established and re-established as circumstances warrant.”¹²⁸ Both of these conceptions have social utility, but they can be difficult for voters to reconcile in making land use policy decisions.

[We] may not be able to rely upon the electorate to make a reasoned decision that takes into account all the relevant information concerning the [land use] proposal and its impact on the municipality. Moreover, communities recognize now more than ever before the importance of planning coordinated and rational land use decisions, a goal that may be inconsistent with the referendum process.¹²⁹

These concerns apply with equal if not greater force to the citizen-led ballot initiative.

him who wants to pray, pay.” The people would likely cut through these intricate problems in some such common-sense and just manner. Our legislation is made intricate so that people cannot understand how they are governed. It should be simple.

Pomeroy, *supra* note 67, at 513–14.

124 LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY* 38–46 (2003).

125 *Id.* at 39.

126 See Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 309 (2006) (examining three models of property, including the “‘castle’ model, which conceptualizes owners as having absolute domain over their property as long as they do not use it to harm others”). Perhaps the Institute for Justice has seized upon this conception of property by naming its “nationwide grassroots property rights activism project” the “Castle Coalition.” See Castle Coalition, About Us, http://www.Castlecoalition.org/index.php?option=com_content&task=view&id=42&Itemid=138 (last visited Mar. 29, 2009).

127 See UNDERKUFFLER, *supra* note 124, at 46–51.

128 *Id.* at 51.

129 Paris, *supra* note 58, at 819.

Craig Anthony (Tony) Arnold has identified eleven processes in land use regulation.¹³⁰ Of particular interest to this analysis are the processes of studying and assessing, planning, deciding, and deliberating.¹³¹ Land use planners and local officials and their staff assess current and future needs and study the current and potential impacts of existing and proposed land uses.¹³² Planning is a systematic process of establishing goals and policies to serve as guidelines for future land use.¹³³ Many factors influence decisionmaking in this area, such as politics, economics, history, and culture, but of special interest here are the deliberative and planning processes.¹³⁴

Though initiatives may succeed in bringing particular issues to the forefront, they are poor substitutes for the normal representative lawmaking processes. Initiatives override other existing democratic processes that represent sunk costs. These mechanisms already provide opportunities for direct participation by the citizenry through public hearings and procedures for petitioning decisionmakers, for example.¹³⁵ According to David Cardwell:

The argument against the initiative was that the [municipality] had gone through a two or three year process developing a compre-

130 Professor Arnold of the University of Louisville Law School describes the processes as 1) studying and assessing; 2) planning; 3) regulating and segregating; 4) deciding; 5) deliberating; 6) enforcing; 7) creating and building; 8) investing, using, operating, maintaining, and enjoying; 9) preserving; 10) competing, disputing, cooperating, and problem solving; and 11) adapting. Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 497–506 (2007).

131 *Id.* at 497–501.

132 See ERIC DAMIAN KELLY & BARBARA BECKER, COMMUNITY PLANNING 17–21 (2000); Arnold, *supra* note 130, at 497.

133 See generally KELLY & BECKER, *supra* note 132, at 23 (analyzing land use planning as a system).

134 Arnold, *supra* note 130, at 495, 498–99, 500–01.

135 For example, the Standard State Zoning Enabling Act provides that if twenty percent or more of the neighboring property owners object to a change in zoning, they may file a protest and the change can only be made by an affirmative vote of three-fourths of the members of the governing body. ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, STANDARD STATE ZONING ENABLING ACT § 5, at 7–8 (rev. ed. 1926). Arizona has adopted such a provision. See ARIZ. REV. STAT. ANN. § 9-462.04(H) (West 2008). *But see* Audrey G. McFarlane, *When Inclusion Leads to Exclusion: The Uncharted Terrain of Community Participation in Economic Development*, 66 BROOK. L. REV. 861, 863–64 (2000) (arguing that federally mandated community participation in development decisions largely has been ineffective); Brandon Simmons, *Kelo's Planning Mandate: Replacing Clarity with Complication*, 43 REAL PROP., TRUST & ESTATE L.J. 139, 158 (2008) (“The fact that the politicization of planning is one of the most dominant features of the planning process leads to serious questions about the actual performance of a system that *theoretically* is based on public participation.”).

hensive plan with extensive hearings, extensive regulations, and conference plans to ensure consistency with other documents. Now, here is a group coming out of nowhere and cutting a wide swath right through that comprehensive plan saying "forget all that you did, we want to change it right now; without going through hearings, without figuring out how it effects the property or how it effects others portions of the comprehensive plan." Consequently, the comprehensive plan [does] not work because it was all interrelated.¹³⁶

Perhaps we do not need another process but rather a better means of engaging the citizenry.¹³⁷ If citizens want to change development patterns, they may use the established procedures to amend the comprehensive plan or zoning ordinance. If planning officials are unresponsive, the citizens have the power to recall those recalcitrant individuals.¹³⁸ Whatever the solution(s) may be, the following discussion illuminates the two main failures of ballot initiatives in land use law: inadequate deliberation and planning.

A. *Deliberative Failure*

Governing officials exercise wide discretion in making land use decisions and those decisions are rife with public policy or value choices. Even though officials usually comply with the procedures required by law (in the zoning ordinance or the comprehensive plan, for example), and rely upon evidence in the record, reasonable minds still can and do differ about which choices to make.

Yet, through the deliberation of the governing body and the citizenry, communities discuss those differences and the reasons for them in order to reach a majoritarian decision. "There exist multiple understandings of what public deliberation entails, but a common overarching definition characterizes deliberation as a thoughtful, substantive exchange of ideas, perspectives, and information oriented toward making a decision. An axiom . . . is . . . that the more deliberation, the better the decision."¹³⁹ One scholar defines deliberation

136 ABA INITIATIVES PROGRAM PROCEEDING, *supra* note 118, at 69.

137 For example, "[r]ather than embracing inflexible bans, time would be better spent devising a list of 'best practices' to promote fairness in the eminent domain process." Timothy J. Dowling, *How to Think About Kelo After the Shouting Stops*, 38 URB. LAW. 191, 198 (2006).

138 See ABA INITIATIVES PROGRAM PROCEEDINGS, *supra* note 118, at 73.

139 John Gastil et al., *When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections*, 78 U. COLO. L. REV. 1435, 1436 (2007) (footnote omitted). *But see* Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 12 (2006) (reporting

simply as “*reasoning on the merits of public policy*.”¹⁴⁰ Tony Arnold distinguishes between the deliberation of individuals in “giving careful and thorough consideration to a decision” and the deliberation of groups of people who discuss the decision and reason together. Land use regulation traditionally involves both types.¹⁴¹

Underlying the concern about deliberation is a desire to make the process and outcome more democratic.¹⁴² Accordingly, this discussion assumes that deliberative decisionmaking is preferable to decisions that arise from little or no deliberation. “[T]he combination of politics, social norms, statutory ‘open government’ requirements, and democratic principles put strong pressure on land use regulators to provide forums for public discussion of land use decisions and to engage in deliberative discussions during publicly accessible meetings, especially on decisions that are controversial or highly visible.”¹⁴³ It is through the traditional process of land use regulation that citizens and officials are able to exchange information, make arguments about the appropriate means of addressing the community’s needs, and have the opportunity to persuade each to take a substantive position which they had not held before the process of deliberation.¹⁴⁴ If the decisionmaking processes involve deliberation, these choices bear the mantle of democratic legitimacy.¹⁴⁵

the results of experiments, “which indicate that deliberation, even when attempted under ideal conditions, does not improve social welfare, and, in all but rare circumstances, may decrease it”).

140 JOSEPH M. BESSETTE, *THE MILD VOICE OF REASON* 46 (1994).

141 Arnold, *supra* note 130, at 501.

142 See JOHN GASTIL, *POLITICAL COMMUNICATION AND DELIBERATION* 12–13 (2008) (“In the end, it is deliberation that helps us decide which issues to place on our nation’s agenda, and it is deliberation that helps us work through those issues as we speak our minds before casting our votes. From the casual conversation to the congressional debate, we are nearer or farther from the democratic ideal depending on how well we learn to deliberate.”).

143 Arnold, *supra* note 130, at 501.

144 See BESSETTE, *supra* note 140, at 49 (“[E]very deliberative process involves three essential elements: information, arguments, and persuasion.”); JOHN S. DRYZEK, *DELIBERATIVE DEMOCRACY AND BEYOND* 1 (2000) (“Deliberation [is] a social process . . . [in which] deliberators are amenable to changing their judgments, preferences, and views during the course of their interactions, which involve persuasion rather than coercion, manipulation, or deception.”); Hannah Jacobs, *Searching for Balance in the Aftermath of 2006 Taking Initiatives*, 116 *YALE L.J.* 1518, 1545–46 (2007) (“Viewed in its most ideal sense, zoning provides a deliberative process through which people can express their preferences about the growth and character of their community.”).

145 See DRYZEK, *supra* note 144, at 1 (“Increasingly, democratic legitimacy came to be seen in terms of the ability or opportunity to participate in effective deliberation on the part of those subject to collective decisions.”).

Even if deliberation occurs among voters without their representatives, the quality of that deliberation is debatable. Two researchers found that as the number of individuals in a deliberative group increases, social welfare decreases.¹⁴⁶ This drop-off occurs because with larger numbers of people, the costs associated with deliberating increase while at the same time individuals become less able to process the growing amount of information before them.

As the cognitive science literature reminds us, however, speaking, listening, and learning are all costly behaviors; that is, when we speak or listen to one person, we must forego the opportunity to do something else. Further, because humans have limited energy, they are able to pay attention to and remember only a small fraction of the information available to them. What these cognitive limitations imply for successful deliberation is this: Whatever the relationship between idealized theories of deliberation and social welfare, deliberation in practice is unlikely to improve social welfare because it is improbable that groups of people will be willing to speak, listen, and learn from one another.¹⁴⁷

This finding challenges the claims of supporters of direct democracy that the initiative process provides adequate deliberation among the voters.¹⁴⁸

Another deliberative criticism of ballot initiatives is that voters lack foresight or fail to take into account collateral and future impacts of their decisions. One political scientist laments the passage of a measure in Colorado, explaining that voters again had succumbed to a measure “that had great ‘curb appeal’ but turned out to be problematic with unforeseen consequences. And it is not the first time direct democracy critics have had reason to question both voter competence and the wisdom of legislating through a process lacking in hearings, testimony, compromise and amendment.”¹⁴⁹

146 See McCubbins & Rodriguez, *supra* note 139, at 29–34.

147 *Id.* at 11–12 (footnotes omitted).

148 These researchers found, however, that “expertise systems” improve social welfare, *id.* at 36, and that many scholars who champion deliberation actually incorporate some form of an expertise system in their models, *id.* at 38–39.

Unlike most deliberative settings (where all participants are expected to speak, listen, and learn from one another), the defining characteristic of an expertise system is that at least one participant has knowledge about a particular topic, and the other participants then have opportunities to learn from that knowledgeable participant’s statements.

Id. at 36. That expertise can be found in elected officials and planning professionals.

149 John A. Straayer, *Direct Democracy’s Disaster*, ST. LEGISLATURES, Mar. 2007, at 30, 31 (discussing Colorado’s Amendment 41, “Standards of Conduct in Government”). Compare *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 349 (Minn. Ct. App. 2002)

The unintended and unforeseen consequences may include preventing enforcement or application of existing regulations and discouraging promulgation of new ones, as is arguably going to be the case with *Kelo*-plus initiatives.¹⁵⁰ The lack of enforcement and regulation may also have a disparate impact on low income and minority communities.¹⁵¹ For example, one study of the use of ballot initiatives to enact local growth controls in California demonstrated that the adoption of such measures had “a significant effect on the racial/ethnic composition of the population.”¹⁵² While such controls appeared to have no effect on the rate of growth of the African American population,¹⁵³ controlling for all other variables, there was larger growth in the white population and lower growth among the Hispanic population.¹⁵⁴ The research postulates that by reducing the supply of single-family housing and thereby raising the prices of such housing, the growth controls contribute to the exclusion of lower income popula-

(“Unlike the process provided in the MPA [Municipal Planning Act] . . . referendum would necessarily proceed without an overriding concept of current and future development and land use needs of the community and of neighboring communities and without benefit of the expertise of land use professionals.”), *with* *Citizens for Responsible Growth v. City of St. Pete Beach*, 940 So. 2d 1144, 1151 (Fla. Dist. Ct. App. 2006) (“[T]he citizens of the City . . . are entitled to express their views on how their City Commission should handle land use problems, despite a pervasive statutory framework implementing a statewide policy on growth and redevelopment.”).

150 See Jacobs, *supra* note 144, at 1545–50 (discussing how partial regulatory takings laws constrain implementation of land use regulation). *But cf.* Burke, *supra* note 21, at 678–81 (finding that property rights laws passed by legislatures have had little impact on land use regulation).

151 As Hannah Jacobs notes, “Preventive zoning is necessary not only to avoid negative neighbor-to-neighbor impacts but also to prevent disproportionate levels of unwanted uses in certain communities.” Jacobs, *supra* note 144, at 1548. She continued,

In the absence of alternative mechanisms, partial regulatory takings regimes will make it difficult for communities to realize the benefits of zoning. It can be challenging to implement proactive zoning-type requirements without government control, particularly because of collective action problems. Moreover, alternatives to preventive zoning are often inadequate for low-income neighborhoods because such neighborhoods are at a financial disadvantage when they rely on private action. As a result, constraints on zoning are particularly worrisome for low-income communities.

Id. at 1550–51 (footnote omitted); see also Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 741 (1993) (arguing that minority communities “are then frequently deprived of the land use protection basic to Euclidean zoning principles”).

152 Nguyen, *supra* note 107, at 143.

153 *Id.* at 141.

154 *Id.*

tions such as Hispanics.¹⁵⁵ Several studies establish a link between land use controls and segregation by race and income because of higher housing prices.¹⁵⁶

This phenomenon, which we shall call income group clustering, is thought by many observers to be highly undesirable for many reasons. It is seen as a symptom of social disorder, as an indication that constitutional norms are being violated, and as an obstacle to the realization of widely held public policy goals.¹⁵⁷

B. *Planning Failure*

The other chief limitation of the use of ballot initiatives to make land use law is that they bypass land use planning. "Comprehensive planning for the development of American communities has a long and respectable history."¹⁵⁸ State and local governments have planning mechanisms in place that trace back to the early twentieth century, in two model acts, providing statutory authority for planning, subdivision regulation, and zoning.¹⁵⁹ The seminal zoning case of *Village of Euclid v. Ambler Realty Co.*¹⁶⁰ from 1926 reflects the idea that zoning must be comprehensive and based upon rational planning. Over time, the type of plans that local officials develop have varied from a "blueprint" in the early days¹⁶¹ to a "vision" in recent times,¹⁶² and "the plan remains one of the planner's primary tools to influence future growth and development. Moreover, societal interest in the plan has intensified."¹⁶³ Not surprisingly, "[t]o 'avoid taking decisions out of the hands of professional planners through the ballot box or litigation'—both equally undesirable in its view—the American Planning Association promotes planning, design, and regulatory

155 *Id.* at 143.

156 *Id.* at 134 (citing studies on growth control and segregation).

157 See Eric J. Branfman et al., *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483, 483 (1973).

158 Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 900 (1976).

159 See ADVISORY COMM. ON CITY PLANNING & ZONING, U.S. DEP'T OF COMMERCE, STANDARD CITY PLANNING ENABLING ACT (1928); ADVISORY COMM. ON ZONING, *supra* note 135. Zoning in some cities, however, predated the authorization provided by the Standard State Zoning Enabling Act. See Mandelker, *supra* note 158, at 901 n.9.

160 272 U.S. 365 (1926).

161 See William C. Baer, *General Plan Evaluation Criteria: An Approach to Making Better Plans*, 63 J. AM. PLAN. ASS'N 329, 334 (1997).

162 See *id.*

163 *Id.* at 329 (internal citations omitted).

approaches that respond to the 'demands and desires' of citizens and retailers."¹⁶⁴

Comprehensive planning, however, is not without its critics.¹⁶⁵ Yet, it is not necessary to have an idealized view of planning in order to recognize the need for and value of it. Indeed two ardent supporters of planning (as opposed to plans), John Mixon and Kathleen McGlynn, write that "planners and local governments are philosophically incapable of creating an ideal, preplanned urban environment."¹⁶⁶ Mixon and McGlynn argue that

land use is a nonlinear, complex, adaptive, dynamical system that cannot be analyzed, predicted, and controlled by a linear cause-and-effect formula As a complex system, land use exhibits characteristics of chaos, emergence, and catastrophe, with the result that actual development patterns cannot be quantified, calculated, or predicted.¹⁶⁷

Carol Rose challenges the idea that we can or should evaluate the legitimacy of land use decisions based upon their conformity with fixed land use plans.¹⁶⁸ "[P]lan jurisprudence recognizes that local governmental bodies cannot be treated as legislatures, whose actions are legitimized and safeguarded by the fragmentation of interests and the give-and-take of coalition-building" and that the small, individualized, piecemeal changes that make up much of routine land use regulations "are guided not so much by generally applicable rules as by a desire to adjust conflicting claims about property development made by limited numbers of claimants."¹⁶⁹ Indeed, Rose argues that the major referendum cases before the U.S. Supreme Court in the 1970s, *James v. Valtierra*¹⁷⁰ and *City of Eastlake v. Forest City Enterprises*, demon-

164 PHYLLIS MYERS, DIRECT DEMOCRACY AND LAND USE 30 (2008) (quoting Jennifer Evans-Cowley, *Meeting the Big Box Challenge: Planning, Design, and Regulatory Strategies*, in PLANNING ADVISORY SERVICE, at 3 (Am. Planning Ass'n, Report No. 537, 2006)).

165 See, e.g., John Mixon & Kathleen McGlynn, *A New Zoning and Planning Metaphor: Chaos and Complexity Theory*, 42 HOUS. L. REV. 1221, 1225–26 (2006) (recommending replacement of the traditional planning paradigm with one based on complexity analysis that takes into account current information rather than being stuck with yesterday's plan); Andrew P. Morriss & Roger E. Meiners, *The Destructive Role of Land Use Planning*, 14 TUL. ENVTL. L.J. 95, 109–23 (2000) (suggesting that planning may be detrimental to the development of modern communities).

166 Mixon & McGlynn, *supra* note 165, at 1223.

167 *Id.* at 1224–25. In the late 1950s and early 1960s, social scientists argued that "[t]here was no unitary 'public interest' . . . nor any possibility of rationalism and comprehensiveness." Baer, *supra* note 161, at 336.

168 Rose, *supra* note 93, at 882.

169 *Id.* at 882.

170 402 U.S. 137 (1971).

strate that no matter who makes the individualized land use decisions—elected officials or voters—we need some safeguard against arbitrariness,¹⁷¹ and the standard of conformity with a comprehensive plan does not provide that check on authority over changes in individual property rights.¹⁷² She does, however, locate legitimacy in local governmental decisions through the elements of participation and withdrawal. That is, citizens have the ability to both participate in local decisions and withdraw or exit the municipality when government officials do not listen to or accede to the citizens' demands.¹⁷³

Mixon, McGlynn, and Rose are not alone in their skepticism of the work that comprehensive plans are able to perform in ensuring good land use decisions. In a review of Oregon's Measure 39, which proponents introduced in reaction to *Kelo*, the City Club of Portland¹⁷⁴ noted a fundamental divide over beliefs about the competence of government to create desirable communities. Supporters of the measure, the City Club found, were "inherently suspicious" of governmental power and "dubious" of government's ability to outperform the market in this realm.¹⁷⁵ Conversely, opponents of the measure viewed "government as a benign force that plays a necessary role in guiding development."¹⁷⁶ The City Club believes that the government plays a positive role in development and that a free market would not lead to optimal results.¹⁷⁷ The City Club concluded that "if opponents of condemnation believe that governments are making bad planning decisions, the answer to bad planning should be better planning, not the absence of planning."¹⁷⁸

Advocates of measures limiting the ability of governments to regulate land use have been successful in disassociating their proposals from their impacts on planning. The passage of Oregon's Measure 37 shows that

property rights groups may be successful in overcoming popular support for land use planning and conservation by framing the

171 See Rose, *supra* note 93, at 866.

172 See *id.* at 881–82.

173 See *id.* at 882–93.

174 The City Club of Portland describes itself as "nonprofit, nonpartisan education and research based civic organization dedicated to community service, public affairs, and leadership development." City Club of Portland, City Club Mission, <http://www.pdxcityclub.org/club-info/index.php> (last visited Mar. 29, 2009).

175 City Club of Portland, *2006 Ballot Measure Report: Measure 39*, CITY CLUB PORTLAND BULL., Sept. 29, 2006, at 15, available at http://www.pdxcityclub.org/pdf/Measure39_2006.pdf.

176 *Id.*

177 *Id.*

178 *Id.*

debate in a way that divorces compensation from planning. In other words, trends suggest that voters nationwide may be loath to restrict the government's ability to plan for ordered, rational development. With savvy marketing, however, they may be convinced to vote for measures the stated purpose of which is to provide compensation for "wipeouts," even if the less obvious impact is to relegate land use planning to an academic exercise by requiring jurisdictions to pay to pass laws that would put the plans into action.¹⁷⁹

Furthermore, when voters attempt to amend a comprehensive plan, they do not have access to the same quality and quantity of information that local officials possess. Even if the proponents of the initiative engage a professional planner to assist in the drafting of the measure, the public and government officials likely will not have an opportunity to critique or seek to amend the proposal.¹⁸⁰ Initiatives are blunt instruments. Voters must either decide "yes" or "no." Moreover, ballot initiatives generally address one subject and that limitation may be at odds with comprehensive planning. The use of initiatives is a piecemeal approach that could "contribute[] to the fragmentation of planning, not just between, but also within jurisdictions."¹⁸¹

Admittedly, to the extent that plans serve as expressions of policy, the use of the initiative may be most legitimate in amending the plan.¹⁸² Citizens are more than capable of expressing their wants and their needs as well. Yet to the extent that plans lay out multiphased, multiyear projects such as roads, sewers, and water supply and treatment facilities, ballot measures are inferior mechanisms for achieving such goals. In order to meet such demands for infrastructure, for example, the community needs some systemic planning. That planning in turn requires expertise and a longitudinal view, among other things, both of which are lacking in the development of land use law through initiatives.¹⁸³

179 Clune, *supra* note 119, at 298–99.

180 See Selmi, *supra* note 39, at 343 ("Involving a professional planner does not transform the direct democratic process into the equivalent of a normal municipal planning process.").

181 Nguyen, *supra* note 107, at 135.

182 See Selmi, *supra* note 39, at 344.

183 Even under the view of Mixon and McGlynn, planning is still appropriate. "What is not useful is a long term legal commitment that binds the community to a program that turns out not to be appropriate in the light of new information and demands, but may be maintained through inertia that produces gotchas and silliness." Mixon & McGlynn, *supra* note 165, at 1262.

III. LAND USE BALLOT INITIATIVES

Almost a century after the first plebiscites in this area, land use law remains poorly comprehended yet tremendously important. Today a number of forces have converged to make the topic again worthy of careful consideration. Much of the scholarly and popular debate about the use of plebiscites has focused on statewide measures. Yet until very recently, most of the direct measures concerning land use law developed at the local level.¹⁸⁴ Daniel Selmi argues that direct democracy at the local level operates differently than it does at the state level in several key respects.¹⁸⁵ One area that he believes differs significantly is the manner in which local voters obtain information,¹⁸⁶ and thus concerns about the process of decisionmaking do not apply with equal force.¹⁸⁷ A recent study concluded, however:

While many local measures are authentically grassroots-driven, they also influence and are influenced by regional, statewide and even national interests. They increasingly reflect the homogenizing effects of rapid communication, similar pressures in communities' economic and policy environments, and campaign strategists' use of local ballots to attract targeted voter groups to the polls.¹⁸⁸

This Part examines initiatives on three types of land use regulations at both the state and local levels: (1) property rights including eminent domain and/or regulatory takings; (2) zoning and other development controls; and (3) environmental including pollution control and land conservation. Though by no means homogenous, these measures consistently demonstrate that plebiscites in this area lead to deliberative failure and/or planning failure.

A. *Property Rights Initiatives*

The passage of Oregon's Measure 37 and the pervasive negative public reaction to *Kelo* together formed the basis of a re-energized rallying cry for private property rights advocates. On the other hand, those events also served as warning bells for advocates of rational land use planning. If Oregonians could be persuaded by a sixty-one to thirty-nine percent margin¹⁸⁹ to change course from their exclusive

184 See Selmi, *supra* note 39, at 300.

185 See *id.* at 300–03.

186 See *id.* at 300–01.

187 See *id.* 309–13.

188 MYERS, *supra* note 164, at 7.

189 David Leip, 2004 Initiative General Election Results—Oregon, <http://uselectionatlas.org/RESULTS/state.php?year=2004&off=61&elect=0&fips=41&f=0> (last visited Mar. 30, 2009).

agricultural zones, urban growth boundaries, protection of natural resources, and regulation of growth, voters in other states could not be too far behind.¹⁹⁰

In *Kelo*, Petitioners argued that “without a bright-line rule [prohibiting the use of eminent domain for economic development] nothing would stop a city from transferring citizen *A*’s property to citizen *B* for the sole reason that citizen *B* will put the property to a more productive use and thus pay more taxes.”¹⁹¹ Though no such private transfer was at issue in the case,¹⁹² the specter of such a transfer has become the backdrop of campaigns supporting ballot initiatives on eminent domain.

And while *Kelo* was only a challenge to the City of New London’s use of eminent domain, private property rights activists have attempted to capitalize on the populist outrage to move forward broader initiatives regarding regulatory takings as well.¹⁹³ The eminent domain measures are known as *Kelo* initiatives¹⁹⁴ and the regulatory takings measures are known as “pay or waive” initiatives.¹⁹⁵ Some of the initiatives combine these two issues and are known as “*Kelo-plus*” initiatives.¹⁹⁶ One commentator describes the “plus” as the belief of many Libertarians and property rights activists “that many common government regulations on real estate, such as zoning and subdivision limits, take away property value. Therefore, they say, government should either compensate the owners or back off.”¹⁹⁷ Thus, these initiatives would require one of two actions whenever a land use regulation restricts the use of private property and thereby diminishes its value. Either the land use authority would have to compensate the

190 Dan Berman, *Reg-Takings Measures Fail to Hitch Ride on Anti-Kelo Bandwagon*, GREENWIRE, Dec. 4, 2006 (on file with the Notre Dame Law Review) (“‘It has restored hope,’ said Measure 37 co-author Ross Day of Oregonians in Action. ‘It’s shown that if you can pass a measure like 37 in Oregon, it can pass anywhere.’”).

191 *Kelo v. City of New London*, 545 U.S. 469, 486–87 (2005).

192 *Id.* at 487.

193 Dan Whipple, *Give and Takings*, GRIST, Oct. 16, 2006, <http://www.grist.org/news/maindish/2006/10/16/whipple> (“[Backers of the initiatives] are hoping to capitalize on popular outrage over . . . [*Kelo*].”).

194 See, e.g., Michael C. Blumm & Erik Grafe, *Enacting Libertarian Property: Oregon’s Measure 37 and Its Implications*, 85 DENV. U. L. REV. 279, 350 (2007) (referring to measures restricting states’ eminent domain power as a “pure-*Kelo* initiative”).

195 See Salkin & Lavine, *supra* note 24, at 1070–71.

196 See, e.g., Blumm & Grafe, *supra* note 194, at 350–51 (“The measures in these states, so-called ‘*Kelo-plus*’ initiatives, contained both eminent domain reform provisions as well as Measure 37-type regulatory takings reforms.”).

197 Ray Ring, *California’s Stealth Initiative on Land Use*, S.F. CHRON., Aug. 20, 2006, at E1.

landowner, or in the absence of payment, the land use authority would have to waive enforcement of the regulation against the complaining landowner.

Ostensibly, the leaders of campaigns for initiatives regarding eminent domain and regulatory takings seek to curb the alleged abuses of nonresponsive elected officials. These campaigns generate "intense interest . . . when the issues are seemingly clear-cut and often emotional matters."¹⁹⁸ Indeed, what could be more clear cut or emotional than the inequity of taking property from one private owner and giving it to another private owner (as the popular notion of *Kelo* represents),¹⁹⁹ and the need for just compensation whenever governmental regulations diminish the value of private property by prohibiting otherwise lawful activity (regulatory takings)?²⁰⁰ For example, Oregon's Measure 37 "declared enticingly that 'governments must pay owners' when land use regulations reduce land values. The theme of proponents' campaign was not anti-planning, but 'fairness,' considerably bolstered by emotive anecdotal inequities."²⁰¹ Derrick Bell cautions, however, that "[t]he emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them. Tumultuous, media-oriented campaigns . . . are not conducive to careful thinking and voting."²⁰²

The campaigns also describe harms that may arise infrequently and urge solutions that may not address the alleged abuses by elected officials. The use of such rhetoric in the debate regarding private property rights is pervasive and persuasive if left unchallenged.²⁰³ Cass Sunstein also is concerned about the proliferation of this rhetoric.

In the current period, there is thus a serious risk that low-cost or costless communication will increase government's responsiveness to myopic or poorly considered public outcries, or to sensation-

198 Bell, *supra* note 2, at 18.

199 *But see* Dowling, *supra* note 137, at 197 ("The widespread effort to characterize the project as a sop by local officials to Pfizer or other private interests is a vicious smear.").

200 *See* Salkin & Lavine, *supra* note 24, at 1070 ("When attached to eminent domain reforms, the idea that property owners should be compensated when regulations diminish the value of their land appears to many voters to be eminently fair and sensible.").

201 Edward J. Sullivan, *Year Zero: The Aftermath of Measure 37*, 38 URB. LAW. 237, 245 (2006) (quoting Measure 37 (Or. 2004)).

202 Bell, *supra* note 2, at 18.

203 *See generally* Burke, *supra* note 36 (examining the effect that political rhetoric has had on the Endangered Species Act).

alistic or sentimental anecdotes that are a poor basis for governance. Although the apparent presence of diverse public voices is often celebrated, electoral campaigns and treatment of public issues already suffer from myopia and sensationalism, and in a way that compromises founding ideals. On this count it is hardly clear that new technologies will improve matters. They may even make things worse. The phenomenon of “talk radio” has achieved considerable attention in this regard. It is surely desirable to provide forums in which citizens can speak with one another, especially on public issues. But it is not desirable if government officials are reacting to immediate reactions to misleading or sensationalistic presentations of issues.²⁰⁴

Greater public participation has its intuitive appeal, but participation that lacks deliberation over varying viewpoints and accurate information is a hollow victory indeed for true believers in direct democracy. “Democracy by soundbite is hardly a perfect ideal.”²⁰⁵

The discussion below will analyze these efforts to develop law and policy regarding eminent domain and regulatory takings primarily on a statewide basis. Despite skillful attempts to persuade voters, these measures achieved limited *direct* success.

1. Eminent Domain

After *Kelo*, many state legislatures leapt into action to limit state and local governments’ authority to exercise the power of eminent domain.²⁰⁶ Recognizing that elected officials may have given mere lip service to property owners’ concerns, private property rights activists moved to secure reforms at both the state and local levels through ballot initiatives.²⁰⁷ The discussion below lays out the basic framework

204 Sunstein, *supra* note 32, at 1785–86 (footnote omitted) (tracing and analyzing the negative, lasting impact of political rhetoric on species protection).

205 *Id.* at 1786.

206 See *supra* notes 20–21 and accompanying text.

207 Despite all of this lawmaking activity to right an apparent wrong, there is scant evidence of the need for such reform. Indeed, evidence suggests that there has not been the rabid abuse that private property rights advocates would have the public believe.

A survey of 154 cities with populations of 100,000 or more revealed that 207 properties were taken for economic development purposes over a five-year period, and 112 of the 154 cities surveyed reported no takings at all. [Professor Jerold] Kayden [of the Harvard University Graduate School of Design] stressed that the findings were preliminary and the research did not include the threat of eminent domain; the count reflects completed takings only. But, he said, “It appears that Americans can sleep tonight without legitimate anxiety that their homes will be turned into a motel.”

for the *Kelo* initiatives,²⁰⁸ which occurred almost exclusively on the state level, with the exception of several municipalities in California.²⁰⁹ Few local ballot measures on eminent domain were the result of citizen-initiated efforts but instead were placed on the ballot largely by local officials trying to reassure their constituencies that nothing like what happened in New London would ever happen in their municipality.²¹⁰ Moreover, “[w]hile the measures appear spontaneous and locally driven, the similarity of language and the clusters noted earlier suggest internet and other networking among state and national property rights groups.”²¹¹ Accordingly, the following discussion of ballot initiatives about eminent domain pertains to statewide measures.

Voters in California, Nevada, and North Dakota approved statewide ballot initiatives to amend their laws of eminent domain. North Dakota considered and Nevada is considering amendments to their eminent domain laws both in the legislature and at the ballot box. This concurrent consideration showcases the qualitative and quantitative differences in deliberation. The discussion below begins with a review of North Dakota's process. An analysis of California's ballot initiatives follows, which highlights potential planning failures.

The Weblog of the Lincoln Institute of Land Policy, <http://www.lincolnst.edu/news/atlincolnhouse.asp> (June 12, 2008, 09:13 EST).

208 Before the *Kelo* decision, most of the ballot measures dealt with controversial redevelopment plans that involved eminent domain; afterwards, the measures mostly involved policy changes: clearer definition of blight, restrictions on takings of private property for transfer to other private parties, and bans on the use of eminent domain solely for economic development. See MYERS, *supra* note 164, at 14 (surveying forty-seven ballot measures on eminent domain between 1999 and 2006).

209 For example, Orange County, California was one of the first local jurisdictions in the nation to weigh in on eminent domain restrictions through a ballot initiative in 2006. The measure, which passed with seventy-five percent of the vote, limits the government's authority to exercise the power of eminent domain for economic development. Am. Planning Ass'n, Eminent Domain Legislation Across America, <http://myapa.planning.org/legislation/eminentdomain/> (last visited Mar. 30, 2009). Voters in Chula Vista passed a measure which limits eminent domain to public uses and requires that the city hold seized property for at least ten years before it is able to sell it to a private entity. See Shannon McMahon, *Eminent Domain Measure to Go on Chula Vista Ballot*, SAN DIEGO UNION-TRIB., Feb. 22, 2006, at B1; *2006 Vote: How the County Voted*, SAN DIEGO UNION-TRIB., June 8, 2006, at A12. In 2006, voters in San Bernardino County, California passed Measure O, a ballot initiative that prohibits the use of eminent domain to transfer property from one private owner to another. County officials considered Measure O to be “the right size” as opposed to the statewide Proposition 90 that voters rejected. Jeff Horwitz, *County Endorses Smaller Measure*, SAN BERNARDINO SUN, Oct. 2, 2006, at B1.

210 See MYERS, *supra* note 164, at 7.

211 *Id.* at 15.

a. North Dakota: Measure 2

North Dakota's Measure 2 amended the state's constitution to define "public use" to exclude "public benefits of economic development."²¹² Over two-thirds of the voters approved this measure.²¹³ Interestingly, while proponents of Measure 2 were gathering the necessary signatures to have the proposed amendment on the ballot in November 2006, the state legislature asked the Judicial Process Committee to study eminent domain in North Dakota.²¹⁴ In this instance, as the legislature was beginning to deliberate, the electorate was preparing to vote.

The chairman of the Judicial Process Committee believed that the ballot measure was premature and that the legislature needed to study the matter to determine if it could address the concerns.²¹⁵ Other state representatives, both for and against the measure, agreed that the legislature should debate the final wording before placing it on the ballot.²¹⁶ In a committee meeting, one state representative argued that the legislative process was superior to the initiative process because it allows the public to weigh in on the specific language of the proposed law and not just the abstract idea.²¹⁷ A former Republican state legislator testified that he "attribute[d] unfavorable public reaction to the Supreme Court decision to overwrought press coverage of its implications" and that the legislature should make any

212 Initiated Constitutional Measure No. 2 § 1 (N.D. 2006). The constitutional provision incorporating Initiated Constitutional Measure No. 2 reads:

For purposes of this section, a public use or a public purpose does not include public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health. Private property shall not be taken for the use of, or ownership by, any private individual or entity, unless that property is necessary for conducting a common carrier or utility business.

N.D. CONST. art I, § 16.

213 Nat'l Conference of State Legislatures, North Dakota Initiatives and Referenda, <http://www.ncsl.org/ncslldb/elect98/irsrch.cfm?recid=3271> (last visited Mar. 30, 2009).

214 Dale Wetzel, *New London Could Have Happened Here: Ability of Government to Take Property Was Expanded in Late 1980s*, GRAND FORKS HERALD, Sept. 19, 2005, at 1A.

215 Dale Wetzel, *Halting Land Grabs, Some Officials Say Property Rights Initiative Could Be Premature*, GRAND FORKS HERALD, Sept. 19, 2005, at 1A.

216 *Id.*

217 N.D. Legislative Council, Minutes of the Judicial Process Committee 5 (Oct. 27, 2005), <http://www.legis.nd.gov/assembly/59-2005/interim-info/minutes/jp102705minutes.pdf>.

change to the state's eminent domain law found to be necessary.²¹⁸ The North Dakota Association of Realtors similarly believed that the legislature should debate the measure first.²¹⁹ The Association's spokesperson testified at a local hearing that "[w]e believe that the legislative process . . . is much more valuable. It allows much more input of individuals. It allows a lot more thoughts As a matter of fact, we are very, very scared about this proposal."²²⁰

One of Measure 2's chief proponents, former state Attorney General Heidi Heitkamp, responded that she believed the initiative process to be similar to the legislative one.²²¹

[J]ust like bills that go through the legislative process, the people will have to vote yes or no on the measure even if they like one part of the measure but not another. She said the language in the proposed initiated measure was sent to and reviewed by many people before the final language was agreed upon.²²²

Similarly, former state Republican chairman Curly Haugland said, "I don't think there's any better public forum or public discussion available to us than the 26,000 or more citizens who are going to have to be convinced to sign this petition That's way more than any legislative hearing is likely to hear."²²³ Heitkamp also expressed skepticism about deeming the legislature a superior forum: "No insult intended to the Legislature, but I think sometimes it's not always the people's interests that get heard at the Legislature. . . . I think it is, frequently, the special interests that get heard."²²⁴

Despite the proponents' protestations to the contrary, the two processes are markedly different. For example, notwithstanding the vetting that occurred before finalizing the proposed amendment's language, nothing guaranteed that any member of the general public who wished to comment would have had an opportunity to do so. Moreover, the sponsoring committee of the initiated measure had no legal obligation to make the process open or transparent.

218 Dale Wetzel, *Questions Raised About Property Rights Initiative*, ACWEEK (Grand Forks) Sept. 26, 2005, at 22 (testimony of Myron Atkinson, Jr., former GOP legislator).

219 *Id.*

220 *Id.* (testimony of Claus Lemloke, Spokesperson, North Dakota Ass'n of Realtors).

221 N.D. Legislative Council, *supra* note 217, at 5.

222 *Id.*

223 Wetzel, *supra* note 218 (quoting Curly Haugland).

224 *Id.* (quoting Heidi Heitkamp).

b. California: Propositions 98 and 99

Voters in California faced a potential planning failure with two propositions on eminent domain in June 2008, after rejecting Proposition 90 on eminent domain in November 2006.²²⁵ Proposition 98, which only captured thirty-eight percent of the vote, would have prohibited the taking of any private property for private use and phased out rent control measures in the state.²²⁶ According to the state's legislative analysis, the measure could have thwarted "many government plans for redevelopment, affordable housing, and public ownership of water or electric utility services."²²⁷ Also, state and local governments may have chosen to repeal certain measures such as the mandatory inclusionary housing ordinances that approximately one-third of the cities adopted to foster the development of low-cost housing.²²⁸ What is more, they may have chosen not to adopt new policies to encourage such development, perhaps due to uncertainty about some of the proposition's provisions.²²⁹ Yet there is a growing shortage of low and lower cost housing in many Californian municipalities, such as the cities of Anaheim²³⁰ and Claremont.²³¹ Proposition 98 would have impeded significantly the governments' ability to secure a sufficient housing supply for their communities.

Proposition 99, a more limited measure, prohibits, with certain exceptions, state and local governments from "acquiring by eminent domain an owner-occupied residence for the purpose of conveying it to a private person."²³² In contrast to the analyst's report on Proposition 98, the report on Proposition 99 concluded that it would not change significantly the governments' current practices for acquiring land,²³³ and thus would not frustrate much, if any, of a municipality's

225 CAL. SEC'Y OF STATE, STATEMENT OF VOTE 18 (2006), available at http://www.sos.ca.gov/elections/sov/2006_general/complete_sov.pdf.

226 Proposition 98 sec. 3, § 19 (Cal. 2006), available at <http://june2008.sos.ca.gov/voterguide/lang/english/pdf>.

227 LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 98, at 7 (2008), available at http://www.lao.ca.gov/ballot/2008/98_06_2008.pdf.

228 *Id.* at 3, 8.

229 *Id.* at 8.

230 See discussion *infra* Part III.B.1.b.

231 See Will Bigham, *Shortage of Land Thwarts Projects: City Scouts Spots for Affordable Housing*, INLAND VALLEY DAILY BULL., Feb. 19, 2008, at A3 (explaining that despite the state's mandate for the comprehensive plan to demonstrate that the city has space for affordable housing, the city cannot find any available vacant land).

232 Proposition 99 sec. 2, § 19(b) (Cal. 2008) (codified at CAL. CONST. art. I, § 19(b)).

233 LEGISLATIVE ANALYST'S OFFICE, PROPOSITION 99, at 3 (2008), available at http://www.lao.ca.gov/ballot/2008/99_06_2008.pdf.

planning processes. Voters approved Proposition 99 by sixty-two percent.²³⁴

2. Regulatory Takings

Regulatory takings initiatives have not been very prevalent on the local level thus far.²³⁵ Organizers have focused on statewide campaigns, with Oregonians leading the way with Measure 37 in November 2004.²³⁶ Measure 37 has been categorized as a “pay or waive” provision²³⁷ and serves as the paradigmatic expression of Libertarians’ frustration with land use law and a host of other regulatory schemes. The Libertarian Reason Foundation even published a playbook for other states to use in following Measure 37 as a model.²³⁸

There are many scholarly and popular critiques of Measure 37. One argued that Measure 37 was an expression of the people’s frustration with the lengths to which the legislature and the state courts had gone to regulate land use.²³⁹ By the end of 2006, landowners had filed 7500 claims, seeking approximately \$13 billion in compensation under Measure 37.²⁴⁰ Due to insufficient funds, rather than paying the claims, local land use authorities began to waive their regulations.²⁴¹

Despite this not insignificant number of claims, the Georgetown Environmental Law and Policy Institute found that the initiative

234 League of Women Voters of Cal. Educ. Fund, Proposition 99 (Jul. 31, 2008), <http://www.smartvoter.org/2008/06/03/ca/state/prop/99>.

235 See MYERS, *supra* note 164, at 7. Notable exceptions have occurred in California, including the June 6, 2006 initiative in Napa County, California where voters defeated by a sixty-four to thirty-six percent margin a ballot measure that sought to limit the local government’s regulatory taking power. Of the local California ballot initiatives, this measure was the most similar to Oregon’s statewide Measure 37. Am. Planning Ass’n, *supra* note 23.

236 See Or. Sec’y of State, General Election Abstract of Votes: State Measure No. 37 (Nov. 2, 2004), <http://www.sos.state.or.us/elections/nov22004/abstract/m37.pdf>.

237 See, e.g., Michelle Bryan Mudd, *Was the Big Sky Really Falling? Examining Montana’s Response to Kelo v. City of New London*, 69 MONT. L. REV. 79, 104 (2008).

238 See LEONARD C. GILROY, STATEWIDE REGULATORY TAKINGS REFORM: EXPORTING OREGON’S MEASURE 37 TO OTHER STATES 2, in REASON FOUND. (2006) (“Citizens, activists, and elected officials across the nation can look to Measure 37 as a model for regulatory reform as they continue the push to protect private property rights from the expanding reach of government and prevent landowners from being forced to bear the hidden costs associated with government regulation.”).

239 See Sara C. Galvan, Comment, *Gone Too Far: Oregon’s Measure 37 and the Perils of Over-Regulating Land Use*, 23 YALE L. & POL’Y REV. 587, 597 (2005).

240 Arthur O’Donnell, *Measure 49 Splits Oregon*, LAND LETTER, Nov. 1, 2007, <http://www.eenews.net/Landletter/2007/11/01/2/>.

241 *Id.*

rested upon a false premise of harm from regulation.²⁴² By conducting an empirical study of land values in Oregon, the institute concluded that land use regulations have little, if any, negative impact on land values.²⁴³ Thus, landowners could receive a windfall which would be antithetical to the stated goals of Measure 37 to achieve fairness in land use regulation.²⁴⁴ Two agricultural and resource economics professors from Oregon State University similarly concluded that there was no evidence of land use restrictions causing widespread reductions in property values in Oregon.²⁴⁵

Though evidence is lacking that land use regulations pervasively jeopardize property values, the American Planning Association believes that “[r]egulatory takings initiatives threaten a wide array of planning, environmental, historic preservation, and land conservation measures.”²⁴⁶ It promises to provide “resources to protect good planning, fairness, and communities of lasting value” in response to these ballot initiatives.²⁴⁷

a. Washington State’s I-933

Washington was the only state in 2006 to consider a bare regulatory takings initiative. Washington’s Initiative 933 (I-933 or the Property Fairness Act), as explained in the voters’ pamphlet, “would require compensation when government regulation damages the use or value of private property, would forbid regulations that prohibit existing legal uses of private property, and would provide exceptions

242 JOHN D. ECHEVERRIA, GEORGETOWN ENVTL. LAW & POLICY INST., PROPERTY VALUES AND OREGON MEASURE 37, at 1–3 (2007), available at <http://www.law.georgetown.edu/gelpi/GELPIMeasure37Report.pdf>.

243 *Id.* at 15–22.

244 *Id.* at 3.

245 William K. Jaeger & Andrew J. Plantinga, *Restrictions Didn’t Hurt Land Values*, MAIL TRIB. (Medford), Oct. 28, 2007, <http://www.mailtribune.com/apps/pbcs.dll/article?AID=/20071028/OPINION/710280309>. Jaeger and Plantinga argue that something other than standard appraisal methods must be used to determine whether land use regulation has reduced property values because the standard methodology fails to take into consideration the impact of regulations on the land market generally. “The single exemption approach looks only at the claimants’ opportunities for increased land values if they *alone* were granted a waiver to the land use regulation. This approach often identifies potentially lucrative opportunities, but in many cases these opportunities were *created by* the land use regulations’ effects on land markets.” WILLIAM K. JAEGER & ANDREW J. PLANTINGA, OR. ST. UNIV. EXTENSION SERV., *THE ECONOMICS BEHIND MEASURE 37*, at 2 (2007), available at <http://extension.oregonstate.edu/catalog/pdf/em/em8925.pdf>.

246 Am. Planning Ass’n, *supra* note 23.

247 *Id.*

or payments.”²⁴⁸ Though modeled upon Oregon’s Measure 37, I-933 had some not insignificant differences with respect to health, safety, and nuisances.²⁴⁹ One researcher commented that “[v]oters in Washington may be tempted to look to Oregon’s experience under Measure 37, but that’s simply not a good guide. Initiative 933 would be far more extreme, costly and disruptive than anything in Oregon.”²⁵⁰

As the November 2006 election approached, there was a legal dispute over the title of the ballot.²⁵¹ Opponents of I-933 complained that the title did not tell voters enough about how the initiative would change the law of the state. One criticism was that the title did not specify that if a government agency could not compensate the landowner, it would have to exempt the property from the challenged regulation.²⁵² And in spite of all the money spent on advertising and the media news coverage, one political scientist said that voters base their decisions largely on the language on the ballot. Accordingly, the outcome of the case was thought to have a significant impact on whether the initiative passed or failed.²⁵³

Ultimately, almost fifty-nine percent of Washington’s voters rejected the measure.²⁵⁴ After voters rejected such regulatory takings and eminent domain measures in California, Idaho, and Washington, one historian opined, “Self-interest has intersected with reality To have open spaces and nice places, people realize, they cannot be a bunch of individuals pursuing self-indulgence. They have to act collectively.”²⁵⁵

248 WASH. SEC’Y OF STATE, 2006 VOTER INFORMATION GUIDE, INITIATIVE MEASURE 933, at 10 (2006) (Official Ballot Title and Explanatory Statement, written by the Attorney General).

249 Eric de Place & Val Alexander, *For Washington, It’s Measure 37 on Steroids*, OREGONIAN, Aug. 8, 2006, at B9.

250 *Id.*

251 Eric Pryne, *Legal Battle over Ballot Title Turns into a War of the Words*, SEATTLE TIMES, Mar. 10, 2006, at B3.

252 *Id.*

253 *Id.*

254 Wash. Sec’y of State, 2006 General Election Results, <http://vote.wa.gov/Elections/general/Measures.aspx> (last visited Mar. 30, 2009).

255 Blaine Harden, *In West, Conservatives Emphasize the ‘Conserve,’* WASH. POST, Dec. 2, 2006, at A1 (quoting Patricia Nelson Limerick, chair of the board of the Center of the American West at the University of Colorado at Boulder).

b. Oregon's Measure 49

In 2007, Oregonians revisited Measure 37, rolling back some of its more radical provisions through the passage of Measure 49.²⁵⁶ Measure 49 is composed of two major parts. The first part applies to claims filed under Measure 37 before June 28, 2007, for which the landowners have not yet acquired a common law vested right to develop.²⁵⁷ Claimants under Measure 37 had ninety days from receipt of notification from the state's Department of Land Conservation and Development to re-file their claims under Measure 49.²⁵⁸ A number of claimants missed the deadline, however.²⁵⁹ The Department received approximately 4,600 claims, which it expects to process by the middle of the year 2010.²⁶⁰ Measure 49 replaces the pay-or-waive provision with approval to build a limited number of home sites.²⁶¹ The second part of Measure 49 applies to new claims based upon regulations promulgated after January 1, 2007, that limit residential uses or restrict farming or forest practices.²⁶² Measure 49 requires land use authorities to pay just compensation or waive enforcement of the regulation if the property owner demonstrates that the regulation reduces the value of the property.²⁶³

Under Measure 49, however, no property owner has filed a viable claim based upon regulations promulgated after January 1, 2007.²⁶⁴ David Hunnicutt, the president of Oregonians in Action, one of the measure's most vocal opponents, speculates that the measure has had a chilling effect and that localities are unwilling to pass new laws that potentially would give rise to a claim under the measure.²⁶⁵ Judith Moore, the manager of the Oregon Department of Land Conservation and Development's Measure 49 Development Services Division

256 Measure 49 (Or. 2007), available at http://www.sos.state.or.us/elections/nov62007/guide/nov07_vp.pdf.

257 *Id.* §§ 5–11 (codified at OR. REV. STAT. ANN. § 195.305 (West Supp. 2008)).

258 *Id.* § 8(3).

259 Interview by Tanya M. Broholm with Judith Moore, Measure 49 Dev. Servs. Div. Manager, Dep't of Land Conservation and Dev., in Salem, Or. (Jan. 5, 2009) [hereinafter Moore Interview].

260 *Id.*

261 Measure 49 §§ 6(1), 7(1) (Or. 2007).

262 *Id.* §§ 12–15 (codified at OR. REV. STAT. ANN. § 195.305–.316 (West Supp. 2008)).

263 *Id.* §§ 4–5 (codified at OR. REV. STAT. ANN. § 195.305 (West Supp. 2008)).

264 Moore Interview, *supra* note 259; Interview by Tanya M. Broholm with David Hunnicutt, President, Oregonians in Action, in Tigard, Or. (Jan 5, 2009) [hereinafter Hunnicutt Interview].

265 Hunnicutt Interview, *supra* note 264. Crook County, Oregon, however, passed an ordinance in October 2008 that may give rise to new Measure 49 claims.

shares Hunnicutt's perception. Moreover, in order to assert a claim for reduction of the value of property under Measure 49, a property owner "must provide an appraisal showing the fair market value of the property one year before the enactment of the land use regulation that was the basis for the claim and the fair market value of the property one year after the enactment."²⁶⁶ Both Hunnicutt and Moore suspect that the requirement for the appraisals is also a significant barrier to new claims.

Ordinance 210 in Crook County, Oregon may produce some new Measure 49 claims, however. Interestingly, this ordinance resulted from the county court's adoption of an advisory ballot measure initiated by citizens of the county. In response to the passage of that measure,²⁶⁷ the County removed the "Destination Resort" overlay map from its comprehensive plan, thereby preventing the development of new resorts in the county that were not already approved.²⁶⁸ After passage of Ordinance 210, some owners of property within the former resort district said that they may file claims under Measure 49.²⁶⁹ They would have to wait until October 2009 to get an appraisal of their land's value, however, and then compare it an appraisal of their land's value in October 2007 to determine if the ordinance lowered their property values. And given the declining demand for resort property in county, they may not be able to prove that the ordinance actually diminished the value of their property.²⁷⁰

3. Eminent Domain and Regulatory Takings

In 2006, voters in Arizona, California, and Idaho considered *Kelo*-plus initiatives.²⁷¹ These measures purportedly addressed the abuse of

266 Measure 49 § 7(7) (Or. 2007) (codified at OR. REV. STAT. ANN. § 195.305 (West Supp. 2008)).

267 Measure 07-47 (Crook City, Or. 2008), available at <http://www.gcoregonlive2.com/pdf/book19.pdf>.

268 Order, Crook County Ct., Oct. 15, 2008 (adopting Ordinance 210 to remove the resort designation), available at <http://co.crook.or.us/> (search for "Crook County Court 1 Regular Session, October 15, 2008").

269 Matthew Preusch, *Crook County Removes Resort Zones*, OREGONLIVE.COM, Oct. 15 2008, http://www.oregonlive.com/news/index.ssf/2008/10/crook_county_removes_resort_zo.html.

270 See Matthew Preusch, *Resorts Ride the Economy Up, Now Down*, OREGONIAN, Oct. 17, 2008, at A1 (explaining how the collapse of the credit and housing markets has dried up the demand for new resorts in central Oregon).

271 Proposition 207 (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. §§ 12-1131 to -1138 (West Supp. 2007)); Proposition 90 (Cal. 2006), available at <http://www.sos.ca.gov/vig-06/pdf/proposition-90/entire-prop90.pdf>; Proposition 2 (Idaho 2006), available at http://www.idsos.state.id.us/elect/inits/96_ID_voters_pamphlet.pdf.

the power of eminent domain and ensured that private property owners would be compensated for regulatory takings. Most of the campaigning for and the actual texts of the initiatives focused on eminent domain.²⁷² Even the media's coverage in some instances focused only upon the eminent domain portion of the measures.²⁷³ But tucked away, and sometimes at the end of several pages about eminent domain, were the provisions to address the alleged problem of regulatory takings.²⁷⁴

Generally, voters have rejected *Kelo*-plus initiatives as was the case with California's Proposition 90 (the "Protect Our Homes Initiative"),²⁷⁵ and Idaho's Proposition 2.²⁷⁶ Voters in California rejected Proposition 90 by a fifty-two percent to forty-eight percent margin.²⁷⁷ Though there was opposition to the eminent domain portion of the proposition, it appears that most of the opposition targeted the por-

272 See Jeff Brady, *Western Voters Weigh Shift in Property Rights*, NPR, Sept. 19, 2006, <http://www.npr.org/templates/story/story.php?storyId=6102255>.

273 See, e.g., BEN YSURSA, IDAHO SEC'Y OF STATE, IDAHO VOTERS' PAMPHLET 12 (2006), available at http://idsos.state.ID.US/elect/inits/06_ID_voters_pamphlet.pdf ("The eminent domain section is included only to distract attention from the initiative's real purpose: gutting local planning that protects our communities and property values and allowing opportunists to prey on Idaho property taxpayers."); Brady, *supra* note 272 ("They're baiting you with eminent domain, telling you that this is going to fix eminent domain," [Boise, Idaho, City Council member Elaine Clegg] says. 'And then they're switching in regulatory takings, and actually getting you to vote for that, when you might not if you really knew what it was about.');

Editorial, *No on Prop. 90: Radical Plan Goes Beyond Eminent Domain*, SAN DIEGO UNION TRIB., Aug. 22, 2006, at B6 (warning about the "radical" regulatory takings portion of the proposition and asking whether "trial lawyers surreptitiously [took] over California's eminent domain movement" by creating "an atmosphere in which local officials contemplating basic questions of governance see legal peril and costly lawsuits at every turn"); Ring, *supra* note 197 ("Reforming eminent domain is partly a smokescreen. The multistate campaign has a bigger target: It aims to choke off governments' ability to pass land-use regulations affecting millions of property owners."); Ray Ring, *Patriotic Pitch Hides Snarling Dog*, SEATTLE POST-INTELLIGENCER, Sept. 17, 2006, at F1 ("National libertarians have their sights set on something bigger than protecting a few property owners from eminent domain: They want to lay waste to land-use regulations used by state and local governments to protect the landscape, the environment and neighborhoods. Their goal has received little attention, partly because of its stealth mode.").

274 See Ring, *supra* note 273 ("The text of Prop. 90 runs four pages, and almost all the wording plays up the eminent domain angle. The regulatory-takings 'plus' is tucked into a few sentences that talk about paying property owners for regulations that damage their property.").

275 See CAL. SEC'Y OF STATE, *supra* note 225, at 18.

276 See Idaho Sec'y of State, November 7, 2006 General Election Results: Statewide Totals, http://www.idsos.state.id.us/ELECT/RESULTS/2006/general/tot_stwd.htm (last visited Mar. 20, 2009).

277 CAL. SEC'Y OF STATE, *supra* note 225, at 18.

tion aimed at regulatory takings.²⁷⁸ Commentators reason that the takings portion of the proposition led to its defeat.²⁷⁹ Voters in Idaho soundly rejected Proposition 2²⁸⁰ after the legislature enacted House Bill 555 on eminent domain.²⁸¹

Alternatively, state supreme courts have removed *Kelo*-plus initiatives from the ballot for violating the state's laws regarding initiatives. In the case of Oklahoma's State Question No. 729, the court found the initiative to be unconstitutional in its entirety because it addressed two subjects,²⁸² whereas in Nevada, the court struck the takings portion of the ballot measure for violating the single-subject rule and left the eminent domain portion on the ballot.²⁸³ In Montana, the

278 See, e.g., CAL. CENTER FOR ENVTL. LAW & POLICY, PROPOSITION 90: AN ANALYSIS 1 (2006), <http://www.law.berkeley.edu/centers/envirolaw/prop90packet.pdf> (“[T]he measure is likely to have a major impact on the extent and manner redevelopment projects are pursued in this state in the future. Even more significant is the potential effect Proposition 90 would have on a broad array of future state and local government regulatory programs.”).

279 See, e.g., Timothy Sandefur, *The California Crackup*, LIBERTY, Feb. 2007, at 15, available at http://libertyunbound.com/archive/2007_02/sandefur-california.html (attributing the defeat of Proposition 90 to the flaws in the regulatory takings portion, a lack of “practical wisdom” and too much “gamesmanship”); Cal. League of Conservation Voters, Prop. 90 Threatens Conservation and Environmental Protection Efforts, <http://www.ecovote.org/noprop90/enviro.pdf> (last visited Mar. 20, 2009) (“Proponents are trying to sell Prop. 90 as eminent domain reform, but hidden in the fine print of the measure are extreme provisions that would erode our ability to pass laws that protect natural resources, wildlife and habitat, ensure water quality and adequate water supplies, and regulate growth and development.”); Judith C. Wolff, *Eminent Domain Restrictions in the Aftermath of Kelo: Will Proposition 90 Rise from the Ashes?*, CEB TOPICS, <http://ceb.com/newsletter/20/4PropertyTax.asp> (“It is almost certain that the additional language is what doomed Proposition 90 in California, an outcome that Jim Nielsen, Chairman of The California Alliance to Protect Private Property Rights, called in a recent press release ‘a victory for special interest groups that benefit financially under a system that allows government vast powers to seize private property from unwilling sellers.’”).

280 Idaho Sec’y of State, *supra* note 276 (citing 76% voting against the proposition).

281 IDAHO CODE ANN. § 7-701A (Supp. 2007) (limiting and restricting the use of eminent domain to transfer the condemned interest to private parties).

282 *In re Initiative Petition No. 382, State Question No. 729*, 142 P.3d 400, 409 (Okla. 2006).

283 *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1238 (Nev. 2006) (striking the regulatory takings portion of the PISTOL ballot initiative and allowing the eminent domain portion to appear on the ballot).

court struck the initiative for violating the rules for gathering signatures.²⁸⁴

But of the states on whose ballot this type of initiative appeared, Arizona has the “distinction” of being the only state to pass it.²⁸⁵ Arizona’s Proposition 207 appeared on the ballot as the Private Property Rights Protection Act.²⁸⁶ Voters approved the measure by a sixty-five to thirty-five percent margin.²⁸⁷ However, it is unclear that the voters realized that they were approving changes to both the eminent domain and regulatory takings laws of the state.

The findings and declarations for the proposed amendment consisted of fifteen paragraphs. Fourteen of those paragraphs discussed eminent domain, public use, and *Kelo*; two paragraphs (the twelfth and fifteen) referred to uncompensated losses due to land use restrictions.²⁸⁸ The provisions providing compensation whenever a land use law reduces the fair market value of the property were sandwiched in between the provisions regarding eminent domain and the definitions.²⁸⁹ The ballot language similarly emphasized the eminent domain portion and underplayed the regulatory takings portion.²⁹⁰ For example, the ballot explains that a “yes” vote would have seven effects, only two of which related to takings.²⁹¹

Like the advertising in the three other states considering such an initiative in 2006, advertising for this proposition focused on eminent domain and rarely mentioned regulatory takings.²⁹² What may have been significant in the passage of the *Kelo*-plus initiative in Arizona was the presence of two competing initiatives regarding the Arizona State Land Department to which the business community devoted

284 See *Montanans for Justice v. State*, 146 P.3d 759, 776–78 (Mont. 2006) (invalidating Montana’s initiative, I-154, for irregularities with respect to the signatures on the petition to place the matter on the ballot).

285 Jill Kusy & Alan Stephenson, *Once Again, Arizona Leads the Nation: Arizona Has the Distinction of Being the Only State to Pass a Regulatory Takings Ballot Initiative in November '06*, VISION (Ariz. Planning Ass’n, Phoenix, A.Z.), Dec. 2006, at 7.

286 See Proposition 207 (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. §§ 12-1131 to -1138).

287 Ariz. Sec’y of State’s Office, 2006 General Elections (Unofficial Results), Proposition 207: Private Property Rights Protection Act (Nov. 28, 2006), <http://www.azsos.gov/results/2006/general/BM207.htm>.

288 Proposition 207 § 2(A)(4)(h), (B).

289 See *id.*

290 See JANICE K. BREWER, ARIZ. SEC’Y OF STATE, BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW 192 (2006), available at <http://www.azsos.gov/election/2006/info/PubPamphlet/english/guide.pdf>.

291 *Id.*

292 See Kusy & Stephenson, *supra* note 285, at 9.

substantial financial resources that might have otherwise been available to fund opposition to Proposition 207.²⁹³

As to be expected, opponents of the measure predicted the “gutting” of local land use law. While acknowledging that there may be some abuses of the governmental authority in land use, one commentator concluded:

Community planning is a balancing act. It can be tough and contentious and not everyone will always get what they want. And even the best laws may be open to allegations of unfairness.

But Proposition 207 is like trying to pull a sore tooth with a sledgehammer. It may fix some legitimate problems, but it will create a much bigger mess.²⁹⁴

Indeed, Pima County, Arizona was “considering a freeze on rezonings while it figure[d] out the impact of Propositions 207.”²⁹⁵ The county was considering at least two options, including requiring development agreements before approving rezonings and requiring developers to waive their right to seek compensation in the future if their plans changed.²⁹⁶ A number of cities are requiring waivers when developers seek rezonings or other approvals. The League of Arizona Cities and Towns sent out model waivers²⁹⁷ “to all 90 cities and towns in the state” and according to the Director of the League of Arizona Cities and Towns, “it’s fair to say most are using them.”²⁹⁸ A survey of the most populous cities in Arizona found that there have been few claims made under Proposition 207, which went into effect on December 4, 2006.²⁹⁹

293 *See id.*

294 Eric de Place, *Prop. 207 Supporters Should Ask How Oregon’s 37 Measures Up*, TUCSON CITIZEN, Oct. 12, 2006, <http://www.tucsoncitizen.com/ss/opinion/29087.php>.

295 Erica Meltzer, *Pima Weighs Zoning Freeze Over New Law*, ARIZ. DAILY STAR (Tucson), Nov. 25, 2006, at B1.

296 *Id.*

297 *See, e.g.*, League of Arizona Cities and Towns, *Waiver of Rights and Remedies Under A.R.S. §12-1134*, http://www.azleague.org/doc/resources/prop207_sample_waiver.doc (last visited Mar. 30, 2009).

298 Mike Sunnucks, *Cities Use Waivers to Dodge Prop. 207*, BUS. J. (Phoenix), Jan. 19, 2007, at 3, 42 (quoting Ken Strobeck, Director, League of Arizona Cities and Towns).

299 Email from Tanya M. Broholm, Research Assistant, to Marcilynn A. Burke, Assistant Professor of Law, Univ. of Houston Law Ctr. (Sept. 10, 2008, 04:44 CST) (on file with author). There have been at least two claims. J. Ferguson, *Property Rights Test Case Filed*, ARIZ. DAILY SUN, June 29, 2007, at A1; Andrea Kelly, *Developer Sues City, Targeting ‘07 Property-Use Law*, ARIZ. DAILY STAR (Tucson), Mar. 13, 2008, at B3.

One attorney who specializes in land use law criticized the waivers as circumventing the new law.³⁰⁰ It is unclear whether the waivers could be viewed as unconstitutional conditions on the right to develop. That is, the government may not condition the availability of some discretionary benefit on agreement by the landowner to waive or forgo a constitutional right.

B. *Development Control Initiatives*

While there are occasionally some statewide land use initiatives addressing development controls, most of the action occurs on the local level.³⁰¹ Such measures involve “big box” development, growth restrictions, rezoning, and procedures for decisionmaking bodies. In this area of land use law, ballot measures target both specific projects and general policies. Generally, these measures can result in deliberative failures, planning failures, or both.

Another concern about the use of ballot initiatives in this area is the NIMBY (“not in my backyard”) syndrome.³⁰² Members of the community more intensely express NIMBYism when municipalities try to site locally undesirable land uses (LULUs) such as human service facilities, correctional facilities, disposal sites, and hazardous waste treatment plants.³⁰³ Moreover, there is some evidence that opposition

300 See Sunnucks, *supra* note 298, at 42 (“‘Cities are going to throw up as many obstructions and roadblocks as needed to eviscerate the meaning of the law,’ [Bob] Kerrick [an attorney at Gallagher & Kennedy] said. ‘Clearly, the waivers violate the spirit of the law.’”).

301 For example, in the 2000 elections, almost ninety-five percent of the ballot measures concerning growth management were at the local level. See Phyllis Myers & Robert Puentes, *Growth at the Ballot Box*, in THE DISCUSSION PAPER SERIES 7 (Brookings Inst. Center on Urban & Metro. Policy, Discussion Paper Series, 2001). At least 77.7% of the “growth-related,” citizen-led ballot initiatives were at the local level. See *id.* at 24.

302 See Michael Dear, *Understanding and Overcoming the NIMBY Syndrome*, 58 J. AM. PLAN. ASS’N 288, 288 (1992) (“NIMBY refers to the protectionist attitudes of and oppositional tactics adopted by community groups facing an unwelcome development in their neighborhood.”); Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 728 (1993) (“The NIMBY syndrome consists of public opposition from more vocal, and politically powerful, middle and upper income communities to the siting of a toxic facility, or other ‘Locally Unwanted Land Use’ (LULU) in their neighborhoods.”).

303 See ABA INITIATIVES PROGRAMS PROCEEDINGS, *supra* note 118, at 71; Dear, *supra* note 302, at 288. Edward Koch, then mayor of New York City, expressed his concern about NIMBYism just days before he left office.

Neighborhoods and political leaders are fighting with increased fervor to prevent unpopular projects from being sited in or near their communities. It’s always hard to find places for jails, drug treatment centers, boarder

to those facilities leads to concentration of them in minority communities.³⁰⁴ To the extent that municipalities attempt to distribute LULUs more fairly throughout the jurisdiction, ballot measures may frustrate those efforts.

The following discussion examines ballot initiatives concerning zoning and growth controls.

1. Zoning

Zoning long has been the subject of plebiscites in this country. With respect to referenda, the U.S. Supreme Court has upheld their use to make zoning decisions, whether the decisions are deemed legislative or adjudicative.³⁰⁵ On its face the Court's reasoning with respect to referenda could apply to initiatives as they also represent

babies, halfway houses, highways and sanitation truck garages, incinerators and homeless shelters. But the "Nimby" (Not in My Backyard) syndrome now makes it almost impossible to build or locate vital facilities that the city needs to function.

....

If executive and legislative leaders yield to fear and suspicion, we will regress into a new feudalism. At the very moment when barriers are coming down around the world, we will find ourselves marching backward toward the imaginary safety of feudal fiefdoms defended by Nimby walls.

Edward I. Koch, *A New Age of Feudalism*, N.Y. TIMES, Dec. 26, 1989, at A27.

304 "The cumulative effect of not-in-my-backyard (NIMBY) victories by environmentalists appears to have driven the unwanted facilities toward more vulnerable groups. Black neighborhoods are especially vulnerable to the penetration of unwanted land uses." ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 37-38 (1994). The result is that "NIMBY, like white racism, creates and perpetuates privileges for whites at the expense of people of color." *Id.* at 131. "Indeed, many representatives of low income and predominantly African American, Latino, or other minority neighborhoods charge that industry and governmental siting officials have adopted a PIBBY—'put it in blacks' backyards'—strategy for siting LULUs." Vicki Been, *What's Fairness Got to Do with It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003 (2001).

305 *Compare* City of Cuyahoga Falls v. Buckeye Cmty. Hope Found., 538 U.S. 188, 199 (2003) (rejecting the distinction between administrative and legislative referenda), and City of Eastlake v. Forest City Enters., 426 U.S. 668, 679 (1976) (upholding citizens' right to decide a rezoning issue through a referendum), with State *ex rel.* Marsalek v. Council of South Euclid, 855 N.E.2d 811, 814 (Ohio 2006) (noting that "a governmental entity's approval of a planned-unit development by issuance of a conditional-use permit for a specific piece of property under preexisting zoning regulations does not constitute a legislative act" and thus is not subject to vote by referendum), and Worthington v. City Council of Rohnert Park, 31 Cal. Rptr. 3d 59, 66 (Ct. App. 2005) (holding that adoption of memorandum of understanding concerning Native American tribe's casino project was an administrative act and thus not subject to referendum).

power that the people have retained to govern. Yet the concerns regarding deliberation and planning are different with initiatives. This section analyzes initiatives in two municipalities, pointing out the dangers of abrogating the deliberative process and interfering in the planning process.

a. Homer, Alaska: Big Box Development

An analysis of sixty-seven “big box development” initiatives³⁰⁶ between 2000 and 2006 found that approximately fifty-five percent of them appeared to limit such development and approximately forty-five percent of them appeared to accommodate it.³⁰⁷ Two-thirds of those measures were site-specific and one-third dealt with broader policy issues.³⁰⁸ The big box initiative in Homer, Alaska, however, both limited and accommodated such development. Though the initiative would have broad implications, it was spurred by a specific project.

In 2002, Fred Meyer, a member of the Kroger grocery retail chain, proposed building a 95,000 square-foot store on Kachemak Bay in Homer, Alaska. The store would have been three times larger than any existing commercial building in the city.³⁰⁹ After Fred Meyer announced its plans, a special task force, the Homer Advisory Planning Commission, and the Homer City Council studied the proposal and the city’s existing retail and wholesale floor-area limits for approximately two years. During that time the City Council held more than a dozen hearings.³¹⁰

In March 2004, voters who wanted big box development in Homer filed a petition for a ballot initiative to establish a limit of 66,000 square feet for retail and wholesale businesses in the relevant zoning districts.³¹¹ Proponents of the initiative “opposed what they called the city council’s attempt to restrict free enterprise and protect certain businesses.”³¹² On April 12, 2004, the City Council passed an ordinance limiting store size to 20,000 to 45,000 square feet in the

306 “Big box” initiatives are those regarding large retail stores such as Ikea, Lowe’s, Home Depot, Target, and the iconic Wal-Mart. See MYERS, *supra* note 164, at 18.

307 *Id.* at 24.

308 *Id.*

309 Carly Bossert, *Voters Pave Way for Big Box Stores*, HOMERNEWS.COM, June 17, 2004, http://homernews.com/stories/061704/new_061704new002001.shtml; Mary Pemberton, *Supreme Court Rules Homer Voter Initiative Invalid Zoning*, ANCHORAGE DAILY NEWS, June 21, 2008, at A6.

310 See *Griswold v. City of Homer*, 186 P.3d 558, 560 (Alaska 2008).

311 See *id.*

312 Bossert, *supra* note 309.

relevant districts.³¹³ Nevertheless, on June 15, 2004, the voters in Homer approved the initiative with almost fifty-eight percent of the vote.³¹⁴ The City Council then enacted an ordinance adopting the 66,000 square foot limit in February 2005.³¹⁵

Frank Griswold, a “[c]itizen activist” who has lived in Homer since 1976 and “favors planned development,” challenged the initiative on several grounds because he believed that “the city planning commission did a good job of coming up with reasonable standards.”³¹⁶ The Supreme Court of Alaska ultimately ruled in his favor, holding that the measure was invalid “[b]ecause this zoning initiative impermissibly bypassed the Homer Advisory Planning Commission, and therefore exceeded the city council’s own legislative power.”³¹⁷ The city could not pass or amend a zoning ordinance without consulting the planning commission. Thus, neither could the electorate.³¹⁸

The Homer City Council does not have the power to pass piecemeal zoning amendments without at least giving the Homer Advisory Planning Commission opportunity to review the proposals and make recommendations. Therefore, voters, who have no obligation to consider the views of the planning commission or be informed by its expertise, cannot use the initiative process to eliminate the planning commission’s role in “areawide” land use planning and regulation, and thus potentially undermine the comprehensive plan for “systematic and organized” local development.³¹⁹

Moreover, the court concluded, state law established the planning commission as the primary venue for initial consideration of zoning amendments.³²⁰ Though the city argued that the law did not preempt the zoning by initiative, the court concluded that the City Council did not have the power to sidestep the planning commission so neither did the voters.³²¹ “The power to initiate cannot exceed the power to legislate.”³²² The court further explained that if allowed to stand, the initiative process could obviate the intended role of the planning commission, a deliberative body, which studied the issue and

313 *Griswold*, 186 P.3d at 560.

314 City of Homer, Resolution 04-58(S), <http://clerk.ci.homer.ak.us/resolutions/reso0458.htm> (last visited Mar. 30, 2009) (certifying the results of the City of Homer Special Initiative Election held on June 15, 2004).

315 *Griswold*, 186 P.3d at 560.

316 Pemberton, *supra* note 309.

317 *Griswold*, 186 P.3d at 559.

318 *Id.* at 563.

319 *Id.*

320 *See id.*

321 *See id.* at 563–64.

322 *Id.* at 560.

applied the standards of Homer's Comprehensive Plan in its decision-making process.³²³ Though the City Council may reject the commission's recommendations, it may not ignore them.³²⁴ Accordingly, the court found that "the voters can not pass an initiative in which the commission's recommendations play no formal, or perhaps even informal, role at all."³²⁵ The Alaska Supreme Court was able to avoid the deliberative and planning failures of this initiative because of the state's law regarding the role of the commissioners.

b. Anaheim, California: Disney's Ballot Box Zoning

In April 2007, the City Council of Anaheim, California, approved a plan to build a 1500-unit housing complex near Disneyland in Anaheim's "Resort District."³²⁶ Of those 1500 units, 1275 were to be condominiums and 225 were to be affordable housing.³²⁷ Supporters of the plan said that the development would help to alleviate the city's housing shortage.³²⁸ The shortage seems to cut across many income levels, but "advocates say the bottom line is that the true low-wage earners—such as those who work in the city's Resort District—are pressed to find housing in Anaheim."³²⁹ Despite the efforts of Disney and some city officials to the contrary, the dispute turned into a forum on housing for low-income residents. Among those urging the city council to be more aggressive in securing affordable housing were housing advocates, labor leaders, religious leaders, and various blue collar workers.³³⁰

Some religious coalition leaders, however, chose to stay out of the fray "partly because some members [sided] with Disney and others didn't believe the entertainment giant [could] be beaten in the courts or at the ballot box."³³¹ They instead chose to focus on another development, where no units had been designated as "affordable," but

323 The commission reviewed recommendations from the Large Structure Impact Task Force and the Chamber of Commerce Legislative Committee; researched necessary improvements to lighting, landscaping, stormwater drainage, and parking; and developed standards for traffic and economic impact analyses. *Id.* at 563.

324 *Id.* at 564.

325 *Id.*

326 See Dave McKibben, *Disney Fight over Housing Complex to Go on Ballot*, L.A. TIMES, May 22, 2007, at B9.

327 *Id.*

328 *Id.*

329 Dave McKibben, *Scope of Housing Dispute Broadens: Anaheim's Battle Over Resort Land Use Is Now a Debate on a City's Role in Mandating Housing That Workers Can Afford*, L.A. TIMES, July 9, 2007, at B1.

330 *Id.*

331 *Id.*

twenty percent of the planned 1100 apartments could be made available for low-income residents.³³² Yet this development also could be halted by another powerful entity. The development is next to the Angel Stadium of Anaheim, home of the Anaheim Angels major league baseball team. Under the terms of the lease for the stadium, the team owner would have to approve any homes built there. At least one City Council member believes that it is highly unlikely that the team owner's would agree to such development.³³³

Meanwhile, a coalition of business and community leaders formed Save Our Anaheim Resort District (SOAR) to oppose the housing plan and proposed two measures for the June 2008 ballot.³³⁴ Disney contributed \$2.1 million to SOAR, while the rest of group's almost 10,000 members contributed less than \$2000.³³⁵ SOAR's ballot initiative would have required the voters' approval for any changes to the resort district's zoning,³³⁶ and its referendum would have overridden the City Council's plan to add housing to the district.³³⁷

Supporters of the city's development plan, the Committee to Protect and Defend Anaheim, persuaded the City Council to place another initiative on the ballot, the "Anaheim Voter Empowerment Initiative." If it had been approved, the initiative would have given voters control over the zoning of the fifty-three acres where Disney is planning to develop its third Disneyland theme park.³³⁸ Using a play on the land use term NIMBY, opponents of SOAR's initiative and supporters of the low-income housing created the acronym YIMBY: "Yes in Mickey's Backyard."³³⁹

332 *Id.*

333 *Id.*

334 Save Our Anaheim Resort District, About SOAR, <http://soaranaheim.com/about-soar.php> (last visited Mar. 30, 2009).

335 Dave McKibben, *Resort District Group's Main Backer Is Disney*, L.A. TIMES, Mar. 3, 2008, at B1.

336 See Dave McKibben, *Disney's Land-Use Measure Advances: City Council to Decide Next Step for Initiative to Give Voters Control of Resort District Projects*, L.A. TIMES, Oct. 11, 2007, at B1 (giving voters ability to block housing projects in the resort district and taking away the city's authority to make land use decisions in the district); Save Our Anaheim Resort District, SOAR Coalition Files 31,348 Signatures to Place Initiative on Ballot (Aug. 22, 2007), <http://soaranaheim.com/home-archive.php> (follow "August 22, 2007" hyperlink).

337 Save Our Anaheim Resort District, SOAR Coalition Files Referendum: Mayor Curt Pringle, State Senator Lou Correa, Lead Efforts to Overturn Council's Vote (Apr. 26, 2007), <http://soaranaheim.com/coalition-files-referendum.php>.

338 McKibben, *supra* note 336.

339 Fred A. Bernstein, *Housing Plan Turns Disney Grumpy*, N.Y. TIMES, May 20, 2007, at § 11.

Ultimately, none of the three measures were on the ballot in June 2008. The developer was unable to complete the purchase of the land and informed the City Council that it was no longer seeking a change in the zoning.³⁴⁰ The City Council then voted to rescind its decision to approve development of housing in the resort area, thus eliminating the need for any of the measures to appear on the ballot.³⁴¹ Still, this conflict demonstrates how one player or interest group can dominate the decisionmaking process and thwart the municipality's efforts to facilitate the development of much needed housing.

2. Growth Controls

Citizens have proposed various initiatives to control and slow growth either directly or indirectly. Some of these initiatives may address policy issues that are appropriately put before the voters. Others, however, may veer into the territory appropriately left to planning professionals and elected officials. In November 2006, for example, voters in Loma Linda, California, decided between two ballot measures concerning open space and growth in the city.³⁴² The citizen-led effort, Measure V, competed with the City Council's proposal, Measure U.³⁴³ Both initiatives sought to protect the hillside areas of the city and regulate growth, but Measure V would amend the city's general plan.³⁴⁴ One editorial urged voters to approve Measure U because it "would protect the hills without detours into technical planning issue[s] in the rest of the city. Measure V's flaws and complexity merit rejection."³⁴⁵ The voters disagreed, however, and approved Measure V.³⁴⁶

Organizers in other jurisdictions generally have successfully wrested governing authority away from their elected officials in order to make such decisions. The following discussion examines four such "successes."

340 Sarah Tully, *Disney-Area Housing Plan Dies*, OC REGISTER, Nov. 27, 2007, <http://www.OCRegister.com/news/council-suncal-repeal-1930790-housing-backed>.

341 Dave McKibben, *Anaheim Rescinds Backing for Housing Near Disneyland*, L.A. TIMES, Nov. 28, 2007, at B3.

342 Stephen Wall, *Competing Measures Eye Growth*, SAN BERNARDINO COUNTY SUN, Oct. 9, 2006, at A1.

343 *See id.*

344 *See id.*

345 Editorial, *U Yes; V No*, PRESS-ENTERPRISE (San Bernardino), Sept. 28, 2006, at B8.

346 Stephen Wall, *3 Council Seats in Question for Loma Linda in Election*, SAN BERNARDINO COUNTY SUN, Mar. 4, 2008, at A6.

a. Washoe County, Nevada: Sustainable Water Supply

The Regional Planning Governing Board of Washoe County, Nevada tried unsuccessfully to avert citizens' efforts to place on the November 2008 ballot an initiative to restrict growth in the county.³⁴⁷ The proponents filed a petition for an initiative that would require that regional planning for growth in the county be based upon sustainable water resources located within the county.³⁴⁸ That is, the initiative would prohibit importing water from outside of the county.³⁴⁹ There is some disagreement about whether this initiative is warranted, given the historical growth rate of the county and a new regional water facilities plan.³⁵⁰ But supporters of the initiative were frustrated with the regional planning efforts and pushed this measure to force the planning commission to synchronize planning for water with planning for development.³⁵¹

The initiative creates a county ordinance; however, there is some doubt about whether a county ordinance could force the regional agency to do anything.³⁵² Nevertheless, after considering the possibility of filing a lawsuit to prevent the initiative from appearing on the ballot, the Board voted to tell "planners to give initiative backers what regional plan changes they want[ed]" in the hopes that the proponents would withdraw the petition before November.³⁵³ The parties

347 Susan Voyles, *Regional Board Concedes Changes to Avoid Growth-Water Ballot Question*, RENO GAZETTE-J., Aug. 8, 2008, <http://planevada.org/content/view/229/461>.

348 Susan Voyles, *Planning Initiative Gathers More than 28,000 Signatures*, RENO GAZETTE-J., June 28, 2008, <http://truckeeriverinfo.org/node/889>. The proposed initiative provides that "[t]he Truckee Meadows Regional Plan shall be amended to reflect and to include a policy or policies requiring that local government land use plans be based upon and in balance with identified and sustainable water resources available within Washoe County." Press Release, Washoe County Manager's Office, Nev., Washoe County Commission Votes to Put Citizen Initiative Regarding Water Resources for Planning on 2008 Election Ballot (Aug. 20, 2008), available at <http://www.co.washoe.nv.us/mgrsoff/mediaroom/pressreleases.php-year=2008&month=8&article=5106#95106>.

349 See Press Release, *supra* note 348.

350 Susan Voyles, *Regional Agency May Ask Judge to Block Washoe Growth Ballot Question*, RENO GAZETTE-J., July 24, 2008, <http://planevada.org/content/view/226/461>.

351 *Petitioners: Effort's Leaders Explain the Initiative*, RENO GAZETTE-J., June 29, 2008, at 11A.

352 Voyles, *supra* note 350 ("But the county, with an ordinance or citizens initiative, can do only what's within its power, Paul Lipparelli, Washoe County chief civil deputy attorney, told the Reno Gazette-Journal. Lipparelli said the county does not have the power to force the regional board to amend the regional plan state law creating regional planning in Washoe County does not provide for an initiative process.").

353 Voyles, *supra* note 347.

were unable to reach a compromise,³⁵⁴ however, and the voters overwhelmingly approved the measure in November 2008.³⁵⁵

b. Redondo, California: Charter Amendment

In November 2008, the voters of Redondo, California, faced two competing ballot measures about the role that they will play in future development of the city. A political action committee, Building a Better Redondo (BBR), wished to slow what it considered the “overdevelopment” of Redondo.³⁵⁶ Its initiative, Measure DD, will require voters’ approval of any “major change in allowable land use” in the city.³⁵⁷ Such changes include proposals that would: “significantly increase traffic, density or intensity of use above the as built condition in the neighborhood where the major change is proposed,”³⁵⁸ “change a public use to a private use,”³⁵⁹ or “change a nonresidential use to residential or a mixed use resulting in a density greater than 8.8 dwelling units per acre.”³⁶⁰

The City Council countered BBR’s efforts with its own ballot measure, the “Redondo Beach Coastal Zone, Parks, Open Space and Single Family Residence Neighborhood Protection Act.”³⁶¹ The Council’s measure also would have required the voters’ approval of “major changes in land use.”³⁶² “The difference between the two, said [Mayor Mike] Gin, is that the council’s ballot measure [would have done] so in a ‘much broader level, rather than project by project.’”³⁶³ The City Council’s approach seemed more consistent with the modern view of planning as a dynamic enterprise.

354 Press Release, *supra* note 348.

355 Susan Voyles, *Planners Set Hearing on Sustainable Water*, RENO GAZETTE-J., Nov. 28, 2008, <http://planevada.org/content/view/288/461> (reporting that voters approved the initiative by seventy-three percent).

356 See Building a Better Redondo, *Why Do We Need BBR’s Measure DD?*, http://www.buildingabetterredondo.org/bbr_ini_why.html (last visited Mar. 30, 2009).

357 Building a Better Redondo, *Petition for Submission to Voters of Proposed Amendments to the Charter of the City of Redondo Beach § 27.4(a)*, http://www.buildingabetterredondo.org/initiative_II.pdf (last visited Mar. 30, 2009) [hereinafter BBR Petition].

358 *Id.* § 27.2(g)(1).

359 *Id.* § 27.2(g)(2).

360 *Id.* § 27.2(g)(3).

361 Sascha Busch, *City Battles Slow-Growth Group with Its Own Ballot Measure*, BEACH REP. (Manhattan Beach), June 18, 2008, http://www.tbrnews.com/articles/2008/06/19/redondo_beach_news/news03.txt.

362 Mark McDermott, *City Offers Own Land-Use Ballot Measure*, EASY READER (Hermosa Beach), June 19, 2008, at 32.

363 Busch, *supra* note 361.

One Council member touted the Council's measure as having simple, direct language that was unlikely to lead to unintended consequences, while he derided BBR's initiative as being "obscure, complicated, and wrong."³⁶⁴ He also found fault with Measure DD's exception for certain types of affordable housing, thus encouraging such development.³⁶⁵ Tellingly, however, BBR's chair criticized the Council's measure for not addressing the issue that led to BBR's initiative: the city's conversion of nonresidential areas to residential areas.³⁶⁶ Ultimately, Measure DD passed.³⁶⁷

c. Sarasota City and County, Florida: Supermajority Requirement and Urban Service Boundary

In 2007, voters in the city and county of Sarasota, Florida, approved ballot initiatives requiring a supermajority of the city and county commissioners, respectively, in order to amend the municipalities' comprehensive plans in certain areas.³⁶⁸ As a result, an affirmative vote from four of the five city or county commissioners is required to change the comprehensive plans, specifically including decisions to change existing land use classifications or to add new ones, and to increase the allowable density, height, or floor area ratios, for example.³⁶⁹ Supporters of the city's amendment apparently sought the changes because of its frustration with two of the city commissioners' decisions over the previous four years.³⁷⁰ One of the leaders of the

364 McDermott, *supra* note 362 (quoting City Council member Steve Diels).

365 *Id.* The proposed amendment would "not apply to affordable housing projects for low and moderate incoming housing . . ." BBR Petition, *supra* note 357, § 27.6(f). The proponents likely excluded that housing to avoid claims under the Fair Housing Act, 42 U.S.C. §§ 3601–3631 (2000), and the Equal Protection Clause of the Fourteenth Amendment alleging that the measure discriminated on the basis of race or some other improper criterion, U.S. CONST. amend. XIV, § 1.

366 McDermott, *supra* note 362.

367 Kristin S. Agostoni, *Measure DD Wins the Battle of Redondo Land-Use Measures*, DAILY BREEZE (Redondo Beach), Nov. 5, 2008, http://www.dailybreeze.com/elections/ci_10904355.

368 Editorial, *A Super Way to Get a Better Grip on How Counties and Cities Grow*, TAMPA TRIB., Nov. 12, 2007, at 14. Sixty-three percent of voters in the city approved the measure, and sixty-one percent of the voters in the county approved the measure. Doug Sword, *Supermajority Results Convey a Mood to Slow Down Growth*, SARASOTA HERALD-TRIB., Nov. 7, 2007, at 10A.

369 See SARASOTA COUNTY, FLA., CHARTER § 2.2A(1) (2009) (requiring an affirmative vote of a majority plus one of the commissioners to approve such changes); CITY OF SARASOTA, FLA., CODE art. IV, § 2(j)(2)(3) (2008) (requiring an affirmative vote of four city commissioners to make such changes).

370 Carol E. Lee, *Sarasota Comp Plan Stronger; City Commissioners Vote 3-2 to Require a "Supermajority" Vote to Change Plan*, SARASOTA HERALD-TRIB., Apr. 17, 2007, at B1 (not-

organizers for the county's amendment said that residents were concerned about population growth.³⁷¹

Buoyed by the success in 2007, activists in Sarasota County, including the chief proponent of the county's supermajority amendment, Citizens for Sensible Growth, collected the requisite number of signatures to qualify for the ballot a measure that would require a referendum any time the county commissioners want to move the "Urban Service Boundary."³⁷² The Urban Service Boundary separates urban and rural development, and there has been increasing development pressure to move the line eastward into rural areas.³⁷³ The voters of Sarasota County approved the measure by seventy-nine percent in May 2008.³⁷⁴ This type of decision may be well-suited for policymaking by initiative, but in this instance there was low turnout, with only sixteen percent of registered voters casting a ballot, which may have been determinative.³⁷⁵ Such low turnout could be viewed as being at odds with the notion that initiatives better represent the will of the people than do decisions by elected bodies.

C. *Environmental Initiatives*

Unlike the two other types of land use regulations examined in this Article, measures to conserve land for parks, recreational areas, wildlife habitat, forests, farmland, watershed protection, and open space enjoy consistent support. Over the last two decades, approximately seventy-five percent of all ballot measures to conserve land have passed.³⁷⁶ Most of the successful initiatives occurred at the local

ing that while only two out of the eleven land use decisions during the past four years had been by a vote of three to two, those decisions "have tainted the relationship between City Hall and city residents [and] 'really damage[d] the public trust in the comprehensive plan'").

371 See Sword, *supra* note 368 (quoting Wade Matthews of the group Citizens for Sensible Growth).

372 See Doug Sword, *From Slow Growth to . . . What Next?: Activists Planning Ways to Capitalize on Recent Election Triumphs*, SARASOTA HERALD-TRIB., Nov. 14, 2007, at 1A [hereinafter Sword, *From Slow Growth to . . . What Next?*]; Doug Sword, *Voters Will Weigh in Once More on Growth*, SARASOTA HERALD-TRIB., Jan. 9, 2008, at 1B [hereinafter Sword, *Voters Will Weigh in Once More on Growth*].

373 See Sword, *Voters Will Weigh in Once More on Growth*, *supra* note 372.

374 Doug Sword, *Voters Fortify the Rural Border*, SARASOTA HERALD-TRIB., May 7, 2008, at 1A.

375 See *id.*

376 See Trust for Public Land, Summary of Measures by Year 1988–present, <http://www.conservationmanac.org/landvote/cgi-bin/nph-landvote.cgi/000000A/https/www.quickbase.com/db/ba72nhu5n?a=q&qid=202> (last visited Mar. 30, 2009).

level,³⁷⁷ and most of them were financing measures: bonds or property taxes.³⁷⁸ “Even the developers who rally against most regulatory initiatives don’t seem to mind bond and tax measures devoted to land purchases.”³⁷⁹ However, few of those efforts were citizen-led.³⁸⁰ Results on the state level have been more of a mixed bag. One noteworthy statewide ballot initiative was California’s Proposition 20, the California Coastal Zone Conservation Act of 1972.³⁸¹ The voters passed Proposition 20 in response to the state legislature’s failure to enact a state counterpart to the Federal Coastal Zone Management Act.³⁸² Instead, the legislature proposed numerous bills that would have been more protective of private property rights than of the coast.³⁸³ Proposition 20 established the State Coastal Zone Conservation Commission and six regional commissions.³⁸⁴ It also led to the passage of the California Coastal Act of 1976 and creation of the Cali-

377 See Peter S. Szabo, *Noah at the Ballot Box: Status and Challenges*, 57 *BIO SCIENCE* 424, 425 (2007) (finding that from 1996 to 2004, seventy-six percent of the successful measures were municipal and eighteen percent of them were at the county level).

378 For example, in a study of 1998 ballot measures, Phyllis Myers found that of the 226 local initiatives on parks, conservation, and smart growth, 140 of them, or sixty-two percent, involved financing. See Phyllis Myers, *Livability at the Ballot Box: State and Local Referenda on Parks, Conservation, and Smarter Growth, Election Day 1998*, in *THE DISCUSSION PAPER SERIES 9* (Brookings Inst. Ctr. on Urban & Metro Policy, Discussion Paper Series, 1999), available at http://www.brookings.edu/reports/1999/01metropolitanpolicy_myers.aspx. For a database of land conservation measures, see the TPL LandVote Database. Trust for Public Land, TPL LandVote Database, <http://www.conservationalmanac.org/landvote/cgi-bin/nph-landvote.cgi/000000A/https/www.quickbase.com/db/bbqna2qct> (last visited Feb. 19, 2009); see also Editorial, *Greening the Garden State*, *N.Y. TIMES*, Nov. 16, 2002, at A16 (“In the last four years, voters in local and state ballots across the nation have allotted more than \$20 billion for the purchase of open spaces—\$2.6 billion of that total coming in the measures passed this election.”); Alan Greenblatt, *Thumbs Up on Land for Leisure*, *GOVERNING*, Feb. 2001, at 110 (reporting that voters in state and local elections approved eighty percent of the ballot initiatives proposed to fund land conservation).

379 Greenblatt, *supra* note 378.

380 For example, in 2000, of the 252 state and local ballot measures regarding open space and parks, only five were citizens’ initiatives. See Myers & Puentes, *supra* note 301, at 10.

381 Proposition 20 ch. 3, art. 1 (Cal. 1972) (codified at CAL. PUB. RES. CODE ANN. §§ 27200–27201 (West 1976) (repealed 1976)), available at http://www.sos.ca.gov/elections_i.htm (follow “California Ballot Propositions Database” hyperlink; then search for “Proposition 20”).

382 J. David Breemer, *What Property Rights: The California Coastal Commission’s History of Abusing Land Rights and Some Thoughts on the Underlying Causes*, 22 *UCLA J. ENVTL. L. & POL’Y* 247, 250 (2004).

383 STEPHANIE S. PINCETL, *TRANSFORMING CALIFORNIA* 195 (1999).

384 Proposition 20 ch. 3, art. 1 (Cal. 1972).

fornia Coastal Commission, which still governs the coast of California today.³⁸⁵

The following discussion will focus on statewide initiatives; however, all three of the initiatives examined below failed. They suffered from deliberative failures in that misinformation abounded and appreciation of varied viewpoints was lacking. In Arizona, moreover, both propositions arguably would have interfered with municipalities' existing land use regulatory authority.

1. Alaska: Ballot Measure 4, the "Clean Water" Initiative

In August 2008, voters in Alaska rejected Ballot Measure 4, the "Clean Water" initiative, with over fifty-six percent opposed³⁸⁶ and bucked the national trend in favor of initiatives for environmental protection. The initiative would have restricted the discharge of toxic materials from large-scale metallic mineral mines in Alaska.³⁸⁷ It was aimed largely at Pebble Mine, a proposed copper and gold mine in southwest Alaska³⁸⁸ near the headwaters of two rivers that feed the region's major salmon runs.³⁸⁹

Supporters of the initiative believe that its opponents were successful in defeating the measure in large part due to the amount of money they spent. Opponents spent somewhere between \$7 and \$15 million, while supporters spent less than \$3 million. As one resident of Bristol Bay near the Pebble Mine remarked, "Money talks and everyone got brainwashed."³⁹⁰ Some believe that funding on both sides of the issue was problematic, leading to the measure's defeat. And while opponents of the measure inaccurately characterized it as shutting down the mining industry, the proponents' drafting of the language was criticized as "sloppy."³⁹¹

385 Breemer, *supra* note 382, at 250.

386 Alaska Div. of Elections, 2008 Primary Election, August 26, 2008, Official Results, Sept. 18, 2008, <http://www.elections.alaska.gov/08prim/data/results.pdf>.

387 Eryn Gable, *Clean Water Plan to Appear on Alaska Ballot, Mining Companies Gear up for Attack*, LAND LETTER, July 10, 2008, <http://eenews.net/Landletter/print/2008/07/10/1>.

388 See, e.g., *id.*; Elizabeth Bluemink, *Court OKs Initiative for Ballot: 'CLEAN WATER': Mining Backers Fought the Measure*, ANCHORAGE DAILY NEWS, July 4, 2008, at A4.

389 See Elizabeth Bluemink, *Vote Shows Which Rural Areas Back Mining*, ANCHORAGE DAILY NEWS, Aug. 28, 2008, at A3.

390 Mary Pemberton, *Measure 4 Supporters Regroup: Next Steps: They Say a Grass-Roots Campaign Heavy on Facts Is Needed*, ANCHORAGE DAILY NEWS, Aug. 28, 2008, at A3.

391 Editorial, *Election Results: Voters Opted for Status Quo with Initiatives, Candidates*, ANCHORAGE DAILY NEWS, Aug. 28, 2008, at B4.

Another important factor in the measure's defeat was the role of the state's executive branch. The state's constitution permits the Lieutenant Governor to provide a summary of the proposed initiative.³⁹² Taking what she called "personal privilege," Governor Sarah Palin, the former Republican vice presidential nominee, chose to go a bit further in influencing the outcome of the election.³⁹³ Just before the election she said, "Let me take my governor's hat off just for a minute here and tell you, personally, Prop 4—I vote no on that."³⁹⁴ An Anchorage-based environmental attorney said, "'Conventional wisdom around here is that [her statement] changed the tide on the proposition, from narrowly passing to being defeated.'"³⁹⁵

Also, the state's Department of Natural Resources (DNR) improperly tried to influence voters. The DNR provided content on its website that was posted ostensibly to educate voters.³⁹⁶ Supporters of the initiative, however, challenged that content as being impermissibly partisan and argued that "the state's 'neutral' statements were actually all negative . . . and improperly echoed the mining industry's concerns."³⁹⁷ Just five days before the election, the Alaska Public Offices Commission ordered the DNR to shut down the website and revise its content so that it would be "fair and neutral."³⁹⁸

Even if voters were willing and capable of analyzing the measure carefully, two barriers prevented them from doing so. The funding level of the opponents and the executive branch's action at a minimum distorted the process.

392 ALASKA CONST. art. XI, § 4.

393 See Lamb, *supra* note 25.

394 *Id.*

395 Sheppard, *supra* note 28 (quoting Anchorage environmentalist lawyer Peter Van Tuyn).

396 *Hearing on Kraft v. Dep't of Natural Res. Before the Alaska Pub. Offices Comm'n* 1 (Aug. 22, 2008), available at http://www.state.ak.us/apoc/pdf/08_14_CD_Kraft_v_DNR_Oral_Order_080822final.pdf [hereinafter *APOC Hearing*].

397 Bluemink, *supra* note 29.

398 See *Hearing on Kraft v. Dep't of Natural Res. Before the Alaska Pub. Offices Comm'n* 4 (Aug. 21, 2008), available at http://state.ak.us/apoc/pdf/08_14_CD_Kraft_v_DNR_Oral_Order_080821.pdf. The Commission found that "in certain areas . . . the website is not a correct representation of the ballot measure as we read [it] tonight." *Id.* at 2 (alteration in original). The Chair of the Commission also said, "I would like to point out some of the areas of the web page that presents us with a concern that the website is not fair and neutral." *Id.*; see also *APOC Hearing, supra* note 396, at 9 (lifting the cease and desist order as soon as the website was revised in accordance with the APOC's order). An Alaska attorney general's opinion states that the "public funds may be expended on political activities only if the government's involvement is fair and neutral." Office of the Attorney Gen. of Alaska, No. 663-90-0176, 1992 Alaska AG LEXIS 6, at *2 (Jan. 1, 1992) (internal quotation marks and citations omitted).

2. Arizona: Propositions 105 and 106, State Trust Lands

In 2006, voters in Arizona considered Propositions 105 and 106. These two propositions advocated two different courses of action for using the state's trust lands that the federal government granted the state for the funding of public institutions. Proposition 106, also known as the "Conserving Arizona's Future Initiative," would have created a conservation reserve consisting of approximately 694,000 acres of state trust land.³⁹⁹ Proposition 105, House Concurrent Resolution 2045, provided initially only for the conservation of less than 43,000 acres of state trust land and would have required the legislature to develop a method for conservation of any additional acreage.⁴⁰⁰ Proposition 106 was citizen-led,⁴⁰¹ and Proposition 105 originated in the legislature.⁴⁰²

State Representative Tom Prezelski criticized both propositions, arguing that they would take away land use planning authority from local governments, among other things.⁴⁰³ He suggested that no action was necessary to reform the manner in which the state managed the trust lands and that the parties proposed these initiatives because of a manufactured crisis erupting out of litigation over the management of the lands.⁴⁰⁴

Manufactured crisis notwithstanding, the state legislature had been considering the issue for some time, "but lawmakers had been

399 Proposition 106 sec. 3, art. X, § 1.1(A) (Ariz. 2006), available at http://www.azsos.gov/election/2006/info/pubpamphlet/sun_sounds/english/prop106.htm.

400 Proposition 105 sec. 3, art. X, § 4.2(B) (Ariz. 2006), available at http://www.azsos.gov/election/2006/info/pubpamphlet/sun_sounds/english/prop/105.htm.

401 See Shanna Hogan, *Desert Land Preserve Initiative Backers to Launch Drive: Information Session Set for Wednesday*, E. VALLEY TRIB. (Mesa), Sept. 5, 2006, at A3.

402 *Id.*

403 Posting of Tom Prezelski to Tucsonsoscene, <http://www.tucsonsoscene.com/?q=node/314> (Oct. 10, 2006, 10:23).

404 As Tom Prezelski wrote,

These two competing propositions arose from a phony crisis that emerged when a conservation group won a lawsuit against the State Land Department. The . . . State Land Department is responsible for managing millions of acres of public land held in trust for our school system. Basically, they are responsible for leasing or selling this land to generate a "maximum return" to the schools. A few years ago, the Department got in some trouble when it was found that they were ignoring the "maximum return" mandate in favor of helping out an old-boy network of cattlemen and developers. This precipitated a three year series of backroom meetings that eventually broke down and led to these two competing proposals.

Id.

unwilling to tackle the multipronged issue.”⁴⁰⁵ Consequently, a coalition of environmental and educational groups formed to place Proposition 106 on the ballot.⁴⁰⁶ Under the terms of Proposition 106, the Governor would have appointed a board of trustees, the majority of whom were to have had “substantial involvement with the public schools,” to manage the land.⁴⁰⁷ Conversely, Proposition 105 would have vested all authority to manage the lands in the state legislature.⁴⁰⁸ Supporters of Proposition 106 opposed this management structure because as one supporter explained, “Unfortunately, for the last thirty years, this land has too often been treated as a political football to be fought over, rather than a resource to be managed.”⁴⁰⁹

Supporters of Proposition 106 also characterized Proposition 105 as a “spoiler”⁴¹⁰ and a “scarecrow”⁴¹¹ intended to confuse voters and keep both propositions from passing. For example, the Sierra Club Grand Canyon Chapter in Tucson argued:

Proposition 105 was referred to the ballot by the Arizona Legislature merely to counter the *Conserving Arizona's Future* Initiative. While the Sierra Club is neutral on the initiative, we do not think it is appropriate for the Legislature to try and confuse voters in order to defeat it. It should pass or fail based on its merits, not on voter confusion.⁴¹²

Nonetheless, if confusion and defeat were the objectives of Proposition 105's supporters, they succeeded. Voters rejected both propositions, and the belief among supporters of Proposition 106 was that voters were confused and thus voted against both measures.⁴¹³ A

405 Opinion, *Let Az Voters Have a Say in State Trust Land*, TUCSON CITIZEN, NOV. 28, 2005, at 4B.

406 *Id.*

407 Proposition 106 sec. 4, art. X, § 1.2 (Ariz. 2006).

408 See BREWER, *supra* note 290, at 42 (arguing against Proposition 105, Arizona Education Association).

409 *Id.* at 65 (arguing for Proposition 106, Grady Gammage, Jr.).

410 See, e.g., Hogan, *supra* note 401 (“[The executive director of the McDowell Sonoran conservancy] called the legislative referendum a ‘spoiler,’ designed to prevent both measures from passing.”); Opinion, *‘Reform’ Bill for Trust Lands Is Not the Solution*, ARIZ. DAILY STAR (Tucson), May 31, 2006, at A8 (“[I]t can be seen mostly as a ‘spoiler’—something placed on the ballot to confuse voters and thereby derail the Conserving Arizona’s Future initiative.”).

411 Posting of AZClydesdale to <http://forums.mtbr.com/showthread.php?t=243646> (Nov. 8, 2006).

412 BREWER, *supra* note 290, at 43 (arguing against Proposition 105, Sierra Club Grand Canyon Chapter).

413 “Most [Scottsdale] city officials attribute the narrow failure of Prop. 106 to voter confusion spurred by Proposition 105, the other land reform initiative sponsored by homebuilders and the Cattlemen’s Association.” Shanna Hogan, *Preserve*

resounding seventy-one percent of the voters rejected Proposition 105.⁴¹⁴ The vote on Proposition 106 was much closer, with fifty-one percent of the electors opposing it.⁴¹⁵ According to the chair of Conserving Arizona's Future, those results confirm "that Arizonans DO care about saving land, but are not sure about the right course of action."⁴¹⁶

IV. MITIGATING MEASURES

Among supporters of direct democracy, "the initiative process [may be] viewed as sacrosanct,"⁴¹⁷ and thus attempts to tinker with the process will be viewed as suspect. Yet there exists a "tension between facilitating public participation in [land use policymaking] on the one hand, and avoiding arbitrariness and promoting efficiency on the other hand."⁴¹⁸ This Part of the Article suggests measures for mitigating the harms that ballot initiatives create for land use policies. None of these suggestions is without cost, and they vary in terms of feasibility and effectiveness.

Several scholars have suggested various procedural and substantive reforms of direct democracy. Such reforms include raising the number of signatures required to place an initiative on the ballot, changing the procedures for gathering signatures, limiting the number of words for initiatives to reduce complexity and deception, and limiting the number of initiatives that may appear on one ballot in any given election.⁴¹⁹ This Part will address briefly some reforms that could improve ballot initiatives in the land use context, such as indirect initiatives, strengthened single-subject requirements, waiting periods, and independent citizen boards.

Backers Mapping New Strategy, E. VALLEY TRIB. (Mesa), Nov. 20, 2006, <http://www.eastvalleytribune.com/story/79273>.

414 Ariz. Sec'y of State's Office, 2006 General Election (Unofficial Results), Proposition 105, State Trust Lands (Nov. 28, 2006), <http://www.azsos.gov/results/2006/general/BM105.htm>.

415 Ariz. Sec'y of State's Office, 2006 General Election (Unofficial Results), Proposition 106, Conserving Arizona's Future (Nov. 28, 2006), <http://www.azsos.gov/results/2006/general/BM106.htm>.

416 Posting of AZClydesdale, *supra* note 411.

417 BRODER, *supra* note 67, at 21.

418 Paris, *supra* note 58, at 819.

419 See, e.g., Cody Hoesly, *Reforming Direct Democracy: Lessons from Oregon*, 93 CAL. L. REV. 1191, 1226-46 (2005); see also Eule, *supra* note 102, at 1507 (advocating more rather than less judicial review of the constitutionality of initiatives); P.K. Jameson & Marsha Hosack, *Citizen Initiatives in Florida: An Analysis of Florida's Constitutional Initiative Process, Issues, and Alternatives*, 23 FLA. ST. U. L. REV. 417, 447-53 (1995) (suggesting changes to the signature requirements).

A. *Indirect Initiatives*

Indirect initiatives require voters to submit their petition to the legislature before it is eligible to be put on the ballot.⁴²⁰ The legislature has a specified period of time in which to adopt, amend, or reject the measure.⁴²¹ If the legislature does not enact the proposal, it appears on the ballot for the voters to decide directly upon it.⁴²² Staunch supporters of direct democracy likely would balk instinctively at this suggestion, but they must remember that the voters still retain the ultimate authority to decide the issue.⁴²³ Eight states have an indirect initiative process, though two of them—Utah and Washington—also have a direct process.⁴²⁴

The City Club of Portland recommended in a recent report that Oregon adopt an indirect initiative system.⁴²⁵ In response to this recommendation, “a longtime conservative advocate of numerous initiatives” claimed that the members of the club “want to keep power in Salem [the state capital] with elected officials and don’t want to let the rest of us have any say in matters of public policy.”⁴²⁶ Another supporter of initiatives “accused the City Club of adopting a ‘paternalistic approach’ toward voters.”⁴²⁷

The advantage of indirect democracy is that it provides an opportunity for deliberation, compromise, study, and amendment that glaringly is absent from the direct initiative process.⁴²⁸ Also, those who are wary of the indirect initiative because of the length of the indirect

420 See Eule, *supra* note 102, at 1511.

421 See *id.*

422 MAGLEBY, *supra* note 40, at 35–36; Eule, *supra* note 102, at 1511..

423 See Eule, *supra* note 102, at 1511 (noting that voters may “displace completely the representational framework . . . [with] a direct one” in a process that “simply takes a little longer”).

424 Nat’l Conference of State Legislatures, *The Indirect Initiative*, <http://www.ncsl.org/programs/legismgt/elect/IndirInit.htm> (last visited Mar. 30, 2009).

425 City Club of Portland, *Making the Initiative Work for Oregon: A City Club Report on Reforming the Initiative, Referendum and Referral Systems in Oregon*, CITY CLUB PORTLAND BULL., Jan. 11, 2008, available at http://www.pdxcityclub.org/pdf/Initiative_Referendum_2008.pdf.

426 Edward Walsh, *Redo Initiative Steps, Club Says*, OREGONIAN, Jan. 8, 2008, at A1 (quoting Bill Sizemore, conservative advocate of numerous initiatives).

427 *Id.* (quoting Jason Williams, executive director of the Taxpayer Association of Oregon).

428 See, e.g., Eule, *supra* note 102, at 1555–58 (comparing the legislative process to the plebiscite process); Paris, *supra* note 58, at 839–40 (explaining how city councils and planning commissions engage in negotiations with developers to reach a compromise on the whole whereas with direct democracy voters either must reject or accept the proposal in its entirety).

process should note that at the local level, indirect initiatives still move through the process relatively quickly.⁴²⁹ Moreover, at the state level, regulation may limit the amount of time that the legislature may hold the initiative before it moves onto the ballot by default.

One of the drawbacks, however, is that legislatures rarely adopt the measure or engage the proponents in meaningful negotiations, leading to a compromise. Negotiation and compromise do sometimes occur after citizens initiate a ballot measure, nevertheless, as transpired with Nevada's eminent domain measure⁴³⁰ and one of Colorado's *Kelo*-plus initiatives.⁴³¹

B. *Single-Subject Requirements*

Many states prohibit the presentation of more than one issue on a single ballot initiative,⁴³² and at least two state supreme courts have held that eminent domain and regulatory takings are two different issues and thus may not appear on the same ballot initiative.⁴³³ On the other hand, many localities do not have a single-subject rule, and thus at times it may be difficult to determine what the initiative is trying to accomplish.⁴³⁴

Advocates in Arizona, California, Idaho, Montana, and Nevada sought to place on the ballot in 2006 *Kelo*-plus initiatives, which arguably contain more than one subject.⁴³⁵ The laws of each of those states,

429 See ABA INITIATIVES PROGRAM PROCEEDINGS, *supra* note 118, at 71 (“[M]ost initiatives at the local government level are going to be a matter of two or three months from beginning to end.”).

430 See Molly Ball, *Land Measure OK'd*, LAS VEGAS REV.-J., May 25, 2007, <http://www.lvrj.com/news/7683872.html> (explaining the process of compromise with the new measure); Omar Sofradzija, *Official, PISTOL Co-Author Strike Eminent Domain Deal*, LAS VEGAS REV.-J., Feb. 16, 2007, http://www.Reviewjournal.com/lvrj_home/2007/Feb-16-Fri-2007/news/12633184.html (explaining deal struck between county commissioner and eminent domain attorney).

431 Am. Ass'n Planning, *supra* note 23.

432 See Rachael Downey et al., *A Survey of the Single Subject Rule as Applied to Statewide Initiatives*, 13 J. CONTEMP. LEGAL ISSUES 579 (2004) (reviewing the existence of some form of single-subject rule that applies to initiatives in Alaska, Arizona, California, Colorado, Florida, Idaho, Illinois, Massachusetts, Michigan, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Washington, and Wyoming).

433 *Nevadans for the Prot. of Prop. Rights, Inc. v. Heller*, 141 P.3d 1235, 1244–45 (Nev. 2006); *In re Initiative Petition No. 382, State Question No. 729*, 142 P.3d 400, 409 (Okla. 2006).

434 See ABA INITIATIVES PROGRAM PROCEEDING, *supra* note 118, at 77; see also *id.* at 76 (“Most local initiatives are not operating in a deregulated, but in an unregulated environment. Consequently, there is often a lot of confusion about them . . .”).

435 See *supra* Part III.A.3.

except Idaho, limit initiatives—statutory, constitutional, or both—to one subject.⁴³⁶ These laws vary in scope and application. For example, in Nevada, the state supreme court reviewed the proposed *Kelo*-plus initiative and removed the regulatory takings measure from the initiative, leaving only the eminent domain portion for voters to consider.⁴³⁷ Arizonans, however, considered regulatory takings and eminent domain together in Proposition 207, unimpeded by the state's single-subject requirement.

Proponents of Arizona's Proposition 207 advertised it mostly as an anti-*Kelo* measure,⁴³⁸ and most of the text of the initiative pertained to the prohibition of transfers of private property to other private entities through eminent domain.⁴³⁹ Buried at the bottom of the initiative, however, was a much more far-reaching change in land use law regarding regulatory takings.⁴⁴⁰ Of the several commercials advocating the passage of Proposition 207, only one of them briefly mentioned regulatory takings.⁴⁴¹ Opponents called the Proposition "a Trojan horse: It is being sold to voters as eminent domain reform while the real danger is hidden."⁴⁴²

436 See ARIZ. CONST. art. XXI, § 1 (constitutional amendments), CAL. CONST. art. II, § 8(d) (statutory and constitutional amendments); NEV. REV. STAT. ANN. § 295.009(1)(a) (LexisNexis 2008); Mont. Auto. Ass'n v. Greely, 632 P.2d 300, 311 (Mont. 1981) (applying MONT. CONST. art. V, § 11, cl. 3 to initiatives).

437 *Heller*, 141 P.3d at 1238.

438 Amanda J. Crawford, *Property Rights or Taxpayer Nightmare? Prop. 207 Ads Don't Tell Complete Story*, ARIZ. REPUBLIC (Phoenix), Oct. 29, 2006, at 6.

439 See Proposition 207 sec. 3, § 12-1131 (Ariz. 2006) (codified at ARIZ. REV. STAT. ANN. § 12-1131 (West Supp. 2007)).

440 See *id.* sec. 3, § 12-1137 (codified at ARIZ. REV. STAT. ANN. § 12-1137 (West Supp. 2007)).

441 Crawford, *supra* note 438.

442 *Id.* Another colorful critique of Proposition 207 deemed it the "[y]ellow brick road to disaster" with the chief financial backer of the measure, Howard Rich, New York real estate investor, playing the role of the Wizard of Oz. Editorial, *Yellow Brick Road to Disaster: The Issue: A 'No' Vote on Proposition 207*, ARIZ. REPUBLIC (Phoenix), Nov. 1, 2006, at 8.

Reject the humbug. . . . In vague, sweeping language it would allow property owners to seek compensation for *any* reduction in their right to use, divide, sell or possess their property caused by the passage of *any* land-use law.

With the possibility of a legal challenge for virtually every land-use regulation, local officials would be paralyzed. Arizona would be frozen in time, unable to take any action to protect our military bases, our water supplies, our neighborhoods, our wildlife, our quality of life or our economic prospects.

Id.

California is yet another state that prohibits the presentation of more than one issue on a single ballot initiative. However, one attorney once quipped “that he could qualify any initiative under the general subject of ‘life.’”⁴⁴³ Indeed, not until 1999 had the California Supreme Court removed an initiative from the ballot because it violated the single-subject rule.⁴⁴⁴ Up until that point, most state courts had reviewed initiatives under the single-subject rule with the same level of deference that they used when reviewing legislation.⁴⁴⁵

Thus, this suggestion includes a recommendation that courts assume a less deferential posture and engage in more rigorous judicial review.⁴⁴⁶ However, Daniel Lowenstein argues “that aggressive single subject review is inherently standardless.”⁴⁴⁷ Indeed, it may be difficult to construct a single-subject rule that is not susceptible to manipulation by elevating the subject to some level of abstraction under which any issue could be included.⁴⁴⁸ Also, by limiting initiatives to single subjects, voters would consider issues in isolation that may be considered more appropriately in a broader context.

C. *Waiting Periods*

Another possible reform is to require a waiting period in between initial consideration of a ballot measure and a final vote. The Nevada Constitution requires that before any initiative designed to amend the constitution may take effect, voters must approve it twice, in two successive elections.⁴⁴⁹ This requirement allows those with opposing views to organize to defeat the measure the second time around or to propose alternative measures or compromises that would obviate the

443 ABA INITIATIVES PROGRAM PROCEEDING, *supra* note 118, at 59 (testimony of Floyd Fleeney, Professor of Law, University of California, Davis).

444 See Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 39 (2002) (discussing *Senate v. Jones*, 988 P.2d 1089 (Cal. 1999)).

445 See *id.* at 35.

446 See Eule, *supra* note 102, at 1572–73 (arguing that as democracy becomes more direct, the level of judicial scrutiny should increase).

447 Lowenstein, *supra* note 444, at 36.

448 See ABA INITIATIVES PROGRAM PROCEEDING, *supra* note 118, at 65 (testimony of Floyd Fleeney, Professor of Law, University of California, Davis); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 938–42 (1983). Lowenstein explains the limitations of the single-subject rule by using a hierarchical diagram of “subjects.” Lowenstein, *supra*, at 940. In that diagram, physics and torts could be considered one subject if the subject were “university education,” but “[m]anifestly, we cannot decide in the abstract whether physics and torts are separate subjects or parts of one subject. It all depends on the purpose of the categorization.” *Id.*

449 NEV. CONST. art. 19, § 2, cl. 4.

need for the original measure. For example, in 2006, voters in Nevada approved the People's Initiative to Stop the Taking of Our Land (PISTOL), and the initiative appeared on the ballot again in November 2008.⁴⁵⁰ In 2007, Nevadans for the Protection of Our Property Rights lobbied the legislature and helped push through legislation, Assembly Joint Resolution Three, that the group thought would eliminate the need for PISTOL. If the legislature approves the resolution again in 2009, and the voters approve it in 2010, it will supersede PISTOL.⁴⁵¹

Many initiatives that win the voters' approval initially, however, win it again in the second election.⁴⁵² Indeed, in November 2008, voters in Nevada considered PISTOL for a second time as required by law and approved it by a margin of sixty percent.⁴⁵³ One notable exception of particular relevance here was the defeat of a measure limiting property taxes. The support for the measure declined substantially *after* the legislature adopted a new law that was similar to the ballot measure, before the second vote.⁴⁵⁴

D. *Independent Citizen Boards*

Another possible reform to address both the deliberative and planning failures is the establishment of independent citizen boards. These boards could reduce the temptation of governing bodies to influence the voters inappropriately as was done in Alaska before the election to decide the Clean Water initiative. Two examples are the proposed Washington's Citizens Initiative Review (WCIR)⁴⁵⁵ and Oregon's Citizens' Initiative Review (CIR) proposed by Healthy Democracy Oregon.⁴⁵⁶ Such independent citizen boards also could reduce the impact of manipulative and misleading advertising.

WCIR, which languished in the House and Senate committees of the Washington State legislature in 2008,⁴⁵⁷ was a proposed reform to

450 See Sofradzija, *supra* note 430.

451 See *id.*

452 See RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS* 134 (2002) (discussing Nevada's experience with the consecutive vote requirement).

453 Nev. Sec'y of State, Official Statewide General Election Results, <http://sos.state.nv.us/elections/results/2008StateWideGeneral/ElectionSummary.asp> (last visited Mar. 9, 2009).

454 *Id.*

455 Citizens Initiative Review, <http://www.cirwa.org> (last visited Mar. 30, 2009).

456 Healthy Democracy Oregon, <http://www.healthydemocracyoregon.org>. (last visited Mar. 30, 2009).

457 See H.R. 1696, 60th Leg., Reg. Sess. (Wash. 2007), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/House%20Bills/1696.pdf>. The

provide voters in Washington with “trustworthy information about ballot initiatives.”⁴⁵⁸ The WCIR would have established independent panels of twenty-four citizens representing a cross-section of Washington’s citizens to review initiatives and referenda approved for the statewide ballot.⁴⁵⁹ A panel would spend five days hearing arguments for and against a measure and then issue a report with its findings. The Secretary of State would place a one-page summary of the report in the voters’ guide and the entire report would be available online, along with the record of the panel’s proceedings.⁴⁶⁰

Healthy Democracy Oregon supports a CIR that closely resembles WCIR, having the same principal proponents.⁴⁶¹ There is some variation, however, in the size of the panels and the amount of time the panels would spend deliberating.⁴⁶² In addition, materials in Oregon would be available at libraries as well as online.⁴⁶³ With this recommendation, I also would suggest an outreach effort with an advertising campaign to urge voters to read and discuss the materials.

House bill was initially referred to the Committee of State Government and Tribal Affairs; it was reintroduced by resolution on January 14, 2008, but retained in present status. See Wash. State Legislature, HB 1696—2007–08, <http://apps.leg.wa.gov/bill/info/summary.aspx?bill=1696&year=2007#documents> (last visited Mar. 30, 2009). The same legislation was introduced in the Senate and referred to the Committee of Government Operations and Elections. See S. 5598, 60th Leg., Reg. Sess. (Wash. 2007), available at <http://apps.leg.wa.gov/documents/billdocs/2007-08/Pdf/Bills/Senate%20Bills/5598.pdf>. Without taking any further action on the bills, the 2008 regular session of the Washington state legislature adjourned on March 13, 2008. See Wash. State Legislature, Statistical Reports, http://www.leg.wa.gov/documents/lic/Documents/Statistical%20Reports/Leg_Session_Dates.pdf (last visited Mar. 30, 2009).

458 Citizens Initiative Review, What Is the CIR?, <http://www.cirwa.org> (follow “What is the CIR?” hyperlink) (last visited Mar. 30, 2009).

459 *Id.*

460 *Id.*

461 Ned Crosby and Patricia Benn are both involved in Washington’s Citizen Initiative Review and Healthy Democracy Oregon. See Citizens Initiative Review, About Us, <http://www.cirwa.org> (follow “About Us” hyperlink) (last visited Mar. 39, 2009); Healthy Democracy Oregon, About Us, http://www.healthydemocracyoregon.org/about_us (last visited Mar. 30, 2009).

462 In Oregon, the panels would consist of eighteen to twenty-four citizens and they would deliberate for three to five days. Healthy Democracy Oregon, The Citizens’ Initiative Review, http://www.healthydemocracyoregon.org/about_CIR (last visited Mar. 30, 2008).

463 See *id.*

CONCLUSION

This Article presents an analysis of the use of ballot initiatives with a specific focus on the formation of land use law and policy. In so doing, it makes two normative claims. First, that ballot initiatives in the area often lead to deliberative failures because of the complexity of the issues involved and their susceptibility to manipulation. "Ballot measures flourish when the existing policy infrastructure has fallen behind what is happening on the ground and traditional institutions and leaders are unwilling or unable to change quickly enough."⁴⁶⁴ Yet absent the level of discussion characteristic of representative government's deliberations, most voters are unable to overcome their bounded rationality to make good choices. Second, these ballot initiatives lead to planning failures. They "jeopardize comprehensive planning and 'upset the delicate procedural structure of land use decision making.'"⁴⁶⁵ Furthermore, these flaws emerge regardless of the substantive merits of the initiatives.

In spite of these difficulties, land use ballot initiatives will be increasingly popular and at the center of some of our most hotly contested political battles, particularly in the West. This Article exposes the realities behind the rhetoric of direct democracy, suggesting that ballot initiatives may be inefficient, unwise, and indeed undemocratic. Such exposure is vital:

When ideas, constructs, and metaphors reach a point of common understanding in a community, they become imbedded as unstated fundamental principles, or "memes," in the minds of community members, and they function as guiding principles when community members analyze and respond to reality. But if the wrong metaphor is chosen, bad results can follow.⁴⁶⁶

For example, there is scant evidence that governments are abusing the power of eminent domain or that regulations are devastating property values. Nor are there great numbers of state and local governments so pro-development that they ignore the negative impacts of development and fail to plan for rational development. Yet these are

464 MYERS, *supra* note 164, at 28; *see also* MATSUSAKA, *supra* note 12, at 92 ("When representatives get out of step, they tend to choose policies that the majority does not support. In initiative states, voters use the initiative to bring policies back into line with their preferences relatively quickly. But in noninitiative states, policy corrections can only be brought about by changing the behavior of representatives, either by replacing them or informing them of the public's new views, which is a somewhat slower process.")

465 Clune, *supra* note 119, at 295 (quoting Selmi, *supra* note 39, at 296).

466 Mixon & McGlynn, *supra* note 165, at 1240 (footnotes omitted).

the memes upon which ballot initiative campaigns are built and, consequently, bad results may follow.

It matters not whether those bad results flow from the adoption or rejection of new land use law and policy or whether they take the form of undesirable processes or outcomes. This Article provides some modest proposals for mitigating the harmful effects of ballot initiatives in the land use context. The aim of this analysis, however, is to stir the elected and electors alike to begin to reframe this use of ballot initiatives, ever cognizant of the misleading narratives upon which they are premised, so that state and local governments may perform the functions both expected and desired of them.