ZONING BY INITIATIVE IN ARIZONA:[1] A MATTER OF JUDICIAL PHILOSOPHY

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INTRODUCTION

Whether a court chooses to allow citizens of municipalities to create or amend zoning ordinances through the initiative process is a matter of judicial philosophy.[2] Different jurisdictions, driven by conflicting views of the appropriate scope of citizen action, interpret similar constitutional and statutory language to reach contradictory results.[3] This dichotomy results from courts embracing two competing philosophies concerning legislative authority.

The first view, expressly adopted by the Arizona Supreme Court in *Transamerica Title Ins. Co. v. Tucson*,[4] is that zoning authority comprises a delegation to a municipality of the state's police power. This philosophy disapproves of local zoning initiatives because it sees them as infringing on property rights without authorization by the government. The competing position, embraced by states such as California,[5] Colorado[6] and Oregon,[7] which allow zoning initiatives, is that the states' powers are delegated by the people and that the initiative process merely asserts a right the people have reserved to themselves.

This Note examines the tension between these views in the lexicon of modern constitutional scholarship which pits the atomistic, rights-conscious "liberalism," or "pluralism,"[8] against the more relational, other-regarding

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1. The Arizona Supreme Court makes a sharp distinction between zoning initiatives and zoning referenda. Both citizen-instigated, the two kinds of legislation differ in their objectives. Referenda result when citizens take exception to a measure already passed by the legislature and seek to repeal it. Initiatives do not wait for the legislature to act. They introduce new legislation for the public's approval. The court allows referenda, maintaining that the due process requirements of notice and hearing are satisfied by the process of enacting the challenged legislation. The court further distinguishes referenda from initiatives by holding that referenda do not actually change zoning ordinances but prevent them from being changed. Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972).

2. *See infra* notes 31-55 and accompanying text.

3. *See infra* notes 92-95 and accompanying text.

4. 157 Ariz. 346, 757 P.2d 1055 (1988).

5. Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

6. Margolis v. District Ct., 638 P.2d 297 (Colo. 1981).

7. League of Women Voters v. Washington County, 56 Or. App. 217, 641 P.2d 608 (1982).

8. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1542 (1988) (describing pluralism as the concept that laws are an economic commodity to be bargained for among competing interests).

"republicanism."[9] Those familiar with the modern, popular connotations of these terms may at first find their use here confusing. "Liberalism," in this context, is not the opposite of "conservatism."[10] It describes the philosophies of people such as Locke, Kant, Mill, and Rawls.[11] The republicanism discussed here has more to do with Thomas Jefferson than with George Bush.[12] This examination begins with a brief sketch of the basic tenets of the two ideologies and their historical,[13] as well as contemporary impact on constitutional law.[14]

This treatment next examines the constitutional limitations on zoning legislation as they have been shaped by the United States Supreme Court.[15] It next sets forth the statutory procedures embodied in Arizona's Zoning Enabling Act[16] (Z.E.A.), upon which the *Transamerica* court relied for its due process analysis.[17] It then considers the constitutional basis[18] for the power of initiative in Arizona and examines Arizona's statutory initiative procedures.[19]

This Note also looks at the distinction drawn by courts that allow zoning initiatives between acts of government that are "legislative" and those that are "administrative" or "adjudicative."[20] Legislative enactments formulate a general policy and/or have a broad impact on a large segment of society. Adjudicative acts, on the other hand, specifically apply that general policy, usually to individuals or subgroups in the community.[21] Legislative acts do not implicate procedural due process; adjudicative acts do. Taking this distinction into account, this Note suggests some alternative grounds for the holdings in the two leading Arizona cases.

The discussion then turns to criticisms levelled at initiatives in general and zoning initiatives in particular: (1) initiatives do not adequately serve society's general needs because voters tend to advance their narrow self interests at the expense of society's greater good; (2) they are not truly democratic because they are subject to capture by special interest groups and only interested parties are likely to vote in them; and (3) they produce inflexible and potentially bad law because they present the voters with a binary choice in the form of prepackaged proposals not susceptible to amendment before adoption.[22] This Note points out the weaknesses of these criticisms, showing them to be fundamentally

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9. For a fuller development of this terminology, see *infra* notes 31-45 and accompanying text.
10. Fallon, *Commentary, What Is Republicanism, and Is It Worth Reviving?*, 102 HARV. L. REV. 1695, 1696 (1989).
11. *Id.*
12. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 37 (1985).
13. *See infra* notes 47-55 and accompanying text.
14. *See infra* notes 56-65 and accompanying text.
15. *See infra* notes 66-77 and accompanying text.
16. *See infra* notes 78-87 and accompanying text.
17. Transamerica Title Ins. Co. v. Tucson, 157 Ariz. 346, 348-49, 757 P.2d 1055, 1057-58 (1988).
18. *See infra* notes 96-106 and accompanying text.
19. *See infra* notes 107-23 and accompanying text.
20. *See infra* notes 167-78 and accompanying text.
21. There is not universal agreement among the courts as to these classifications. *See id.*
22. This agenda was suggested by Note, *Instant Planning—Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497, 516-21 (1988).

pluralist[23] in their outlook, while crediting the modern legislature with republican[24] attributes which it does not possess.[25]

This Note concludes that the Arizona Supreme Court is wrong to prohibit zoning initiatives out of hand. The court should allow such measures to go forward subject to constraints and requirements similar to those presently imposed upon legislatively enacted ordinances and non-zoning initiatives. This conclusion arises from the belief that civic awareness and mass participation in the political process are inherently good things[26] that should be fostered[27] (or at least not hindered) by the judiciary.[28] Conversely, feelings of disenfranchisement and alienation result when the court declares zoning law off-limits to the electorate.[29] Such feelings defeat participatory inclinations to the general detriment of the political process.[30]

REPUBLICANISM VERSUS LIBERALISM

The Ideologies

Recent constitutional scholarship casts the two competing forces underlying the enactment of the United States Constitution as republicanism and liberalism. The modern literature is replete with varying definitions of the two ideologies.[31] Generally speaking, classical republicans were concerned with inculcating the citizenry with virtue. This virtue reciprocally served as the wellspring of efforts to accomplish the "common good" or "civic virtue."[32] Republican efforts took the form of dialogue and deliberation[33] among members of small, homogeneous political subdivisions.[34] Such deliberation had the dual advantages of producing results well suited to the needs of the public[35] and developing an other-regarding attitude among its participants.[36] The town

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23. *See infra* notes 31-46 and accompanying text.
24. *Id.*
25. *See infra* notes 207-46 and accompanying text.
26. H. ARENDT, ON REVOLUTION 115 (1963) (stating that "public happiness is simply the notion that participation in government [is] a positive good, providing a kind of happiness that can be found nowhere else").
27. Michelman, *The Supreme Court, 1985 Term — Forward: Traces of Self Government*, 100 HARV. L. REV. 4 (1986). Professor Michelman goes so far as to suggest that the judiciary should act as virtual representative of the people when the people have not had an opportunity for direct participation in the political process. *Id.* at 73.
28. *See, e.g.*, Sunstein, *supra* note 8. *But see* Fallon, *supra* note 10.
29. *See infra* notes 204-06 and accompanying text.
30. *Id. See also* Sunstein, *supra* note 8, at 1547:

> [A] system lacking widespread participation will suffer from the failure to cultivate the various qualities that may accompany political life — self-development, feelings of empathy, social solidarity, and so forth. One need not believe that the political life is uniquely valuable, or that a system lacking widespread and frequent citizen participation is necessarily oppressive, in order to conclude that political activity is often an important individual and collective good.

31. Fallon, *supra* note 10, at 1697-98. *See generally* Sunstein, *supra* note 12; Michelman, *supra* note 27 and sources cited therein.
32. Sunstein, *supra* note 12, at 36-37; Michelman, *supra* note 27, at 18-19.
33. Sunstein, *supra* note 12, at 31. *See also* Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503-05 (1988).
34. Sunstein, *supra* note 12, at 36; Michelman, *supra* note 27, at 19.
35. Sunstein, *supra* note 12, at 36-37.
36. *Id.*

meeting was the favorite analogue for the classical republican's ideal of government.[37]

This formulation is typically contrasted with what is alternately called liberalism or pluralism.[38] Liberalism views society as atomistic; a collection of discrete actors with individual, competing interests.[39] The liberal is concerned with demarcating prepolitical individual rights and protecting those rights from incursion.[40]

Necessary to the republican epistemology is the belief in positive law,[41] the notion that rights are products of a well functioning republic rather than its basis.[42] Republicans look to a virtuous citizenry seeking to accomplish the common good to demarcate privileges and opportunities for members of society.[43] Liberals, on the other hand, subscribe to a concept of negative law.[44] This concept embraces the idea that rights are intrinsic to individuals and independent of politics, and that law's function is to protect those rights from infringement by government or competing interests.[45]

The Philosophies of the Founders

John Greville Agard Pocock[46] and other historical scholars[47] have displaced the belief that the framers of the United States Constitution were motivated primarily by the liberalism of John Locke.[48] The currently prevailing view is that republicanism, with its organic conceptions of the citizen's relationship to society, was the overriding philosophy of the revolutionary period.[49] Professor Sunstein writes: "It is no longer possible to see a Lockean consensus in the founding period, or to treat the framers as modern pluralists believing that self-interest is the inevitable motivating force behind political

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37. Sunstein, *supra* note 12, at 31. The United States Supreme Court adopted the analogue in City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 672-73 (1976) ("[T]he town meeting [is] a tradition which continues to this day in some States as both a practical and symbolic part of our democratic processes.") (citations omitted).

38. Sunstein, *supra* note 12, at 32; Michelman, *supra* note 33, at 1507-08; Michelman, *supra* note 27, at 21.

39. Sunstein, *supra* note 12, at 32-33.

40. *Id.* at 33.

41. Michelman, *supra* note 27, at 25-26.

42. Sunstein, *supra* note 8, at 1579-80:

> Republicans do of course believe in rights, understood as the outcome of a well functioning deliberative process; hence republicans enthusiastically endorse the use of constitutionalism as a check on popular majorities. But republicans are skeptical of approaches to politics and constitutionalism that rely on rights that are said to antedate political deliberation.

43. *Id.*

44. Michelman, *supra* note 27, at 25-26.

45. *Id.*

46. J. POCOCK, VIRTUE, COMMERCE, AND HISTORY (1985); J. POCOCK, THE MACHIAVELLIAN MOMENT (1975).

47. *See, e.g.*, G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969) and other sources cited in Fallon, *supra* note 10, at 1695 n.2.

48. Fallon, *supra* note 10, at 1694-96; Sunstein, *supra* note 8, at 1540.

49. Fallon, *supra* note 10 at 1694-96 (stating that "[r]ecent studies have largely displaced the traditional view of the Constitution's framers as pervasively animated by the natural rights theories of John Locke," and that "a plausible case can be made that the republican influence far outweighed that of Lockean liberalism") (citing among others the seminal work of J. POCOCK, THE MACHIAVELLIAN MOMENT (1975)).

behavior. Republican thought played a central role in the framing period. . . ."[50]

James Madison creates difficulties for the commentators who place him at divergent points along the republican[51]/liberal[52] continuum. Like the republicans, Madison sought the "common good" but recognized the impracticality of the town meeting model of democracy in the national polity. It is not surprising, therefore, that the government which developed during the founding period is a hybrid of republican and pluralist ideology.[53] For example, bicameralism was intended to assure citizen participation by making the House more responsive to the public than the (then) indirectly elected Senate.[54] The Senate guarded against liberal factionalism while at the same time serving the republican end of reasoned discourse by providing a forum above the fray where the common good could be pursued.[55]

The Republican Revival

Modern constitutional scholars have renewed interest in the republicanism which animated the founding of America. Commentators such as Sunstein[56] and Michelman[57] advocate re-embracing some of the more appealing tenets of classical republicanism and applying them to modern judicial determinations. The revivalists are dissatisfied with the liberal view of politics as a tool for implementing preexisting preferences and for maintaining established allocations of wealth and power.[58] They point out that such a system allows policy to be formulated on the basis of bad preferences.[59] They believe that politics should not only seek to aggregate, but to transform public opinion.[60] They are particularly concerned with increasing opportunities for the public to engage in what Michelman terms "jurisgenerative politics."[61] In his influential *Forward — Traces of Self Government*,[62] Professor Michelman says: "Republican citizens 'do not reduce self-government to self preservation, and then transfer the power it defines to a sovereign representative.' After all, the justification of the republic is freedom, to be found in the process of self-government — not in the freedom of *rulers* as a class apart. . . ."[63] Professor Sunstein similarly states: "A central lesson of the republican revival is the need

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50. Sunstein, *supra* note 8, at 1540.
51. Sunstein, *supra* note 8, at 1559 (stating that "[a]bove all, Madison's conception of representation incorporated important features of traditional republican thought").
52. Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694, 709 (1985) (stating that "Madison was a liberal").
53. Sunstein, *supra* note 12, at 47-48.
54. *Id.* at 43.
55. *Id.*
56. Sunstein, *supra* note 12; Sunstein, *supra* note 8.
57. Michelman, *supra* note 27; Michelman, *supra* note 33.
58. Sunstein, *supra* note 8, at 1542-44; Michelman, *supra* note 33, at 1526.
59. Sunstein, *supra* note 8, at 1543-44 (referring specifically to racial discrimination — a practice that was undeniably the result of popular preference, at least within certain regions of the country).
60. Sunstein, *supra* note 8, at 1549, 1551.
61. Michelman, *supra* note 33, at 1504-06.
62. Michelman, *supra* note 27.
63. *Id.* at 42 (quoting Harrington, *The Commonwealth of Oceana*, in THE POLITICAL WORKS OF JAMES HARRINGTON 170 (J. Pocock ed. 1977)) (emphasis in original).

to provide outlets for self determination in the public and private spheres."[64] The commentators vary in their emphasis on discrete points of the republican doctrine, but they speak with one voice in their call for more citizen involvement in the political process.[65]

THE CONSTITUTIONAL AND STATUTORY FOUNDATIONS FOR ZONING LAW

The United States Supreme Court Decisions

Zoning land into districts involving different classifications such as uses, density and height began in the 1920s.[66] Zoning measures arose from the concept of "nuisance" in the common law of property,[67] and it is therefore not surprising that the United States Supreme Court spoke of right things in wrong places in *Village of Euclid v. Ambler Realty Co.*[68] *Euclid* was the first case to uphold a comprehensive zoning ordinance of the type now common throughout the country.[69] In *Euclid* and subsequent cases,[70] the Court made clear that for a zoning ordinance to constitute a valid exercise of the states' police powers, it must bear a reasonable relationship to the "public health, safety, morals or general welfare" and not be "clearly unreasonable and arbitrary."[71] This last limitation has rarely come into play, because the Court has historically been extremely deferential to the states' zoning power.[72]

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64. Sunstein, *supra* note 8, at 1578.

65. *See, e.g.*, Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

66. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 1.1, at 1 (2d ed. 1985).

> Land use planning and control law did not begin to emerge as a separate and distinct area of the law until the early zoning ordinances and judicial decisions concerning them in the 1920s. . . . Planners and municipal law specialists began to think of "zoning" as a "special" area in the 1930s, 40s and 50s, but few treatises, hornbooks, casebooks, manuals or law school courses were devoted to the subject before the 1960s.

Id.

67. Williams, *Legal Discourse, Social Vision and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427 (1988).

68. 272 U.S. 365 (1926).

69. D. MANDELKER, LAND USE LAW § 1.01 (2d ed. 1988).

70. *See, e.g.*, Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) (prohibition on live nude dancing not shown to be related to public welfare); Moore v. East Cleveland, 431 U.S. 494 (1977) (requirement that all occupants of houses be related to specified degrees struck down as invasion of family and unrelated to stated objectives such as controlling overcrowding); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (restriction on number of unrelated people allowed to occupy a single family residence upheld because legitimately related to quality of environment in residential areas).

71. *Euclid*, 272 U.S. at 387. *See also* ARIZ. REV. STAT. ANN. § 9-462.01 (1990) (purpose of Arizona's Zoning Enabling Act is to "conserve and promote the public health, safety, and general welfare"). Arizona did not include "morals" in its statute and that is probably just as well since no zoning cases have relied on the Supreme Court's "morals" language in other jurisdictions. Note, *Developments in the Law — Zoning*, 91 HARV. L. REV. 1427, 1445 (1975).

72. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 405 (3d ed. 1986). *See also Schad*, 452 U.S. 61, 68 (stating that "[w]here property interests are adversely affected by zoning, the courts generally have emphasized the breadth of municipal power to

Like other legislative actions, zoning measures are also prohibited from interfering with constitutionally guaranteed individual rights other than "mere" property rights.[73] In addition, zoning measures must not "go too far" and deprive land owners of all reasonable uses of their property, lest they be struck down as uncompensated takings under the fifth amendment.[74]

Although the earlier cases relied on the nuisance analogy for justification,[75] zoning for historic preservation was approved in *Penn Central Transportation Co. v. New York City*[76] and for aesthetics in *Village of Belle Terre v. Boraas*.[77] The Court thus established in broad strokes the constitutional limitations of comprehensive zoning ordinances. These limitations are applied, of course, to zoning actions taken pursuant to zoning enabling acts.

The Zoning Enabling Act

Arizona modeled its Z.E.A.[78] on the Standard State Zoning Enabling Act.[79] In addition to imbuing the legislative bodies of localities with the authority to create planning entities (planning commissions, planning departments, directors) entitled to formulate and administer general and specific plans,[80] the Act sets forth procedures by which those bodies may adopt or amend such plans.[81] Of primary importance to those objecting to the use of initiatives to change zoning ordinances on due process grounds are those pro-

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control land use and have sustained the regulation if it is rationally related to legitimate state concerns and does not deprive the owner of economically viable use of his property").

73. Free speech is an example, as in *Schad*, in which the Court struck down an ordinance prohibiting live entertainment in the community. 452 U.S. 61. The Court stated that "when a zoning law infringes upon a protected liberty, it must be narrowly drawn and must further a . . . substantial government interest." *Id.* at 68. *But see* Young v. American Mini Theaters, Inc., 427 U.S. 50, *reh'g denied*, 429 U.S. 873 (1976) (ordinance requiring disbursal of adult-oriented businesses upheld).

74. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). For discussions of the impact of this language on subsequent takings cases, see D. HAGMAN & J. JUERGENSMEYER, *supra* note 66, at § 10.7; D. MANDELKER, *supra* note 69, at chapter 2 (need page numbers here).

75. *See, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1929). *See also* Williams, *supra* note 67.

76. 438 U.S.104, *reh'g denied*, 439 U.S. 883 (1978).

77. 416 U.S. 1 (1974). The Supreme Court stated:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Id. at 9.

78. ARIZ. REV. STAT. ANN. §§ 9-461 to -462.08 (cities and towns), §§ 11-801 to -832 (counties) (1990).

79. D. MANDELKER, *supra* note 69, at § 4.16 ("All state zoning legislation is based on a Standard Zoning Enabling Act proposed by the U.S. Department of Commerce in the mid-1920s. . . ."). The Standard State Zoning Enabling Act was originally promulgated by the Commerce Department's Advisory Committee on Zoning in 1924. By the end of 1925, nineteen states had adopted it and by the end of the decade, every state had granted political subdivisions the power to zone to a greater or lesser degree. R. CHUSED, CASES, MATERIALS AND PROBLEMS IN PROPERTY 1157 (1987).

80. ARIZ. REV. STAT. ANN. §§ 9-461.01 to -461.03 (cities and towns), § 11-803 (counties) (1990).

81. ARIZ. REV. STAT. ANN. §§ 9-461.06, -461.09, -462.03, -462.04 (city actions), §§ 11-821 to -829 (counties) (1990).

visions setting forth procedures for notice and hearing before a plan may be enacted or modified.[82]

Arizona law requires that a municipal zoning ordinance be consistent with the general plan of a municipality.[83] It further requires that where municipalities have a planning commission,[84] that body must hold a public hearing on any zoning ordinance and notify owners of property affected by the ordinance at least fifteen days in advance of the hearing.[85] If there is no local planning commission, the legislative body (city council, board of supervisors) must provide for such notice and hearing before any new enactments or modifications take effect.[86]

In *Scottsdale v. Superior Court*[87] and *Transamerica*,[88] the Arizona Supreme Court keyed into these statutorily created procedures as defining the requirements for due process compliance.[89] The court found it necessary to take this view because it determined that the power to zone is derivative of the state's police powers:

> [G]overnmental units, like the city and county, do not inherently have the zoning power. The power to zone is part of the police power and may be delegated by the State, but the subordinate governmental unit has no greater power than that which is delegated. . . . [T]he delegation of the power to zone may also include the process that must be followed to achieve the zoning.[90]

The Arizona Supreme Court's reliance on statutory procedure as the minimum for due process compliance is not universally embraced.[91] Some courts hold that zoning by initiative is valid even though, by definition, it does

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82. *Id.*

83. ARIZ. REV. STAT. ANN. § 9-462.01(E) (1990). Interestingly, the municipality is not required to adopt any such plan before enacting zoning ordinances. *See* ARIZ. REV. STAT. ANN. § 9-462.04(E) (1990).

84. It is not required under ARIZ. REV. STAT. ANN. § 9-462 (1990).

85. ARIZ. REV. STAT. ANN. § 9-462.04(A) (1990).

86. ARIZ. REV. STAT. ANN. § 9-462.04(F) (1990).

87. 103 Ariz. 204, 439 P.2d 290 (1968).

88. 157 Ariz. 346, 757 P.2d 1055 (1988).

89. *Scottsdale*, 103 Ariz. at 208, 439 P.2d at 294; *Transamerica*, 157 Ariz. at 349, 757 P.2d at 1059.

90. *Transamerica*, 157 Ariz. at 350, 757 P.2d at 1059.

91. *See, e.g., Margolis*, 638 P.2d 297, 305 ("[W]e find that zoning and rezoning are legislative in character and therefore are subject to the . . . initiative provisions of the Colorado Constitution."); *Associated Home Builders*, 18 Cal. 3d 582, 594, 557 P.2d 473, 479, 135 Cal. Rptr. 41, 47 (stating that "[p]rocedural requirements which govern *council* action, however, generally do not apply to initiatives, any more than the provisions of the initiative law govern the enactment of ordinances in council") (citations omitted, emphasis in original); Meridian Development Co. v. Edison, 91 N.J. Super. 310, 314, 220 A.2d 121, 124 (1966) (quoting New Jersey state constitution: "All political power is inherent in the people," and allowing the voters to amend a zoning ordinance by initiative); Storegard v. Board of Elections, 22 Ohio Misc. 5, 7, 255 N.E.2d 880, 881, 50 Ohio Op. 2d 228, 229 (1969) (stating that "Ohio has taken the view that both the initiative and referendum powers are reserved to the people," the court allowed a zoning ordinance to be repealed by initiative); League of Women Voters v. Washington County, 56 Or. App. 217, 641 P.2d 608 (1982) (land use ordinance enacted by initiative accepted as part of county's comprehensive plan). These cases were all cited by the intervenor in *Transamerica*, 157 Ariz. at 349, 757 P.2d at 1058.

not follow statutorily prescribed notice and hearing procedures.[92] The divergence among courts on this point does not reflect differences in the states' Z.E.A.s. The Z.E.A.s of states which allow zoning by initiative are markedly similar to Arizona's in their notice and hearing requirements.[93] Because all Z.E.A.s sprang from common roots,[94] it is not surprising that the language of the laws has a similar ring as one looks from state to state. The similarity of the various state statutes reinforces the conclusion that the difference between those jurisdictions that allow zoning initiatives and those that prohibit them is one of judicial philosophy rather than of statutory language. Those that allow zoning initiatives reason that the people of the municipalities have always retained the power to enact laws — they do not need to rely on authority delegated by the state legislatures.[95]

THE INITIATIVE

Constitutional Provisions

The powers of the initiative and referendum were very much on the minds of the delegates to Arizona's 1910 constitutional convention.[96] Indeed, there was widespread interest in these powers across the country at that time, as the Progressive movement swept the nation.[97] Additionally, a majority of the delegates believed that they were elected with a mandate to protect the rights of the municipalities to practice "home rule."[98] The constitutional provisions that those delegates fashioned are discussed below.

The Arizona Constitution states that "the legislative authority of the state shall be vested in a legislature,"[99] but expressly acknowledges that "the people reserve the power to propose laws and amendments to the Constitution and to enact or reject such laws or amendments at the polls."[100] The constitution goes on to declare that "[t]he powers of the initiative . . . are hereby further reserved to the qualified electors of every incorporated city, town, and county in all

92. *See supra* note 91.

93. *See, e.g.*, CAL. GOV'T. CODE § 65854 (West 1983) (ten days' notice required to affected property owners); COLO. REV. STAT. § 31-23-304, 305 (1986) (fifteen day requirement).

94. *See supra* note 79.

95. *E.g., Associated Home Builders*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (stating that California's constitutional amendment guaranteeing the right of initiative was "[d]rafted in light of the theory that all power of government ultimately resides in the people" and that "the . . . initiative [is] not . . . a right granted the people, but . . . a power reserved by them"); *Margolis*, 638 P.2d 297, 298 (speaking of the initiative power as being "reserved to the people" under the Colorado constitution).

96. B. MASON & H. HINK, CONSTITUTIONAL GOVERNMENT IN ARIZONA 19 (5th ed. 1979) (Stating that "[t]he outstanding issues of the [constitutional] convention became the initiative, referendum and recall"). *See also* D. VAN PETTEN, THE CONSTITUTION AND GOVERNMENT OF ARIZONA 18 (1952).

97. R. HOFSTADTER, THE AGE OF REFORM 108, 257 (1st ed. 1955).

98. B. MASON & H. HINK, *supra* note 96, at 19 ("Of the 52 members of the convention, 39 were pledged to the initiative and referendum.").

99. ARIZ. CONST. art. IV, pt. 1, § 1(1).

100. *Id.*

local city, town, or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate."[101]

The citizens of Arizona routinely exercise the initiative power on local matters. In *Hamilton v. Superior Court*,[102] proponents of a successful citizens' initiative sought to prevent Phoenix from leasing city owned land to a developer for use as a public golf course. Although the appellants failed to prevent the target project from going forward,[103] the validity of the initiative itself was not even questioned.[104]

Statutory Procedures and Their Purposes as Applied to Zoning Initiatives

The Arizona legislature has spelled out the initiative process in considerable detail.[105] A party interested in setting the process in motion must be a voter registered in the area to be affected by the measure.[106] The party begins by registering with the Secretary of State or corresponding county or municipal officer. The Secretary of State (or the county or city clerk) then issues the party a number which must appear on all petitions.[107] Petitions may be circulated and signed only by registered voters within the affected area.[108] Those petitions not so circulated are disqualified and improper signatures are discarded.[109]

When the valid signatures of ten percent of the electorate who voted in the last major election[110] are collected, the proposal is referred to the people for a vote.[111] There are elaborate safeguards built into the statutes to prevent fraud.[112] Arguments supporting or opposing the measure must be filed with the city or town clerk at least thirty days prior to the election.[113] The city or town clerk then distributes these arguments in pamphlet form to every registered voter within the affected locality.[114]

The initiative process is not one to be lightly undertaken. Organizers and supporters must be inspired to considerable zeal before they will jump through the numerous hoops the legislature has set up. For those who perceive

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101. ARIZ. CONST. art. IV, pt. 1, § 1(8).
102. 154 Ariz. 109, 741 P.2d 242 (1987).
103. The golf course was already constructed by the time the case was decided. *Id.*
104. *Id.* at 112, 741 P.2d at 245. In fact, the only issue was whether the transaction was a "done deal" before the passage of the initiative.
105. ARIZ. REV. STAT. ANN. §§ 19-101 to -141, -143 to -144 (1990).
106. ARIZ. REV. STAT. ANN. § 19-112 (1990).
107. ARIZ. REV. STAT. ANN. § 19-101 (1990).
108. ARIZ. REV. STAT. ANN. § 19-112 (1990).
109. *Id.*
110. For example, a mayoral race.
111. ARIZ. CONST. art. IV, pt. 1, § 1(2).
112. ARIZ. REV. STAT. ANN. § 19-112 (1990) requires the circulator of the petitions to sign an affidavit swearing to their authenticity. Section 19-114 prohibits county recorders and justices of the peace or anyone who is not a registered voter from circulating petitions. Section 19-114.01 makes it a class one misdemeanor to receive payment of any kind for signing a petition. Section 19-115 makes signing a false name a class one misdemeanor. Section 19-116 makes it a class one misdemeanor to coerce anyone into signing or not signing a petition. Section 19-121.02 provides for the Secretary of State [or equivalent municipal officer] to verify a random sample of five percent of the signatures.
113. ARIZ. REV. STAT. ANN. § 19-141 (1990).
114. *Id.*

opportunities for citizen participation in dialogue and deliberation[115] as cornerstones of "republicanism," these procedural requirements represent an appropriate, perhaps even a superior,[116] alternative to legislative action.

Because the initiative procedures are adequate to assure participation, it makes little sense for the Arizona Supreme Court to impose the statutory procedures of the Z.E.A. on initiative measures. The court itself was unwilling to perform a similar act in *Mecham Recall Committee, Inc. v. Corbin.*[117] That case held that a recall committee need not comply with the campaign finance disclosure laws applicable to initiatives and referenda.[118] Even though a recall campaign is in many ways functionally indistinguishable from an initiative effort, the court said that it was not "contrary to sound statutory construction to treat recall differently from initiative and referendum. Both the Arizona Constitution and the Arizona statutes treat initiative and referendum and recall in distinct and separate provisions. . . . We hold that a recall committee is not controlled by [the statute requiring financial disclosure]. Since the statute does not mention recall committees, they are not included."[119]

The same logic applies with greater force to zoning initiatives. In *Mecham Recall Committee* the court had to reconcile two sets of statutes, each setting forth procedures for the exercise of a *constitutionally guaranteed* right.[120] In the case of zoning initiatives, only the initiative right has constitutional status. It is only logical that the court not impose the statutory procedures outlined for governmental zoning actions on constitutionally based initiative efforts.[121] The detailed procedures for the initiative process alone should govern initiatives.

The Statutory/Constitutional Conflict

By adopting the Z.E.A., the Arizona state legislature made zoning questions, in the words of the constitution, "matters on which . . . cities, towns, and counties are . . . empowered by general laws to legislate."[122] In light of the constitutional language reserving to the people the right to initiate legislation on local matters,[123] it is difficult to understand how the Arizona Supreme Court can declare that "citizens may not create, amend or expand city or county zoning ordinances by initiative."[124]

The *Scottsdale* court stated that a zoning ordinance adopted by initiative is void if it does not satisfy the statutory requirements for notice and hear-

115. *See supra* notes 31-37 and accompanying text.
116. Gillette, *supra* note 65 (suggesting that criticisms of plebiscitary processes are misplaced in light of the modern deficiencies of the representative system).
117. 155 Ariz. 203, 745 P.2d 950 (1987).
118. *Id.* at 205, 745 P.2d at 952 (citing ARIZ. REV. STAT. ANN. §§ 16-901 to -924 (1990)).
119. 155 Ariz. at 205, 745 P.2d at 950.
120. *See supra* notes 100-01; ARIZ. CONST. art. VIII, pt. 1.
121. *See infra* notes 122-30 and accompanying text.
122. ARIZ. CONST. art. IV, pt. 1, § 1(8) states: "The powers of the Initiative and Referendum are hereby further reserved to the qualified electors of every incorporated city, town, and county as to all local, city, town or county matters on which such incorporated cities, towns, and counties are or shall be empowered by general laws to legislate."
123. *Id.*
124. *Transamerica*, 157 Ariz. at 350, 757 P.2d at 1059.

ing.[125] The *Transamerica* court interpreted this language to mean that *because* a zoning measure is submitted as an initiative, it *necessarily* violates the due process requirements of notice and hearing.[126] In explaining its holdings, the court indicated that "where the legislature has dealt specifically and in considerable detail with the subject of zoning and the procedures to be followed in adopting a zoning measure, its enactments in that regard should be deemed controlling over more general *constitutional*, statutory or charter provisions reserving or granting the power of the initiative to the electors of the municipalities."[127] The court gives no indication why the usual hierarchy which requires statutes to comply with the Constitution should be inverted so as to make legislative zoning enactments superior to "general constitutional . . . provisions."[128] The answer lies in distinguishing between the belief that the power of initiative is reserved by the people when creating the legislature, and the idea that it is one granted or delegated to them by the lawmaking body.[129] This distinction implicates the fundamental philosophies underlying the establishment of our American form of government.[130]

The Influence of Republicanism in Plebiscitary Zoning Cases

City of Eastlake v. Forest City Enterprises, Inc.

The United States Supreme Court took a republican tack, favoring citizen participation in the zoning process, in *City of Eastlake v. Forest City Enterprises, Inc.*[131] *Eastlake* involved a challenge to an amendment of a city charter which required zoning changes to be submitted to a popular vote before becoming effective. The measure required a fifty-five percent majority vote for approval. A developer whose project failed to receive the requisite percentage sued the city contending that the referendum unlawfully delegated the legislative power to the people.[132] The Ohio Supreme Court agreed, holding that such a delegation violated the fourteenth amendment's Due Process

125. 103 Ariz. at 208, 439 P.2d at 294 (citing 8A E. MCQUILLIN, MUNICIPAL CORPORATIONS § 25.246, at 148 (3d ed. 1949)). The court held that "[p]roperty owners who seek to initiate rezoning within the city without complying with the provisions of the zoning statute as to notice and public hearings cannot be permitted by this means to by-pass the statute." *Id.*

126. The court stated that "'zoning law is exempted from the initiative process,' in order to prevent private citizens from usurping the governing body's delegated power and from circumventing the notice and hearing requirements of the zoning statute." 157 Ariz. at 349, 757 P.2d at 1058 (citing *Scottsdale*, 103 Ariz. at 208, 439 P.2d at 294).

127. *Transamerica*, 157 Ariz. 346, 350, 757 P.2d 1055, 1059 (quoting Annotation, *Adoption of Zoning Ordinance or Amendment Thereto Through the Initiative Process*, 72 A.L.R.3d 991, 995 (1976) (emphasis added)).

128. Constitutional provisions are of necessity general. That is the only way they can provide guidelines for a broad range of issues as times and conditions change.

129. Michelman casts this question in terms of a conflict between a government "of the people" and a government "of laws." Michelman, *supra* note 33, at 1509.

130. For a succinct summary of the debate between the federalists and the antifederalists and their conflicting views on the desirability of broad-based participation in government, see G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1-13 (1986).

131. 426 U.S. 668 (1976).

132. *Id.* at 670, 671.

Clause because the voters were not given any standard to guide their decision.[133]

Chief Justice Burger reminded the Ohio court of the legislative power's origins. He wrote: "Under our constitutional assumptions, all power derives from the people, who can delegate it to representative instruments which they create. In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."[134] The Court held that because ample mechanisms were available for relief from unreasonable or arbitrary enactments, referring zoning matters to popular approval did not violate the United States Constitution.[135]

In contrast to *Eastlake*, the Arizona Supreme Court theorizes that the people — having established a legislature by adopting a constitution, and that legislature having spoken on the subject of zoning procedures — forever surrender their right to direct action in the zoning area.[136] By adopting this stance, the court assumes the pluralist role of protecting the property rights of

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133. *Id.* at 671, 672.

134. 426 U.S. at 672 (citations omitted). It is true that this case involved a referendum and not an initiative (a distinction of critical importance to the Arizona court, *see supra* note 1), but the underlying philosophy militates at least as strongly in favor of initiatives as it does for referenda. The Arizona Supreme Court uses language very similar to that in *Eastlake*, extolling the virtues of citizen participation in *referenda* elections, in Queen Creek Land & Cattle Corp. v. Yavapai County Bd. of Supervisors, 108 Ariz. 449, 501 P.2d 391 (1972). It is surprising that a court can adopt such differing philosophies toward two procedures which are usually not distinguished in the minds of the public.

135. 426 U.S. at 676-77.

> The Ohio Supreme court did not hold, and respondent does not argue, that the present zoning classification under Eastlake's comprehensive ordinance violates the principals established in *Euclid v. Ambler Realty*. If respondent considers the referendum result itself to be unreasonable, the zoning restriction is open to challenge in state court, where the scope of the state remedy available to respondent would be determined as a matter of state law, as well as under the Fourteenth Amendment standards. That being so, nothing more is required by the Constitution.

Id.

136. *See supra* notes 125-30 and accompanying text. At present, the court's mistrust of the popular voice seems peculiarly limited to zoning matters. It has recently manifested this mistrust in a case involving a zoning referendum. In Cottonwood Dev. v. Foothills Area Coalition, Inc., 134 Ariz. 46, 653 P.2d 694 (1982), a citizens' group sought to overturn a resolution of the Pima County Board of Supervisors granting a zoning change on three hundred acres of property north of Tucson. Noting that a measure can be referred by obtaining the signatures of only ten percent of the electorate, the court stated "[b]ecause this is a great power, the power of the minority to hold up the effective date of legislation which may well represent the wishes of the majority, the constitution and the statute made pursuant thereto must be strictly followed." *Id.* at 49, 653 P.2d at 697. The court, on an expedited appeal, enjoined the election based on a perceived technical flaw in the petitions. *Id.* at 48, 653 P.2d at 696. Apparently, the expedited appeal was necessary in order to decide the case before the voters had a chance to demonstrate whether the challenged resolution actually did "represent the wishes of the majority."

With regard to initiatives in contexts other than zoning, the court has spoken with almost reverential adulation. For example, in Whitman v. Moore, 59 Ariz. 211, 220, 125 P.2d 445, 450-51 (1942), the court stated that it was

> [b]eyond contradiction that the people themselves deliberately and intentionally announced that, by [the Arizona Constitution's] adoption, they meant to exercise their supreme sovereign power directly to a far greater extent than had been done in the past, and that the legislative authority, acting in a representative capacity only, was in all respects intended to be subordinate to direct action by the people.

individual landowners from the public. It does this by preventing the dialogue and debate of an election in favor of an authoritarian pronouncement.[137] In its zeal to prevent popular reallocation of economic resources — land values — the Arizona Supreme Court pursues a kind of procedural Lochnerism.[138] Instead of relying on substantive due process, as courts did in the 1920s and 30s,[139] this court manifests its mistrust of the popular will by imposing inappropriate procedural formalities on the initiative process.

Reasoning that zoning comprises a delegation of the state's police power,[140] not subject to initiative, sends the court in a dangerous direction. If the court allows the legislature to deny the people their constitutional prerogative in the zoning area, what prevents it from overriding it in other areas? It is possible to imagine the legislature enacting detailed regulations for municipalities to follow in making decisions regarding police and fire[141] protection, water,[142] and electrical service. All of these things impact on health, safety and welfare, and initiatives concerning them, like those involving zoning, could be considered delegations of the state's police powers.[143] Nothing apparently prevents the court from using the same reasoning to make such enactments a basis for declaring such areas beyond the reach of the initiative.[144] From the court's perspective, Arizona's founders apparently "induced the popular sovereign to recognize itself for the one-time purpose of legislating its own

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137. *Transamerica*, 157 Ariz. at 350, 757 P.2d at 1059.

138. Lochner v. New York, 198 U.S. 45 (1905), heralded the advent of the doctrine of substantive due process, under which the Supreme Court struck down a multitude of economic enactments as violating rights (usually contract rights) implied by the due process clause. The *Lochner* era was a period of intense judicial scrutiny which has since come to symbolize the pitfalls of judicial interference in the ends of government. *See* Williams, *supra* note 67.

139. *See* Williams, *supra* note 67, at 429-33.

140. *Transamerica*, 157 Ariz. at 350, 757 P.2d at 1059 (stating that "[t]he power to zone is part of the police power and may be delegated by the State, but the subordinate governmental unit has no greater authority than that which is delegated").

141. Williams v. Parrack, 83 Ariz. 227, 319 P.2d 989 (1957) (compelling the mayor of Phoenix to submit to voters an initiative measure setting up compensation classifications for fire fighters).

142. An example of an initiative with the potential to impact the health of a community by way of its water supply is the "Recharge Initiative." In a grass roots campaign that was contemporaneous with the Buffer Zone effort, proponents of this measure sought to have water from the Central Arizona Project channeled into existing washes so that it could filter naturally into the ground water supply rather than have it treated at an expensive filter station. Opponents argued that such a procedure would not adequately purify the water and that it would pick up toxins from wildcat landfills in the washes. Obviously this measure fell under the health and safety requirements of the police power definition, yet the measure was placed on the ballot without judicial intervention. The recharge initiative was soundly defeated at the polls. *See Proposition 100 Is Only One to Fail: Total Recharge Plan Is Rejected*, Ariz. Daily Star, Nov. 4, 1987, at 1, col. 1.

143. In fact ARIZ. REV. STAT. ANN. § 9-101(E) (1990) uses police power terminology in defining "community" for purposes of incorporation as a group of people "having common interests in such services as public health, police protection, fire protection and water. . . ." Under this definition it is difficult to imagine any exercise of local governmental authority which could not be reasoned into the police power classification.

144. In the words of the California Supreme Court, "[t]he fact that the zoning law is a special statute will not support [the court's earlier holding finding the statute superior to the constitution]; special legislation is still subject to constitutional limitations. . . . Indeed if the constitutional power reserved by the people can be abridged by special statutes, then by enacting a host of special statutes the Legislature could totally abrogate that power." *Associated Home Builders*, 18 Cal. 3d 582, 589, 595 P.2d 473, 480, 135 Cal. Rptr. 41, 48.

irrevocable future disappearance from the scene" where zoning is concerned.[145] The specter is unappealing regardless of one's ideology.[146]

The California Cases

Although a majority of jurisdictions do not allow zoning initiatives,[147] that position is not unanimous. California, like most other states, was initially hostile to zoning initiatives. In *Hurst v. City of Burlingame*,[148] decided in 1929, the California Supreme Court ruled that the specific procedures mandated by the state's zoning legislation conflicted with the more general statutory provisions governing initiatives and that the zoning procedures took precedence.[149] The court also indicated in dictum that constitutional due process requirements might prohibit zoning by initiative even if the statutes did not conflict.[150]

The language of *Hurst*, stating both statutory and constitutional objections to zoning by initiative, became the basis for subsequent California decisions[151] and similar holdings in other jurisdictions, including Arizona.[152] In 1974, however, the court negated *Hurst*'s constitutional due process concerns in *San Diego Building Contractors Association v. City Council*,[153] limiting its decision to concern for the notice and hearing requirements embodied in the statutes.[154]

In 1976, the court explicitly overruled *Hurst* in *Associated Home Builders v. City of Livermore*,[155] stating that the procedures prescribed by the zoning statutes applied only to actions undertaken by the legislative body of a political subdivision and not to initiatives.[156] The California Supreme Court foreclosed any lingering constitutional doubts, stating that although the procedures for zoning were *statutorily* created, the right of the people to institute initiatives was *constitutionally* protected. Therefore the statutory zoning procedures were subordinate to the constitutional initiative right.[157] This

145. Michelman, *supra* note 33, at 1509.

146. Of course, those with republican leanings find a diminution of popular political input more disturbing than do pluralists. Professor Sunstein suggests that a pluralist would be ambivalent to nonparticipation by the electorate in the political process because such a condition makes political equilibrium easier to maintain. Sunstein, *supra* note 8, at 1539. Washington takes a particularly harsh position, prohibiting zoning by initiative or referenda. Lince v. City of Bremerton, 25 Wash. App. 309, 607 P.2d 329 (1980).

This prohibition was ignored by the people of Seattle on May 16, 1989 when they overwhelmingly enacted the Citizens Alternative Plan (CAP) which places height and density limits on downtown development. *CAP Winners Savor The Message Sent to City Hall*, Seattle Times, May 17, 1989, at A1, col. 1. So far the initiative has not been challenged in court.

147. D. MANDELKER, *supra* note 69, at § 6.73.

148. 207 Cal. 134, 277 P. 308 (1929).

149. *Id.* at 141, 277 P. at 311.

150. *Id.*

151. *E.g.*, Laguna Beach Taxpayers Ass'n v. City Council, 187 Cal. App. 2d 412, 9 Cal. Rptr. 775 (1960).

152. *Scottsdale*, 103 Ariz. 204, 208, 439 P.2d 290, 294. The court cites *Hurst* and quotes *Laguna Beach Taxpayers Association*.

153. 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

154. *Id.* at 216-17, 529 P.2d at 576-77, 118 Cal. Rptr. at 152-53 (1974).

155. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

156. *Id.* at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

157. *Id.* at 594-95, 557 P.2d at 479-80, 135 Cal. Rptr. at 47-48 (stating that "although the procedures for exercise of the right of initiative are spelled out in the initiative law, the right

formulation places the various canons of law into the customary hierarchy.[158] The court thus makes it clear that it believes that legislative power is bestowed by the populace and that the power of the initiative is reserved by the people rather than delegated by the legislature.[159] In other words, the court has aligned itself with republican ideology. This is manifest by its encouraging the participative, dialogic initiative process over the mechanical application of law.

The Colorado Rationale

While California resolved the conflict between its state constitution and Z.E.A. by declaring that notice and hearing procedures need not be followed for zoning initiatives, the Colorado Supreme Court took an alternative approach in *Margolis v. District Court*.[160] The court held that initiative actions do not dispense with the notice and hearing requirements of the fourteenth amendment but meet them through "[t]he election campaign, the debate and airing of opposing opinions, [which] supplant a public hearing prior to the adoption of an ordinance by the municipal governing body."[161] This reasoning fits well with the republican attitude that places a high premium on participation by, and dialogue among, the members of the electorate.[162]

LEGISLATIVE VERSUS ADJUDICATORY/ADMINISTRATIVE ACTS

This Note does not disagree with the outcomes of the two Arizona cases it criticizes. The Arizona Supreme Court properly voided the enactments challenged by these two cases because they would have resulted in unduly harsh impacts on individual landowners. This treatment is instead concerned with the anti-republican reasoning the Arizona Supreme Court employed to reach its conclusions, and the message that reasoning sends to the person on the street.[163] Moreover, the Arizona Constitution requires a different approach.[164] There are alternative rationales for the two decisions that the court should have employed instead of its anti-participative reasoning. Some require adopting a

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itself is guaranteed by the Constitution. . . . Thus the notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful constitutionality. . . .").

158. *See supra* notes 125-30 and accompanying text.

159. *Associated Home Builders*, 18 Cal. 3d at 591, 557 P.2d at 477, 135 Cal. Rptr. at 45 ("[A]ll power of government ultimately resides in the people, . . . the initiative and referendum [are] not . . . a right granted the people, but . . . a power reserved by them.") (citations omitted).

160. 638 P.2d 297.

161. *Id.* at 305 (quoting Meridian Development Co. v. Edison Township, 91 N.J. Super. 310, 220 A.2d 121 (1966)).

162. *See supra* notes 31-37 and accompanying text.

163. The public tends to perceive the judiciary as a part of "politics." That view is reinforced when people think they have been unfairly deprived of a right to participate in decision-making. *See, e.g.*, Burchell, *State Justices Strike Buffer Initiative From Ballots*, Ariz. Daily Star, Oct. 2, 1987, at 1, col. 1 (comments by Doug Shakel, one of the organizers of the Buffer Zone Initiative: "[[T]he ruling] shows the appalling degree of influence the development and real estate interests have on selected parts of Arizona's political structure.").

164. *See supra* notes 96-101, 122-30 and accompanying text.

test to determine if a proposed zoning action is legislative or administrative/adjudicative.[165]

In jurisdictions that allow zoning by initiative, the local electorate is not given free rein to do as it pleases in all zoning matters. These jurisdictions draw a distinction between legislative and administrative or adjudicative acts.[166] The theory behind this distinction is that because general acts of the legislature do not require notice or an opportunity to be heard to each and every affected individual, and because initiatives merely supplant the normal legislative function, legislative measures undertaken by initiative also should incur no such requirement.[167] However, when contemplated measures concern variances or other decisions concerning the *execution* or administration of the plan, they are held to be adjudicatory or administrative. Therefore, in keeping with *Mullane v. Central Hanover Trust Co.*,[168] courts require that statutory procedures for notice and hearing be followed and prohibit the use of initiatives for adjudicatory or administrative procedures.[169]

Professor Sunstein explains the legislative/administrative distinction in republican terms. He suggests that what is really at issue is the affected parties' opportunity to participate in the decision and/or to receive detailed explanations demonstrating that the result is the product of a "genuine attempt to discern the public interest."[170] Professor Gillette posits that courts have been more likely to classify issues of broad interest as legislative, those of narrower appeal as administrative.[171]

Among states that make the legislative/administrative distinction, there are at least two different approaches. California employs a rigid test which simply designates any matter which changes the zoning ordinance as legislative, without regard to the size of the parcels involved or the number of landowners affected. Any other kind of official action, such as subdivision map approval, is administrative.[172] The court defends this bright line distinction by pointing

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165. The application of the legislative/administrative test would not alter the outcomes of these two cases. It should be noted that the legislative/administrative (sometimes called "quasi-judicial") test is also important in determining the level of judicial scrutiny to which a court will subject a zoning enactment. Fasano v. Board of Comm'rs of Washington County, 264 Or. 574, 507 P.2d 23 (1973).

166. *See supra* note 91.

167. San Diego Bldg. Contr. Ass'n. v. City Council of San Diego, 13 Cal. 3d 205, 211-12, 529 P.2d 570, 573-74, 118 Cal. Rptr. 146, 149-50 (1974).

168. 339 U.S. 306, 313 (1950) (holding that due process requires that "deprivation of life, liberty or property *by adjudication* be preceded by notice and opportunity for hearing appropriate to the nature of the case") (emphasis added).

169. *San Diego*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146.

170. Sunstein, *supra* note 12, at 65-67.

171. Gillette, *supra* note 65, at 984.

172. Arnel Development Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980). The court stated that

> past California land-use cases have established generic classifications, viewing zoning ordinances as legislative and other decisions, such as variances and subdivision map approvals, as adjudicative. This method of classifying land-use decisions enjoys the obvious advantage of economy; the municipality, the proponents of a proposed measure, and the opponents of the measure can readily determine if notice, hearings, and findings are required, what form of judicial review is appropriate, and whether the measure can be enacted by initiative or overturned by referendum.

out its ease of application and consequent certainty and economy of party and judicial resources.[173]

Oregon, on the other hand, rejects the broad California approach and draws the line between legislative and administrative acts on a case-by-case basis. In *Fasano v. Board of County Commissioners*,[174] the Oregon Supreme Court examined whether the proposed action involved the formulation of basic policy, and was thus legislative, or the application of policy to individual landowners and parcels, and therefore administrative. The court held that a zoning change involving a small piece of property was administrative and subject to the provisions of the Z.E.A. requiring conformance to the comprehensive plan.[175]

Of the two approaches, the Oregon method seems most balanced. Although it provides the electorate with the opportunity for political involvement, it does not require unbridled confidence in the civic virtue of the populace. It therefore provides some protection from the kind of majoritarian tyranny demonstrated through practices such as small area rezonings.[176]

Alternative Rationales for the Arizona Cases

Application of the legislative/administrative test to the Arizona cases provides an alternative ground for each of the court's holdings short of a broad prohibition against citizens initiating action on any and all matters touching on zoning. However, the first suggested alternative ground for the holding in *Transamerica Title Ins. Co. v. Tucson*[177] does not even require the court to make the legislative/administrative distinction. It suggests that the court could have resolved the case consonant with precedent without addressing the constitutionality of zoning initiatives.

Transamerica involved an attempt by two citizens' groups to amend the City of Tucson and Pima County zoning ordinances through the initiative process.[178] The object of both measures was to require that any changes in the existing zoning of parcels in close proximity to national and state parks and other environmentally sensitive areas be submitted to a popular vote before they could be enacted.[179] The proposals would have affected over 150 thousand acres in Tucson and Pima County.[180] The measures were challenged on several fronts by landowners whose property would have been affected.[181] In reaching its decision, the court focused primarily on the assertion that zoning by initiative deprived affected landowners of their fourteenth amendment due

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Id. at 523, 620 P.2d at 572, 169 Cal. Rptr. at 911.

173. *Id.* at 523, 620 P.2d at 572-73, 169 Cal. Rptr. at 911.

174. 264 Or. 574, 507 P.2d 23.

175. *Id.* at 580-81, 507 P.2d at 26-27.

176. The small area rezonings would normally be downzonings going from greater to lesser density to the economic detriment of the land owner. This is to be distinguished from "spot zoning," a term which, to zoning law scholars, implies higher density, more privileged treatment for isolated parcels. *See* D. HAGMAN & C. JUERGENSMEYER, *supra* note 66, at § 5.4; D. MANDELKER, *supra* note 69, at § 6.24.

177. 157 Ariz. 346, 757 P.2d 1055.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

process rights of notice and hearing.[182] The court buttressed its decision to disallow the initiative with references to the procedures set forth in the Z.E.A.[183]

Aware of the Arizona Supreme Court's holding in *Scottsdale v. Superior Court*[184] that zoning changes could not be brought about by the initiative process,[185] the intervenor in *Transamerica* argued that the proposed amendments to the city and county zoning ordinances did not change the zoning of any of the affected parcels, but merely added an additional procedural step before any proposed zoning changes could take effect.[186] The court rejected that characterization and held that the proposed ordinance did indeed change the zoning of the affected parcels because it created a new classification of property subject to new requirements for rezonings.[187] This interpretation enabled the court to place *Transamerica* squarely within the purview of its earlier decision in *Scottsdale*. The *Scottsdale* court had prevented an initiative seeking to down-zone a small parcel from retail to residential use. The court found that zoning by initiative violates the due process clause of the fourteenth amendment because it does not follow the notice and hearing requirements imposed upon local legislative bodies by the Z.E.A.[188]

The *Transamerica* court could have agreed with the intervenor, however, and resolved the issue without invoking the due process clause at all.[189] In attempting to add an additional step to the zoning approval process, the intervenor was attempting to modify, through local initiative, a matter of general state law.[190] The procedures to be followed *by the governing bodies* of cities and counties in enacting zoning ordinances are clearly spelled out in Arizona's Z.E.A.[191] The Z.E.A. makes no provision for city councils or boards of supervisors to submit their enactments to popular approval before those measures become effective.[192]

Because citizens of political subdivisions within the state may not change state-wide general laws through local initiatives,[193] the court could have disposed of the Buffer Zone Initiative as an impermissible local incursion into an area preempted by the state legislature.[194] Given the court's preference for

182. *Id.* at 349-50, 757 P.2d at 1058-59.
183. *Id.* at 348, 757 P.2d 1057.
184. 103 Ariz. 204, 439 P.2d 290.
185. *Id.* at 207, 439 P.2d at 293.
186. Intervenor-Appellee's Answering Brief at 29-35; *Transamerica*, 157 Ariz. at 349, 757 P.2d at 1058 (The court stated that "[t]he county and intervenor contend that the proposed initiatives change the *procedures* for rezonings, but they do not change the uses permitted on any particular property within the proposed buffer zones. We reject this contention.").
187. 157 Ariz. at 349, 757 P.2d at 1058.
188. *Scottsdale*, 103 Ariz. 204, 439 P.2d 290.
189. *See infra* note 195 and accompanying text.
190. *See supra* notes 78-86 and accompanying text.
191. *Id.*
192. *Id.*
193. ARIZ. REV. STAT. ANN. §§ 19-101 to -141 (1990).
194. When actions of a charter city conflict with general laws that are of state-wide interest and the legislature has appropriated the field through legislation, general laws will prevail. State v. Jacobson, 121 Ariz. 65, 69, 588 P.2d 358, 362 (Ct. App. 1978) (citing Clayton v. State, 38 Ariz. 466, 300 P. 1010 (1931)); City of Tucson v. Tucson Sunshine Climate Club, 64 Ariz. 1, 4-6, 164 P.2d 598, 599-601 (1945). When there is no direct conflict, the court inquires

resolving conflicts at a statutory, rather than a constitutional (particularly a *federal* constitutional) level,[195] it is surprising that the court bypassed this rather obvious statutory resolution in favor of a resort to the United States Constitution.[196]

This argument implies that the voters should be allowed to wholly circumvent the Z.E.A. procedures but not be allowed to alter those procedures slightly. The point is that the voters have a right to enact zoning legislation. The legislation itself is a matter of local concern. Because the procedures governmental bodies must follow are matters of general state statute, however, the citizens of political subdivisions do not have a right to prescribe procedures *for their boards of supervisors* (or city councils) to employ in enacting such legislation.

A second alternative rationale for the *Transamerica* case employs the legislative/administrative test without changing the outcome. The court could have found that by prescribing, not the general plan, but only its method of implementation as applied to individual properties as requests for rezoning were received, the ordinance sought impermissibly to control the administrative functions of local government.[197]

Similarly, employing an Oregon-type legislative/administrative test would not have altered the outcome of *Scottsdale*.[198] The *Scottsdale* case involved a citizens' initiative seeking to prevent the owner of a seven and one-half acre parcel from obtaining a zoning change from residential to neighborhood commercial use.[199] The Arizona Supreme court reasoned that the power to zone is delegated to, and not reserved by, the cities.[200] The court held that, because the procedural requirements of the Z.E.A. had not been met by the initiative, it was "in irreconcilable conflict with the due process clause of the United States Constitution."[201] Using the Oregon approach, the court could have reasoned that such a small parcel rezoning was not legislative because it

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as to "whether state legislation has so completely occupied the field that it becomes the sole and exclusive law on the subject." Prendergast v. City of Tempe, 143 Ariz. 14, 17, 691 P.2d 726, 729 (Ct. App. 1984). That seems to be the case with procedures to be followed by town and county governments in enacting zoning legislation.

The measure might also have been attacked under ARIZ. REV. STAT. ANN. § 9-284(B) (1977 & Supp. 1989), which prohibits city charters from conflicting with "the constitution and laws relating to the exercise of the initiative and referendum [(making referral on certain measures mandatory)] and other general laws of the state. . . ."

195. *Mecham Recall*, 155 Ariz. 203, 204, 745 P.2d 950, 951 (stating that "[a]lthough both parties and amicus curiae emphasize the first amendment aspects of this matter, we believe we need go no further than our statutes to decide this question").

196. The court does give this statutory conflict passing notice ("[t]he initiative would add requirements to rezoning not authorized by the controlling state statutes"), but apparently uses it primarily as substantiation for the proposition that the landowner's procedural due process would be jeopardized if the law were enacted. *Transamerica*, 157 Ariz. at 349, 757 P.2d at 1058.

197. Such a result would necessitate the implementation of the Oregon-type test because California holds *all* rezonings to be legislative and therefore subject to the initiative process regardless of whether they involve only one individual property. *See supra* notes 165-76 and accompanying text.

198. *Scottsdale*, 103 Ariz. 204, 439 P.2d 290.

199. *Id.* at 205, 439 P.2d. at 291.

200. *Id.* at 207, 439 P.2d at 293.

201. *Id.*

did not involve the formulation of general policy, but applied that policy to a discreet individual and property. That application could have been ruled impermissible as an attempt to submit an administrative act to popular approval.[202] This approach avoids resort to the United States Constitution to solve a question of local law.

The existence of alternative grounds for the holdings in these two leading cases supports the conclusion that relaxing Arizona's prohibition against zoning initiatives need not substantially change the present situation. Although relaxation may produce zoning law through the initiative process, the courts will still have the means to disallow bad law of the kind struck down in these two cases.

If changing the reasoning would not alter the results, why incur the additional expense of initiatives[203] and the litigation they are likely to engender? Why not maintain the *status quo* and simply declare all zoning matters out of reach of the initiative? The answer is that individuals and society benefit from encouraging participation in the political process,[204] and removing entire areas of the law from direct access by the public tends to make that public feel disenfranchised and powerless.[205] The less impact individuals feel they can have on a political outcome, the less inclined they will be to inform themselves about the issues involved and to make their voices heard on the subject.[206] This kind of discouragement can seriously undermine the vitality of a democratic (albeit a representative democratic) system.

MODELS OF DECISION MAKING

Professor Gillette points out that the more common criticisms of zoning initiatives derive from an inherent mistrust of direct participation in the legisla-

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202. *Fasano*, 264 Or. 574, 507 P.2d 23. The *Scottsdale* court also held that the city council had no constitutional or statutory authority to voluntary submit the measure to the electorate. 103 Ariz. at 206, 439 P.2d at 292.

203. Actually, unless initiatives require special elections, the only cost involved is validating the signatures and printing a few extra words on the ballots. Telephone interview with Harry Lewis, Administrative Aide, Office of the Director, Pima County Board of Elections (Jan. 18, 1990).

204. *See, e.g.*, B. BARBER, STRONG DEMOCRACY, PARTICIPATORY POLITICS FOR A NEW AGE (1984); A. MACINTYRE, AFTER VIRTUE (1981).

205. *See, e.g., Land Use Decisions Via the Ballot Box*, N.Y. Times, May 22, 1988, § 10, at 1, col. 4 (organizer Wanda Shattuck convinced by *Transamerica* decision that power structure is against them); Beal, *A Bout That Never Was*, Ariz. Daily Star, Oct.4, 1987, 1987, at C1, col. 1 (editorial remarking that the "fix was in" to keep the developers from suffering certain defeat at the polls).

206. Abrahamson & Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 511-513 (Sept. 1982) (stating that voter turnout declined by ten percent between 1960 and 1980 and attributing at least half of that decline to increased feelings of voter alienation. In addition to their own findings, the authors state, "we have numerous empirical studies that document a relationship between high feelings of political effectiveness and political participation."). *See also* Southwell, *Alienation and Non-voting in the United States, Crucial Interactive Effects Among Independent Variables*, 14 J. POL. & MIL. SOC. 249 (1986) (suggesting that, when combined with other variables, alienation may be a more potent detriment to voter participation than previously supposed).

tive process.[207] Before the United States Constitution was ratified, James Madison expressed the opinion that a representative form of government was necessary to "refine and enlarge" the popular will.[208] Commentators opposed to initiatives typically seize upon this idea to defend their positions.[209] But the framers of Arizona's Constitution believed that the citizens of localities were entitled to occasionally assert their wishes unalloyed by legislative input.[210]

Initiatives and Property Rights

Initiatives affecting property rights seem to engender more ire from people on all sides of the issue than do other kinds of enactments,[211] perhaps because property is specifically mentioned in the fifth amendment.[212] The idea of property as a fundamental right outside the realm of state (as opposed to federal) encroachment did not occur, however, until some years after the adoption of the Bill of Rights.[213] Moreover, in the absence of a physical invasion[214] or a diminution in value to zero,[215] the United States Supreme Court has permitted property rights to be curtailed by legislative action through zoning or taxation measures.[216]

Even if the Arizona Supreme Court believes property holds some special status, that belief merely indicates a higher standard of judicial review[217] for

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207. Gillette, *supra*, note 65, at 940-42 and notes contained therein (stating that "[t]he sentiment that participatory government reduces to raw majoritarianism has a long tradition in American political theory").

208. THE FEDERALIST No. 10, at 60 (J. Madison) (P. Ford ed. 1898).

209. *See, e.g.*, Note, *supra* note 22, at 516-21.

210. The concept of participatory government was zealously championed by the delegates to Arizona's constitutional convention, the language authorizing initiatives engendering a great deal of fervor. *See* COMPLETE VERBATIM REPORT, ARIZONA CONSTITUTIONAL CONVENTION, 1910 ARIZONA TERRITORY CONSTITUTIONAL CONVENTION 5-8, 17, 26 (Nov. 4, 1910), 18 (Nov. 5, 1910).

211. *See Land Use Decisions Via the Ballot Box*, *supra* note 205 (detailing the furor surrounding recent zoning initiative and referenda cases around the country).

212. U.S. CONST. amend. V reads in part: "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

213. Note, *supra* note 52, at 714.

214. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (television cable installed on plaintiff's property held to be invasion and compensable).

215. Hadacheck v. Sebastian, 239 U.S. 394 (1915) (ruling that brick manufacturing plant was nuisance, reducing value of property by some seventy-five percent).

216. Bi Metallic Inv. Co. v. State Bd. of Equalization of Colorado, 239 U.S. 441 (1915) (measure increasing the valuation of all taxable property by forty percent upheld even though the law drastically reduced property values).

217. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (imposing heightened scrutiny on condition that landowner grant public right-of-way across his property before he could obtain a building permit); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (requiring compensation for period of time during which property was subject to an ordinance that was later found invalid). Actually, the Arizona Supreme Court has been quite deferential to zoning ordinances in general. It has consistently invoked the rational relationship (the court actually uses the slightly stronger term "substantial relationship") language of *Euclid* and its progeny in upholding such legislation. *See, e.g.*, Cardon Oil Co. v. City of Phoenix, 122 Ariz. 102, 593 P.2d 656 (1979); City of Phoenix v. Oglesby, 112 Ariz. 64, 537 P.2d 934 (1975). These cases make it apparent that the court's concern in zoning initiative cases is not with the zoning aspect of the efforts, but with the initiative element.

the ordinance a zoning initiative may produce. It does not justify the court in preventing the electorate from enacting such an ordinance.

Initiatives Generally

Criticisms of zoning initiatives are really criticisms of *all* initiative measures. When the peculiarities of zoning are removed, the issue becomes: Are laws best enacted directly by the people or through their elected representatives?

Initiatives May Not Serve the General Welfare

In helping to frame the United States Constitution, James Madison was concerned about the public good being sacrificed to the passions of the majority with the rights of other citizens in the national polity being trampled upon.[218] Even among participatory government's most eloquent apologists, very few commentators advocate direct participation on a national level.[219] Even at the local level, however, Madison's concerns may merit attention.[220] Professor Sager has grave concerns that a majority of voters in a municipality will vote to advance their own interests at the expense of other citizens.[221] The assumptions underlying such an argument are pluralist in that they assume that ideological differences are extrinsic to the political process and are incapable of being modified by it. The argument is republican, however, because it justifies itself through the supposed superiority of the legislature to deliberate and thereby arrive at the common good.

Professor Gillette takes up this criticism at some length.[222] Since critics express skepticism that voters are capable of altruistic motivation,[223] Professor Gillette makes the pluralist assumption of self-interested voters.[224] His argument, generally couched in economic terms, suggests that the republican benefits of participation constitute positive perceived gains to the individual actors.[225] The more one participates by deliberating and engaging in dialogue with others, the greater this perceived benefit. He therefore concludes that citizens will deliberate in the way a properly functioning legislature should.[226] This, and all of Professor Gillette's arguments are comparative. He does not attempt to prove that participatory lawmaking necessarily produces the best kind of legislation. He finds it sufficient to show that plebiscites are no worse than representative systems.[227]

Professor Rose substantiates Professor Gillette's position by pointing out that local legislative bodies do not (indeed cannot) benefit from the Madisonian

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218. *See generally* THE FEDERALIST No. 10, *supra* note 208.
219. Gillette, *supra* note 65, at 931.
220. *Id.*
221. Sager, *Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc.*, 91 HARV. L. REV. 1373 (1978).
222. Gillette, *supra* note 65.
223. *See generally* R. HARDIN, COLLECTIVE ACTION 6 (1982).
224. Gillette, *supra* note 65, at 956.
225. *Id.* at 950-51.
226. *Id.* at 957-58.
227. *Id.* at 932, 956.

ideal.[228] They do not represent a constituency of sufficient size and variety to overcome the influence of faction.[229] In fact, "[a] legislative body drawn from too small or too homogeneous a constituency may be dominated by a single interest or faction."[230] Taken together these commentators suggest that at the local level the plebiscite is not as bad, nor the legislature as good, as anti-initiative arguments presume them to be.

The Undemocratic Nature of Initiatives

Critics also attack initiatives as being subject to the machinations of special interests and distorted by voter apathy and ignorance.[231] They argue that those directly interested in the outcomes are likely to invest large sums of money in campaigns that present their points of view and thereby sway the electorate.[232] They also argue that those directly affected by the proposal (whether positively or negatively) are much more likely to vote than those upon whom the measure's impact would be weaker, and that the initiative process does not provide an opportunity for deliberative decision making because the public's access to information is curtailed.[233]

Professor Gillette again makes a comparative argument showing that in many respects the legislature might actually be *more* susceptible to capture than is the plebiscite.[234] The influence of powerful, well-financed special interest groups on the law-making process has been a source of continual and increasing alarm in this country for some time.[235] Professor Gillette suggests that this problem arises because lobbyists are able to offer legislators benefits in terms of re-election assistance that have no appeal to the electorate.[236] He also notes that lobbyists can more easily target legislators with whom they are acquainted than they can an ill-defined public.[237]

He takes up the second argument by demonstrating that even pluralistic self-interested actors must adopt enough republican doctrine to acknowledge that their individual interests are entwined with the long term interests of the community.[238] He maintains that they will therefore participate in the process whether immediately impacted by a given measure or not.[239] Maintaining his model of a self-interested voter, he relies not on a republican concept of empathy, but upon a fear of loss of reputation and retaliation should the voter be overly self-serving at the expense of the community.[240] Finally, experience

228. Rose, *Planning and Dealing: Piecemeal Land Controls As a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 853-57 (1983).
229. *Id.*
230. *Id.*
231. *See, e.g.*, Note, *supra* note 22, at 519-20. *See also* D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 8 (1984).
232. Note, *supra* note 22, at 519-20. *See generally* Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 UCLA L. REV. 505 (1982).
233. Note, *supra* note 22, at 519-20.
234. Gillette, *supra* note 65, at 978-82.
235. *See, e.g.*, P. STERN, THE BEST CONGRESS MONEY CAN BUY (1988).
236. Gillette, *supra* note 65, at 978-82.
237. *Id.*
238. *Id.* at 973.
239. *Id.*
240. *Id.* at 961-67.

simply does not support the charge that the electorate does not have available the information necessary to deliberate effectively. Newspapers and other media exhibit a particular affinity for disseminating information relating to initiatives.[241]

The Inflexibility of Initiatives

A final supposed advantage of the representative legislative process over initiatives is the legislature's ability, commensurate with the opportunity to deliberate, to achieve compromise.[242] Initiatives are submitted to the voters on a take-it-or-leave-it basis. Detractors therefore argue that legislation may be enacted by initiative which contains negative (or less than optimal) provisions, which would have been excised in the give-and-take of the legislative logrolling process.[243]

The reply to the all-or-nothing argument is that the logrolling that produces compromise in the legislature may actually relate more to lawmakers maximizing their own interests than to advancing the common good.[244] Professor Gillette further refutes the argument by pointing out that opportunities exist for deliberation and compromise *before* the measure is submitted to the voters. The drafters of initiative proposals must carefully consider every aspect of those proposals, eliminating outrageous or offensive provisions before submitting the measure for public scrutiny.[245] Without careful, moderate draftsmanship a proposal will not gather the broad base of support necessary to insure its passage.[246]

CONCLUSION

The courts have upheld comprehensive zoning ordinances enacted under Zoning Enabling Acts as constitutionally permissible exercises of the states' police powers so long as they reasonably relate to the health, safety or welfare of the state, and are not arbitrary or unfair in their application. Arizona's Zoning Enabling Act empowers cities, towns and counties to enact zoning ordinances for their localities and prescribes a procedure for bringing about those enactments, including provisions for notice and hearing to affected land owners.

According to the Arizona Constitution, however, the citizens of the various political subdivisions retain the right to initiate legislation pertaining to matters upon which the local government is empowered to rule. The procedures for initiatives defined by the Arizona statutes, although quite involved, do not contain the same notice and hearing requirements as the zoning procedures.

The Arizona Supreme Court, perceiving a conflict between the Z.E.A. and the more general constitutional provision insuring the right of initiative, and apparently believing that the initiative power is one delegated to the people

241. For example, The Arizona Daily Star ran sixteen articles on the Recharge Initiative in 1987. The Tucson Citizen ran a similar number.
242. *See* Note, *supra* note 22, at 521.
243. *Id.*
244. Gillette, *supra* note 65, at 967-71.
245. *Id.* at 969-70.
246. *Id.*

rather than one reserved by them, inverts the usual constitutional/statutory hierarchy and holds the statute superior to the constitution. This is necessary, in the court's opinion, because the power to zone resides in the legislature and the procedures it prescribes to political subdivisions for exercising that power describe its outer limits of local authorization. More importantly, the court holds that any deviation from the mandated procedures constitutes a violation of the notice and hearing requirements of the fourteenth amendment to the United States Constitution.

Other courts, willing to acknowledge that the state has no power superior to that the people bestow upon it, place their state constitutions in the more familiar position of superiority to statutory enactments. These courts distinguish between legislative and administrative acts and posit either that because acts of the legislature are not subjected to the notice and hearing requirements of the fourteenth amendment, legislation brought about by initiative is also exempt, or that the due process requirements of notice and hearing are satisfied by the political debate surrounding the election.

The existence of alternative grounds for the decisions in Arizona's two principal cases in this area reveals that allowing citizens to initiate zoning legislation would not leave the court without adequate tools to prevent the enactment of bad law. Without undermining the court's powers of judicial oversight, local land use initiatives would foster citizens' interest and participation in the political process, ensuring the continued vitality of the system.

The criticisms applied to this participatory process in land use situations is more properly understood as an indictment of initiatives in general. One need not subscribe to a theory of universal human virtue to believe plebiscites capable of serving the public interest at least as well as representative bodies. Criticisms that the initiative may not represent the general interest and that it is not truly democratic are answered by showing that representative law making is equally susceptible to these complaints. The charge that initiatives present the voter with a binary, inflexible choice, leaving no room for moderation and compromise, is met with the observation that drafters will be careful to compose proposals devoid of extreme provisions which might lead to their defeat at the polls.

Aside from the cost savings of preventing elections on this issue, there are few reasons for the Arizona court to continue to embrace the position that zoning is not a proper subject for initiative. Such a stance denies citizens exercise of a right the framers of Arizona's constitution thought important enough to specifically provide, in an area of law of intense public interest. Where zoning is concerned, We The People are entitled to be heard.