Direct Democracy in Land Use Planning: The State Response to Eastlake

Jon E. Goetz
Paul, Hastings, Janofsky & Walker

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DIRECT DEMOCRACY IN LAND USE PLANNING: The State Response to 
Eastlake

Jon E. Goetz*

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Since the 1970s voters have increasingly withdrawn a number of land use decisions from city council chambers and have taken them into the voting booth. Voters have taken on planning responsibility through the use of the initiative and referendum. The initiative allows citizens to propose a municipal ordinance, such as a zoning ordinance or amendment. A majority vote of the electorate will enact the ordinance into law. A referendum is a vote on an action taken by the local legislative body. The electorate votes either to retain the law or to reject it. Both the initiative and the referendum usually require proponents to collect a specified number of voters’ signatures on a petition to qualify the measure for the ballot.

The United States Supreme Court heartily endorsed the use of the initiative and referendum in its 1976 decision in *Eastlake v. Forest City Enterprises, Inc.* The decision came at a time when many municipalities had recently adopted the initiative and referendum for land use decisions. Despite the Court’s unambiguous support, however, state courts have subsequently been divided on whether to allow

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2. *Id.* § 16.53.
Direct voter control of land use policy. The states have been concerned with three conflicts which were not resolved by *Eastlake*: democratic decisionmaking as contending with representative government, comprehensive land use planning, and property rights. State courts have felt a need to choose between these conflicting values.

To date, however, state legislatures have failed to officially acknowledge that local land use policy is being decided by direct vote. Their failure to enact land use planning procedures tailored to the initiative and referendum has resulted in simplistic and poorly drafted measures, inability of the voters to utilize existing planning resources, lack of protection for property rights, and the oppression of minorities. This article will examine the state court opinions since *Eastlake*, discuss the fundamental tensions raised by the initiative and referendum, and suggest methods to resolve these tensions.

I. INTRODUCTION: LAND USE POLICYMAKING THROUGH THE INITIATIVE AND REFERENDUM

A. Current Use of the Initiative and Referendum

The initiative and referendum have developed in the 1970s and 1980s into a popular and viable method for citizen groups to implement their land use goals. The November, 1986 elections in California, a leading user of direct legislation, illustrates this widespread usage. At least twenty-seven initiatives and referenda reached city and county ballots in these elections, posing a variety of land use issues to local voters. Eight or more of the measures proposed some sort of growth control ordinances. Seven measures restricted the ability of localities to allow construction of onshore facilities related to offshore oil drilling. Others allowed voters to decide the fate of specific developments, such as new towns and shopping centers.

Direct legislation has largely been employed in reaction to unwanted development in the community. This development may be of two sorts: A specific project, or a general wave of growth and expansion. Opponents of particular projects will often use a referendum to veto a specific authorization of a local government. Opponents of growth in general tend to utilize the initiative process to enact a broad restriction on future expansion.

1. Growth Control Initiatives

A number of diverse initiative measures can be categorized under the term "growth control," despite the wide variety of approaches taken toward this general goal. Some of the differences in approaches can be explained by different conditions existing in the communities—one city's concern may be the prevention of urban expansion into agricultural land while another may be primarily interested in the infill of urban development. Some of the differences in approaches can better be explained by the stage of the growth control movements. Some strategies attempted in the earlier days of the fledgling growth control movement were abandoned in favor of more successful and popular techniques.

Some of the earliest, and successful, initiatives proposed limits on the population of the locality. Such measures were narrowly rejected in Boulder, Colorado in 1971 and in Brentwood, California. The voters of Nevada County, California rejected an initiative in 1978 which would have set a maximum of 50,000 persons in that rural county. This approach is not commonly used today, perhaps because of its past failures to win elections, or perhaps because it set a goal which was too remote from the current problem of assimilating residential growth and provision of services. However, a related approach succeeded in Boca Raton, Florida, where voters limited the total number of "dwelling units" to 40,000.

A second early strategy was to impose a moratorium on all building construction. At least three communities, Livermore and San Jose in California, and Broward County in Florida, have passed such moratoriums through the initiative process. Livermore citizens qualified their initiative for the ballot in 1972, during a period of rapid growth which changed the once rural town into a suburb of the San Francisco Bay area. Their response was to draft a conditional mor-

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torium, banning all construction until three vital public services were adequate. First, the public schools must not be overcrowded or on double sessions. Second, sewage treatment must be adequate according to state regulations. Third, the water supply must be sufficient to avoid rationing and to provide adequate reserves for fire protection. The 1973 San Jose initiative was also passed during the city’s period of rapid expansion. Its measure focused on only one service: schools. It provided for a freeze on zoning in residential areas, unless a developer would agree to provide a temporary alternative to school construction in overcrowded areas. The moratorium is still occasionally proposed, but is generally coupled with a requirement that a new comprehensive plan for development be prepared. The moratorium is generally not seen as an end unto itself, but as a temporary freeze on construction until new growth-restrictive policies can be enacted.

A similar approach is being attempted in suburban Orange County, California. Slow-growth activists are attempting to qualify the “Citizens Sensible Growth and Traffic Control Initiative” which would restrict development in any area with congested roads or a lack of infrastructure. The initiative proponents hope to place the initiative on the county ballot in June, 1988, as well as the ballots in twenty-six Orange County cities.

Probably the most common method used in growth control initiatives is to enact an annual limit on the granting of building permits. California voters have approved such measures in Camarillo, Monterey Park, Belmont, Union City, Santa Cruz County, and Napa County. Two different approaches have been used. The measures in Camarillo and Monterey Park set an absolute number of new construction permits to be issued annually. Camarillo’s ordinance allows 400 units to be built annually, with exemptions for single homes, subsidized low-income housing, senior citizen housing, and small apartment complexes of four or fewer units. Monterey Park

11. See Deutsch, supra note 5 at 15-22 (discussing San Jose and Livermore initiatives).
12. See Orange County Register, Dec. 6, 1987, at B1, col. 5.
15. Orman, supra note 6, at 4-7. Permit limit measures have failed in El Dorado County, Madera County, Navato, Visalia, and Napa. Id.
16. Building Indus. Ass’n, 41 Cal. 3d at 815, 718 P.2d at 70, 226 Cal. Rptr. at 83.
allows only 100 new units to be built annually. A second approach, used by Santa Cruz County, is to decide on the overall annual rate of growth, and to adjust the number of permits accordingly. Its growth control ordinance requires the county board of supervisors to set the desired growth rate each year. The permit limit approach seems to appeal to voters due to its ability to restrict the annual rate of growth, in the short term as well as the long term. The number of permits allowed, however, may be arbitrary, not closely related to the city's capacity to provide services or absorb growth.

Another popular initiative approach is to restrict development in areas that the locality wants to protect, such as agricultural land or hillsides. Voters in Riverside, Gilroy, Sutter County, and Sonoma County, California, were presented with measures designed to preserve agricultural areas. Only the Riverside measure passed, however, perhaps reflecting greater hostility toward restrictive zoning in less urbanized areas. Hillside development restrictions were proposed in Fremont, Saratoga, South San Francisco, and Hayward, California, with two cities for and two cities against. The successful Fremont measure reacted to proposals to build in highly visible hill areas with a measure that drastically reduced the number of hillside homes that could be built, from 1400 to 250. The measure also restricted density of development to ten acre lots. It further restricted density to twenty acre lots for areas without city services and banned development altogether on the steeper hills. The agricultural and hillside initiatives have the advantage of targeting a specific type of unwanted development. Of course, with this targeting comes intense opposition from property owners in the restricted areas. The Sonoma County Farmlands initiative, for example, drew its primary opposition from the local Farm Bureau, individual farmers and ranchers, as well as other real estate interests.

A more recent target of growth control initiatives has been the urban center. San Francisco voters have approved six measures in the last decade restricting development in the city's downtown area.

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18. Orman, supra note 6, at 3-5.
20. Orman, supra note 6, at 3-7.
21. Id.
22. Id. at 5-8.
23. Id. at 9.
24. L.A. Times, Nov. 6, 1986, 1, at 3, col. 3.
Los Angeles voters passed Proposition U in November, 1986. This proposition restricts the size and number of new buildings allowed in commercial and industrial zones, forcing new commercial construction into several areas of highrise commercial development. San Diego voters also passed an initiative in 1985 to encourage development in more urbanized areas of the city in order to limit growth on the urban fringe.

2. Direct Votes on Specific Projects

Citizen groups have attempted to stop unwanted development through the use of both the initiative and referendum. When almost any kind of significant project is proposed, the developer must ask the local government for a zoning amendment. Many states, though not all, allow citizens to place a referendum on a local government rezoning approval on the ballot. The citizens must generally circulate a petition protesting the government action, gathering a specified number of signatures in a short time period after the rezoning ordinance is enacted. The question is put to a vote of the locality. A negative vote will nullify the rezoning, leaving the zoning in the same state as before the amendment was enacted.

Project-specific votes have occurred nationwide, unlike growth control initiatives, which tend to be concentrated in California and other western and sunbelt states. Perhaps the leading users of the process are the cities of Ohio. A study of one representative area of Ohio, Cuyahoga County, shows a wide acceptance of direct voter participation in rezoning decisions. Professor Ronald H. Rosenberg compiled the voting records of the county from 1962 to 1982. In those 20 years he found 152 referenda, with the voters authorizing the rezoning in 61% of the cases, and 35 initiatives, which passed 48% of the time. In the sixty cities of Cuyahoga County, he found six different referendum regimes. First were those cities which

27. Glenn, State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments, 51 S. CAL. L. REV. 265, 271 (1978). Land is often placed in a restrictive zone, with few permitted uses, so that any developmental proposal will require the developer to come to the city to seek permission to build. Id.
29. E. McQuillen, supra note 1, § 16.59.
31. Id. at 422.
neither authorized nor prohibited initiatives and referenda, but implicitly recognized the voters' right of direct legislation. Second were those cities which authorized a general right of initiative and referendum in their charter or ordinances, but did not specifically provide for direct legislation on land use questions.

A third group of cities subjected all zoning amendments to mandatory referenda. A fourth alternative was the "ward veto" system, in which the voters in the election ward where the subject land was located have a direct vote on the project. Fifth, some cities required a mandatory referendum for multi-family housing only. Sixth, some cities require the proponent of rezoning to subject his or her property to a mandatory referendum, and also to pay for the costs of the election. approximately a third of the cities had some sort of mandatory referendum. Professor Rosenberg suggests that a number of city referendum laws were plainly illegal or of dubious validity, but had not been successfully challenged in court.

Direct votes, both in Ohio and in other states, have been taken on a variety of projects which the sponsors of initiatives and referenda have found objectionable. A number of votes have been forced on proposed shopping centers, from a small center to be converted from an old high school to major regional malls. Many referenda have concerned the construction of new towns or planned unit developments. Ohio citizens were successful in subjecting a 164 acre "community unit plan" to a referendum vote. On a larger scale, Alameda County, California voters turned down the 4500 acre Las Positas new town which had a projected population of 45,000 residents. Projects which would put commercial development, office buildings, or hotels in areas zoned residential have also been subject to referenda. Opponents of specific industrial projects have been less successful in forcing votes on such development. Citizens in Hooksett, New Hampshire failed in attempting to require a vote on the siting of a hazardous waste facility in their town, and citizens of San

32. The city of Eastlake, Ohio enacted such a system. The text of the city ordinance is included in the dissent of Justice Stevens in Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 686-87 (1975).
36. Orman, supra note 6, at 9-10.
Marcos, California, likewise failed in putting to a vote the siting of a solid waste disposal plant.\(^{39}\) Citizens failed to get referenda on the operation of gravel pits in two Ohio cities,\(^{40}\) but a California county successfully voted on an initiative requiring a buffer zone between surface mining operations and residential areas.\(^{41}\) Referenda have been held on rezoning for multi-family apartment projects.\(^{42}\) Voters in vacation areas have forced votes on proposed resort projects.\(^{43}\) The diversity of projects which have been the subject of referenda illustrates that virtually any change in the environment can stir the wrath of local residents. A referendum or initiative is a useful weapon against most types of unwanted change.\(^{44}\)

**B. The Legal Background: Eastlake v. Forest City Enterprises, Inc.**

The only case in which the Supreme Court has directly passed on the validity of the direct vote on a land use matter is *Eastlake v. Forest City Enterprises, Inc.*\(^{45}\) Chief Justice Burger's opinion in that case celebrated the initiative and referendum as "a basic instrument of democratic government."\(^{46}\) Beneath the surface, however, lay a traditional case of zoning with an exclusionary impact. The direct result of the Eastlake referendum was to defeat a proposed apartment building, with the resulting exclusion of minorities and persons of low income. The case is remarkable not only for its decision upholding zoning through the initiative and referendum, but for its non-decision on the issue of exclusion through direct democracy.\(^{47}\)

42. See, e.g., City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1975); Bruce v. City of Alameda, 166 Cal. App. 3d 18, 212 Cal. Rptr. 304 (1985).
44. The referendum has pragmatic appeal to 'no growth' advocates who oppose any development. By adding an additional level of decisionmaking, the requirement of voter approval of rezonings does more than increase the likelihood that a rezoning petition ultimately will be rejected. It also decreases the landowners' incentive to propose new developments that require zoning amendments because of the increased costs of delay, publicity, and uncertainty associated with a referendum.
46. *Id.* at 679.
47. Justice Stern, in his concurring Ohio Supreme Court opinion, advocated that the court's decision focus on the exclusionary zoning issue. 41 Ohio St.2d 187, 199, 324 N.E.2d 740, 748 (1975).
Eastlake can be seen as part of two lines of cases. First are those which generally uphold the use of the initiative and referendum. The second includes those in which the court declined to hold that the 14th amendment prevents government actions with a discriminatory impact. Within this general category are a string of cases which effectively withdrew the federal courts as forums for resolving exclusionary zoning disputes.

Eastlake involved a challenge to a mandatory referendum ordinance adopted by the voters of Eastlake, Ohio. Forest City Enterprises acquired an eight acre parcel zoned for “light industrial” uses. It applied to the city for a zoning change to permit construction of a multi-family high-rise apartment building. The zoning change was recommended by the planning commission and approved by the Eastlake city council. During the process of this rezoning, however, the voters of Eastlake approved an initiative requiring any changes in land use to be approved by a fifty-five percent vote, in a referendum election to be financed by the developer. The zoning amendment to the Forest City property was subsequently submitted to the electorate but failed to win approval.

Forest City filed an action against Eastlake in state court to have the initiative charter provision held unconstitutional. The Ohio Supreme Court found that rezoning by referendum was an unconstitutional delegation of legislative power in violation of the 14th amendment due process clause. The court invalidated the mandatory referendum provision because of its failure to provide standards to guide the voters’ decision. The referendum, stated the court, allowed the police power to be exercised in an arbitrary and capricious manner.

Finding the referendum a power reserved by the people, the United States Supreme Court reversed the Ohio ruling. The Court’s ruling is premised upon the Madisonian idea that all power derives from the people. Under this theory, the people of Ohio transferred their power of legislation to their elected representatives but reserved the power of initiative and referendum for themselves. The initiative and referendum are therefore not delegations of power from the legisla-

50. 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975).
ture to the people, but powers which the people had never given up.\textsuperscript{31}

The Court celebrated the initiative and referendum as part of the American tradition of direct democracy. It compared them to the town meeting, "a practical and symbolic part of our democratic processes." The referendum, said the Court, allows "direct political participation," giving the people "veto power over enactments of representative bodies."\textsuperscript{52}

The Court found that the due process clause imposes no standards on the voters other than the standard of \textit{Village of Euclid v. Ambler Realty Co.} \textsuperscript{3} that the zoning not be arbitrary or unreasonable.\textsuperscript{53} The Court distinguished two cases relied upon by the Ohio Supreme Court, \textit{Eubank v. Richmond}\textsuperscript{54} and \textit{Washington ex rel. Seattle Title Trust Co. v. Roberge}.\textsuperscript{55} The Ohio court cited those cases for the proposition that the legislature could not delegate legislative power to the electorate. In the \textit{Eubank} case, the Supreme Court invalidated a city ordinance which gave the owners of property the power to establish building setback lines on their street, upon two-thirds approval.\textsuperscript{56} In the \textit{Roberge} case, the Supreme Court invalidated an ordinance which permitted the establishment of philanthropic homes for the aged in residential areas, but only upon the written consent of two-thirds of the neighboring property owners.\textsuperscript{57} The \textit{Eastlake} opinion distinguished those cases as involving the delegation of legislative power from the people to a legislative body and then delegated back to "a narrow segment of the community, not to the people at large."\textsuperscript{58} The Eastlake ordinance not only allowed the full community to decide, but also involved a reserved power rather than a redelegated power.

\textit{Eastlake} was seen by commentators as one of a number of 1970's Supreme Court zoning decisions which indicated a hands-off approach to zoning controversies. More specifically, \textit{Eastlake} was seen as one of a series of cases in which the Court abdicated any responsibility for remedying exclusionary zoning on constitutional

\textsuperscript{52} Id. at 672-73.
\textsuperscript{53} Id. at 676-77.
\textsuperscript{54} 226 U.S. 137 (1912).
\textsuperscript{55} 278 U.S. 116 (1928).
\textsuperscript{56} Eubank, 226 U.S. at 144.
\textsuperscript{57} Roberge, 278 U.S. at 120.
\textsuperscript{58} Eastlake, 426 U.S. at 677.
The other key rulings included *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, in which the Court refused to order the city to zone for multi-family housing without proof of intent to exclude minorities; *Warth v. Seldin*, in which the Court imposed strict standing requirements for exclusionary zoning challenges; and *Village of Belle Terre v. Boraas*, in which the Court allowed cities to use their zoning laws to exclude unrelated persons from living together.

The facts underlying *Eastlake* certainly provided an ample opportunity for a pronouncement on exclusionary zoning. Although the Ohio court opinion did not decide the issue, the problem was discussed in the concurring opinion of Justice Stern.

There can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending before the City Planning Commission and City Council . . . . There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.63

Only Justice Stevens and Justice Brennan showed an inclination to pursue the exclusionary zoning question, however. Thus *Eastlake* and the other cases effectively sent plaintiffs to their state courts to pursue state remedies for exclusionary zoning problems. *Eastlake*'s judicial abdication of a federal forum for exclusionary effects can be viewed as encouraging strong state court remedies, free from federal interference. This view is exemplified by *Mt. Laurel* and other state inclusionary decisions.64

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61. 422 U.S. 490 (1975).
63. 324 N.E.2d 740, 748 (Ohio 1975).
Eastlake's other facet, its support for the use of the referendum and initiative on land use questions, has had less impact. Since the Eastlake ruling in 1976, as many states have abolished or restricted the use of direct land use votes as have authorized their use. This results partly from the structure of the legal question of Eastlake. The Court saw its task as merely determining whether the Constitution forbids the use of the initiative and referendum for land use legislation, not whether the Constitution requires its use. On the other hand, the Court's opinion contains a vigorous argument in favor of direct democracy. The Court could have, if it had chosen to, resolved some of the states' difficulties with the deficiencies of the initiative and referendum, and influenced further use of the technique. Instead, the Court primarily reiterated the arguments in favor of direct democracy, without resolving some of the tensions that it raises.

Eastlake came in the wake of two other rulings of mandatory referenda. In the 1969 case of Hunter v. Erickson, the Court invalidated an initiative ordinance passed by the voters of Akron, Ohio, which required a mandatory referendum on fair housing ordinances. The initiative required a referendum for any ordinance regulating property on the basis of race, color, religion, national origin, or ancestry. The initiative coincided with a fair housing ordinance recently passed by the Akron City Council, requiring equal opportunity to housing regardless of race or background. The Court struck down the initiative as disadvantaging efforts to strike down racial and other discrimination as opposed to other regulation of the real estate market. Two years later, however, the court upheld a mandatory referendum provision for low-income housing in James v. Valtierra. In that case, the voters of California enacted an initiative which required a referendum on the approval of any low rent housing project. The court distinguished the facts from Hunter on the grounds that the California provision did not explicitly create a classification based upon race.

Neither the rhetoric of these two cases, nor that of Eastlake, shows any attempt to reconcile the dangers of direct democracy with its advantages. The Hunter opinion spoke of the need for minority

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65. States authorizing the use of the initiative and referendum include California, Colorado, Florida, and Missouri. States restricting their use include Texas, Idaho, Washington, New Mexico, Oregon, and West Virginia. See infra notes 153-79.
protection against unrestrained majority sentiment,68 while the James opinion celebrated the referendum as "devotion to democracy, not to bias, discrimination, or prejudice."69 The Eastlake Court continued this pattern of polarized rhetoric by citing James and ignoring Hunter. Yet the three cases refer to the same phenomenon—direct democracy. The initiative and referendum provide unique opportunities to directly tap the sentiment of the people, while they risk allowing the majority to overwhelm minorities. Eastlake could have integrated these elements of direct democracy into a coherent statement on the initiative and referendum, but neglected to do so. In failing to do so, Eastlake limited its influence on state courts which would later consider their own localities' use of direct legislation to adopt land use laws.

II. THE PEOPLE, THE POLITICIANS, AND THE PLANNERS

A. Historical Origins of the Tension Between Direct Democracy and Representative Democracy

Chief Justice Burger's reference to the town meeting tradition in his Eastlake opinion captured one image of direct democracy in American history. As the modern heirs of the Athenian democracy, the town meeting and referendum share a heritage of heightened citizen participation in making the decisions of governance. Burger's opinion, however, failed to reflect the opposite image of direct democracy which has simultaneously existed throughout American history. The failure of the Eastlake opinion to deal with and reconcile the opposing preference for representative democracy has limited the influence of Eastlake in promoting direct democracy.

James Madison showed a strong preference for limiting direct public participation in national politics. In The Federalist Papers, No. 10, he argued for the establishment of a republican form of government.

[A] pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from

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68. Hunter, 393 U.S. at 391.
69. James, 402 U.S. at 141.
the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such 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. . . [I]t may well happen that the public voice, pronounced by the representatives of the people, will be more consonant to the public good than if pronounced by the people themselves, convened for the purpose.70

Madison’s reservations about direct democracy inspired a number of structural checks against majority rule. The Constitution established the House of Representatives as the only directly elected body. Both the Senate and the President originally were indirectly elected by intermediate bodies—the state legislatures and the electoral college. Moreover, the Constitution has never provided for direct legislative decisionmaking by the voters. Yet at the same time, as noted by de Tocqueville, direct democracy flourished in the cities and towns of the early republic. DeTocqueville wrote of a decentralized style of government that had developed a populace which was “enlightened, awake to their own interests, and accustomed to take thought for them.”71 He painted a picture of citizens enthusiastically participating in their own governance, often making mistakes, but drawing on their creative energy to solve the problems of the day. Direct participation in the United States brought a legitimacy to government that de Tocqueville found missing in Europe. It is not always feasible to call on the whole people, either directly or indirectly, to take its part in lawmaking, but no one can deny that when that can be done the law draws great authority therefrom. This popular origin, though often damaging to the wisdom and quality of legislation, gives it peculiar strength. There is a prodigious force in the expression of the wills of a whole people. When it stands out in broad daylight, even the imagination of those who would like to contest it is somehow smothered.72

The unique features of the New England town meeting illustrate how the Madisonian and Tocquevillian notions of popular participation could coexist. The homogeneity of the town residents made

72. Id. at 236.
them resistant to the factions that worried Madison. The stability of the town population provided an incentive to keep the peace by satisfying minority concerns. The small size of the towns allowed everyone (at least all landowning adult males) to actively participate, either at the meetings or in the informal discussions which were generally held prior to town votes. As a result, the votes were often unanimous, reflecting a consensus which resulted from a distaste for oppressive majority tactics and a sensitivity to minority concerns. At least in the stable, homogeneous environment of early New England, direct democracy could survive as a viable system of governance.

The next surge of interest in direct democracy came in the Progressive movement of the early 20th century. At the center of the Progressive agenda was the establishment of the initiative and referendum. The Progressive activists, political and blood descendants of the Yankees of the New England towns, revived de Tocqueville's vision of the capable and energetic citizen. They sought to increase citizen decisionmaking as they diminished the power of legislatures, political parties, politicians, and powerful private organizations. The Progressives placed their trust in individual citizens, assuming an informed and educated citizenry which was ready and able to take control of the important policy decisions of government. They were opposed by members of the European ethnic groups which had succeeded at taking control of state and local government, and the organizations which influenced those governments. In California for instance, the goal of the Progressives was to kick the Southern Pacific Railroad out of politics, and all those elected officials who succumbed to its influence. Although most Progressives did not assume that all important decisions would be decided by initiative and referendum, they did envision a major role for direct legislation.

The Progressive movement left several major structural reforms: direct election of United States senators, suffrage for women, and the establishment of the initiative, referendum, and recall in a number

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75. Id. at 20.
76. Id. at 21.
77. Id. at 22.
79. L. FITZ, CALIFORNIA CONTROVERSY 121 (1968).
80. D. MAGLEY, supra note 74, at 23.
of states. The result, however, was nothing like the reestablishment of Athenian democracy. Instead, it reflected the continuing coexistence of direct and representative democracy in the United States. The reforms made a significant inroad for direct participation, but left the core structure of representative government basically untouched.

A second wave of progressivism brought new calls for increased citizen participation in government. This new distrust of government can be traced to such events as the Vietnam War, urban rioting, and Watergate. The rhetoric of this era is similar to that of the Progressive era, in the sharp criticism of elected officials and the exalting of popular decisionmaking powers. This era brought increased use of the initiative and referendum in states which had adopted direct legislation, and calls for its adoption on the national level and in other states. The citizen revolt against their representatives is best symbolized by the passage of California’s Proposition 13, which can be interpreted as a broad restructuring of the relative powers of voters and elected officials. Other democratic reforms in this period include the expansion of direct presidential primaries, expanded voting rights for blacks and 18-year-olds, and congressionally mandated opportunities for citizen participation in federally funded programs.

In the 20th century, the United States has seen a series of expansions of the ability of citizens to directly participate in government. At the same time, however, representative government has also retained its vitality as a suitable method to deal with the increasingly complex problems of governance. The town meeting tradition remains more as a symbol of direct citizen participation rather than as a workable model of how to govern today’s larger and more diverse cities. While the line between representative democracy and direct democracy has moved a number of times in this century, the Madison-Tocqueville struggle remains.

B. The People v. The Politicians: How State Courts Have Responded to the Tension in Land Use Controversies

The tension between direct and representative democracy is as old as the republic, and is now being played out in a variety of land use controversies. A leading contemporary writer on the initiative and

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81. *Id.* at 26.
82. *Id.* at 25-26.
referendum, David Magleby, sums up this debate. "Direct democracy values participation, open access, and political equality. It tends to deemphasize compromise, continuity and consensus.... Indirect democracy values stability, consensus, and compromise and seeks institutional arrangements that insulate fundamental principles from momentary passions or fluctuations in opinion."  

The *Eastlake* opinion did not attempt to reconcile these opposing values, but instead emphasized the longstanding arguments in favor of the referendum and initiative. The Court celebrated the initiative as "a basic instrument of democratic government," and "a classic demonstration of 'devotion to democracy,'" assuring that "all the people of the community will have a voice."  

The Court's failure to rebut the Madisonian view of direct legislation has left state courts on their own in reconciling their states' provisions for land use planning and the initiative and referendum. The courts face a difficult dilemma—the arguments for and against the direct vote on land use matters both implicate wholesome, traditional American values. Although courts have the power to deny the vote to citizens, they are naturally reluctant to do so explicitly.

1. Direct Democracy v. Representative Democracy

At the core of this tension is the debate between those who advocate maximum direct public participation in the decision of land use questions and those who advocate decisions by officials elected by the voters. Both sides agree that the people should ultimately make the policy choices. The question is how those choices should be made—through elected representatives or direct voting.

In a perfectly representative system, the initiative and referendum would be unnecessary. Local officials would be elected on the basis of their policy stances on land use issues important to the voters. Representatives would consult with their constituents before acting on a rezoning or conditional use permit, and would attempt to bring about a result consistent with their constituents' policy preferences. The drafting of ordinances would be enhanced by the expertise and sensitivity of elected officials, who would craft legislation that satisfied their constituents and accommodated outside interests as well.

84. D. MAGLEBY, supra note 74, at 181.
While this idealized scenario may be unrealistic, it is the vision that prompted a Pennsylvania court in 1978 to hold that the initiative and referendum were unavailable in land use planning and zoning matters. In relying on an earlier state ruling the court spoke of the initiative:

[it] is inconsistent with our representative democratic form of government. One of the prices paid for the creation of a representative democracy is the vesting by the electorate of trust and responsibility in its elected representatives. Discretion is placed within the hands of the municipal legislators and we must accept the lawful exercise of this discretion. The efficiency of government, its stability, and the protection of the public at large necessitates the creation of certain categories wherein the legislative prerogative is unfettered by the initiative and referendum processes.

The argument for direct democracy, however, is predicated on a breakdown of the representative process. Just as the California Progressives advocated direct legislation to combat the influence of the railroad, today's initiative and referendum proponents advocate direct legislation to combat the influence of the real estate developer. Local officials have often been charged with a bias toward real estate interests at the expense of their constituents' desires. As one commentator stated, "local politicians have demonstrated parochialism, favoritism, stupidity, and greed in regulating land development." Widespread corruption in land use regulation was found in a report of the Stanford Research Institute. The corruption is both non-systematic, as when a local official occasionally takes a bribe to influence his vote, and systematic, as when a system of campaign contributions is used to cultivate a cooperative relationship between officials and real estate interests.

The proponents of initiatives and referenda see the availability of those devices as "the gun behind the door" which prevents local officials from making decisions contrary to public interest. When the decision is "wrong" citizens can step in with an initiative or referendum to correct the representative deficiency. This is the theory

90. Id. vol. I, at 48.
behind one of the strongest state court defenses of the initiative and referendum. In *Margolis v. District Court*, the Colorado Supreme Court upheld the use of the referendum to challenge the rezoning of various sized properties.\(^2\) The court stated that "a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the powers of referenda and initiative in the zoning context."\(^3\)

The actual experience with direct legislation on land use matters, however, supports neither of these extreme views. The relationship between direct voting and representative politics tends to be symbiotic and reinforcing. Direct democracy often exists as an odd hybrid of citizen involvement and representative politics.

An initiative or referendum can be used as a method of stirring debate in the community on an issue of land development, forcing local officials or candidates to confront the issue. Forcing the issue requires officials and candidates to take a stand, thereby giving voters a clearer choice, and curing the representational defect. This was the pattern in the growth control moratorium initiatives in San Jose and Livermore, California in the early 1970s. In both cities the initiatives were opposed by the local power structure. The San Jose opponents included the mayor, a majority of the city council, builders, construction unions, and the chamber of commerce. Similarly, the Livermore opposition came from the entire council and from local builders. The voters of both cities not only approved the initiatives, but voted out the opposing council members and replaced them with majorities of growth control supporters.\(^4\)

Conversely, initiatives and referenda are often sponsored by local officials or candidates to further their policy goals or personal ambitions.\(^5\) Issue activists may see their sponsorship of a successful initiative or referendum as a method of attaining public recognition and aiding a future run for elective office. Maverick public officials use the initiative and referendum process to allow them to bypass normal legislative channels to take their proposal directly to the

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\(^3\) *Id.* at 303.


\(^5\) See D. Magley, *supra* note 74 at 192-93. Advocacy of initiatives has appeared to help the candidacies of Paul Gann, one of the sponsors of Proposition 13, in the 1980 United States Senate race, and Jerry Brown, the sponsor of the 1974 Fair Political Practices Initiative, in his successful race for governor of California.
people. This technique was recently used successfully by former San Diego Mayor Roger Hedgecock, who had failed in his attempts to block city council approval of the development of 5100 acres of "urban reserve" in the undeveloped northern portion of the city. He and his allies then sponsored an initiative which reversed the council approval and prevented development of the area for ten years. Using colorful rhetoric to appeal to the voters, Hedgecock portrayed his own city council as the villain in the campaign. He said that passage of the measure was necessary to prevent the "slaughter of the urban reserve," to prevent San Diego from becoming "just a slightly smaller version of Los Angeles." He claimed that the campaign to defeat the initiative was financed "by the usual gang of developers who have so successfully controlled city council decisions," and resisted ceding control to San Diego voters. The voters approved the initiative.

Sometimes the message sent by the vote on an initiative or referendum will conflict with the message sent by the vote for elected representatives. The resiliency of the direct vote is illustrated by two examples of this potential conflict occurring in Northern California. The initiative and referendum prevailed in these instances, due partly to the great strength of the direct vote and partly to the greater policy specificity of the mandate sent by approval of direct legislation. In June, 1978 (the same election in which California voters approved Proposition 13) the voters of Santa Cruz County approved a strong growth control measure which left the implementation to the county board of supervisors. At the same time, the voters also recalled two supervisors who were in support of the measure, replacing them with two opponents of growth control. Although this left a majority of the board which was hostile to the measure, the board adopted a surprisingly strong program to implement it. The supervisors chose to implement a two percent annual growth rate, a rate which would cut in half the current rate of growth.

Similarly, the voters of the city of Fremont approved an initiative measure which restricted hillside development, over the opposition of majorities of the city council and planning commission. After the measure's passage the planning commission, apparently attempting to facilitate a court challenge to the initiative as an invalid government taking, recom-

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96. Despite support for the initiative, Hedgecock lost his position as a result of a later conviction in an unrelated scandal. G. COLEBURN, San Diego: Beyond Spit and Polish, PLANNING 7-8 (Nov. 1985).
97. Orman, supra note 6, at 3-5.
mended that the council designate a larger protected hill area than even the measure's supporters had envisioned. The council, however, designated a smaller boundary which was considered more reasonable and defensible. Both the Santa Cruz County and Fremont initiatives illustrate the complex relationship between the roles of direct democracy and representative decisionmaking on land use issues, a relationship that resembles neither Madisonian nor Progressive expectations.

2. Deficiencies of the Initiative and Referendum

a. Majority Tyranny vs. "Devotion to Democracy"

Four major deficiencies of the initiative and referendum have worried courts reviewing land use votes. Perhaps the most troubling of these deficiencies is the ability of the populace to use the direct vote to oppress minorities. The need to temper the will of the majority to accommodate the needs of the minority becomes more acute in a direct vote than in representational politics.

Derrick A. Bell, Jr. explained why a representative system is preferable to a direct vote for the protection of minority interests. First, the public spotlight in which officials cast their votes creates pressures to vote to protect minority interests. Even those representatives whose constituencies oppose civil rights legislation will often respond to minority pressures. Politicians "do not wish publicly to advocate racism; they cannot openly attribute their opposition to 'racist constituents.'" Second, the representative system can translate intensity of interest into victories for minority groups. A city councilman with ten percent of his constituents intensely lobbying for approval of a low income housing project, and ninety percent of his constituents mildly opposed, will often vote to approve the project. These two checks on majoritarianism, however, are absent from the initiative and referendum process. "[Few] of the concerns that can transform the 'conservative' politician into a 'moderate' public official are likely to affect the individual voter's decision. No political factors counsel restraint on racial passions emanating from

98. Id. at 5-8.
100. Id. at 13-14.
101. Id. at 25.
longheld and little considered beliefs and fears." Furthermore, a
direct vote cannot capture the intensity of voters’ interests. While
the intense minority may have a higher voter turnout rate, it is still
likely to lose to the mildly interested majority.

The fear of minority oppression can be traced to Madison, who
feared that the majority would "sacrifice the weaker party" and
tamper with property rights and individual liberties. Madison’s
writings were cited in Justice Douglas’s concurring opinion in Reit-
man v. Mulkey:

And to those who say that Proposition 13 represents the will of the
people of California, one can only reply: ‘Wherever the real power
in a Government lies, there is the danger of oppression. In our
Governments the real power lies in the majority of the Community,
and the invasion of private rights is chiefly to be apprehended, not
from acts of Government contrary to the sense of its constituents,
but from acts in which the Government is the mere instrument of
the major number of the Constituents. This is the truth of great
importance, but not yet sufficiently attended to . . ..

The opposing benign viewpoint is best illustrated by the writings
of Justice Black in his majority opinion in James v Valtierra, and
the dissent in Reitman. In James he wrote:

Provisions for referendums demonstrate devotion to democracy, not
to bias, discrimination or prejudice. . . . The people of California
have also decided by their own vote to require referendum approval
of low-rent public housing projects. This procedure ensures that all
the people of a community will have a voice in a decision which
may lead to large expenditures of local governmental funds for
increased public services and to lower tax revenues. It gives them a
voice in decisions that will affect the future development of their
own community.

The Eastlake opinion followed Justice Black’s benign view of direct
democracy, ignoring the exclusionary intent aspect of that case. In
adopting wholesale the positive image of direct democracy, the court
failed in these opinions to give needed guidance to states on how
they could prevent the great power and legitimacy accompanying

102. Id. at 14.
104. 387 U.S. 369, 387 (1967) (quoting five writings of James Madison (Hunt ed. 1904)).
107. James, 402 U.S. at 141-43.
plebiscites from being used for the uglier purposes of excluding minorities and poor persons. The Court showed in *Hunter v. Erickson* that it would guard against such use of the initiative and referendum.\(^9\) In noting that the impact of the Akron initiative fell disproportionately on minorities, Justice White wrote that "the majority needs no protection against discrimination, and if it did, a referendum might be bothersome but no more than that."\(^10\) The minority, however, received the protection of the court when the political process failed to safeguard its interests.

More recent attempts to stop low-income housing projects through the initiative and referendum have been thwarted by state and federal statutes preventing discrimination against affordable housing. A California court of appeals threw out an initiative ordinance in 1985 that required the approval of city voters to authorize the construction of government subsidized rental housing.\(^11\) The court found the initiative ordinance to be preempted by a state statute that prevented localities from discriminating against residential development intended for persons of low and moderate income.\(^12\) As a result of this statute, drafters of growth control initiatives in California have exempted low-income housing from the restrictions of the ordinance.\(^13\)

Conversely, the image of the dominant majority as oppressor can be flipped so that the minority is the oppressor. This is particularly true in states where qualifying a referendum for the ballot automatically suspends the ordinance until the election is held. In these states, a minority consisting of the proponents and signers of the petition may suspend and possibly nullify the enactment of a democratically elected legislative body. The Arizona Supreme Court showed its distrust of this facet of the referendum process when it invalidated a referendum petition in *Cottonwood Development v. Foothills Area Coalition of Tucson, Inc.*: "This power which is reserved to the people is not without opportunity for abuse. A small minority of

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110. Id.
112. Id. at 20, 212 Cal. Rptr. at 305. See also CAL. GOV'T CODE § 65008 (West 1983). The statute provides that "No city ... shall, in the enactment or administration of ordinances pursuant to this title, prohibit or discriminate against a residential development because such development is intended for occupancy by persons and families of low and moderate income." Id.
the voters has the power to suspend legislation enacted by the duly
elected representatives of the people, legislation that could be sup-
ported by a majority of the electors at the subsequent referendum
election."^{114}

b. Meeting Regional Needs

Ensuring that local land use decisions are consistent with regional
needs is difficult, but the problem is exacerbated when the decision
is made by the electorate rather than the local legislative body. First,
the electorate is less aware of the regional responsibilities of local
government. Elected officials may not be any more receptive than
the electorate to accommodating regional needs, but they at least
know they have the responsibility.

Second, initiatives and referenda weaken the ability of the courts
to supervise land use decisions to ensure compliance with regional
needs. A number of states require local governments to justify policy
decisions which exclude high-density, affordable housing or conflict
with other regional needs. Courts in these states require a record of
public hearing transcripts, evidence received, reports, and other leg-
ilislative material to form the judicial record for review of the zoning
decision.^{115} Rezoning by initiative or referendum provides almost no
evidentiary basis for the courts, though.^{116} It is therefore much more
difficult for courts to balance the policy goals underlying initiatives
and referenda with the needs of the region.

The California Supreme Court recognized this problem in Building
Industry Association v. City of Camarillo,^{117} but ruled that the record
produced by an initiative would be sufficient for review. The court
ruled that a state inclusionary zoning statute, which requires that
local governments establish the need for growth control ordinances
and that the need be balanced against regional housing needs,^{118}
applies to initiatives. The court ruled further that initiative proponents
could establish a record through the debate on the measure in public
forums and newspapers, and through campaign materials. Proponents
may also present the housing element of the municipality's general

\[115\] See D. Mandelker, Land Use Law 201-20 (1982).
\[117\] 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986).
plan, which is required to include plans for affordable housing.\footnote{Building Indus. Ass'n, 41 Cal. 3d at 822, 718 P.2d at 75, 226 Cal. Rptr. at 88.} The court also ruled that initiatives need not comply with another inclusionary zoning statute, which requires local governments to balance their need for growth control legislation against local housing needs,\footnote{Id. at 823, 718 P.2d at 76, 226 Cal. Rptr. at 89. See also \textit{Cal. Gov't Code} § 65863.6 (West 1983).} and to adopt findings of factors which justify restricting housing opportunities. The court ruled that such findings, even if they were adopted by initiative, would not show that the electorate actually did the purported balancing and consideration.\footnote{Building Indus. Ass'n, 41 Cal. 3d at 823, 718 P.2d at 76, 226 Cal. Rptr. at 89.}

c. \textit{Accommodation vs. Uncompromised Proposals}

A third deficiency of direct legislation is its incompatibility with the norms of accommodation and compromise. An initiative is placed on the ballot as it is first written. It undergoes none of the processes that produce refinements and amendments—no hearings, no debate, no technical analysis by legislative counsel. After the signatures are gathered, not even the proponents may change the wording. As a result, voters are confronted with an all-or-nothing policy choice on a measure which is formulated by the sponsors alone.

This process is perfectly suited for single interest groups, which have no competing interests which need to be accommodated. Such groups may prefer to present their unamended proposal directly to the voters, rather than sponsor a measure before the city council which will inevitably be amended.\footnote{D. Magleby, \textit{supra} note 74, at 188-90.} This dislike of compromise is reflected in an explanation of the popularity of the initiative process by Larry Orman, the director of People For Open Space, a San Francisco environmental group:

Those concerned with open space protection tend to see land as a finite and dwindling resource. Since most legislative decisions are based on compromise, most land-use actions usually result in the loss of at least some farmland, forest or natural habitat area. ... Conservation activists respond by seeking to limit these progressive and cumulative losses of land. They often see the legislative process as a ratchet that moves periodically, but in one direction only—toward more land development. An initiative is seen as a way to limit the range of discretion of the compromise-oriented legislature,
in order to protect vulnerable farming and grazing land, as well as other environmental resources.123

In the same way, a referendum on a rezoning action is also seen as a method of stopping projects without the need to compromise. Even the threat of a referendum on a zoning amendment by a city council or county supervisors can act as a deterrent to development proposals.

d. Participation vs. Distortion

A final dilemma is the direct vote’s potential to distort the voters’ desires. Courts must often wrestle with the tension between allowing the voters to speak out directly on a land use question, and assuring that the vote actually reflects public opinion.

One common problem is low voter participation. Contrary to the expectations of the Progressives, surveys of voting on statewide ballot propositions show lower voter interest in initiatives and referenda than in candidates for public office. Fourteen to seventeen percent124 of the voters do not vote for ballot propositions after voting for candidates. Local land use propositions, however, are often highly salient issues for voters, perhaps softening the voter dropoff effect. On the other hand, land use propositions often target a specific development, and therefore have their primary impact only in a small area of town. If the impact of the initiative or referendum is too localized, it may primarily invoke the interest of only the neighboring residents.125

A California appellate court appeared to be alluding to this phenomenon in Arnel Development Co. v. City of Costa Mesa (Arnel II).126 The court held that an initiative ordinance rezoning a fifty acre plot was invalid because it was discriminatory, and it was inconsistent with regional housing needs. In so holding, the court noted the election statistics for the initiative. It passed 4,295 to 3,901, but the turnout was only 22.5%. The unstated conclusion appeared to be that a group of neighbors may have turned out disproportionately to tip the election in favor of the restrictive zoning, resulting

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123. Orman, supra note 6, at 11.
124. D. Magleby, supra note 74, at 86-87. Between 1970 and 1982, the average dropoff rate on statewide ballot propositions was 14% in California and Washington, and 17% in Massachusetts. Id.
125. A survey of participation in Cuyahoga County, Ohio land use elections shows very low voter turnouts. Rosenberg, supra note 30, at 432.
in a de facto neighborhood veto. Voter turnout is very important to the legitimacy of the initiative and referendum. A low turnout enables neighbors to be overrepresented, resulting in an outcome that is desired by the neighborhood but may not be good for the city. Low turnout also allows the overrepresentation of higher status voters, who tend to have the highest voting rate. If higher status voters own the most expensive property in the locality, they may be more likely to vote to exclude housing projects aimed at persons of lower income.127

A second problem is the often poor quality of the drafting of initiatives. As discussed in the previous section, initiative measures cannot be changed once the signature gathering process has begun. There is no method to cure drafting errors or clarify the measure's language. As a result, voters often find themselves voting on measures which may not actually accomplish what the proponents intended. The courts often face the dilemma of when to construe the initiatives to save them from faulty drafting, and when to invalidate them altogether.

One 1986 California case shows the lengths that courts in that state will go to save a faulty initiative. In Patterson v. County of Tehama,128 the voters of that agricultural county passed an initiative which attempted to abolish virtually all land use planning in the county. The "Landowners Bill of Rights" prohibited a long list of land controls by unspecified "public entities." The intent of the proponents was to abolish government land use controls, substitute economics as the primary land use regulator, and establish that the "right to acquire and own property and . . . use it as the owner chooses, so long as the use harms nobody, is a natural right."129 While the dissenting judge would have voided the entire initiative due to the clear intent to keep out state-mandated land use controls, the court majority saved portions of the initiative. For instance, the court saved parts that abolished any government controls on the type and size of housing, shape of buildings, and fence requirements by construing the provisions to abolish only aesthetic regulation. This was a creative construction of the ordinance, which never explicitly referred to aesthetic zoning.

129. Id. at 1558, 229 Cal. Rptr. at 700.
The court recited that initiatives are to be construed liberally to ascertain the intent of the electorate. The opinion also notes, however, that "while the courts have an obligation to interpret an ambiguous initiative ordinance to save its intent, they have no authority to emasculate its intent in order to save it from itself . . . . The voters of Tehama County cannot impede laws passed by the Legislature requiring the county to plan for the development of private property."\(^{130}\)

A third and related problem is the low level of voter information, comprehension, and deliberation. Voters typically get their information about ballot proposition from the mass media.\(^ {131}\) In smaller cities and towns newspaper coverage is the most influential medium. Informal discussion among residents, so important in the town meeting process, is rarely influential on all but the most salient initiatives and referenda.\(^ {132}\) Few voters read the text of the ordinance itself, and even fewer comprehend the legal significance of the measure. Some states require government prepared voter handbooks on ballot propositions, but these are generally unreadable to anyone with less than a college education.\(^ {133}\) The lack of information and discussion leaves voters vulnerable to manipulation by advertising campaigns, which often reduce complex issues to slogans.\(^ {134}\)

The San Diego campaign to restrict development of its urban reserve, for example, used the slogan "No L.A.—Yes on A."\(^ {135}\) The Alameda County campaign to ratify the Las Positas new town proposal featured simple slogans such as "Yes on A—We Need More Housing."\(^ {136}\) The Kauai building height restriction initiative used such slogans as "Vote X for Lowrise Kauai."\(^ {137}\) While not necessarily deceptive, a campaign of slogans is simplistic, and avoids the specifics of the proposed measure itself. The evidence suggests that voters are

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\(^{130}\) Id. at 1568, 229 Cal. Rptr. at 706.


\(^{132}\) See CALIFORNIA POLL 7904, THE FIELD INSTITUTE, NOV. 12-19, 1979. While many voters discuss the ballot with others, few consider discussions their most important source of information. Id.

\(^{133}\) See D. MAGLEY, supra note 74, at 138-39. Surveys of the readability of voter handbooks find that the reading level of the official description of the proposal is at the third year of college in Massachusetts and Rhode Island, and at the second year of postgraduate work in California and Oregon. The readability of the actual proposition is no better—at the third year of college level in California. Id.

\(^{134}\) Id. at 146-51.

\(^{135}\) G. COLBURN, supra note 96, at 8.

\(^{136}\) Longhini, supra note 28, at 14.

essentially casting broad policy mandates without a commitment to the specific proposal itself.

C. The People vs. The Planners

The use of the initiative and referendum to decide land use matter implicates another classic dilemma of 20th century governance: When should the people and their representatives decide directly and when should the experts decide? This battle has been fought throughout the century between the advocates of scientific management and the proponents of popular decisionmaking. On the one hand, support for the idea of unchecked delegation of important government decisions to trained experts has long since peaked, and is in some disfavor today. During several periods of the 20th century, however, this idea was promoted as a technique to remedy a wide range of social problems. In the New Deal era, for example, proponents of a strong federal administrative structure believed that a strong and independent force of expert administrative officials could determine what policies were in the "public interest," and successfully implement them. With the loss of faith in government in the 1960s and 1970s came a new skepticism that there is a single objective public interest. Instead, government actions are seen as involving a choice between competing economic interests and social values. "Experts" are seen as no better equipped to make those choices as anyone else. Leaving decisions to experts allows them to mask their policy preferences under the guise of objective scientific management. On the other hand, many of the decisions of government have grown too complicated to be resolved by generalists. Just as the setting of railroad rates was seen as an appropriate task for specialized commissions as early as the late 19th century, today's decisions on nuclear plant safety or securities regulations are left to expert commissions.

Most American zoning systems are set up to mediate this dilemma. Proposed zoning amendments, variances, conditional use permits, etc., must be considered by both a popularly elected city council or county board, and by an appointed planning commission. Both

138. J. LANDIS, THE ADMINISTRATIVE PROCESS 46 (1938). Landis wrote that the broad delegation of powers to administrative agencies resulted from the inability of traditional branches of government to solve pressing problems: "The administrative process is, in essence, our generation's answer to the inadequacy of the judicial and the legislative processes." Id.


bodies have the assistance of expert planners. Experts have become more necessary as land use decisions have tended to grow in complexity since the early days of zoning. Some states have begun to mandate both a comprehensive general plan to guide zoning decisions and environmental impact statements to gauge the impact proposed developments will have on traffic, noise, pollution, and other facets of city life.

The use of the initiative and referendum to decide land use questions raises problems because the direct vote circumvents these elaborate land use planning systems. The task of resolving the competing values of expert planning and direct decisionmaking has fallen to state courts. With the exception of New Jersey, which has banned the use of the initiative and referendum for zoning decisions, no state legislature has explicitly laid out procedures for the direct vote on land use questions. Instead, the state courts have been forced to reconcile two competing provisions—the general authorization of the local initiative and referendum and the state zoning enabling statute. State legislatures, in enacting zoning statutes, assumed that zoning would be undertaken by the local governing body. As a result, the statutorily mandated procedures are appropriate only for such bodies. The courts must first determine whether the two provisions can be reconciled to allow a direct vote. If so, the court must then sort out which procedural protections to apply to initiatives and referenda, and which to ignore.

Several post-Eastlake state court decisions have found the planning process and direct democracy irreconcilable. In Leonard v. City of Bothell the Washington Supreme Court found that a zoning amendment could not be subject to a referendum because the voters lacked the sophistication to decide the matter. Amendments to the zoning code or rezone decisions require an informed and intelligent choice by individuals who possess the expertise to consider the total economic, social, and physical characteristics of the community. Respondent's planning commission and city council normally possess the necessary expertise to make these difficult decisions.

The court also emphasized the need to evaluate a 160 page environmental impact

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142. D. HAGMAN, supra note 140, at 554-56.
144. 557 P.2d 1306 (Wash. 1976).
145. Id. at 1311.
statement for the project in question, along with six appendices and 102 comment letters, a task it doubted would be or could be undertaken by the voters.

The Idaho Supreme Court likewise held that the initiative cannot be used to enact a zoning ordinance because of the inability to comply with the detailed procedures required by the State Local Planning Act of 1975. In *Gumprecht v. City of Coeur D'Alene* the court invalidated an initiative which would have set building height limits on all lakefront property in the city, finding "it impossible for initiative zoning to comply with these legislative mandates."147

A California court has ruled that an initiative zoning statute is invalid unless it complies with the locality's general plan. In *deBottari v. City Council*, an appellate court allowed the city of Norco to keep a referendum off the ballot which would have repealed a recent zoning amendment, but left intact a conforming general plan amendment. In a strong upholding of the state's general plan requirement, the court states: "Judicial deference to the electoral process does not compel judicial apathy towards patently invalid legislative acts . . . . [T]he requirement of consistency is the linchpin of California land use and development laws, it is the principle which infused the concept of planned growth with the force of law. We are not persuaded that this principle must now be sacrificed on the altar of an invalid referendum." The California experience shows that direct democracy and planning principles need not be mutually exclusive.

III. The People and the Rights of Property

A. Historical Tensions Between Majority Rule and Property Rights

The clash between majority sentiment and private property rights, a fundamental tension in today's land use votes, is a conflict which resonates throughout American history. In fact, concern over this very conflict in the late 18th century helped to create support for a new constitution and bill of rights. Had he been faced with the issue

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146. 661 P.2d 1214 (Idaho 1983).
147. *Id.* at 1217.
149. *Id.* at 1213, 217 Cal. Rptr. at 795.
James Madison may well have been opposed to entrusting land development decisions to the voters as inconsistent with the property rights which had been guaranteed by the Constitution. Majoritarian forces would have welcomed the idea more warmly.

Madison and the other framers of the Constitution acted in response to the debtors' rebellion which arose in the 1780s. The crisis was founded on a chain of debt which reached from New England farmers to their merchants, and from the merchants to their British suppliers. When the British exporters called in their debts from the merchants, the merchants in turn pressured the farmers to settle their accounts, in cash. The farmers, who were accustomed to paying their debts in agricultural surplus, resisted their creditors. Many of the farmers found themselves imprisoned for nonpayment of even small debts. Fear of being jailed or losing their land stirred up the farmers, and led to a polarization of the agricultural and commercial classes.

Farmers controlled some legislatures, and those bodies responded with laws highly destructive of credit values. Private rights in property were attacked by stay laws, legal tender laws, and other measures meant to relieve the debtors. Moreover, open rebellion had broken out in some states. Shays' Rebellion, the farmer's battle to seize control of the federal arsenal in Springfield, Massachusetts, epitomized the radical state of the farmer's insurrection.

Leaders of the commercial and professional sectors worried that the farmers would seek the cancellation of debts and redistribution of property. Although these redistribution goals were primarily found in the fears of opponents, and not in fact, the prospect of a loss of property rights inspired calls for the drafting of a new constitution. The commercial elite feared mob rule, either by the democratic attacks on capital by semi-sovereign state legislatures or by extra-governmental rebellion.

The framers responded by writing a constitution that reflected the theme that republican institutions are not sufficient to guarantee individual rights when sharp divisions appear in society. The overall structure of the government was, in part, derived from Madison's...
Federalist No. 10. It was intended to prevent a tyranny of the majority not only by guarantees of individual rights, but by empowering a federal level of government, thereby preventing individual factions from dominating the republic. The most direct response to the agrarian rebellion came in Article I, section 10, which provided that “No State shall . . . emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, . . . or law impairing the Obligation of Contracts.”

Chief Justice John Marshall, writing passionately on the contract clause in his dissent in Ogden v. Saunders, reflected the federalists’ outrage at the majoritarian attacks on property:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

Other protections restricted the new federal government’s authority to tamper with private property. The fifth amendment requires that “No person shall . . . be deprived of . . . property, without due process of law . . . .” The due process clause has been interpreted as deriving from the Magna Carta’s “guarantees against the oppressions and usurpations” of the royal prerogative. The clause was seen by the Supreme Court, in an early opinion, as “a restraint on the legislative as well as the executive and judicial powers of the government, and cannot be so construed as to leave congress [or the states] free to make any process ‘due process of law,’ by its mere will.”

Even in the transition from monarchy to representative democracy,

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157. U.S. CONST. amend. V.
early American leaders recognized the need for checks on majority rule over the ownership of property.

The fifth amendment takings clause—"nor shall private property be taken for public use without just compensation," adds a further protection of property.\textsuperscript{159} Both the government power of eminent domain and the practice of compensation were already well established in colonial times.\textsuperscript{160} The takings clause may have been inspired by recent abuses in that power, however, such as the confiscation of the property of English loyalists and the cancellation of debts owed to British subjects by the tobacco states.\textsuperscript{161} Again, the framers insulated property ownership from excesses of majoritarian democracy.

\section*{B. The Property/Democracy Conflict in State Court Decisions}

The Supreme Court attempted in its \textit{Eastlake} ruling to resolve the dilemma of property rights against direct democracy which is posed by the zoning referendum. The Court held that the use of the initiative and referendum to make land use policy satisfies federal constitutional requirements.\textsuperscript{162} Due process standards are met as long as the measure meets the test of \textit{Euclid v. Ambler Realty Co.},\textsuperscript{163} that it not be arbitrary or unreasonable, and that it has a substantial relation to the public welfare.\textsuperscript{164} But again, \textit{Eastlake} failed to resolve the tension underlying zoning by direct vote, and thereby limited the influence of the opinion on state courts which would later face the issue.

The Court's failure is again rooted in its one-sided portrayal of the direct democracy process in relation to the rights of property. The \textit{Eastlake} court responded to the due process question with an image of the city referendum as an updated version of the New England town meeting. The voters, said the Court, are no more likely than the city council to act unreasonably or arbitrarily. When they do act arbitrarily, the \textit{Euclid} standard will allow a court to invalidate the resulting ordinance. The Court viewed voters and the legislative body of the city as equally capable of rendering a fair decision. It viewed the voters' decision as subject to invalidation by

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\bibitem{159} U.S. CONST. amend. V.
\bibitem{160} E. PAUL, \textit{PROPERTY RIGHTS AND EMINENT DOMAIN} 72 (1987).
\bibitem{161} \textit{Id.} at 74.
\bibitem{162} \textit{Eastlake}, 426 U.S. at 676-77.
\bibitem{163} 272 U.S. 365 (1926).
\bibitem{164} \textit{Eastlake}, 426 U.S. at 676-77.
\end{thebibliography}
the courts should the measure unreasonably destroy a landowner's property rights. This image is appealing to democratically minded jurists. A number of state courts have responded to the *Eastlake* model of electoral responsibility with decisions upholding the use of the direct vote on zoning amendments.¹⁶⁵

At the same time the opposing image of the mob bent on destroying private property rights remains powerful. As many states have restricted zoning by initiative and referendum as have upheld its use in the last eleven years.¹⁶⁶ The courts in these states see the democratic resolution of zoning disputes as inevitably conflicting with the orderly protection of property. These courts have invalidated or restricted voter zoning in three ways. First, some have defined zoning as off limits to the electorate because of its "adjudicative" nature. Second, some have held that initiatives and referenda conflict with the procedures established in state zoning enabling statutes. And third, some have invalidated petitions which have not strictly complied with state signature gathering requirements. None of these holdings, however, directly discusses the underlying conflict of democracy and property. This conflict, having been ignored and finessed by the Supreme Court in *Eastlake*, must now be satisfactorily resolved by state legislatures and courts.

1. The Adjudication/Legislation Distinction

The state courts' most prevalent method of determining whether the initiative and referendum are available on land use matters is also the most formalistic. The courts characterize the land use action as either "legislative," which can be decided by direct vote, or "adjudicative," which cannot be decided by the voters. In the eleven years since *Eastlake* was decided the state courts have split on how to characterize zoning amendments. At least four have classified rezoning as legislative,¹⁶⁷ while two have called rezonings administrative.¹⁶⁸ Another state, Michigan, has characterized zoning amend-

¹⁶⁵. *See infra* text accompanying notes 169-212.
¹⁶⁶. *See id.*
ments as legislative for the purpose of a referendum, but adjudicative for the purpose of an initiative.

The distinction derives from early 20th century Supreme Court determinations of the due process required in municipal action. In *Londoner v. Denver*, the Court required that a taxpayer receive a variety of procedural protections when the Denver Board of Public Works imposed an assessment on him and his neighbors for street paving. The court found the taxpayer entitled to a hearing, with prior notice, an opportunity to be heard, and right to oral argument. Yet, in the subsequent case of *Bi-Metallic Investment Co. v. State Board of Equalization*, the Court found no procedural requirements necessary, when the Colorado State Board of Equalization increased the valuation of all taxable property in Denver by forty percent. The difference between the two situations, explained the *Bi-Metallic* Court, lies in the number of affected persons. When “a relatively small number of persons” is concerned, the government action is more likely to be adjudicative, and trial-type protections are needed. “Where a rule of conduct applies to more than a few people,” however, it is impractical for all affected persons to get a hearing. Furthermore, the Court said, such a large scale action is a legislative decision in which the constraints of representative democracy act as checks on the government, to the protection of the affected citizens.

Two other rules have followed from the *Bi-Metallic* distinction. First, courts have traditionally applied a lax standard of review of legislative decisions, while applying a stricter scrutiny of adjudicative decisions. Second, municipal law has allowed the electorate to make legislative policy through the initiative and referendum, but has made adjudicative decisions off limits to the voters.

The structure of local governments makes this distinction between legislative and adjudicative matters unclear. Unlike the federal and state governments, local governments lack a clear separation of functions. The local legislative body acts as legislator, as judge, and as administrator of its laws at various times. Perhaps nothing makes

171. 210 U.S. 373 (1908).
172. 239 U.S. 441 (1915).
173. *Id.* at 446.
174. *Id.* at 445-46.
175. *Id.*
this multiple function clearer than zoning. Formally, amendments to the zoning map are accomplished through ordinances, enacted by the legislative body of the municipality. But realistically, the rezoning process has elements of both legislative policymaking and adjudication of individual interests.

A minority of states has adopted the view that rezoning is quasi-judicial, and hence off limits to the initiative and referendum process. These states, led by the 1973 Oregon decision of Fasano v. Board of County Commissioners of Washington County, require additional procedural protections for landowners and stricter judicial review of decisions. They view zoning map changes as primarily affecting the landowner within the zone and the surrounding neighbors. Such a zoning change lacks the citywide policy implications to be truly regarded as a legislative act. Justice Stevens, joined by Justice Brennan, cited this concern in his Eastlake dissent, noting "the obvious difference between the adoption of a comprehensive citywide plan by legislative action and the decision of particular issues involving specific uses of specific parcels." Even large-scale rezonings have been held to be quasi-judicial, and off limits to the electorate. Shortly after Eastlake was decided, the Washington Supreme Court ruled in Leonard v. City of Bothell that the rezoning of a 141 acre parcel to allow construction of a regional shopping center was not subject to referendum. The Washington court ruled that a rezoning is "an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally."

Likewise, the Idaho Supreme Court invalidated an initiative which would have set building height limits for all buildings near the Lake Coeur D'Alene shoreline. The court, ruling in the case of Gumprecht v. City of Coeur D'Alene, did not resort to the legislative/adjudicative classification. Instead, it strictly upheld the application of procedural protections recently enacted by the Idaho legislature which

177. See D. Mandelker, supra note 141, at 160-61.
178. 507 P.2d 23 (Or. 1973).
181. Id. at 1309.
created trial-type procedures for rezonings. The Washington and Idaho rulings are remarkable for the courts’ adherence to the adjudicative concept even in zoning actions having clear policy impact on the entire locality.

The states which have adopted the legislative classification of rezoning want to encourage the use of direct democracy. They see the lesser protections of the initiative and referendum process as sufficient to meet due process needs. The leading case on this view is the California Supreme Court ruling of *Arnel Development Co. v. City of Costa Mesa.* In that case Arnel persuaded the city to rezone its fifty acre plot to allow the construction of 127 single family homes and 539 apartments intended for moderate income tenants. A neighboring homeowners' group opposing the development sponsored an initiative, subsequently passed by the voters, which downzoned the property to a single family residential zone.

The court found that the political process provided procedures satisfactory to affected landowners. The landowner may seek a variance from the city or seek judicial invalidation of the zoning as arbitrary and unreasonable. Most importantly, the court stated:

> [L]andowners have the same opportunity as their opponents to present their case to the electorate.

Although from the landowner's view a “hearing” before the electorate may be less satisfactory than a hearing before a planning commission or city council, as a practical matter the initiative is unlikely to be employed in matters which could fairly be characterized as adjudicative in character. An initiative petition requires valid signatures of ten percent of the registered voters. (Elec. Code, 4011) Having accomplished this feat, the proponents must then be prepared to wage an expensive campaign to persuade the majority of the voters to support the measure. In consequence of these requirements, the initiative can be and is employed to support or oppose major projects which affect hundreds or thousands of persons and often present questions of policy concerning the quality of life and the future development of the city; it is not likely to be employed in matters which affect only an individual landowner and raise no policy issues.

The spectre of a few voters imposing their selfish interests upon an objecting city and region has no basis in reality.
Decisions upholding direct voter zoning in Missouri, Colorado, Florida, and Ohio follow the *Arnel* rationale.185

The *Arnel* electoral due process argument, however, runs counter to American experience with direct democracy. Landowners do not have an equivalent opportunity to be heard and receive a just decision when forced to speak to the electorate rather than to the city council. The right to speak means little when the electorate has difficulty understanding the technical, legal, planning, and policy issues involved. Landowners, unless they mount expensive campaigns to saturate the electorate with catchy slogans and persuasive information, cannot be assured that they can express their case to the public. While an under-informed public may be an acceptable decisionmaking body for a broadly applicable issue of public policy, it cannot satisfy even minimal due process for the resolution of an individual zoning dispute. This theme was the basis of Justice Powell’s brief dissent in *Eastlake*. He wrote that “here the only issue concerned the status of a single small parcel owned by a single ‘person’. This procedure, affording no realistic opportunity for the affected person to be heard, even by the electorate, is fundamentally unfair.”186

Moreover, the second *Arnel* argument that the initiative and referendum will only be used on important issues of policy is empirically incorrect. Direct votes are often forced on relatively insignificant rezonings of small single tracts of property. Neighboring property owners may be sufficiently upset over a rezoning to collect signatures on a petition, and to campaign vigorously for the measure.

The common theme of all these decisions is the notion that the act of enacting a zoning amendment is partly legislative, a generally applicable rule-making exercise, and partly adjudicative, a determination of the rights of specific parties based on findings of fact. Some rezonings fall more on the policy end of the continuum. Some fall more toward the judicial end. In general, rezonings of big areas tend to be more legislative than rezonings of small areas. Rezonings of a single plot tend to be more adjudicative than rezonings of multiple plots. Can courts draw a line between primarily adjudicative rezonings and primarily legislative rezonings based on these factors?

Justice Stevens’ *Eastlake* dissent advocates that states make such a distinction.

185. See supra note 167.
I have no doubt about the validity of the initiative or the referendum as an appropriate method of deciding questions of community policy. I think it is equally clear that the popular vote is not an acceptable method of adjudicating the rights of individual litigants. If the [general public interest] aspect of the controversy were predominant, the referendum would be an acceptable procedure. On the other hand, when the record indicates without contradiction that there is no threat to the general public interest in preserving the city's plan—as it does in this case... I think the case should be treated as one in which it is essential that the private property owner be given a fair opportunity to have his claim determined on the merits.187

Stevens does concede that the development of a multi-family apartment in a small city like Eastlake could fall into the category of a primarily legislative decision. He sees it as also likely, though, that the community at large would be indifferent to the project, with only the landowner and neighbors directly concerned.188

The California Supreme Court declined to make such a distinction in Arnel. The court rejected the criterion of size as a determining factor, arguing that "the rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land use policy."189 It resisted requiring courts to make case-by-case determinations of which rezonings are adjudicative and which are legislative, preferring to retain the "generic classifications" of zoning amendments as legislative.190 The Arnel ruling can only be justified on grounds of judicial economy, and of furthering a state policy of encouraging use of the initiative and referendum. Arnel provides no fair solution for the voter rezoning which is not a major policy change, but forces a small landowner to appeal to the electorate for a proper resolution of his property rights.

2. Conflict Between Voter Zoning and State Enabling Statutes

Rezoning by initiative or referendum can be seen as an end-run around carefully enacted procedures for zoning decisions. No hearings are needed, no reports of professional planners, no amendments and compromise, no testimony by the affected landowner, and no city

187. Id. at 693-94.
188. Id. at 694.
190. Id.
council members are held accountable for a controversial decision. On the other hand, voter rezoning can be seen as a new development in land use law, not technically within the letter of the state mandated procedures, but well within the American tradition of democratic policymaking.

State zoning enabling statutes invariably require a host of procedural protections by the city councils, county board, planning commissions, and zoning commissions entrusted with the zoning power. Only one state legislature, however, has enacted legislation specifically aimed at zoning by the electorate (and that state, New Jersey, banned the practice). Zoning by the electorate literally conflicts with the enabling statutes in virtually all the other states. This conflict has forced state courts to decide whether they can construe zoning by initiative and referendum as consistent with the state grant of power, or as inherently inconsistent and therefore void.

One debate is over who should zone: only elected representatives and appointed commissions, or voters as well as government officials? The supreme courts of Washington and New Mexico took the position that when their state enabling statutes gave zoning power to city councils and county boards, the statutes gave exclusive power to those bodies. Neither court, however, cited any convincing evidence that the legislatures of their states had ever actually considered whether zoning might be done by direct voting, and had made a decision on voter zoning one way or the other. Instead, the courts relied purely on their interpretations of the wording of the statutes, which fails to persuasively resolve the due process question.

This line of reasoning probably reflects the courts' belief that the voters are inferior to government bodies in making consistent and rational zoning decisions. As noted in the previous section, voters lack the expertise built up by city councils and planning commissions over their consideration of great numbers of zoning proposals. It is unlikely that the electorate will ever decide a sufficient number of zoning matters to gain a similar level of expertise. Evidence also shows a more casual and less reasoned decisionmaking process on the part of the voters. As one commentator summarized the problem, the public cannot "enjoy the requisite deliberative mediation" that

191. See D. Mandelker, supra note 141, at 77-95.
can be expected from legislative and appointed government bodies. “Legislation by plebiscite is not and cannot be a deliberative process . . . there is no genuine debate or discussion, no individual commitment to a consistent or fair course of conduct.” Property rights appear to be safer in the hands of a city council than a group of voters.

The second debate is over how zoning should be done: what procedural requirements are necessary to safeguard the rights of affected property owners as well as the interests of the general public? Two California Supreme Court rulings, separated by almost fifty years, best illustrate this debate. In the 1929 case of *Hurst v. City of Burlingame*, the court found zoning by initiative “hopelessly inconsistent” with the state’s zoning act. If the Burlingame city council had adopted a zoning ordinance, the court stated, the city council and the city planning commission would have been required by the state statute to hold public hearings on the proposed zoning. Without the hearings, the zoning ordinance would be invalid. “It is equally clear that the infirmity would not be cured by the purported adoption of the ordinance by the electors of the city under the initiative law.”

*Hurst* was overruled in 1976, just months after the *Eastlake* decision, by *Associated Home Builders, Inc. v. City of Livermore*. First, the court determined that the legislature never intended its notice and hearing requirements to apply to zoning initiatives. Second, it determined that the legislature could not enact any procedures which would prevent the electorate from exercising its right of initiative, a right guaranteed by the state constitution. The court stated:

> Although the Legislature can specify the manner in which general law cities enact ordinance restricting land use, legislation which permits council action but effectively bars initiative action may run afoul of the [constitutional right of initiative]. Thus the notice and hearing provisions of the state zoning law, if interpreted to bar initiative land use ordinances, would be of doubtful constitutionality; all such doubt dissolves in the light of an interpretation which

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195. 207 Cal. 134, 277 P. 308 (1929).
196. *Id.* at 141.
197. *Id.*
198. 18 Cal. 3d 582, 596, 557 P.2d 473, 480, 135 Cal. Rptr. 41, 48 (1976).
199. *Id.* at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.
limits those requirements to ordinances enacted by city councils.\textsuperscript{200}

Since that pivotal decision the California courts have been faced with the task of deciding which state-mandated planning requirements are to apply to initiatives and referenda. In 1986, it ruled in \textit{Building Industry Association v. City of Camarillo} that statutory requirements which do not "effectively bar" the initiative are applicable; those which place an "insurmountable obstacle in the path of the initiative process and effectively give legislative bodies the only authority to enact this sort of zoning ordinance" are invalid as applied to initiatives.\textsuperscript{201} In this case, the court found applicable a 1980 statute that establishes a presumption that growth limitation ordinances adversely affect regional housing needs, placing the burden of proof on the locality to show that the ordinance is necessary to promote the public health, safety, and welfare. This requirement does not effectively bar such initiatives, as long as the proponents are given an opportunity to intervene in the legal action. On the other hand, the court held a second statute inapplicable to initiatives. That statute, which requires a balancing of public service needs against regional housing needs and the making of such findings before adoption of a growth control ordinance, could not be done by initiative, according to the court.

Even after \textit{Eastlake} dismissed the federal due process concerns of voter zoning, a surprising number of state courts have followed \textit{Hurst} in deciding that zoning and the initiative process are "hopelessly inconsistent." Besides the Washington and New Mexico rulings, courts in Idaho,\textsuperscript{202} West Virginia,\textsuperscript{203} and Texas\textsuperscript{204} have cited the due process requirements of their statutes as preventing voter zoning. The Idaho court, for instance, ruled in \textit{Gumprecht v. City of Coeur D'Alene} that a building height limit initiative proposal was invalid for failure to comply with the state's 1975 Local Planning Act. The Act requires advisory and informational meetings and hearings, a comprehensive planning process, notice to interested parties, and an opportunity to appear. The 1982 amendments require approval or denial of rezoning to be based upon articulable written standards, accompanied by a statement of findings of fact and conclusions of law, a verbatim transcript, and minutes of proceedings. Such pro-

\textsuperscript{200} \textit{Id.} at 594-95, 557 P.2d at 480, 135 Cal. Rptr. at 48.
\textsuperscript{201} \textit{Building Indus. Ass'n v. City of Camarillo}, 41 Cal. 3d 810, 825, 718 P.2d 68, 76, 226 Cal. Rptr. 81, 89 (1986).
\textsuperscript{202} \textit{Gumprecht v. City of Coeur D'Alene}, 661 P.2d 1214 (Idaho 1983).
cedural requirements, designed to guarantee a fair hearing as well as facilitate judicial review, cannot be undertaken by the electorate. Therefore, ruled the court, "the comprehensiveness of zoning legislation in Idaho leaves no room for direct legislation by electors through an initiative election . . ."\(^{205}\)

While the holdings of these courts may appear excessively harsh, they may not preclude voters from making land use decisions. The cases primarily interpret their state statutes. Therefore, state legislatures could draw statutory procedures which would be more appropriate to the initiative and referendum process.

Four states, California,\(^{206}\) Colorado,\(^{207}\) Florida,\(^{208}\) and Missouri,\(^{209}\) have found their state procedural requirements not to apply to direct zoning legislation. Upon finding that the initiative and referendum are powers reserved by the people, these courts require only that constitutional due process standards be met. State procedural requirements, having been designed for zoning by representative bodies, are deemed inapplicable to direct voter zoning. No procedural requirements beyond the *Euclid* standard are required. The courts see the election campaign as providing ample opportunity for a public hearing in the zoning issue. The Colorado Supreme Court, in *Margolis v. District Court*, wrote that "The election campaign, the debate and airing of opposing opinions, supplant a public hearing prior to the adoption of an ordinance by the municipal governing body."\(^{210}\)

These decisions create a wide procedural gap between legislative rezoning and electoral rezoning. The very same rezoning decision can be accomplished by the local legislative body, adhering to a long list of state and locally mandated procedures, or by the electorate, adhering only to majority rule and procedures for qualifying the petition. Given the historical tension between democracy and property rights, this procedural gap calls out for a new legislatively enacted set of procedures appropriate to the electoral process.

\(^{205}\) Gumprecht, 661 P.2d at 1217.


\(^{208}\) Florida Land Co. v. City of Winter Springs, 427 So. 2d 170, 172-73 (Fla. 1983).

\(^{209}\) State *ex rel.* Hickman v. City Council, 690 S.W.2d 799, 803 (Mo. App. 1985).

\(^{210}\) *Margolis*, 638 P.2d at 305 (quoting in part Meridian Dev. Co. v. Edison Township, 91 N.J. Super. 310, 220 A.2d 121 (1966) and *Associate Home Builders*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976)).
3. Technical Requirements for Petition Qualification

A third method courts have employed to protect property rights is to uphold statutory requirements for the qualification of the petition for initiative or referendum. The courts confront a dual responsibility. First, they must protect the right of citizens to qualify measures for the ballot. Problems frequently occur as the citizen proponents often lack experience in the procedures of writing an initiative or referendum, gathering signatures, and presenting the petition to the local government for qualification. Second, the courts must protect the often inattentive electorate from misleading ballot proposals which are presented to them for their signature or for their vote.

Some courts view "substantial compliance" with statutory requirements as sufficient. This reflects an acknowledgement of local activists as amateurs, who will often stray from the technical requirements imposed by state codes. A California court of appeals, faced with an initiative petition which had not strictly complied with two requirements, explained the theory. On one hand, courts will "apply a liberal construction" to the power of initiative and referendum so that the right cannot improperly be annulled. If doubts can reasonably be resolved in favor of the direct vote, the courts will preserve that power. On the other hand, "where petition deficiencies threaten the proper operation of the election process, refusal to file the petition has been judicially upheld . . . . [T]he statutes designed to protect the elector from confusing or misleading information should be enforced so as to guarantee the integrity of the process." Application of this general standard leaves courts wide discretion to determine which requirements must be enforced. That California court, for example, refused to invalidate a petition for failing to carry the statutorily mandated caption "Referendum Petition Protesting Adoption of Ordinance 85-38." It found the petition invalid, however, for failing to include the complete text of the ordinance in the petition, because the signers were not given a full legal description of the property at issue.


212. Id. at 664, 232 Cal. Rptr. at 70.
The courts of Ohio, with one exception, have required strict compliance rather than substantial compliance. When a legislature enacts detailed procedural requirements for qualifying a referendum or initiative, it often sets a trap for the unwary citizen activist with few corresponding benefits to the electorate and affected landowners. Allowing substantial compliance helps to ameliorate this problem, while mandating strict compliance exacerbates it. Four Ohio cases illustrate the potential for absurdity. In *State ex rel. Griffin v. Krumholtz*, the state supreme court invalidated a petition which carried the warning: "Notice: Whoever knowingly signs this petition more than once, signs a name other than his own or signs when not a legal voter, is liable for prosecution." The petition was invalidated for failure to carry the less comprehensive, but statutorily required, warning: "The penalty for election falsification is imprisonment for not more than six months or a fine of not more than one thousand dollars, or both."

In *Shelly & Sands v. Franklin County Board of Elections*, the court invalidated a petition containing a very dry and technical "Brief Summary of the Proposal" for a referendum on the rezoning of a portion of a sand and gravel quarry. The court found that the summary was misleading for failing to state that the remainder of the 106 acre parcel would continue to be zoned for quarry uses. The statement did have a correct legal description of the rezoning action up for referendum, though. Moreover, the statement was so technical that it is hard to envision a voter actually reading it, let alone basing his or her vote on it. Likewise, the court held in a 1976 case that a petition was invalid for failing to show that the circulators of the petition were placed under oath, and in another 1976 case invalidated a referendum petition which inadvertently included a rezoning which had been denied by the city council. Other states have followed the strict compliance doctrine as well.

One Ohio court decision allowed substantial compliance, but that case can be explained by the principle of estoppel. In *Nunnecker v.*

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213. 435 N.E.2d 1110 (Ohio 1982).
214. *Id.* at 1111.
215. *Id.*
Murdock, an appellate court allowed a referendum petition with four technical defects to stand, after the citizen proponents had received an erroneous referendum form from an employee of the county board of elections.\textsuperscript{220}

Strict upholding of some legislative requirements may be of dubious help to the voters. The courts should take notice of the fact that virtually all voters get their information on ballot proposals from intermediate sources, such as newspapers, campaign material, or voter handbooks. Strict legal descriptions of the property involved, or of the zoning amendment are of little use to the electorate. A correct legal wording may not be important to the court, either, if the proponents’ intent is clear.

IV. REFORMS: THE ACCOMMODATION OF DIRECT DEMOCRACY AND LAND USE POLICY

Direct democracy on land use matters raises a threat to representative democracy, comprehensive land use planning, and the rights of property. It places the people in contention with the politicians, the planners, and the owners of property. These tensions raised by direct democracy are old, even older than the republic. The dilemma has not been effectively resolved by the Supreme Court. Its Eastlake opinion exalted the initiative and referendum without reconciling the opposing considerations. The dilemma has not been effectively resolved by the state courts. Their opinions since Eastlake have either been excessively restrictive of direct votes, or excessively permissive and blind to its problems. The dilemma has not been effectively resolved by state legislatures. Although the use of the initiative and referendum has escalated in the past two decades, no state has enacted a system that integrates the unique features of direct democracy with its land use policy.

The answer lies in the accommodation of the initiative and referendum with land use planning. Some sort of accommodation would be consistent with American history. Direct democracy and representative democracy have coexisted since the beginning of the nation. Democratic land use policymaking and comprehensive planning by experts have also gone hand-in-hand, represented by the coexistence of the zoning authority of both city councils and planning commissions. Democracy has also accompanied property rights. The govern-

\textsuperscript{220} 458 N.E.2d 431 (Ohio 1983).
ment has always been able to affect property ownership, subject to the constraints of the takings clause and due process clause.

A. The People and the Politicians

States need to strengthen democratic control of land use policy by acting to reconcile the best aspects of direct democracy and representative democracy. First, they should require or strongly encourage the use of initiatives which ask the voters to make a general statement of policy, but leave implementation of that policy to the local legislature. Questions submitted to the voters should be short and written in easily understandable language. The questions should express a clear and unmistakeable policy mandate. For instance, the Camarillo growth control initiative could be revised to read: “The City of Camarillo should restrict new building construction to the extent necessary to prevent the overburdening of public roads, public services, schools, and air quality.” If the measure were approved by the voters, the city council would be responsible for setting specific criteria for determining when public services are “overburdened,” and for enacting an appropriate limit on construction. Whenever possible, voters should be given a range of options from which to choose. This would avoid the all-or-nothing quality of the single proposal initiative, and more closely simulate the choices possible within the legislative process.

The general policy mandate offers several advantages over the specific enactment. Such proposals would be more understandable to the voters. Debate over the measure would center on the policy issue involved, rather than the complex mechanics of the plan. Voter power might actually increase as the electorate gains the ability to send a strong mandate of support or opposition to a policy proposal. The increase in voter power would come at the expense of single interest group proponents, who would no longer be able to write their agenda into law by use of the initiative. Making issues more accessible and understandable would tend to increase voter participation as well. From the legislative standpoint, this reform would allow a local government new flexibility to resolve a policy problem of interest to the voters. It would take advantage of the checks of the legislative system—drafting assistance of professionals, public hearings, and amendments. It could also allow legislative bodies to accommodate competing interests when doing so would not set back policy goals. Experience shows that even local legislative bodies who oppose a measure can be trusted to fairly implement it. The clarity
of the voters’ policy mandate should give ample direction to any local officeholder who wants to keep his or her job.

States should enact legislation to require the use of the general policy question initiative. Alternately, state courts could encourage their use by raising the standard of review of traditional initiative ordinances. As is done in California, initiative proponents should be subjected to the same requirements as city councils to prove that their ordinances are not arbitrary or unreasonable, are related to the public welfare, and are consistent with regional housing needs. Courts must guard against the use of direct democracy to bypass such requirements. Courts should grant standing to proponents of general policy question initiatives to challenge the legislative implementation of successful initiatives.

Courts should also take an active role in scrutinizing initiative proposals which involve a discriminatory impact on minority groups. Courts should ensure that majorities do not take advantage of direct democracy by taking away benefits that minorities have obtained through representative democracy.

Secondly, states should uphold the right of the referendum on land use matters. The referendum serves as the “gun behind the door” needed to cure defects in the representative process. The right to veto unwanted ordinances complements the right to select office holders. The referendum carries a clear mandate and suffers from none of the drafting problems of the enactment of specific ordinances by initiative.

B. The People and the Planners

States should integrate comprehensive land use planning into all phases of the initiative and referendum process. One way to do this is to give proponents of direct measures access to planning staff when preparing the measures. Municipalities could provide a number of services which would improve the quality of initiative measures. Planners could familiarize proponents with the locality’s land use system, and help to maintain consistency with conventional planning efforts. Lawyers could give advice on drafting and legal questions, helping proponents to avoid the legal pitfalls which have invalidated or weakened past measures.

While this approach may not be useful in localities where citizen activists and government officials are at odds with each other, it could be widely successful. Many professional planners have wel-
comed citizen involvement in planning efforts, and would be likely to give substantial help to proponents. At its best, the assistance of professional planning experts could help the proponents of land use ballot measures to more effectively achieve their policy goals, while also ensuring consistency with local planning efforts.

A second approach, the general policy mandate initiative, would be an even more effective method of bringing planning expertise to direct democracy. If the local legislative body were required to implement the initiative, it would refer proposed ordinances to planning staff, lawyers, and the planning commission for review. The planning experts would not be bypassed in this form of the initiative.

C. The People and the Rights of Property

States should adopt protective measures in their zoning enabling statutes to ensure that property owners receive a similar level of due process whether their land is the target of action by the electorate or by the local legislative body. State legislation would guarantee the rights of the voters to decide important land use policies. It would also ensure that land use referenda and initiatives do not escape the due process restrictions that bind city councils and county boards considering the same issues.

Legislatures can make a big contribution to due process by setting a presumptive dividing line between policy-oriented proposals, which would be subject to initiatives and referenda, and adjudicative proposals, which would not be subject to ballot proposals. The dividing line could be set at a certain acreage, providing that only rezonings of, perhaps, 100 acres or more would be subject to electoral decisions. The dividing line could categorically exclude certain projects from initiatives and referenda, such as apartment buildings and low-income housing projects. The goal of such a division would be to prevent votes on actions concerning mainly the landowner and neighbors, without discouraging votes on proposals affecting the community at large. Admittedly, drawing such a line would be somewhat crude and arbitrary. Yet it would provide some degree of certainty to proponents of ballot measures, to local legislatures, and to courts administering the law. Even a crude line would provide more due process than the electoral due process solution of Arnel, and would

permit more votes on land use policy questions than are allowed by more restrictive states. Some judicial economy would be retained. Making the line presumptive rather than fixed would allow court challenges so that votes could be utilized for small projects with substantial policy implications, and rejected for bigger projects with few policy aspects.