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# BALLOT BOX ZONING: INITIATIVE, REFERENDUM AND THE LAW

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## I. INTRODUCTION

Using the initiative to rezone property in Hawaii has focused public attention on ballot box measures to change land use regulations on specific parcels of property. The Supreme Court of Hawaii eventually declared such initiatives illegal as contrary to both state enabling legislation and the planning process it embodies. While there are some obvious points to be made in favor of direct democracy, on balance it is difficult to make a consistent case for the use of initiative or referendum to rezone land. First, as the historical summary of direct democracy below demonstrates, initiative and referendum have been used primarily to make policies which affect the population of a particular jurisdiction generally, not to overturn a specific implementation of such policies. For example, both initiatives and referenda were used to decide whether particular states or counties would continue to permit the sale of alcoholic beverages, but not whether a particular distillery or brewery should remain open or closed. By analogy, popular voting on whether to undertake zoning or planning would be a proper policy issue, but how that policy is implemented by placing a particular parcel in a particular zone would not. As discussed below, there are legal bases for this historical distinction as well.

This Article examines several of the more prominent legal and institutional issues which bear upon the use of initiative and referendum for rezoning land. First, it evaluates the effects of initiative and referendum on federal and state due process requirements. Second, the Article reviews the differences between legislative and quasi-judicial acts. While every state recognizes that only legislative acts are subject to

initiative or referendum, they are split on whether rezonings should be characterized as primarily legislative or quasi-judicial.

Third, many courts have recognized the critical importance of planning in land use decisions and the inconsistency zoning by initiative can create. This Article discusses the substantive and procedural conflicts between comprehensive plans and initiative and referendum. Fourth, the Article addresses the reservation of the power of initiative and referendum in a state's constitution, and its importance in determining the validity of ballot box zoning. Fifth, the Article analyzes direct democracy's discrimination potential, and criticizes initiative and referendum for its insensitivity, if not downright antithesis, to minorities on a variety of grounds. Finally, the Article concludes that the process of rezoning by initiative is, on balance, seriously flawed.

## II. HISTORY OF INITIATIVE AND REFERENDUM

Despite some common roots, the framers of the Constitution and institutions existing at the time the United States was formed rejected direct democracy as a form of government. Direct democracy survived primarily as a method for adopting constitutions and their amendments. In the latter part of the nineteenth century, direct democracy resurfaced in the form of the initiative and referendum as part of the progressive movement's struggle against legislative abuse. States used initiatives and referenda, however, primarily for laws and policies concerning the general welfare, and not to initiate or repeal specific decisions applicable to specific individuals or property. Even the use of the initiative and referendum to decide more narrow issues in the 1980s has tended to avoid targeting specific people or property. Although the effects of such votes often have threatened a relatively small group, it gives rise to the sort of majoritarian tyranny that one of our founding fathers sought vigorously to avoid in the eighteenth century. The specific use of initiative and referendum to reclassify individual parcels of land through rezoning can therefore be characterized as inconsistent with this history.

The latter half of the eighteenth century witnessed the success of the American Revolution and the failure of the French Revolution. These events were, to some degree, both the inspiration and the result of an exposition of political ideas. The two countries shared ideas and influenced each other in the formation of their new governments.<sup>1</sup>

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1. E. OBERHOLTZER, *REFERENDUM IN AMERICA* (1912).

One of the most influential philosophers of this period, the Frenchman Jean Jacques Rousseau, strongly supported pure democracy. He advocated a system in which the people assembled to develop and approve laws. No legislative act became valid unless ratified by the people. Thus, the general will of the people was sovereign. Rousseau viewed republics as corrupting the ideal of democracy.<sup>2</sup>

American pamphleteers, most prominently Thomas Paine, quickly adopted Rousseau's ideas. Led by Benjamin Franklin, these American democrats advocated a single chamber government and frequent elections. This system, they believed, would ensure a simple form of government with maximum citizen participation.<sup>3</sup> While this system would nominally be a republican form of government, democratic ideals would be preserved as much as possible.

In response, the advocates of a republican form of government wrote a series of pamphlets later grouped into a collection called *The Federalist*. In it, James Madison singled out "factions" as one of the fundamental problems of a democratic government. Madison described a faction as a group of citizens united by an interest adverse to the rights of other citizens.<sup>4</sup> Accordingly, Madison argued that democracies fail to provide any safeguards against a faction routinely imposing its will upon the weaker minority.<sup>5</sup>

Proponents of a republican form of government argued that republics contain in their structure the remedy for factions. First, public views are filtered through the legislative body so that they are refined.<sup>6</sup>

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2. *Id.* at 3. As one author observed, "Representative government with [Rousseau] was an evil, necessary sometimes no doubt, but only to be tolerated, — never to be cordially admired." *Id.*

3. *Id.* at 7.

4. THE FEDERALIST No. 10, at 16-17 (J. Madison) (R. Fairfield 2d ed. 1961).

5. *Id.* at 20. Specifically, Madison stated:

It may be concluded that 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 results from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual.

*Id.*

6. *Id.* at 19-20. Among such devices or filters is the representation filter: The true distinction between the "pure democracies of Greece" and the American government," explained Madison, "lies in the total exclusion of the people in their collective capacity from any share in the latter." It was this distinction that the Federalists believed might permit our government to succeed where other democracies had failed. The problems posed by majority factions were most acute in a

When so filtered and analyzed, passionate views lose their force.<sup>7</sup> Second, a republican system allows for the representation of a larger number of people over a greater territory. Consequently, more interests are contained within the represented territory which makes it difficult for an oppressive majority to form.<sup>8</sup>

The persuasive arguments in *The Federalist* led to the adoption of the Federal Constitution. Once this document was in place, the states began adopting their own constitutions. In 1778, Massachusetts legislators finished drafting their constitution and submitted it to the voters for approval. The voters rejected this version of the constitution and in 1780 approved a different version. This action was ostensibly the first use of the referendum in the United States. The practice of submitting the proposed constitution to the voters spread throughout the states.<sup>9</sup>

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direct democracy. Placing the exclusive power of ordinary lawmaking in governors distinct from the governed checked "the inducements to sacrifice the weaker party, or an obnoxious individual." . . . This was not a wholly naive or elitist vision of representatives as morally and intellectually superior actors - although it is certainly not above criticism on either ground. The vision was a broader one. Its scope encompassed the virtues of deliberation and cooperation.

. . . .

Popular masses too quickly form preferences, fail adequately to consider the interests of others, and are overly susceptible to contagious passions and the deceit of eloquent and ambitious leaders. In contrast, the deliberative process offers time for reflection, exposure to competing needs, and occasions for transforming preferences."

Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1526-27 (1990) (footnotes omitted) (emphasis in original).

7. THE FEDERALIST, *supra* note 4, at 21. As one commentator recently noted, this theme runs throughout *The Federalist*. "If a majority be united by a common interest," wrote Madison in *The Federalist* No. 51, "the rights of the minority will be insecure." "[T]here are particular moments in public affairs," he opined in *The Federalist* No. 63, "when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament." Government must provide "safeguard[s] against the tyranny of [such] passions."

Eule, *supra* note 6, at 1522 (footnotes omitted).

8. THE FEDERALIST, *supra* note 4, at 22. For an expanded and scholarly treatment of this "filtering" process and arguments for applying extra "filtering" of initiatives at the judicial level, see generally Eule, *supra* note 6.

9. In 1778, New Hampshire voters rejected the first version of their constitution. They later approved a different version in 1784. Rhode Island voters approved their constitution in 1788. Connecticut, Maine and New York followed in 1818, 1819, and 1821, respectively. J. ZIMMERMAN, PARTICIPATORY DEMOCRACY - POPULISM REVIVED 35 (1986).

Not surprisingly, the referendum first appeared in New England, a region with vast history of direct voter participation in the form of town meetings. In colonial times, citizens gathered to discuss local issues and pass legislation at such meetings.<sup>10</sup> Given this democratic background, it makes perfect sense that, with the formulation of the United States, the people of New England sought the power of referendum.<sup>11</sup>

Subsequent to the adoption of the state constitutions, little interest existed in the power of initiative and referendum until the late nineteenth century. Popular mistrust of legislatures best characterizes this period. The people believed the influence of business interests, particularly railroad interests, corrupted the government.<sup>12</sup>

The Progressive movement was predicated on ideas similar to those of Rousseau. Demonstrating hostility to organized government, the Progressives advocated direct citizen participation as the cure for government corruption.<sup>13</sup> Robert M. LaFollette, a prominent progressive leader, argued that initiative and referendum were needed to protect the general populace from the "allied forces of organized wealth and political corruption."<sup>14</sup> LaFollette reasoned that initiative and referendum would make it possible for the people, by direct vote, to repeal "bad laws" or enact beneficial measures which their representatives refused to consider.<sup>15</sup>

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10. H. HAHN & S. KAMIENIECKI, REFERENDUM VOTING: SOCIAL STATUS AND POLICY PREFERENCES 8 (1987).

11. While frequently described as examples of Rousseau democracy, town meetings also have been criticized as being imperfect examples of participatory democracy. Colonial society was extremely homogenous in terms of race and class. Thus, town meetings "merit description not as a public forum for the resolution of conflicting social views and interests but instead as a community demonstration of consensus." Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381, 385 n.15 (1984). See also D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 22 (1984).

12. H. HAHN & S. KAMIENIECKI, *supra* note 10, at 9; Zimmerman, *The Initiative and the Referendum: A Threat to Representative Government*, 8 URB. L. & POL'Y 219, 221 (1987).

13. The structure of the Swiss government influenced the movement's leaders. The Swiss Constitution, while similar to that of the United States Constitution, differed in that it provided for referendum.

14. J. ZIMMERMAN, *supra* note 9, at 221 (quoting E. Torelle, compiler, *THE POLITICAL PHILOSOPHY OF ROBERT M. LAFOLLETTE*, 173-74 (1920)).

15. *Id.* LaFollette stated that:

For years the American people have been engaged in a terrific struggle with the allied forces of organized wealth and political corruption. . . . The people must

The Progressive movement led to state constitutional amendments providing for statutory initiative and referendum.<sup>16</sup> In fact, between 1898 and 1918, nineteen states adopted the initiative.<sup>17</sup> Moreover, in 1959, Alaska entered the union with a constitutional provision for initiative already in place. In 1968, Wyoming adopted the initiative, followed by Illinois in 1970, and Florida in 1972.<sup>18</sup> Florida was the last state to adopt the initiative.

The various constitutional amendments granted voters, through initiative and referendum, the power to legislate diverse issues primarily related to general public welfare rather than specific persons or property. Initially, these issues fell into three general categories: (1) taxes and financing, (2) annexation and the determination of local boundaries, and (3) issues of public policy tending to be highly divisive.<sup>19</sup>

The issues, however, have changed somewhat over time.<sup>20</sup> In the late nineteenth and early twentieth centuries, initiatives and referenda focused on child labor, the eight-hour workday, women's suffrage, and

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have in reserve new weapons for every emergency, if they are to regain and preserve control of their governments . . . Through the initiative, referendum, and recall the people in any emergency can absolutely control. The initiative and referendum make it possible for them to demand a direct vote and repeal bad laws which have been enacted, or to enact by direct vote good measures which their representatives refuse to consider.

*Id.*

16. In 1898, South Dakota was the first state to so amend its constitution: [voters] expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the State [and] to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the State before going into effect.

J. ZIMMERMAN, *supra* note 9, at 220 (quoting S.D. CONST. art. III, § 1 (1898)).

17. J. ZIMMERMAN, *supra* note 9, at 221.

18. *Id.*

19. These were issues of an essentially disagreeable and vexing character. The legislature hesitated either to enact or refuse to enact a certain measure. Partisans criticized the legislature no matter what policy it adopted. Consequently, the legislators then deferred to the people:

We will refer this question to you. You elect us and we represent you. In this matter we will submit the law directly to you and if you are in favor of it you may pass it; if, however, you are opposed to it you will reject it. In any case you cannot blame us.

E. OBERHOLTZER, *supra* note 1, at 286.

The broadness of public policy legislation tended to minimize concerns about majority tyranny because issues of general policy affect all citizens, or a substantial number of them. Thus, a minority group or parcel of property would not be singled out for harsh treatment.

20. D. MAGLEBY, *supra* note 11, at 69.

morality issues such as gambling, prohibition, and prostitution.<sup>21</sup> These issues dealt with general social and political reform that were popular with the Progressives. They provided the divisive matters which the legislatures preferred to refer to the voters, much as the California legislature does today.

In the 1930s, issues tended to focus on social welfare,<sup>22</sup> such as alcohol control.<sup>23</sup> In the 1950s and 1960s, initiative and referendum focused on civil rights and civil liberties issues such as busing, housing, and the death penalty.<sup>24</sup> In the 1970s and 1980s, environmental issues became popular subjects.<sup>25</sup> Although the specific subject matter of initiatives has varied somewhat in recent years, the general array of interests represented has remained consistent with that of previous years.<sup>26</sup>

In addition to the change in the specific subject matter of initiatives, the number of initiatives proposed has increased. California represents a prime example of a state that has experienced an explosion in its initiative process. In the 1950s, while seventeen California initiatives circulated, only ten qualified for the ballot.<sup>27</sup> Only nine initiatives qualified for the ballot, however, in the 1960s.<sup>28</sup> But, in the 1970s, a dramatic increase in the number of initiatives occurred: 185 initiatives went into circulation, and 25 qualified for the ballot. By September 1, 1988, voters proposed more than 225 initiatives in the 1980s, and 41 qualified for the ballot.<sup>29</sup>

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21. H. HAHN & S. KAMIENIECKI, *supra* note 10, at 2.

22. *Id.*

23. D. MAGLEBY, *supra* note 11, at 69.

24. H. HAHN & J. KAMIENIECKI, *supra* note 10, at 2.

25. *Id.* D. MAGLEBY, *supra* note 11, at 69.

26. *Id.* at 74. Since 1898, the general subject matter of initiative measures has been evenly distributed across issue categories such as health, welfare, housing, business regulation, revenue and taxes, and public morality. *Id.*

27. Price, *Initiative Campaigns: Afloat on a Sea of Cash*, CAL. J. 481 (Nov. 1988).

28. Salzman, *Hiram's Folly?*, GOLDEN ST. REP. 10 (Oct. 1988).

29. Price, *supra* note 27, at 481. The following quotation from Julian Eule's recent article on judicial review of direct democracy starkly sets out what confronts even the educated California voter on election day:

No one prepared me, however, for Election Day. Sometime in mid-October a massive booklet arrived in my mailbox. At first I thought it was the local phone directory. Closer examination revealed it to be a "Ballot Pamphlet" from California's Secretary of State. Its contents included a staggering array of bond acts, proposed constitutional amendments and statutory initiatives. The pamphlet contained the complete text of each ballot measure (some running over a dozen pages in print so small that a magnifying glass, if not a microscope, was required to read it), summaries prepared by the State's Attorney General, analyses by someone identified as



The increase in California initiatives<sup>30</sup> over the past two decades also illustrates a change in the nature of initiative.<sup>31</sup> The late 1970s saw the advent of an initiative industry, complete with signature collection companies, computer mail specialists, and campaign consultants.<sup>32</sup> This modernization leads to the observation that, at least in California, the initiative process is "not citizen democracy because such campaigns are run for profit and not for the benefit of the public."<sup>33</sup> Thus, direct democracy is no longer being used "for its original purpose: as a way for an aggrieved citizenry to overcome a Legislature captured by special interests . . . [rather,] those same special interests have discovered that by spending enough money, they . . . can turn the initiative process to their will."<sup>34</sup> This view is not idle speculation. California voters approved only 46% (11 of 24) of the growth control measures on the November 1988 ballots, and approved 57% (13 of 23) of the pro-

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the Legislative Analyst, arguments in favor of and in opposition to each measure written by a diverse group of persons chosen by some unexplained process, and rebuttals to both sets of arguments, often by yet a different group of mysteriously-selected "representative" voices. Even those able to make the major time commitment necessary to trudge through the opus - the 1988 version ran 159 pages - must have found the going tough. The propositions average over forty-five words per sentence, and recent studies suggest that only those with a reading level equivalent to that of a third-year college student could have comprehended the pamphlet.

Just as I was struggling through the state ballot pamphlet and beginning to wonder how I had graduated law school with a reading level below that of a third-year college student, the postal service delivered another ballot pamphlet. This one was compiled by the Los Angeles City Clerk and contained text, summaries, arguments - pro and con - and rebuttals for approximately half-a-dozen city ballot measures. Although the pages were fewer - the 1988 version ran sixty-four pages - and smaller - eight and a half by five inches rather than eight and a half by eleven inches - and the print was a good deal larger, I was too dazed to exhibit the proper appreciation. By the time a third pamphlet arrived, a gift from the County Registrar-Recorder with information concerning the county measures, earthquakes were starting to look appealing.

Eule, *supra* note 6, at 1508-09.

30. The increase of initiatives in California has been attributed to the passage of Proposition 13, a popular initiative that placed a ceiling on ad valorem taxes on real property. LaBarre, *Initiative, Inc.*, GOLDEN ST. REP. 13 (Oct. 1988). Proposition 13 produced the unintended effect of reducing the amount of funding available to the schools. This result led to the approval of another initiative, Proposition 98, which increased funding to schools as a remedy to Proposition 13. Price, *supra* note 27, at 485.

31. LaBarre, *supra* note 30, at 13.

32. Salzman, *supra* note 28, at 8.

33. *Id.* at 7.

34. Price, *supra* note 27, at 481.

growth measures. These figures compare unfavorably with the 80% of growth control measures approved, and with only 14% of pro-growth measures approved in 1987.<sup>35</sup> Notably, the cost of such ballots in California exceeded \$130 million, moving one California legislator to remark that initiative and referendum had become "a tool of the private interests."<sup>36</sup>

Moreover, special interest groups occasionally have proposed initiatives with an extremely narrow focus. For instance, some recent initiatives "have dealt with controversial subjects like gay rights and legalized gambling; calling into question the appropriateness of deciding such volatile issues by popular vote."<sup>37</sup> Legislation that impacts on such small groups of citizens is exactly the sort of majority tyranny that Madison sought to avoid.<sup>38</sup> The concern over majority tyranny is especially relevant when the subject of an initiative or referendum is the rezoning of a particular parcel of land affecting a very small minority — frequently one person. When the subject matter impacts on a small group, it becomes very easy for a majority faction to form and sacrifice the interests of the minority landowner. This scenario presents precisely the type of situation that Rousseau did not foresee, and which Madison sought to guard against.<sup>39</sup>

Even these situations, however, do not single out a particular individual or a particular piece of land, as does rezoning by initiative. While demonstrating some narrowing of subject matter, the history of initiative and referendum reveals that initiative and referendum still maintain a broadly legislative focus either on policy, or on the application of a particular measure across a spectrum of the population in a

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35. 3 CALIFORNIA PLANNING AND DEVELOPMENT REPORT NO. 12, at 1 (Dec. 1988).

36. *Initiative Pro and Con*, Sunday Star-Bull. & Advertiser, May 21, 1989, at B-3.

37. Comment, *The Use of Initiative in Municipal Zoning*, 55 UMKC L. REV. 284, 285 (1987). The City Council of St. Paul, Minnesota attempted to protect gay rights when it enacted an ordinance prohibiting discrimination based upon, among other things, sexual preference. The voters amended this ordinance by initiative to delete the language referring to sexual preference. Thus, they used the majority power to eliminate legislation protective of a minority group. Comment, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating By Initiative*, 61 S. CAL. L. REV. 733, 749 (1988).

38. See *supra* notes 4-8 and accompanying text discussing Madison's arguments against a pure democratic form of government.

39. See *supra* note 2 and accompanying text discussing Rousseau's views toward representative governments; *supra* notes 4-8 and accompanying text discussing Madison's views toward republican form of government.

given jurisdiction. Rezoning by initiative or referendum, however, does not fall into either category. Rather, it is directed at a specific piece of property owned by a specific landowner. Therein lies the problem.

### III. THE HAWAII SUPREME COURT AND DIRECT DEMOCRACY IN THE 1980'S

Concluding a trilogy of cases,<sup>40</sup> the Supreme Court of Hawaii in *Kaiser Hawaii Kai Development Co. v. City of Honolulu (Sandy Beach)*<sup>41</sup> held that zoning by popular vote, at least through the use of initiative, is illegal. Significantly, *Sandy Beach* represents the only Hawaii case to date squarely addressing the legality of popular voting on land use decisions.<sup>42</sup>

The facts in *Sandy Beach* are straightforward. Kaiser Hawaii Kai Development Company (Kaiser) proposed to develop a tract of land located across the Kalaniana'ole Highway from Sandy Beach Park, a popular public beach park.<sup>43</sup> The proposed development entailed the construction of over 150 expensive single-family homes in close proximity to a golf course.<sup>44</sup> The tract had been zoned for residential use since 1954 and designated for residential use on the applicable development plan for the City and County of Honolulu since its adoption in 1983.<sup>45</sup> Hearings for a shoreline management permit for a portion of the residential project alerted Honolulu residents to the impending de-

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40. *Kaiser Hawaii Kai Dev. Co. v. City of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989); *Lum Yip Kee, Ltd. v. City of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989); *County of Kauai v. Pacific Standard Life Ins.*, 651 Haw. 318, 653 P.2d 766 (1982), *appeal dismissed sub nom*, *Pacific Standard Life Ins. v. Committee to Save Nukolii*, 460 U.S. 1077 (1983).

41. 70 Haw. 480, 777 P.2d 244 (1989). *Kaiser Hawaii* became popularly known as the *Sandy Beach* case through the efforts of the coalition seeking to stop the development in question through popular initiative.

42. The two cases completing the trilogy deal with initiative or referendum either indirectly or through dicta, and therefore, are only somewhat useful in determining the scope of our common law on ballot box zoning. See *supra* note 40 citing pertinent cases.

43. *Sandy Beach*, 70 Haw. at 482, 777 P.2d at 245-46. The Kamehameha Schools/Bernice Pauahi Bishop Estate owned the disputed tract of land. *Id.* at 481, 777 P.2d at 245.

44. *Id.* at 481, 777 P.2d at 245.

45. Pursuant to its charter, Honolulu's nine charter mandated development plans take precedence over rezonings and subdivision applications. The plans are composed of detailed maps and texts which cover all of Honolulu (Island of Oahu).

velopment.<sup>46</sup> In time, substantial public opposition materialized and coalesced into the "Save Sandy Beach Coalition" (Coalition).<sup>47</sup> The Coalition circulated and certified a petition in accordance with the Honolulu City Charter<sup>48</sup> which placed an initiative measure before the voters of the City and County on November 8, 1988.<sup>49</sup> The petition sought to change the development plan map classification from residential to preservation, and to "downzone" or reclassify the tract on the City and County's zoning map from R-5 residential to P-2 preservation.<sup>50</sup>

The initiative measure overwhelmingly passed. Kaiser, however, brought suit to set aside the measure. The lower court held that the state enabling act granted the power to zone exclusively to the City Council and, therefore, the exercise of the charter-authorized initiative over zoning was unauthorized and illegal.<sup>51</sup>

The Supreme Court of Hawaii affirmed the decision of the trial court, but on significantly different grounds. The court noted that the language of the Zoning Enabling Act<sup>52</sup> clearly indicated the legislature's emphasis on comprehensive planning for reasoned and orderly development.<sup>53</sup> Further, the court stated that zoning by initiative was

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46. *Sandy Beach*, 70 Haw. at 482, 777 P.2d at 245.

47. *Id.* at 482, 777 P.2d at 246.

48. REVISED CHARTER OF HONOLULU art. III, ch. 4, § 3-402 (1984).

49. *Sandy Beach*, 70 Haw. at 482, 777 P.2d at 246.

50. *Id.* at 482, 777 P.2d at 246.

51. *Id.*

52. HAW. REV. STAT. § 46-4(a) (Supp. 1988).

53. *Sandy Beach*, 70 Haw. at 484, 777 P.2d at 246-47. Quoting the Zoning Enabling Act's language, the court accurately portrayed the legislature's concern for orderly development and zoning through comprehensive planning:

Zoning in all counties shall be accomplished within the framework of a long range, comprehensive general plan prepared or being prepared to guide the overall future development of the county. *Zoning shall be one of the tools available to the county to put the general plan into effect in an orderly manner.*

. . . The powers granted herein shall be liberally construed in favor of the county exercising them, and *in such a manner as to promote the orderly development of each county or city and county in accord with a long range, comprehensive, and general plan, and to insure the greatest benefit for the State as a whole.*

*Sandy Beach*, 70 Haw. at 483-84, 777 P.2d at 246-47 (emphasis added) (quoting HAW. REV. STAT. § 46-4(a) (Supp. 1988)). The Court further stated that:

The pressure of a rapidly increasing population in the Territory of Hawaii requires an orderly economic growth within the various counties and the conservation and development of all natural resources. Adequate controls must be established, maintained and enforced by responsible agencies of government to reduce waste and put all of our limited land area, and the resources found thereon, to their most

inconsistent with the goal of long range comprehensive planning.<sup>54</sup> Consequently, the court found it unlikely that the legislature intended to permit the initiative process to supersede local zoning.<sup>55</sup>

The Coalition, however, argued that the initiative process was reserved to the people regardless of what the legislature may have intended and despite adverse effects on planning.<sup>56</sup> The court flatly rejected this contention.<sup>57</sup> In making its determination, the court remarked that all the cases cited in support of the Coalitions argument were from jurisdictions in which the state constitution reserved to the people either initiative, referendum, or both.<sup>58</sup> In contrast, the Hawaii constitution reserves neither initiative nor referendum power to the people.

Lastly, the Coalition argued that the court had dealt with the issue of popular vote already in the *Nukolii* case.<sup>59</sup> Indicating that *Nukolii*

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beneficial use. It is the intent and purpose of the legislature, by means of zoning ordinances and regulations enacted by or under this act, and in accord with a long range, comprehensive general plan, to promote the health, safety, convenience, order, welfare and prosperity of the present and future inhabitants of the Territory.

*Sandy Beach*, 70 Haw. at 483-84, 777 P.2d at 246-47 (quoting Haw. Sess. Laws § 1, Act 234). These excerpts indicate that the court is not merely addressing the question of whether the legislature authorizes initiative and referendum. Rather, the court has concluded that however enacted, those ordinances must comport with the long-range general plan embodied in the Zoning Enabling Act. *Id.* at 489, 777 P.2d at 250. Indeed, the court reasonably concluded that the legislature did not even contemplate zoning by initiative when it enacted the Zoning Enabling Act. *Id.* at 486, 777 P.2d at 248.

54. *Id.* at 484, 777 P.2d at 247. The court cited several cases from other jurisdictions for the proposition that initiative is inconsistent with zoning plans. *Id.* citing *Kelly v. John*, 162 Neb. 319, 75 N.W.2d 713 (1956); *Township of Sparta v. Spillane*, 125 N.J. Super. 519, 312 A.2d 154 (1973); *Smith v. Livingston Township*, 106 N.J. Super. 444, 256 A.2d 85 (1969); *Leonard v. City of Bothell*, 87 Wash. 2d 847, 557 P.2d 1306 (1976). Although the court noted that *Spillane* and *Leonard* dealt with referenda, it nevertheless found their reasoning applicable to initiatives in the context of comprehensive zoning plans. *Sandy Beach*, 70 Haw. at 484, 777 P.2d at 246-47.

55. *Sandy Beach*, 70 Haw. at 484, 777 P.2d at 246 (citing *Smith v. Livingston Township*, 106 N.J. Super. 444, 457, 256 A.2d 85, 92 (1989)).

56. *Id.* at 484, 777 P.2d at 248-50.

57. *Id.* at 487, 777 P.2d at 248-49 n.3.

58. *Id.*

59. *County of Kauai v. Pacific Standard Life Insurance Co.*, 65 Haw. 318, 653 P.2d 766 (1982), represented the first Hawaii case to consider land use referenda. This case, known as the "*Nukolii*" case, was named after the Kauai beach over which the litigation arose. In *Nukolii*, the court held that rights to proceed with a development vested only after a landowner changed his position by relying upon rights obtained after the issuance of the last necessary discretionary permit. *Id.* at 338, 653 P.2d at 780. That permit - to construct a hotel and condominiums - was a referendum. The petition for

was a referendum case, not an initiative case as in *Sandy Beach*, the court rejected this argument on the further ground that "the court in the *Nukolii* case was not faced with the issue of whether zoning by referendum is permissible in light of H.R.S. § 46-4(a). We, therefore, hold that the *Nukolii* case is inapposite."<sup>60</sup>

In sum, the *Sandy Beach* Court decided that the legislature had not authorized zoning by initiative or referendum. In so holding, the Court declared that zoning by initiative is inconsistent with the goal of long range comprehensive planning (which appears in other statutes than just the Zoning Enabling Act). Moreover, neither initiative nor referendum powers are reserved to the people absent a constitutional amendment to that effect. The court, however, did not address whether zoning by initiative's failure to provide for notice, hearing, and planning commission recommendations violates either statutory or constitutional due process. Furthermore, the court did not decide whether land use decisions of the map amendment type, like rezonings, are principally legislative acts otherwise subject to initiative and referendum after the above issues are satisfactorily resolved, or quasi-judi-

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the referendum, moreover, had been certified before the developer obtained what otherwise represented the last discretionary permit: a special management area permit or SMA permit. *Id.* at 330, 653 P.2d at 775.

As the *Sandy Beach* Court noted, the *Nukolii* court never considered the legality of the referendum process to reclassify land in conjunction with the Zoning Enabling Act and so cannot be said to have ruled on that issue. *Sandy Beach*, 70 Haw. 480, 485, 777 P.2d 244, 247-48 (1989). Even if the court had considered its *Nukolii* decision as somehow binding on the subject of citizen participation, at least two crucial differences would make it inapplicable to the *Sandy Beach* litigation.

First, *Nukolii* involved the referendum process, whereas *Sandy Beach* dealt with the power of initiative. The referendum process at least has the virtue of permitting the planning and zoning process to go forward, even if it has the potential of knocking the whole into a cocked hat by rendering a popular decision directly at odds with those processes. The initiative is far more damaging, as it does not provide for such process at all.

Second, at least some due process is afforded to parties in either the initiative or referendum process under the Kauai charter. The Kauai County Council is required "immediately to consider an initiative or referendum petition which has been determined sufficient in accordance with the provision of this article. . . . If a referendum petition is concerned, the ordinance to which that petition is directed shall be reconsidered by the council. . . ." KAUAI COUNTY CHARTER art. XXII, § 22.07 (1984). Therefore some minimum procedure arguably brings in some planning process. The planning process, however, was wholly lacking under the Honolulu initiative procedure used in the *Sandy Beach* case.

60. *Sandy Beach*, 70 Haw. at 485, 777 P.2d at 248. For a fuller discussion, see Note, *Kaiser Hawaii Kai Development Company v. City and County of Honolulu: Zoning by Initiative in Hawaii*, 12 U. HAW. L. REV. 181 (1990).

cial, contested case acts,<sup>61</sup> which are not subject to popular vote as a matter of law.<sup>62</sup>

The following sections address these issues, revisit the effects of initiative on plans and planning, and briefly note the effects of initiative on the rights of minorities.

#### IV. DUE PROCESS AND DIRECT DEMOCRACY

The fourteenth amendment's due process clause requires procedural

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61. *Town v. Land Use Comm'n*, 55 Haw. 538, 524 P.2d 84 (1974).

62. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441 (1915). The issues decided in the *Sandy Beach* litigation very nearly were decided some months before in *Lum Yip Kee, Ltd. v. City of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989) (*Date-Laa*). In *Date-Laa*, the Hawaii Supreme Court failed to reach the issue of the legality of zoning by initiative because the Honolulu City Council passed an ordinance conforming to the results of the initiative thereby rendering the issue moot. The court, however, discussed the importance of planning in land use decision-making at length, which, in hindsight, foreshadowed its decision in *Sandy Beach*.

In the *Date-Laa* case, owners of a 5.5 acre tract in Nukoliia appealed a lower court decision upholding the City Council's conforming ordinance which classified the property for low-density apartment development. *Id.* at 181-86, 767 P.2d at 817-19. The lower court also found the initiative ordinance making the medium-density classification illegal because the state enabling act conferred zoning authority only on the city council. *Id.* The Supreme Court of Hawaii never reached the city's challenge of the initiative ordinance, however, after it upheld the City Council ordinance. *Id.* at 192 n.15, 767 P.2d at 823 n.15. For over fifty years, the property had been classified, but not used, for high-density residential use. Further, briefly in 1984, the city classified it as medium-density in response to resident concerns over the loss of low-income housing in the predominantly two and three story apartment complexes on the tract. *Id.* at 184-85, 767 P.2d at 818-19.

While not particularly enlightening on the use of initiative and referendum, the *Date-Laa* case is a virtual textbook on the importance of plans and their relationship to zoning. Not only does the court set out in great detail the character and contents of development plans in the city and county, *id.* at 182-83, 767 P.2d at 817-18, dwelling at great length on the requirement that zoning ordinances must conform to such plans, but also the court fully discusses the importance of state plans and their relationship to county plans. *Id.* at 186-87, 767 P.2d at 821. The court further noted that the Hawaii State Plan requires county development and general plans to consider statewide objectives, policies, and programs stipulated in state functional plans, thus, providing a framework for state and county planning. Moreover, the court then made the critical finding that the Council's zoning ordinance was "clearly enacted" within the framework of the functional plans. *Id.* In so holding, the court quoted portions of the State Housing Functional Plan pertaining to low income housing. *Id.* Moreover, in rejecting Lum Yip Kee's contention that the council had not changed the plan designation on their property on bases set out in State Plan, the court held that "the City Council Ordinance was 'formulated on the basis of sound rationale, data, analyses, and input from the state and county agencies and the general public.'" *Id.* at 189, 767 P.2d at 821-22.

safeguards to accompany any deprivation of property.<sup>63</sup> Federal law sets forth the minimum due process requirements of notice, hearing and standards to guide delegated decision makers. States may require additional protections beyond the federal requirement, but they may not authorize the deprivation of a protected right without these minimum procedural safeguards.<sup>64</sup>

### A. *Federal Due Process and the Problem with Eastlake*

A federal due process attack on an initiative or referendum may take one of two forms. The landowner may either object to the lack of notice and hearing as a violation of federal due process requirements, or claim that allowing the voters to rezone his land amounts to a standardless delegation of legislative power.

#### 1. Due Process and Notice

Due process violations may arise when the affected individual is not given notice or an opportunity to be heard in the decision-making process.<sup>65</sup> The Court has held that for a notice to be valid, it must be reasonably calculated to apprise all interested parties of the pendency of the action, afford them reasonable opportunity to make their appearance and present their objections, and reasonably convey the required information.<sup>66</sup> Thus, notice "should include not only the time, date, and place of the hearing, but it should also provide an adequate description of the property at issue and the nature of the proposed change."<sup>67</sup> Moreover, the due process clause's procedural protections are tailored to the demands of the particular situation.<sup>68</sup> In rezoning matters, the landowner must be allowed the opportunity to protest the decision to rezone the property and to "present and rebut evidence."<sup>69</sup>

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63. The due process clause of the fourteenth amendment reads: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

64. See, e.g., *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985).

65. See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Scott v. City of Indian Wells*, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972).

66. Kahn, *In Accordance With a Constitutional Plan: Procedural Due Process and Zoning Decisions*, 6 HASTINGS CONST. L.Q. 1011, 1039 (1979) (citing *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

67. Kahn, *supra* note 66, at 1040.

68. *Mathews*, 424 U.S. at 321.

69. Kahn, *supra* note 66, at 1041.



Denying the landowner such an opportunity would violate the concept of fairness which is the "essence of due process."<sup>70</sup>

Courts favoring the use of initiative and referendum generally have thwarted this requirement by characterizing the rezoning as legislative. Constitutional due process applies to administrative or quasi-judicial decisions, but not to legislative ones. Thus, once the action is characterized as legislative, the due process clause does not apply.<sup>71</sup>

Simple labeling of all zoning actions as legislative is arguably unconstitutional because most rezonings affect only a small number of people. In *Bi-Metallic Investment Co. v. State Board of Equalization*,<sup>72</sup> the United States Supreme Court addressed the constitutionality of a city wide tax measure. The Tax Board of Colorado had issued an order increasing the valuation of all taxable property in Denver by 40%.<sup>73</sup> The plaintiff, a real estate owner in Denver, objected to the order on the ground that it violated his due process rights by not giving him an opportunity to be heard.<sup>74</sup> The Court phrased the issue as "whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,"<sup>75</sup> and held that due process is not required where a "rule of conduct applies to more than a few people."<sup>76</sup> Logically, rezonings must therefore be examined to determine whether they apply to more than a few people. If rezonings apply to more than a few people, then they are deemed legislative and

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70. Note, *Arnel Development Co. v. City of Costa Mesa: Rezoning by Initiative and Landowners' Due Process Rights*, 70 CALIF. L. REV. 1107, 1125-26 (1982).

71. In *San Diego Building Contractors Association v. City Council of San Diego*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974), the court held that the enactment by initiative of a generally applicable building height restriction constituted a legislative act. Therefore, "the constitutional requirements of 'notice' and 'hearing' do not apply." *Id.* at 211, 529 P.2d at 573, 118 Cal. Rptr. at 149. Likewise, in *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980), the Supreme Court of California upheld an initiative that rezoned a 68 acre parcel from apartment use to single family residential use. *Id.* at 525, 620 P.2d at 573, 169 Cal. Rptr. at 912. In so ruling, the court characterized all zoning actions as legislative regardless of the size of the parcel. *Id.* at 521-22, 620 P.2d at 571, 169 Cal. Rptr. at 910-11. The court admitted that this was done largely for the sake of convenience. *Id.* at 514, 620 P.2d at 567, 169 Cal. Rptr. at 906. The Supreme Court of Colorado in *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), carried the *Arnel* logic to its extreme when it held that the rezoning of 3.34 acres was a legislative act. *Id.* at 305.

72. 239 U.S. 441 (1915).

73. *Id.* at 443.

74. *Id.* at 444.

75. *Id.* at 445.

76. *Id.*

no procedural safeguards are required. If not, however, then due process requirements must be met.<sup>77</sup>

## 2. Due Process, Standardless Delegation and *Eastlake*

The standardless delegation of zoning powers to the voters presents the second issue raising a constitutional due process question in the context of initiative and referendum. The Supreme Court focused on this issue in *City of Eastlake v. Forest City Enterprises, Inc.*<sup>78</sup> Several commentators have pointed out, however, that *Eastlake* is far from becoming a consistent basis for later decisions.<sup>79</sup> Rather, most jurisdictions considering popular voting on land use matters have dealt with the subject on other grounds such as state due process, effect on planning, effect on property rights, and quasi-judicial versus legislative.<sup>80</sup> This result is not surprising given the narrowness of the *Eastlake* decision and the issues the Court failed to address. Although *Eastlake* has been cited for the sweeping proposition that the use of initiative and referendum in zoning does not violate the due process clause,<sup>81</sup> its holding is far narrower. The Court held that where the Ohio Constitution reserved the power of initiative and referendum to the people, the use of referendum to rezone was not a standardless delegation of power violative of due process.<sup>82</sup>

In *Eastlake*, Forest City Enterprises acquired an eight acre parcel zoned for light industrial uses in Eastlake.<sup>83</sup> Forest City applied to the City Planning Commission for a zoning change to allow a high rise apartment building.<sup>84</sup> The City Council, upon recommendation of the Planning Commission, allowed the change.<sup>85</sup> Meanwhile, the voters of Eastlake amended the city charter to require that any land use changes agreed to by the Council be approved by a fifty-five percent vote in a

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77. *Bi-Metallic*, 239 U.S. at 445. The Supreme Court in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), never reached this issue. See *infra* notes 78-103 for an in-depth discussion of *Eastlake*.

78. 426 U.S. 668 (1976).

79. See Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 PAC. L.J. 793, 794-95 (1987); Rosenberg, *supra* note 11, at 415.

80. Goetz, *supra* note 79, at 794-95.

81. See, e.g., *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170 (Fla. 1983).

82. *Eastlake*, 426 U.S. at 677 n.11.

83. *Id.* at 670.

84. *Id.*

85. *Id.* at 670-71.

referendum.<sup>86</sup> Forest City then applied to the Commission for “parking and yard” approval.<sup>87</sup> Approval was denied on the ground that the voters had not yet approved the rezoning.<sup>88</sup> Subsequently, Forest City challenged the charter amendment as an unconstitutional delegation of legislative power to the people. An Ohio appellate court held that the amendment was valid. The Supreme Court of Ohio reversed that decision and held that while rezoning was a legislative function, the standardless delegation of this legislative power to the voters permitted the police power to be used in an arbitrary and capricious manner.<sup>89</sup> Consequently, the court found that the amendment violated the due process clause.<sup>90</sup>

The United States Supreme Court, however, reversed the Supreme Court of Ohio’s decision.<sup>91</sup> In reaching its conclusion, the Court explained that lawmaking power flowed from the people to the legislature.<sup>92</sup> The people could reserve some of this power if they so desired.<sup>93</sup> In the Ohio Constitution, the people specifically had reserved to themselves the power of initiative and referendum.<sup>94</sup> Because the people did not surrender this power to the legislature, no delegation of power from the legislature to the people occurred and, consequently, no delegation, standardless or not, violated due process.<sup>95</sup> Accordingly, the Court upheld the charter amendment.<sup>96</sup>

The Court’s analysis clearly indicates that *Eastlake* does not stand for the proposition that the use of initiative and referendum must meet all federal due process requirements. First, standardless delegation, the only federal due process issue the court addressed, is but one aspect of due process. A violation may still occur for lack of notice and hearing

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86. *Id.*

87. *Id.* at 671.

88. *Id.*

89. *Id.* (citing *Forest City Enterprises, Inc. v. City of Eastlake*, 41 Ohio St.2d 187, 324 N.E.2d 740 (1975)).

90. *Eastlake*, 426 U.S. at 672.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 673.

95. *Id.* at 675.

96. *Id.* at 679. As a result of the Court’s decision, the requisite 55% vote of approval was not garnered. *Id.* Thus, the proposed zoning change to allow a high rise apartment failed “with the resulting exclusion of minorities and persons of low income.” Goetz, *supra* note 79, at 801.

or other procedural due process irregularities. Second, the Ohio Constitution explicitly reserved the power of initiative and referendum to the people. As noted below,<sup>97</sup> this makes it more likely, though by no means conclusive, for a court to uphold rezoning by initiative. Only when the initiative and referendum power is reserved in the state constitution could a court conclude that standardless delegation of the power to zone is irrelevant because the power is reserved and not delegated. Finally, *Eastlake* is a referendum case, not an initiative case. Because more governmental process is associated with referenda, the proposition to be voted on has at least been through the requisite state and local procedures normally accompanying a rezoning: notice, hearings, planning commission review and recommendation.

The *Eastlake* Court offered no opinion on other critical initiative and referendum questions.<sup>98</sup> The Court failed to decide whether the rezoning of property was a legislative or a quasi-judicial act, as it had done for variances. Rather, the Court deferred to the Supreme Court of Ohio's "binding interpretation"<sup>99</sup> of the action as legislative. If the Ohio court had held the rezoning a quasi-judicial act, then presumably, the United States Supreme Court would be bound by this interpretation and the action would not be referendable.

The Court's decision is puzzling given that even Justice Black in *James v. Valtierra*<sup>100</sup> would confine initiative and referendum to "questions of public policy."<sup>101</sup> It is difficult, however, to identify the public policy in the *Eastlake* rezoning. In his dissenting opinion, Justice Stevens indicated that he would not grant such a high degree of deference to a state determination of whether the action was legislative or not.<sup>102</sup> Moreover, Justice Stevens stated that he would not give "legislative" status to any rezoning unless the public policy aspects of that particular use of land at that particular location could be clearly

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97. See *infra* notes 157-97 and accompanying text discussing the reservation of the power of initiative and referendum in the state constitution as a prerequisite to ballot box zoning.

98. See Freilich & Guemmer, *Removing Artificial Barriers to Public Participation in Land Use Policy: Effective Zoning and Planning by Initiative and Referendum*, 21 URB. LAW. 511, 513 (1989).

99. *Eastlake*, 426 U.S. at 674 n.9.

100. 402 U.S. 137 (1971) (cited in *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 678 (1976)).

101. *Id.* at 141.

102. *Eastlake*, 426 U.S. at 686 (Stevens, J., dissenting).

demonstrated.<sup>103</sup>

In sum, *Eastlake* is good law only to the extent of its narrow holding: where the Ohio Constitution reserved the power of initiative and referendum to the people, the use of referendum to rezone was not a standardless delegation of power violating part of federal due process requirements. The *Eastlake* decision offers no guidance on whether its holding applies to initiatives.

### B. *State Statutes and Due Process*

Apart from serious federal due process issues, zoning by initiative is also contrary to the statutory processes provided in most planning and zoning enabling legislation. Two principal issues are: (1) who or what body should zone under the statutes, and (2) what procedural safeguards are necessary for that zoning. As one commentator has recently stated, rezoning by initiative or referendum is essentially "an end-run around carefully enacted procedures for zoning decisions."<sup>104</sup> No hearings, amendments, compromise, professional planners' reports, and affected landowners' testimony are needed. Further, no city council members are held accountable for a controversial decision.<sup>105</sup>

A number of courts have struck down initiative or referendum precisely on the ground that it either directly contradicted state zoning enabling legislation, or indirectly provided a body without delegated authority to zone with the power to reclassify. These decisions come both before and after the *Eastlake* decision, and clearly indicate that whether or not referenda are compatible with federal due process, states are concerned with the language in their own enabling acts.

Perhaps the clearest statement comes from the Superior Court of New Jersey.<sup>106</sup> Holding zoning amendments by referendum illegal, the court found certain aspects of the zoning statute inherently at odds with the referendum process.<sup>107</sup> Specifically, the court noted that in authorizing local governing bodies to establish administrative agencies to regulate zoning, the state laid down specific and detailed procedures to be followed.<sup>108</sup> Further, the court stated that such comprehensive

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103. *Id.* at 693.

104. Goetz, *supra* note 79, at 833.

105. *Id.* at 833-34.

106. *Township of Sparta v. Spillane*, 125 N.J. Super. 519, 312 A.2d 154 (1973).

107. *Id.* at 526, 312 A.2d at 158.

108. *Id.* at 526, 312 A.2d at 157.

and precise treatment demonstrated the legislature's special concern in municipal zoning regulation.<sup>109</sup> Finally, the court concluded that the publicity which might accompany the referendum campaign and the exposure and discussion generated did not justify disregarding these procedural requirements.<sup>110</sup>

In striking down certain bulk amendments to a municipal zoning code, the Supreme Court of Idaho provided equally strong language.<sup>111</sup> Although the court appeared to rely in part on what it interpreted as the state's specific delegation of zoning power to local legislative bodies, the court's language is far broader. Specifically, the court stated that the Local Planning Act's express procedures indicated that the legislature intended to give local legislative bodies authority to consider, amend, or enact zoning plans.<sup>112</sup> Consequently, the court found that the comprehensiveness of Idaho zoning legislation left no room for zoning by initiative.<sup>113</sup>

The Supreme Court of Washington likewise limited referenda or initiatives' use on rezonings by refusing to issue a writ of mandamus for a referendum on a commercial rezoning.<sup>114</sup> The court held that the legislature granted the power to zone exclusively to the local legislative body.<sup>115</sup> Because the legislature knew of the statutes' referendum and

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109. *Id.* at 526, 312 A.2d at 158.

110. *Spillane*, 125 N.J. Super. at 527, 312 A.2d at 158. The court also expressed concern about the local planning commission's authority and affected landowners' rights:

Whether the referendum stems from a submission of an ordinance by the governing body directly to the voters or by a referendum petition filed by the necessary number of voters, the so-called veto power of the planning board or protesting landowners would be rendered meaningless. A simple majority of the voters would be all that was necessary to approve or disapprove the ordinance.

*Id.*

111. *Gumprecht v. City of Coeur D'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983).

112. *Id.* at 617, 771 P.2d at 1216-17 (emphasis added). The court noted that the local planning act required a myriad of procedures, including:

holding advisory and informational meetings and hearings in developing plans and zoning structures[,] . . . conducting a comprehensive planning process to prepare, implement and update the comprehensive plan, which is to be based upon specific, delineated components . . . and, giving notice to interested parties and holding public hearings prior to the recommendation, adoption or amendment of a plan or zoning ordinance. . . .

*Id.*

113. *Id.* at 618, 661 P.2d at 1217.

114. *Leonard v. City of Bothell*, 87 Wash. 2d 847, 557 P.2d 1306 (1976) (en banc).

115. *Id.* at 853, 557 P.2d at 1310.

initiative authorization provisions, the Court explained that, presumably, the legislature could have appropriately amended those provisions if it so chose.<sup>116</sup> Moreover, the court stated that zoning code amendments require individuals possessing the expertise to consider the total economic, social, and physical characteristic of the community to make informed and intelligent choices.<sup>117</sup> The court further expressed the concern that the voters in a referendum election may not have an adequate opportunity to read relevant information regarding the proposed land use change.<sup>118</sup> In contrast, the court found that local legislative bodies normally possess the necessary experience to make difficult zoning decisions.<sup>119</sup>

In *Dewey v. Doxey-Layton Realty Co.*,<sup>120</sup> the Supreme Court of Utah held that the power to legislate by initiative, although specifically reserved to the people in the state constitution, did not apply to zoning.<sup>121</sup> In so holding, the court stated that the power to initiate

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116. *Id.*

117. *Id.* at 854, 557 P.2d at 1311.

118. *Leonard*, 87 Wash. 2d at 854, 557 P.2d at 1311.

119. *Id.* Similarly, in *San Pedro North, Ltd. v. City of San Antonio*, 562 S.W.2d 260 (Tex. Civ. App. 1978), a Texas appellate court held a rezoning ordinance was not subject to the initiative nor referendum provisions of a city charter. *Id.* at 262. Noting that statutory authority empowers Texas cities to zone, and requires public hearings and planning commission recommendation, the court explained:

To give effect to the election in this case . . . would be to add a procedural step to zoning which is not required by the comprehensive provisions of the Enabling Act. A city can no more add a step to the procedures required by state law than it can omit one.

*Id.* at 262.

Even more pervasive in its limitation on initiative and referendum is the Supreme Court of Arizona's decision in *City of Scottsdale v. Superior Court*, 103 Ariz. 204, 439 P.2d 290 (1968) (en banc). In that case, the court upheld an injunction prohibiting an election on a municipal rezoning. *Id.* at 207, 439 P.2d 293. The court found that the state statutory zoning requirements of a public hearing on zoning amendments apparently granted the power to zone to the local legislative body alone. *Id.* at 205-06, 439 P.2d at 291-92. Consequently, the court stated:

[I]t is clear and we hold that the initiative process is not available as a mode for amending a comprehensive zoning plan. It is an irreconcilable conflict with . . . the express provisions of the state statute which delegated zoning powers to the governing body of an incorporated city.

*Id.* at 207-08, 439 P.2d at 293-94. See also *Hancock v. Rouse*, 437 S.W.2d 1, 4 (Tex. Civ. App. 1969) (holding that the general statutory enabling act's notice and hearing requirements for zoning could not be complied with if the ordinance was submitted to the voters).

120. 3 Utah 2d 1, 277 P.2d 805 (1954).

121. *Id.* at 6-7, 277 P.2d at 809.

legislation was limited to the types of legislation subject to initiative.<sup>122</sup> The court reasoned that because the legislature also had power to act under the constitution and had chosen to protect private property by setting out procedural due process requirements in the state zoning enabling statute, the initiative could not be used to rezone private property.<sup>123</sup> Because the city had to comply with the due process set out in the statute, the court added, so did the people.<sup>124</sup>

The Supreme Court of New Mexico in *Westgate Families v. County Clerk* struck down a referendum returning newly reclassified residential and planned development parcels to a recreational-wilderness district on the ground that even in a home rule county, "the [Zoning Enabling] Act indicates both procedural and substantive limitations are imposed upon Counties when exercising its zoning power."<sup>125</sup> The court also precluded the county from zoning by referendum because the Zoning Enabling Act, stating that a proposed ordinance "shall be passed only by a majority vote of . . . the board of county commissioners," thereby expressly limited rezoning to "representative bodies."<sup>126</sup>

In contrast, California courts take the opposite view with respect to statutory process. In *Associated Home Builders, Inc. v. City of Livermore*,<sup>127</sup> the Supreme Court of California conclusively held that the zoning enabling act's notice and hearing provisions did not apply to zoning ordinances enacted by initiative.<sup>128</sup> In making its determina-

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122. *Id.*

123. *Id.*

124. Dewey, 3 Utah 2d at 7, 277 P.2d 809 (1954). The Missouri courts also have refused to permit an election on a rezoning of a 225 acre tract from residential to industrial *even though the constitution gave citizens the right to initiative*. See *State ex rel. Powers v. Donohue*, 368 S.W.2d 432 (Mo. 1963). In part, they refused because there would be no notice, hearing, or report from the planning commission, all of which the zoning enabling act required. *Id.* at 438-39.

However, the Missouri courts otherwise construe rezonings as legislative acts and a recent appellate court decision found that certain notification and hearing processes preceding a rezoning initiative satisfied the *Donohue* requirements, particularly after the United States Supreme Court's *Eastlake* decision. Motions for rehearing and/or transfer to the Supreme Court of Missouri were denied and it remains to be seen whether that court would agree with this somewhat altered position. See *State ex rel. Hickman v. City Council*, 690 S.W.2d 799 (Mo. 1985).

125. *Westgate Families v. County Clerk*, 100 N.M. 146, 148, 667 P.2d 453, 455 (1983).

126. *Id. Accord State ex rel. MacQueen v. City of Dunbar*, 167 W. Va. 91, 278 S.E.2d 636 (1981).

127. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

128. *Id.* at 596, 557 P.2d at 480-81, 135 Cal. Rptr. at 49.



tion, the court recognized that the state constitution, amended in 1911 to reserve the power of initiative and referendum to the people, was of paramount importance and authority.<sup>129</sup> Indeed, the court set out at length the process which led to the amendment and its critical importance in California.<sup>130</sup> Unlike any other state, California's constitutional reservation of initiative and referendum overshadows virtually all other legal considerations in the California courts.

The Supreme Court of Virginia's recent decision in *R.G. Moore Building Corp. v. Committee for Repeal*<sup>131</sup> demonstrates the legal damage that results from an overbroad reading of *Eastlake*.<sup>132</sup> In *R.G. Moore*, a developer challenged a rezoning referendum on a host of grounds, including that it was an improper delegation of power to the electorate.<sup>133</sup> The Supreme Court of Virginia purported to find a delegation of authority for initiatives and referenda in the Virginia Constitution's general language that "all power is vested in and consequently derived from, the people."<sup>134</sup> The court then quoted *Eastlake* dicta to the effect that a referendum cannot be characterized as a delegation of power.<sup>135</sup> The court, however, failed to note the context from which the *Eastlake* dicta emerged — the Ohio Constitution's specific delegation of authority for initiative and referendum.

Even generally pro-initiative commentators concede this extremely limited nature of the *Eastlake* holding.<sup>136</sup> The Virginia court somehow failed to grasp that even though the people of a state are indeed the source of power, they have by their state constitution delegated law-making power to the legislature except insofar as some powers are specifically reserved.<sup>137</sup> The Court further stated that the reservation came through the charter. That fact is no help if the local government, a creature of the state, was not specifically delegated authority to so reserve the power under the state constitution.

In sum, a number of the foregoing cases demonstrate that many ju-

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129. *Id.* at 591, 557 P.2d at 479-80, 135 Cal. Rptr. at 45.

130. *Id.*

131. 239 Va. 484, 391 S.E.2d 587 (1990).

132. 426 U.S. 668 (1976).

133. *R.G. Moore Bldg. Corp.*, 239 Va. at —, 391 S.E.2d at 588.

134. *Id.* at —, 391 S.E.2d at 589, (citing VA. CONST. art. I, § 2).

135. *Id.* at —, 391 S.E.2d at 589.

136. Freilich & Guemmer, *supra* note 99, at 523, 527-28.

137. D. MANDELKER, D. NETSCH, P. SALSICH & J. WEGNER, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM ch. 1 (1990).

risdictions have restricted their procedural limits in rezoning by initiative to matters of constitutional due process, often holding that rezonings by initiative violate legislative due process. They have the better argument. The California courts do not address the lack of fairness to a property owner caused by the elimination of statutory hearing, notice, and expert review procedures required of local governments. It is the majority's wielding of this unfairness against the minority that was as much on the minds of our founding fathers as protection against an unfair biased government.<sup>138</sup>

#### V. ZONING BY INITIATIVE: LEGISLATIVE OR QUASI-JUDICIAL?

One of the principal issues confronting a court in deciding whether a land use measure is subject to initiative or referendum is its legislative or quasi-judicial character.<sup>139</sup> Black letter law provides that legislative decisions are "referendable" — subject to either initiative or referendum, other things being equal — but quasi-judicial ones are not.<sup>140</sup> This rule exists because people as a whole have no legally protected interest in the application of law and policy to an individual or particular situation as compared to a broad policy decision affecting everyone. Moreover, the adjudication of individual situations are immune from random decisions by popular vote. Thus, the characterization of zoning decisions as either legislative or quasi-judicial will determine whether such decisions are subject to initiative or referendum as a matter of law.

The Supreme Court of Oregon in *Fasano v. Board of County Commissioners*<sup>141</sup> provides the principal decision on the subject. In *Fasano*, the court considered whether the local legislative body's map amendment to a zoning ordinance was a legislative act.<sup>142</sup> The court stated that zoning ordinances detailing general policies without regard to a specific piece of property typically characterize an exercise of legisla-

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138. See Eule, *supra* note 6, at 1522-30.

139. Freilich & Guemmer, *supra* note 99, at 528.

140. A. RATHKOPF, *THE LAW OF ZONING AND PLANNING*, ch. 27, § 3 (1975); 42 AM. JUR. 2d *Initiative and Referendum* § 11 (1969).

141. 264 Or. 574, 507 P.2d 23 (1973).

142. *Id.* at 579, 507 P.2d at 26. Initially, the court stated that it "would be ignoring reality to rigidly view all zoning decisions by local governing bodies as legislative acts to be accorded a full presumption of validity and shielded from less than constitutional scrutiny by the theory of separation of powers . . ." *Id.*

tive authority.<sup>143</sup> In contrast, the court found that the determination of whether a specific piece of property's permissible use should be changed is usually an exercise of judicial authority.<sup>144</sup> Accordingly, the court held that the commission's actions in this instance constituted an exercise of judicial authority.<sup>145</sup>

While the Oregon courts have perhaps presented the most effective case for zoning as a quasi-judicial act, they are by no means the only courts to so hold. Courts in other jurisdictions have not only found map amendments to be administrative or quasi-judicial, but referendum-proof as well.<sup>146</sup>

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

144. *Id.* The court stated further:

An illustration of an exercise of legislative authority is the passage of the ordinance by the Washington County Commission in 1963 which provided for the formation of a planned residential classification to be located in or adjacent to any residential zone. An exercise of judicial authority is the County Commissioners' determination in this particular matter to change the classification of the A.G.S. Development Company's specific piece of property.

*Id.*

145. *Fasano*, 264 Or. at 586, 507 P.2d at 29. The Oregon courts reiterated this position in a later case in which the Oregon Court of Appeals made it clear that initiative would be wholly inappropriate for map amendments affecting only a single parcel of property. See *Allison v. Washington County*, 24 Or. App. 571, 575, 548 P.2d 188, 190-91 (1976) (en banc). *Allison* involved initiative and referendum as applied to land use policy. The court held that initiative was applicable to a comprehensive plan amendment. *Id.* at 587-88, 507 P.2d at 197-98. The court stated, however, that:

As a preliminary matter, it is important to draw a threshold distinction between legislative and quasi-judicial matters. *Action is legislative when it affects a large area consisting of many parcels of property in disparate ownership.* An example would be a zoning ordinance, that happened to be adopted by initiative, restricting buildings to a height of 30 feet in all of San Diego California between Interstate 5 and the ocean. *Conversely, action is considered quasi-judicial when it applies a general rule to a specific interest, such as a zoning change affecting a single piece of property, a variance, or a conditional use permit.* We are here concerned solely with legislative action - a comprehensive plan or zoning ordinance adopted or amended by initiative or referendum that affects a large area in disparate ownership.

*Id.* at 575, 548 P.2d at 190-91 (emphasis added).

146. See, e.g., *West v. City of Portage*, 392 Mich. 458, 221 N.W.2d 303 (1974). In *West*, after exhaustive analysis of treatises, articles and cases from other jurisdictions, the Supreme Court of Michigan held that an "amendatory ordinance" reclassifying 150 acres was administrative, and, therefore, not subject to a referendum. *Id.* at 472, 221 N.W.2d at 310. Although the court disagreed with its rationale, the court eventually said in the course of its opinion:

We hold that the amendment adopted by the city commission of the City of Portage rezoning 150 acres of land from single-family residential into sections allowing

The Supreme Court of Nevada, for example, struck down a rezoning by initiative on the ground that map amendments are administrative and not legislative in character.<sup>147</sup> Noting that municipal ordinances may be either legislative or administrative, the court stated that the establishment of a zoning policy to regulate the construction and use of buildings within a fixed area is a legislative matter subject to referendum.<sup>148</sup> The court added, however, that once such a policy delegating the power to grant exceptions to the planning commission and city council has been determined in order to secure the uniformity necessary to accomplish the purposes of the comprehensive zoning ordinance, such action is administrative and not referendable.<sup>149</sup> The court concluded that such was the case here.<sup>150</sup>

Similarly, the Supreme Court of Utah in *Bird v. Sorenson*<sup>151</sup> refused to issue a writ of mandamus for a referendum on the reclassification of certain property from residential to commercial under a local zoning ordinance.<sup>152</sup> Stating that the determinative question was whether the city council's action was administrative or legislative,<sup>153</sup> the court held that if the action was administrative, it was not subject to referendum.<sup>154</sup> In so holding, the court reasoned that "if each change in a zoning classification were to be submitted to a vote of the city electors,

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community business, multiple family and office service was an administrative, not a legislative, act and, therefore, not subject to referendum. . . .  
*Id.* at 472, 221 N.W.2d at 310.

*But see* *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475 (1979). Although not overruling *West, Zaagman* has been cited in two Michigan appellate opinions for the proposition that zoning amendments constitute legislative acts, not administrative acts. *See* *Jacobs, Visconsi & Jacobs Co. v. City of Burton*, 108 Mich. App. 497, 502, 310 N.W.2d 438, 440-41 (1981) ("[w]e conclude that the majority opinion adopted 'the legislative approach' and interpret *Zaagman* to permit application of referendum to zoning amendments."); *Chynoweth v. City of Hancock*, 107 Mich. App. 360, 309 N.W.2d 606, 607 (1981) ("Since the majority of the present Court has indicated more support for the legislative approach rather than the administrative approach, we conclude that the Court would find that this amendatory zoning ordinance was a legislative act subject to the right of referendum.").

147. *Forman v. Eagle Thrifty Drugs & Mkts., Inc.*, 89 Nev. 533, 516 P.2d 1234 (1973), *reh'g denied*, (1974).

148. *Id.* at 537-38, 516 P.2d at 1237.

149. *Id.*

150. *Id.*

151. 16 Utah 2d 1, 394 P.2d 808 (1964).

152. *Id.* at 2, 394 P.2d at 808.

153. *Id.*

154. *Id.*

any master plan would be rendered inoperative. Such changes are administrative acts implementing the comprehensive plan and adjusting it to current conditions."<sup>155</sup> Since the *Eastlake* opinion, the Utah Supreme Court has had occasion to revisit the issue of whether rezonings are administrative or legislative and has come to the same conclusion.<sup>156</sup>

In sharp contrast, however, is the leading Supreme Court of California opinion in *Arnel Development Co. v. City of Costa Mesa*.<sup>157</sup> In *Arnel*, the court held that California precedent has settled the principle that zoning ordinances, whatever the size of the parcel affected, are legislative acts.<sup>158</sup> The court argued that to hold to the contrary would disrupt years of established rules governing the enactment of land use restrictions, creating confusion which would require years of litigation to resolve.<sup>159</sup> Further, the court reasoned that the distinction between legislative and quasi-judicial acts is unnecessary to protect either the rights of the landowners or the public interest in orderly community development.<sup>160</sup> Consequently, the court concluded that the ordinance rezoning plaintiff's property was a legislative act.<sup>161</sup>

The *Arnel* decision has been heavily criticized and largely viewed as one based on judicial economy.<sup>162</sup> Additionally, the decision can best be described as result-oriented, strengthened both by previous decisions<sup>163</sup> and the fact that California is a very pro-initiative state.<sup>164</sup>

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155. *Id.*

156. *See* *Wilson v. Manning*, 657 P.2d 251 (Utah 1982).

157. 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980) (Richardson, J., dissenting).

158. *Id.* at 514, 620 P.2d at 566-67, 169 Cal. Rptr. at 906.

159. *Id.* at 523, 620 P.2d at 572-73, 169 Cal. Rptr. at 912.

160. *Id.* at 523-24, 620 P.2d at 573, 169 Cal. Rptr. at 912.

161. *Id.* at 524, 620 P.2d at 573, 169 Cal. Rptr. at 912.

162. *See, e.g.*, Note, *supra* note 70, at 1107; Comment, *The Legislative Adjudicative Distinction in California Land Use Regulation: A Suggested Response to Arnel Development Co. v. City of Costa Mesa*, 34 HASTINGS L.J. 425 (1982); Comment, *Instant Planning: Land Use Regulation by Initiative in California*, 61 S. CAL. L. REV. 497 (1988).

163. *See, e.g.*, *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); *San Diego Bldg. Contractors Ass'n v. City Council*, 13 Cal. 3d 205, 529 P.2d 570, 118 Cal. Rptr. 146 (1974).

164. In upholding zoning by initiative, the California courts place great weight on the fact that the California Constitution guarantees the initiative process. *See supra* notes 63-139 and accompanying text discussing the effects of constitutional reservation of the initiative or referendum process on due process concerns. For example, in *Associated Home Builders, Inc. v. City of Livermore*, the Supreme Court of California stated

Indeed, the court was split on the legislative versus quasi-judicial question, and the dissent set out strong arguments for holding as quasi-judicial such rezoning decisions directly affecting only a few landowners. Not surprisingly, California courts also have held plan amendments to be legislative acts and therefore referendable, unless they create internal inconsistencies or inconsistencies with zoning.<sup>165</sup>

Equally difficult to follow is the Supreme Court of Virginia's rationale in upholding a rezoning by referendum despite the landowners' strong argument that rezoning is a nonlegislative act. In *R.G. Moore Building Corp. v. Committee for Repeal*,<sup>166</sup> the court incorrectly argued that it would be "flagrantly" inconsistent to characterize a comprehensive zoning law's adoption as a legislative act, and an amendment to such a law as a quasi-judicial act.<sup>167</sup> In making its determination, the court reasoned that if the original act was legislative,

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that: "[I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of *this reserve power*, courts will preserve it." *Associated Home Builders*, 18 Cal. 3d at 591, 557 P.2d at 477, 135 Cal. Rptr. at 45 (emphasis added) (quoting *Gayle v. Hamm*, 25 Cal. App. 3d 250, 258, 101 Cal. Rptr. 628, 634 (1972), and *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961)). See also *Building Ass'n v. City of Camarillo*, 41 Cal. 3d 810, 718 P.2d 68, 226 Cal. Rptr. 81 (1986) (procedural requirements enacted to help ease an affordable housing shortage were inapplicable to the initiative process).

165. *Yost v. Thomas*, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984).

A recent decision of the Supreme Court of Florida agreed with the California courts in *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170 (Fla. 1983). Essentially the court based its decision upon the United States Supreme Court's *Eastlake* opinion and its inability to distinguish between the passage of an original zoning ordinance and a map amendment. *Id.* at 173-74. Significantly, in Florida, the referendum is guaranteed by the Florida Constitution. Thus, the court held it was reserved to the people. The same holds true for Nebraska.

Based upon the reasoning in the *Arnel* decision, the Supreme Court of Colorado reversed an earlier decision and held that rezonings of any size are legislative in character. *Margolis v. District Ct.*, 638 P.2d 297, 304 (Colo. 1981) (en banc). The court so held in consolidated cases involving both a single lot and a 90 acre tract, on grounds which seem more technical than logical:

It seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative. It appears only logical that since the original act of zoning is legislative, the amendatory act of rezoning is likewise legislative even though the procedures may entail notice and hearing which characterizes a quasi-judicial proceeding.

*Id.* at 304. The court then characterized planning amendments as quasi-judicial because, in Colorado, they are merely advisory and passed by resolution. *Id.* at 306.

166. 239 Va. 484, 391 S.E.2d 587 (1990).

167. *Id.* at —, 391 S.E.2d at 590 (citing *Blankenship v. City of Richmond*, 188 Va. 97, 106, 49 S.E.2d 321, 325 (1948)).

then any amendment to it partakes of the same character.<sup>168</sup> The Supreme Court of Virginia failed to recognize, however, the crucial distinction between the two acts. The comprehensive zoning ordinance's passage is a matter of land use policy affecting all the people in the jurisdiction. In contrast, a map amendment, reflecting an implementation policy, affects only the property owner and immediate neighbors. The United States Supreme Court has recognized such amendments as the classic definition of nonlegislative acts.<sup>169</sup>

In sum, while several recent cases have decided that rezonings are legislative in character and so referendable, the better argument militates against such a finding for several reasons. First, rezoning amounts to the implementation of a policy, usually in connection with a particular parcel of land with one owner. Thus, it more closely resembles the granting of a permit than the enacting of a general law. Second, and closely related to the first point, rezonings apply to a small group of people. Only rarely does much of a legally-cognizable interest exist, except perhaps that of some neighbors, beyond that of the property owner. Third, the courts that have characterized rezonings as legislative appear to be engaging in judicial overreaching in order to subject zoning to the initiative process. Typically, such courts are located in states with a long history of ballot box initiative and referendum measures, and in which their state constitutions reserved to the people the power of initiative and referendum. Even pro-initiative and referendum commentators have firmly drawn the line on rezonings, proffering the *Fasano* test which makes such rezonings referendum-proof.<sup>170</sup>

## VI. PLANNING AND DIRECT DEMOCRACY

Most state enabling acts contain detailed procedures for the land rezoning, usually heavily laden with planning process and expert evaluation as well as citizen participation through notice and hearings. The use of initiative or referendum to decide zoning issues circumvent such elaborate plans and planning processes. Because the land use planning

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168. *Id. Accord* Laird v. City of Danville, 225 Va. 256, 261, 302 S.E.2d 21, 24 (1983).

169. *See* James v. Valtierra, 402 U.S. 137, 142 (1971).

170. *See* Freilich & Guemmer, *supra* note 99. The authors noted that "Since the *Fasano* doctrine emerged over a decade ago, it has been clear that the mere application of zoning to individual parcels should be classified as quasi-judicial or administrative in nature to which the referendum should not lie." *Id.* at 514-15.

and zoning process is a complex one, the use of such procedures and experts becomes more necessary.<sup>171</sup> Despite language to the contrary in the *Eastlake* decision, a number of state courts have recognized that the process of initiative and/or referendum is irreconcilable with plans and the planning process. This part summarizes these decisions and those in which the California courts appear to be split on the issue.

The inconsistency of direct democracy with plans and planning was well-recognized before the *Eastlake* decision. The Supreme Court of Utah expressed this sentiment in turning down a request for a referendum on a zoning map change.<sup>172</sup> Noting that the municipality involved provided, in effect, a master plan ordinance, the court stated that zoning by referendum would render the ordinance inoperative.<sup>173</sup>

Perhaps the most spirited defense of zoning plans in the face of popular voting on map amendments came from the New Jersey courts in *Township of Sparta v. Spillane*.<sup>174</sup> In *Spillane*, the court explained that "zoning is intended to be accomplished in accordance with a comprehensive plan and should reflect both present and prospective needs of the community."<sup>175</sup> The court declared that piecemeal attacks on zoning ordinances by referenda would tend to fragment zoning and the achievement of its broader planning goals without any overriding concept.<sup>176</sup> Because planning boards and governing bodies may not have always demonstrated the expected expertise in approving amendments, the court concluded that the concept embodied in the comprehensive plan should not be discarded.<sup>177</sup>

In contrast, the Supreme Court of Virginia reached the opposite conclusion in *R.G. Moore Building Corp. v. Committee for Repeal*.<sup>178</sup> The court's reasoning, however, is difficult to follow. To the allegation that rezoning by referendum would be piecemeal and contrary to local comprehensive plans, the court indulged in what can only be characterized

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171. Goetz, *supra* note 79, at 822-23.

172. Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

173. *Id.* See also Dewey v. Doxey-Layton Realty Co., 3 Utah 2d 1, 277 P.2d 805 (1958) (Supreme Court of Utah upheld dismissal of an initiative petition to rezone land from commercial to business in part because of the comprehensive plan requirement).

174. 125 N.J. Super. 519, 312 A.2d 154 (1973).

175. *Id.* at 525, 312 A.2d at 157. The court stated that zoning decisions showed a myriad of considerations, including the social, economic and physical characteristics of the community. *Id.*

176. *Id.* at 526, 312 A.2d at 157.

177. *Id.*

178. 239 Va. 484, 391 S.E.2d 587 (1990).



as judicial sleight of hand. The court held that a referendum acts on local legislative decisions which are therefore not effective until after the referendum has upheld or reversed them.<sup>179</sup> In reaching its conclusion, the Court reasoned that “[T]he original zoning on the landowner’s property remains in place; the landowner is merely prevented from obtaining a new use for the land in a different zoning classification.”<sup>180</sup> Further, “[T]he referendum provisions can never be used to rezone property, so the anticipated danger of piecemeal alterations to the City’s comprehensive plan does not exist.”<sup>181</sup>

The Supreme Court of Virginia’s reasoning at best exalts the barest of form over substance. There may be better arguments for claiming that initiatives and referenda can be consistent with comprehensive planning, but this is clearly not among them. Comprehensive plans are for the express purpose of ensuring that land use decisions are in accordance therewith, regardless of what body exercises the zoning power. Here, it is the people through referendum, and they should be bound by comprehensive plans even in those states which approve zoning by ballot box.

Even California courts, in which initiative and referenda have fared best in land use changes despite numerous challenges, have held that voters by initiative may not create an “internal” inconsistency by amending a plan so that it is at significant variance with the rest of the plan when read as a whole.<sup>182</sup> Indeed, the California situation is in considerable flux<sup>183</sup> as a result of two recent decisions striking down initiatives largely on planning grounds. In the first decision, *Garat v. City of Riverside*,<sup>184</sup> a superior court held two initiatives classifying property in a residential agricultural zone (5200 acres) invalid on the

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179. *Id.* at —, 391 S.E.2d at 590.

180. *Id.*

181. *Id.*

182. *Sierra Club v. Board of Supervisors*, 126 Cal. App. 3d 698, 179 Cal. Rptr. 261 (1981). *See also* *Leshar Communications v. City of Walnut Creek*, 213 Cal. App. 3d 1287, 262 Cal. Rptr. 337, *cert. granted*, 49 Cal. 3d 1107, 783 P.2d 184, 264 Cal. Rptr. 825 (1989) (*en banc*) (holding that a zoning map amendment by referendum would be inconsistent with the local comprehensive plan, should be treated as a *de facto* plan map amendment; and apparently is subject to popular vote); *deBottari v. Norco City Council*, 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (1985) (an initiative is invalid unless the land use change accords with the general applicable plan).

183. *See generally* Curtin & Jacobson, *Growth Management by Initiative in California: Legal and Practical Issues*, 21 URB. LAW. 491, 496 (1989) (for a discussion of the shift in California law on initiative).

184. *Garat v. City of Riverside*, No. 191567.

ground that the City of Riverside did not have a legally adequate general plan as required by California statutes.

In the second, a California appellate court in *L.I.F.E. Committee v. City of Lodi*<sup>185</sup> held invalid an initiative measure which prevented an annexation in part because the measure conflicted with state planning laws.<sup>186</sup> In so holding, the court stressed that "the right of local initiative must give way where the issue is one of paramount statewide concern."<sup>187</sup> The court noted that state land use planning laws granted cities legislative power to enact general planning and zoning ordinances.<sup>188</sup> Therefore, the court reasoned that a local electorate may not interfere through initiative with the exercise of this statutorily conferred legislative power.<sup>189</sup> Characterizing the initiative measure in *L.I.F.E. Committee* as the voters' attempt to condition the right of annexation before it commenced, the court found that the scheme interfered with and frustrated state annexation procedures.<sup>190</sup>

The *L.I.F.E. Committee* decision reflects earlier concerns about using the local initiative process to affect matters of statewide concern. In *Committee of Seven Thousand v. Superior Court (COST)*,<sup>191</sup> for example, the California Supreme Court struck down a local initiative which would have required the submission of certain transportation fees to the voters before they could be imposed.<sup>192</sup> The court found that the applicable California statutes clearly manifested intent that

185. 213 Cal. App. 3d 1139, 262 Cal. Rptr. 166 (1989).

186. *Id.* at 1149, 262 Cal. Rptr. at 172.

187. *Id.*

188. *Id.* at 1148, 262 Cal. Rptr. at 172.

189. *L.I.F.E. Comm.*, 213 Cal. App. 3d at 1148-49, 262 Cal. Rptr. at 172.

190. Specifically, the court stated that:  
*Ferrini* [an earlier case] presents the obverse of the annexation coin. There the voters attempted to overrule a previously approved and completed annexation process. Here, the voters of Lodi have attempted to reserve the right to hold annexation before it can commence. Either scheme interferes with and frustrates state annexation procedures and cannot be sustained.

...  
State land use planning laws grant legislative power to the city to enact a general plan and zoning ordinances. . . The city council may not condition this power by enacting an ordinance requiring voter approval of such measures. *A fortiori* neither may the electorate through the initiative fetter the exercise of the legislative power conferred by the statutes governing land use. . . .

*Id.* at 1148-49, 262 Cal. Rptr. at 171-72 (citing *Ferrini v. City of San Luis Obispo*, 150 Cal. App. 3d 239, 246, 197 Cal. Rptr. 694 (1983)).

191. 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988).

192. *Id.* at 512, 754 P.2d at 721, 247 Cal. Rptr. at 375.

such funding was a matter of statewide concern.<sup>193</sup> Consequently, the court held that the state could, and did, delegate that funding authority solely to the cities without violating the constitutional reservation of initiative to the people.<sup>194</sup> In making its determination, the court explained that in matters of statewide concern, the state may preempt the entire field to the exclusion of all local control.<sup>195</sup> The court further noted that the state may choose instead to grant some measure of local control and autonomy.<sup>196</sup> In that case, however, the state has authority to impose procedural restrictions which may include barring the exercise of the initiative and referendum.<sup>197</sup>

The *COST* court made it abundantly clear that the reasoning in the *Associated Home Builders*<sup>198</sup> and *Arnel*<sup>199</sup> cases was wholly inapplicable because those cases dealt with measures which the court viewed as local rather than regional or statewide in importance.<sup>200</sup> Furthermore, the court noted that the legislature in those cases used the term "legislative body" rather than "city council."<sup>201</sup> The use of the former, according to the court, "is more easily read as including the electorate" than the latter.<sup>202</sup>

Both the plans and the process of planning become irrelevant when land use mapping decisions are made through popular democracy.<sup>203</sup> So lamented Justice Clark in dissent in the California case that started it all, "Because of today's holding that the initiative takes precedence over zoning laws, the legislative scheme of notice, hearings, agency consideration, reports, findings and modifications can be by-

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193. *Id.* at 511, 754 P.2d at 720, 247 Cal. Rptr. at 374.

194. *Id.*

195. *Committee of Seven Thousand*, 45 Cal. 3d at 511, 754 P.2d at 720, 247 Cal. Rptr. at 374.

196. *Id.*

197. *Id.*

198. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976). See *supra* notes 127-30 and accompanying text for a discussion of the *Associated Home Builders* decision.

199. *Arnel Dev. Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980). See *supra* notes 158-66 and accompanying text for a discussion on *Arnel*.

200. *Committee of Seven Thousand*, 45 Cal. 3d at 504-05, 754 P.2d at 716, 247 Cal. Rptr. at 370.

201. *Id.*

202. *Id.*

203. See *Goetz, supra* note 79, at 822-23.

passed . . .”<sup>204</sup> As one commentator has pithily put it, “[P]lanning and environmental protection are matters of statewide concern. As such, local initiative action should not be permitted to interfere.”<sup>205</sup>

## VII. THE RESERVED POWER DOCTRINE: RESERVING THE POWER OF INITIATIVE AND REFERENDUM IN A STATE CONSTITUTION AS A PREREQUISITES TO BALLOT BOX ZONING

The reserved power doctrine is based upon the assumption that the power to govern comes entirely from the people, who can delegate such powers to their chosen representatives.<sup>206</sup> In delegating their powers, the people may choose to keep or “reserve” certain powers to act on issues that may ordinarily be delegated to their legislative body.<sup>207</sup> The United States Supreme Court has placed great importance on the constitutional reservation of initiative and referendum when considering the validity of initiative and referendum measures.<sup>208</sup> Moreover, the Supreme Court has held that the absence of standards makes no difference when the act in question involved a power constitutionally reserved to the people rather than a delegation of power.<sup>209</sup>

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204. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 615, 557 P.2d 473, 492, 135 Cal. Rptr. 41, 60 (1976) (Clark, J., dissenting).

205. Note, *Zoning by Initiative in California, A Critical Analysis*, 12 LOY. L.A.L. REV. 903, 915 (1979).

206. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) (citing THE FEDERALIST No. 39 (J. Madison)).

207. *Id.* at 672-73 (citing *Hunter v. Erickson*, 393 U.S. 385, 392 (1969) and *James v. Valtierra*, 402 U.S. 137, 141 (1971)).

208. See *Eastlake*, 426 U.S. at 672-73 (“To be subject to Ohio’s referendum procedure, the question must be one within the scope of the legislative power.”); see *supra* notes 78-104 (discussing *Eastlake* and the implications of the constitutional reservation of initiative and referendum on ballot box zoning).

209. *Eastlake*, 426 U.S. at 675. In *Eastlake*, the Supreme Court explained: Assuming, *arguendo*, their relevance to state governmental functions, these cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine [requiring standards] is inapplicable where, as here, rather than dealing with a delegation of power, we deal with a power reserved by the people to themselves.

Since the rezoning decision in this case was properly reserved to the people of Eastlake under the Ohio Constitution, the Ohio Supreme Court erred in holding invalid, on federal constitutional grounds, the charter amendment permitting the voters to decide whether the zoned use of respondent’s property could be altered. *Id.* at 675, 679 (emphasis added).

As this part demonstrates, even where a state constitution reserves the initiative power to the people, many courts reject zoning by initiative. On the other hand, there appears to be only one case in which the court has upheld the use of initiative and referendum where there was no constitutional reservation of power. In sum, those courts that have upheld zoning by initiative and referendum are in states where the constitution has reserved the power; conversely, only one court has approved of the procedure in states where the constitution has not.

#### A. Where There is a Constitutional Reservation

Not surprisingly, many jurisdictions uphold ballot box zoning where the state constitution specifically reserves the power of initiative to the people. California courts in particular have taken this position. California amended its constitution in 1911 to reserve the power of initiative and referendum to the people.<sup>210</sup>

In *Associated Home Builders, Inc. v. City of Livermore*,<sup>211</sup> the Supreme Court of California held that a zoning ordinance adopted by initiative was valid. The ordinance prevented the issuance of building permits until educational, sewage, and water facilities met specified standards. The state zoning enabling act provided that any ordinance that changed zoning or imposed land use restrictions could only be enacted following notice and a hearing before the planning commission and council.<sup>212</sup>

In making its determination, the court reasoned that statutory notice and hearing requirements of the zoning ordinance apply only to city council action, not to action taken by voters in an initiative.<sup>213</sup> First, the court explained that there is no conflict between the initiative statute and zoning statutes.<sup>214</sup> The legislature never intended the zoning law's notice and hearing requirements to apply to zoning by initiative any more than the initiative law requirements apply to the council zoning enactments. Second, although a state statute specifies initiative procedures, the right itself was constitutionally guaranteed.<sup>215</sup> Conse-

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210. *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976). See Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717 (1966).

211. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41.

212. *Id.* at 582, 590-91, 557 P.2d at 473, 477, 135 Cal. Rptr. at 44-45.

213. *Id.* at 596, 557 P.2d at 481, 135 Cal. Rptr. at 49.

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

215. *Id.* at 594-95, 557 P.2d at 479, 135 Cal. Rptr. at 47.

quently, legislative enactments could neither limit nor restrict the exercise of the right.<sup>216</sup> The court in *Associated Home Builders*, therefore, heavily relied upon the reserved nature of initiative and referendum in California.

In *Queen Creek Land & Cattle Corp. v. Yavapai County Board of Supervisors*,<sup>217</sup> a landowner sought injunctive relief to prevent the County Board of Supervisors' rezoning of 3840 acres of land from being submitted to a referendum vote. The Court of Appeals of Arizona denied the landowner's requested relief, holding that the referendum was proper.<sup>218</sup> The court reasoned that the constitutional reservation of initiative and referendum established the electorate as a coordinate source of legislation.<sup>219</sup> Like the *Associated Home Builders* court, the Arizona court based much of its decision on the constitutional reservation of the power of initiative and referendum.

Many of the cases upholding initiative and referendum in states with a constitutional reservation of the power have distinguished legislative from administrative acts. For instance, the Supreme Court of Colorado in *Margolis v. District Court*,<sup>220</sup> decided that zoning and rezoning are legislative acts, and are thus subject to initiative and referendum constitutionally reserved to the people.<sup>221</sup>

The *Margolis* court characterized initiative and referendum as fundamental rights of a republican form of government the people have reserved for themselves.<sup>222</sup> The court reasoned, therefore, that reservation of power should be liberally construed in favor of the right to exercise it.<sup>223</sup> Because initiative and referendum are direct checks on elected officials' legislative actions, the constitutionally reserved powers apply only to acts of the city council which are legislative in character.<sup>224</sup> Thus, even though the power of initiative and referendum may be reserved in the state's constitution, it must be applied to a legislative

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216. *Id.*

217. 108 Ariz. 449, 501 P.2d 391 (1972).

218. *Id.* at 450, 501 P.2d at 392.

219. *Id.* at 451, 501 P.2d at 393 (citing *Allen v. State*, 14 Ariz. 458, 130 P.2d 1114 (1913)).

220. 638 P.2d 297 (Colo. 1981) (en banc).

221. *Id.* at 304.

222. *Id.* at 302 (citing *Bernzen v. City of Boulder*, 186 Colo. 81, 87, 525 P.2d 416, 419 (1974)).

223. *Id.* (citing *Brooks v. Zabka*, 168 Colo. 265, 450 P.2d 653 (1969)).

224. *Margolis*, 638 P.2d at 302-03.

act to be valid.<sup>225</sup>

Courts in other jurisdictions have come to similar conclusions. In *Florida Land Co. v. City of Winter Springs*,<sup>226</sup> the court held that a referendum vote on an ordinance that would rezone and affect a particular tract of land would not violate the owner's due process rights and that the city ordinance changing the zoning was a legislative act subject to referendum.<sup>227</sup>

In addressing a due process challenge to the referendum vote,<sup>228</sup> the court first held that because the referenda is a reserved power, certain discernible standards do not apply, as they would with "delegated" powers.<sup>229</sup> Relying upon the United States Supreme Court's holding in *Eastlake*, the court concluded that the referendum did not violate due process.<sup>230</sup> Finally, the court held that the zoning change was a legislative act subject to referendum.<sup>231</sup>

### B. *Ballot Box Zoning Illegal Despite a Constitutional Reservation*

Even in states constitutionally reserving the power of initiative and referendum to the people, many courts have struck down zoning by initiative and referendum.

In *Transamerica Title Insurance Co. v. City of Tucson*,<sup>232</sup> the Arizona Supreme Court held that a city or county zoning ordinance may not be amended by initiative.<sup>233</sup> The *Transamerica* court distinguished an initiative from a referendum,<sup>234</sup> and reaffirmed its prior decision in

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225. *Id.* at 302. "We held that a rezoning ordinance passed by the city council was subject to the referendum provisions of the Fort Collins City Charter." *Id.* (citing *City of Fort Collins v. Dooney*, 178 Colo. 25, 27-28, 496 P.2d 316, 317-18 (1972)). "In *Zwerdinger* we held that the Colorado Constitution, art. V, § 1, reserved the powers of referendum and initiative 'only to acts which are legislative in character.'" *Id.* (citing *City of Aurora v. Zwerdinger*, 194 Colo. 192, 196, 571 P.2d 1074, 1077 (1977)).

226. 427 So. 2d 170 (Fla. 1983).

227. *Id.* at 174.

228. *Id.* at 173. (The plaintiff argued that it had been deprived of its right to proper notice and its right to be heard). *Id.* at 172.

229. *Id.* at 174, (citing *City of Eastlake v. Forest City Enterprises, Inc.* 426 U.S. 668, 679 (1976)).

230. *Id.* at 174.

231. *Id.* See also *City of Coral Gables v. Carmichael*, 256 So. 2d 404, 408 (Fla. 1972) (zoning code amendment changing zoning on specific property held to be legislative instead of quasi-judicial, and thus subject to referendum).

232. 157 Ariz. 346, 757 P.2d 1055 (1988) (en banc).

233. *Id.* at 349-50, 757 P.2d at 1058-59.

234. *Id.* at 349, n.6, 757 P.2d at 1058 n.6 ("[referendum] does not change zoning as

*City of Scottsdale v. Superior Court*,<sup>235</sup> which held that initiative conflicts with the due process clause of the fourteenth amendment of the United States Constitution.<sup>236</sup> Furthermore, the court held that initiative violated the state zoning enabling act's provisions delegating zoning powers to the governing body of the city and requiring notice and hearing before zoning regulations are adopted.<sup>237</sup>

The Supreme Court of Nevada employed similar reasoning in *Forman v. Eagle Thrifty Drugs & Markets*.<sup>238</sup> In *Thrifty Drugs*, the court found the planning commission and city council's actions administrative and not subject to initiative and referendum<sup>239</sup> when a zoning policy has been determined, and the task of changing zoning areas or the granting of exceptions has been given. Likewise, the Supreme Court of Ohio in *State ex rel. Srovnal v. Linton*,<sup>240</sup> held that a city council resolution confirming the planning and zoning commission's grant of a zoning use exception represented an administrative act, and, therefore, was not subject to referendum.<sup>241</sup>

Some courts have found initiative or referendum inapplicable when the process would have conflicted with state statutes.<sup>242</sup> In *Gumprecht v. City of Coeur D'Alene*,<sup>243</sup> for example, the Supreme Court of Idaho held that the initiative could not be exercised for zoning decisions because it was inconsistent with the zoning law's procedural requirements.<sup>244</sup> In so holding, the court found that the legislature delegated the authority to enact comprehensive plans, establish zoning districts and adopt amendatory ordinances exclusively to city and county legislative or governing bodies.<sup>245</sup> The court further found that the legislature granted the authority pursuant to specific prescribed

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an initiative would, and the notice and hearing process has been accomplished prior to the referendum").

235. 103 Ariz. 204, 439 P.2d 290 (1968) (en banc).

236. *Id.* at 207-08, 439 P.2d at 293-94.

237. *Transamerica*, 157 Ariz. at 348, 757 P.2d at 1057.

238. 89 Nev. 533, 516 P.2d 1234 (1974).

239. *Id.* at 537-38, 516 P.2d at 1237.

240. 46 Ohio St. 2d 207, 346 N.E.2d 764 (1976).

241. *Id.* at 213, 346 N.E.2d at 768.

242. *See Committee of Seven Thousand v. Superior Ct.*, 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988).

243. 104 Idaho 615, 661 P.2d 1214 (1983).

244. *Id.* at 618-19, 661 P.2d at 1217-18.

245. *Id.* at 618, 661 P.2d at 1217.



procedures.<sup>246</sup> Thus, the court concluded that “the comprehensiveness of zoning legislation in Idaho leaves no room for direct legislation by electors through an initiative election.”<sup>247</sup> Accordingly, initiative or referendum may not always be judicially permitted in rezonings even where there is a constitutional reservation of the power.

### C. *Ballot Box Zoning Without a Constitutional Reservation*

Research has revealed only one case in which a court upheld the use of initiative or referendum in land use decision-making when its constitution did not reserve the power, but when a charter reserved it. In *Denny v. City of Duluth*,<sup>248</sup> the Supreme Court of Minnesota used a referendum power reserved in the city’s charter to enjoin the city from issuing building permits in a recently rezoned area until the zoning amendment was submitted for a referendum vote.<sup>249</sup> The court held that zoning amendments are legislative in character and therefore subject to referendum.<sup>250</sup> The court reasoned that the City Council was under a statutory duty to amend boundaries of residential zone by ordinance and that adopting an ordinance is legislative in character.<sup>251</sup>

Courts, however, are most likely to disapprove of the use of initiative or referendum in states where the power has not been reserved in the constitution. For instance, the Superior Court of New Jersey in *Smith v. Township of Livingston*,<sup>252</sup> held that a zoning amendment may not be enacted by initiative process. The court reasoned that when there is conflict between a general statute and a specific statute which covers the subject more minutely and definitely, the more specific statute will

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246. *Id.*

247. *Id.* at 618, 661 P.2d at 1217. *Accord* *Korash v. City of Livonia*, 388 Mich. 737, 202 N.W.2d 803 (1972); *State ex rel. Powers v. Donahue*, 368 S.W.2d 432, 439 (Mo. 1963) (en banc); *Dewey v. Doxey-Layton Realty Co.*, 3 Utah. 2d 1, 277 P.2d 805 (1954); *Lince v. City of Bremerton*, 25 Wash. App. 309, 607 P.2d 329 (1980).

248. 295 Minn. 22, 202 N.W.2d 892 (1972). Arguably, there is a second case, *R.G. Moore Co. v. Committee for Repeal*, 239 Va. 484, 391 S.E.2d 587 (1990), but the court there found the initiative and referendum power had been generally reserved to the people, even absent specific language.

249. *Denny*, 295 Minn. at 26, 202 N.W.2d at 894.

250. *Id.* at 28-29, 202 N.W.2d at 895-96.

251. *Id.* at 29, 202 N.W.2d at 896. *But cf.* *San Pedro North v. City of San Antonio*, 562 S.W.2d 260 (Tex. Civ. App. 1978) (holding that a zoning ordinance was not subject to initiative and referendum provisions of the city’s charter because the initiative vote would have added a procedural step not required in the state Zoning Enabling Act).

252. 106 N.J. Super. 444, 256 A.2d 85, *aff’d*, 54 N.J. 525, 257 A.2d 698 (1969).

prevail over the former and will be considered an exception to the general statute.<sup>253</sup> The Zoning Act was specific, while the initiative and referendum provisions of the Faulkner Act did not mention zoning at all.<sup>254</sup>

Furthermore, the *Smith* court found that the "right to referendum and initiative in municipal affairs is strictly a statutory and *not a constitutional right*."<sup>255</sup> The court reasoned that the "Zoning Act . . . constitutes an exclusive grant of legislative power to the governing bodies of the respective municipalities preventing the voters from exercising power of initiative."<sup>256</sup>

The Court of Appeals of New York in *Elkind v. City of New Rochelle*<sup>257</sup> held a section in the city charter permitting a referendum on zoning amendments invalid.<sup>258</sup> The court explained that the city was established by the City Home Rule Law.<sup>259</sup> Because this law expressly states when mandatory and permissive referenda must and may be executed, it precludes the city from granting any authority to allow zoning or rezoning by referendum.<sup>260</sup>

In sum, the reservation of the initiative and referendum powers in a state constitution is critical to a judicial finding that making land decisions by initiative or referendum is proper. Courts usually strike down initiative and referendum in states where the power was not reserved in the state constitution. Generally, constitutional reservation of the initiative or referendum power is essential to upholding their use for reclassifying property.

### VIII. DIRECT DEMOCRACY AND DISCRIMINATION

One of the most potentially troublesome problems with initiative and

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253. *Id.* at 451, 256 A.2d at 89.

254. *Id.* at 452, 256 A.2d at 89.

255. *Id.* at 453, 256 A.2d at 89 (emphasis added).

256. *Id.* at 457, 256 A.2d at 91. See also *Township of Sparta v. Spillane*, 125 N.J. Super. 519, 312 A.2d 154 (1973). In *Spillane*, the Superior Court of New Jersey, Appellate Division, held that the referendum provisions of the Faulkner Act do not apply to zoning amendments of the municipality, because "essentially the same considerations which bar application of the initiative process to zoning ordinance amendments apply in the case of the referendum." *Id.* at 525, 312 A.2d at 157.

257. 5 N.Y.2d 836, 155 N.E.2d 404, 181 N.Y.S.2d 509 (1958).

258. *Id.* at 837, 155 N.E.2d at 405, 181 N.Y.S.2d at 509.

259. *Id.* at 837, 155 N.E.2d at 404, 181 N.Y.S.2d at 509.

260. *Id.*

referendum is their tendency to dilute minority rights whether or not direct discrimination is intended. As Madison wrote in a letter to Thomas Jefferson during the debates on the United States Constitution, "measures are too often decided, not according to the rules of justice, and the rights of the minor party, but by the superior force of an interested and overbearing majority."<sup>261</sup>

Unfortunately, the examples of majoritarian tyranny of this sort are manifold. Referenda have been used to repeal local-government passed fair housing ordinances and initiatives to pass alien land laws.<sup>262</sup> Initiatives have declared English the official language, banned funds for poor women seeking abortions, and authorized involuntary AIDS testimony for assailants of police and emergency workers.<sup>263</sup> Perhaps the issue is best put by Professor Derek Bell in his seminal article on the subject. "Appeals to prejudice, oversimplification of the issues, and exploitation of legitimate concerns by promising simplistic solutions to complex problems often characterize referendum and initiative campaigns."<sup>264</sup> As Bell observed, politicians in office may do much the same thing — but we can vote them out of office. Moreover, even if they do not become models of well-informed representatives, at least the checks and balances of the political process will curtail their worst excesses. Politicians, even prejudiced ones, do not wish to publicly advocate racism or attribute such sentiments to their constituents. The representative system can translate intensity of interest into minority victories. An active group can easily win over a politician as against an apathetic or mildly opposed majority. That is not so with voters in the privacy of the voting booth, who are able to vote their prejudices with impunity.<sup>265</sup> No accommodation exists in the direct democratic pro-

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261. THE FEDERALIST No. 10, at 16 (J. Madison) (R. Fairfield 2d ed. 1966). Madison further wrote:

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.

*Id.* See generally Eifenbein, *The Myth of Conservatism as a Constitutional Philosophy*, 71 IOWA L. REV. 401, 473 (1986).

262. See generally Comment, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988).

263. See Eule, *supra* note 6, at 1551.

264. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 19-20 (1978).

265. *Id.* at 14.

cess exemplified by initiative and referendum.<sup>266</sup>

Other problems arise with direct democracy and minority rights. In a seminal article suggesting heightened judicial scrutiny of most initiatives and referenda, Julian Eule cites persuasive authority for the proposition that the initiative is unduly insensitive to minority rights. Noting that "racism, sexism, nativism, and self-interest are too much a part of American history to be ignored,"<sup>267</sup> Eule observes that results of substantive plebiscites in 1988 worked hardships on minorities of every stripe, whether economic, ethnic or sexual.<sup>268</sup> Comparing legislative lawmaking with direct democracy, Eule concludes that the truly pernicious nature of direct democracy results from its purposeful measuring of naked, aggregated preferences of a majority. This result, by definition, works against minorities.<sup>269</sup>

Unfortunately, the United States Supreme Court has sufficiently ex-

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266. Accommodation is a norm of importance to the successful operation of a legislature as well as to that of a political system generally. Subjecting an unlimited array of issues to popular vote has the detrimental effect of intensifying preexisting differences. By their nature, referendum campaigns appeal to passions and prejudices, spotlight tensions, and result only in greater conflict and disagreement. The most notable example of an area in which referendums have had this effect is that of race relations.

D. MAGLEBY, *supra* note 11, at 185. One commentator has noted:

[c]ompared with voters generally, people who typically vote on propositions are disproportionately well-educated, affluent, and white. Minorities, the poor, and the uneducated are thus doubly underrepresented in the plebiscite. They are both less likely to turn out and less likely to vote on propositions [compared to candidates] if they do.

Eule, *supra* note 6, at 1515 (footnote omitted).

267. Eule, *supra* note 6, at 1553.

268. America's "outsiders" cannot have felt sanguine over the results of substantive plebiscites in November, 1988. Initiatives declared English the official language in Arizona, Colorado, and Florida. Voters in Arkansas, Colorado, and Michigan banned funding for poor women seeking abortions. California voters authorized involuntary AIDS testing for sex crime suspects and for assailants of police and emergency workers. And, in Oregon, an initiative repealed the Governor's executive order banning discrimination against lesbians and gay men in the executive branch.

Eule, *supra* note 6, at 1551 & n.211 (citing 9 INITIATIVE AND REFERENDUM REPORT NO. 10 (Dec. 1988) and INITIATIVE AND REFERENDUM: THE POWER OF THE PEOPLE (Winter 1989)).

269. Specifically, Eule argues:

The problem with substitutive democracy is different. When naked preferences emerge from a plebiscite, it is not a consequence of a system breakdown. Naked preferences are precisely what the system seeks to measure. Aggregation is all that it cares about. The threat to minority rights and interests here is structural. This is how the system is supposed to work.

alted direct democracy through the referendum process so as to ignore such problems. Although it was *City of Eastlake v. Forest City Enterprises, Inc.* that upheld direct democracy through referendum on a rezoning,<sup>270</sup> the seeds were sown earlier in Justice Black's opinion in *James v. Valtierra*.<sup>271</sup> As discussed in Part IV, the *Eastlake* Court was also impressed with this benign version of direct democracy and chose to ignore the exclusionary aspect of the rezoning in that case.<sup>272</sup>

## IX. CONCLUSION

There is little legal basis for rezoning by initiative and referendum. Rezoning by initiative and referendum bypasses statutory (or charter) notice, review and hearing requirements so as to impermissibly violate these statutory requirements and deprive a property owner of property without due process of law. Courts in other jurisdictions have so held, even after the United States Supreme Court decision in the *Eastlake* case. In fact, *Eastlake* addressed only a "delegation of authority" issue which does not arise in those states where the state constitution does not reserve initiative and referendum to the people. Most decisions approving rezoning by popular vote are from states which do reserve the power to the people. In some of these jurisdictions, however,

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Eule, *supra* note 6, at 1551 (footnotes omitted).

Eule correctly emphasizes that even with their faults, legislatures represent the most rational, careful, considered, and politic place to enact laws, as compared to the unconsidered, often misinformed aggregation of numbers characterizing legislation by ballot box. Accordingly, courts should examine such legislation with heightened, rather than diminished scrutiny because of the potential adverse effects on minority rights. Eule continues to advocate heightened judicial scrutiny based upon other legal and policy arguments. While I subscribe to most of these, they are by and large tangential to the legal arguments in this analysis which mitigate strongly against the initiative and referendum in rezoning issues. See D. MAGLEBY, *SUPRA* note 11 (promoting heightened judicial scrutiny of initiative and referendum measures).

270. 426 U.S. 668 (1976).

271. 402 U.S. 137 (1971). In *Valtierra*, Justice Black stated:

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 decision that will affect the future development of their own community.

*Id.* at 141-43.

272. See Goetz, *supra* note 79, at 815-16.

courts have held that such a general reserved power must give way to statutory processes of affecting property through zoning and rezoning.

Constitutional due process of a procedural nature is generally not accorded to those whose property is affected by a truly legislative decision. Nonetheless, statutory procedures, as noted above, may still apply. This disparity raises the fundamental question of whether rezoning is a legislative (referendable) act, or a quasi-judicial/administrative (non-referendable) act. If characterized as legislative, then it is not only referendable, but also free of constitutional due process requirements. An act is legislative if it is an expression of general policy applicable to the people as a whole in a particular jurisdiction. It is administrative or quasi-judicial if it represents the implementation of a policy, affecting only part of the people in a jurisdiction and directed at them; in the land use context, if it affects a particular parcel of land rather than many parcels classified in a particular category or zone. Thus, for example, the addition of a new zoning category or district would clearly represent a legislative act. Granting a variance or special use permit to an individual property owner would not.<sup>273</sup> On balance, does reclassifying a particular piece of property more closely resemble the granting of a permit or the creation of a new and generally applicable zoning category? Surely the answer cannot be made to depend upon whether the body exercising the function is a legislative body or not. On balance, rezoning most closely resembles the permitting process, and so should be classified as a quasi-judicial or administrative act. As such, it is both subject to at least state procedural due process requirements and is not referendable.

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273. An exception to much of the above is the state of California. Even there, the courts are growing wary of the use of initiative and referendum when the subject matter is devoid of certain planning processes or is of statewide (including regional) concern. California courts have by and large approved zoning by initiative, holding that statutory notice, hearing and expert review otherwise required of a local legislative body are inapplicable to the initiative process. The same courts have also held that rezoning is a legislative and not a quasi-judicial act. However, both these holdings rest at bottom on the reservation of the initiative and referendum power to the people and the vigorous defense of that reservation in all matters put to popular vote by the courts, the legislature and the constitutional process that amended the constitution to reserve the powers in 1911.