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ESSAY

TROUBLE PRESERVING PARADISE?

Nicole Stelle Garnett†

Pa said there were too many people in the Big Woods now. Quite often Laura heard the ringing thud of an ax which was not Pa's ax, or the echo of a shot that did not come from his gun. The path that went by the little house had become a road. . . . Wild animals would not stay in a country where there were so many people. Pa did not like to stay, either.

—Laura Ingalls Wilder¹

Election Day 2000 was not a good day for proponents of suburban growth controls.² They watched in bitter disbelief as the overwhelming initial support for initiatives that proposed statewide growth management plans in Colorado and Arizona withered in the face of vigorous opposition campaigns.³ And, adding insult to injury, they woke up on Wednesday morning to learn that voters in Oregon had approved a little-noticed initiative⁴ that amended the state constitution to require compensation for “partial” regulatory takings—that is, for any “reduction in the fair market value” of property resulting from government regulation⁵—thus throwing into question the future of the state’s widely touted “model” controlled growth scheme.⁶

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¹ LAURA INGALLS WILDER, *LITTLE HOUSE ON THE PRAIRIE* 1–2 (1935).

² See *Environmental Initiatives Do Poorly on State Ballots*, NAT’L J.’S CONGRESSDAILY (evening ed.), Nov. 8, 2000 (describing defeat of several major land use initiatives), available at 2000 WL 27012646.

³ Carey Goldberg, *The Ballot Initiatives: Changes in Drug Policy and Gun Laws Are Picked*, N.Y. TIMES, Nov. 9, 2000, at B12 (noting that defeated growth control initiatives received support from only 30% of voters in both Colorado and Arizona).

⁴ See Editorial, *The Sleeper: It’s Measure 7, a Costly, Radical and Deceptive Scheme to Dismantle Oregon’s Environmental and Land-Use Legacy*, OREGONIAN, Nov. 2, 2000, at D14 (noting that Measure 7 attracted little pre-election attention).

⁵ OR. CONST. art. I, § 18(a). The text of Ballot Measure 7 as adopted, which amended the Oregon Constitution by adding subsections (a) through (f) to section 18 of Article I, is available at <http://www.sos.state.or.us/elections/irr/2000/046text.pdf> (last visited Aug. 27, 2000).

⁶ See Joe Mosley, *‘Takings’ Law Clouds Land Use Rules*, REGISTER-GUARD (Eugene, Or.), Nov. 9, 2000, at 1A; R. Gregory Nokes, *Measure 7 Clouds Future of Growth Boundaries*, OREGONIAN, Nov. 14, 2000, at B1 (reporting that a Department of Land Conservation and Development official commented “[i]f [Measure 7] is retroactive, I think it is the virtual end of

It was not supposed to be this way. Early in the election cycle, Vice President Gore promised to make “livability” issues, including suburban growth controls, a cornerstone of his campaign.⁷ This strategy built upon what Gore and others reasonably perceived as a groundswell of support for limits on new development.⁸ Public-opinion polls consistently show high levels of support for curbing suburban growth,⁹ many Americans list the ills of suburban sprawl as the *most important* issue facing their communities.¹⁰ What’s more, so-called smart-growth initiatives enjoyed widespread success at the polls during the 1998 election cycle.¹¹ Advocates were therefore understandably optimistic about the prospects of initiatives proposing comprehensive growth controls on the ballots in November 2000. The results in Colorado and Arizona, where unprecedented growth has driven anti-sprawl sentiments to an all-time high, understandably disappointed them as well.¹² And, the approval of Oregon’s partial-takings amendment was downright flabbergasting.¹³

At least on the surface, all three of these election results suggest that voter support for growth controls may be thinner than advocates had hoped—or at least that it has limits. This Essay uses the November 2000 election results to explore what those limits may be: Why did voters reject growth controls in Colorado and Arizona, and limit them in Oregon, despite repeated protestations that they strongly support

urban growth boundaries”). For a description of Oregon’s controlled growth scheme, see *infra* notes 86–92 and accompanying text.

⁷ Terry M. Neal, *‘Livability’: A National Issue? Voters’ Urban Woes May Play into Presidential Race*, WASH. POST, Aug. 15, 1999, at A2.

⁸ See *id.* (“[V]oters around the country have approved nearly 200 initiatives aimed at controlling or limiting sprawl and preserving open space.”).

⁹ ROPER CTR. FOR PUB. OPINION RESEARCH, *WHY VOTERS CARE ABOUT THE QUALITY OF LIFE* (2000) (poll conducted in June 2000 finding that 74% of Americans expressed support for “growth plans that seek to concentrate development in already developed areas in order to limit sprawl and preserve open spaces”), available at Westlaw, POLL Database, Question ID USPENN.00DLCJ R14.

¹⁰ See PEW CTR. FOR CIVIC JOURNALISM, RESEARCH—STRAIGHT TALK FROM AMERICANS—2000: THE STATE OF THE NATION AND ITS COMMUNITIES (2000), at http://www.pewcenter.org/doingj/research/r_ST2000nat1.html (last visited Aug. 21, 2001) (national poll finding that 18% of Americans, and 26% of suburban residents, listed “development/sprawl/traffic/roads” as the most important problem facing their community).

¹¹ PHYLLIS MYERS, *LIVABILITY AT THE BALLOT BOX: STATE AND LOCAL REFERENDA ON PARKS, CONSERVATION, AND SMARTER GROWTH, ELECTION DAY 1998*, at 2 (Ctr. on Urban & Metro. Policy, Brookings Inst., Discussion Paper, 1999), at <http://www.brook.edu/es/urban/myers.pdf> (voters approved over 70% of the 240 growth-related initiatives); Richard Lacayo, *The Brawl over Sprawl*, TIME, Mar. 22, 1999, at 44, 45 (noting that most of the over 240 “antisprawl” initiatives on the 1998 ballot passed).

¹² See PEW CTR. FOR CIVIC JOURNALISM, *supra* note 10 (finding that 60% of Denver residents listed sprawl as the biggest problem facing their community); Kathleen Ingley, *73% of Arizonans in Poll Support Control of Sprawl*, ARIZ. REPUBLIC, May 28, 1999, at B1.

¹³ See Randy Gragg, *Measure 7 Detonates Land-Use Planning*, OREGONIAN, Dec. 3, 2000, at F3 (describing election as “the day property-rights activists detonated the state’s identity”).

them? What characteristics distinguish smart-growth policies that enjoyed continued success at the polls? And, what does the discrepancy between successful and unsuccessful policies say about how voters may react to future efforts to control the suburban sprawl that they supposedly dread?

Before answering these questions, I first set the stage with a thumbnail sketch of academic arguments for and against suburban growth controls. I then piece together, through accounts in the press, the electoral "stories" in Colorado, Arizona, and Oregon. I attempt to explain the results in these three states, all of which would have surprised poll watchers as late as a few weeks before the election. I also dissect growth control proponents' explanations for these electoral disappointments—that powerful special interests, mounting misleading public relations campaigns stole the Colorado and Arizona elections, and that Oregon voters simply failed to understand the implications of the partial-takings measure.

With this background in mind, I consider the future prospects for the comprehensive curbs on development preferred by academic proponents of growth controls, such as those at issue in Arizona and Colorado last year.¹⁴ Ultimately, the outcome of the growth control debates in those states demonstrates that those seeking to enact such policies through statewide initiatives likely will face uphill battles. In 2000, voters proved more willing to endorse growth controls imposed on a local, as opposed to a regional or statewide basis. And, public choice theory suggests that the influential interests that opposed the Arizona and Colorado initiatives may dampen prospects for state legislative action.¹⁵

Furthermore, the election results demonstrate that the public's anti-sprawl sentiments may be more readily channeled toward policies that minimize the externalities of sprawl without restricting development on a comprehensive scale, such as the conservation and open-space policies that enjoyed widespread success last November.¹⁶ While these policies may not address all of the woes targeted by comprehensive growth management policies, they do have significant benefits. Given the potential negative consequences imposed by *local* controls on new developments, they may prove to be a wiser policy alternative than other politically feasible options.

¹⁴ See, e.g., *infra* notes 136–50 and accompanying text.

¹⁵ See *infra* notes 149–80 and accompanying text.

¹⁶ See, e.g., William W. Buzbee, *Sprawl's Political-Economy and the Case for a Metropolitan Green Space Initiative*, 32 URB. LAW. 367, 380–90 (2000) (arguing for such policies).

I

THE ACADEMIC DEBATE OVER GROWTH CONTROLS

The reality of suburban sprawl¹⁷ forms the backdrop of a vigorous academic debate about growth controls.¹⁸ Many academics decry the predominant American pattern of development¹⁹ with two prevailing criticisms: that it contributes both to environmental degradation and intramunicipal economic inequities.²⁰

As for the first criticism, there is no question that suburban sprawl has serious environmental consequences.²¹ New suburban development inevitably consumes agricultural land and green spaces.²² As a result, "the aesthetic and environmental benefits of green spaces are forever lost, as are [their] biodiversity benefits."²³ Suburban development also means new roads, parking lots, and other improvements, which increase run-off that degrades water quality.²⁴ Low-density residential development makes commuting by mass transit a

¹⁷ Academics dispute how to define "suburban sprawl." See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 960 (2d ed. 1999) (noting existence of debate). I adhere to the following definition, recently set forth by Robert Burchell and Naveed Shad:

Sprawl refers to a particular type of suburban peripheral growth. It refers to development that expands in an *unlimited and noncontiguous (leap-frog) way outward* from the solidly built-up core of a metropolitan area. In terms of land-use type, sprawl includes both *residential and nonresidential development*. Residential development contains primarily single-family housing, including significant numbers of distant units scattered in outlying areas. Nonresidential development includes shopping centers, strip retail outlets along arterial roads, industrial and office parks, and freestanding industrial and office buildings, as well as schools and other public buildings.

Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 *HASTINGS W.-NW. J. ENVTL. L. & POL'Y* 137, 141 (1999).

¹⁸ Because this debate spans thirty years, I have truncated my discussion of the rich literature on growth controls as a matter of necessity. A full explication of the nuances of the debate is far beyond the scope of this Essay.

¹⁹ See, e.g., KENNETH T. JACKSON, *CRABGRASS FRONTIER* 283-87 (1985) (describing the process of suburbanization in the U.S.).

²⁰ See, e.g., Robert H. Freilich & Bruce G. Peshoff, *The Social Costs of Sprawl*, 29 *URB. LAW.* 183, 184 (1997) (characterizing the costs of sprawl).

²¹ See William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 72-75 (1999) (discussing ways in which sprawl contributes to air pollution and other environment harms).

²² See Burchell & Shad, *supra* note 17, at 141 ("Another of sprawl's distinguishing traits is its *consumption of exurban agricultural and other frail lands* in abundance, since these are the types of land found at the periphery of development."); Buzbee, *supra* note 21, at 74; Robert H. Freilich & Linda Kirts Davis, *Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America*, 13 *URB. LAW.* 27, 30 (noting that "[u]rbanization is encroaching on some of the nation's very best cropland").

²³ Buzbee, *supra* note 21, at 74 (footnote omitted).

²⁴ See *id.*

near impossibility,²⁵ forcing suburbanites to drive to work.²⁶ This commuting pattern causes terrible traffic congestion that eats up Americans' precious free time,²⁷ increases stress,²⁸ and, of course, produces air pollution.²⁹

A second critique of suburban sprawl is that it has contributed mightily to the economic woes plaguing major cities.³⁰ A decision to build on the urban periphery represents a decision not to invest in the urban core. Over time, critics argue, sprawl causes cities to spiral downward. Disinvestment decreases property values and undercuts property tax bases, forcing cities to raise taxes to pay for basic city services.³¹ As taxes increase and the quality of services decrease, more residents and businesses flee for the suburbs. With them, these residents and businesses take jobs and cause demand for government services to rise.³² The tone of some of this literature is quite inflammatory, blaming suburbanites for contributing to the economic and racial segregation of American metropolitan areas,³³ as well as for leeching off of cities by taking advantage of the cultural and commer-

²⁵ See ANTHONY DOWNS, *NEW VISIONS FOR A METROPOLITAN AMERICA* 8–9 (1994) (arguing that sprawl makes public transportation infeasible); Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 *STAN. L. REV.* 1115, 1135 (1996); Craig N. Oren, *Getting Commuters out of Their Cars: What Went Wrong?*, 17 *STAN. ENVTL. L.J.* 141, 169–70 (1998) (same).

²⁶ See Burchell & Shad, *supra* note 17, at 141 (noting that “[u]nder sprawl conditions, there is almost total reliance on the automobile”); Oren, *supra* note 25, at 169–70.

²⁷ See DOWNS, *supra* note 25, at 8 (noting increased commute times). Economist Paul Krugman has noted that in 1995 “Americans lost more than eight billion hours to traffic delays, at a total cost of more than \$80 billion—mainly in the form of wasted time.” Paul R. Krugman, *The Tax-Reform Obsession*, *N.Y. TIMES*, Apr. 7, 1996, § 6 (Magazine), at 37.

²⁸ See generally Daniel Stokols et al., *Traffic Congestion, Type A Behavior and Stress*, 63 *J. APPLIED PSYCHOL.* 467 (1978) (reporting results of a behavioral study linking stress to traffic congestion).

²⁹ Buzbee, *supra* note 21, at 73 (noting that traffic congestion is the major culprit when cities fail to attain Clean Air Act ozone standards); see also Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work*, 21 *ENVTL. L.* 1549, 1572 (1991) (arguing that sprawl causes residents to depend upon automobiles and results in air pollution).

³⁰ See Buzbee, *supra* note 21, at 69–70 (discussing harmful economic effects including disinvestment, deteriorating housing, and decreased tax base). For a detailed discussion of sprawl's sociological costs (and benefits), see DOWNS, *supra* note 25, at 60–94.

³¹ Robert W. Burchell, *Economic and Fiscal Costs (and Benefits) of Sprawl*, 29 *URB. LAW.* 159, 167–68 (1997); Buzbee, *supra* note 21, at 69–70; see also ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* 4–7 (1995) (reviewing evidence of the negative economic impact of suburban sprawl); Richard Briffault, *Localism and Regionalism*, 48 *BUFF. L. REV.* 1, 11 (2000) (arguing that sprawl contributes to the downward spiral of urban core areas).

³² Buzbee, *supra* note 21, at 69–70; see also Richard Briffault, *Our Localism* (pt. 2), 90 *COLUM. L. REV.* 346, 351 (1990) (noting that big cities frequently have “serious social welfare and infrastructure problems, straitened economies and traditionally high tax rates”).

³³ See, e.g., Burchell, *supra* note 31, at 168; Freilich & Peshoff, *supra* note 20, at 189–90; Jerry Frug, *Decentering Decentralization*, 60 *U. CHI. L. REV.* 253, 281 (1993).

cial benefits that major cities provide without paying their fair share of the costs of these amenities.³⁴

According to growth control proponents, properly structured, metropolitan- or statewide limits on suburban development are necessary to address sprawl's twin ills,³⁵ because local government power leads to a tragedy of the commons within a metropolitan area.³⁶ Suburban governments, viewed as co-equal in the eyes of the law,³⁷ jealously guard their authority to regulate land use to maximize local tax revenues and resident satisfaction.³⁸ More affluent "inner-ring" suburbs accomplish these goals through exclusionary zoning techniques that freeze out new development, pushing it to the suburban fringe.³⁹ Consequently, communities located on that fringe enjoy a competitive advantage and have incentives to encourage development by relaxing land use standards.⁴⁰ Sprawl results inevitably from this pattern of exclusion and invitation.⁴¹ Proponents argue that growth controls can counter this pattern by channeling development back into declining central cities and saving undeveloped land.⁴²

Other academics, however, assert that growth controls have severe adverse consequences. Most anti-growth policies are imposed lo-

³⁴ Briffault, *supra* note 25, at 1139; *see also* Briffault, *supra* note 32, at 443 (commenting that suburbanites now routinely deny the "historic association of suburbs with their cities," including the fact that "the city was the primary center of jobs and commercial and cultural institutions for the region"); Frug, *supra* note 33, at 279 (arguing that local government laws should force suburbanites to recognize that localities are situated within a region).

³⁵ Comprehensive growth management is not the only policy tool proposed to address sprawl. *See, e.g.*, Buzbee, *supra* note 16, at 378-79 (summarizing components of the standard "sprawl policy menu," including reorienting transportation policy away from highways and toward public transportation, relaxing so-called "Euclidean" zoning rules, requiring environmental impact statements for new development, and a host of urban revitalization efforts).

³⁶ *See* NELSON & DUNCAN, *supra* note 31, at 19 ("Regional approaches to planning and growth management issues have long been championed as a necessary alternative to the problems associated with fragmented, uncoordinated, and competitive local government policies."); Freilich & Peshoff, *supra* note 20, at 197 ("If communities refrain from adopting aggressive, coordinated growth management strategies, development will continue to sprawl across the countryside, because sprawl is a *process* that pits new development areas against old.")

³⁷ *See* Briffault, *supra* note 32, at 349 (noting that "local government law does not distinguish within the category of municipal corporation between city and suburb").

³⁸ *See* Briffault, *supra* note 25, at 1134-35; Briffault, *supra* note 32, at 366 (linking suburban autonomy and local land use regulation).

³⁹ Briffault, *supra* note 25, at 1136; Jerry Frug, *The Geography of Community*, 48 STAN. L. REV. 1047, 1083-84 (1996).

⁴⁰ *See* WILLIAM A. FISCHER, DO GROWTH CONTROLS MATTER? 53-57 (1990); Briffault, *supra* note 25, at 1136-37.

⁴¹ *See* Freilich & Davis, *supra* note 22, at 30-31.

⁴² *See id.* at 29. *See generally* William B. Shore, *Recentralization: The Single Answer to More Than a Dozen United States Problems and a Major Answer to Poverty*, 61 J. AM. PLAN. ASS'N 496 (1995) (advocating for the "recentralization" of urban areas to combat downward economic trends).

cally, not regionally (a reality running contrary to the hopes of academic growth management proponents). These critics claim that growth controls exacerbate, rather than ameliorate, sprawl by shifting development to noncontrolled areas.⁴³ As William Fischel has observed, growth controls "probably cause metropolitan areas to be too spread out. [L]ocal ordinances cause developers to go to other communities. The most likely alternative sites are in exurban and rural communities, where the political climate, at least initially, is more favorable to development."⁴⁴

There is some empirical evidence to support this proposition. For example, one well-known study of the San Francisco Bay Area found that development disproportionately concentrated in municipalities without growth controls.⁴⁵ Growth controls—at least in their most common forms⁴⁶—contributed to the very pattern of development that growth management proponents deplore.⁴⁷

Moreover, growth controls, according to their critics, do not necessarily lead to a more equitable distribution of economic resources within metropolitan areas. Both economic theory and empirical research suggest that limits on development drive up property values and therefore deprive low-income individuals of affordable housing opportunities.⁴⁸ Development limits also force neighboring communities to accept less desirable land uses.⁴⁹ Not surprisingly, support for growth controls tends to be highest in areas with high housing ownership rates. As Professor Ellickson has observed, "[a]ntigrowth measures have one premier class of beneficiaries: those who already own residential structures in the municipality doing the excluding."⁵⁰ Importantly, experience in Oregon and elsewhere suggests that these

⁴³ See, e.g., Q. Shen, *Spatial Impacts of Locally Enacted Growth Controls: The San Francisco Bay Region in the 1980s*, 23 ENV'T & PLAN. B: PLAN. & DESIGN 61, 86 (1996).

⁴⁴ FISCHEL, *supra* note 40, at 55.

⁴⁵ See Shen, *supra* note 43, at 86.

⁴⁶ See FISCHEL, *supra* note 40, at 2–3.

⁴⁷ See *supra* notes 35–43 and accompanying text.

⁴⁸ See Shen, *supra* note 43; see also FISCHEL, *supra* note 40, at 29–41.

⁴⁹ Jan K. Brueckner, *Growth Controls and Land Values in an Open City*, 66 LAND ECON. 237, 240–41 (1990); Robert W. Helsley & William C. Strange, *Strategic Growth Controls*, 25 REGIONAL SCI. & URB. ECON. 435, 438 (1995); Susan M. Wachter & Man Cho, *Interjurisdictional Price Effects of Land Use Controls*, 40 WASH. U. J. URB. & CONTEMP. L. 49, 50 (1991).

⁵⁰ Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 400 (1977). Although the evidence is mixed, some studies show a correlation between levels of home ownership and support for growth controls. See, e.g., MARK BALDASSARE, *TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA* 95 (1986) (finding strong correlation between home ownership and support for limiting apartment construction); Alan Gin & Jonathan Sandy, *Evaluating the Demand for Residential Growth Controls*, 3 J. HOUSING ECON. 109, 119 (1994) (concluding that support for growth controls increases with rates of home ownership). But see Mark Baldassare & Georjeanna Wilson, *Changing Sources of Suburban Support for Local Growth Controls*, 33 URB. STUD. 459, 466–67 (1996) (finding mixed evidence on correlation).

price effects hold true regardless of whether the controls operate on a local or a multijurisdictional basis.⁵¹

II

THE POLITICAL DEBATE, CIRCA 2000

At the outset, it hardly comes as a surprise that Colorado and Arizona proved to be the major battlegrounds for growth controls during the last election cycle. Both states have experienced exponential growth in recent years, after recovering from devastating recessions ten years ago. Both states are also blessed with striking natural beauty which is increasingly marred by new suburban tract homes and “McMansions.” Residents of both Colorado and Arizona regularly cite sprawl as one of the most important—if not *the* most important—issues facing their states.⁵² Given these similarities, the fact that the two debates over similar growth control proposals ran nearly parallel to each other was not entirely unpredictable. In both states, strong initial support for the proposals rapidly eroded in the face of well-funded campaigns conducted by similarly constituted opposition coalitions.⁵³

A. Colorado’s Amendment 24

A group of environmentalists unveiled the Colorado Responsible Growth Initiative, or Amendment 24, in March 2000.⁵⁴ Amendment 24 would have amended the Colorado Constitution to require local governments to designate growth areas for all new development.⁵⁵ The growth areas, and any amendments to them, were to become ef-

⁵¹ See *infra* note 91 and accompanying text.

⁵² See, e.g., Ingle, *supra* note 12 (showing 73% of voters supported giving local governments the power to set growth boundaries); M.E. Sprengelmeyer, *Down on Development: Growth, Sprawl, Roads Listed as Top Problems by Six of 10 Residents in Latest Metro Study*, DENVER ROCKY MOUNTAIN NEWS, Feb. 13, 2000, at 5A (discussing poll results in Denver area).

⁵³ See *Environmental Initiatives Do Poorly on State Ballots*, *supra* note 2 (noting that anti-sprawl measures in Colorado and Arizona lost by 70/30 margins “[d]espite commanding late summer leads”); Louis Jacobson, *Business Leading on Arizona, Colorado Sprawl Issues*, NAT’L J.’s CONGRESSDAILY (evening ed.), Nov. 3, 2000 (noting that support for Arizona Proposition 202 had fallen from sixty-eight percent of voters in July 2000 to twenty-four percent in October 2000; support for Colorado Amendment 24 had plummeted from a high of sixty-five percent to thirty-two percent during the same time period), available at 2000 WL 27012806; *Home Builders Applaud Voter Rejection of Anti-Growth Initiatives in Arizona*, Colorado, U.S. NEWSWIRE, Nov. 8, 2000, LEXIS, Nexis Library, U.S. Newswire File [hereinafter *Home Builders*] (describing the interests opposing growth controls as “similar”).

⁵⁴ Sue O’Brien, Editorial, *When Leaders Don’t Lead, the People Do*, DENVER POST, Mar. 26, 2000, at 14; John Sanko, *Environmentalists Push Anti-Sprawl Proposal*, DENVER ROCKY MOUNTAIN NEWS, Apr. 24, 2000, at 10A.

⁵⁵ LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, AN ANALYSIS OF THE 2000 STATE-WIDE BALLOT PROPOSALS, Amend. 24 §§ 4(4), (6), at 54, 56 (Nov. 7, 2000), available at http://www.state.co.us/gov_dir/leg_dir/lcsstaff/2000/ballot/Bluebook/HTML/2000bluebook.htm.

fective only upon approval by local voters.⁵⁶ Sponsors of the initiative claimed that the failure of the state legislature to enact growth control legislation necessitated the plebiscite.⁵⁷ Initial voter response to the proposal echoed this frustration; early reaction to Amendment 24 was overwhelmingly positive, with polls reflecting a seventy-eight percent favorable rating in June 2000.⁵⁸

Opponents wasted little time before striking back with a vengeance, organizing over 160 organizations to campaign against the measure.⁵⁹ Membership in the impressively diverse "No on 24" coalition ranged from development and real estate interests,⁶⁰ to unions,⁶¹ local governments,⁶² and Habitat for Humanity affiliates in Colorado⁶³—who took a position on a political issue for the first time in twenty-one years.⁶⁴ Elected officials, including Denver's Democratic Mayor Wellington Webb⁶⁵ and Republican Governor Bill Owen, also opposed the proposal.⁶⁶ Opponents amassed an enormous war chest of nearly six million dollars to defeat the measure.⁶⁷

Ultimately, their money proved well spent: A deluge of commercials confronted voters, warning them that Amendment 24 was com-

⁵⁶ *Id.* §§ 5, 8, at 55, 57.

⁵⁷ See Fred Brown, *Growth Challenge Difficult to Contain*, DENVER POST, May 7, 2000, at 1A (petition organizers prompted by legislative failure); Julia C. Martinez, *Sprawl Opponents Launch Petitions, Lambaste Legislators*, DENVER POST, May 25, 2000 (same).

⁵⁸ John Sanko, *Tax-Cut, Sprawl Proposals Lose Steam; Both Ballot Measures Still Lead in Colorado Poll, but Both Have Lost Significant Ground Since Early June*, DENVER ROCKY MOUNTAIN NEWS, Sept. 11, 2000, at 4A (poll showed support for Amendment 24 had fallen from seventy-eight percent in June to sixty-five percent in mid-September).

⁵⁹ See Editorial, *Message from the Voters*, DENVER POST, Nov. 8, 2000, at 10B.

⁶⁰ See *id.* The Colorado Association of Realtors required each member to pay a mandatory fee to oppose the initiative. Todd Hartman, *Realtors Group Imposes Fee to Fight Growth Issue*, DENVER ROCKY MOUNTAIN NEWS, July 22, 2000, at 5A.

⁶¹ See Berny Morson, *AFL-CIO Officials Oppose Ballot Initiative to Control Growth*, DENVER ROCKY MOUNTAIN NEWS, Sept. 6, 2000, at 18A.

⁶² See Editorial, *supra* note 59, at 10B.

⁶³ See Vincent Carroll, *Squeezing Out Low-Cost Homes*, DENVER ROCKY MOUNTAIN NEWS, Sept. 3, 2000, at 1B; Richard A. Oppel, Jr., *Efforts to Restrict Sprawl Find New Resistance from Advocates for Affordable Housing*, N.Y. TIMES, Dec. 26, 2000, at A18.

⁶⁴ Richard A. Oppel, Jr., *State Proposals Will Decide the Pace of Construction*, N.Y. TIMES, Nov. 7, 2000, at A18.

⁶⁵ See Dan Luzadder, *Webb Opposes Amendment 24*, DENVER ROCKY MOUNTAIN NEWS, Oct. 19, 2000, at 25A.

⁶⁶ See Julia C. Martinez, *Governor Hits Growth Initiative*, DENVER POST, Sept. 13, 2000, at B5.

⁶⁷ See Michelle Ames, *Money Talked in Colorado Election*, DENVER ROCKY MOUNTAIN NEWS, Nov. 10, 2000, at 6A (noting that the campaign by Coloradans for Responsible Reform was the most expensive initiative campaign in Colorado history, raising \$5.7 million to fight Amendment 24).

plicated and “extreme,”⁶⁸ and would devastate the economy.⁶⁹ These commercials also asserted that Amendment 24 would make “[h]ousing so expensive [that] teachers, firefighters and the rest of us won’t be able to live in the communities where we work.”⁷⁰ Proponents countered the onslaught with appeals to the voters’ avowed concern about sprawl.⁷¹ They aired commercials featuring smoke-spewing bulldozers, traffic jams, and smog-shrouded mountains covered with tract houses.⁷² The ads warned that Amendment 24 was necessary because “[e]very hour Colorado loses 10 acres of ranchland and open space to sprawling development.”⁷³

In the end, voters overwhelmingly responded to the opponents’ message. By the fall, previously sky-high support for Amendment 24 had faltered. On election day, only thirty percent of voters cast affirmative votes.⁷⁴

B. Arizona’s Proposition 202

Arizona Proposition 202 suffered a similar plight. Although Proposition 202 would have amended the state law (rather than the constitution), it mirrored Amendment 24 in other relevant respects. It required local governments to establish growth management plans concentrating all new development within urban growth areas and prohibiting new development outside of them.⁷⁵ As in Colorado, the proposed legislation required voter approval of all growth management plans and any amendments to them.⁷⁶

⁶⁸ See Michele Ames & Todd Hartman, *Growth Control Amendment Fails: \$6 Million Ad Campaign Helps Defeat Initiative, but Supporters Vow to Press On*, DENVER ROCKY MOUNTAIN NEWS, Nov. 8, 2000, at 24A.

⁶⁹ See Charles Roos, Editorial, *Truth Being Swallowed Up in Political Advertising*, DENVER ROCKY MOUNTAIN NEWS, Oct. 30, 2000, at 33A.

⁷⁰ Mark Obmascik, *Accuracy Isn’t the Hallmark of Two Sides’ Amend. 24 Ads*, DENVER POST, Oct. 17, 2000, at A12.

⁷¹ See *supra* note 52 and accompanying text.

⁷² See Karen Abbott, *Growth-Control Ads Tap into Emotions: Amendment 24 Motivates Supporters, Detractors to Evoke State’s Beauty*, DENVER ROCKY MOUNTAIN NEWS, Oct. 27, 2000, at 32A.

⁷³ See Obmascik, *supra* note 70.

⁷⁴ See Joanne Ditmer, *24’s Defeat Shows Power of Advertising*, DENVER POST, Nov. 19, 2000, at 2K.

⁷⁵ Arizona Proposition 202 would have required the establishment of urban growth areas “outside of which new urban development and services will be limited.” SEC’y OF STATE, STATE OF ARIZ., 2000 BALLOT PROPOSITIONS & JUDICIAL PERFORMANCE REVIEW, Prop. 202 § 11-1602(A)(1), at 109 (Nov. 7, 2000), available at <http://www.sosaz.com/election/2000/info/pubpamphlet/english/prop202.pdf>. But for a few exceptions, see *id.* § 11-1605, at 110, Proposition 202 would also have required developers to pay the full cost of all new public facilities necessitated by their projects unless the development fell within an “infill incentive area,” *id.* § 11-1602(A)(2), at 109.

⁷⁶ *Id.* § 11-1606, at 110–11 (requiring public hearing and vote on all growth management plans and amendments thereto).

As in Colorado, proponents turned to the initiative process in part out of frustration over legislative inaction with respect to the pace of new development.⁷⁷ And Arizona's growth control proposal, like Colorado's, enjoyed immense support in the months after proponents unveiled it, but public sentiment flip-flopped by election day following a heated opposition campaign.⁷⁸ The battle lines over the Arizona proposal fell along nearly identical lines as well. Environmentalists campaigned for the measure,⁷⁹ and interests similar to the membership of Colorado's "No on 24" campaign comprised the opposition coalition.⁸⁰ Many elected officials, including the popular governor Jane Hull, also opposed the proposal.⁸¹ Opponents spent millions of dollars on advertisements warning voters that the measure threatened the state's booming economy⁸² and would drive up housing prices.⁸³ On election day, the measure suffered a similarly resounding defeat, losing by a forty-percent margin.⁸⁴

⁷⁷ See, e.g., *Arizona: Growth Initiative Unveiled*, GREENWIRE, Mar. 15, 1999, LEXIS, Nexis Library, Greenwire File (discussing environmentalist objection to legislative activity); Steve Wilson, *Goal Line So Close for Agreement on Growth Plan*, ARIZ. REPUBLIC, Feb. 3, 2000, at A2 (discussing breakdown of negotiations between Arizona Governor Jane Hull and Sierra Club on a compromise growth control initiative).

⁷⁸ See, e.g., Kathleen Ingley, *Voters Do Flip-Flop on Key Measures: Polls Says Yes on Stadium, No on Growth Limits*, ARIZ. REPUBLIC, Nov. 4, 2000, at A1 (noting that barrage of advertising contributed to drop in support for Proposition 202, from sixty-two percent support in mid-September to fifty-one percent opposition before election).

⁷⁹ See Meghan Stromberg, *Anti-Growth Initiatives Sound Death Knell for Builders*, PROF. BUILDER, Oct. 2000, at 26.

⁸⁰ *Home Builders*, *supra* note 53 ("In Arizona, for example, the AFL-CIO came out against Proposition 202, as did advocates for the homeless and low-income families. The state's farmers were also against it, as was the Arizona League of Cities and Towns . . . Similar interests were united against Amendment 24 in Colorado[.]"); see *supra* notes 59-66 and accompanying text.

⁸¹ Pat Flannery, *1 Growth Initiative is Losing Support; Prop. 202 Fading After Foes' Ad Blitz*, ARIZ. REPUBLIC, Oct. 15, 2000, at A19 (discussing Hull's growth control proposals); Stromberg, *supra* note 79, at 26.

⁸² For example, the Arizona Chamber of Commerce released a study saying that the initiative would decrease employment by seven percent and destroy two-thirds of all construction jobs. See Robert Robb, *Plausibility is Question in Prop. 202 Predictions*, ARIZ. REPUBLIC, Sept. 1, 2000, at B9. See also, e.g., Steve Wilson, *In Debate over Growth, Proceed with Caution*, ARIZ. REPUBLIC, Aug. 22, 2000, at A2 (discussing the argument that "[p]assing the Citizen's Growth Management Initiative would have the economic impact of dropping a neutron bomb on Arizona").

⁸³ See, e.g., Oppel, *supra* note 63.

⁸⁴ See ARIZ. SEC'Y OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2000 GENERAL ELECTION—NOVEMBER 7, 2000, at 16, at <http://www.sosaz.com/election/2000/BM202.pdf> (listing official election results).

C. Oregon's Ballot Measure 7

Oregon has long been a Mecca for proponents of comprehensive growth management.⁸⁵ In 1973, the state legislature enacted a law requiring all local governments to adopt and maintain development plans that parallel academic proponents' "ideal" growth control scheme. Each plan must be consistent with state planning goals,⁸⁶ which include the establishment of "urban growth boundaries" to "provide for an orderly and efficient transition from rural to urban land use."⁸⁷ With few exceptions, all new development must be within these growth boundaries, as would have been the case under Colorado's Amendment 24 and Arizona's Proposition 202.⁸⁸ Commentators have hotly contested the wisdom of this policy.⁸⁹ Boosters of the Oregon program claim that it has saved the state from sprawl.⁹⁰ Critics, however, claim that the growth boundaries have increased property values, and, importantly, housing prices within the growth boundaries and artificially depressed those outside of them.⁹¹

Proponents clearly designed Ballot Measure 7 to appeal to property owners harmed economically by, or at least disillusioned with, the urban-growth boundary policy.⁹² It provides, in relevant part:

[i]f the [government] passes or enforces a regulation that restricts the use of private real property, and the restriction has the effect of reducing the value of property upon which the restriction is im-

⁸⁵ See Edward J. Sullivan, *Oregon Blazes a Trail*, in *STATE & REGIONAL COMPREHENSIVE PLANNING* 51 (Peter A. Buchsbaum & Larry J. Smith eds., 1993).

⁸⁶ *Introduction to PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION*, at ix, ix (Carl Abbott et al. eds., 1994).

⁸⁷ *Oregon's Statewide Planning Goals*, in *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION*, *supra* note 86, at 299, 302.

⁸⁸ See GERRIT KNAAP & ARTHUR C. NELSON, *THE REGULATED LANDSCAPE: LESSONS ON STATE LAND USE PLANNING FROM OREGON* 39-42 (1992); Arthur C. Nelson, *Oregon's Urban Growth Boundary Policy as a Landmark Planning Tool*, in *PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION*, *supra* note 86, at 25, 25-45 (explaining Oregon's growth boundary policy).

⁸⁹ See, e.g., ELLICKSON & BEEN, *supra* note 17, at 993-95 (reviewing literature).

⁹⁰ See Carl Abbott, *The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree*, 8 *HOUSING POL'Y DEBATE* 11 (1997). *But cf.* Henry R. Richmond, *Comment on Carl Abbott's "The Portland Region: Where City and Suburbs Talk to Each Other—and Often Agree"*, 8 *HOUSING POL'Y DEBATE* 53, 64 (1997) (advocating for a land use policy reform emphasizing development).

⁹¹ See, e.g., KNAAP & NELSON, *supra* note 88, at 52-58, 82-84 (discussing the debate); Jim Robbins, *Oregon: Two Sides of the Antisprawl Line*, *N.Y. TIMES*, Apr. 22, 2001, at 41.

⁹² See Scott Learn, *Rural-Inspired Bill Could Affect Portland*, *OREGONIAN*, Nov. 3, 2000 at B2 (noting that "rural uproar" over regulations restricting building in farm areas "helped spur the initiative"); Patty Wentz, *This Land is Their Land*, *WILLAMETTE WK. (Or.)*, Nov. 29, 2000 at 21 (interview with Measure 7 sponsors asserting that the initiative was made necessary by government regulations preventing development of farm land).

posed, the property owner shall be paid just compensation equal to the reduction in the fair market value of the property.⁹³

By approving this amendment to the state constitution, Oregon once again effected a revolution in land use law. The Fifth Amendment's Takings Clause entitles property owners to compensation for "regulatory takings." The compensation requirement under the Fifth Amendment, however, is not triggered by a partial reduction in value of the property, but rather by its evisceration.⁹⁴ Oregon's ballot measure entitles the property owner to compensation for any reduction in the value of his or her property.

Despite Measure 7's radical implications—the official fiscal impact statement estimated that the proposal will cost state and local governments \$5.4 billion per year⁹⁵—it garnered little pre-election attention. In the months leading up to the election, a few influential newspapers editorialized against the property rights measure.⁹⁶ Measure 7's opponents also overshadowed its boosters in fundraising efforts and in the official voter pamphlet explaining arguments for and against ballot measures.⁹⁷ The bulk of the pre-election controversy, however, centered on several other initiatives sponsored by conservative activist Bill Sizemore,⁹⁸ which would have ended the seniority system for public school teacher pay and employment,⁹⁹ adopted a "paycheck-protection" system for union employees,¹⁰⁰ required a vote on all tax and fee increases,¹⁰¹ and made federal income taxes fully deductible on state returns.¹⁰²

⁹³ OR. CONST. art. I, § 18(a), available at <http://www.sos.state.or.us/elections/irr/2000/046text.pdf> (last visited Aug. 27, 2000).

⁹⁴ See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–31 (1992).

⁹⁵ See ELECTIONS DIV., OR. SEC'Y OF STATE, ONLINE VOTER'S GUIDE: STATE OF OREGON GENERAL ELECTION (NOV. 7, 2000), at <http://www.sos.state.or.us/elections/nov72000/guide/mea/m7/m7.htm>. See also R. Gregory Nokes, *Study Sees Billions in Boundary Costs if Measure Passes*, OREGONIAN, Oct. 17, 2000, at A1 (discussing voter pamphlet estimate and study estimating even higher costs).

⁹⁶ See, e.g., Editorial, *Vote No on Measure 7*, OREGONIAN, Oct. 9, 2000, at B8.

⁹⁷ See David Steves, *Opponents of Tax Cuts Pull In Most Donations*, REGISTER-GUARD (Eugene, Or.), Oct. 10, 2000, at A1 (noting that while proponents had only \$50,000 for the fall campaigns in support of Measure 7 and five other initiatives, Measure 7's opponents had raised \$650,117); ELECTIONS DIV., *supra* note 95.

⁹⁸ See Wentz, *supra* note 92, at 22; see also Steve Duin, *Bill Sizemore: Think Small If You Think at All*, OREGONIAN, Oct. 22, 2000, at C1 (commenting on Sizemore's domination of public debate).

⁹⁹ See Steves, *supra* note 97.

¹⁰⁰ Steve Mayes, *Ripple Effects Add Third Front to Ballot Battle*, OREGONIAN, Oct. 30, 2000, at A6.

¹⁰¹ Editorial, *A Word in Oregon's Defense: No*, OREGONIAN, Nov. 8, 2000, at C16.

¹⁰² *Id.*

Measure 7 did not come into the spotlight until polls began to show high levels of support in early November.¹⁰³ At that point, opponents enlisted all the allies they could find, including most of the state's political leaders and opinion makers, to defeat the measure.¹⁰⁴ Ultimately, the dire warnings that Measure 7 would devastate the state economically and undermine its unique legacy by obliterating the long-standing land use regime proved ineffectual.¹⁰⁵ Measure 7 passed by a slim margin,¹⁰⁶ leaving regulators and local governments scrambling to find a way to comply with its strictures,¹⁰⁷ or to have it declared a nullity post hoc by a court.¹⁰⁸

III

ELECTION 2000: EXPLANATIONS AND QUESTIONS

Do the election results in Colorado, Arizona, and Oregon suggest that the popular tide is turning against growth controls? Proponents say no, and their explanations for the disappointing results are plausible. Proponents assert that the defeat of Colorado's Amendment 24 and Arizona's Proposition 202 resulted from raw interest-group politics. Opponents of the measures outspent their adversaries by millions of dollars,¹⁰⁹ leaving boosters helpless to counter a deluge of "misleading" advertisements.¹¹⁰ As Elise Jones, a spokeswoman for the spon-

¹⁰³ See Diane Dietz, *Myriad Measures Stir Feelings*, REGISTER-GUARD (Eugene, Or.), Nov. 3, 2000, at 1A (noting that Measure 7 "hardly registered a flicker on the political passions meter through the fall campaign"); Ed Russo, *Voters Take Stock of Measure 7*, REGISTER-GUARD (Eugene, Or.), Nov. 3, 2000 (indicating that a late-October poll showed forty-nine percent of likely voters supported measure).

¹⁰⁴ See R. Gregory Nokes, *Opponents Call Measure 7 Threat to Land, McCall Legacy*, OREGONIAN, Nov. 2, 2000, at A11 (discussing Oregon Governor John Kitzhaber's vociferous opposition); Editorial, *supra* note 4.

¹⁰⁵ See, e.g., Cristine Gonzalez, *Measure 7 Draws Late Opposition: Passage Would Be Economic Bombshell, Opponents Say*, E. OREGONIAN, Nov. 7, 2000, at <http://www.eonow.com/news/stories/2000/nov/07b.shtml>.

¹⁰⁶ Unofficial results on Measure 7, listed by county, can be found at <http://www.orcities.org/members/M7/m7ns022.pdf>.

¹⁰⁷ See, e.g., Don Hamilton, *Cities, County Sketch Measure 7 Reply*, OREGONIAN, Dec. 6, 2000, at E1 (local governments instituting claims procedures); Nokes, *supra* note 6.

¹⁰⁸ Activists and local governments immediately filed a lawsuit challenging the amendment under several theories. See Scott Learn, *Cities Going After Measure 7*, OREGONIAN, Nov. 30, 2000, at C1. In February 2000, a trial judge invalidated the measure on state constitutional grounds. See *McCall v. Kitzhaber*, No. 00C19871 (Or. Cir. Ct. Feb. 22, 2000).

¹⁰⁹ See Ames, *supra* note 67 (reporting that Coloradans for Responsible Growth spent \$934,216 and Coloradans for Responsible Reform spent \$5,717,439).

¹¹⁰ See Abbott, *supra* note 72 (quoting pro-amendment campaign chairwoman criticizing one ad as "totally false, totally deceiving"); Ditmer, *supra* note 74 (editorial characterizing the "No on 24" advertisements as "inaccurate scare-tactic charges against the amendment"); Obmascik, *supra* note 70 ("Amendment 24 may be aimed at controlling Colorado's rapid growth, but it's not stopping the sprawl of misleading TV ads."); Roos, *supra* note 69 (discussing "television advertising that is oversimplified, inflammatory and even downright false"); see also E.J. Montini, *Resisting Indecent Propositions*, ARIZ. REPUBLIC,

sors of Amendment 24, explained, “The outcome of this election is the result of nearly \$6 million barrage of misleading ads. . . . It’s extremely difficult if not impossible to overcome that amount of money and that amount of misleading information.”¹¹¹

This explanation fits neatly within the substantial body of academic literature on initiatives. Contrary to the hopes of Progressive-era reformers,¹¹² well-funded and well-organized special interests tend to dominate the initiative process.¹¹³ This is in part because the high costs of participation dissuade unorganized citizens from getting involved.¹¹⁴ Indeed, the results in Colorado and Arizona follow the pattern identified by empirical studies of initiatives. Not only is there a strong correlation between the amount of money spent on an initiative campaign and the election outcome,¹¹⁵ but disproportionate spending is most effective when used to oppose an initiative, rather than to support it.¹¹⁶ David Magleby’s comprehensive study of initiatives found that even initiatives with substantial early support usually fail when, as in Colorado and Arizona, opponents launch a well-organized and well-funded “no” campaign to convince voters to reconsider the wisdom of their initial inclinations.¹¹⁷ As for the veracity of the

Nov. 2, 2000, at B1 (discussing anti-initiative ad campaigns in Arizona); Jim Nintzel, *The Lying Game*, TUCSON WEEKLY, Oct. 12, 2000, at 18 (same).

¹¹¹ Ames & Hartman, *supra* note 68 (quoting Elise Jones).

¹¹² See generally DAVID D. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 3–23* (1989) (reviewing history of initiative movement during Progressive era); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1512 & n.37 (1990) (reviewing literature on popular referenda and initiatives); Richard Briffault, *Distrust of Democracy*, 63 *TEX. L. REV.* 1347, 1348 (1985) (reviewing DAVID B. MAGLEBY, *DIRECT LEGISLATION: VOTINGS ON BALLOT PREPOSITIONS IN THE UNITED STATES* (1984)) (noting that Progressive-era legislators created the initiative to address the concern that special interests had captured the legislative process, believing that direct democracy would “break the stranglehold these [special interests] had on the political process”).

¹¹³ See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 *MICH. L. REV.* 930, 936 (1988); see also MAGLEBY, *supra* note 112, at 6 (arguing that initiatives involve well-funded campaigns because of interest group participation).

¹¹⁴ See MAGLEBY, *supra* note 112, at 36–42 (discussing state ballot qualification requirements that lead to reliance on the “initiative industry”); Elizabeth Garrett, *Who Directs Direct Democracy?*, 4 *U. CHI. L. SCH. ROUNDTABLE* 17, 19–22 (1997) (discussing significant organization impediments to ballot qualification).

¹¹⁵ See Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment*, 29 *UCLA L. REV.* 505, 544–46 (1982) (discussing a correlation between one-sided spending and a successful outcome).

¹¹⁶ Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 *U. COLO. L. REV.* 143, 147–48 (1995) (reviewing literature demonstrating that “[o]ne-sided spending has been successful in persuading people to vote *against* an initiative, but has had a negligible effect on obtaining affirmative votes”); see also MAGLEBY, *supra* note 112, at 167 (noting that high levels of negative campaign spending can spell defeat for an initiative).

¹¹⁷ See MAGLEBY, *supra* note 112, at 211–14. This phenomenon may be partially attributable to the fact that voters without strong preferences (who come to the ballot box to vote in candidate elections) decide the outcome of initiative elections. See, e.g., Lynn A. Baker, *Direct Democracy and Discrimination: A Public Choice Perspective*, 67 *CHI.-KENT L. REV.* 707, 724 (1991) (arguing that “individuals may well vote in plebiscites even if they have little interest

advertisements opposing the Colorado and Arizona initiatives, academic opponents of initiatives regularly complain that misleading or oversimplified “sloganeering” typically characterizes campaign advertising.¹¹⁸

Of course, these factors cannot explain results in Oregon, where Ballot Measure 7’s success challenges the conventional academic wisdom that monied special interests dominate initiative battles. Measure 7’s champions were “a pair of down-home property-rights zealots”¹¹⁹ who were vastly outspent by respected, establishment interests. The measure also went virtually unnoticed before its enactment.¹²⁰

To explain the unexpected success of Oregon’s partial-takings proposal, opponents must fall back on another familiar academic refrain about the initiative process: that voters often have absolutely no idea what they are doing when they vote on initiatives.¹²¹ Not only is the initiative process, according to its critics, inherently undeliberative,¹²² but ballot initiatives frequently are written in legal language that is impenetrable to the lay person.¹²³ Voter uncertainty and confusion is particularly problematic when, as with Measure 7, the initiative generates little pre-election publicity. This forces voters to make their decisions in “an informational vacuum.”¹²⁴ The post-election debate swirling around Measure 7 illustrates this point. Even well-trained land use attorneys dispute how it will affect land use regulation in Oregon.¹²⁵ And, a trial court enjoined the implementation of

in outcome”). Such voters may be relatively amenable to changing their initial inclinations about an initiative.

¹¹⁸ See, e.g., Briffault, *supra* note 112, at 1355. See generally Lowenstein, *supra* note 115, at 609–31 (discussing California initiatives and campaigns between 1968 and 1980).

¹¹⁹ See Wentz, *supra* note 92, at 22 (characterizing the authors of Measure 7).

¹²⁰ See *supra* note 103 and accompanying text.

¹²¹ See, e.g., MAGLEBY, *supra* note 112, at 118–19 (presenting a table of the readability of referenda in four states and discussing their difficulty level).

¹²² See, e.g., Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1, 18–19 (1978) (arguing that the “emotionally charged atmosphere often surrounding referenda and initiatives can easily reduce the care with which the voters consider the matters submitted to them”); Gillette, *supra* note 113, at 942–44 (discussing the argument that initiative process is flawed, compared to legislative process, because legislators are more deliberative). *But see* Baker, *supra* note 117, at 737–51 (contesting the argument).

¹²³ See THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 75* (1989) (arguing that technical difficulty of ballot language may actually disenfranchise some voters); MAGLEBY, *supra* note 112, at 118–19 (finding that ballot measures in Oregon required the average voter to have a reading level equivalent to that of a person with bachelors degree plus two years of graduate training to understand them); see also Eule, *supra* note 112, at 1516–17 (reviewing public opinion data indicating that voters frequently do not understand initiatives).

¹²⁴ MAGLEBY, *supra* note 112, at 167.

¹²⁵ See Op. Or. Att’y Gen. No. 8277 (Feb. 13, 2001) (responding to Oregon Governor John Kitzhaber’s request for clarification on Measure 7’s effects), available at <http://>

Measure 7, after finding a reasonable likelihood that the text of the provision failed to “give voters fair notice of all of the legal changes which would follow from the enactment of the proposed amendment.”¹²⁶

While plausible, none of these explanations eliminate the lingering sense that the ballot initiative results in Colorado, Arizona, and Oregon resulted from something more than a toxic combination of special interest politics and voter ignorance. The “NO” campaigns in Colorado and Arizona may have been hyperbolic and even misleading, but they presented voters with a stark choice between controlling growth and preserving affordable housing. This dichotomy swayed voters twice, in separate states, in the same election cycle, suggesting that similar arguments could convince voters in future battles.

Finally, voter confusion alone cannot explain results in Oregon. Voters usually respond to uncertainty about an initiative’s meaning conservatively, by voting no and maintaining the status quo ante.¹²⁷ Presumably, the overwhelmingly negative attention that Measure 7 received at the eleventh hour should have reinforced voters’ conservative instincts.¹²⁸ Yet, while voters rejected most of Oregon’s statewide initiatives, including those that received the lion’s share of pre-election publicity,¹²⁹ voters embraced Measure 7, thereby upsetting Oregon’s long-standing land use regime. Furthermore, the geographic distribution of support for Measure 7 suggests that part of the motivation for this unorthodox response may have been a backlash against the existing land use regulations. Voter approval was highest (over seventy percent) in areas outside of urban-growth boundaries, where the system artificially deflates property values.¹³⁰

www.doj.state.or.us/AGOffice/agopinions/op8277.pdf, see also, e.g., Brent Hunsberger, *Effects of Measure 7 Remain Up for Debate*, OREGONIAN, Nov. 20, 2000, at A1; Nokes, *supra* note 6. For a discussion of the problems that courts face when interpreting initiative language, see Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477 (1996); John Copeland Nagle, *Direct Democracy and Hastily Enacted Statutes*, 1996 ANN. SURV. AM. L. 535 (1996); Jane S. Schacter, *The Pursuit of “Popular Intent”: Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107 (1995).

¹²⁶ *McCall v. Kitzhaber*, No. 00C19871 (Or. Cir. Ct., Dec. 6, 2000), available at <http://www.orcities.org/members/M7/m7page.html> (enjoining enforcement of Measure 7 and finding that the language failed to inform voters of the full impact of the proposal).

¹²⁷ Briffault, *supra* note 112, at 1356–57.

¹²⁸ The fact that all Oregon residents vote by mail, see OR. SEC’Y OF STATE, VOTE-BY-MAIL: FREQUENTLY ASKED QUESTIONS, at <http://www.sos.state.or.us/executive/policy-initiatives/vbm/faq.html> (last visited Aug. 28, 2001), makes evaluating the extent to which these efforts influenced the election’s outcome particularly problematic.

¹²⁹ Harry Esteve, *Oregon Voters Tame Tidal Wave of Ballot Measures*, OREGONIAN, Nov. 9, 2000, at C9; *The Measures*, OREGONIAN, Nov. 8, 2000, at C4 (listing results on state-wide ballot measures); see also BALLOTMEASURE.COM, available at <http://ballotmeasure.com/Bal- lotMeasures.asp> (last visited Aug. 28, 2001) (listing results on state-wide ballot measures).

¹³⁰ See Wentz, *supra* note 92, at 21 (initiative passed fifty-three to forty-seven percent, but up support soared as high as sixty-nine percent in rural counties).

Growth control advocates have bolstered their positive read on last November's election results with assertions that, nationwide, voters considered and approved a record number of smart-growth or anti-sprawl initiatives.¹³¹ While this is true, the story is more complicated than it appears. The vast majority of the initiatives lumped into the anti-sprawl category did not propose regulatory limits on new development. Most of them employed far less coercive means to alleviate the negative consequences of sprawl. Publicly funded conservation efforts, for example, proved extremely popular. Indeed, voters approved nearly eighty percent of the 257 ballot measures proposing the preservation of open space or the creation of new parks, including two statewide proposals.¹³² Voter approval of such measures, however, says little about voter willingness to support growth controls.

True, voters approved a number of ballot proposals limiting new development as well.¹³³ While statewide controls in Colorado and Arizona went down in flames, voters approved a majority of local growth control proposals.¹³⁴ Still, growth control proponents have reason to be concerned. Both Colorado Amendment 24 and Arizona Proposition 202 proposed versions of the academics' "ideal" growth control scheme. Each proposed statewide growth management plans that would have concentrated new development in existing population centers. Both Amendment 24 and Proposition 202 also would have curbed local government control over land use planning, thereby minimizing opportunities for individual municipalities to exacerbate sprawl by inviting developers to set their sights on exurban green spaces.¹³⁵

The local controls that won at the ballot box, however, do not advance these same goals and may unintentionally have the opposite

¹³¹ See PHYLLIS MYERS & ROBERT PUENTES, *GROWTH AT THE BALLOT BOX: ELECTING THE SHAPE OF COMMUNITIES IN NOVEMBER 2000*, at 3–4 (Ctr. on Urban & Metro. Policy, Brookings Inst., Discussion Paper, 2001) (analyzing the 553 state and local "growth-related" ballot measures considered on Election Day 2000), available at <http://www.brook.edu/es/urban/ballotbox/finalreport.pdf>.

¹³² *Id.* at 21–23 (finding that voters approved 201 of the 257 proposals to preserve open space or build and maintain parks, including 2 of 6 statewide proposals); *id.* app. at 50 tbl.1 (listing all 553 growth-related ballot measures and election outcome); see also LAND TRUST ALLIANCE, *VOTERS INVEST IN OPEN SPACE: 2000 REFERENDA RESULTS*, at <http://www.lta.org/publicpolicy/referenda2000.htm> (listing election results on conservation-related initiatives).

¹³³ See MYERS & PUENTES, *supra* note 131, at 14–16 (analyzing results of "growth management/regulation" proposals).

¹³⁴ See *id.* at 14; see also Mike Anton & Seema Mehta, *Electorate Taking Control of Growth*, L.A. TIMES, Nov. 12, 2000, at A46 (discussing election results of growth-related ballot measures in California). As MYERS & PUENTES, *supra* note 131, at 15, indicates, nearly half of the true growth-control measures were on ballots in California.

¹³⁵ See *supra* notes 35–41 and accompanying text.

effect. First, because local controls cover only one small geographic area, they do not direct the course of regional growth.¹³⁶ Instead, they tend simply to stop development in its tracks and exclude newcomers through policies such as development moratoria.¹³⁷ When viewed in this light, the types of controls approved by voters on Election Day 2000 begin to look like another familiar, but far more disfavored, land use mechanism—exclusionary zoning.¹³⁸

Second, because local controls cover only one jurisdiction, local curbs may actually encourage sprawl by forcing developers to set their sights on green spaces farther and farther from the urban core, where regulatory sentiment remains favorable.¹³⁹ Thus, local growth controls may only renew the vicious cycle discussed above: exclusionary land use laws in the inner suburbs push development farther and farther out, thereby exacerbating, rather than controlling, sprawl.

IV

ELECTION 2000 AND THE PROSPECTS FOR CHANGE

What does this electoral pattern say about the prospects for the comprehensive, cross-jurisdictional growth controls preferred by academics and planners and defeated in Colorado and Arizona? The answer to that question may turn on the explanation behind another: Why would an electorate that expresses overwhelming concern about sprawl vote to raise taxes to conserve open space and to impose *local* growth controls, but reject proposals designed to address suburban sprawl through comprehensive, regional growth management?

There are at least three plausible answers to this puzzle. First, not all of the members of the coalitions that formed to defeat Amendment 24 and Proposition 202 had the same interests at stake in the

¹³⁶ See William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 526 (2000) (arguing that sprawl is "at least a regional phenomenon in most states"); Freilich & Davis, *supra* note 22, at 35–37 (advocating regional or statewide growth controls); Freilich & Peshoff, *supra* note 20, at 195 ("The only proven method of controlling the negative effects of sprawl is through a regional growth management system . . .").

¹³⁷ See FISCHEL, *supra* note 40, at 55.

¹³⁸ See ELLICKSON & BEEN, *supra* note 17, at 979 (raising question of comparison between exclusionary zoning and growth controls); see also ERIC DAMIAN KELLY, *MANAGING COMMUNITY GROWTH* 216–17 (1993) (arguing that the only possible justification for local growth controls are the "self-serving rationalizations of the communities adopting them" and that such controls have disproportionate impact on the poor). Early efforts to limit new growth were in fact challenged as illegal exclusionary zoning. See, e.g., *Constr. Indus. Ass'n v. City of Petaluma*, 522 F.2d 897 (9th Cir. 1975) (upholding local land restriction); *Golden v. Planning Board*, 285 N.E.2d 291 (N.Y. 1972) (upholding Ramapo town zoning ordinance). Not surprisingly, these challenges met with little success. As William Fischel has noted, "[g]rowth controls are seemingly beyond judicial reproach on exclusionary grounds because they democratically exclude everyone." FISCHEL, *supra* note 40, at 54.

¹³⁹ FISCHEL, *supra* note 40, at 37–38; KELLY, *supra* note 138, at 216.

outcome of initiatives proposing conservation measures or local growth controls. For example, while developers, who represented the primary financiers of the "NO" campaigns, might not have believed they had as much at stake with respect to local growth control measures, they may have believed they could have channeled their new developments elsewhere. Thus, they may have lacked the incentive to work as hard to defeat local measures.¹⁴⁰

Second, enlarging the geographic scope of the regulatory proposal may change how voters evaluate the costs and benefits of growth controls. Building upon the prediction that growth controls drive up housing prices, a number of academics have suggested that growth controls benefit existing homeowners and hurt prospective homeowners. Existing homeowners can charge prospective homeowners the premium that they gain when the government limits new development.¹⁴¹ Of course, an existing homeowner who wishes to reap the benefit of this premium is usually also a prospective homeowner; she generally plans to sell her home and purchase a new one. In order for the existing homeowner to reap the full benefit of the premium, therefore, she must be able to sell her home within the controlled area and move to a home outside of it, where she will not have to pay a similar growth control imposed premium. Regional or statewide growth controls make it much more difficult to profit from the growth control premium. If an existing homeowner must leave the state in order to avoid paying the growth control premium on a new home, her costs of exit are much higher than if she can move one town over. She might have to change jobs, leave family and friends, and make other lifestyle changes. Thus, increasing the scope of the proposed controls may lead more residents to vote as prospective homeowners, who worry about the price effects of growth controls, instead of as existing homeowners, who stand to benefit from increases in property values.

Finally, the American psyche may also explain these results. Kenneth Jackson's insightful history of suburbia illustrates that a detached, suburban home has long formed the centerpiece of the American Dream.¹⁴² Contemporary public opinion polls illustrate that this remains the case. Americans consider a single-family suburban home their "ideal," and they are willing to make significant financial sacrifices, and commute long distances, to live in one.¹⁴³ In

¹⁴⁰ See generally, Buzbee, *supra* note 16, at 373-78 (describing the "powerful motives and incentives in both the political and market spheres" of the sprawl debate).

¹⁴¹ See Ellickson, *supra* note 50, at 400 (connecting support for growth controls with home ownership); see also *supra* notes 50-51 and accompanying text.

¹⁴² JACKSON, *supra* note 19, at 287-90.

¹⁴³ See, e.g., ANTHONY DOWNS, STUCK IN TRAFFIC 16-17 (1992); see also Vicki Been, *Comment on Professor Jerry Frug's The Geography of Community*, 48 STAN. L. REV. 1109, 1110-11

Colorado and Arizona, opponents successfully appealed to our psychological fixation on home ownership. When they told voters that comprehensive growth controls might place this cornerstone of the American Dream out of reach, voters responded by overwhelmingly rejecting the controls.¹⁴⁴

Jackson and others have noted that the popularity of the suburban lifestyle arises out of the illusion of country life.¹⁴⁵ Not only have American patterns of development always been relatively disperse by international standards,¹⁴⁶ but for over one hundred and fifty years, Americans have viewed a suburban home as a retreat from the bustle and congestion of the city, an escape to a semipastoral setting.¹⁴⁷ This ideal, however illusory, may also have played a role in voters' rejection of comprehensive growth controls in Colorado and Arizona. After all, proponents of these measures designed them to increase the *density* of residential development by concentrating development within urban growth boundaries. The American opposition to density, which might lead voters to reject the "urban growth boundary" model of growth controls, also explains support for local growth control measures. After all, these local growth control measures curb or halt all new development within a jurisdiction, and therefore preserve any remaining open space within municipal boundaries. It also explains why publicly financed conservation efforts proved popular during the last election cycle. Preserving green spaces not only enhances the livability and "pastoral feel" of existing suburbs, but it also tends to increase property values.¹⁴⁸

For all of these reasons, last November's election results suggest that the odds are stacked against comprehensive growth management accomplished through a statewide plebiscite. Not only do growth con-

(1996) (discussing economic reasons that Americans prefer the suburbs); Burchell & Shad, *supra* note 17, at 138 ("Sprawl is so well-accepted by the public that the AAA-rated locations for both residential and nonresidential development are increasingly farther out rather than closer in, and more, rather than less, segregated by type of land use."); Buzbee, *supra* note 21, at 65-66 ("Many Americans recently surveyed about sprawl, however, confirmed market trends that indicate many, if not most, citizens favor new residential developments with cul de sacs set at a substantial distance from retail markets and mass transit."); Peter Gordon & Harry W. Richardson, *Are Compact Cities a Desirable Planning Goal?*, 63 J. AM. PLAN. ASS'N 95, 96-97 (1997) (discussing strong preferences for suburban living).

¹⁴⁴ See *supra* notes 68-70, 74, 83-84 and accompanying text.

¹⁴⁵ JACKSON, *supra* note 19, at 73. See generally ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987) (tracing the history and development of the modern suburb).

¹⁴⁶ See WITOLD RYBCZYNSKI, *CITY LIFE* 77-83 (1995).

¹⁴⁷ See JACKSON, *supra* note 19, at 71-72 (arguing that the suburban home offered retreat from commercialism and industry and "seemed immune to the dislocations of an industrializing society and cut off from the toil and turbulence of emerging immigrant ghettos").

¹⁴⁸ See Buzbee, *supra* note 16, at 384 (noting connection between proximity to substantial park space and property values).

trol opponents have voter inertia on their side,¹⁴⁹ they also proved twice during the last election cycle that they could convince even avowed opponents of suburban sprawl to vote against statewide plans to curb it. Given the extremely high stakes at issue,¹⁵⁰ it is not unreasonable to expect similar, and similarly potent, coalitions to emerge when proposals similar to the defeated Colorado and Arizona initiatives arise in the future.

Growth control proponents have vowed to renew their fight for comprehensive growth management in the state legislatures.¹⁵¹ And, at least for now, hopes are high in Colorado, where opponents have agreed to cooperate and work toward growth control legislation and the legislature seems poised to act.¹⁵² Perhaps these renewed efforts will enjoy some measure of success. The threat of an initiative has prompted legislative action in the past.¹⁵³ And even unsuccessful initiatives play an important role, as Professor Briffault has argued, “alerting legislators that public concern on a subject that the legislature has neglected has become great enough to get a measure on the ballot, yet giving the legislature a grace period in which to move on the matter before the voters become sufficiently aroused to do it for them.”¹⁵⁴ The probability that the legislature will respond to such signals may be particularly high when, as in Colorado and Arizona, initial public support for the policies proposed was high.¹⁵⁵

Still, it is important to remember that the defeated growth control initiatives were “born of disappointment”¹⁵⁶ in the legislative pro-

¹⁴⁹ See *supra* note 127 and accompanying text.

¹⁵⁰ See *infra* notes 160–71 and accompanying text.

¹⁵¹ See Ames & Hartman, *supra* note 68; Kathleen Ingley, *New Growth Plans Promised Despite Defeat of 2 Measures*, ARIZ. REPUBLIC, Nov. 9, 2000, at A22 (stating environmentalists are planning a new ballot proposition to regulate development on state land); Tom Kenworthy, *Colo. Growth Limit Defeated but Not Dead*, USA TODAY, Jan. 8, 2001, at 4A (quoting Arizona Sierra Club member as saying the growth issue has not gone away); Blake Morlock, *Group Already Plans Land Issue Vote for '02*, TUCSON CITIZEN, Nov. 20, 2000, at 1A.

¹⁵² See Erika Gonzalez, *Business Likes 'Status Quo' Vote*, DENVER ROCKY MOUNTAIN NEWS, Nov. 9, 2000, at 1B; John Sanko, *Owens Mounts Mission Against Sprawl*, DENVER ROCKY MOUNTAIN NEWS, Nov. 16, 2000, at 4A. In contrast, the Arizona legislature shows no interest of tackling the issue. See Kenworthy, *supra* note 151 (noting “marked contrast” between determination to enact legislation in Colorado and the lack of interest in Arizona); Blake Morlock, *After Loss, Eco-Groups Seek Smaller Victories*, TUCSON CITIZEN, Nov. 20, 2000, at 1A.

¹⁵³ Briffault, *supra* note 112, at 1372 (“[T]he existence of the initiative process as a supplement to the legislature will influence the pattern of legislative behavior in the direction of greater conformity to popular interests.”); see Elisabeth R. Gerber, *Legislative Response to the Threat of Popular Initiatives*, 40 AM. J. POL. SCI. 99 (1996).

¹⁵⁴ Briffault, *supra* note 112, at 1372.

¹⁵⁵ See Gerber, *supra* note 153, at 121 (finding that the probability that a legislature would adopt a law in response to threat of initiative increased with the level of voter support).

¹⁵⁶ Gillette, *supra* note 113, at 976.

cess, as most initiatives are.¹⁵⁷ This disappointment resulted not from legislators' neglect of growth issues. To the contrary, legislators in both states considered, and repeatedly rejected, growth control legislation.¹⁵⁸ If accounts in the popular press are accurate, their rejection was at least partly a response to strong objections from the very special interests that organized to defeat Amendment 24 and Proposition 202.¹⁵⁹

There is every reason to believe that these interests will continue to oppose the radical overhaul of traditional land use regulation advocated by growth control proponents. The stakes are too high to demur.¹⁶⁰ Realtors and developers worry that the controls would increase the price of housing and dry up sales. While these increased costs usually pass to home purchasers, at some point, home purchasers may become unable or unwilling to accept them. When this happens, they may choose instead to defer home purchases, spending resources to refurbish their existing homes.¹⁶¹ Similar concerns motivate low-income housing advocates such as Habitat for Humanity, who worry that increasing the cost of new housing might slow the "filtering" process that provides most low-income housing opportunities in this country.¹⁶² Unions also worry that growth controls may slow the pace of new development, thus leading to a drop in the number of jobs available for members.¹⁶³

¹⁵⁷ See *id.* at 982 (citing "[a]necdotal evidence" that "special interest groups initiate plebiscites only after failure to convince the legislature to enact similar provisions"); Lowenstein, *supra* note 115, at 567-68 (implying that policies proposed through the initiative process have, as a matter of course, suffered rejection at the hands of the legislature).

¹⁵⁸ See Patricia E. Salkin, *Smart Growth at Century's End: The State of the States*, 31 URB. LAW. 601, 606-07 (1999) (discussing Arizona legislature's failed efforts to regulate sprawl).

¹⁵⁹ See, e.g., Paula Moore, *Growth Initiative Killed*, DENVER BUS. J., Apr. 7, 2000, at 6A (attributing the defeat of Colorado growth control initiative to lobbying by home builders and the rural electric cooperative).

¹⁶⁰ See Buzbee, *supra* note 16, at 373-78 (describing interests involved in sprawl debate).

¹⁶¹ See Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1186 (1981) (explaining how increase in housing costs due to land use regulation may lead to deferred housing purchases).

¹⁶² As Kenneth Jackson observes:

The positive result of this [suburbanization] process is called "filtering." The construction of new housing in the suburbs puts competitive pressure on the older housing stock, depressing its price. . . . Thus, the typical model of urban growth in the United States has been the sequential reuse of housing by progressively lower-income households. Were it not for the subdivisions of the periphery, the shelter available to the poor would be even more limited and expensive.

JACKSON, *supra* note 19, at 285; see also Ellickson, *supra* note 161, at 1184-87 (describing the filtering process).

¹⁶³ See Morson, *supra* note 61.

Finally, local governments proved to be vociferous opponents of the Colorado and Arizona measures,¹⁶⁴ which would have severely limited their authority to regulate land use.¹⁶⁵ Local government officials have good reason to fear comprehensive reforms that limit this authority.¹⁶⁶ Given the fact that local governments have no inherent power,¹⁶⁷ it is understandable that local officials would fight to preserve the most significant power entrusted to them by state law.¹⁶⁸ Furthermore, as Professor Charles Tiebout predicted, decentralized local governments compete for residents by providing an attractive package of services at the lowest possible cost.¹⁶⁹ Professor Been, among others, has demonstrated how local communities employ land use laws to achieve this objective.¹⁷⁰ By depriving them of this tool, the Colorado and Arizona amendments would have limited local governments' abilities to stem the "exit" of desirable residents by shaping their communities to fit local tastes.¹⁷¹

The reality is that these efforts to influence the legislative process may prove successful. Public choice literature suggests that special interests exert significant influence in the legislative process,¹⁷² and that "decisions made by legislators may be far more susceptible to interest group pressure than plebiscitary ones."¹⁷³ For all its warts, perhaps

¹⁶⁴ O'Brien, *supra* note 54 (complaining that "the mayors, city council members and county commissioners . . . have fought tooth and nail to repel all intruders from their petty fiefdoms").

¹⁶⁵ Colorado's Amendment 24 would have limited local autonomy by requiring local governments to submit all changes in growth boundaries to voters, *see* LEGISLATIVE COUNCIL OF THE COLO. GEN. ASSEMBLY, *supra* note 55, Amend. 24 § 5, at 55; Arizona's Proposition 202 would have similarly tied local officials' hands by pegging the pace of new development to population growth, *see* SEC'Y OF STATE, STATE OF ARIZ., *supra* note 75, Prop. 202 § 11-1602(A)(1), at 109.

¹⁶⁶ *See* Buzbee, *supra* note 16, at 374 (discussing local government motivations for opposing growth controls).

¹⁶⁷ Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1062-63 (1980).

¹⁶⁸ *See* Richard Briffault, *Our Localism* (pt. 1), 90 COLUM. L. REV. 1, 3 (1990) ("Land use control is the most important local regulatory power.").

¹⁶⁹ *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956).

¹⁷⁰ *See* Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 506-28 (1991); *see also* WILLIAM A. FISCHER, *THE ECONOMICS OF ZONING LAWS* 214-20 (1985) (analyzing the local government structure in the twenty-five largest U.S. cities).

¹⁷¹ *See* Briffault, *supra* note 32, at 352 (1990) ("Moreover, for many suburbs, particularly the more affluent ones, the principal local regulatory goals often are controlling growth and preserving the status quo. Local legal autonomy significantly empowers them in this quest.").

¹⁷² *See, e.g.,* Gillette, *supra* note 113, at 978. *See generally* DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 12-21 (1991) (reviewing literature on interest group influence upon political process); Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 883-908 (1987) (providing a comprehensive collection of political science "rational choice" literature).

¹⁷³ Gillette, *supra* note 113, at 981.

the best argument for the initiative process may be that it provides an external check on the power of insiders who dominate the legislative and regulatory processes.¹⁷⁴ Developers, unions, and local governments are all just such insiders—repeat players in the state legislative process. As such, legislators concerned about re-election, campaign contributions, and the like have more of an incentive to please these interests than they do the dispersed electorate.¹⁷⁵

Another significant benefit of the initiative process is that the initiative's author controls the policy agenda—a fact standing in sharp contrast to the legislative process.¹⁷⁶ As Professor William Riker has noted, the legislative “agenda is set by a combination of the legislature's majority party (or a committee of it), back benchers who in one way or another insert themselves in the agenda-setting process, and the pre-existing legislative rules.”¹⁷⁷ As a result, even a successful push for legislative action on growth issues is far more likely to yield a compromise closer to the desires of these “back benchers,” including the groups who opposed Amendment 24 and Proposition 202, than the policy desired by growth control proponents.

Indeed, their continued influence was immediately evident in the months following the defeat of Colorado Amendment 24. After the election, Colorado Governor Bill Owens warned that he would be “busting heads if necessary” to achieve legislation addressing sprawl.¹⁷⁸ Months later, a legislative statement over competing proposals remained. The Governor called an additional legislative session on the growth issue, and local pundits predicted that more hard-line supporters of regional growth management would be forced to accept more moderate reform.¹⁷⁹ Members of the anti-Amendment 24 campaign are devoting their excess cash reserves to keeping their coalition together during the legislative battle ahead. The coalition also hired a land-use attorney to draft growth control legislation.¹⁸⁰ And, in Arizona, the political disinterest in renewing the growth man-

¹⁷⁴ Briffault, *supra* note 112, at 1368; *see also* SCHMIDT, *supra* note 112, at 25–40 (discussing advantages of initiatives over legislative process); Baker, *supra* note 117, at 747 (noting that collective action theory suggests that interest groups can less efficiently and successfully lobby the voting population at large than legislators).

¹⁷⁵ *See* Briffault, *supra* note 112, at 1367; Gillette, *supra* note 113, at 978–79. *See generally* RUSSELL HARDIN, *COLLECTIVE ACTION* 38–49 (1982) (discussing the greater collective action problem faced by larger groups); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 53–65 (1965) (same).

¹⁷⁶ Baker, *supra* note 117, at 732 (noting that this difference has been overlooked in much of the scholarship comparing the two processes).

¹⁷⁷ William H. Riker, *Comment on Baker, “Direct Democracy and Discrimination: A Public Choice Perspective”*, 67 *CHI.-KENT L. REV.* 791, 791 (1991).

¹⁷⁸ *See* Sanko, *supra* note 152.

¹⁷⁹ *See Matsunaka, Owens Spar over Sprawl*, *DENVER POST*, Aug. 29, 2001, at B8.

¹⁸⁰ *See Michele Ames, Solution to Growth Is Sought: Coalition Attempts to Stick Together*, *DENVER ROCKY MOUNTAIN NEWS*, Nov. 30, 2000, at 7A.

agement debate itself suggests the influence of growth control opponents.

That is not to say that comprehensive growth management policies are unattainable—experience in Oregon and elsewhere has proven otherwise.¹⁸¹ Rather, the results in the last election cycle suggest that the road to reform will be a rough one.¹⁸² Growth control opponents have shown that they can organize to defeat such proposals—either at the ballot box or in the state legislatures. And, voter approval of Oregon's Measure 7 raises the question of whether the types of growth controls advocated by academics are politically sustainable over the long haul.

CONCLUSION

Americans say that they worry about sprawl. But, they also say, overwhelmingly, that they prefer to live in suburban homes with yards,¹⁸³ and that they are willing to commute long distances to sprawling developments where this "ideal" is an affordable reality.¹⁸⁴ November election results demonstrate that these are not necessarily inconsistent sentiments. The votes on growth issues neatly reflect a classic American sentiment—that the suburbs offer an escape from the disruptions of the urban core to life in a semipastoral setting.¹⁸⁵ Thus, in Colorado and Arizona—and perhaps also in Oregon—voters signaled a limited tolerance for regulations that curb their ability to "exit" to greener pastures in the land of sprawl (or that threaten to eliminate the limited greenness of their own neighborhoods by increasing the density of residential development).

Elsewhere, however, voters approved dozens of initiatives that address the ills of sprawl by financing the public acquisition of more parks and green spaces.¹⁸⁶ Voter willingness to approve these "half-stepping" measures may come as cold comfort to the visionaries who sponsored Colorado's Amendment 24 and Arizona's Proposition 202.

¹⁸¹ See, e.g., NELSON & DUNCAN, *supra* note 31, at 19–36 (describing state and regional growth management policies); Buzbee, *supra* note 136, at 532–35 (describing factors leading to comprehensive growth management in the Atlanta region); *supra* notes 85–88 and accompanying text (discussing Oregon law).

¹⁸² See Buzbee, *supra* note 136, at 528–32 (discussing the political, institutional, and market barriers to comprehensive reform of American land use laws).

¹⁸³ Buzbee, *supra* note 21, at 65–66 ("Many Americans recently surveyed about sprawl, however, confirmed market trends that indicate many, if not most, citizens favor new residential developments with cul de sacs set at a substantial distance from retail markets and mass transit.")

¹⁸⁴ See DOWNS, *supra* note 25, at 16–17; Been, *supra* note 143, at 1110–13 (discussing economic reasons why Americans prefer the suburbs).

¹⁸⁵ See JACKSON, *supra* note 19, at 57–60. See also Freilich & Peshoff, *supra* note 20, at 186 (arguing that "[s]prawl has been promoted by social forces, which reflect the desire for a rural lifestyle coupled with an urban income").

¹⁸⁶ See *supra* note 132 and accompanying text.

While the acquisition of additional open space may not be a magic wand that will solve all of our urban and suburban woes, these policies have significant benefits of their own. As Professor Buzbee has recently argued, green spaces not only break the monotony of the "sprawlscape" and offer significant biodiversity benefits, but they also can serve a community-building function by acting as public meeting places that "counteract the insularity and frequent homogeneity associated with new sprawling development."¹⁸⁷ Because proximity to parks and green spaces tends to increase property values, these policies may also entice developers to consider building more densely near them.¹⁸⁸ If academic predictions about the negative consequences of local growth controls are correct, pro-conservation policies may prove to be more beneficial than other politically feasible anti-sprawl policies.

¹⁸⁷ Buzbee, *supra* note 16, at 384.

¹⁸⁸ *Id.*