A NEW CHARTER FOR AMERICAN CITIES

10 RIGHTS TO RESTRAIN GOVERNMENT AND PROTECT FREEDOM

by Nick Dranias, Director, Goldwater Institute Center for Constitutional Government

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in defense of liberty

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Nick Dranias holds the Clarence J. and Katherine P. Duncan Chair for Constitutional Government and is Director of the Joseph and Dorothy Donnelly Moller Center for Constitutional Government at the Goldwater Institute.[1]

EXECUTIVE SUMMARY

Since 1972, America has gained an average of one new local government every day.[2] The mushrooming of local governments is outdone only by the growth in state and local spending, which has outstripped that of the federal government since 1970.[3] Arizona is no exception.

"Special districts" in Arizona have burgeoned from just over 30 in 1952 to more than 300 in 2007—so numerous that they now approach the sum of all counties, cities, and towns in Arizona.[4] The bulk of this growth occurred after 1980, suggesting that municipalities deliberately spun off special districts to engage in spending projects that would otherwise be unconstitutional under reforms enacted after the stagflation of the 1970s, which attempted to restrict local government spending to a formula based on inflation and population growth. In fact, since 1998, Arizona's local public payroll has ballooned 90 percent, exceeding the growth of the federal payroll.[5] At the same time, local politicians have borrowed tens of millions of dollars for swimming pools, dog parks, skateboard parks, mountain bike trails, and waterslides.[6]

Despite their proliferating numbers and profligate spending, Arizona's local governments are functioning as if securing liberty were irrelevant to their mission. Since 1980, Arizona's crime rates for the most violent criminal offenses have ranged between five and 10 percent higher than national rates. And local government bureaucracies are more intrusive, opaque and less accountable than ever, with public records request responsiveness in Arizona receiving a grade of "F" from the Better Government Association and National Freedom of Information Coalition in 2007.[9] If anything, the growth of local government has been a detriment to liberty.

Business as usual is no longer possible. Local property and sales tax revenues are plummeting.[11] Yuma, for example, faces a $3 million budget shortfall.[12] Between August and November 2008, Tempe's sales tax revenues reportedly slumped 9.2 percent.[13] A host of other cities in Arizona and across the country also face large budget deficits.[14]

In short, Arizonans face significant challenges stemming from overspending combined with the national financial crisis. One of the biggest challenges involves deciding what

to do about local governments that have grown unsustainably numerous, large, intrusive, and irresponsible.

Legitimate governments are meant to secure liberty. Local governments are no exception. This report recommends adopting and enforcing the first principles of legitimate government at the local level. It provides the theoretical basis for advancing a judicially enforceable set of individual rights, as opposed to simply relying on local political processes to achieve reform. And it furnishes a road map for legislatively implementing the recommended reforms. In so doing, the proposed Local Liberty Charter aims to restrain out-of-control local government growth.

INTRODUCTION

"The end of Law is not to abolish or restrain, but to preserve Freedom." **—John Locke**[15]

"Legitimate governments are meant to secure liberty. Local governments are no exception."

The Arizona and U.S. constitutions eloquently identify the most fundamental principles of individual freedom. Each protects life, liberty, and property with the promise of due process and equal protection of the law, also identifying crucial civil rights meant to prevent the worst abuses of government power.[16] Each constitution declares that freedom of speech shall not be infringed.[17] Each declares that contracts shall not be impaired.[18] And to ensure that the listing of specific rights is not read to suggest that government power is otherwise unlimited, each contains a general reservation of rights emphasizing that the power of government is constrained by inherent and inalienable rights, which have been retained by the people.[19]

These principles of liberty, however, are not reliably enforced at any level of government.[20] The resulting threat to freedom and responsibility is especially pronounced at the level of local government. For example, in the first round of litigation over the CityNorth mall in north Phoenix, local entrepreneurs and taxpayer advocates were unable to stop the city from showering $97.4 million in subsidies on the mall developer, despite Arizona's constitutional bans on special privileges.[21] Although entrepreneurs won the second round of the CityNorth case in the court of appeals, the city has decided to appeal to the state supreme court. Most ordinary Arizonans simply cannot afford such protracted litigation with City Hall—win or lose.

In fact, our political system has led to a concentration of power at the local level that would be anathema elsewhere in government. And contrary to romanticized notions of the town hall meeting, local governments are not less likely to abuse such power.[22] Today's megacities and vast county governments replicate all of the structural failures of representative democracy found at statewide and national levels—namely, the tendency of public policy to be driven by special interests and irrational voting. Consequently, relative to statewide and national constraints on governmental power, scholars and jurists have increasingly recognized that there are "too few checks on the abuse of local power" and that addressing this problem requires "systematic" reform.[23] This report advocates checking the concentrated power of towns, cities, counties, and special districts with a Local Liberty Charter.

The Local Liberty Charter proposes enforceable individual rights aimed at restraining local governments. It would restructure the rules of the local political game to institutionalize freedom and fiscal responsibility. As such, there is no known equivalent to what this report proposes.[24] The legal "rights" typically found at the local level more often add a layer of bureaucracy and regulation restricting private conduct.[25] Although freedom-oriented local "bills of rights" have occasionally surfaced, they have either been toothless[26] or exceedingly narrow in scope.

TABLE 1: THE TEN RIGHTS OF THE LOCAL LIBERTY CHARTER

The right to:

1. **A presumption of liberty**
2. **Use and enjoy property**
3. **Separation of powers**
4. **Freedom from crime**
5. **Fiscally responsible government**
6. **Freedom from favoritism**
7. **Accountability**
8. **Local sovereignty**
9. **Transparency**
10. **Reconstitute government**

THE NEXT STEP IN ARIZONA'S MOVEMENT TOWARD FREEDOM AND RESPONSIBILITY

From its beginning, Arizona has embraced traditions of rugged individualism and personal responsibility. Arizona's founders wrote a state constitution with strictly defined limits on government power. And Arizonans have enjoyed a number of victories against governments that overstep their constitutional limits. This provides fertile cultural and political ground for

the Local Liberty Charter. State courts, for example, have recently begun to uphold the Arizona Constitution's strong prohibitions against abuses of eminent domain—specifically prohibiting the seizure of private property for private use and development.[28] Arizona law awards citizens their attorneys' fees and expenses when they prevail in a regulatory enforcement action brought by a local government.[29] Arizona's Administrative Procedure Act contains a "regulatory bill of rights" aimed at protecting individuals from the worst forms of unfair treatment at the hands of the multitudinous agencies of the state.[30] And by restricting unfair property regulations, the 2006 passage of Proposition 207 promises to reduce other regulatory abuses both at the statewide and local levels.[31]

Arizonans have also succeeded in enacting reforms that promote public accountability. In 1992, for example, Arizonans enacted the Victim's Bill of Rights, which incentivizes diligent prosecutions of serious crimes by enabling victims to participate meaningfully in the legal process.[32] Significant progress has also been made on transparency, including laws requiring "truth in taxation" disclosure of proposed property tax levies,[33] public online posting of state contracts,[34] minutes and agendas from open meetings,[35] and disclosure of disciplinary records for public officers and employees.[36]

"Arizona's founders wrote a state constitution with strictly defined limits on government power."

Arizonans have advanced economic liberty. In 2006, Arizona was ranked number one in labor market freedom by the Frasier Institute.[37] Ten years ago, Arizona compelled statewide regulatory agencies to make prompt decisions on licenses, permits, and other regulatory approvals.[38] To reinforce such freedoms, Arizona recently enacted a "Sunrise Act," announcing the statewide policy of restricting occupational regulation to genuine health and safety purposes.[39]

Arizonans have implemented fiscal controls. In 1978, anticipating the taxpayer's bill of rights movement, Arizona enacted a "Tax and Expenditure Limitation," which limited growth of government expenditures to 7 percent of personal income.[40] Additionally, "Proposition 101 limited the property tax rate to 1 percent of assessed value and mandated that assessments on property could increase by no more than 10 percent annually."[41] And in 1992, "Arizona voters approved a ballot initiative that requires a two-thirds vote of the legislature for the enactment of a tax increase."[42]

There are also points of light among Arizona's cities. Phoenix, for example, is credited with pioneering competitive bidding for city services by existing departments and private

contractors in the 1970s.[43] More recently, Phoenix began surveying citizens to prioritize city services and measure performance.[44] The "Phoenix Model" has since inspired even more ambitious programs by such cities as Indianapolis, Charlotte, and most recently, San Diego.[45]

Meaningful—even robust—governmental reform is clearly possible in Arizona. Such reform is desperately needed at the local level. As discussed in the next section, the Local Liberty Charter is both a natural and *necessary* next step for Arizona's freedom and responsibility movement.

LOCAL GOVERNMENTS GONE WILD

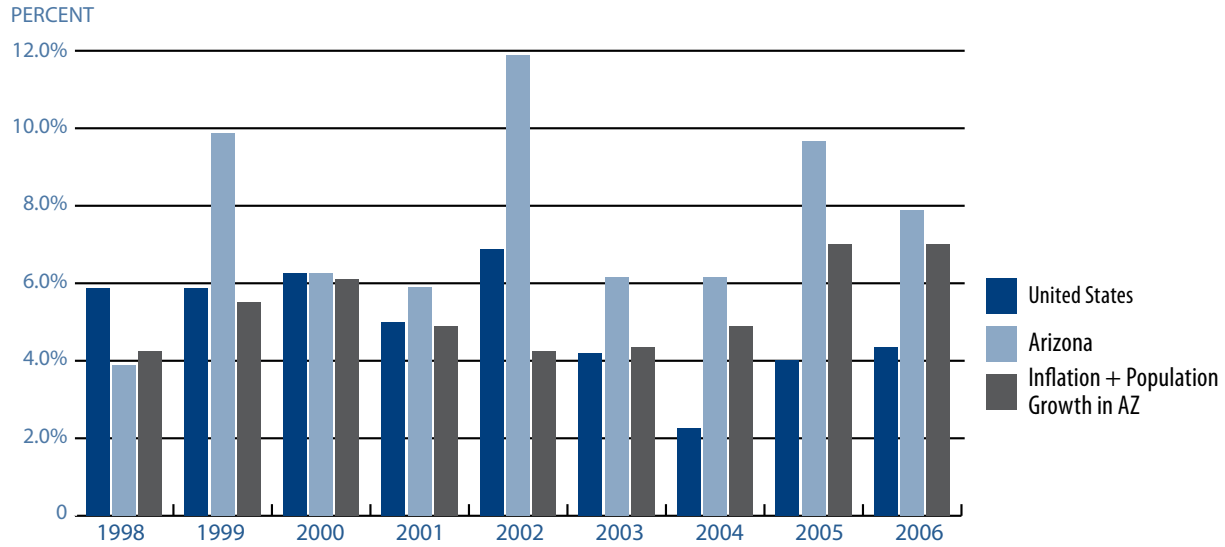
Most of the reforms discussed above have had limited impact on local governments. Arizona's regulatory "bill of rights," for example, is not applicable to local governments or special districts created by the state legislature.[46] Arizona's new Sunrise Act does not clearly apply to local governments, nor does it provide for a private enforcement action or judicial review. Municipalities such as Tucson and Flagstaff are disregarding the plain language and intent of Proposition 207, hoping to generate a "test case" based on the exemption of public health and safety regulations from compensation requirements.[47] Other cities such as Peoria are demanding the waiver of rights under Proposition 207 as a condition of allowing property development.[48] These facts underscore the need for comprehensive reform of Arizona's local governments.

Local Governmental Growth Is Unsustainable

Experts in municipal financial management have been sounding the alarm that a fiscal storm is brewing at the local level.[49] Vallejo, California, for example, recently filed bankruptcy after being unable to meet financial obligations to its public-sector unions.[50] At least 32 cities and towns across the country have declared bankruptcy since 1980.[51] This figure excludes the near-bankruptcies of numerous other local governments, including New York City in 1975; Bridgeport, Connecticut, in 1991; Orange County, California, in 1994; and Pittsburgh in 1995.[52]

The warning signs of impending local government bankruptcy include "unfunded pension liabilities, an anemic economy, costly infrastructure repairs and falling property values."[53] Most, if not all, of these signs exist in Arizona right now. Over the past 10 years, Arizona's numerous local governments have been rapidly expanding their payrolls, thereby increasing public union constituencies who depend on government and demand still more government.[54] Since 1999, for example, the growth of Arizona's local governmental payroll has consistently exceeded that of the federal government, and the sum of inflation and state population growth (see Figure 1).

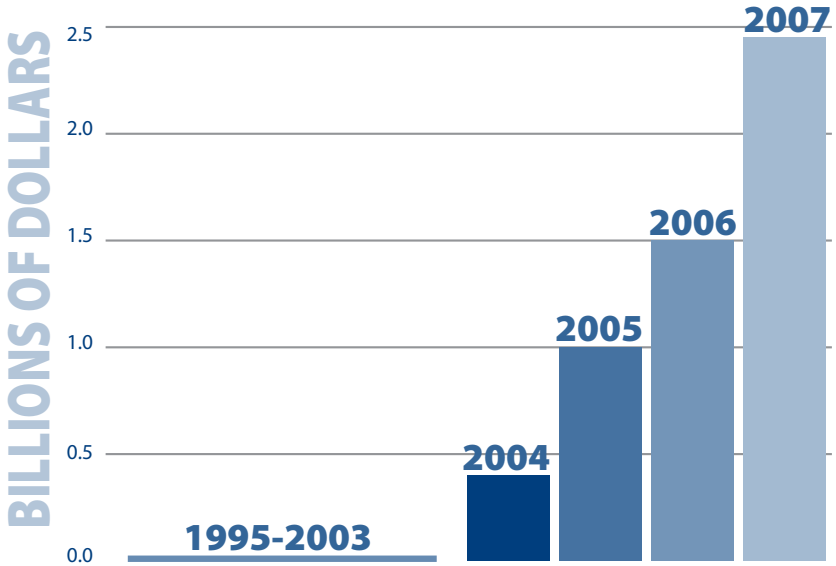
Figure 1: Percentage Increase in Local Government Payroll over Year Prior



U.S. Census Bureau

At the same time, unfunded pension liabilities for state and local government employees have risen rapidly and, according to some, are currently at the worst level in 30 years.[55] From 2006 to 2007 alone, the amount of net unfunded actuarial accrued liability "increased from $1,495,869,118 to $2,439,798,768" (see Figure 2).[56]

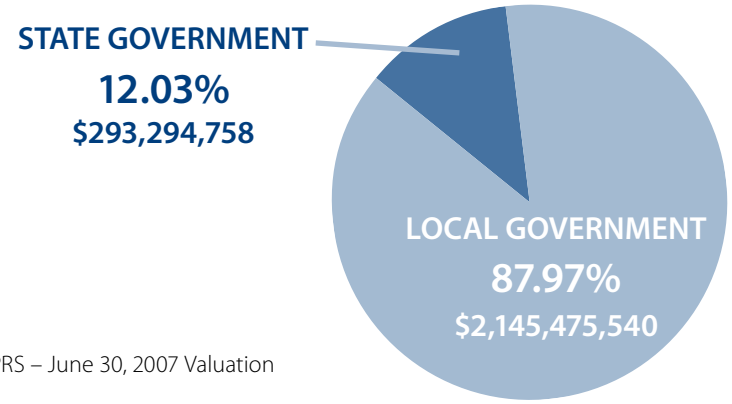
Figure 2: History of Unfunded Actuarial Accrued Liabilities in Arizona Public Safety Personnel Retirement System



Arizona PSPRS – June 30, 2007 Valuation

As shown by the proportion of such liabilities attributable to local governments in 2007 (see Figure 3), which is nearly 88 percent, local governments likely account for most of the growth in unfunded pension liabilities.

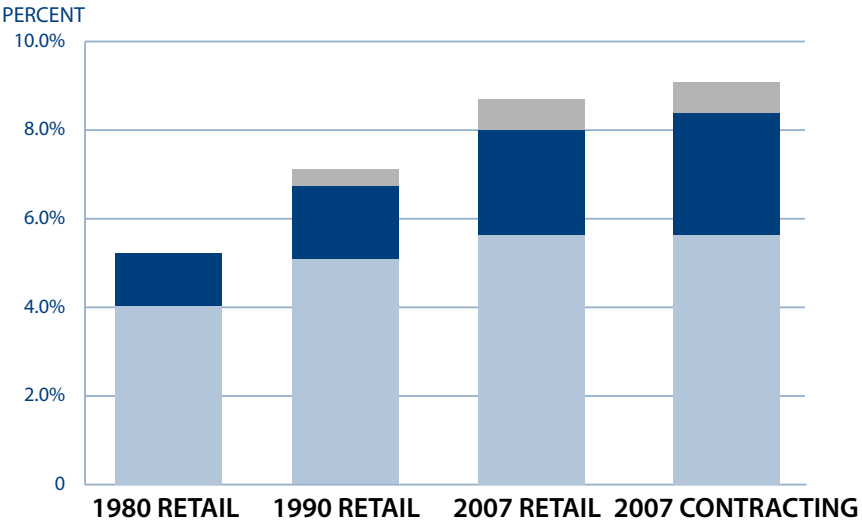
Figure 3: Unfunded Actuarial Accrued Liability in Arizona Public Safety Personnel Retirement System: Local v. State Government Entities in 2007



Arizona PSPRS – June 30, 2007 Valuation

Meanwhile, the average sales tax rate of local governments has been growing faster than the state sales tax, with average city sales taxes doubling since 1980, from 1.2 percent to 2.4 percent (see Figure 4).

Figure 4: Increase in Average Sales Tax Rates in Arizona

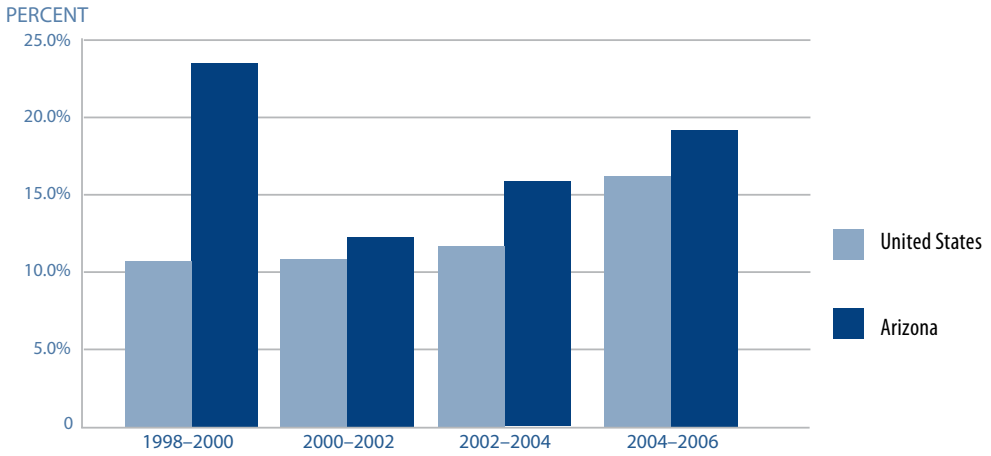


	1980 RETAIL	1990 RETAIL	2007 RETAIL	2007 CONTRACTING
AVG COUNTY RATE	0.0%	0.5%	0.7%	0.7%
AVG CITY RATE	1.2%	1.6%	2.4%	2.8%
AVG STATE RATE	4.0%	5.0%	5.6%	5.6%

Arizona Tax Research Association, 2007 Arizona Tax Conference

Correspondingly, until this year, Arizona's local governmental revenues—mostly local taxes—had been growing at a rate that exceeds that of the federal government (see Figure 5).

Figure 5: Percent Increase in Local Government Revenue



U.S. Census Bureau

But now, in the midst of a national financial crisis, cities such as Phoenix and Scottsdale face huge shortfalls in tax revenues.[57]

The financial picture of Arizona's local governments bears a disturbing resemblance to that of New York City during the 1960s and 1970s, which similarly showed continuous increases in taxes, payroll, and unfunded benefits until an economic downturn revealed the trend as financially unsustainable.[58] As experienced by New York City, when the expansion of local government occurs in times of "relative prosperity," an unsustainable cycle of "distributional politics" can be produced:

> [T]he illusion that a local economy can sustain the higher taxes that go with bigger government encourages weak government leaders to offer small concessions to special interests, such as municipal unions or vocal advocates for the poor. These concessions snowball over time, creating an ever-larger constituency for government spending and making it increasingly difficult to turn back the clock.[59]

In short, with the bursting of the real-estate bubble, the "distributional politics" that devastated New York City three decades ago may have finally reached

Arizona. Even though cities such as Phoenix have moved aggressively to reduce public payroll and local government spending in recent months, such behavior is far from universal, and Arizonans can no longer be complacent about the financial management of their counties, cities, and towns.

Local Governments Are Opaque

Arizona is fifth worst in the nation when it comes to compliance under its public records law.[60]

Moreover, local governments in Arizona are notorious for refusing to share public information—even when the law mandates disclosure. Auditors of public records requests addressed to Arizona state agencies and local governments have reported "a government culture in which some workers believe the documents belong to their agencies, not the people."[61] They report "citizens seeking information from the state's police agencies, school districts or county and municipal officials likely will encounter delays and hassles."[62]

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For example, in response to a request for basic public records, the interim city attorney of Nogales reportedly declared, "[W]e can't have just anyone walk in and show them these records."[63] More recently, the Benson City Attorney refused to provide copies of billing invoices for legal services he furnished to the city, which totaled more than $44,000.[64]

In 2004, the worst offenders were the local agencies that possess the most critical information. Fifty percent of police departments and 25 percent of school districts ignored repeated requests for public records.[65] In fact, during a series of audits in 2001, some police departments responded to requests for public records by filing a "suspicious person" report against the auditor, inviting an auditor into an interview room for questioning, or attempting to charge exorbitant fees.[66] Additionally, in 2004, 14 percent of city and county manager offices did not comply with requests for information regarding expense documents.[67]

It is well established that "secretiveness has helped elites and politicians keep corrupt practices under wraps in many countries."[68] Such secretiveness is especially galling in the United States, where the government is meant to be the servant of the people. And what makes this culture of secrecy

especially dangerous at the local level is that local governments can indulge in regulatory schemes with a speed and intimacy that cannot be matched by state government.

Local Governments Regulate without Restraint

While not exactly nimble, local governments can enact new regulations through their typically unicameral councils much faster than Arizona's bicameral state legislature.[69] Local governments typically consolidate legislative and executive authority in one body. That concentrated regulatory authority easily leads to regulatory absurdities.

For example, Peoria licenses circuses.[70] Scottsdale licenses and regulates people who ply the "magic arts" trade.[71] Mesa, Glendale, and Gilbert each license and regulate "fortunetellers."[72] Glendale regulates even garage sales under its "occasional sales" license.[73] Scottsdale requires a permit, supported by $1,000,000 in insurance coverage, to film public areas for motion pictures and television[74]; Peoria requires insurance coverage of $3,000,000 for filming permits.[75]

Likewise, cities extensively regulate commercial speech—the freedom to propose, advertise, and discuss business transactions.[76] For example, the town of Gilbert has an ordinance that prohibits "all signs not expressly permitted."[77] Before placing notices, placards, and bills anywhere "calculated to attract the attention of the public," Mesa citizens must be able to identify a local, state, or federal law that specifically authorizes them to do so.[78] Portable signs are either prohibited or strictly restricted to certain pre-approved contents in Chandler.[79] In Tempe, only a very special kind of business, "boutiques" selling "primarily locally handcrafted goods," enjoy the right to free speech using portable signs.[80]

CASE STUDY:
City of Tucson v. Michael Goodman

Despite being experienced in Tucson real estate, Michael Goodman was unable to navigate the City of Tucson's bureaucratic briar patch unscathed. In August 2003, Goodman met with Tucson's Development Services Department to discuss developing land he purchased from the city in 1993.[82] The land was within walking distance of the University of Arizona, and he wanted to build eight luxury duplexes for student housing, each on its own individual lot. Eight individual duplexes would be more reflective of the neighborhood's character (and more appealing than one giant apartment building) and provide the flexibility of being able to build each duplex separately to open additional financing options. City officials had no objections and authorized Goodman to reconfigure the existing 10 lots into eight lots and begin constructing the duplexes.[83]

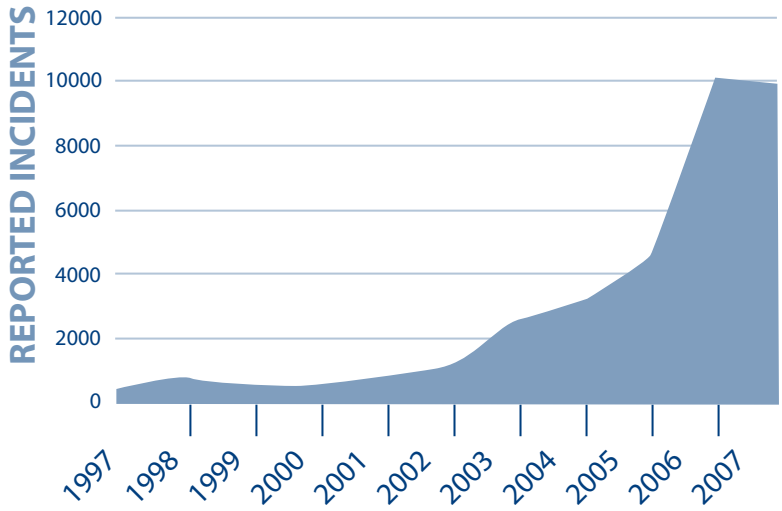
By August 2005, Goodman completed underground water and sewer systems for all eight parcels. He also poured foundations, finished framing, and began installing rough mechanical and electrical systems for one duplex. But when Mike approached the city for permission to allow access to a few of his duplexes through an existing City easement, which was on his property, city officials cited him for violating Tucson Code § 26-40(7)(a) and (b) for failing to furnish the City with documents showing compliance with various storm water control regulations.[84] These storm water-related requirements were never previously required of Goodman nor even mentioned despite his prior discussions with the City and the issuance of his building permits. Nevertheless, Goodman agreed to provide what he thought were the demanded documents in January 2006.[85]

Not only are local regulations just absurd, but they are often matched by a dollop of unaccountable bureaucratic discretion. Such wide authority results in unreliable and contradictory decision-making.

Hard Paternalism Is Knocking

Local governments across the nation embrace paternalism, banning the likes of fast food, smoking, happy hour, trans fats, foie gras, hip-hop clothing, and dancing, on the justification that such bans are for their citizens' "own good."[91] Phoenix was recently ranked 14th in the nation on *Reason Magazine's* personal freedom index—in the upper half of the 35 major cities ranked, but behind such cities as Denver, Milwaukee, and Kansas City, which are hardly known for their libertine culture.[92] With the recent passage of a statewide smoking ban, the hard paternalism wave has finally hit Arizona. That wave may have crested in 2006 with just under 10,000 reported incidents of paternalistic bans across the country (see Figure 6), but like a powerful tsunami, it is still moving inland. The logic of paternalism inexorably pushes local governments to shrink the scope of personal autonomy.[93]

Figure 6: National Nanny-State Bans



Westlaw, http://www.westlaw.com

City of Tucson v. Michael Goodman (cont.)

Almost as soon as Mike submitted what he thought complied with the City's code, the City's Zoning Administrator revoked his original building permits--including the permits for the parcel on which foundations had been poured, framing built, and rough mechanical and electrical systems installed.[86] This action was justified with the claim that the development of the eight duplexes was a "unified project" requiring a single plan of development.[87] City officials acted surprised about Goodman's eight-duplex project despite knowing precisely what his development plans had been when it reconfigured his land into eight parcels and issued his building permits in August 2003. The city also refused to allow Goodman to protect the framing of his in-progress construction from the elements until he secured new building permits. But new building permits required new plans because the City had changed the development law in the interim. Of course, new plans meant new uncertainties under more restrictive standards. So Goodman was forced to fight.

First, Goodman appealed to the Board of Adjustment and lost after the city attorney directed board members to disregard Goodman's vested rights in his building permits.[88] Next, he appealed to state court, which upheld the Board of Adjustment.[89] Then, he appealed to the Court of Appeals, where he finally prevailed in December 2007. The Court ruled there was "no valid legal basis for the Zoning Administrator's revocation of Goodman's permits."[90] But the damage had been done.

Mike's existing foundation work, framing, mechanical and electrical systems on two buildings had been exposed to the elements for nearly two years and vandalized, necessitating expensive repairs. He also incurred attorneys' fees in excess of $100,000 and sustained well in excess of $500,000 in lost rental income. Even with the possible recovery of his damages and fees, Mike's experience illustrates why ordinary citizens with less financial fortitude are forced to buckle under bureaucratic bullying.

Liberty is a seamless web.[94] Disrespect for individual autonomy causes wholesale restrictions on one type of freedom to encroach onto others. The same paternalism that first protected the public from the marketplace of goods and services, and then from the marketplace of ideas about goods and services, now threatens to protect the public from the marketplace of fun or unhealthy lifestyles and basic nonconformity. But paternalism is more than a threat to human dignity; it represents a dangerous misallocation of resources away from local government's core functions.

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Stopping Serious Crime is Not a Serious Enough Priority

Arizona chronically lags national law enforcement performance, and the threat of more crime still looms. Between 1980 and 2005, Arizona's crime rates for the most violent criminal offenses have typically ranged between 5 and 10 percent higher than national rates.[95] As recently as 2000, property offenses were 46 percent higher than national rates.[96] A 2005 report published by the Morrison Institute ranked Arizona worst among all 50 states with regard to its rate of serious crimes, which includes murder, rape, robbery, aggravated assault, burglary, larceny, and auto theft.[97]

William Bratton, Chief of the Los Angeles Police Department and former Chief of the New York City Police Department, warns that violent crime is "making a comeback" across the country because of the deployment of significant policing resources away from traditional crime-fighting to homeland security matters.[98] National statistics show nearly a five percent increase in homicides and almost a 10 percent increase in robberies between 2005 and 2006.[99] And notwithstanding recently reported declines in 2007, Arizona's violent and property crime rates have shown similar signs of resurgence.[100] Between 2004 and 2006, for example, Phoenix saw its homicide rate increase 12 percent and its robbery rate increase 17 percent.[101] These statistics show that focusing Arizona's local governments on their core functions is a necessity.

ACTIVATE THE JUDICIARY

"An elective despotism was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced ... that no one could transcend their legal limits, without being effectually checked and restrained by the others."

—Thomas Jefferson[102]

The Local Liberty Charter is not a pledge signed by politicians who promise to redress grievances. It is meant to be enforceable in court by ordinary citizens—and that means the judiciary must exercise a check on the political process. Specifically, each policy implementation recommended in this report is meant to furnish a private right of action, empowering individuals to file lawsuits, when necessary, to compel local governmental officials to respect freedom and to shoulder legitimate governmental responsibilities.

To ensure that the judiciary understands its crucial role in checking the concentrated power of local government, any implementation of the Local Liberty Charter must be accompanied by plain and inescapable language directing the judiciary to independently assess the legitimacy of the challenged local government action (see, for example, Appendix C, § G.3). To minimize the chances that the judiciary might abstain from checking abusive local political processes based on these doctrines, it is crucial that any reform clearly state who can bring a legal challenge and also when that challenge can be brought (see, e.g., Appendix C, §§ G.1 and G.2).[103]

"The prospect of enforcing the Local Liberty Charter through private litigation, of course, raises the possibility of 'judicial activism' interfering with democracy."

The prospect of enforcing the Local Liberty Charter through private litigation, of course, raises the possibility of "judicial activism" interfering with democracy. Although a serious concern, it is nevertheless important to emphasize that our republican system of government was not built on democracy but on skepticism of concentrated power—regardless of whether that power resided in the states, elected representatives, the electorate, majorities, or minorities.[104] Democratic processes are merely one tool among many aimed at diffusing concentrations of power.[105] The Founders recognized that unchecked democratic processes could themselves result in tyranny when they are captured by political factions or seized by irrational passions.[106] They concluded that this vulnerability necessitated counterweights to those processes, including, but not limited to, such concepts as the

separation of powers into distinct and independent branches of government, federalism, bicameral legislative bodies, the Electoral College for presidential elections, and, of course, the Bill of Rights.[107]

Although it has been argued that the proximity of local government to the citizenry justifies placing greater discretionary power in the hands of local public officials,[108] such proximity unfortunately does not sufficiently counteract the dangers of unchecked democratic processes. Even in Arizona's cities and towns, the power of the ballot box to constrain abusive government is overrated. Accordingly, as discussed in the next subsections, a structural counterweight is needed against local political processes to protect local residents and businesses from such dangers—and the judiciary is uniquely positioned to fulfill that need.

Judicial Engagement Is Needed Because Localities Are Not Exempt from the Problem of Factions and Irrational Voting

One structural failure of representative democracy is presented by the problem of "factions" or special interest groups.[109] The undue influence of special interests arises from the government's power to pass laws that bestow concentrated benefits on a few, with costs dispersed over the many.[110] The wide dispersion of costs ensures that the public in general does not become outraged by or even concerned about the passage of such laws. Indeed, the costs of such laws are often so minimal when individually distributed across the voting public that it can be downright irrational for citizens to incur the cost of their time in trying to understand them, much less to oppose or vote against them.[111] By contrast, the few citizens who receive the concentrated benefits conferred by such laws have an incomparably strong interest to become informed about them and pursue their passage, as well as to maintain their existence.[112] As a result, even the most conscientious city councilmember likely has the palpable sense that there is only one side of the issue.[113] This enables special interests to "capture" the legislative process to serve their narrow interests.

"The undue influence of special interests arises from the government's power to pass laws that bestow concentrated benefits on a few with costs dispersed over the many."

For example, the only people opposing Mesa's recent effort to deregulate fortune-telling are the fortune-tellers themselves, who claim that they are protecting the public from illegitimate purveyors of psychic services.[114] This tiny clique of licensed fortune-tellers prevailed in the city council vote, illustrating

the capture of local occupational regulation by the regulated occupation to exclude potential competition.[115]

As this example suggests, the problem of factions is often magnified, not diminished, at the local level—the State of Arizona, after all, does not bother to regulate fortune-telling.[116] This is because larger jurisdictions tend to have more special interest groups competing for more special benefits. The objectives of these more numerous special interest groups are also more likely to be incompatible.[117] Consequently, there is a greater chance that their lobbying efforts will balance or drown themselves out.[118] In a smaller jurisdiction, by contrast, odds are that there is relatively less diversity of interest and therefore a greater chance that a few special interests will dominate the legislative process. Also, there are typically fewer people in the government to persuade.[119] Moreover, local governments have a relatively greater ability to redistribute wealth and opportunity because power is concentrated in fewer hands, compared with the state or federal level; local governments can also exercise such power legislatively more quickly.[120]

"Judicial engagement to enforce the Local Liberty Charter is justified by the same concerns that prompt judicial enforcement of state or national constitutions."

The problem of factions is then compounded by the threat of irrational voting. Ironically, the modern Arizona metropolis or county may not be big enough to support the multiplicity of special interests needed for competing factions to cancel each other out, but most are still not small enough to give the average voter a big enough stake in the electoral process to really care about the business of local government. The likelihood of any particular individual influencing a local election remains so minute that there is no anticipated cost associated with voting for bad policies.[121] Consequently, the incentive to indulge whims, emotions, and false or even irrational beliefs during the voting process can systematically skew local election results toward bad public policy.[122]

In short, local politics are neither immune from the problems of factions nor irrational voting. Judicial engagement to enforce the Local Liberty Charter is therefore justified by the same concerns that prompt judicial enforcement of state or national constitutions. Such engagement is also warranted in light of inadequate policy competition among local governments to preserve liberty.

Judicial Engagement Is Needed Because Competition among Local Governments Is Insufficient to Preserve Liberty

Although competition among local governments for residents and businesses might incentivize the development of local governmental policies and services that maximize the well-being of the local inhabitants, the reality is that the effectiveness of such "Tiebout competition" has been oversold.[123] A study of data ranging from 1850 to 1990 concluded that people are not sufficiently mobile for robust policy and public service competition to arise between local governments.[124] This is because, "given the various employment, housing, administrative and emotional ties that potential migrants have to a given region," even when people choose to vote with their feet, they are just unwilling to relocate far beyond a certain radius of their childhood home.[125] This means that local governments in a given region have what amounts to a captive resident base. As a result, local governments do not feel enough pressure from the possibility of losing residents to engage in significant policy or service competition. In fact, one study concluded that "Tiebout's model will only achieve efficiency if there are 'literally hundreds of local communities with different public services' in each region."[126] Taken together, there is no reason to believe that "Tiebout competition" between local governments can *alone* overcome the problems of factions and irrational voting. Therefore, the judiciary—the least political of all three branches of government—must have a strong role in remedying abuses of local governmental power.

THE LOCAL LIBERTY CHARTER

Like state and national politics, local politics are too easily distorted to be relied upon *exclusively* to consistently reach good public policy, much less to protect the basic liberties and responsibilities that ensure good public policy.[127] For this reason, there must be a governing set of first principles for local government, which are not subject to an ordinary vote, to structure and check the local political process.[128] The Local Liberty Charter is meant to provide those principles. But there must also be an *institution* outside of the immediate political process that can enforce the Local Liberty Charter.[129] The only such institution is the judiciary because of its relative political insulation and its ancient power to void government actions that are "against common right and reason."[130] That is why this report advocates a *judicially enforceable* Local Liberty Charter.[131] Table 2 outlines the 10 rights and 27 policy reforms discussed below, specifying whether they are best implemented at the statewide or local level.

"The judiciary—the least political of all three branches of government—must have a strong role in remedying abuses of local government power."

THE TEN RIGHTS AND THEIR POLICY IMPLEMENTATIONS

The right to:

1. **A presumption of liberty**
   - Protect liberty with meaningful sunrise and sunset review . . . . . statewide and local reform
   - Ensure prompt regulatory review . . . . . statewide and local reform
2. **Use and enjoy property**
   - Protect property with meaningful sunrise and sunset review . . . . . statewide and local reform
   - Protect property with vesting of rights at purchase . . . . . statewide reform
   - Authorize infill development without regulatory micromanagement . . . . . statewide and local reform
   - Replace zoning with privately enforced restrictive covenants . . . . . statewide reform
3. **Separation of powers**
   - Codify the separation of powers at the local level . . . . . statewide and local reform
   - Check concentrated power with alternative dispute resolution . . . . . statewide and local reform
4. **Freedom from crime**
   - Require performance benchmarking based on core outcomes. . . . . statewide and local reform
   - Improve performance with an overtime pool . . . . . statewide and local reform
   - Remedy poor performance with tax credits and managed competition . . . . . statewide and local reform
5. **Fiscally responsible government**
   - Restrict the business of local government to government. . . . . statewide and local reform
   - Mandate managed competition . . . . . statewide and local reform
   - Restrict spending growth to an objective formula. . . . . statewide and local reform
6. **Freedom from favoritism**
   - Stop subsidies with meaningful sunrise and sunset review . . . . . statewide and local reform
7. **Accountability**
   - Three strikes and you're out. . . . . statewide and local reform
8. **Genuine local sovereignty**
   - Kick the federal funding habit . . . . . statewide and local reform
   - Enforce federalism by demanding local coordination . . . . . statewide and local reform
9. **Transparency**
   - Set a deadline for responding to records requests. . . . . statewide and local reform
   - Require governmental action to cite authority . . . . . statewide and local reform
   - Map local governmental jurisdictions . . . . . statewide and local reform
   - Post all financial transactions online . . . . . statewide and local reform
   - Trigger automatic disclosure of lobbying and regulatory history . . . . . statewide and local reform
   - Post performance benchmarking online . . . . . statewide and local reform
10. **Reconstitute local government**
    - Provide a binding "None of the Above" ballot option . . . . . statewide and local reform
    - Dissolve unaccountable special districts . . . . . statewide reform
    - Establish objective triggers for mandatory bankruptcy filing . . . . . statewide and local reform

"A clear line must be drawn between the powers of local governments and the sphere of individual autonomy needed for economic prosperity and human dignity."

1. The Right to a Presumption of Liberty[132]

"I appear ... this evening as a thief and a robber.... I stole this head, these limbs, this body from my master, and ran off with them." **—Frederick Douglas[133]**

Self-ownership implies the right to freedom of action. Local governments overly restrict the freedom to work, to run a business, and even to communicate in a peaceful and non-fraudulent way. For this reason, the Local Liberty Charter robustly protects the freedom to act consistently with the equal freedom of others. To enforce this freedom, the recommended policy implementation is to codify what Professor Randy Barnett of Georgetown University calls a "presumption of liberty"—the idea that the law should presume each individual is free to act peaceably and honestly. This should be done by precluding, simplifying, or eliminating regulations through "sunrise" and "sunset" review, as well as by eliminating needless regulatory delay.

• Protect Liberty with Meaningful Sunrise and Sunset Review

A clear line must be drawn between the powers of local governments and the sphere of individual autonomy needed for economic prosperity and human dignity. That line is suggested by the Declaration of Rights to the Arizona Constitution, which states: "The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people."[135] This provision naturally supports the idea that the State of Arizona's powers, including those of local governmental subdivisions, are presumptively limited by retained and inalienable individual rights. Or, to borrow from Professor Barnett, that the powers of the state and its subdivisions were meant to be islands floating in a sea of liberty.[136]

Unfortunately, legal precedents have yet to embrace this natural "presumption of liberty" interpretation of the Arizona State Constitution's "reservation of rights" provision. Instead, courts have held that the "reservation of rights" provision was meant only to reinforce the collective vesting of broad legislative power in the hands of elected representatives.[137] Under this precedent, the legislative power of the state—and of local government (if so delegated)—is a vast sea,

merely dotted with such islands of individual liberties as are specifically chartered in the state constitution. Regardless of whether this interpretation reflects the Arizona Constitution's original meaning,[138] its predominance underscores the practical necessity of an additional legal framework for preserving liberty, especially those freedoms not specifically identified in the state constitution.

"If taken seriously, sunrise and sunset review could be a catalyst for common sense regulatory simplification."

The model for that framework already exists in the form of sunrise and sunset review laws. These laws, which have been enacted in Arizona and across the country, aim to restrict the promulgation of laws to those that are genuinely "required" for public health, safety, or welfare.[139] Such laws typically require advocates to prepare a detailed report to a legislative committee showing, among other things, that a real threat to public health, safety, or welfare exists and that the proposed law is more effective in addressing that threat than less restrictive regulatory, common law, or market-based alternatives. In the case of sunrise laws, the failure to make this demonstration prevents the proposed law from moving out of committee. In the case of sunset laws, an existing law automatically expires unless a similar demonstration is made to the satisfaction of a sunset review committee.

If taken seriously, sunrise and sunset review could be a catalyst for common sense regulatory simplification.[140] This is because sunrise and sunset review can counteract the structural failures of democracy that cause local governments to over-legislate. By requiring "multiple stages of legislative action to sustain a particular public policy," sunrise and sunset reviews tend to "increase the probability that an optimal public policy will be selected by legislators."[141] Additional stages of fact-finding increase the amount of information in the policy-making process, which reduces the lobbying advantage enjoyed by special interests relative to ordinary citizens.[142] And requiring regulations specifically to sunset (i.e., imposing a temporary duration on regulations) helps end bad public policies that may have resulted from political influence, innocent ignorance of adverse consequences, or passing irrationality.[143]

For these reasons, enforcing the right to a presumption of liberty should require thorough sunrise and sunset review establishing that a proposed regulation is

genuinely required for public health, safety, or welfare but is not paternalistic. This should involve a greater inquiry than simply asking whether "harm" would result without the proposed regulation. A naked harm standard could justify nearly any regulation because of the externalities that are intrinsic to social living in urban settings.[144] Rather, it should be kept in mind that regulation (1) is often the product of factional influence, not sound public policy; (2) typically overrides the judgments of innumerable competent individuals; and (3) is often counterproductive because of its unintended consequences. Consequently, the sunrise and sunset review process must promote a full appreciation of the wide-ranging and devastating risks of harm from regulation—not just the asserted risks of harm from the absence of regulation—and regulations should also be carefully crafted to target the sort of harm that is at least commensurate with the sort of harm associated with misdirected regulation.[145]

Toward that end, the regulatory proponent should be required to establish each of the following seven factors:

1. The regulation's objective is protecting public health, safety, or welfare, not restraining competent adults for their own good nor promoting some private interests to the detriment or disadvantage of others.
2. The regulation is within the power of the local governmental body to enact.
3. The regulation targets an activity or condition that is an actual threat to public health, safety, or welfare, which is verifiable, substantial, and not remote.
4. The regulation will substantially reduce or eliminate the threat it targets.
5. The regulation's short, medium, and long-term costs and adverse consequences are not out of proportion to its benefits.
6. Enforcement of the regulation can be performance-benchmarked.
7. The regulation is the least restrictive and least onerous restraint on freedom consistent with feasibly reducing the targeted threat to public health, safety, or welfare.[146]

The first factor is aimed at blocking proposals for regulation that reflect factional influences to which local governments are especially susceptible. The second factor protects the rule of law by confirming the existence of a legal framework for the proposed regulation. The third, fourth, and fifth factors are geared toward ensuring that the regulation targets harms that are proportionate to the risks of regulation and that there is a high degree of confidence in the regulation's efficacy in promoting public health, safety, and welfare. The sixth factor ensures that there can be transparency and accountability in regulatory enforcement. And the seventh factor ensures that the regulation is well tailored to the conduct that it targets, in order to preserve a maximum degree of freedom and to minimize unforeseen and unintended adverse impacts from the regulation. Essentially the same sort of review should later take place at a designated "sunset" date. (Appendix C provides an example of model sunrise and sunset legislation.)

"The constitutional "organic law" of a local government should prohibit enforcement of any regulation that is enacted or extended without a formal process of sunrise and sunset review."

Of course, the predominant criticism of sunrise and sunset review laws is that they are not and never have been taken seriously. Consequently, they are blamed for generating unjustified administrative costs or for only leading to the repeal of minor regulations that would likely have been repealed by ordinary legislative processes.[147] This criticism has some merit. Under the "doctrine of entrenchment," a current legislative body cannot bind future legislative bodies by mere legislative action. For this reason, if enacted as a law meant to govern the legislative process, it is not immediately clear what can be done to enforce sunrise and sunset review laws if they are ignored or not seriously enforced by a legislative body. The few lawsuits that have been brought to enforce such laws have had mixed results.[148] However, the potential inefficacy of sunset and sunrise review may be overcome with three policy fixes.

First, the constitutional "organic law" of a local government—such as its charter or constituting statutory framework—should prohibit enforcement of any regulation that is enacted or extended without a formal process of sunrise and sunset review. Second, in the event of a lawsuit challenging the legitimacy

of a local governmental regulation, the same organic law should empower the judiciary to independently review the regulation for compliance with sunrise and sunset processes and fulfillment of the requisite legal factors.[149] Third, when conducting judicial review of freedom-restricting regulations, it should not matter whether City Hall chose to flex its regulatory muscle against economic freedom or against noneconomic freedom. Economic regulations are not more amenable to "review and correction through democratic politics" than noneconomic regulations.[150]

"Half of the states in the nation have enacted statutes requiring or setting firm deadlines for regulatory approval, most of which give automatic approval to a regulatory application if the deadline is missed."

It can be safely presumed that those on the losing end of the legislative stick—especially in local politics—tend to be relatively politically powerless in some respect, regardless of whether the law restricts their economic freedom or their noneconomic freedom. Put differently, "virtually every case challenging the constitutionality of a law will be brought on behalf of a litigant who is absolutely unique in some ways, and a member of a powerless minority in many other ways."[151] Therefore, even if one holds the idea that judicial scrutiny should only be heightened based on the goal of correcting for political weakness, that premise leads to the conclusion that judicial review should be content-neutral between economic and noneconomic regulations.[152] Taken together, these safeguards will ensure that the local government meant to be restrained by sunrise and sunset scrutiny is not the sole judge of whether a given regulation withstands such scrutiny.

- **Ensure Prompt Regulatory Review with Automatic Approval**

Freedom of action is impossible and economic development is hobbled when the government unreasonably delays furnishing necessary regulatory approvals. That is why more than half of the states in the nation have enacted statutes requiring or setting firm deadlines for regulatory approval, most of which give automatic approval to a regulatory application if that deadline is missed.[153] In Minnesota, for example, agencies and local governments have 60 days to approve or deny applications for permitting, licensure, zoning, or other regulatory approval—otherwise, the

application is automatically approved.[154] In 1996, Arizona mandated that state agencies (defined to exclude local governments) promulgate rules establishing deadlines for regulatory approvals or denials, encompassing environmental, business, and occupational regulations.[155] This has resulted in mandated approval or denial periods for permitting and licensing of all kinds ranging from seven to 180 days.[156]

The benefit from these reforms has been enhanced certainty in business planning and greater responsiveness by regulatory agencies.[157] The same benefits could accrue at the local level. Developers in the Phoenix area, for example, routinely allow "one year to work through city regulatory processes when the land is already appropriately zoned."[158] If that process "can be whittled down to five or six months," the prospects for redeveloping neglected neighborhoods will be greatly enhanced.[159] Moreover, setting strict deadlines for regulatory approval of all types of licenses and permits is clearly feasible—a recent review of the performance of 60 Arizona state administrative agencies in nearly every regulatory field indicated that 99.5 percent of 852,382 applications were processed within established deadlines.[160] Accordingly, implementing the right to a presumption of liberty should require prompt regulatory approval from local governments with automatic approval in the event of unreasonable processing delay.

2. The Right to Use and Enjoy Property

"Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, that alone is a just government, which impartially secures to every man whatever is his own."

—James Madison[161]

Property owners should have the right to use and develop their properties as they see fit so long as they do not violate the rights of others. No governmental action should restrict or deprive anyone of their property unless such action is genuinely required to prevent, remedy, or punish a tangible injury to another. That is why the Local Liberty Charter advocates additional protection for property rights.

"No governmental action should restrict or deprive anyone of their property unless such action is genuinely required to prevent, remedy, or punish a tangible injury to another."

The recommended policy implementation involves simplifying and eliminating land use regulations through sunrise and sunset review, as well as transforming zoning into a freedom-friendly legal framework.

- **Protect Property with Meaningful Sunrise and Sunset Review**

Proposition 207 requires governments to compensate property owners if a regulation reduces the value of their property. But very little legal protection exists against regulations that whittle away at the number of legal ways owners can use their property, without an immediate or quantifiable impact on land value. For example, Scottsdale recently considered passing a new zoning law that prohibits check-cashing stores from being located near each other or near "sensitive uses."[162] Despite the fact that this proposal would diminish the land uses currently permitted in Scottsdale, the protections of Proposition 207 were never considered. This is because it is difficult to measure the loss in land value associated with merely removing one stick out of the property-rights bundle. Seemingly innocuous land use restrictions are thus free to multiply despite Proposition 207, eventually having a significant cumulative impact on land values.

"Very little legal protection exists against regulations that whittle away at the number of legal ways owners can use their property, without an immediate or quantifiable impact on land value."

In short, property rights in Arizona still run the risk of "death by a thousand paper cuts." Moreover, Proposition 207 has an even larger loophole for those regulations that actually have a large and immediate adverse impact on land values—it exempts previously existing land use regulations, as well as property regulations that purportedly protect against direct threats to public health and safety. This is a loophole, not merely an exemption, because it creates a significant opportunity for local governments to dress up social engineering as public health and safety regulation. Whether a property use is a direct as opposed to an indirect threat to public health and safety is often in the eye of the beholder. Proposition 207 provides inadequate guidance for distinguishing between legitimate and illegitimate public health and safety regulations. Moreover, even leaving aside deliberate efforts to evade Proposition 207, the truth is that public health and safety

regulations are typically enacted with little or no formal scrutiny—and without any consideration of less restrictive alternatives.

Building codes, for example, simply adopt privately promulgated standards from the International Building Code. Oftentimes, these codes are adopted by local governments without any consideration of whether they actually are legitimate public health and safety regulations or whether they needlessly increase building costs.[163] Equally often, land use regulations lack any measurable or objective meaning, subjecting property owners to ad hoc regulation. For example, laws requiring compatibility between a proposed development and existing comprehensive plans or uses are often so vague that building permit applicants rarely know whether they have met the relevant standard.[164] Proposition 207 provides inadequate protection against such illegitimate regulation.

Proposition 207 was a robust and necessary first step to save property rights in Arizona, but the bleeding can only be stopped by demanding rigor in the creation of any property regulation. Advocates of regulation at every level of government should be required to marshal evidence demonstrating that public health, safety, or welfare will be protected by any new land use regulation they propose. The right to a presumption of liberty should apply to the enjoyment of property as much as it applies to freedom of action in general. The Local Liberty Charter, therefore, proposes subjecting to sunset review all existing property regulations, which are exempted from Proposition 207's protections against regulatory takings, as well as subjecting to sunrise scrutiny all such subsequently enacted regulations.[165]

Proposition 207 was a robust and necessary first step to save property rights in Arizona, but the bleeding can only be stopped by demanding rigor in the creation of any property regulation.

• Protect Property Rights with Immediate Vesting of Rights

The doctrine of vesting currently determines when a protected property right is acquired. Only after an interest in property has "vested" does such an interest become a property right, which must be recognized by local governments and protected

against "zoning changes that alter the use of the property or otherwise diminish its value."[166] Presently, no statutory law in Arizona specifies when property owners can safely rely upon existing zoning laws or land use approvals.[167] Generally, a certain degree of pre-investment of time, money, and regulatory approval with respect to the property is required before one's interest is deemed to vest sufficiently to justify developing property. But the precise degree is difficult to ascertain under existing precedent.[168] Jordan Rose, a prominent land use attorney in the Phoenix metro area, has observed that, because of this lack of clarity, landowners are forced "to gamble thousands or millions of dollars on the whims of judges."[169]

Other states have statutes that identify clearly the event that causes vesting of property rights. Under Colorado law, property rights vest immediately upon the approval of a site-specific development plan.[170] New Hampshire, likewise, deems property rights to existing lawful land uses vested "for a period of four years from the date of approval of the plat or site plan."[171] Such laws constitute a step in the right direction, but they still invite arbitrary and abusive conduct by local governments, which still retain control over plat or plan approval.

Vesting doctrine was never meant to be an arbitrary hurdle to the enforcement of property rights. It was meant to require a demonstration that the enforcement of property rights is based on a real connection to the use of the property. But because Arizona law often does not recognize the vesting of property rights until after substantial investments are made, the value of undeveloped property is artificially diminished.[172] This is wasteful and economically inefficient because it gives property owners who wish to secure their property rights a significant incentive to engage in property development that might not otherwise occur so quickly or so intensively.[173] And it is unfair because it fails to recognize that in a modern economy most of the productive or investment planning for property occurs long before development plan approval, and usually even before the property is purchased. For these reasons, the mere act of purchasing property usually signifies a real connection between the owner and the lawful uses of the property. Therefore, the Local Liberty Charter proposes a rule of vesting that preserves—or "locks in"—all lawful property uses under existing laws for the owner, purchaser and all subsequent transferees, subject only to future regulations that survive sunrise and sunset review.

"The mere act of purchasing property usually signifies a real connection between the owner and the lawful uses of property."

- **Authorize Infill Development without Regulatory Micromanagement**

Borne of bureaucratic central planning, zoning inevitably lags on-the-ground economic reality, resulting in what the *Arizona Republic* has criticized as "a huge disconnect" between zoning codes and desired development.[174] But the answer to bad planning is not more planning. As the late law professor Bernard Siegan observed:

> Planning in a democratic society confronts overwhelming problems. It cannot remain "pure" because the persons elected to govern hire its officials and often seek to influence or control its policies. Planners are primarily interested in achieving their objectives and frequently accord secondary status to individual liberties.... Planners are incessantly subject to the demands of special interests and their lobbyists, some of which are likely to be adopted and thereby destroy the gestalt of the plan.[175]

Tweaking traditional zoning with yet more "visioning" by planners, such as evidenced by Phoenix's recently proposed "Form Based Code," will not overcome the political and economic dynamics that undermine the coherence and relevance of zoning laws. A better solution to the problem of special interest–driven zoning is to create legal frameworks that bypass regulatory micromanagement as much as possible.

"A better solution to the problem of special interest-driven zoning is to create legal frameworks that bypass regulatory micromanagement as much as possible"

One way to do so is to implement a freedom-friendly zoning overlay similar to what was successfully employed by Curt Pringle, mayor of Anaheim, California.[176] Mayor Pringle targeted a variety of areas in town for redevelopment, but rather than use extensive planning, subsidies, or eminent domain, his staff devised a zoning overlay based on the physical infrastructure capacity of the area and the principle of allowing the market to operate freely within very basic development constraints. For example, in one neighborhood, the city determined that the existing sewer and roadways could support 9,500 housing units.[177] The city then created a zoning overlay that allowed mixed commercial and residential uses, allocating building permits on a first-come, first-served basis for 9,500 housing units. Without the city micromanaging the location or mix of residential or commercial units, the neighborhoods covered by the overlay exploded with compatible and synergistic economic activity.[178]

Local governments in Arizona should be able to replicate Anaheim's overlay model based on existing statutory authority.[179] A number of Arizona cities, such as Mesa, already authorize "overlay zoning" to allow for higher-intensity land use.[180] But for the most part, such overlay authority seems to be aimed at placing more restrictions on the lawful uses of properties, rather than increasing the scope of lawful uses and easing regulatory approval. Tucson, for example, is well known for its deliberate use of overlay zoning to squelch the development of dormitory housing in the vicinity of the University of Arizona.[181] Local governments in Arizona, on the whole, are disregarding the Arizona law that authorizes the creation of "infill incentive districts" by which local governments are broadly authorized to relax zoning, code, and permitting requirements in areas that meet certain objective criteria that correlate with urban blight.

"Local governments should not place conditions on infill incentive districts without a real, demonstrable connection to legitimate public health and safety goals."

One exception is the City of Sierra Vista, which recently passed a resolution implementing the regulatory loosening Arizona law allows.[182] Sierra Vista's policy broadly contemplates that it "may consider" wide-ranging waivers and other relief from the requirements of its development code. The catch is that Sierra Vista has also declared its intention to exact valuable concessions from a developer, including the provision of subsidized housing and compliance with fancy architectural guidelines. This stance illustrates that "the drawbacks [of flexible infill development] are the cost of negotiating each case individually and the uncertainty of outcomes that can depend on personalities and politics."[183]

Local governments should not place conditions on infill incentive districts without a real, demonstrable connection to legitimate public health and safety goals. After all, local governments are still exercising their regulatory authority when they conditionally restrain the peaceful and productive development of land to its highest and best use. For this reason, the conditions that local governments may administratively place on granting infill authority should first be required to withstand sunrise review based on the seven factors previously discussed.

- **Replace Zoning with Privately Enforced Restrictive Covenants**

The unvarnished truth is that just about any zoning law functions as a vehicle for politics to dominate property rights.[184] This is because the primary criteria for zoning decisions typically boil down to: "How many people favor and how many oppose? Who supports the zoning of the site and who objects to it?"[185] As a result, "when the final vote comes, most if not all legislators will vote for reasons that have no relationship to maximizing production, satisfying consumer demand, maintaining property rights and values or planning soundly."[186] Not surprisingly, studies of Philadelphia, Lexington, Chicago, New York, and Los Angeles have shown "control of property through zoning is more chaotic than it is orderly."[187] Therefore, there is good reason to consider abandoning centrally planned zoning altogether in favor of the decentralized system found in Houston.

Houston's land uses are coordinated almost entirely by private easements, covenants, and contractual restrictions, which arose through voluntary contract and are administered by homeowners associations.[188] A comparative study of Houston's private land use arrangements found that:

- Economic forces tend to make for a separation of uses even without zoning. Business uses will tend to locate in certain areas, residential in others, and industrial in still others. Apartments will tend to concentrate in certain areas and not in others. There is also a tendency for further separation within a category; light industrial uses do not want to adjoin heavy industrial uses, and vice-versa.
- When the economic forces do not guarantee that there will be separation, and separation is vital to maximize values or promote tastes and desires, property owners will enter into agreements to provide such protection.
- In the absence of zoning, municipalities will adopt specific ordinances to alleviate specific land use problems.
- The experience of the FHA [Federal Housing Administration] suggests that the appreciation over the years in values of new and existing single-family homes has not differed in Houston from those of zoned cities.[189]

Houston is evidence that planning bureaucracies and zoning laws are unnecessary to coordinate compatible property uses. But transitioning away from

zoning requires a process that is sensitive to existing reasonable expectations. It should involve essentially two phases: (1) sunset review of existing zoning restrictions, and (2) legislative transformation of surviving zoning restrictions into private restrictive covenants.

Phase 1: Sunset Review of Existing Zoning Restrictions

Sunset review of existing zoning restrictions is necessary to minimize the possibility that transforming zoning into restrictive covenants might result in regulatory takings or otherwise unfairly restrict property rights to a greater extent than provided by existing zoning laws, which might trigger the need for just compensation under Proposition 207.[190] For example, some cities take a very flexible approach to their zoning laws, freely granting variances or amending the zoning map upon request of landowners or upon a minimal showing. In those cities, if existing zoning regulations were simply transformed into private restrictive covenants, property owners would effectively be subjected to more onerous and permanent land use restrictions than they otherwise would face under zoning. This means that, if the right to use one's property peaceably and productively is to be respected, the legal process for transitioning away from zoning to private restrictive covenants must protect reasonable expectations of flexibility in land use regulation. That change requires a sunset review process to eliminate or relax land use restrictions that would otherwise be eliminated or relaxed under existing laws. The recommended sunset review process is described below.

"If the right to use one's property peaceably and productively is to be respected, the legal process for transitioning away from zoning to private restrictive covenants must protect reasonable expectations of flexibility and land use regulation."

During Phase 1 of the transition away from zoning, sunset review of existing land use regulations would be triggered by applications for review filed by property owners within a reasonable, widely publicized deadline. This would focus administrative resources on areas of genuine concern, as well as decentralize the process, allowing local knowledge to drive sunset review, rather than bureaucratic central planning. In essence, property owners would be authorized to file applications requesting sunset review of existing zoning restrictions, specifying desired conditional uses, variances, or zoning map amendments

for their parcels. To protect investment-backed expectations formed in reliance upon existing zoning regulations, the transitional law should require sunset review applications to be filed in compliance with established notice and hearing procedures for analogous relief under existing zoning laws (presuming those procedures are reasonable); and the outcome of such sunset review should be determined by the factors established under existing zoning laws.[191]

Property owners who obtained their desired outcome from sunset review would then be authorized to record notice of their respective conditional use, variance or zoning map amendment in the chain of title for their parcel. Adverse outcomes from sunset review could be challenged by property owners through established legal processes or by exercising the option of binding alternative dispute resolution (discussed below in connection with the right to separation of powers). However, because this means the final resolution of sunset review disputes might take considerable time, the second phase of transitioning away from zoning—transforming zoning restrictions into private restrictive covenants—should proceed immediately and concurrently.

"Property owners would have the right to enforce restrictive covenants against all parcels within 300 feet of their property."

Phase 2: Transforming Zoning Restrictions into Private Restrictive Covenants

Phase 2 would involve enacting a law that deems existing zoning regulations as the equivalent of restrictive covenants on title, subject to modification based on the final outcome of sunset review as described in the previous section. To protect existing expectations without creating windfall enforcement rights, this law should specify that the benefit of any restrictive covenant (i.e., the power to enforce original zoning restrictions) runs only with title to those properties that fall within a reasonable proximity of the formerly zoned property. The requisite "reasonable proximity" should be codified to protect the interests currently protected by existing zoning laws under the definition of a "zoning area," which requires notice of proposed zoning changes to be given to all property owners within 300 feet of the location of the proposed change.[192] Mirroring the definition of a "zoning area," this means that property owners would have the right to enforce restrictive covenants (established by the prior zoning law) against all parcels within 300 feet of their property. To protect

subsequent reliance upon the chain of title, the law also should set a reasonable deadline requiring property owners to record notice of their right to enforce restrictive covenants against the burdened properties. If the owner fails to record this notice within the deadline, the law could deem any such enforcement rights abandoned.

- **Land Use Regulation Without Zoning Would Work**

This flexible, decentralized system would shield property rights from meddling by local politicians and bureaucrats. It would also preserve the best elements of zoning—certainty over what uses are permitted—while allowing property uses to evolve freely with market supply and demand, consistent with a reasonable degree of protection for expectations that arose based on the original zoning law. Specifically, once the initial legal framework establishing restrictive covenants and enforcement rights based on the prior zoning has been established, the process of securing permission to develop property for what had been conditionally prohibited uses—such as special uses or conditional uses—could then be obtained by property owners, either by negotiation with the property owner who claims the benefit of the related restrictive covenant (aimed at securing a release or an easement) or by seeking a declaratory judgment in state court that the proposed use fulfills the factors established under the prior law (which is now incorporated into title as a restrictive covenant). Similarly, permission to develop property for unconditionally prohibited uses—the equivalent of a zoning change under the old regime—could be obtained either by negotiation or by seeking a declaratory judgment that the proposed new use meets the prerequisites established for zoning map amendments under the prior law.

"Consequently, property owners would still be protected from new property development that is shown to undermine public health and safety or actually interfere with previously established lawful property uses."

There is no reason to believe that the challenges associated with transitioning to a system of private restrictive covenants come anywhere near the challenges associated with the documented chaos of politically driven zoning practices. Transitioning to privately enforced restrictive covenants entails the risk that surrounding property owners might frustrate future development by refusing to accept any amount of money in exchange for releasing restrictive covenants.

However, litigation to declare existing restrictive covenants ineffective still remains an option under the factors of the old zoning law. Unlike litigation with local governments, which possess vast resources courtesy of their taxing authority, litigation between private parties almost always results in settlement. For this reason, any problem of unreasonable holdouts would most likely be ephemeral.

The flipside of the asserted problem of holdouts is that transitioning from zoning to private restrictive covenants might result in "too much" development. In this context, as in Houston, the common law of nuisance would still be operative alongside land use laws that survive robust sunrise and sunset review. Consequently, property owners would still be protected from new property development that is shown to undermine public health and safety or actually interfere with previously established lawful property uses. Moreover, if the transaction costs associated with privately enforcing restrictive covenants or nuisance laws proved individually too expensive, property owners would be free to band together, forming the equivalent of homeowners associations to enforce them. But unlike politically driven, centrally planned zoning restrictions, any limit on the nature or extent of development would be rooted in actual or threatened violations of individual rights.

3. The Right to Separation of Powers

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."—**James Madison**[193]

Combining legislative, executive, and quasi-judicial authority in one unchecked public body enables the abuse of power and biased decision-making. For this reason, the Local Liberty Charter promotes the diffusion of power, consistent with the principle of separation of powers, while also recognizing the unique efficiency needs of local government. The recommended policy implementation would check the concentration of power in local government by giving citizens aggrieved by quasi-judicial and administrative local government action the option to demand alternative dispute resolution over questions of regulatory interpretation and application.

- **Codify the Separation of Powers at the Local Level**

To structurally limit "the opportunity for abuse of power," legislatures are generally denied the opportunity to "sit in an executive or quasi-judicial capacity to decide how regulations should be applied in particular cases."[194] But there have traditionally not been clear lines of demarcation between the legislative, judicial, and executive powers at the local level.[195] This tradition arose when the scope of governmental power was much more strictly construed than it is today.[196] It persists because courts have not yet recognized a constitutional requirement that local governments be organized consistently with separation-of-powers doctrine.[197] As a result, citizens who participate in local government often have the Alice in Wonderland experience of criticizing a hostile member of the city council at a public meeting, only to watch the same city council member return after a pro forma adjournment to sit on the local planning commission and adjudicate their personal regulatory matters.

"Legal precedent has blurred the normal distinctions between local legislative action on the one hand and executive and judicial action on the other."

In Arizona, local elected officials traditionally wear multiple hats. Furthermore, legal precedent has blurred the normal distinctions between local legislative action on the one hand and executive and judicial action on the other. Elsewhere, it is generally recognized that legislative action is either a matter of "determining how the public fisc will be expended" or "open-ended, affecting a broad class of individuals or situations ... resulting in the formation of a general rule or policy ... [which is] prospective, determining 'what the law shall be in future cases.'"[198] The same principle is reflected to some extent in Arizona law.[199] This common definition logically precludes deeming "legislative" any local governmental action that applies specific legal factors to determine or enforce the rights and responsibilities of particular citizens. Nevertheless, regulatory approvals needed for permitting, variances, and zoning changes have often been deemed "legislative" simply because a legislative body makes them—despite the presence of multifactorial tests that misleadingly suggest the approval process is administrative or adjudicative.[200] As explained by one court, so long as the "final decision" rendered by the legislative body on

an individual permitting application is "expressly stated [in the governing ordinance] to be entirely discretionary (e.g., a matter of grace)," the decision is ipso facto "legislative."[201] Such purportedly "legislative" actions are then subject to minimal judicial scrutiny when they are challenged in court.

As a result, local elected officials often not only determine general policy, but they effectively execute and adjudicate policy. This concentration of legislative, executive, and quasi-judicial power in the hands of elected officials makes a farce out of whatever legal tests or factors appear in local regulations. Reforms are needed to ensure that such "broad local powers do not corrupt those who wield them, and that the people are protected from their government just as they are benefited by it."[202]

"This concentration of legislative, executive, and quasi-judicial power in the hands of elected officials makes a farce out of whatever legal tests or factors appear in local regulations."

Even at the local level, there is a fundamental need for impartial rule of law. The "whole power" of one or more of the three departments of government "should not be exercised by the same hands which possess the whole power of either of the other departments."[203] Corruption is a real risk and, therefore, a substantial justification for diffusing concentrations of local power.[204] Additionally, there are efficiency gains from defining the roles of distinct departments of local government.[205] The recommendation made here builds on the Phoenix Charter model, which mandates separation between elected officials and city administration.[206]

The fundamental problem with classifying regulatory actions aimed at specific individuals as "legislative" is that doing so cannot be squared with the constitutional prohibition on special laws. The Arizona Constitution bars local governments from enacting laws that are only uniquely applicable to specific individuals and not to the general public.[207] The granting of a permit, variance, or zoning change in consideration of the unique circumstances of identifiable individuals is the epitome of a governmental action that predominantly affects specific individuals and not the general public. Such actions simply cannot be categorized as "legislative," because if they really were, they would

be unconstitutional special laws. The only way to avoid this constitutional classification conundrum is to firmly embrace the principle that regulatory actions that target and affect specific individuals are not legislative acts.

Accordingly, it is recommended that the organic law of a local governmental entity specifically declare that the legislative power is restricted to public finances and general policy, and to expressly exclude from the local legislative power specific applications of regulatory policy to particular individuals, such as in the case of zoning, permitting and licensing. Additionally, the local executive power should be expressly defined as the administrative or ministerial execution of general policies and laws. All other local governmental actions should be categorized as judicial or quasi-judicial. These understandings would enable the creation of a feasible legal framework to check and balance the powers of local government, which is discussed below.

- **Check Concentrated Power with Alternative Dispute Resolution**

Local governments are not meant to have all of the legalistic "bells and whistles" of state or federal government. There are speed and efficiency needs unique to local government. It would be unreasonable to expect precise one-to-one correspondence between applications of separation-of-powers doctrine at the local level as compared with higher levels of government. But that does not mean the doctrine should not apply at all.

The codified boundaries between legislative, executive, and quasi-judicial power need not require local governments to establish formally separate and distinct departments where doing so is inconsistent with budgetary reality. Rather, alternative dispute resolution (ADR) could provide an inexpensive and effective check on concentrated local power.

There are typically two types of ADR: mediation and arbitration. In mediation, a mediator facilitates negotiation toward an agreement on an acceptable resolution of the dispute; in the case of binding mediation, the mediator reaches a decision that best accommodates the interests of both parties in the dispute. In arbitration, an arbitrator hears from both sides and reaches a decision resolving their dispute based on informally presented evidence and testimony. Either type of ADR is much less costly than litigation, and both types can resolve disputes in a fraction of the time typically consumed by litigation. Accordingly, it is recommended that if nonlegislative functions are to be performed by elected officials (who also hold legislative power), or if quasi-

judicial functions are to be performed by administrative officials (who also hold executive power), then in the event of a dispute, the organic law should diffuse such concentrated power by giving disaffected citizens the legal option of demanding ADR.[208]

If the ADR option is exercised, it is recommended that the Local Liberty Charter require a *binding* resolution within a specific period, rather than a nonbinding, open-ended process. Developer Mike Goodman and others report that local governments in Arizona often play "rope-a-dope" with citizens who dispute their decisions, using every available opportunity for delay in a final resolution to cause them to suffer increasing economic uncertainty and financial pressure until they acquiesce. Only if a timely, final resolution is promised by the ADR process will it furnish a cost-effective check on the local legislative and executive branches of government and actually prevent the concentration of distinct governmental powers. Moreover, because it would be an "option" afforded only the citizen—citizens could not be coerced into the process by local government—citizens would retain the option of pursuing what administrative review process may already exist instead of ADR, should that process be preferable. This avoids the due process concerns that might otherwise arise from mandatory ADR; to compete with the ADR option, it might also incentivize local governments to create administrative review processes that are more fair and responsive to their citizens.

4. The Right to Freedom from Crime

"Security from domestic violence, no less than from foreign aggression, is the most elementary and fundamental purpose of any government, and a government that cannot fulfill that purpose is one that cannot long command the loyalty of its citizens." **—Barry Goldwater** [209]

Protecting citizens from crime is the core function of government; exercising the rights to life, liberty, and property requires peace and order. Headline-grabbing and resource-wasting press events should not take center stage at the police department. The Local Liberty Charter advances a civil right to freedom from crime to ensure they do not. The recommended policy implementation to protect that right is to require performance benchmarking for law enforcement, to use overtime to incentivize high performance, and to contract out failing departments to other localities.

- **Focus Benchmarking on Core Outcomes**

Successful crime-fighters, such as former Dallas Mayor Steve Bartlett, emphasize that law enforcement reform must be institutionalized to ensure that it is not simply personality driven. While in office, Mayor Bartlett reduced crime rates dramatically, reportedly achieving reductions of nearly 50 percent in homicides during his four years in office.[210] Nevertheless, he laments that many of his crime-fighting achievements dissipated after he left office.[211] That is why the Local Liberty Charter enforces the right to freedom from crime with specific policy implementations.

"Community policing programs—though widespread in Arizona—are just not an adequate substitute for such "performance benchmarking."

At a time when Arizona tops the charts in violent and property crimes, the first step to properly prioritizing policing for violent and property crimes is to ensure that local governments set crime reduction and service quality goals for their police departments.[212] Community policing programs—though widespread in Arizona—are just not an adequate substitute for such "performance benchmarking." In fact, one of the key criticisms of community policing is the lack of any clear measure of policing success.[213] Simply put, without performance goals, community policing risks becoming a labor-intensive and ineffective end in itself, rather than a means to an end.

Fortunately, the means and models exist for establishing the needed benchmarks. "Performance benchmarking" has been standard practice for most federal, state, and local departments since the passage of the Government Performance and Results Act of 1993.[214] Uniform Crime Report (UCR) statistics, which can help local governments set performance standards based on similar localities around the country, have been maintained by the U.S. Federal Bureau of Investigation for nearly 80 years. Phoenix, for example, has been tracking and publishing local crime statistics based on UCR statistics for several years.[215] Moreover, by state law, Arizona criminal justice agencies are required to submit arrest and case disposition information for all felony offenses to the central state repository, which is called the Arizona Computerized Criminal History.[216] And New York City is famous for its achievements in reducing crime beginning in the mid-1990s, using its CompStat system, which focused on core crime rates.[217]

Although detailed policing statistics are increasingly common, a review of police department websites around the state provides no indication that transparent performance benchmarking is standard practice in local governments today. While performance measurements have been adopted by a number of cities, it appears that the measurement process is generally not tied to policing goals or budgeting consequences, with few exceptions.[218] There is no easy way for the public to get timely answers to such simple questions as: What is the targeted crime rate of local policing efforts? What is the targeted response time of 911 dispatch? What is the targeted public complaint rate arising from police misconduct? What is the status of progress toward policing goals? Without a commitment to setting performance goals as an essential part of managing local law enforcement, and a means for the public to monitor progress toward those goals, common sense suggests that Arizona's crime rates will continue to exceed national rates. The question is not whether to benchmark public safety services, but how.

Although the International Center for Performance Measurement has proposed "several hundred" measurements for setting police service benchmarks, there comes a point when too many measurements are worse than none—they give a misleading appearance of a drive for efficiency, but measure so many things that core performance becomes obscured.[219] The performance "scorecard" should be balanced enough to achieve good police service while emphasizing simplicity.[220]

"To keep things simple, benchmarks should be focused on a few core outcomes of good police service."

To keep things simple, benchmarks should be focused on a few core outcomes of good police service.[221] It is therefore recommended that the Local Liberty Charter implement the right to freedom from crime by mandating that police departments adopt performance benchmarking that targets desired crime rates, crime clearance rates (both arrest-to-charge and arrest-to-conviction), public complaint rates, and response times.[222] Moreover, Mayor Bartlett emphasizes that there should only be two performance standards. The first standard should simply require benchmarked statistics to improve every month. The second standard should set an ultimate statistical goal for each benchmarked statistic within a designated period. One year is Mayor Bartlett's preferred time frame for feasibly reforming the management

of a police department. Policymakers should set the ultimate goal based on what is generally agreed to be a reasonable state of security while also setting goals to minimize public complaints regarding police conduct to ensure that benchmarking does not promote "bounty hunting" behavior.[223] Such goals should also be reality-tested by comparing them with the highest-performing comparable local governments.

Mayor Bartlett emphasizes that freedom from crime requires more than measurement—it also requires both data transparency and consequences. Policy analysts have long recognized that "performance measurement is not perfect ... knowing that their performance will be measured against the target, agencies may become innovative—in the wrong way—to meet their targets."[224] Therefore, the right to transparency, discussed below, is an integral component of ensuring the right to freedom from crime can be implemented. Once established, departmental benchmarked statistics and performance standards, including the status of compliance, should be published online for easy public viewing. Additionally, an independent expert should audit data-gathering quarterly. And to ensure that there are consequences for meeting these transparent performance benchmarks, the law should also furnish positive and negative performance incentives.

- **Improve Performance with an Overtime Pool**

Dallas Mayor Steve Bartlett has observed that there are basically two things that motivate most police officers: arrests and overtime. For this reason, as a positive incentive to motivate performance, Mayor Bartlett recommends creating a special "overtime pool," perhaps using funds budgeted for media events like the Phoenix gun buy-back program. This pool could then be used to pay overtime to officers who volunteer to cover benchmark-lagging neighborhoods and precincts—as determined by geographical information system mapping. A particular officer's access to such overtime privileges should be based on monthly personal performance statistics plus a requirement that the officer have no complaints against him for misconduct by any member of the public during the preceding month. Mayor Bartlett reports that basic civility is usually sufficient for highly performing officers to avoid complaints about their conduct.

- **Remedy Poor Performance with Tax Credits and a Dose of Managed Competition**

There must be consequences for poor performance. If a police department fails to fulfill its performance standards for an unreasonable amount of time, then elected officials should give citizens dollar-for-dollar property tax credits for furnishing private security services that benefit the public. Elected officials should also be required to invite bids from nearby or overlapping local governments to assume its local law enforcement responsibilities. This would crucially attach real consequences to bad performance. Of course, some consideration must be given to the argument that it is unfair to enforce performance goals that involve factors beyond the control of local police departments, such as designated crime rates, conviction rates, and public complaint rates. This argument is unconvincing, since there are very few goals in life that are entirely within anyone's control. The objective of a police department is the maximum degree of personal and property security that is consistent with a free society—policing is not an end in itself. The only way to reach any objective on a consistent basis is to pursue it consciously as a goal.

"The objective of a police department is the maximum degree of personal and property security that is consistent with a free society—policing is not an end in itself."

Police departments have difficulty reaching crime-reduction goals because of systemic problems that may exist between policing and prosecution, between convictions and sentencing, or within the fabric of society itself. In the final analysis, those problems are better addressed by creating incentives to fix them, rather than simply sending citizens a tax bill for ineffectual police work. Even if politicians set completely unreasonable performance goals, the recommended managed competition mandate, discussed in the next section, would perform a valuable reality check—revealing the unreasonableness of performance goals through the absence of bidders or the exorbitant cost of contracting a local government's policing responsibilities.

5. The Right to Fiscally Responsible Government

"A wise and frugal Government, which shall restrain men from injuring one another, shall leave them otherwise free to regulate their own pursuits of industry and improvement, and shall not take from the mouth of labor the bread it has earned. This is the sum of good government, and this is necessary to close the circle of our felicities." **—Thomas Jefferson**[225]

Citizens are entitled to a government that is no larger than necessary, fiscally accountable, sound and disciplined, and not the cause of intergenerational conflict. Accordingly, the Local Liberty Charter demands fiscal responsibility from local government. The recommended policy implementation is to mandate managed competition, restrict the growth of municipal expenditures to a function of population and inflation growth, and limit the business of local government to government.

• Restrict the Business of Local Government to Government

Long-term fiscal viability requires maximizing the extent to which local government budgets are insulated from political pressures to live beyond fiscal means. For this reason, one powerful yet simple tool for implementing the right to fiscal responsibility is to restrict the powers of local government to nonproprietary functions.[226] In Arizona, considerable case law exists for defining what functions are "proprietary" versus "governmental." The generally accepted test is that, unless the activity is "a fundamentally inherent function of or encompassed within the basic nature of government," it is a proprietary function.[227] Put another way, under prevailing case law, a "competitive, commercial endeavor" is not a governmental function.[228] Restricting local governments to nonproprietary, genuinely governmental functions would preclude many unnecessary and expensive exercises of government power.

"Long-term fiscal viability requires maximizing the extent to which local government budgets are insulated from political pressures to live beyond fiscal means."

• Mandate "Managed Competition"

As a general rule, even with aggressive, competitive outsourcing, local governments cannot be expected to furnish services as efficiently as private markets.[229] This is because even when competitively outsourcing, local governments still function as a single buyer and therefore are simply unable to demand or purchase

services that satisfy every citizen's personal wants or desires. But mandated "managed competition" can still furnish an effective fiscal firewall between the budget and constituencies employed by the government, who pressure politicians to engage in the worst forms of fiscal irresponsibility.

Presaging the privatization movement, Phoenix is credited with developing the policy of managed competition in 1978, which pioneered competitive bidding for city services by existing departments and private contractors.[230] As explained by former Phoenix Public Works Director Ron Jensen, "The term 'Managed Competition' describes a process of public-private competition that is managed, in that every step to be followed is clearly defined and the roles of all participants in the process are understood."[231]

Like privatization, managed competition involves competitively contracting out services performed by departments of local government on the principle that "public services are often provided more effectively and efficiently through privatization, which allows private markets to develop innovative new services and products that reflect changing needs and wants of local consumers."[232] Unlike privatization, managed competition encourages public entities to participate in the contract bidding process.[233] Managed competition thus deflects the criticism that privatization squanders existing human capital, resources, and infrastructure, and makes competitive bidding more politically palatable to constituencies employed by local government.[234] It also has the added benefit of rendering political controversies over local governmental consolidation irrelevant. By allowing any local government to compete to provide public services for any other local government, the most efficient provider of such services—whether it be the adjacent city or the overlapping county—will come to dominate the area based on merit rather than by jurisdictional fiat.[235]

"The idea of mandating managed competition is not unprecedented in Arizona."

The idea of mandating managed competition as part of the organic law of local governments is not unprecedented in Arizona. The state legislature has already taken the first step by passing a law requiring larger local governments to compete with private companies to provide commercial trash hauling services.[236] As a result of this mandatory managed competition law, many cities opted for private

waste hauling services, which were the lowest bidders, but others saw their sanitation services departments restructure themselves for greater efficiency in order to compete effectively. In Tucson, the impetus to compete with private companies resulted in the city devising a more efficient routing system that saved $1 million in costs, resulting in a 25 percent rate reduction in solid waste services. This law provides a tested model for implementing the right to fiscal responsibility. Building on this experience and the "Phoenix model," the ball should be advanced even further.

Studies show that "if properly implemented, managed competition, or competitive sourcing, as it is also known, can invigorate service delivery, enhance the general perception of public service, and translate into annual savings in the range of 10 to 30 percent."[237] For example, Charlotte, North Carolina's collection costs per ton of garbage "were 35 percent less than the statewide average" in 2007 after implementing managed competition.[238] This mirrors the success of Phoenix's use of managed competition for solid waste collection, which resulted in a 38 percent decline in inflation-adjusted costs over the first 15 years of the program.[239] A subsequent statistical analysis of 46 major cities around the country even established that "the city of Phoenix ranked as the city with the most efficient services overall and held that position for each year from 1995–1998."[240] Moreover, in Indianapolis, the savings to taxpayers from an aggressive policy of managed competition have been estimated at $450 million over 10 years.[241] This track record recently led the mayor of San Diego to announce in May 2008 that the city would be contracting out at least 11 city functions pursuant to the city's managed competition ordinance.[242]

The feasibility of contracting out nearly every local governmental service is further evidenced by the recent success of Sandy Springs, Georgia. In 2005, 90,000 residents of Sandy Springs voted to incorporate and also "to contract nearly all government services" after first carefully scrutinizing every "traditional" service or function.[243] Eventually, they entered into a $32 million contract with Operations Management International Inc. (OMI), a unit of engineering titan CH2M Hill Cos., which agreed to be responsible for overseeing and managing "the day-to-day operations of the city," including "virtually all city functions outside of fire, police and emergency management services."[244] The cost of this contract was "just above half" what residents previously paid to the county for public services when Sandy Springs was unincorporated.[245]

Implementing managed competition should begin with the commonsense "yellow pages" policy adopted by Indianapolis Mayor Stephen Goldsmith:

> If the phone book lists three companies that provide a certain service, the [government] should not be in that business, at least not exclusively. The best candidates for marketization are those for which a bustling competitive market already exists. Using the yellow pages test, [you] can take advantage of markets that have been operating for years.[246]

In fact, a quick review of the yellow page directory will typically reveal that there are established private markets for virtually every service furnished by local government. For this reason, local governments in Arizona should be required to set performance benchmarks for each public service that established private markets can furnish and to invite competitive bids from the public and private sector to meet them (with safeguards designed to prevent the competition from being rigged in favor of the public sector).[247] Public safety services, including fire and police protection, should not be off the table. Managed competition would harness the potentially greater efficiencies of the private sector, and in those circumstances where especially efficient local government departments win the contract, local public officials could rethink the budgeting process and how they provide public services (e.g., as the experiences of Phoenix and Tucson show).

"As evidenced by the trajectory of unfunded public employee retirement liabilities, spending self-discipline is lacking in Arizona as well."

- **Restrict Spending to an Objective Formula without Loopholes**

In light of the bankruptcy of Vallejo, California, municipal finance expert Girard Miller observed, "It is no small wonder that a California taxpayers' group has abandoned hope and written a referendum proposal to prevent public agencies from granting unsustainable retirement benefits. If self-discipline is lacking, then we can't fault the voters from stepping in with ... financial straightjackets."[249] As evidenced by the trajectory of unfunded public employee retirement liabilities, spending self-discipline is lacking in Arizona as well. The bottom line is that, because of the structural problems of representative democracy, "legislators, however well-intentioned, are unlikely to exhibit fiscal restraint over time."[250] Arizonans already know this, having tried to correct the problem before.

In 1980, Arizonans amended the state constitution to restrict the growth of spending by counties, cities and towns to a formula based on past revenues, adjusted by growth in population plus inflation.[251] But the formula has two huge loopholes. First, the spending limitations can be overridden by a simple majority vote at a special or general election called by local initiative or two-thirds of local elected officials. As shown by local governmental payroll growth, this has not been a high enough hurdle to block excessive government spending. Second, most special districts are excluded from spending limitations altogether. As a result, local governments have been free to spin-off spending programs to special districts to avoid expenditure limitations—which may explain the tripling of special districts in Arizona since 1980 (see Figure 8 discussed in connection with the Right to Reconstitute Government).

The growth of local expenditures should be constrained by an objective formula based on prior year expenditures adjusted by inflation and population growth, with no exceptions for special districts and no simple majority vote overrides.[252] In essence, a formula equivalent to that of Colorado's statewide Taxpayer Bill of Rights (TABOR) should be adopted for Arizona's local governments. The law securing this reform could simply overlay the existing constitutional restraint, providing that, as between the loophole-free TABOR formula and the constitutional formula, local governments shall be limited to spending the lesser of the two amounts.

Despite much controversy, the TABOR formula has succeeded in responsibly restricting the size and scope of government.[253] Colorado's TABOR reform, for example, is estimated to have reduced statewide government spending by $3.2 billion through 2003.[254] Moreover, recent studies indicate that levels of poverty declined dramatically in Colorado during the 1990s—a time when TABOR had its greatest impact on levels of government spending.[255] Therefore, TABOR reforms may even have an indirect role in reducing poverty—perhaps by incentivizing more efficient uses of existing resources by government agencies or by minimizing the extent to which government crowds out the more productive private sector. The controversies that have arisen from Colorado's TABOR can be resolved simply by tweaking the standard formula.

The most serious critique of restricting government spending to a formula based on inflation and population growth involves the objection that if the base year set for the growth of expenditures falls in a recessionary period, it

might unduly restrict expenditures. This objection can be overcome by using a moving average of several years as the base, combined with authority allowing for the creation of a rainy day fund.[256] Resolving other objections would likewise require only minimal adjustments.

Some critics have contended, for example, that formula-based expenditure restrictions fail to protect spending on core functions of government. They contend that, by forcing politicians to choose between spending on frivolous popular programs and critical government services, a political dynamic is created that results in the overfunding of popular programs.[257] This objection can be overcome by restricting the growth of overall expenditures to the rate of growth of expenditures in the core functions of government. For example, the TABOR formula could be augmented with language providing that the year-to-year rate of growth for municipal expenditures overall shall never exceed the year-to-year rate of growth for law enforcement services aimed at UCR "part 1" crimes (violent and property crimes). In this way, spending on popular programs will never crowd out spending on core governmental functions.

"Some critics have contended, for example, that formula-based expenditure restrictions fail to protect spending on core functions of government. This objection can be overcome by restricting the growth of overall expenditures to the rate of growth of expenditures in the core functions of government."

A related objection is that the cost of core functions might grow so fast that it will be impossible under formula-based restraints to pay for basic services even with such compensating factors preventing the bulk of the budget being attributed to crowd-pleasing "bread and circuses."[258] Again, this objection can be addressed by ensuring that expenditure limitations have an appropriate objectively defined "escape valve." Such a provision could provide that if prices attributable to the cost of core functions are growing substantially faster than the general Consumer Price Index, then the allowable growth in expenditures for such core functions may be correspondingly increased. For example, if price inflation for costs associated with policing were 10 percent but the general CPI was 5 percent, TABOR language could provide that expenditures on policing may increase by 10 percent.

In the final analysis, the only objection to strengthening Arizona's existing limitations on local governmental expenditures that cannot be resolved rests on the point of view that government spending should grow with growth in personal income. This objection presumes that people are entitled to continue to consume government services like luxuries in ever increasing amounts corresponding to their income, even though government services should be treated as basic necessities, like food and water, which are relatively fixed and lag increases in income. The view of government as a luxury service provider rather than a necessary expense underpins fiscal irresponsibility.

This observation is confirmed by the fact that, in the 10 states that substituted growth in income for growth in population in the base TABOR formula, all have seen "virtually no effect on state fiscal outcomes." California, in fact saw a "48 percent increase in spending during Governor Gray Davis' first three years in office." Greater fiscal responsibility has not been a by-product of allowing government spending to increase in proportion to personal income. Therefore, the right to fiscally responsible government requires a formula that restricts government spending to a function of prior year expenditures without exceptions for special districts or simple majority vote overrides.

6. The Right to Freedom from Favoritism

"It would be against the spirit of our free institutions, by which equal rights are intended to be secured to all, to grant peculiar franchises and privileges to a body of individuals merely for the purpose of enabling them more conveniently and effectually to advance their own private interests." **—Supreme Court Chief Justice Roger Taney**[261]

Government favoritism—the wielding of government power to single out preferred or disfavored individuals or groups for distinct benefits or harms—thrives at the local level. Such favoritism not only clashes with the generality and equality, which is the essence of the rule of law, it promotes a predatory society, which is the very opposite of civilization. However, citizens are entitled to municipal services furnished or performed by impartial public services uniformly applying general laws. For this reason, the Local Liberty Charter advances freedom from municipal favoritism by rooting out laws, taxes, expenditures, and administrative actions that disproportionately confer costs and benefits on citizens.

"The Local Liberty Charter builds on the Arizona Constitution's Herculean efforts to prohibit political favoritism."

The Local Liberty Charter builds on the Arizona Constitution's Herculean efforts to prohibit political favoritism. Article II, Section 9, bars local governments from "granting irrevocably any privilege, franchise, or immunity." Article II, Section 13, prohibits laws "granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." And as discussed previously, Article IV, Section 19, prohibits "special laws." Moreover, the risks of "public corruption" and the poor investment of public funds from fiscal favoritism led the framers of the Arizona Constitution to include specifically targeted safeguards against the use of taxing, borrowing, or spending authority to subsidize private interests.

Article IX, Section 1, of the Arizona Constitution, for example, provides unequivocally that "the power of taxation shall never be surrendered, suspended or contracted away." The "gift clause," Article IX, Section 7, states plainly: "Neither the state, nor any county, city, town, municipality, or other subdivision of the state shall ever give or loan its credit in the aid of, or make any donation or grant, by subsidy or otherwise, to any individual, association, or corporation ...." Taken together, it is difficult to imagine how prohibitions on regulatory and fiscal favoritism could be more plainly stated than already exists in the Arizona Constitution.

Unfortunately, state court interpretations of these clauses have evolved to be extremely deferential to governmental bodies. For ordinary citizens who lack pro bono legal representation, attempting to enforce the Arizona Constitution's prohibitions on fiscal and regulatory favoritism is simply impractical. Implementing the right to freedom from favoritism requires robust sunrise and sunset scrutiny.

The sunrise and sunset review processes discussed earlier should be applied with an eye to barring regulatory favoritism. Moreover, bureaucrats and administrators should also be required to apply the same factors to prevent favoritism in the exercise of regulatory discretion. But that still leaves the problem of *fiscal* favoritism, where local governments use

taxing, borrowing, or spending authority to subsidize private interests to the detriment or disadvantage of others.

Whenever an exercise of taxing, borrowing, or spending authority is proposed that is not directly tied to performing a nonproprietary, governmental function, there should be a determination based on a documented and publicly disclosed economic analysis as to whether a specific individual, entity, or class of individuals or entities, distinct from the general public, is being subsidized. If so, then the exercise of such authority should be barred as an instance of fiscal favoritism. Speculative indirect economic benefits to the general public from the exercise of taxing, borrowing, or spending authority should not be considered in deciding whether to classify the exercise of such authority as a subsidy. This review process, if observed by a local government's elected officials and enforced non-deferentially by the judiciary, should stop fiscal favoritism and enhance the ability of local government to secure the right to fiscal responsibility.

7. The Right to Accountability

"I had rather live under severe laws than under any man's discretion." **—Sir Edward Coke**[263]

Much of the power of local government resides in unelected officials. These public officials need to understand more clearly that they serve the people and that the people have effective and direct recourse against them for mismanagement and wrongdoing. Accordingly, the Local Liberty Charter enforces public accountability. The recommended policy implementation is a "three strikes and you're out" law for unelected public officials who repeatedly misapply the law to the substantial detriment of their constituents.

• Three Strikes and You're Out

The general rule for government employees at every level of government is that they are shielded from personal accountability for nearly all of their interactions with the public. They are shielded by various doctrines of tort immunity for their wrongdoing. They are shielded from termination for poor performance by civil service protections, which include "myriad webs

of workplace rules, ironclad job protections, and strict salary schedules that reward seniority rather than productivity and limit the options available to make the bureaucracy more accountable and effective."[264] And as an unintended consequence of the constitutional bar on patronage hiring, local bureaucrats are shielded from discharge by local elected officials who may have been specifically elected to terminate them.[265] As a result, ordinary citizens are forced to submit to unaccountable local bureaucratic decision-making. If citizens choose to fight back, like developer Mike Goodman did, they can spend hundreds of thousands of dollars in attorney fees simply to exercise their basic rights peaceably and productively.

"Relative to the private sector, there are too few incentive structures in place to strongly motivate either local governments or their employees to treat citizens fairly and competently."

Relative to the private sector, there are too few incentive structures in place to strongly motivate either local governments or their employees to treat citizens fairly and competently. The Local Liberty Charter, therefore, proposes to supply that incentive structure directly through a judicially enforceable "Three Strikes and You're Out" rule. Specifically, the law should provide that nonelected public officials must be immediately dismissed from their employment if on three or more occasions during their employment they are found (by internal review, judicial decision, or ADR) to have (1) violated the law, including the state and federal constitutions, or (2) caused citizens to suffer substantial detriment based upon erroneous interpretations of law or other erroneous actions or omissions. To ensure the performance of government employees is measured based on outcomes, not intentions, the standard should be basic "causation in fact," not whether the underlying conduct had been wrongful.[266] In other words, a bureaucrat should be terminated if three violations of the law or instances of significant detriment would not have happened "but-for" his actions or omissions. At the same time, it would be important to carefully define both termination-triggering "strikes" and any related legal responsibility to ensure that competent public servants do not lose their jobs for political reasons, immaterial missteps, or conduct that they cannot reasonably be expected to control.

"Local governments would also have clear legal authority to trim their workforces of employees who fail to uphold the highest standards of public conduct."

The resulting incentive structure would likely discourage public officials from engaging in arbitrary enforcement behavior or refusing to discharge their obligations under the Local Liberty Charter. Local governments would also have clear legal authority to trim their workforces of employees who fail to uphold the highest standards of public conduct. By ensuring that public officials can be held personally accountable for their regulatory actions, public servants will develop a personal interest in properly enforcing objective laws and in bringing vague, ambiguous, or subjective laws incapable of consistent enforcement to the attention of the political branches of government. Combined with the automatic approval process discussed in connection with the right to a presumption of liberty, local public officials could not simply ignore their regulatory decision-making duties in the hope that difficult questions would go away. Even if they did, adversely affected citizens would have legal standing to enforce their right to accountability in a court of law or through alternative dispute resolution.

8. The Right to Genuine Local Sovereignty

The addiction to federal money inflates demand for unsustainable levels of government services, substitutes central planning for local programs, and distracts local government from its core functions. Additionally, local governments routinely disregard their power to modify or even derail new federal regulations by refusing to demand that federal agencies coordinate with them. To kick this habit and to enforce federalism, the Local Liberty Charter locks in genuine local sovereignty. The recommended policy implementation is to bar acceptance of federal funding, and all its attached strings, and to obligate local public officials to demand coordination from federal agencies to stop the implementation of onerous federal regulations.

• Kick the Federal Funding Habit

In fiscal year 2005–2006, Arizona local governments received just over $1.2 billion in federal funding.[267] That "free" federal money came at a price. The cost of federal money is federal mandates. These federal mandates

are made with little regard to local conditions; they arise from one-size-fits-all legislative plans crafted from a national perspective, which tend to be less efficient than those crafted at the statewide or local level. Such federal programs typically stoke local demand for more government than would otherwise be desired in states such as Arizona.

"This not-so-free federal money is a Trojan horse to more than just mandates; it invites behavior by politicians and constituents that undermines fiscal responsibility and good government."

This not-so-free federal money is a Trojan horse to more than just mandates; it invites behavior by politicians and constituents that undermines fiscal responsibility and good government.[268] Federal funding motivates politicians to maintain and grow the size and scope of local government for fear of being blamed for refusing "free money" and letting other people spend local federal tax money. It also encourages citizens to demand and expect more local government services because they are able to consume government services at a rate they otherwise could not afford.[269] Even those who refuse to get hooked must confront the fact that the money extracted from them through federal taxation will now go to a distant municipality or state, rather than be returned home. Thus, when confronted with a funded federal program, coupled with mandates, there is only a choice between two evils for local governments and their constituents—and a very difficult one at that. A Local Liberty Charter would lock in the choice of the lesser evil by barring local governments from accepting federal money to which mandates attach.

- **Enforce Federalism by Demanding Local Coordination**

Former U.S. Attorney Fred Kelly Grant, president of Stewards of the Range, has developed the "coordination approach," which is a plan of action for local public officials to fight back against overreaching federal regulations. The plan is based on Grant's discovery that nearly all federal laws regulating land uses contain a provision requiring "coordination" or "cooperation" between federal agencies and local governments. This requirement empowers local governments to demand that federal agencies implement regulations affecting local resources and land uses consistently with existing local plans and policies. The federal laws requiring coordination

include the Federal Land Policy and Management Act, the National Forest Management Act, the National Environmental Policy Act, the Endangered Species Act, the Wild and Scenic River Act, the Clean Air Act, the Clean Water Act, and the Soil and Water Resources Conservation Act.[270]

Grant's coordination approach involves essentially two steps: (1) developing a freedom-friendly local land use or resource management plan, and (2) demanding that federal agencies coordinate their land use regulations with the local land use or resource management plan. From counties down to water districts, any local government with existing authority over resource planning, resource management, zoning, or other land use authority likely has the legal right to demand coordination of federal regulations with its local plans. And when federal agencies have failed to heed the demand for local coordination, local governments have successfully sued them in federal court. For example, based on the failure of the federal agency to meaningfully coordinate with the local county government, a federal judge recently set aside a decision by the U.S. Bureau of Land Management to release wild horses that were possibly infected with equine infectious anemia onto public and private lands in Utah.

"Litigation is not the only tool for local governments to enforce federalism."

Litigation is not the only tool for local governments to enforce federalism. Grant reports that local governments have an impressive track record of moderating or even derailing the implementation of onerous federal regulations without litigation simply by demanding coordination or having the reputation of demanding coordination.[272] For example, the Bureau of Land Management was made to withdraw proposals for wildlife enclosures that would have deprived ranchers of grazing rights, when Owyhee County, Utah, demanded that the Bureau coordinate its proposals with its Natural Resources Committee.[273] And an effort by federal agencies to list the "spotted frog" as an endangered species in Owyhee County, which would have triggered restrictive federal land use regulations, failed when word of the county's previous coordination litigation led federal officials to voluntarily seek the county's input.[274]

In view of such success, implementing the right to genuine local sovereignty should involve adopting Grant's coordination approach. Federalism, after all, is not an end in itself; its purpose is to protect liberty. Local governments, as subdivisions of the state, can do more than "just say no" to federal funding. They can have an important *proactive* role in enforcing the principles of federalism to advance liberty.

9. The Right to Transparency

"Knowledge will forever govern ignorance. And people who mean to be their own governors, must arm themselves with the power which knowledge gives." **—James Madison**[275]

Apart from the Founding Fathers, University of Arizona journalism professor David Cuillier put it best: "If government works for the people, then the people are its boss—and the boss is entitled to know what his employees are doing on his dime."[276] Transparency is perhaps the single most important feature of any government, both to prevent corruption and also simply to make the rule of law and accountability possible. But given the culture of local governmental secrecy, requests for public records under state law are terribly inadequate to obtain the basic information needed to enforce the Local Liberty Charter. The recommended policy implementation requires timely public posting of financial information and performance benchmarking (including a personal rating system for public officials), specific deadlines for public records request compliance, automatic disclosure of critical public information, and open municipal contracting.

"At the very least, there should be a specific deadline for local governmental compliance with public records requests."

• Set a Deadline for Responding to Records Requests

At the very least, there should be a specific deadline for local governmental compliance with public records requests. Presently, the state law only requires compliance "promptly." This indefinite response deadline has earned a "nearly dark" sunshine index rating—the second-to-worst rating—from the University of Florida's Citizen Access Project. Moreover, the Better Government

Association and National Freedom of Information Coalition gave Arizona's public records request responsiveness an "F" rating.[278]

"The right to transparency should be implemented proactively—not just reactively to records requests."

Based on compliance deadlines for similar freedom of information laws around the country, Cuillier contends that local governments should be required to furnish a written response to a public records request in not more than "three-to-five" days. That response should either furnish complete compliance with the request or specify a reasonable deadline for complete compliance (not in excess of 14 days). The writing should also address requests specifically and index responsive materials.

- **Require Governmental Action to Cite Authority**

The right to transparency should be implemented proactively—not just reactively to records requests. Citizens should receive immediate and verifiable assurance that local governmental bodies are acting within the scope and limits of their power. Every proposed or new law, rule, or resolution enacted by any local governmental entity should be accompanied by a full disclosure of all authorizing authorities for the same, by specific legal citation. This recommendation is analogous to the "Enumerated Powers Act," which has been proposed repeatedly "to require Congress to specify the source of authority under the United States Constitution for the enactment of laws."[279] Likewise, every administrative or quasi-judicial action affecting the legal rights of a citizen should specifically cite sufficient supporting legal authority to justify the action. For example, responses to records requests under the state public records law should justify any nonproduction with specific reference to the law that justifies such action. This would mirror the recently enacted Federal Open Government Act of 2007.

- **Require Jurisdictional Mapping**

The complexity and opacity of the relationships between the multitude of local governments and their distinct or overlapping responsibilities may make gathering information about local governmental issues especially difficult for ordinary citizens.[280] For this reason, every local governmental entity, and special districts in particular, should be required to publicly

disclose their jurisdictional boundaries online together with a summary of their powers and responsibilities, in a unified graphical interface if possible, enabling citizens to search a designated address to determine which local government is governing them.[281]

• Post All Financial Transactions Online

Much can be learned by a recent push for transparency in Brazil. Beginning in May 2003, municipal governments were made subject to random audits. Reports detailing the results of the audits were then compiled, posted online, and disclosed to the media.[282] This resulted in the exposure of graft, waste, and corruption on a massive scale. Similarly, the Local Liberty Charter should require all local government finances to be publicly posted online in real time and on an easily navigable website, as the revenues are received and the checks are cut, in those jurisdictions in which transactions are automatically logged in electronic bookkeeping software.[283] In those jurisdictions where financial transactions are not automatically logged, then government finances should be accessible online based on not fewer than quarterly independent audits.[284]

"Public officials will undoubtedly treat citizens more consistently and with less favoritism if they know their official actions can and will easily be scrutinized by the public."

• Trigger Automatic Disclosure of Lobbying and Regulatory History

Public officials will undoubtedly treat citizens more consistently and with less favoritism if they know their official actions can and will easily be scrutinized by the public. For this reason, certain public records should be automatically disclosed when triggered by significant governmental actions. Any proposed law, for example, should be accompanied by the automatic disclosure of every related prior communication with public officials that had been received or transmitted via publicly owned property, such as through a public official's email account. This would help ordinary citizens counteract the natural advantage held by lobbyists. Additionally, detailed information about the processing status of zoning, permitting, or licensing applications

should be available online in real time using in-house tracking software, such as PermitWorks. Lastly, any denial of regulatory approval should be accompanied by an *automatic* printout of all regulatory approvals or denials under the same ordinance or code provision within the past year.

- **Post Performance Benchmarking Online**

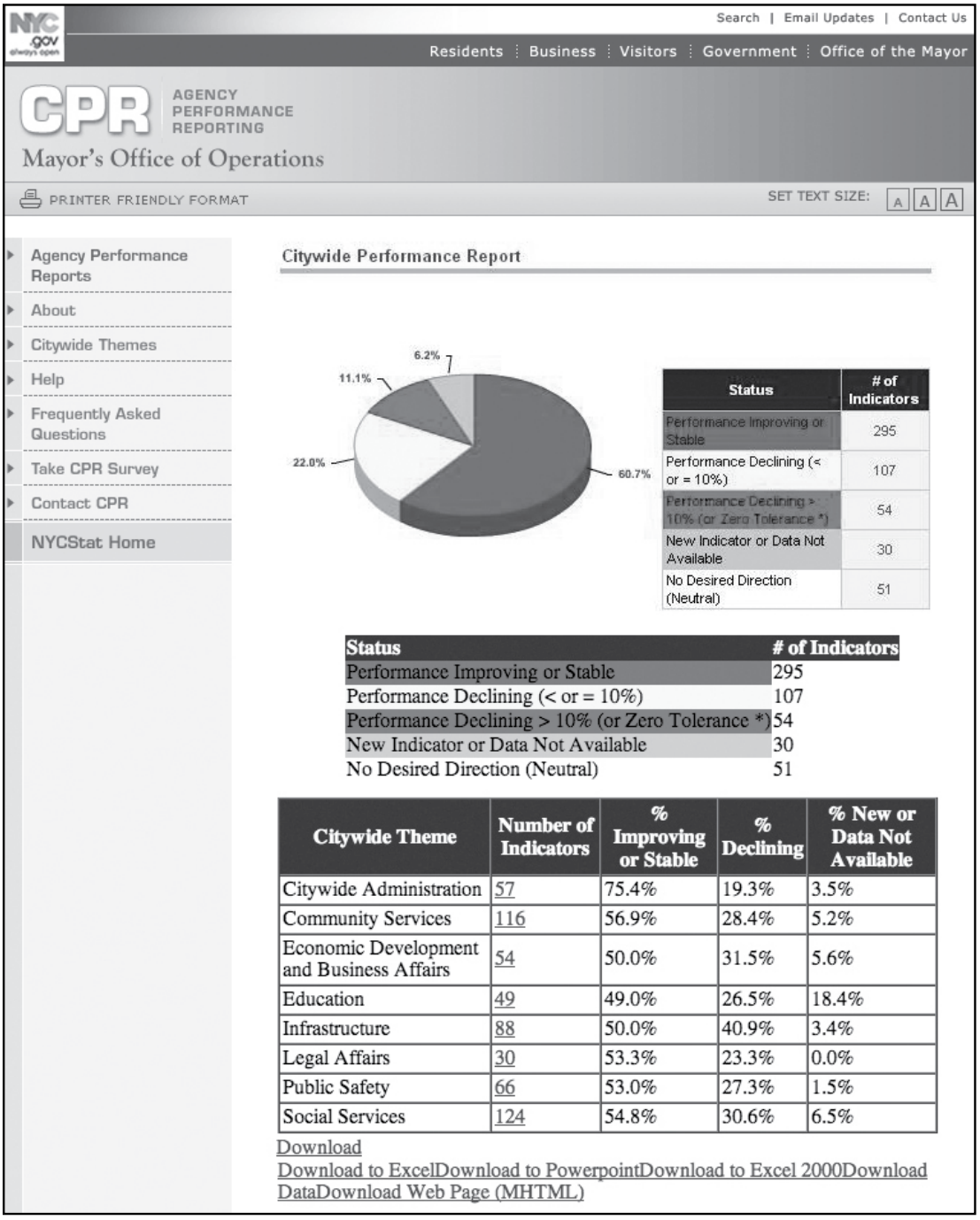
Baltimore's increasingly emulated CitiStat program demonstrates that aggressive computerized performance measurement and benchmarking will result in significant efficiency gains by local government.[285] There is no longer any technological reason to conceal such programs from real-time public scrutiny. The status of performance benchmarking of local governmental services—especially those services that are contracted based on managed competition[286] —should be online and updated as close to a real-time basis as is feasible.[287]

"A citizen-input scorecard of local governmental performance, including rankings for specific government officials, should be maintained online."

Thanks to Mayor Bloomberg of New York City, the model for transparency in benchmarking now exists. The city's new transparency website, called the "Citywide Performance Reporting Tool," was activated in February 2008 and demonstrates that city service performance can be made understandable and transparent enough for ordinary citizens to monitor their governments and assess their performance (see Figure 7). When fully completed, the website promises citizens the ability to use an interactive graphical interface to review performance measures for every city agency and service.[288]

Finally, a citizen-input scorecard of local governmental performance, including rankings for specific government officials, should be maintained online. Such scorecards are entirely feasible. A similar scorecard has been used in Bangalore, India, resulting "in firings of officials, improved service delivery and a decreased incidence of bribery."[289] Arizonans should have at least as much transparency in government as the citizens of Bangalore.

FIGURE 7: Citywide Performance Reporting Tool



Source: http://www.nyc.gov/html/ops/cpr/html/home/home.shtml

10. The Right to Reconstitute Local Government

Local politics can become wedded to bad government. But the proper response is not necessarily to vote with one's feet and move to a locality that is better suited to freedom and responsibility. Mass exodus from abusive local governments may have the unintended consequence of entrenching abusive government by rendering it relatively immune to electoral accountability.[290] A better response is to ensure that robust electoral tools exist to "reboot" local government gone wrong. The recommended policy implementation is to empower citizens with the right to vote for "none of the above," to dissolve electorally unaccountable special districts, and to mandate bankruptcy filing by fiscally irresponsible local governments.

"Before unknown, power-brokered candidates are foisted upon the public, the public should have the right to reject the offering."

• Provide a Binding "None of the Above" Ballot Option

Before unknown, power-brokered candidates are foisted upon the public, the public should have the right to reject the offering. Therefore, the first tool to reboot government should involve enacting a civil right to a binding "none of the above" (NOTA) option in local elections, whereby if NOTA receives more votes than any other candidate, a special election must be called, disqualifying the original candidates and requiring new candidates to run for the office.[291]

This idea is not unprecedented. A proposed state constitutional amendment to reform statewide elections exactly along these lines was introduced in the Arizona State Senate in January 1997, under Senate Concurrent Resolution 1008. As recently as 2007, a bill was introduced in the Massachusetts legislature to provide for a binding NOTA ballot option.[292] Moreover, the State of Nevada has long listed a nonbinding NOTA option on its statewide office ballots.[293] Also, in 1998, Puerto Rico included a NOTA option on a referendum for statehood—which received more votes than any other option.[294] These examples illustrate the political feasibility of implementing a NOTA voting option. Nowhere would it make more sense to do so than in local governmental elections, which would provide perfect testing grounds to evaluate its effectiveness in rendering representative government more responsive to the citizenry.

• Require Dissolution of Unaccountable Special Districts

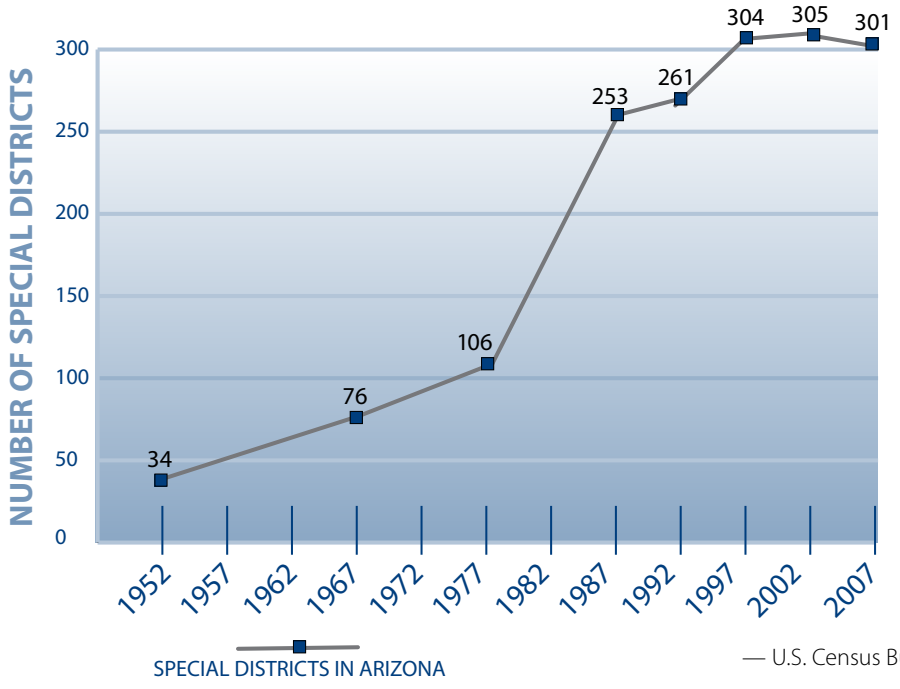
While the number of cities, towns, and counties in Arizona has remained relatively steady since 1952, the number of "special districts" has increased

nearly tenfold, from around 30 to 300, during that same period (see Figure 8). And almost all of that growth has occurred since 1980, when most special districts were exempted from a constitutional amendment that limited the growth of local governmental expenditures to a fixed formula. Special districts now account for nearly half of Arizona's 645 local governments, and the majority of them may have been created to evade a systematic effort by Arizonans to impose fiscal discipline on local government.[295]

This multiplicity of local governmental bodies obscures the true status of municipal finance and regulation and is obviously confusing to the general public, undermining the goals of governmental transparency and accountability. Not surprisingly, the few available studies on special districts indicate that the electorate generally does not meaningfully participate in special district elections, or even know what special districts do.[296] This is dangerous because local politicians can abuse the system when they do not fear electoral consequences.[297]

The Local Liberty Charter, therefore, proposes a rule that if less than 10 percent of the qualified electorate votes in a special district election, the results should be discarded and a special election should be held. If this phenomenon is repeated during the special election, then the district should be dissolved and its functions transferred to its organizing political entity.

FIGURE 8: Special Districts in Arizona



— U.S. Census Bureau

- **Establish Objective Triggers for Mandatory Bankruptcy Filing**

The City of Yuma's recent issuance of an "emergency" swimming pool complex bond may foreshadow the future of gamesmanship in municipal finance.[298] Because Yuma labeled the bond issuance an "emergency," residents were led to believe that it would occur immediately, preventing them from exercising their constitutional and statutory right to call a referendum and disapprove the bonding. Furthermore, Yuma waited 30 days before issuing the bonds—the same amount of time ordinarily allowed for voters to exercise their right of referendum.

Yuma may have deliberately labeled its bond issuance an "emergency" to confuse the public and protect its financing gambit from voter disapproval. If so, this maneuver illustrates the lengths to which local governments in Arizona might go to avoid the consequences of their fiscal irresponsibility. To stop such behavior, Arizonans need the kind of fail-safe financial reform implemented in the State of Michigan nearly two decades ago.

Michigan's Local Government Fiscal Responsibility Act of 1990 authorizes the State Treasurer to appoint an Emergency Financial Manager (EFM) with wide-ranging authority to restructure local governmental finances, similar to the authority of the trustee in bankruptcy, including the authority to override almost any contrary local governmental power or authority.[299] Under the Act, an EFM appointment is made following a preliminary review triggered by a number of statutory grounds deemed to evidence "financial distress," including underfunding of pensions or inaccurate accounting.[300] Most significantly, the Act specifically authorizes citizens to request the appointment of an EFM through the filing of a petition.[301]

With the recent bursting of the real-estate bubble, Arizonans may soon be facing an economic environment similar to what Michigan residents experienced in the 1970s and 80s.[302] Michigan's Local Government Fiscal Responsibility Act establishes the feasibility of empowering citizens to demand the restructuring of profligate local government finances. However, there is not yet a need to duplicate the comprehensive statutory framework of Michigan's Act because an equally powerful and long-established federal law that can accomplish the same thing already exists—Chapter 9 of the U.S. Bankruptcy Code.

Chapter 9 has long applied to subdivisions of states, including local governments. It enables a local government to renegotiate obligations, restructure finances, cease services, and contract out departments.[304] Decades of legal precedent interpreting and applying Chapter 9, which arise from a multitude of fact patterns, already exist. Such precedent provides well-settled guidance for local governments, courts, and trustees in bankruptcy, ensuring that enacting the proposed reform would involve far less uncertainty than would result from an entirely new statutory structure.

In view of the model of Michigan's Local Government Fiscal Responsibility Act, it is recommended that a local government should be required to file Chapter 9 bankruptcy as a ministerial matter when there are certain triggering events evidencing municipal insolvency. This would be a powerful tool to refocus a local government on good governance—if only because it could stiffen the backs of politicians in negotiating concessions from interest groups when finances are in disarray. When this right is coupled with real-time financial transparency, knowledge would indeed be power to the people. If public officials ignore events requiring bankruptcy filing, the citizenry could enforce the obligation directly and expeditiously through the court remedy of mandamus.

IMPLEMENTING THE LOCAL LIBERTY CHARTER

"It's time now ... to reimplement the original dream which became this nation ... that you and I have the capacity for self-government—the dignity and the ability and the God-given freedom to make our own decisions, to plan our own lives and to control our own destiny." **—Ronald Reagan[305]**

"A local government should be required to file Chapter 9 bankruptcy when there are certain triggering events evidencing municipal insolvency."

The final questions are: Where should the change in local government take place? Who could spark it—legislators or ordinary public citizens? What level of government should be the focus for enacting the Local Liberty Charter? What methods could be used? All freedom lovers, inside and outside of government, at all levels and by all lawful means can participate. The structural problems of democracy make implementing fundamental governmental reform challenging, but not impossible. This is because—for good or ill—"a tide of opinion, once it flows strongly, tends to sweep over all obstacles, all contrary views."[306] All that is needed to implement the Local Liberty Charter is for the tide of opinion favoring reform to surge.

But the reform effort must be directed to reining in the power of local government in such a way that the Local Liberty Charter trumps the ordinary lawmaking power of counties, municipalities, and special districts. Because of the rule that mere laws cannot bind future legislatures, reform will not be effective in the form of an ordinance or resolution of a local government. Ordinances and resolutions can always be superseded or repealed by subsequent ordinances and resolutions. Instead, the Local Liberty Charter must be made effective as part of the "organic law" of the local government. It must govern the local government's police power in the same way that a constitution governs a state or federal government's lawmaking power.

"The organic law of local governments can be reformed through the statewide enactment of a Local Liberty Charter, whether by the state legislature or by public initiative."

Statewide Reform

The organic law of local governments can be reformed through the statewide enactment of a Local Liberty Charter, whether by the state legislature or by public initiative (see Appendix A). This is because, as a general rule, counties, municipalities, and special districts are seen as subdivisions of the state, over which the state's legislative power reigns supreme.[307] Based on this hierarchy, the passage of a statewide law is potentially the most potent way to secure reform.[308] Moreover, it is the *only* guaranteed way to reform counties and cities incorporated under state statutes. These incorporated counties or cities require statewide reform to control their legislative powers because the incorporation statutes themselves function as their "constitution" and "organic law."

Furthermore, for reforms aimed at special districts, the vesting of property rights, or zoning, there may be no reliable alternative to enacting a statewide law.[309] Laws restricting the power of special districts must generally be enacted at the state level because their powers are typically defined by statute. Additionally, property law is generally a matter of statewide importance; therefore, ensuring that the vesting of property rights is redefined to lock in all lawful uses, as proposed in Right #2, requires statewide legislative reform. Furthermore, the Arizona Supreme Court has emphasized that "when the state grants zoning

power to a city, the power must be exercised within the limits and in the manner prescribed in the grant and not otherwise."[310] This pronouncement has led to a rule of law barring the use of local initiatives as a means of changing zoning laws directly or even only to change procedural prerequisites for changing zoning.[311] Moreover, statutorily mandated comprehensive land use plans often dictate how zoning laws must be enforced at the local level. Changing the nature of zoning laws to make them freedom-friendly thus requires statewide statutory reforms.

But there is risk in pursuing statewide reform efforts. If the Local Liberty Charter is enacted as a single piece of legislation, it can be expected that both statewide legislation and initiative proposals will be challenged under the "single-subject rule." This rule stems from the Arizona Constitution's ban on "log-rolling"—proposed laws that mix and match disparate measures, which if proposed separately would not gain public support.[312] The test for compliance with the single-subject rule is essentially whether the elements of legislation form a logically integrated and natural whole, such that "the voter supporting [one part] would reasonably be expected to support the principle of the others."[313] The Local Liberty Charter arguably passes this test because each right buttresses and reinforces the other in counteracting the problems of faction and suboptimum voting incentives and achieving the goal of restructuring local government for freedom and responsibility.[314] Accordingly, the Local Liberty Charter, if enacted in a single statewide law, could survive single-subject rule scrutiny. Nevertheless,

How statutory cities can adopt the Local Liberty Charter

1. An election is held on the question, "Shall the city adopt a charter form of government?", and at the same time, a fourteen member board of freeholders is elected. This election may be called ether by the city council or by the mayor when petitioned to do so. The petition must be signed by a number of qualified voters equal to 25 percent of the number voting in the preceding municipal election.
2. If a majority of the voters favor adopting a charter, the board of freeholders proceeds to write a charter. They must complete their work within 90 days after the election.
3. When the charter is completed, it must be published in the local newspaper for at least 21 days, if the paper is a daily or in three consecutive issues if it is a weekly.
4. Within 30 days, and not less than 20 days after publication, an election is held on the question of ratifying the charter. If a majority of the voters favor the charter, it is then submitted to the Governor for approval.

League of Arizona Cities and Towns[315]

the uncertainties of litigation may make it more desirable to consider framing each right in independent statewide legislation—and to concurrently pursue local reform.

Concurrent Local Reform

The potentially greater reach of statewide reform does not necessarily mean that a Local Liberty Charter should only be proposed at the statewide level. There is value to concurrently pursuing reform locally—if only to sidestep the delays that might be associated with legal challenges to statewide legislation. But the Local Liberty Charter, if enacted locally, still must be grafted onto the "organic law" of the local government. Fortunately, both cities and counties have been and can continue to be organized under a local charter, which serves as a kind of local constitution.[315]

"The potentially greater reach of statewide reform does not necessarily mean that a Local Liberty Charter should only be proposed at the statewide level."

Organizing a new municipal charter through citizen's petition or local legislation (see sidebar) or amending an existing charter through local citizen's initiative (Appendix B) to include a Local Liberty Charter could effectively bind future local governmental action in the form of ordinances, resolutions, or executive decisions.[316] Moreover, the scope of permissible charter amendments or new charters enacted by local initiative is very broad and should encompass the power to enact the Local Liberty Charter, including most of the recommended policy implementations (leaving aside reforms targeted to special districts, the vesting of rights under property law and replacing zoning laws with restrictive covenants).[317] This is because the grant of charter powers originates directly from the state constitution, which gives charter cities and counties the power to legislate on every subject not inconsistent with state statutory law.[318]

CONCLUSION

"I've spoken of the shining city all my political life ... in my mind it was a tall, proud city built on rocks stronger than oceans, windswept, God-blessed, and teeming with people of all kinds living in harmony and peace; a city with free ports that hummed with commerce and creativity. And if there had to be city walls, the walls had doors and the doors were open to anyone with the will and the heart to get here. That's how I saw it, and see it still."

—Ronald Reagan[320]

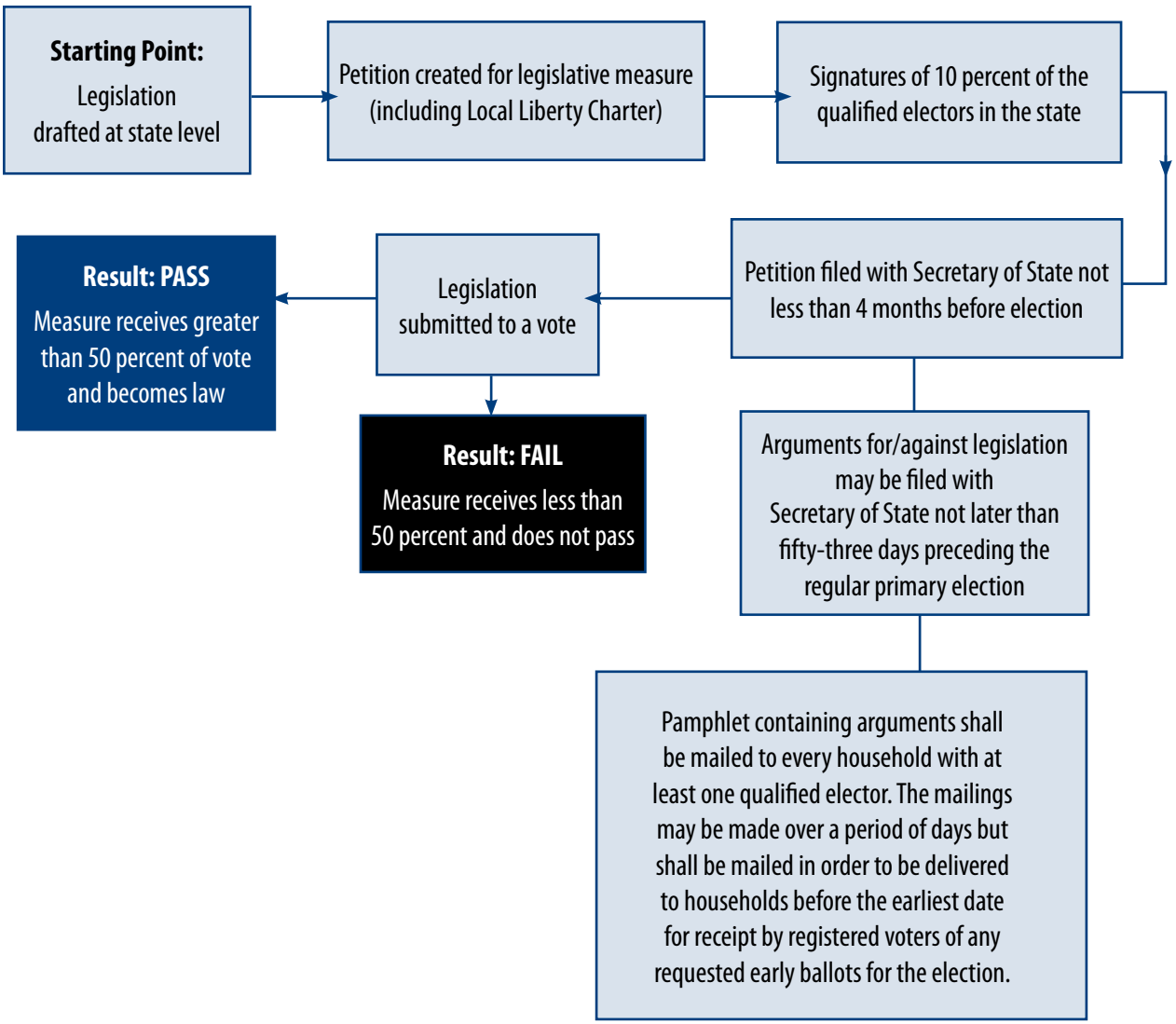
The local regulatory hammer has become a magic wand for irresponsibly growing government's size, scope and intrusiveness. At the same time, because of a lack of transparency, noncompliance with public records laws, and an imperial civil service, Arizonans have been unable to effectively monitor their local governments and hold them accountable. Left to its own devices, overreaching and opaque local government not only threatens the dignity and economic well-being of individuals, it threatens the ability of government to fulfill its core functions.

The Local Liberty Charter declares that there are bounds beyond which government cannot go and responsibilities it cannot ignore. It proudly proclaims "liberty is a normal condition for humans, without which the value of life is reduced" and "individuals freely exercising their creativity, ingenuity and productivity have accounted for society's greatest advances." The Local Liberty Charter systematically advances a legal and policy framework to focus local public officials on that proclamation, thereby laying the foundation for shining cities of freedom and responsibility.

"The local regulatory hammer has become a magic wand for irresponsibly growing government's size, scope and intrusiveness."

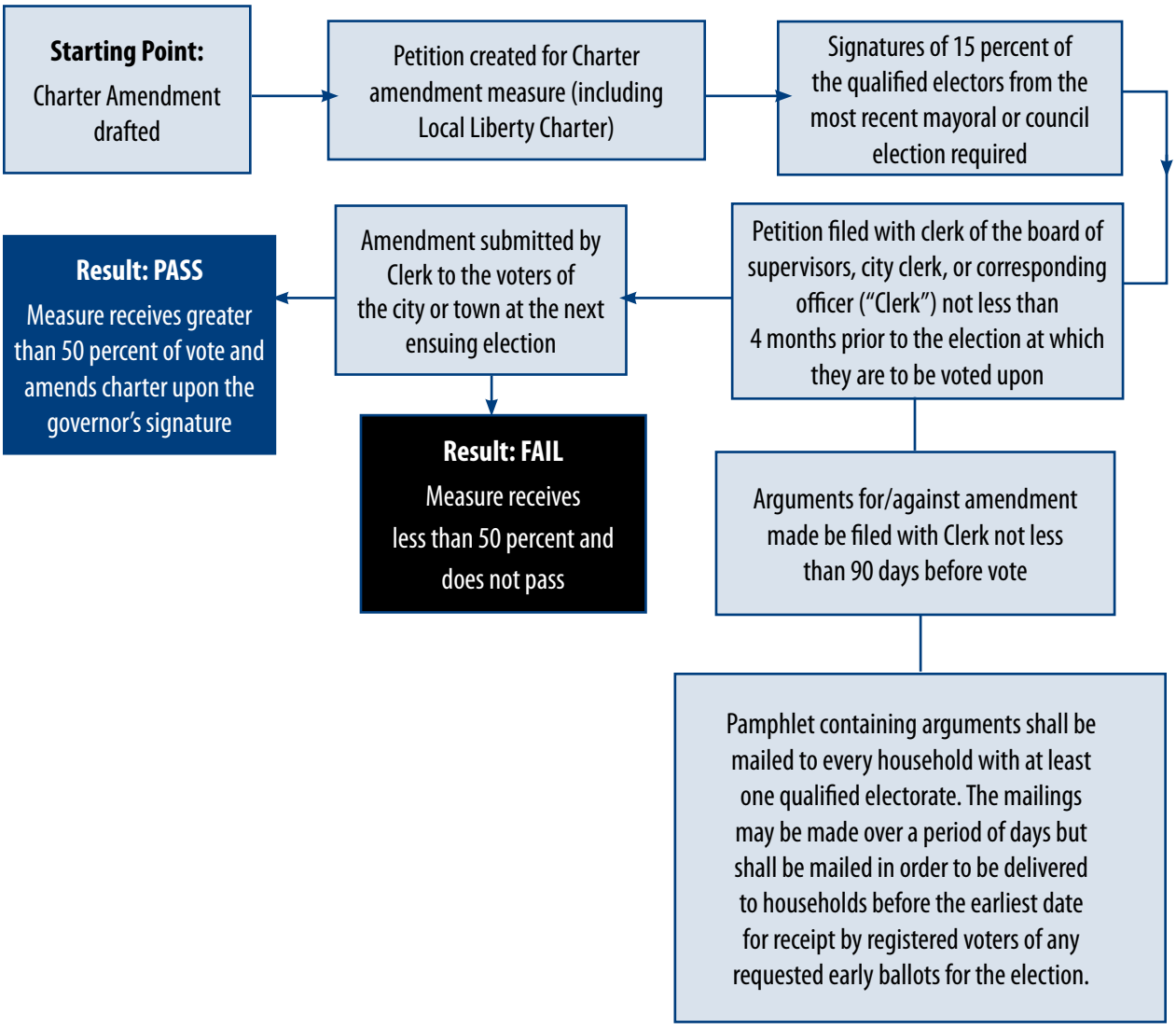
APPENDIX A

Changing the Organic Law of All Statutory Cities and Counties via Citizen's Initiative[323]



APPENDIX B

Amending City Charters via Citizen's Initiative [324]



APPENDIX C

Model Universal Organic Law Requiring Regulatory Sunrise and Sunset Review

A. Regulation shall not be imposed legislatively or administratively on any act, activity, occupation, profession, use of property, condition or state of affairs, which is ordinarily peaceful, non-violent, and non-fraudulent (hereinafter "peaceful activities or conditions"), except in accordance with the sunrise and sunset review processes herein provided.

B. All proposed legislation or administrative action to regulate peaceful activities or conditions shall be subject to "sunrise review" by the responsible regulatory body according to the criteria herein provided. Additionally, all existing legislation and administrative rules (and policies) regulating peaceful activities or conditions shall expire and be regarded as repealed at their specified sunset date or the latter of three years after enactment of this law or three years from their promulgation date, unless extended following "sunset review" by the responsible regulatory body according to the following criteria. Finally, all discretionary administrative interpretation or enforcement of existing regulations or other discretionary executive regulatory action shall be rendered in accordance with the following criteria.

C. Peaceful activities or conditions may be regulated only if:

1. It is within the power of the responsible regulatory body to regulate the targeted activity or condition;

2. Neither the primary purpose nor the predominant effect of regulating the targeted activity or condition will protect a discrete interest group from economic competition, restrain competent adults for their own good, or otherwise promote some private interests to the detriment or disadvantage of others;

3. The targeted activity or condition is an actual threat to public health, safety, or general welfare, which is verifiable, substantial, and not remote or dependent on speculation; and

4. Existing market forces, common law and statutory civil actions are not sufficient to reasonably reduce the threat posed to public health, safety, or general welfare by the targeted activity or condition.

D. After evaluating the criteria prescribed in subsection C, if the responsible regulatory body finds regulation is permissible, only the least restrictive method of regulation consistent with reasonably reducing the threat posed to public health, safety, or general welfare may be implemented, considering the following distinct modes of regulation:

1. The regulation may furnish additional or augmented civil remedies to render common law or statutory civil actions more effective;

2. If furnishing more effective civil remedies will not reasonably reduce the threat posed to public health, safety, or general welfare, the regulation may also impose clear, objective legal standards and enable the enforcement of violations by injunctive relief;

3. If the foregoing modes of regulation will not reasonably reduce the threat posed to public health, safety, or general welfare, the regulation may also enable the enforcement of clear, objective legal standards by inspections and enforcement of violations by civil penalty and injunctive relief;

4. If the foregoing modes of regulation will not reasonably reduce the threat posed to public health, safety, or general welfare, the regulation may also enable the enforcement of clear, objective legal standards by permitting, licensing or other regulatory pre-approval processes;

5. If the foregoing modes of regulation will not reasonably reduce the threat posed to public health, safety, or general welfare, the regulation may also enable the enforcement of clear, objective legal standards by criminal sanctions.

E. A given regulation is a reasonable means of reducing a threat posed to public health, safety, or general welfare only if it has been promulgated as set forth in paragraphs C and D and:

1. The regulation is reasonably expected, upon sunrise review, to substantially reduce or eliminate the threat it targets or, upon sunset review, has substantially reduced or eliminated the threat it targeted;

2. The regulation's short, medium, and long-term costs and adverse consequences are reasonably expected, upon sunrise review, not to be out of proportion to its benefits considering less restrictive alternative modes of regulation or, upon sunset review, have not been out of proportion to its benefits considering less restrictive alternative modes of regulation; and

3. The regulation's enforcement is reasonably expected, upon sunrise review, to be performance benchmarked according to verifiable standards or, upon sunset review, has been performance-benchmarked according to verifiable standards.

F. Reporting Requirements:

1. Anyone advocating new or extended legislative regulation of peaceful activities or conditions shall submit a written report explaining how the regulation meets the criteria specified in subsections C, D, and E to the legislative body responsible for considering the enactment or extension of the regulation reasonably in advance of any related vote and not later than the date required for public notice of the vote;

2. Any administrative body responsible for promulgating or extending administrative rules and policies regulating peaceful activities or conditions shall document in writing its consideration of how the regulation meets the criteria specified in subsections C, D, and E reasonably in advance of any related rulemaking or policy issuance and not later than the date required for public notice of such rulemaking or policy issuance;

3. Whenever regulatory approval for peaceful activities or conditions is refused or conditioned based on discretionary judgment, the official responsible for applying such discretion shall document in writing how such regulatory action meets the criteria specified in subsections C, D, and E reasonably in advance of such refusal or conditioning;

4. The reports contemplated herein shall be made immediately available for inspection and copying by the general public.

G. Enforcement of Sunrise and Sunset Review Process:

1. No regulation or regulatory action affecting peaceful activities or conditions is effective or enforceable if it was promulgated, enacted, extended, or implemented without, in fact, meeting the substantive criteria identified in subsections C, D, and E or without fulfilling the reporting requirements of subsection F. Any such regulation or regulatory action is null, void, and further deemed as a matter of law to cause at least nominal injury to anyone who resides, owns property, or operates a business within the jurisdictional boundaries of the responsible regulatory body;

2. Anyone who resides, owns property, or operates a business within the jurisdictional boundaries of the responsible regulatory body has a private right of action to seek declaratory and injunctive relief from any regulation or regulatory action of that body which affects peaceful activities or conditions if it was promulgated, enacted, extended, or implemented without meeting the substantive criteria identified in subsections C, D, and E or without fulfilling the reporting requirements of subsection F. Such relief may be sought by filing an appropriate pleading in state court immediately and without first exhausting any other administrative or legal process or remedy;

3. If a regulation or regulatory action is challenged in court based on a claim for declaratory or injunctive relief alleging the failure to comply with subsections C, D, E, or F, the responsible regulatory body shall bear the burden of proving such compliance by not less than a preponderance of the evidence. The court shall grant or deny the requested declaratory or injunctive relief based on its independent assessment of whether the responsible regulatory body has complied with subsections C, D, E, and F. In reaching its decision, the court shall render specific findings concerning whether the challenged regulation or regulatory action governs peaceful activities or conditions and, if so, whether the criteria specified in subsections C, D, and E have been fulfilled, without deference to any legislative, administrative, or executive finding and without diminishing the level of scrutiny applied based on the subject matter of the challenged regulation or regulatory action.

ENDNOTES

[1]Goldwater Institute President Darcy Olsen should be credited with the original idea of applying a "Bill of Rights" framework to local government. Additionally, the author thanks Clint Bolick, Tom Patterson, Tom Jenney, David Cuillier, Mike Goodman, and numerous other reviewers, who will remain anonymous, for their insights, comments, and challenging critiques.

[2]Clint Bolick, Leviathan: *The Growth of Local Government and the Erosion of Liberty* (Hoover Institute, 2004).

[3]*Ibid*., xiii, 8.

[4]See Section IV, subsection 10, "The Right to Reconstitute Local Government."

[5]See Section III, subsection 1, "Local Governmental Growth Is Unsustainable."

[6]Compare Susanna Caizo, "Little League field nearly ready," *Arizona Daily Star*, March 16, 2004, which discusses park improvements and quotes a public official as saying, "This is a park that was a premier park in Tucson, but over the years it hasn't received the needed pampering"; Kimberly Matas, "Play, sports areas grow," *Arizona Daily Star* (Jan. 1, 2004); *and* Kimberly Matas, "Recreational projects viewed as vital to area's future," *Arizona Daily Star*, (Jan. 1, 2005), http://www.azstarnet.com/sn/fromcomments/4070.php, *with* Section IV, subsection V, "The Right to Freedom from Crime."

[9]See Section IV, subsection 9, "The Right to Transparency."

[11]Neil Young, *More City Employees Lose Jobs*, Mohave Daily News (Nov. 19, 2008), http://www.mohavedailynews.com/articles/2008/11/20/news/top_story/top1.txt; Sonu Munshi, *Mesa Plans On Cutting Workers' Pay by 2 Percent*, East Valley Tribune (Nov. 19, 2008), http://www.eastvalleytribune.com/story/130848.

[12]Joyce Lobeck, *City Faces $3 Million Shortfall*, Yuma Sun (Nov. 18, 2008), http://www.yumasun.com/news/city_45924___article.html/yuma_shortfall.html.

[13]Mike Branom, *Tempe's Sales Tax Revenue Slumps 9.2% in Last 4 Months*, East Valley Tribune (Nov. 18, 2008), http://www.eastvalleytribune.com/story/130762.

[14]The Economist, *Local Zeroes: Cities and States Are Facing Big Budget Deficits; It Is Partly Their Own Fault* (Nov. 13, 2008), http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=12608223; Arizona City & Town [Arizona League of Cities and Towns], *Making Difficult Budget Decisions in Tough Economics Times 15* (Summer 2008), http://www.azleague.org/pdf/az_city_town_summer08.pdf, which (reporting an average estimated revenue shortfall of 8.8 percent among 35 reporting municipalities).

[15]John Locke, *Second Treatise of Civil Government* (1690), in Locke: *Two Treatises of Government* § 57 (Peter Laslett ed., Cambridge University Press 1967).

[16]Compare U.S. Const. amends. 2 ("Right to bear arms"), 4 ("No unreasonable searches or seizures"), 5 ("Due process"), *and* 14 ("Due process and equal protection applied to states") *with* Ariz. Const. art. II, §§ 4 ("Due process of law"), 8 ("Right to privacy"), 12 ("Liberty of conscience"), 17 ("Eminent domain; just compensation for private property taken; public use as judicial question"), and 26 ("bearing arms").

[17]Compare U.S. Const. amend. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances") *with* Ariz. Const. art. II, § 6 ("Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right").

[18]Compare U.S. Const. art. I, §10 ("No State shall ... pass any ... Law impairing the Obligation of Contracts") *with* Ariz. Const. art. II, § 23 ("No ... law impairing the obligation of a contract, shall ever be enacted").

[19]Compare U.S. Const. amend. 9 *with* Ariz. Const. art. II, § 33.

[20]See, *e.g.,* Chip Mellor & Robert Levy, *The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom* (Sentinel 2008), which analyzes cases that undermined most of the core freedoms protected by the U.S. Constitution, and Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton Press 2006), which discusses in great detail how the general reservation of individual rights set out in the Ninth Amendment to the U.S. Constitution is still generally regarded as an "ink blot" rather than a crucial means of ensuring that the federal government remains one of limited and enumerated powers with respect to its ability to restrict individual liberty.

[21]Ariz. Const. art. II, §§ 9 ("Irrevocable grants of privileges, franchises or immunities") and 13 ("Equal privileges and immunities"); art. IV, part 2, § 19 ("Special laws"); art. IX, § 1 ("Surrender of power of taxation; uniformity of taxes") and § 7 ("Gift or loan of credit; subsidies").

[22]Joseph D. McGoldrick, *The Law and Practice of Municipal Home Rule*, 1916–1930 1 (Columbia University Press 1933) observes, "The conduct of municipal business has almost universally been inept and inefficient and at times it has sunk to humiliating depths of corruption. At its best it has rarely achieved more than an unimaginative inert routine; at its worst it has been unspeakable, almost incredible."

[23]Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform,* 25 Stetson L. Rev. 627, 698 (1996).

[24]See generally International Council on Human Rights Policy, *Local Rule: Decentralisation and Human Rights 2* (2002), observing: "However, except in relation to self-determination and minority rights, little effort has been made to examine local government or decentralisation in relation to human rights."

[25]Chad A. Readler, *Local Government Anti-discrimination Laws: Do They Make a Difference?* 31 U. Mich. J.L. Ref. 777, 788 n. 79, 791–92 (1998) observes: "New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, and Detroit have all adopted some type of anti-discrimination ordinance.... Tucson, Arizona's employment discrimination ordinance, which bans discrimination on the basis of characteristics including sexual or affectional preference and marital status, was upheld against a constitutional challenge in state court."

[26]The charter of the City of East Point, Georgia, for example, includes a bill of rights promising, among other things, freedom, equality, and ethical local government, while also emphasizing its nonbinding and "aspirational" nature (City of East Point, Georgia, Code of Ordinances, Division I. Charter and Related Local Laws, Bill of Rights (2007), available at http://www.municode.com/Resources/gateway.asp?pid=10677&sid=10).)

[27]In the 2006 session of the Oklahoma state legislature, for instance, a "Neighborhood Bill of Rights Act" was proposed, which would have required "a prompt and courteous" response to citizen inquiries by local governmental bodies "within one (1) business day of the contact," as well as "advance notification" of public works, zoning changes, land use variances, or exceptions. Even this modest bill failed to move out of committee (HB 3086, County and municipal government; Neighborhood Bill of Rights Act; codification; effective date 2006 (2008)).

[28]Compare *Bailey v. Mesa*, 76 P.3d 898, 901 (Ariz. Ct. App. 2003) *with* Jordan R. Rose, *Eminent Domain Abuse in Arizona: The Growing Threat to Private Property* 4 (Goldwater Institute Arizona Issue Analysis no. 174, Aug. 16, 2002).

[29]*Roubos v. Miller*, 138 P.3d 735 (Ariz. Ct. App. 2006) (citing Arizona Revised Statute [ARS] § 12-348).

[30]ARS § 41-1001.01 (2008).

[31]"2006 Ballot Propositions," http://www.azsos.gov/election/2006/Info/pubpamphlet/english/prop207.htm

[32]Ariz. Const. art. II, § 2.1 (2008).

[33]See, e.g., ARS § 42-17107 (2008) and Arizona State Senate Issue Brief (Nov. 7, 2006), which discusses how "truth in taxation" legislation requires school districts, "counties, cities and community college districts to provide public notice in a newspaper of general circulation in the proper jurisdiction and hold a public hearing if they intended to raise primary property taxes in excess of the previous year's levy, plus an amount attributable to new construction."

[34]Arizona Senate Bill 1235, *An Act Amending Title 41, Chapter 4, Article 3, Arizona Revised Statutes, by Adding Section 41-725; Relating to State Financial Disclosure* (48th Leg., 2d sess., 2008), http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/laws/0312.htm (2008).

[35]Better Government Association (BGA), *2005 Annual Report* 16, www.bettergov.org/pdfs/2005annualreport.pdf states that "[w]orking with State Senator John J. Cullerton (D-6th District), the BGA in 2005 helped amend the [open meetings] law to require online posting of notices, agendas and meeting minutes."

[36]Arizona House Bill 2159, *An Act Amending Title 39, Chapter 1, Article 2, Arizona Revised Statutes, by Adding Section 39-128; Relating to Disciplinary Records of Public Officers and Employees* (48th Leg., 2d sess., 2008), http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/laws/0277.htm

[37]Economic Freedom of North America: 2006 Annual Report, Appendix C, p. 52, available at www.freetheworld.com/efna2006/EFNA2006_states.pdf.

[38]ARS §§ 41-1073, *et seq.*

[39]ARS § 32-4301 (2008).

[40]Ariz. Const. art. IX, Sec. 17 (2008); Michael J. New, *The Time Is Now: A Taxpayer Bill of Rights for Arizona* 2 (Goldwater Institute Policy Report no. 202, Mar. 22, 2005).

[41]New, *The Time Is Now* 2.

[42]New, *The Time Is Now* 3 (citing Ariz. Const. Art. 9, Sec. 22).

[43]Frontier Centre for Public Policy, *A Conversation with Ronald Jensen* (Sept. 1, 2000), http://www.fcpp.org/main/publication_detail.php?PubID=214.

[44]Geoffrey F. Segal & Adam B. Summers, *Citizens' Budget Reports: Improving Performance and Accountability in Government* 14–16 (Reason Public Policy Institute Policy Study no. 292, Mar. 2002), http://www.rppi.org/ps292.pdf.

[45]See City of Charlotte, Business Support Services, *History of Managed Competition in Charlotte,* http://www.charmeck.org/Departments/Business+Support+Services/Procurement/PCAC/History+of+PCAC.htm; Frontier Centre for Public Policy, *A Conversation with Stephen Goldsmith* (Apr. 4, 2001), http://www.fcpp.org/main/publication_detail.php?PubID=232; Deloitte, *Managed Competition: Proceed—with Caution* (2008), http://www.deloitte.com/dtt/newsletter/0,1012,sid%253D3666%2526cid%253D47404,00.html; and San Diego Code of Ordinances ch. 2, art. 2, div. 37, §§ 22.3701, et seq.

[46]*Thompson v. Tucson Airport Authority, Inc*., 786 P.2d 1024, 1025 (Ariz. Ct. App. 1989).

[47]See, e.g., Rob O'Dell, *Council to Look at Minidorm Dispute: Rules on Homes Near University May Be Imposed*, Arizona Daily Star (Apr. 24, 2007), http://www.azstarnet.com/metro/179835, *and* Howard Fischer, Test Case, Arizona Daily Sun (Oct. 4, 2007), http://www.azdailysun.com/articles/2007/10/04/news/20071004_front%20page_10.txt.

[48]Leonard C. Gilroy ed., *Reason Foundation Annual Privatization Report 2007* 107, http://www.reason.org/apr2007/apr2007.pdf. See also League of Arizona Cities and Towns, *Sample Proposition 207 Waiver Form and Claims Checklist* (Dec. 19, 2006), http://www.azleague.org/doc/resources/prop207_sample_waiver_form_checklist.doc, which recommends waiver of Proposition 207 rights "if the owner applies for any of the numerous land use actions within a municipality's jurisdiction, i.e. rezoning, zoning change, use permit, preliminary development plan, general plan amendment, variance, site plan, subdivision, or ordinance."

[49]Mary Williams Walsh, *Under Strain, Cities Are Cutting Back Projects*, New York Times (Oct. 1, 2008).

[50]Girard Miller, *Benefits Beat: Avoiding Benefits Bankruptcy,* Governing (May 2008), http://www.governing.com/articles/0805gmillerb.htm.

[51]Eric Weiner, *What Happens When City Hall Goes Bankrupt?* NPR.org (Feb. 28, 2008); *see also* http://www.ci.vallejo.ca.us/GovSite/default.asp?serviceID1=712&Frame=L1 (last visited January 7, 2009).

[52]Weiner, *What Happens When City Hall Goes Bankrupt?*

[53]Weiner, *What Happens When City Hall Goes Bankrupt?*

[54]E.J. McMahon & Fred Siegel, *Gotham's Fiscal Crisis: Lessons Unlearned* 97 (The Public Interest no. 158, Winter 2005).

[55]Doug MacEachern, *Municipalities Need To Get Handle On Public-Employee Liabilities*, Arizona Republic (Mar. 30, 2008).

[56]Arizona Tax Research Association newsletter 8 (vol. 68, no. 2 (Feb./Mar. 2008).

[57]Lynh Bui, *Valley Cities Face Sweeping Budget Cuts*, Arizona Republic (Oct. 17, 2008), http://www.azcentral.com/arizonarepublic/news/articles/2008/10/17/20081017citycuts1017.html.

[58]McMahon & Siegal, *Gotham's Fiscal Crisis* 103–105.

[59]McMahon & Siegal, *Gotham's Fiscal Crisis* 97–98.

[60]Results and Criteria of BGA/NFOIC Survey, http://www.nfoic.org/uploads/results1.pdf (last visited January 20, 2009).

[61]Daryl James, *Open & Shut Part 1: Information Often under Lock and Key*, Arizona Daily Star (Dec. 19, 2004), http://www.azstarnet.com/sn/related/53197.

[62]James, *Open & Shut Part 1.*

[63]James, *Open & Shut Part 1.*

[64]Thelma Grimes, *City Attorney Refuses News-Sun Request*, San Pedro Valley News-Sun (June 10, 2008), http://www.bensonnews-sun.com/articles/2008/06/10/news/news02.prt.

[65]Daryl James, *Open & Shut Part 3: Cops, Schools Are Least Cooperative*, Arizona Daily Star (Dec. 21, 2004), http://www.azstarnet.com/sn/related/53484.

[66]Jacques Billeaud & Enric Volante, *Open & Shut: A Statewide Public Records Audit—Police Less Likely to Open Records*, Arizona Daily Star (Jan. 22, 2002), http://www.azstarnet.com/publicrecords/20122-police.html.

[67]Billeaud & Volante, *Open & Shut.*

[68]Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, Finance & Development (Mar. 1998), http://www.worldbank.org/fandd/english/0398/articles/020398.htm.

[69]Brian P. Brennan, *Democracy without Elections? The Cancellation Phenomenon in California's Special Districts 3* (prepared for presentation at California State University–Sacramento, Mar. 2008).

[70]Peoria Code of Ordinances, § 11-182 (2008).

[71]Scottsdale Code of Ordinances, §§ 16-141, et seq. (2008).

[72]Mesa Code of Ordinances, §§ 5-19-1, *et seq.* (2008); Glendale Code of Ordinances art. 1, §§ 21-1, *et seq.* (2008); Gilbert Code of Ordinances art. IV, §§ 14-266, *et seq.* (2008).

[73]Glendale Code of Ordinances art. IV, §§ 21-151, *et seq.* (2008)

[74]Scottsdale Code of Ordinances art. XIII, §§ 16-431, *et seq.* (2008).

[75]Peoria Code of Ordinances chap. 11, §§ 11-191 (2008).

[76]See generally Daniel E. Troy, *Advertising: Not "Low Value" Speech*, 16 Yale J. on Reg. 85, 88 (1999).

[77]Gilbert Code of Ordinances chap. 1, § 4.402(R) (2008).

[78]Mesa Code of Ordinances, § 5-6-2 (2008).

[79]Chandler Code of Ordinances, §§ 39-8(A) and 39-10 (2008).

[80]Tempe Code of Ordinances chap. 9, §§ 3-406(B) and 4-902(B)(10) (2008).

[81]The following case study is based on an interview conducted with Michael Goodman on June 27, 2008, and the findings of fact rendered in *City of Tucson v. Hon. Deborah Bernini*, case no. 2 CA-SA 2007-0076 (Nov. 1, 2007) and *Michael Goodman v. City of Tucson, et al.*, case number 2-CA-CV 2007-0057 (Dec. 17, 2007).

[82]*Goodman v. Tucson* 2.

[83]*Goodman v. Tucson* 2.

[84]*Tucson v. Bernini* 3.

[85]*Tucson v. Bernini* 2; *Goodman v. Tucson* 3.

[86]*Goodman v. Tucson* 4.

[87]*Goodman v. Tucson* 4.

[88]*Goodman v. Tucson* 4.

[89]*Goodman v. Tucson* 5.

[90]*Goodman v. Tucson* 11.

[91]See generally Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations,* 61 U. Pitt. L. Rev. 419, 480 (2000). *See, e.g.*, Mesa Code of Ordinances, § 5-11-1 (2008) ("Licensing teenage dance halls"); David Harsayani, *Nanny State: How Food Fascists, Teetotaling Do-gooders, Priggish Moralists, and Other Boneheaded Bureaucrats Are Turning America into a Nation of Children* 2, 5, 85, 108, 106, 121, 125, 140 (Broadway 2007) (New York City prohibiting cell phones while driving, pornography on newsstands, expiration dates on gift certificates, and alcohol billboards near schools, as well as requiring two-forms of identification with credit card use, nutritional labeling on restaurant menus, measuring the fat of public-school students, and imposing a "fat tax" on junk food, video games, commercials, and movies); Catrin Einhorn, *Minnesota Bill Would Ban Limitless Drinking Specials,* New York Times A22 (Jan. 20, 2008) (banning happy hour drink specials); Henry Miller, *Foolish Food Fads*, Washington Times A13 (Jan. 3, 2008) (San Francisco imposes a tax on high-fructose corn syrup); Jordan Lite, *New Food Fight Over Calories: City Revives Push for Disclosure by Eateries*, New York Daily News 6 (Jan. 22, 2008) (New York imposing a rule to require the disclosure of calorie counts in restaurants); Kate Stone Lombardi, *Does the Trans-fat Ban Grease a Slippery Slope*, New York Times 1 (Jan. 27, 2008); *Seniors May Get Doughnuts After All*, Los Angeles Times F5 (Aug. 27, 2007) (ban of doughnuts at senior citizen's centers), available at http://articles.latimes.com/2007/aug/27/health/he-briefly27; Robert Samuels, *It's a Boxer Rebellion over Opa-locka's Saggy Pants ban*, GBMNews (Oct. 26, 2007), http://www.gbmnews.com/articles/1763/1/It039s-a-boxer-rebellion-over-Opa-locka039s-saggy-pants-ban/Page1.html (Florida town bans saggy pants); Kathi Swarthout, letter to the editor, *The Insatiable Maw: If It's Dough They Want, Then Dough They'll Have*, Seattle Times B5 (July 23, 2007) (trans fat ban); Alexia Elejalde-Ruiz, *Commissioner Sets Sights on Bottled Water*, RedEye [Chicago Tribune] 8 (Sept. 7, 2007, (attempting to end expenditures on water bottles); *Louisiana Town Bans Sagging Pants to Avoid Exposing Underwear*, FoxNews.com (Aug. 14, 2007, available at http://www.foxnews.com/story/0,2933,293209,00.html (last visited January 20, 2009); Deborah Soderquist, letter to the editor, *Trans Fats: "Nutrition Cop" Goes Too Far*, Portland Oregonian B7 (Jan. 10, 2007,) (trans fat ban); Echa Schneider, letter to the editor, *Secondhand Smoke Ordinance: Nanny-state Law*, Alameda Times-Star (Calif.) [Q: Date?] (Oakland debates a ban of smoking within apartment buildings); Gil Smart, editorial, *Extinguish Smoking Ban*, Intelligencer Journal (Lancaster, Pa.) 1 (July 1, 2007): Letters to the Editor, *Adults' Rights among Smoking Ban Worries*, The Journal Gazette (Ft. Wayne, Ind.) 9A (Sept. 19, 2006); Associated Press, Summary Box: *Smokers Fired Up over Health Department Bans* (Nov. 28, 2004) (smoking bans); and Fox Chicago Perspective (WFLD-IL television broadcast, Aug. 27, 2006). See also Paul Frumkin, *Chicago City Council's Anti-foie Gras Law Shoulders In on Rights of Restaurateurs: Sale of Foie Gras Banned in Restaurants*, Nation's Restaurant News 29(1) (May 15, 2006) (Chicago bans foie gras); James Colgrove & Amy Fairchild,

op-ed, Father Mike, New York Times (Oct. 22, 2006) (trans-fat ban); Peter Schworm, *Lawsuit Challenges Smoking Ban in Private Clubs: Eagles Say Health Board Overstepped Authority*, Boston Globe (July 11, 2004), http://www.boston.com/yourlife/health/other/articles/2004/07/11/lawsuit_challenges_smoking_ban_in_private_clubs_eagles_say_health_board_overstepped_authority/; Duane D. Stanford, *Health Officials Eye Smoking Ban for Cities*, Atlanta Journal-Constitution 3JJ (Dec. 7, 2004) (indoor smoking bans); Kathy McCabe, S*alem Stands by Its Ban on Smoking April 1 Cutoff at Bars, Eateries to Be Fought*, Boston Globe 1 (Mar. 18, 2001) (Salem, Massachusetts, bans smoking in bars and restaurants); Douglas Belkin, *Smoking Flags Going Up at Boca Area Beaches*, Parks Palm Beach Post (Fla.) A1 (June 22, 1999) (describing recent ban restricting smoking and tobacco use on beaches and in parks); Shandra Martinez, *Holland Council OKs Limits on Smoking in 8 City Parks,* Grand Rapids Press A14 (July 22, 1999) (describing new antismoking ordinance); Elsa Brenner, *Battle Over Smoke Moves Outdoors*, New York Times WC-1 (June 21, 1998) (describing recent laws banning smoking in various public places); Marcia Meyers, *Smoking Limits Spread Outdoors*, Baltimore Sun A1 (Apr. 26, 1998)(reporting bans in Santa Cruz, CA, Mesa, AZ, and Sharon, MA); Maria Alicia Gaura, *Smoked Out: Laws Increasingly Target Right to Light Up in the Open Air*, San Francisco Chronicle A13 (May 11, 1998) (reporting on California municipal ordinances); Marv Balousek, *Smoking Ban May Expand: Proposal Includes Some Outdoor Areas,* Wall Street Journal A1 (Oct. 8, 1998) (discussing proposed antismoking ordinance); George Snell, *Health-board Leader Firm on Smoking Law*, Worcester Telegram & Gazette B1 (Oct. 18, 1996) (the effects of a smoking ban in Worcester, Massachusetts); Richard Berman, *A Smoking Ban Goes Too Far*, Restaurant Bus. 169 (Dec. 10, 1996) (discussing outdoor smoking ban); and Robert B. Nugent, *Fitchburg Board of Health Widens Smoking Ban*, Worcester Telegram & Gazette (Mass.) B1 (June 3, 1996).

[92]*What's the Matter with Chicago? and Seattle and New York and Boston...?* Reason (July 9, 2008), http://reason.com/news/show/127481.html.

[93]Pope, *Balancing Public Health Against Individual Liberty* 493 observes: "One economist has remarked that '[i]t is somewhat ironic that the government discourages smoking and drinking ... yet when it comes to the major cause of death-heart disease ... politicians let us eat with impunity.' In response to this apparent irony, a Yale psychologist has proposed a junk-food tax. Others have proposed even more direct regulation of fatty foods" (citing Jack Chambless & Sarah C. McAlister, *Eating with Impunity*, Orlando Sentinel G1 [Dec. 22, 1996]; Kelly D. Brownell, *Get Slim with Higher Taxes*, New York Times A29 [Dec. 15, 1994]; Bill Reel, *A Buck a Pack Is a Helluva Whack*, Newsday A43 [Mar. 25, 1994]; U.S. Department of Health, Education, and Welfare, *Forward Plan for Health FY 1977–81* 104 [1975]; John Doyle, *Why Fattening Foods Are Being Positioned As the Next Targets for Public Health Officials*, Nation's Restaurant News 42 [Aug. 10, 1998]; Joyce Howard Price, *New Battle about Evil Spirits*, Insight on News 40 [Feb. 1, 1999]; and Cori Vanchieri, *Lessons from the Tobacco Wars Edify Nutrition War Tactics*, 90 J. Nat'l Cancer Inst. 420 [1998]).

[94]Timothy Sandefur, *Rights Are a Seamless Web*, 26 Rutgers L. Rec. 5 (2002). *See also Lynch v. Household Fin. Corp.,* 405 U.S. 538, 522 (1972), which states, "[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without lawful deprivation, no less than the right to speak or the right to travel, is in truth a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized"; Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* 138–39 (Harvard University Press 1985), which asks, "Can anyone find a society in which freedom of speech flourishes where the institution of private property is not tolerated? A country in which there is a free nationalized press?"); and James Madison, *On Property, in Madison: Writings* 515 (Jack Rakove ed., Library of America 1999), which states, "This term in its particular application means 'that domination which one man claims and exercises over the external things of the world, in exclusion of every other individual.' In its larger and juster meaning, it embraces every thing to which a man might attach a value and have a right; and which leaves to every one else the like advantage. In the former sense, a man's property in his opinions and the free communication of them.... In a word, as a man is said to have a right to his property, he may be equally said to have a property in his rights...."

[95]Arizona Criminal Justice Commission, *Arizona Crime Trends 2007: Fact Sheet*, http://azcjc.gov/pubs/home/UCR_Crime_One_pager_Dec_6_06.pdf.

[96]Arizona Criminal Justice Commission, *Arizona Crime Trends 2007.*

[97]Arizona State University, *Rate of Serious Crime per 100,000 Population, 2003*, http://www.asu.edu/copp/morrison/50statedata/01SeriousCrime.pdf. *See also* Arizona Criminal Justice Commission, *Arizona Crime Trends: A System Review* 12 (2005), http://acjc.state.az.us/pubs/home/Crime_Trends_2005.pdf

[98]William J. Bratton, *The Unintended Consequences of September 11th*, 1 Policing 21–24 (2007).

[99]Police Executive Research Forum, A *Gathering Storm—Violent Crime in America* 14 (Oct. 2006).

[100]Police Executive Research Forum, *A Gathering Storm* 14.

[101]Police Executive Research Forum, *Violent Crime in America: 24 Months of Alarming Trends* (2007), http://www.policeforum.org/upload/Violent%20Crime%20Report%203707_140194792_392007143035.pdf.

[102]*Notes on the State of Virginia* (1783), in *Thomas Jefferson: Writings* 245 (Merrill D. Peterson ed., Library of America 1984).

[103]Advocates of the Charter need to recognize that a variety of legal doctrines exist that ordinarily require the judiciary to defer to local legislative and administrative decision-making, or otherwise abstain from deciding a legal challenge. For example, although Arizona robustly recognizes the right of taxpayers to challenge illegal governmental fiscal conduct, such "taxpayer standing" is not unlimited and may not support a citizen's effort to enforce every implementation of the Local Liberty Charter. Likewise, complex legal doctrines of "ripeness" or "justicability" can bar legal challenges deemed to have been brought "too soon," even when common sense may suggest that further delay will not accomplish anything.

[104]Michael W. McConnell, *Active Liberty: Interpreting Our Democratic Constitution*, 119 Harv. L. Rev. 2387, 2393–94 (June 2006); *see generally* Alexis de Tocqueville, *Democracy in America*, 249 (Prentice-Hall, 1973).

105Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay in Kermit Roosevelt's the Myth of Judicial Activism*, 23 J.L. & Pol. 1, 7 (2007).

[106]Alexander Hamilton, *Federalist No. 51*, 324 (Mentor Books, 1961) observes, "In a society under the form of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger."

[107]Bernard Siegan, *Economic Symposium: F.A. Hayek and Contemporary Legal Thought*, 23 Sw. U. L. Rev. 479–80, 482–83 (1994) (quoting James Madison, Federalist No. 48).

[108]See, e.g., Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. Va. L. Rev. 683, 685–86 (2007), which states: "Americans have traditionally cherished local autonomy... the more discretion that local leaders have, the better they can address problems in a manner that is most suitable to the community's particular needs. With enhanced local power also comes enhanced citizen participation in local government. Citizens participate in government when that participation can be meaningful. The smaller the governmental unit, the more likely a citizen's participation will be meaningful."

[109]A.C. Pritchard & Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 N.C. L. Rev. 409, 478 (1999).

[110]Pritchard & Zywicki, *Finding the Constitution* 478–79, 483.

[111]Pritchard & Zywicki, *Finding the Constitution* 483.

[112]James M. Buchanan & Gordon Tullock, *The Calculus of Consent* (Ann Arbor Paperbacks 1992) (1962); Pritchard & Zywicki, *Finding the Constitution* 481 n. 294.

[113]Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 Colum. L. Rev. 883, 903 (2007) (discusses how conditions "are ripe for the kind of special interest group pressure described by public choice theorists" when "in larger local governments, the per taxpayer cost ... may be relatively insignificant"); Bernard H. Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 23 (2d ed., George Mason University Press 1994).

[114]Mesa City Council Meeting (June 23, 2008), http://www.mesachannel11.com/vod.php?show=404.

[115]Charles J. Wheelan, *Politics or Public Interest? Licensing and the Case of Respiratory Therapists,* Perspectives on Work (Labor and Employment Relations Association) 43 (Winter 2005).

116Alexis de Tocqueville, *Democracy in America* 46 (Richard D. Heffner ed., Mentor 1956); McConnell, *Active Liberty* 2395.

[117]James Madison, *Federalist No. 10* and *Federalist No. 51*.

[118]Bernard Siegan, *Economic Liberties and the Constitution* 63 (2d ed., Transaction Publishers 2006).

[119]International Council on Human Rights Policy, *Local Rule* 29–30 and 65 (citing USAID Center for Democracy and Governance, May 2000).`

[120]Sandefur, *The Wolves and the Sheep of Constitutional Law* 5–6. *See also* Sam Staley, *Bigger Is Not Better* 12 (Cato Institute Policy Analysis no. 166, January 21, 1992), http://www.cato.org/pub_display.php?pub_id=1026&full=1.

[121]Pritchard & Zywicki, *Finding the Constitution* 481

[122]Bryan Caplan, *The Myth of the Rational Voter: Why Democracies Choose Bad Policies* 119–34 (Princeton University Press 2007). Notably, as against this theory, some scholars advance evidence of the "Miracle of Aggregation," which arises from studies of collective guessing and "prediction markets" that have shown when many people estimate the

number of jelly beans in a jar or bet their money on predictions of future events, the average prediction tends to be very close to the truth. This "miracle" is explained by the argument that erroneous estimates, which are based on ignorance, tend to cancel each other out, leaving behind the most knowledgeable estimates, which then determine the collective average. The problem with the Miracle of Aggregation, as applied to politics instead of jelly beans, is it presumes that collective averages of voting preferences determine political outcomes and that politicians are a known quantity, like a jar of jelly beans. Politicians are intrinsically unknown quantities whose policy choices may not be motivated by the collective average of voting preferences. Even if there is a "correct" set of policy positions for a politician to hold, there is no "correct" estimate of who is the "right" politician, because as soon as politician are elected, there is little to stop them from shifting their policy positions. Moreover, even if policy decisions were made by direct democracy, rather than through representatives, the Miracle of Aggregation theory fails to take into account the observed phenomena that erroneous estimates of "good" or "bad" policies can be based on widespread, systematic irrationality, rather than random ignorance. Unlike in prediction markets, where each participant has a monetary stake in his or her prediction, there is generally no significant anticipated cost to voting based on false beliefs (see *The Myth of the Rational Voter* 9–10). The costlessness of irrationality during voting makes it possible for the bulk of the voting population to indulge fashionable false beliefs. If this happens, these decisions do not cancel each other out; collectively, they point in one direction—toward irrationality—and they swamp the impact of knowledgeable, rational voters (9–10). Indeed, this sort of phenomena essentially describes the "mob action" tendency of direct democracies that caused the Founders to devise a republican system of government in the first place.

[123]As against the comprehensive reform proposal advanced in this report, one scholar has argued very creatively that controversies over local property rights protection might be resolved by establishing various rights regimes by statute—weak, middling, and strong—and then allowing local governments to opt into the regime of their choosing (Serkin, *Local Property Law* 885–86). This proposed solution is based on the argument that local governments would compete for residents and businesses, eventually causing the most felicitous rights regime to prevail. Perhaps this sort of idea might even be extended to facilitate competition between local governments over operative conceptions of liberty. Cities might choose between hard paternalist, soft paternalist, and libertarian legal frameworks. This idea could possibly even be extended to fiscal policy, where cities could opt into spendthrift, moderate, or conservative fiscal policies established by statute. The fundamental problem with these ideas, however, is that they all presume competitive pressures between local governments to secure new residents and businesses with agreeable legal frameworks will dominate the political pressures that lead to abusive local government. This is far from clear. The author contends that the contrary presumption is much more plausible, in view of the problem of factions, irrational voting, and studies showing insufficient "Tiebout competition" between local governments.

[124]Paul W. Rhode & Koleman S. Strumpf, *Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1850 to 1990*, 93 American Economic Review 1648–1677 (Dec. 5, 2003).

[125]Douglas W. Kmiec & Eric L. Diamond, *New Federalism Is Not Enough: The Privatization of Non-public Goods,* 7 Harv. J.L. & Pub. Pol'y 321, 382–83 (1984).

[126]Kmiec & Diamond, *New Federalism Is Not Enough.*

[127]Pritchard & Zywicki, *Finding the Constitution* 483.

[128]Compare with Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 22, which observes that "[p]eople should understand that in exercising their rights, they are not at the mercy of the politicians. The legislature cannot provide this assurance against itself."

[129]International Council on Human Rights Policy, *Local Rule* 35 observes that "[s]uch unevenness—or injustice, or inequity—can only be removed by policies that vigorously promote fair and consistent effects. In practice, such policies do not 'stick' in the absence of an enforcement process that is effective and a legal framework that is independent of political powers."

[130]Steve Sheppard ed., *The Selected Writings and Speeches of Sir Edward Coke*, vol. I, 264, 265 n.3, 267 n.7, 279–80, 390–96, 399, 401, 404 n.28 (Liberty Fund 2003) (reprinting *Dr. Bonham's Case*, Hilary Term, 7 James 1. (1610); *The Case of the Tailors of Habits &c. of Ipswich*., Michaelmas Term, 12 James 1 (1614); *The Case of Monopolies,*.Trinity Term, 44 Elizabeth I In the Court of King's Bench (1602)); Siegan, *Economic Liberties and the Constitution* 14–15, 17.

[131]Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 30; International Council on Human Rights Policy, *Local Rule* 31.

[132]This title is borrowed from Barnett, *Restoring the Lost Constitution.*

[133]Mark J. Simmons & Valerie Cunningham, *Three Centuries of African-American History* 130 (University of New Hampshire Press 2004).

[134]Douglas B. Rasmussen, *Why Individual Rights? in Individual Rights Reconsidered: Are the Truths of the U.S. Declaration*

of Independence Lasting? 35, 39, 113, 119–26 (Tibor R. Machan ed., Hoover Institution 2001).

[135]Ariz. Const. art. II, § 33 (2008).

[136]Barnett, *Restoring the Lost Constitution.*

[137]See, e.g., *Adams v. Bolin*, 74 Ariz. 269, 282 (Ariz. 1952), and *Earhart v. Frohmiller*, 65 Ariz. 221, 225 (Ariz. 1947).

[138]There is good reason to doubt whether the prevailing interpretation of the reservation of rights provision is correct. Notably, when interpreting an identical provision in its state constitution, the Minnesota Supreme Court contemporaneously held that the provision was meant to protect "inherent and inalienable" individual rights from legislative power (*Thiede v. Town of Scandia Valley*, 14 N.W.2d 200,225-26 [Minn. 1944]). Moreover, interpreting the "reservation of rights" provision as protecting inherent and inalienable, if unenumerated, individual rights better fits first two provisions of the Declaration of Rights to the Arizona State Constitution, which state: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government," and "[a]ll political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights." *See generally* Benjamin Barr, *Defining the Fundamental Principles of the Arizona Constitution: A Blueprint for Constitutional Jurisprudence* (Goldwater Policy Report no. 214, Oct. 24, 2006).

[139]"Sunset review" laws, which apply to a wide range of regulations restraining peaceful conduct and activities, were enacted in over half of the states, including Arizona, during the 1970s and 1980s. James E. Gerson, *Temporary Legislation*, 74 U. Chi. L. Rev. 247, 259–60 (2007). At least 19 states, including Arizona, have also enacted "sunrise review" laws, which typically apply to occupational regulations (ARS §§ 32-3101 to 32-3108; Colorado Rev. Stat. § 24-34-104.1; Fla. Stat. § 11.62; Code of Georgia §§ 43-1A-1 to 43-1A-9; Hawaii Stat. § 26H-2; Kan. Stat. §§ 65-5001 to 65-501; Maine Rev. Stat. tit. 32, §§ 60-J to 60-L, and tit. 5, § 12015; Minn. Stat. §§ 214.001 to 214.002; Neb. Stat. §§ 71-6201 to 71-6229; N.M. Stat. §§ 12-9A-1 to 12-9A-6; N.C. Gen. Stat. §§ 120-149.1 to 120-149.6; S.C. Code §§ 40-1-10 to 40-1-220; Tenn. Code §§ 4-29-101 to 4-29-122; Tex. Code §§ 318.001 to 318.003; Utah Code §§ 36-23-101 to 36-23-108; Vt. Stat. §§ 3102 to 3107; Code of Va. §§ 54.1-100, 54.1-309 to 54.1-311; Rev. Code of Wash. chap. 18.118, §§ 18.118.005 to 18.118.900, and chap. 18.120, §§ 18.120.010 to 18.120.910; W. Va. Code §§ 30-1A-1 to 30-1A-6).

[140]See, e.g., Doug Kaplan, *Simplify, Don't Subsidize: The Right Way to Support Private Development* (Institute for Justice Perspectives on Eminent Domain Abuse no. 4, June 2008), and Curt Pringle, *Development without Eminent Domain: Foundation of Freedom Inspires Urban Growth* (Institute for Justice Perspectives on Eminent Domain Abuse no. 2, July 2007).

[141]Compare with Gerson, *Temporary Legislation* 268–75.

[142]Compare with Gerson, *Temporary Legislation* 268–75.

[143]Compare with Gerson, *Temporary Legislation* 268–75.

[144]Pope, *Balancing Public Health Against Individual Liberty* 448 observes that "[n]o person is an entirely isolated being. It is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them. Theoretically, there is little, if any, individual conduct that does not 'harm' other people. The term 'harm' is thus plagued with conceptual ambiguities that permit its expansive interpretation."

[145]Numerous studies show regulation is seldom effective, and often counterproductive. *See, e.g.*, Ronald Coase, *Economists and Public Policy*, in Large Corporations in a Changing Society 184 (J. Fred Weston ed., New York University Press 1974); Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 46–47, which summarizes that in "53 studies of government regulation, by more than 60 individual and institutional researchers, which have appeared in the most prestigious scholarly literature ... the vast bulk of these scholars favor either total or substantial deregulation of the area under study"; Morris M. Kleiner, *Occupational Licensing and the Internet: Issues for Policy Makers* 4–5 (prepared for the Federal Trade Commission Hearings on "Possible Anticompetitive Efforts to Restrict Competition on the Internet," Oct. 1, 2002), which compiles studies of occupational regulation; Robert Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 Hamline J. Pub. L. & Pol'y 319, 382 (2000); Stanley J. Gross, *Professional Licensure and Quality: The Evidence* (Cato Policy Analysis no. 79, Dec. 9, 1986), and http://www.cato.org/pubs/pas/pa079.html. See generally Federal Trade Commission & U.S. Department of Justice, *Improving Health Care: A Dose of Competition* 2:27 (July 2004).

[146]These factors represent a fusion of the previous statutory models and the pro-liberty constitutional principles discussed in Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 40–41.

[147]Compare with Gerson, *Temporary Legislation* 260 & n. 66, citing William Lyons and Patricia K. Freeman, *Sunset Legislation and the Legislative Process in Tennessee*, 9 Leg. Stud Q. 1, 151 (1984).

[148]Compare *Gebbie v. Olson*, 828 P.2d 1170, 1173 (Wash. 1992), which rejects the argument that the Sunrise Act of Wash. Stat. § 18.120.010 "resulted in a legislative reformulation of the State's police power," *with Long & Foster Real Estate, Inc. v. NRT Mid-Atlantic, Inc.,* 357 F.Supp.2d 911, 916–17 (E.D. Va. 2005), which embraces the language of Virginia's Sunrise Act in defining the constitutional right to work in a lawful profession and the limits of an administrative agency's authority.

[149]During such judicial review, the burden of persuasion should be placed squarely on the shoulders of the local government. Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 42 argues that "[t]he responsibility for justifying a limit on liberty rests with the government entity seeking the limit."

[150]Sandefur, *The Wolves and the Sheep of Constitutional Law* 27.

[151]Sandefur, *The Wolves and the Sheep of Constitutional Law* 26–27.

[152]As against objections that such judicial scrutiny would be too burdensome on local government, it should be observed that if a legislative body takes its obligation to scrutinize proposed regulations seriously at "sunrise" or "sunset," it should have already generated and considered sufficient evidence to justify the law. Moreover, "it is not true that wrongly annulling a law exceeds the danger of wrongly upholding it" (Sandefur, *The Wolves and the Sheep of Constitutional Law* 22–23). When a law is wrongly struck down, local governments can always promulgate new laws to replace it; they get multiple bites at the apple. By contrast, a judicial decision wrongly upholding a law is more often the last word because the challenger to the law, having already lost the political battle, typically lacks the power or influence to repeal it.

[153]Ala. Code §§ 11-19-14, 11-52-32 (1996); Alaska Stat. § 29.40.110 (1995); Cal. Gov't Code §§ 65920–65957.1 (West 1996); Colo. Rev. Stat. §§ 30-28-110(E), 31-23-215 (1996); Del. Code Ann. Tit. 6811, § 4811 (1995); Kan. Stat. Ann. § 12-752(B) (1996); La. Rev. Stat. Ann. 33:113 (1996); Md. Code Ann. § 65b:5.04 (1996); Mich. Comp. Laws § 5.04 (1996); Minn. Stat. § 462.358, Subd. 3b (1996); Mo. Rev. Stat. §§ 64.245, 64.590, 64.830, 89.370, 89.420 (1996); N.D. Cent. Code S § 40-48-21 (1996); N.M. Stat. Ann. § 3-20-7e; (1996); N.Y. Stat. Local Gov'ts § 32 (1996); N.Y. Law § 30-A(2) (1996); Ohio Rev. Code Ann. §§ 711.05, 711.09 (1995); R.I. Gen. Laws. § 45-23-9 (1996); Okla. Stat. Ann. § 74-115 (1996); Pa. Stat. Ann. § 10709 (1996); R.I. Gen. Laws § 45-23-37d (1996); S.C. Code Ann. § 6-7-1050 (Law Co-Op 1995); S.D. Codified Laws § 11-2-24.1 (1995); Tenn. Code Ann. § 13-4-304; (1995); Tex. Code Ann. § 212.009 (1997); Wis. Stat. Ann. § 236.11 (1996); and Wyo. Stat. Ann. §§ 18-5-307 & 308 (1995)..

[154]Minn. Stat. § 15.99, subd. 2.

[155]ARS § 41-1073 (2008).

[156]See, e.g., Ariz. Admin. Code R4-5-108 (2008) (stating "the Board [of Barbers] shall issue or deny all licenses and renewals ... within seven days of receipt of an application except for an initial school license"); Ariz. Admin. Code R4-45-216 (stating Department of Respiratory Care will issue or deny licenses within 67 days); *and* Ariz. Admin. Code R13-9-104 (stating Department of Public Safety will issue various licenses in seven days from receipt of completed application);

[157]Ben DiPietro, *Lawmakers Tinker with Automatic Permit Approval Law* (Pacific Business News [Honolulu]) (Mar. 2, 2001), http://pacific.bizjournals.com/pacific/stories/2001/03/05/story7.html, notes that Hawaii's "automatic permit approval law passed by the Legislature in 1998 is considered by many local businesses to be one of the best measures to come out of the Economic Revitalization Task Force."

[158]Tara Ellman, *Infill: The Cure for Sprawl?* 6 (Goldwater Institute Arizona Issue Analysis no. 146, August 1997).

[159]Rose, *Eminent Domain Abuse in Arizona* 8–9.

[160]Kathy I. Zatari, *Agency Compliance with Licensing Time Frames: July 1, 2006 through June 30, 2007* (submitted by the Governor's Regulatory Review Council under ARS § 41-1078(B), Nov. 26, 2007).

[161]James Madison, *On Property, in Madison: Writings* 515 (Jack Rakove ed., Library of America 1999).

[162]See Nick Dranias, *Sunrise Review for Property Restrictions Would Fill in Prop 207 Gaps* (Goldwater Institute Daily Email, Sept. 23, 2008), http://www.goldwaterinstitute.org/aboutus/ArticleView.aspx?id=2334.

[163]Friedrich A. Hayek, The Constitution of Liberty 355 (University of Chicago Press 1960).

[164]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 671.

[165]Compare with Siegan, *Economic Liberties and the Constitution* 238.

[166]Jordan R. Rose, *Protecting Private Property: The Case for Vested Property Rights* 2 (Goldwater Institute Policy Brief no. Mar. 1, 2004).

[167]Rose, *Protecting Private Property* 2–3.

[168]The legal standard is "[a] right vests only when it is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust." *Hall v. A.N.R. Freight Systems, Inc.*, 717

P.2d 434, 444 (Ariz. 1986). In practice, because the application of this standard turns on a given judge's sense of what is "manifestly unjust," sometimes the right to develop property will be deemed to vest after building permits to develop the property are secured; sometimes earlier, upon investment of money planning the development; and sometimes later, after substantial investment is made based upon the issuance of permitting.

[169]Rose, *Protecting Private Property* 4.

[170]Colo. Rev. Stat. § 24-68-102 (2008).

[171]Rose, *Protecting Private Property* 5.

[172]Serkin, *Local Property Law* 915.

[173]Serkin, *Local Property Law* 916.

[174]Arizona Republic, *Phoenix Gets Real* (editorial, July 9, 2008).

[175]Siegan, *Economic Liberties and the Constitution* 193.

[176]Pringle, *Development without Eminent Domain* 148.

[177]*Development without Eminent Domain* 6.

[178]*Development without Eminent Domain* 8–9.

[179]A.R.S § 9-499.10 (2008).

[180]Mesa Code of Ordinances, §§ 11-10-1, et seq.

[181]Gilroy, *Reason Foundation Annual Privatization Report 2007* 107.

[182]City of Sierra Vista Resolution 2005-079, Infill Incentive District Policy.

[183]Tara Ellman, *Infill* 6.

[184]Bernard H. Siegan, *Land Use without Zoning* 222 (Lexington Books, D.C. Heath and Company 1972) observes that "[for in] the systematic operation of zoning ... the overwhelming majority of cases, the sole or dominant motivation [of the zoning administrator] is to accede to the political dictates of the issue."

[185]Siegan, *Land Use without Zoning* 10.

[186] Siegan, *Land Use without Zoning* 10.

[187]Siegan, *Land Use without Zoning* 16.

[188]Siegan, *Land Use without Zoning* 75–82.

[189]Siegan, *Land Use without Zoning* 75–76.

[190]For an excellent overview of the constitutional law of regulatory takings, *see* Leonard C. Gilroy, *AICP Statewide Regulatory Takings Reform: Exporting Oregon's Measure 37 to Other States* (Reason Policy Report no. 343, April 2006).

[191]However, in view of studies showing that politics predominantly drive the implementation of zoning laws, it may be reasonable to consider a different set of factors during the sunset review process—factors more consistent with a presumption of liberty. From this perspective, it is recommended that once an applicant establishes that existing zoning restrictions interfere with a property's highest and best use, the burden at the sunset review hearing should shift to advocates of current restrictions to demonstrate their legitimacy under the seven review factor outlined in connection with the right to a presumption of liberty.

[192]See ARS § 11-829(H) (stating for purposes of giving notice of proposed zoning changes, such notices must be given to all property owners in the "zoning area," defined to be the "area within three hundred feet of the proposed amendment or change"). Alternatively, determining which properties enjoy the benefit of restrictive covenants established by the prior zoning law could be based on generally accepted real-estate appraisal standards for identifying comparable properties in the relevant community. If the current use of a given property were residential, appraisal standards might establish a comparable property radius of one-half mile. If codified as the requisite "reasonable proximity" for enforcing restrictive covenants, this would give owners of that residential property the right to enforce restrictive covenants (established by the prior zoning law) against all properties within a half-mile radius. This would ensure a substantial connection exists between the property that is burdened by a restrictive covenant and the value of the property that is benefited by the restrictive covenant.

[193]Siegan, *Economic Symposium* 479–80 (quoting James Madison, The Federalist No. 47).

[194]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 629–30. *See generally* Siegan, *Economic Liberties and the Constitution* 70.

[195]*Redelsperger v. City of Avondale*, 87 P.3d 843, 847 (Ariz. Ct. App. 2004). *See also* Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 629–31.

[196]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 663–64.

[197]See, e.g., *Dreyer v. Illinois*, 187 U.S. 71, 83–84 (1902), *and* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law,* 90 Colum. L. Rev. 1, 7 (1990).

[198]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 633.

[199]*Redelsperger v. City of Avondale* 847 distinguishes between legislative and administrative action based on "whether the action is (1) permanent or temporary, (2) of general or specific (limited) application, and (3) a matter of policy creation or a form of policy implementation."

[200]See, e.g., *Pioneer Trust Co. v. Pima County*, 811 P.2d 22, 26 (Ariz. 1991); *Bartolomeo v. Town of Paradise Valley,* 631 P.2d 564 (Ariz. Ct. App.1981); *and Town of Paradise Valley v. Gulf Leisure Corp.,* 557 P.2d 532 (1976).

[201]*Gp Properties Carefree Cave Creek, L.L.C. v. Town of Carefree*, n.4 (Ariz. Ct. App. Div. 1)

[202]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 698.

[203]Lincoln, *Executive Decisionmaking by Local Legislatures in Florida* 652; Siegan, *Economic Liberties and the Constitution,* 69, 70, 72, 73.

[204]International Council on Human Rights Policy, *Local Rule* 29–30.

[205]Frontier Centre for Public Policy, *Winnipeg Can Learn from Phoenix* (Sept. 7, 1998), http://www.fcpp.org/main/publication_detail.php?PubID=80.

[206]Frontier Centre for Public Policy, *A Conversation with Ronald Jensen*; Frontier Centre for Public Policy, *Winnipeg Can Learn from Phoenix*.

[207]See, e.g., *Sherman v. City of Tempe*, 45 P.3d 336 (Ariz. 2002); *City of Tucson v. Grezaffi,* 23 P.3d 675 (Ariz. Ct. App. 2001); *Smith v. City of Tucson*, 736 P.2d 1184 (Ariz. Ct. App. 1987); *and State v. Loughran*, 693 P.2d 1000 (Ariz. Ct. App. 1985).

[208]Notably, the State of Colorado has recently enacted a statute that authorizes intergovernmental ADR to resolve land use disputes between counties and municipalities. Such authority does not extend to citizens involved in land use disputes with government, but it illustrates the confidence that policy-makers have in the ADR process to fairly resolve land use disputes. See Colorado Office of Smart Growth, *Local Government Guide to Alternative Dispute Resolution,* http://www.dola.state.co.us/osg/adrguide.htm.

[209]Barry Goldwater, speech accepting the Republican presidential nomination (San Francisco, July 16, 1964).

[210]Editor's page, D Magazine (Apr. 1, 1995).

[211]Steve Bartlett, editorial, *The Crime Capital of America*, D Magazine (Oct. 1 2005).

[212]Segal & Summers, *Citizens' Budget Reports* 20.

[213]U.S. Department of Justice, Office of Community Orient Policing Services, *Community Policing Defined*, http://www.cops.usdoj.gov/Default.asp?Item=36.

[214]U.S. General Accounting Office, *Department of Justice: Status of Achieving Key Outcomes and Addressing Major Management Challenges* 1 (GAO-01-729, June 2001).

[215]City of Phoenix, *Phoenix City Manager's Executive Report*, May 2008.

[216]Arizona Criminal Justice Commission, *Criminal History Records Analysis: 1997 to 2005 Trend Analysis* (July 2007), http://azcjc.gov/pubs/home/RQI_FactSheet_0707.pdf (citing ARS § 41-1750).

[217]Vincent E. Henry, *The COMPSTAT Paradigm: Management Accountability in Policing, Business and the Public Sector* 318 (Looseleaf Law Publications 2002); William Bratton & Peter Knobler, *Turnaround: How America's Top Cop Reversed the Crime Epidemic* 224 (Random House 1998).

[218]See, e.g., International Association of Law Enforcement Planners minutes, Southwest Chapter meeting (Oro Valley, Ariz., Nov. 16, 2004).

[219]David J. Roberts, *Law Enforcement Tech Guide for Creating Performance Measures That Work: A Guide for Executives and Managers* 23–26 (U.S. Department of Justice, Office of Community Oriented Policing Services, 2006).

[220]Roberts, *Law Enforcement Tech Guide for Creating Performance Measures That Work* 24.

[221]Author telephone interview with former mayor Steve Bartlett, July 16, 2008.

[222]Compare with Segal & Summers, *Citizens' Budget Reports* 20.

[223]Notably the Justice Department has protested performance benchmarking requirements, arguing "Justice believes that setting performance targets could cause the public to perceive law enforcement as engaging in 'bounty hunting' or pursuing arbitrary targets merely for the sake of meeting particular goals" (U.S. General Accounting Office, *Department*

of Justice 2).

[224]Compare with U.S. General Accounting Office, *Department of Justice* 9.

[225]Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm.

[226]Compare with Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 57.

[227]*Book-Cellar, Inc. v. City of Phoenix*, 721 P.2d 1169, 1171 (Ariz. Ct. App. 1986).

[228]*Book-Cellar, Inc. v. City of Phoenix* 1169, 1171.

[229]See generally Robert Franciosi, *Garbage in Garbage out: An Examination of Private/Public Competition* (Goldwater Institute Arizona Issue Analysis no. 147, Jan. 1998).

[230]William D. Eggers, *Competitive Neutrality: Ensuring a Level Playing Field in Managed Competitions* 4 (Reason Foundation How-to Guide no. 18, Mar. 1998); Frontier Centre for Public Policy, *A Conversation with Ronald Jensen*.

[231]Ron Jensen, *Managed Competition—The Phoenix Experience* 3 (Frontier Center for Public Policy Oct. 2000), http://www.fcpp.org/main/publication_detail_print.php?PubD=245.

[232]Staley, *Bigger Is Not Better* 2; E.J. McMahon, Adrienne Moore, & Geoffrey F. Segal, *Private Competition for Public Services: Unfinished Agenda in New York State* 4 (Manhattan Institute for Policy Research Civic Report no. 41, Dec. 2003).

[233]Ron Jensen, *Managed Competition—The Phoenix Experience* 3.

[234]Frontier Centre for Public Policy, *A Conversation with Ronald Jensen*.

[235]McMahon, Moore, & Segal, *Private Competition for Public Services*.

[236]Lynn Merrill, *The Wild West's Commercial Collection Show-Down*, Waste Age (Oct. 1, 1998), http://wasteage.com/mag/waste_wild_wests_commercial/.

[237]Deloitte, *Managed Competition* (citing Elliot Sclar, *The Privatization of Public Services: Lessons from Case Studies* [Economic Policy Institute 2004]).

[238]City of Charlotte, Solid Waste Services, *Your Tax Dollars at Work*, http://www.charmeck.org/Departments/Solid+Waste/About+Us/Your+Tax+Dollars+At+Work.htm.

[239]E.S. Savas, *Privatization and Public-Private Partnerships in Phoenix* (report prepared for the National Council for Public-Private Partnerships, Oct. 2003), http://ncppp.org/resources/papers/savas_phoenix.pdf. *See also* Frontier Centre for Public Policy, *A Conversation with Ronald Jensen*, which indicates that, for the first 10 years of the program, the cost of waste collection in Phoenix declined 4.5 percent per year.

[240]Adrian Moore & James Nolan, *Putting out the Trash: Measuring Municipal Service Efficiency in U.S. Cities*

8 (Reason Public Policy Institute Sept. 2003).

[241]Frontier Centre for Public Policy, *A Conversation with Stephen Goldsmith*.

[242]City of San Diego, Mayor's Office press release, *Mayor Moves 11 City Functions Forward in Managed Competition Process* (May 2, 2008), http://www.sandiego.gov/mayor/pdf/080502fs.pdf.

[243]Leonard C. Gilroy & Steve Stanek, *Sandy Springs Incorporates, Inspires New Wave of 'Private' Cities in Georgia: City Opts to Contract Out Nearly All Government Services* (Nov. 1, 2006), http://www.reason.org/commentaries/gilroy_20061101b.shtml; Ryan Mahoney, *Colorado Company in Line to Manage Sandy Springs*, Atlanta Business Chronicle (Sept. 16, 2005), http://atlanta.bizjournals.com/atlanta/stories/2005/09/19/story7.html?jst=cn_cn_lk.

[244]Gilroy & Stanek, *Sandy Springs Incorporates, Inspires New Wave of 'Private' Cities in Georgia; Mahoney, Colorado Company in Line to Manage Sandy Springs*.

[245]Gilroy & Stanek, *Sandy Springs Incorporates, Inspires New Wave of 'Private' Cities in Georgia; Mahoney, Colorado Company in Line to Manage Sandy Springs*.

[246]McMahon, Moore, & Segal, *Private Competition for Public Services* 4.

[247]Managed competition can tip the scales of competition in favor of public entities by virtue of the fact that they are tax exempt—giving them an estimated 25 percent expense advantage over private companies (Frontier Centre for Public Policy, *A Conversation with Stephen Goldsmith*). Mayor Goldsmith is not troubled by the bidding advantage created by a department's general tax exemption, arguing that the fundamental question for city governance should be securing the most value for the least cost. But it is generally agreed that special tax and regulatory exemptions that give the public sector distinct price advantages should be removed where needed to ensure local taxation and regulation is not manipulated to give public entities a competitive advantage (Deloitte, *Managed Competition*, citing C. DeMaio & B.

Badolato, *Competitive Sourcing: The Wait Is Over, the Time Is Now* (Reason Public Policy Institute May 2003).

[248]The bulk of local governmental expenditures typically relate to the public safety payroll. Notably, Charlotte requires both its police and fire departments to propose a list of services for competitive contracting and a schedule for implementing the same. And judging from the 57 percent growth in fire district assistance tax levies between 2002 and 2006, there is a dire need for similar or more sweeping action in Arizona. Fortunately, the private sector already offers options. Scottsdale, Arizona, as well as numerous other municipalities in Arizona, have been leaders in competitive contracting for public safety services (Rural/Metro Corporation, *Communities Served*, http://www.ruralmetro.com/about_communitiesserved.asp; Robert W. Poole, *Cutting Back City Hall* 71–72 (Universe Books 1980 [identifies Nashville, Tennessee, and Elk Grove Township, Illinois, as having contracted their fire services]). These cities have been contracting out their fire services to Rural/Metro Corporation and others, in some cases for more than thirty years (Steve Stanek, *Private Firefighters Are Popular in Arizona*, Budget & Tax News [Feb. 1, 2007], http://www.heartland.org/Article.cfm?artId=20577; Kmiec & Diamond, *New Federalism Is Not Enough* 392–93). Such competitive contracting helps avoid the documented "overinvestment in fire suppression and an underinvestment in fire prevention" that results from monopoly government provision of fire protection services (*Cutting Back City Hall* 62).

[249]Miller, *Benefits Beat.*

[250]Clint Bolick, *A Taxpayer's Bill of Rights: A Natural Fit in the Arizona Constitution* 3 (Goldwater Institute Policy Brief, Apr. 21, 2005).

[251]Ariz. Const., Art. 9, § 20.

[252]Bolick, A Taxpayer's Bill of Rights 3.

[253]New, *The Time Is Now* 4, 6;.

[254]New, *The Time Is Now* 6.

[255]Matthew Ladner, *How to Win the War on Poverty* (Goldwater Policy Report no. 215, Nov. 14, 2006), http://www.goldwaterinstitute.org/Common/Img/PovertyStudy.pdf.

[256]Compare with *New, The Time Is Now.*

[257]Tom Brown, The Effects of TABOR on Municipal Revenues and Spending in Colorado 2, 3 (Center for Colorado Policy Studies 2001).

[258]Andrew Reschovsky, *The Taxpayer Protection Amendment: A Preliminary Analysis* 2 (LaFollette School of Public Affairs, University of Wisconsin, Mar. 4, 2006).

[259]Michael New, *Reforming TABOR in Colorado* (May 2, 2004), http://www.cato.org/pub_display.php?pub_id=2637.

[261]Carl Brent Swisher, *Roger B. Taney* 366–67 (Mcmillan 1935) (quoting memorandum from Chief Justice Roger Taney to President Andrew Jackson [June 20, 1836]).

[262]Mark Brnovich, *How the Arizona Constitution Protects Taxpayers: The Importance of Safeguarding Article IX 8*, 11 (Goldwater Policy Report no. 196, Oct. 12, 2004).

[263]Steve Sheppard ed., *The Selected Writings and Speeches of Sir Edward Coke*, vol. III, 1209 (Liberty Fund 2003).

[264]Ronald N. Johnson, *Courts, a Protected Bureaucracy, and Reinventing Government*, 37 Ariz. L. Rev. 791, 792 (1995).

[265]Johnson, *Courts, a Protected Bureaucracy, and Reinventing Government* 822.

[266]The "three strikes" rule should not run afoul of constitutional precedent that recognizes a protected property interest in continued public employment based on existing civil service rules. The Supreme Court, after all, has sustained disciplinary actions against public employees based on rules as frivolous as those requiring "short hair cuts" (*Kelley v. Johnson*, 425 U.S. 238, 247 (1976) [upholding disciplinary rule requiring short hair cuts as rationally related to public employment goals against constitutional challenge by police officer]). However, in view of the state and federal constitutional prohibition on the impairment of existing contracts, the "three strikes" rule might not be enforceable against existing public employees who are governed by a union contract. For this reason, the law should mandate that the "three strikes" rule applies immediately to new and existing nonunion employees, while reserving prospective application to public union employees as a mandatory provision of future collective bargaining agreements. At the same time, aggrieved citizens should be granted a corresponding private right of action to enforce the "three strikes" rule in state court through appropriate injunctive relief.

[267]U.S. Census Bureau, *Table 1: State and Local Government Finances by Level of Government and by State: 2005–06,* http://www.census.gov/govs/estimate/0603azsl_1.html.

[268]See generally Pietro S. Nivola, *Tense Commandments, Federal Prescriptions and City Problems* 95–97 (Brookings Institution Press 2002).

[269]Benjamin Barr, *Arizona's Struggle for Sovereignty: The Consequences of Federal Mandates* 5 (Goldwater Institute Policy Report No. 227, June 3, 2008).

[270]43 United States Code (USC) § 1712(c)(9) (Federal Land Policy and Management Act); 42 USC §§ 7402(a) and 7421 (Clean Air Act); 42 USC § 4331(b)(1) (National Environmental Policy Act); 33 USC §§ 1251(g) and 1252(a) (Clean Water Act); 16 USC § 1604(a) (National Forest Management Act); 16 USC § 1533(b)(1)(A) (Endangered Species Act); 16 USC §§ 1271(c) and 1282(b)(1) (Wild and Scenic River Act); 16 USC § 2003(b) (Soil and Water Resources Conservation Act); 43 Cole of Federal Regulations (CFR) § 1610.3-1 (regulations implementing Federal Land Policy and Management Act); 40 CFR § 1506.2(c) (regulations implementing National Environmental Policy Act).

[271]*Uintah County v. Gale Norton*, civil no. 2:00-CV-0482J (D.C. Utah 2001).

[272]Fred Kelly Grant, *Successes of the County Planning Process in Owyhee County*, http://www.stewards.us/CoordinatingCounties/cc-owyheesuccess.html.

[273]Grant, *Successes of the County Planning Process in Owyhee County*.

[274]Grant, *Successes of the County Planning Process in Owyhee County*.

[275]James Madison, letter to W.T. Barry (Aug. 4, 1822)

[276]David Cuillier, conversation at First Amendment Society meeting (July 10, 2008).

[277]Citizen Access Project, http://www.citizenaccess.org/summary_by_state.html.

[278]Results and Criteria of BGA/NFOIC Survey, http://www.nfoic.org/uploads/results1.pdf (last visited January 20, 2009).

[279]H.R. 1359 ("Enumerated Powers Act) would require Congress to specify the source of authority under the United U.S. Constitution for the enactment of laws, and for other purposes.

[280]Fred Cutler & J. Scott Matthews, *Guesswork? Municipal Electoral Behaviour in a Federal Context: Vancouver 2003* 13 (prepared for delivery at the annual meeting of the Canadian Political Science Association, Halifax, May 2003).

[281]Byron Schlomach, Piercing the Fog: *A Call for Greater Transparency in State and Local Government* 9 (Goldwater Institute Policy Report no. 226, July 29, 2008).

[282]Claudio Ferraz & Frederico Finan, *Electoral Accountability and Corruption in Local Governments: Evidence from Audit Reports* 13, 18, 20 (IZA [Institute for the Study of Labor] Discussion Paper no. 2843, June 2007).

[283]Schlomach, *Piercing the Fog* 5–6.

[284]Sunshine Review, *Ten-Point Transparency Checklist*, http://sunshinereview.org/index.php/Ten-Point_Transparency_Checklist.

[285]See Jonathan Walters, *Martin O'Malley Ran Baltimore by the Numbers; Can He Make It Work for All of Maryland?* Governing (Oct. 2008), http://www.governing.com/performance/performance.aspx?id=5826.

[286]McMahon, Moore, & Segal, *Private Competition for Public Services* 8.

[287]Schlomach, *Piercing the Fog* 8–9.

[288]City of New York, Citywide Performance Reporting Tool, http://www.nyc.gov/html/ops/cpr/html/home/home.shtml.

[289]Gray & Kaufmann, *Corruption and Development* 53.

[290]Stuti Khemani, *Decentralization and Accountability: Are Voters More Vigilant in Local vs. National Elections?* 15 (Development Research Group, The World Bank [first draft] July 25, 2000) (hypothesizing that "the electoral mechanism of inducing local governments to perform in the interests of the public is a weaker instrument" because of "greater geographical mobility in the U.S." that allows "voters to 'vote with their feet'").

[291]About Voters for None Of The Above, http://www.nota.org/aboutvnota.htm.

[292]Massachusetts SB 456, HB 706 (2007).

[293]Nev. Rev. Stat. § 293.269.

[294]Mireya Navarro, *Looking Beyond Vote in Puerto Rico After 'None of the Above' Is Top Choice*, New York Times (Dec. 15, 1998).

[295]U.S. Census Bureau, *Local Governments and Public School Systems by Type and State: 2007*, http://www.census.gov/govs/cog/GovOrgTab03ss.html.

[296]Brennan, *Democracy without Elections?* 16.

[297]Ferraz & Finan, *Electoral Accountability and Corruption in Local Governments* 27.

[298]See, e.g., Yuma City Resolution, Nos. R2007-56 (Sept. 19, 2007)

[299]See, e.g., Michigan Compiled Laws Annotated (MCLA) 41.1a (2008) (providing powers of statutory township overridden by EFM Act); MCLA 42.1a (2008) (providing powers of charter townships overidden by EFM Act); MCLA 45.501a (2008) (providing powers of charter county overridden by EFM Act); MCLA 46.1a (2008) (providing statutory powers of county boards of commissioners overridden by EFM Act); MCLA 61.1c (2008) (providing statutory powers of villages overridden by EFM Act); MCLA 81.1d (2008) (providing statutory powers of Fourth Class Cities overridden by EFM Act); MCLA 117.1b (2008) (providing charter cities overridden by EFM Act); *and* MCLA 124.426 (2008) (providing that powers of Metropolitan Transport Agency overridden by EFM Act).

[300]MCLA § 141.1212(1) states that the petition must contain "specific allegations of local government financial distress signed by a number of registered electors residing within the jurisdiction of the local government equal to not less than 10% of the total vote cast for all candidates for governor within the jurisdiction of the local government at the last preceding election at which a governor was elected."

[301]MCLA §§ 141.1212(1)(c).

[302]Patricia Paruch, *Government Law*, 53 Wayne L. Rev. 435, 448 (Spring 2007).

[303]Chapter 9 originated in 1934, in response to widespread defaults of municipal debt and provided for the involuntary reorganization of debts (The Act of May 24, 1934, ch. 345, 48 Stat. 798 (1934)). This legislation was later ruled unconstitutional because it restricted the states' ability to control their governmental and fiscal affairs (in regard to *Mount Carbon Metropolitan District*, 242 BR 18, 32 (1999) [citing *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936)]). The current legislation, 11 USC § 941, restricts Chapter 9 to voluntary declarations of bankruptcy that are only available when the municipal government is insolvent (*Mount Carbon*, 298 BR 32).

[304]Miller, *Benefits Beat.*

[305]Brad Lips and Dan Lips, *The Reagan Vision: How You Can Revive the Revolution*, 53 Goldwater Institute, 2004,.

[306]Milton Friedman & Rose Friedman, *Free to Choose: A Personal Statement* 272 (Harcourt Brace Jovanovich 1980).

[307]*Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

[308]A state constitutional amendment could also be pursued, but this would likely be unnecessary. However, without a constitutional amendment, implementing the right to fiscal responsibility to restrict local governments to nonproprietary functions by statute may need to have an exception for "industrial pursuits" because the Arizona Constitution's Article II, Section 34, grants municipal corporations "the right to engage in industrial pursuits."

[309]Serkin, *Local Property Law* 905, 907.

[310]*City of Scottsdale v. Scottsdale Associated Merchants, Inc*., 583 P.2d 891, 892 (Ariz. 1978).

[311]*Transamerica Title Ins. Co. v. Tucson*, 757 P.2d 1055, 1059 (Ariz. 1988); *Robertson v. Graziano*, 942 P.2d 1182, 1186 (Ariz. Ct. App. 1997) (observing "[r]educed to their simplest form, these cases stand for the proposition that because cities do not have the power to legislate in the field of zoning and highway alignment except as allowed by state law, the electorate may not circumvent state law through the initiative process).

[312]*Slayton v. Shumway*, 800 P.2d 590, 593 (Ariz. 1990). *See also Manic v. Dawes*, 141 P.3d 732, 736 (Ariz. Ct. App. 2006) (observing "[t]he purpose of article IV, pt. 2, § 13, known as the single subject rule, is to prevent "the practice of 'logrolling', or the combining of disparate minorities into a majority through a combination of unrelated legislative goals in a single bill [and] to prevent the evils of omnibus bills, surreptitious and 'hodgepodge' legislation.").

[313]*Kerby v. Luhrs*, 36 P.2d 549, 554 (Ariz. 1934).

[314]For example, the right to transparency is the capstone right that gives meaning to all of the other rights set out in the Local Liberty Charter. After all, sunrise and sunset review is impotent to stop irrational or abusive regulation if the related processes are secretive and opaque. Verifying that police departments have met or failed to meet their performance benchmarks is crucial to ensuring that crime-fighting priorities are maintained. Policing favoritism requires knowledge of the equality or lack thereof in treatment. The right to fiscal responsibility cannot be exercised with closed financial books. Managed competition cannot work without open bidding, known performance benchmarks, and the ability to monitor and audit contractual performance transparently and conveniently. Holding mysteriously multiplying special districts accountable requires knowing where and how they operate. Ensuring federal mandates are not dictating local priorities requires disclosure of funding sources. Similar arguments can be made illustrating how each right is logically necessitated by various aspects of the structural problems of democracy, and also how each right can only be effectively enforced in connection with the others.

[315]*Constitutional Municipal Home Rule in Arizona* 33, 34, 35 (1960) (discussing applicability of charter to cities and counties). There are 20 charter cities and towns in Arizona, including the City of Tombstone, which remains organized by its original territorial charter from the federal government (League of Arizona Cities and Towns, *Charter Government Provisions in Arizona Cities and Towns* 1 [Dec. 2005]; League of Arizona Cities and Towns, So You Got Elected ... So Now What? 23–24 [Mar. 2004].

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[316]League of Arizona Cities and Towns, *Charter Government Provisions in Arizona Cities and Towns*; League of Arizona Cities and Towns, *So You Got Elected*.

[317]Notably, even seemingly "administrative" rules can be codified in a local charter. For example, charter amendments to set public official salaries and to require public spending on police as a "top budget priority" have been upheld (*Robertson v. Graziano*, 942 P.2d 1182, 1186–87 (Ariz. Ct. App. 1997, adopting *Fuldauer v. City of Cleveland*, 32 Ohio St.2d 114, 290 N.E.2d 546, 549, 551 (1972) [voters' adoption of city charter amendment setting salaries of firefighters and police officers was exercise of legislative power; charter amendment could set spending for police as top budget priority]). Such authority should support enacting, by new or amended charter, performance benchmarking of police work and mandated managed competition, as well as the "Three Strikes and You're Out" right to accountability. Additionally, charter provisions can effectively implement the right to the separation of powers because the greater power of chartered cities to establish their own city courts and appoint city judges (*State v. Mercurio*, 736 P.2d 819) certainly includes the lesser power to offer the option of binding ADR for disputes over local quasi-judicial and administrative decisions.

[318]*State v. Mercurio*, 736 P.2d 819 (Ariz. Ct. App. 1987).

[319]League of Arizona Cities and Towns, *Exploring Charter Government for Your City* 1–2 (Nov. 2000) states: "If local citizens present a petition containing signatures equal to twenty-five percent of the voters that voted in the last city election, then the council must call an election on the question. The election will determine whether a charter will be framed for adoption, and the election of fourteen freeholders (founding fathers) who will draft the charter. Article XIII, Section 3, of the Arizona Constitution requires that the election to approve proceeding with drafting a charter be held not later than 30 days from the date on which the election is called. However, a key deadline in the absentee voting law of the state is the requirement that the ballots be prepared and delivered to the election official at least 30 days prior to the Saturday before the election. An Arizona Attorney General's ruling (I84-063) concludes that absentee voting does not extend to the freeholder election portion of the charter process."

[320]Lips & Lips, *The Reagan Vision* 73.

[321]Timothy Sandefur, *Liberal Originalism: A Past for the Future*, 27 Harv. J.L. & Pub. Pol'y 489, 527–28 (Spring 2004) argues that "there are things that are simply beyond the legitimate reach of any government."

[322]Siegan, *Drafting a Constitution for a Nation or Republic Emerging into Freedom* 7.

[323]Ariz. Const. art. IV, part 1, § 1, cls. 2, 4, & 7; ARS §§ 19-123, 19-124.)

[324]Ariz. Const. art. IV, part 1, §1(4), (8), (9); art. XIII, § 2; ARS §§ 19-102; 19-141; 19-143, 19-144. The Arizona Constitution provides that local governments "may prescribe the manner of exercising" initiative "powers within the restrictions of general laws." Apparently pursuant to this authority, Charter Amendment via Citizen's Initiative is illegal in City of Scottsdale according to Scottsdale City Charter Article 10 Section 1. The Scottsdale Charter may only be amended by amendments proposed and submitted by the City Counsel to the qualified electors thereof at a general or special election. (Scottsdale City Charter 16, § 1).