

COUNTERING MAJORITARIAN POLITICS: CHALLENGING STATEWIDE INITIATIVES AT THE LOCAL LEVEL

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I. INTRODUCTION

In every election there are winners and losers.¹ Increasingly, the victorious and the vanquished are not candidates for office, but the proponents and opponents of ballot measures put before the voters. In fact, in some states, voters pass judgment on as many (or more) initiatives and referenda as candidates. This direct policymaking, broadly known as direct democracy, represents a fundamental departure from traditional American representative democracy by, at base, allowing for pure majoritarian rule. Such a system abandons many of the institutional protections drawn into the federal constitution and many state constitutions meant to mitigate the power of the many to overwhelm the interests of the few. The effects of the initiative on certain minority groups is well documented by other legal scholars, yet their analysis to this point has omitted one important interest group. This article aims to show that rural communities should be included within those minority groups that suffer at the hands of the initiative process and it attempts to provide an introduction to possible solutions to the problem.

Rural and urban interests are rarely in sync.² In fact, the differences between agriculture and industry dominated the early years of the United States.³ This tension, however, superficially disappears at the ballot box because, through the initiative, urbanites can impose their will on more rural communities on a host of issues. This is so because although the urban population may be relatively geographically compact, it often commands a majority of a state's population.⁴ As most measures require only a simple majority of the popular vote to be enacted, rural voters face a fundamental disadvantage when proposed initiatives supported by urbanites would adversely affect rural interests. While various legal authors have examined the perceived dire effects of the initiative on other types minority interests,⁵ they have largely ignored the effects of the initiative on different geographic areas within a state. While this problem with the initiative system has been examined by political scientist Daniel A. Smith,⁶ it remains an understudied phenomenon meriting closer academic scrutiny.

To understand the issues at play, this article begins with an illustration of how the initiative can harm rural communities—a 2002 Oklahoma initiative to ban

cockfighting. The next section introduces the concept of local governments and localities, the level at which I believe these geographic inequalities can best be understood, and explains the unique role of local governments within the American system and their inability to protect their populations from the effects of the initiative process. Section three of the article examines the initiative system itself and attempts to place it within the conceptual framework of the American political system. Taking the substance of the two sections together, one discovers that allowing citizens to pass judgment on proposed legislation presents fundamental concerns for the integrity of local governments⁷ and challenges the traditional notion of representation present in the American system. Of course, recognition of the problem is only the first step. The article thus concludes with several proposed reforms that, while certainly not panaceas, provide hope for rural communities.

II. ILLUSTRATING THE PROBLEM—COCKFIGHTING IN OKLAHOMA

Some initiatives affect all localities in substantially the same way. For example, recent anti-tax measures such as those proposed in Colorado, Idaho, and Florida⁸ handicap all localities equally.⁹ Other initiatives, especially those that seek to regulate activity, have a tendency to affect the various areas of a state in different ways. Perhaps the best recent example of this phenomenon comes from Oklahoma where, in 2002, urban activists sought to ban cockfighting via a statewide initiative. While this is not the only example of an initiative with a uniquely adverse effect on rural communities, the events in Oklahoma present a narrative. Indeed, raising and fighting chickens is a uniquely rural activity in Oklahoma opposed by more liberal (and generally urban) animal protection activists.¹⁰

At first blush, one might wonder why a pro-animal measure serves as such a prototypical example of the danger initiatives can pose to rural localities. In addition to the bare factual symmetry the example provides, it also works well because the issue was high profile and dominated Oklahoma election coverage. Perhaps surprisingly, the measure was among the most contentious initiatives on the Oklahoma ballot in 2002.¹¹ In fact, some claimed that the candidates' stance on cockfighting affected both the gubernatorial race and a U.S. House race.¹² The controversy surrounding the measure so-pervaded the media that the struggle over cockfighting was rated the sixth-biggest story in Oklahoma for 2002 by the Associated Press.¹³

The controversy was not new to 2002, either. In 1963, a state appellate court allowed cockfighting to continue despite a statewide ban on animal fighting.¹⁴ The court held that the use of the term "animal" in the statute was ambiguous and therefore did not clearly apply to gamecocks. Rather than invalidate the entire law, the court

ruled simply that chickens were not legally animals for these purposes.¹⁵ For years thereafter, animal activists lobbied the state legislature to amend the law to include cockfighting.¹⁶ When activists finally turned to the initiative, rural cock owners delayed submission of the measure to voters for two years through intensely contentious litigation.¹⁷ When these challenges ultimately proved unsuccessful and the governor ordered the measure onto the 2002 ballot,¹⁸ rural activists fought a bitter campaign to protect this aspect of their lifestyle.¹⁹

Come Election Day, the measure passed by over 100,000 votes.²⁰ Amazingly, despite the overall statewide support for the ban, it passed in only 20 of the state's 77 counties.²¹ More importantly, the twenty counties that approved the ban were largely urban areas, while rural parts of the state strongly opposed the proposal.²² As the local newspapers pointed out, the 20 counties in favor of the ban were not prime cockfighting areas and were largely centered around Oklahoma's urban hubs—Tulsa and Oklahoma City.²³

The effect on rural areas would have been severe. Under the ban, rural residents are prohibited from participating in an activity that they enjoy and in some cases depend on for income.²⁴ Moreover, rural local governments are charged with enforcing a new state law that is wildly unpopular within their jurisdictions. Indeed, the potential effect was so great that some rural residents claimed the ban represented “. . . the first step toward doing away with their way of life.”²⁵ As such, rural residents were not willing to give up the fight quite so easily.

Ban opponents first turned to the courts, filing suits that challenged the measure's constitutionality in many of the counties that had rejected the initiative.²⁶ The battle lines were thus drawn once again and “[pitted] urban areas against rural regions.”²⁷ One of the plaintiffs' attorneys claimed that the ban was poorly drafted and, as summarized by a local newspaper, “subjected voters in rural areas where cockfighting is common to the will of voters in large urban counties where most voters favored the ban.”²⁸ Though 47 other states have similar bans on cockfighting,²⁹ the plaintiffs were successful in getting the law enjoined from enforcement in several counties while the cases proceeded to trial.³⁰ At the time of this writing, the lawsuits had been consolidated prior to trial and the state Supreme Court was set to rule on the constitutionality of the measure.³¹

At about the same time the lawsuits were filed, rural activists convinced several members of the state legislature to enter the fray against the statutory initiative. One proposed measure sought to essentially make the measure a local option law by giving counties that had voted against the ban the choice of opting out of enforcement.³² Another legislator proposed a referendum to ask voters to consider reducing the penalties for violating the ban from a felony to a misdemeanor.³³

Though the latter proposal evoked strong criticism from some legislators,³⁴ newspapers,³⁵ and ban proponents,³⁶ it made steady progress through the state

legislature.³⁷ After passing through the state senate, the house initially killed the proposal 52 to 47, only to reverse itself the next day with amendments that required senate concurrence.³⁸ On May 19, the bill failed to get enough votes in the state senate, failing by only two votes.³⁹ Though it appeared dead, the senate sponsor salvaged the measure, at least temporarily, through a motion to reconsider.⁴⁰ By that point, however, few people really understood for what the bill stood. According to one newspaper editorial, “There have been so many versions of reduced cockfighting penalties floated that even close observers are having trouble keeping track.”⁴¹

The situation was only further muddled after a local newspaper revealed Oklahomans had contradictory feelings about cockfighting. While a majority believed that cockfighting, as an issue, should be left for individual counties to resolve, a similar majority opposed giving counties the opportunity to overturn the statewide ban passed by voters in any way.⁴² While legislative intervention failed to change the law in 2003 and the lawsuits remain unresolved, the events in Oklahoma to date are sufficient to draw several conclusions. For one, regardless of whether the lawsuits or future legislative reforms succeed, Oklahoma’s experience represents what may be a growing problem with the initiative process.

III. THE UNIQUENESS OF LOCALITIES

In addition to the above example, urban activists have proposed other types of legislation that adversely affect rural local communities.⁴³ Much like the initiative, the concept of local government plays a unique role in the American political system. Local governments are, at base, the various political subdivisions of a state, which includes counties, municipal corporations, school districts, and special districts (such as for fire and water service).⁴⁴ As is true with other levels of government, there is much disagreement about the role local governments should play, both in relation to its citizens and in relation to the state.

Some, for example, hold local governments in high esteem and believe they serve “as a focal point for public discourse about politics, as the sole level of government that is capable of providing some semblance of participatory democracy.”⁴⁵ From this perspective, local governments help true communities to form and coalesce, encourage citizens to take an active role in self-governance, and promote efficiency.⁴⁶ Given this positive conception, those who support this view of the locality also argue that local governments should have some significant level of autonomy from both state and federal control.⁴⁷

At the other end of the spectrum, other commentators view local governments in a more historically traditional way—as little more than the collector and distributor of services and goods. According to Gillette and Baker, this concept grows out of legal

welfarism theory and focuses on the efficiency of communitarianism rather than any inherent faith in governance by the people. From this perspective, local governments exist because they operate as better and more fair distribution centers than do private markets.⁴⁸ Thus, while some degree of locality-autonomy is still desirable, it is of a different and more limited nature than that sought when one holds the other view of local governments.⁴⁹

Many of the same issues that plague other forms of government tend to affect local governments as well. One dilemma, made relevant by the previous section, is how local government officials should seek to represent their constituents and the motivations that guide their concerns.⁵⁰ Regardless of the theory of representation one chooses to adopt,⁵¹ one cannot escape the representative nature of the actor—local governments act in the tradition of the republic and, like the state and federal governments, do not govern primarily through direct democracy.⁵² Their structure therefore does not share the same infirmities as the initiative and, as a result, one might be tempted to believe that local governments might therefore be able to serve as a valuable check against the effects of the statewide initiative. Local governments with some degree of autonomy from the state, in other words, might be able to legislate away the dire effects of the state majority's tyrannous ways. Such faith, however, would be misplaced because of fundamental limits generally placed on local governments.

Among the most important issues at play for a local government is the relationship between the locality and the state, much in the same way state governments must find their place in relation to the federal government. This tension is expressed in much of the writing about local governments, which tends to focus on issues of state preemption of local prerogatives and the general conflict of power that exists between the two levels of government.⁵³ Indeed, localism itself, as defined by another author, is the “intrastate analogue of federalism in American constitutional law” and “embodies the idea that local governance ought to be protected to a greater or lesser degree from control by central governments.”⁵⁴

Despite the analogy to federalism, and regardless of the role one believes localities *should* play in American governance, it is incontrovertible that local governments' role in America traditionally has been very limited. This reality means that local governments are generally ill equipped to protect their citizens from the excesses of state control, including the effects of statewide votes on initiatives. There are two related sources for this historical lack of autonomy. The first is a simple realization about the origins of local governments. There is no constitutional requirement that local governments exist; rather they are around only because their presence relieves some burdens from the state authorities. They are, in effect, “a delegate of the state.”⁵⁵ This subservience means that the state government, in many cases, enjoys almost total hegemony over localities; to the extent that local

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governments generally do not have a cause of action against the state to enforce their “rights” or those of their citizens.⁵⁶ As Briffault succinctly puts it, “[L]ocal governments have no rights against their states. . . . Nor do the residents of local governments have any inherent right to local self-government. . . .”⁵⁷

The implication of this notion that local governments exist essentially at the whim of the state has come to be known as Dillon’s Rule, after legal commentator John F. Dillon. Under Dillon’s formulation, local governments possess only those powers (1) expressly conferred, (2) “necessarily or fairly implied in or incident to the powers expressly granted,” and (3) essential to the fulfillment of the locality’s purposes.⁵⁸ Therefore, under Dillon’s Rule, local governments possess only those powers expressly conferred on them by the state and only “obtain power to govern” through such “clear and express state delegation.”⁵⁹ The presumption then is that the locality is without power in any given circumstance. Thus, Dillon’s Rule “reflects the view of local governments as agents of the state by requiring that all local powers be traced back to a specific delegation: whenever it is uncertain whether a locality possesses a particular power, a court should assume that the locality lacks that power.”⁶⁰

Dillon’s Rule remains an important background principle that continues to limit local governments today. The effect of the rule is best articulated in *Hunter v. City of Pittsburgh*, in which the Supreme Court stated local governments

. . . are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers. . . . [T]his may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.⁶¹

Undercutting this traditional precept is the 20th century concept of “home rule,”⁶² by which local governments are given, in theory, far greater autonomy from the state.⁶³ The home rule movement originated in Missouri in 1875 and began to spread nationwide during the Progressive Era that brought America direct democracy.⁶⁴ While home rule provisions can be found both in state statutes or state constitutions,⁶⁵ for these purposes the differences between the two are largely irrelevant.⁶⁶ There are two general models of home rule, whether constitutional or statutory in origin.⁶⁷ In their original incarnation, these laws treated local governments

as “a state within a state, possess[ing] . . . the full police power with respect to municipal affairs and also enjoying a correlative degree of immunity from state legislative interference.”⁶⁸ The scope of what constituted local affairs was left to judicial interpretation.⁶⁹ These incarnations, however, were unsuccessful in drawing a clear boundary between the powers of the state and those of localities.⁷⁰

When definitional problems arose, new versions of home rule were drafted that attempted to define broader local powers without reference to limits on state power. Moreover, these new statutes left it up to the state legislature to determine the bounds of home rule.⁷¹ Under either type of statute, the theoretical unpinning of home rule is a reversal of Dillon’s Rule in which “all powers are granted until retracted.”⁷² Yet despite this purpose, several commentators have noted that state courts continue to construe local authority very narrowly.⁷³

The thrust of home rule is to remedy existing conflicts between the state and locality—essentially whether the state can or may preempt local autonomy over an issue.⁷⁴ Towards that end, in practice, home rule statutes serve two functions: to increase the power of local governments to legislate and to limit state intrusion into local affairs.⁷⁵ In certain limited circumstances, both of these elements might prove useful in protecting rural communities from oppressive statewide initiatives. The first difficulty, however, is that there must be competing local and state laws before home rule provisions will be considered. Home rule is designed to resolve conflict between the governments and no conflict can be said to exist until there are competing laws.

In evaluating the applicability of home rule protections, the threshold question is whether the issue is one of state or local concern (or a mixed issue),⁷⁶ after which it must be determined if both state and local legislation can coexist. Put another way, the “test” has three components: “(1) whether a particular activity falls within the sphere of home rule; (2) whether an overlap of state and local law is generally consistent or conflicting; and (3) whether, in the event of inconsistency or conflict, the state or local law supercedes the other.”⁷⁷ As a general matter, the state may not interfere with a locality’s prerogative in local issues, but has the authority to preempt local governance in matters of state concern. As the Colorado Supreme Court once put it:

In matters of local concern, both home rule cities and the state may legislate. However, when a home rule ordinance or charter provision and a state statute conflict with respect to a local matter, the home rule provision supercedes the conflicting state provision. In matters of statewide concern, the General Assembly may adopt legislation and home rule municipalities are without power to act unless authorized by the constitution or by state statute. . . . [I]n matters of mixed local and state concern, a charter or ordinance provision of a home rule municipality may coexist with a state statute as long as there is no conflict, but in the event of conflict the state statute supercedes the

conflicting provision of the charter or ordinance.⁷⁸

Unfortunately, it is often difficult to determine the difference between local and statewide issues and courts often make the determination on an *ad hoc* basis.⁷⁹ Defining these concepts with any particularity is therefore exceedingly difficult, especially given the general lack of consistent judicial interpretation.⁸⁰ This task is only complicated by the vagueness of many home rule statutes and constitutional provisions.⁸¹ Moreover, the state may have impliedly preempted local authority to legislate in an area.⁸²

Nonetheless, to the extent that an initiative might be construed to impinge on a matter of local concern, in other words an issue that the courts agree is better resolved at the local level, home rule protections might help the local government to protect its citizens' interests.⁸³ But, the number of issues proposed on a statewide ballot dealing with matters of local concern will probably be relatively small. Additionally, as others have conceded, home rule itself has largely failed to attach the kind of autonomy originally intended that would approach any semblance of locality sovereignty.⁸⁴

In a sense, then, local governments are just another interest group⁸⁵ competing for influence and advantage within the state.⁸⁶ Unfortunately, unlike other individuals and entities, the localities tend to be at a greater disadvantage against the state. Put another way, "Doctrines involving municipal home rule, implied preemption, and Dillon's [R]ule of statutory interpretation frame the structure of state and localities' legal relationships. Under current local government jurisprudence, they do so in a way that tends to disadvantage local governments vis-à-vis the states."⁸⁷ Although the place of localities within the American system raises many legal and policy questions, for these purposes it is enough to conclude that even under modern home rule statutes, local governments possess relatively little power to protect the interests of their citizens from state control. One such type of state control, of course, are the initiated measures passed by the voters of the entire state that adversely affect rural localities. As such, local governments are ill equipped to protect the interests of their residents against tyrannical initiatives.

IV. A PRIMER ON DIRECT DEMOCRACY

To understand the reforms necessary to protect minority interests, one must first have a basic understanding of direct democracy and how it fits into American politics. The initiative is part of a package⁸⁸ of reforms pushed through state legislatures, mostly during the early years of the 20th century, meant to curb perceived corruptions by big business within the political system.⁸⁹ The reforms were radical, so much so in fact that Robert Henry describes their enactment as a second American

Revolution,⁹⁰ and represented a fundamental shift in the way Americans chose to self-govern.

A. The Basics of the Initiative

The initiative is a form of direct democracy that allows citizens the opportunity to propose and enact legislation at the state or local level without having to go through the governing legislative body (i.e., the state legislature or a city council). Instead, issue proponents place proposed measures directly on the ballot for popular approval.⁹¹ In most cases, a simple majority of those voting determines whether the measure passes or fails⁹² and if voters approve the measure, it has the same effect as a law passed through the legislature.⁹³ Thus, in short, the initiative creates a form of directness in legislation that is ordinarily lacking in the American system. For purposes of brevity, the discussion that follows assumes a basic understanding of the initiative and its process, however two aspects of lawmaking at the ballot that are central to this article merit some foundation.⁹⁴

The first such feature is the distinction between a statutory initiative and a constitutional amendment. In many states, “initiatives” can be either statutory (and thus like any other law passed by the legislature) or can amend the state constitution.⁹⁵ In states where voters may enact both statutes and constitutional amendments via the initiative, the procedures to qualify them for the ballot are often the same.⁹⁶ The difference between the amendment and statute lies in the effect each has on the governing legislative bodies. In most states, the state legislature may later amend or repeal a statutory initiative, but changes to a constitutional amendment require the consent of the people via another election. This added protection, perhaps not surprisingly, makes constitutional amendments a more powerful use of the initiative.⁹⁷ On an abstract level, the wisdom of allowing amendments to a state constitution in this way probably depends on whether one thinks it is wise to relatively easily change the scope of fundamental rights under that state’s laws.⁹⁸ However, this distinction between types of initiatives is blurred in a few states with laws that make it more difficult for a state legislature to modify a statute passed by initiative.⁹⁹ Of course, whether statutory or a constitutional amendment, the initiative must be consistent with the U.S. Constitution.¹⁰⁰

The second feature that merits attention is one of the many procedural hoops initiative proponents must pass through before their measure will appear on the ballot.¹⁰¹ To place an initiative on the ballot, proponents must, among other requirements, first gather a requisite number of signatures.¹⁰² Usually, this requirement is tied to some percentage of the voter-turnout from the previous election.¹⁰³ Regardless of the specific number of signatures needed, in many states

there is no requirement for where they must be collected or from how many different geographic areas the signatures must come.¹⁰⁴ This fact is important to this Article because, without such a geographic requirement, urbanites may qualify a measure for the ballot and later pass it without ever having to visit a rural locality. Understanding how the initiative works, however, does not adequately explain its implication for localities on a theoretical level, much less the practical level central to the arguments made in this article.

In terms of process, then, the initiative represents pure democracy at all stages. Potentially disaffected minority interests have no say in whether the proposal will merely add a new provision to the state statutes or alter the state constitution. Similarly, less than a majority is required to place the measure on the ballot. Finally, and most obviously, once the proposal makes it to the ballot, the minority is subjected to the whims of the voting majority. Such pure majoritarian rule represents, in some respects, an anathema to the principles of American government. To understand why, a brief introduction to democratic theory is in order.

B. Democracy in Action

The initiative represents a fundamental departure from the traditional form of American governance.¹⁰⁵ Indeed, the greatest virtue and vice of the initiative is that it represents pure democracy in action.¹⁰⁶ While sometimes mischaracterized, Americans live under a republican system often described as a representative democracy rather than a true democracy.¹⁰⁷ In a pure democracy, citizens participate directly in the policy-making process; whereas in a representative democracy citizens choose, via elections, the individuals who will make policy.¹⁰⁸ The distinction is key to understanding why the threat of majority tyranny presented by the initiative is so troublesome.

The American system created by the Founding Fathers explicitly rejected the unmitigated rule of the majority embodied in a system of pure democracy in favor of a representative system.¹⁰⁹ For instance, in *Federalist No. 51*, Madison stressed the ability of the republic to check a tyranny by the majority. Specifically, he writes,

Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil [...] . . . The second method will be exemplified in the federal republic of the United States. Whilst all authority in it will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of

the majority.¹¹⁰

Similarly, in *Federalist No. 10*, Publius (be that Madison or Hamilton in this case) stresses not only the need, but also the ability of the proposed federal republic, to control the effects of these factions that would otherwise terrorize the minority elements of society.¹¹¹ Other commentators have translated the Founders' fears of majority control at the national level to more local forms of government.¹¹²

The kind of direct democracy embodied by the initiative, by allowing citizens to vote on issues without the need for legislative or executive consent, is a variation of the pure democracy condemned by the Founders.¹¹³ Despite its noble goal of involving the citizenry in the political process, contemporary critics point to several deficiencies in the initiative system that make it a less desirable way to govern than a representative democracy.¹¹⁴ Of importance to this discussion are three concerns (in addition to the worries of a tyranny of the majority discussed above): The lack of deliberation inherent with direct democracy, the binary nature of the voters' choice at the polls, and the system's failure to register the intensity of voter preferences.

The first two concerns really represent a subtle variation of the same problem. The legislative process is roundly criticized for its perceived inaction, for the gridlock that prevents progress.¹¹⁵ In reality, that gridlock is often a function of the deliberation built into the process of legislative lawmaking.¹¹⁶ The deliberative process allows, at least in theory, for a full and frank discussion of the merits of proposed legislation: Points and counterpoints are made before those who will ultimately pass judgment on the measure. Equally important, the deliberation that takes place allows for modification of the measure. As the bill passes through committees and floor votes, provisions can be added and subtracted as need be. Compromises, again at least in theory, ensure that the final version of the proposal will be substantially improved over its original incarnation.

Direct democracy does not have the same deliberative feature. Voters instead are bombarded with self-serving television ads, mailings, and telephone calls all aimed at persuading the recipient to vote one-way or the other.¹¹⁷ Similarly, there is no one to whom the voter can confidently turn to ask questions about the measure. This means the people enacting measures often do so without substantial understanding of the ballot issue's provisions. In fact, some people likely have never even read the ballot initiative's text before casting their ballot.¹¹⁸ Rather, voters have only two options when they cast their ballot—yes or no.¹¹⁹ Voters must take the measure “as-is” and decide, on the whole, whether it is likely to do more good than harm. This balancing act, while certainly present in more traditional forms of lawmaking, is greatly exacerbated with direct democracy.

Another problem with the initiative is that it cannot account for the intensity of voter preferences, as demonstrated in Oklahoma.¹²⁰ Voter intensity is, at base, “the

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depth of a voter's feeling about an issue."¹²¹ It is perhaps best defined by Sherman Clark:

By equating the preference of the majority with the will of the people, we fail to take into account that, for any particular issue, some individuals will care more—have more at stake—than will others. More to the point, single-issue votes cannot take into account that, for each person, some issues will be more important than will others. The paradigmatic case of the intensity problem is that of a relatively apathetic majority prevailing over a significant minority with a great stake in the issue at hand.¹²²

So, in Oklahoma, one sees an urban majority of the population that, on the whole, disfavors cockfighting. However, in large urban areas, cockfighting is not much of a daily issue—the cockfighters do not live in the city. The city-slicker objection, then, is more philosophical than practical. By contrast, to some in rural communities cockfighting represents a form of entertainment and even livelihood. To this vocal minority, the “sport” is important, and its banning has a real effect. Despite this disparity of passion on the matter, the urban areas’ lukewarm support was enough to enact the measure over the rural communities’ strong dissent.¹²³

In drawing these comparisons between direct democracy and representative democracy, it may seem as though representative democracy is the ideal towards which all systems should aspire. Certainly, the republican model of governance is not sacrosanct, in this country or any other. Quite to the contrary, contemporary commentators continually propose political reforms that would fundamentally alter the American system and criticize current norms.¹²⁴ Nonetheless, the representative system is the foundation of the American system and as such is the baseline against which any other mechanisms must be compared. As a result, these issues, among others not articulated here, beg the question whether the initiative process is consistent with the U.S. Constitution. In other words, one must ask if the initiative is even a permissible system of lawmaking under our laws. If not, the urban/rural problem disappears without much discussion.

If the initiative, as theory, is a rejection of the American system of government and its effect is to harm significant segments of the populace, one might assume that it is unconstitutional. While this would be a simple solution to the problems faced by rural communities and other minority interests, the following discussion shows that, while still unresolved, the initiative seems unlikely to be invalidated by any court any time soon.

C. The Constitutionality of the Initiative

Nearly a century ago, critics of direct democracy challenged the constitutionality of the initiative in *Pacific States Telephone & Telegraph Company v. State of Oregon*.¹²⁵ While in state court, the Oregon Supreme Court reaffirmed an earlier state decision sustaining the constitutionality of the initiative.¹²⁶ On appeal, the U.S. Supreme Court chose not to rule on the constitutionality of the initiative itself but to actually dismiss the case on simpler grounds.

The plaintiffs had based their challenge to direct democracy on the theory that it violated of the Guaranty Clause of the federal constitution, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government”¹²⁷ In support of their claims, counsel in *Pacific States* argued

The initiative is in contravention of a republican form of government. Government by the people directly is the attribute of a pure democracy, and is subversive of the principles upon which the Republic is founded. Direct legislation is therefore repugnant to that form of government with which alone Congress could admit a state to the Union, and which the state is bound to maintain.¹²⁸

Relying on the precedent established in *Luther v. Borden*,¹²⁹ however, the Court found that because interpretation of the Guaranty Clause was a political question, the plaintiffs’ challenge was non-justiciable.¹³⁰ The plaintiffs’ challenge was thus dismissed and the Supreme Court avoided the truly difficult issue in the case.

Given *Luther*, the Court’s decision made jurisprudential sense. Nearly a century later, however, the case’s continued vitality is in serious doubt. One hundred thirteen years after *Luther*, the Court substantially undermined both *Luther* and *Pacific States* in *Baker v. Carr*,¹³¹ a decision that called into question the scope of the political question doctrine. Indeed, given *Carr*, several commentators have suggested new challenges to the initiative based on the Guaranty Clause.¹³² For instance, Douglas Hsiao notes that “[t]he trend among commentators is to argue not over whether [the] political question doctrine should be scrapped, but, rather, *how fast* and *how much* it should be.”¹³³ As such, there is a growing consensus on “the justiciability of the Guaranty Clause.”¹³⁴

Merely allowing courts to hear Guaranty Clause claims, however, does not mean the initiative will be held unconstitutional. As such and despite the protests of some writers, it seems unlikely that any court, much less the U.S. Supreme Court, will invalidate a popular form of lawmaking that dates back over 100 years. Indeed, courts in recent years have rested their decisions on the *Pacific States* precedent in reaffirming the constitutionality of the initiative.¹³⁵ This means that, rather than

challenge direct democracy as a system of governance, rural residents and localities must find other ways to attack proposed initiatives that deal with the specific provisions of a measure.

V. SOLUTIONS

To summarize, statewide initiatives have the potential to disproportionately disadvantage rural localities within a state; despite its departure from the American political norm of governance, the initiative is unlikely to be held unconstitutional, and local governments are currently by and large unable to protect their citizens from the harsh effects of these measures either through litigation or legislation. Stopping there makes the situation seem rather dire. There are, however, several alternatives that concerned rural residents and their local governments can turn to in an effort to mitigate the effects of the initiative.

A. Going to Court

The first alternative is to file suit, which, as will be discussed, will often be unsatisfactory in many circumstances. As a threshold matter, the first concern must lie with who has the right to bring suit to challenge an initiative. Clearly, local governments cannot sue the state in most circumstances.¹³⁶ That leaves only the affected residents eligible to file. Without getting into a long exegesis on the jurisprudential requirements of standing, to challenge an initiative in court “a person must show, first and foremost, ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent.’”¹³⁷ Let us assume that rural residents, whether corporate or individual, will generally meet this standing requirement if the initiative at issue really does cause significant harm to rural communities.¹³⁸ For example, in Oklahoma there is no evidence that the state, in defending the constitutionality of the cockfighting ban, challenged the standing of the cockfighters suing to invalidate the measure. The harm to them is obvious.

The more pernicious problem for litigants is likely the claim(s) to be brought. Plaintiffs must, of course, have a claim that the particular initiative is somehow unconstitutional or in conflict with established law.¹³⁹ The plaintiffs in Oklahoma claimed that the cockfighting ban was both unconstitutional and was unduly economically burdensome.¹⁴⁰ Constitutional challenges to the initiatives will generally be grounded on equal protection and due process grounds.¹⁴¹ Though individual factual situations will make litigation more or less promising, many post-hoc challenges will be unsuccessful. In most cases, however, realities beyond the particular provisions of the initiative will often make winning difficult. For one, it is

not as though proponents of an initiative simply “place” it on the ballot for popular approval. Part of the process of qualifying a measure in many states involves a substantive review of the proposal by state attorneys that is designed to flag any statutory or constitutional infirmities with the measure.¹⁴² Proponents will then have the opportunity to correct any uncovered problems.¹⁴³

For another, in this age of professional direct democracy, very few initiatives are put forward by amateurs. Rather, specialized attorneys hired by the amateurs draft the proposal and coordinate the ensuing campaign.¹⁴⁴ Combined, this means the proposed initiative is drafted by a legal expert in the first instance and reviewed by other trained professionals before being voted on by the citizenry. It logically follows, then, that initiated measures will generally be drafted to accord with the federal and state constitutions and glaring constitutional problems will have been addressed before the measure is put to the voters. This is not to say that all initiatives are immune from challenges, far from it in fact. But, it would be a mistake to think legal challenges will frequently succeed in overturning initiatives.

Again turning to the Oklahoma case, most commentators agree that there is little chance that the plaintiffs will win their case against the cockfighting ban in Oklahoma,¹⁴⁵ in no small part because 47 other states already have bans on cockfighting.¹⁴⁶ If that is true, one might wonder why the plaintiffs would incur the costs of such an uphill struggle. The most obvious answer is that the plaintiffs do not view their claims as devoid of merit and truly hope to prevail in court. While this might be the case in many lawsuits, put that aside for the moment and assume that the plaintiffs know that they are fighting a losing battle.¹⁴⁷ In such a case, the lawsuit may simply be an attempt to get the measure temporarily enjoined from enforcement while the affected residents turn to another alternative.

B. Going to the Statehouse

This second alternative is to turn to the state legislature for help, either before or after the election.

1. Amending a Previously Enacted Initiative

As to the more obvious solution, local advocates might be able to persuade the state legislature to overturn, or at least substantially modify, a statutory initiative after it has passed. Although political scientists have long claimed that legislators are reticent to revisit issues considered by voters at the polls,¹⁴⁸ more recent studies make clear that legislators are in fact often willing to substitute their judgment for that of the voters on some occasions.¹⁴⁹ This is precisely the situation in Oklahoma and, perhaps,

an explanation for why the plaintiffs in the challenge to the cockfighting ban might be willing to fight a losing battle in court.¹⁵⁰ This remedy, however, has several important shortcomings. First, like litigation, it occurs after-the-fact and requires challenging a law already enacted. Second, even where a few individual legislators might be willing to challenge the “will of the people,” it may be difficult convincing a majority of both chambers of the legislature to make that leap. Legislators interested in keeping their jobs, after all, must be careful when challenging the judgment of their constituents. Finally, this remedy only works to challenge statutory initiatives (not constitutional amendments) and, as noted, safeguards in some states may even shield those measures.¹⁵¹

2. Prospective Reforms

A more ambitious plan would be to turn to the legislature before such initiatives come down the pike in the hope of tweaking the initiative process more generally.¹⁵² Indeed, several states have already enacted such changes to the system. These changes generally fall into two categories: geographic signature requirements and requiring super-majorities to pass certain types of legislation through the initiative.¹⁵³

a. Geographic Signature Requirements

Signature requirements were introduced in Part II (A) and generally require proponents of an initiative to gather a certain number of signatures before the measure is qualified to appear on the ballot.¹⁵⁴ The reason for requiring signature gathering is to ensure that the measure has a certain minimal level of support before asking voters to decide on its propriety.¹⁵⁵ Some states require the signatures come from a geographically diverse area, in other words require that a certain number or percentage of the signatures come from different parts of the state.¹⁵⁶ This accomplishes the further goal of ensuring some level of *statewide* support for the proposal.¹⁵⁷ Thus, in these states before an anti-rural initiative can qualify for the ballot, it must have at least minimal support from the rural areas of the state.

Geographic requirements have an “anti-urban bias” that makes it more difficult to place measures on the ballot.¹⁵⁸ While an effective tool, geographic signature requirements only ensure that initiative proponents convince a few voters in rural localities to allow voters to pass judgment on the issue. Indeed, signing an initiative petition is not necessarily an endorsement of the measure, and in fact, some people sign petitions without really understanding the contents of the proposed initiative.¹⁵⁹ As such, no substantive protections would inure to the residents of rural localities. Rather, geographic signature requirements should instead be thought of as a gatekeeper

protection designed to keep the most heinous anti-rural measures off the ballot.

More importantly, geographic signature requirements have been successfully attacked of late. In Idaho, a federal district judge struck down the state's signature law on the theory that it violated the Equal Protection Clause and gave undue preferences to rural areas.¹⁶⁰ A year later, the Utah Supreme Court struck down that state's geographic gathering requirement, holding that the law violated the "one person, one vote" mandates of *Reynolds v. Simms* and *Baker v. Carr*.¹⁶¹ In the wake of these holdings, the continued vitality of such protections for minority interests is in serious doubt. As such, other remedies are probably necessary.

b. Super-Majorities

Another solution provides more protection but would likely be more difficult to enact. In 1998, voters in Utah amended their state constitution to require a two-thirds majority to enact any anti-hunting initiatives.¹⁶² Arizona nearly enacted a similar requirement in 2000.¹⁶³ Such super-majority requirements would virtually assure that any initiative covered by the requirement would need substantial statewide support to be enacted. The problem lies in how to draft the scope of the amendment. Requiring a super-majority for all initiated measures would likely meet with little statewide support.¹⁶⁴ Yet trying to draft language that would narrowly protect rural interests would be exceedingly difficult—no one can predict every type of issue that could be proposed that would adversely affect rural communities. However, with careful drafting and probably a fair amount of trial and error, workable proposals could be developed. Moreover, within some states, the threats to rural interests might be readily identifiable. Thus, while super-majorities might not be the perfect solution, such a requirement (especially in conjunction with geographic signature requirements) might help mitigate the potential harms inflicted by the initiative.

C. Back to Localities

Part II concluded that, despite the noble aims of home rule provisions, local governments generally remain relatively powerless against their state. As such, they are ill equipped to guard their residents against the ill effects of statewide initiatives. Nonetheless, local governments clearly have more power today under home rule than they did under the limits of Dillon's Rule. The greatest potential protection for local interests, then, is to again redesign the concept of local governments. To some extent, such a movement is already underway through more expansive versions of home rule.¹⁶⁵ But, home rule is not enough. Instead, concepts of true federalism must be written into state constitutions that in fact give localities powers against the state

similar to those possessed by the state against the federal government.¹⁶⁶ Localities must have greater power to legislate, meaning either a great expansion of the definition of local issue or an abandonment of this constraint and more latitude to challenge the acts of the state in court.

Such a radical reform would of course come with costs. Greater local power to legislate means less uniformity within the state, meaning that driving from one county to another might subject persons to different sets of laws.¹⁶⁷ Although this is a fundamental cost of federalism present between the states as well,¹⁶⁸ it may seem exacerbated when the geographic distance between changes in the law (and the number of laws affected) become too small.¹⁶⁹ Additionally, giving a locality the power to sue to enforce “rights” would likely greatly increase the caseloads of already-overburdened state courts.¹⁷⁰

A less radical reform that would require no legislative action would require some degree of judicial activism.¹⁷¹ If judges were to finally abandon the constraints of Dillon’s Rule and interpret the provisions of home rule more broadly, the ability of local governments to act would be greatly increased.¹⁷² Under either approach, rural residents are better off, generally, as the benefits of greater local power would help limit even the state legislature to impose its will on localities.

VI. FAITH IN THE LEGISLATURE

Implicit throughout this Article and key to the previous Part is the belief that a legislative body can and will better protect rural interests than will pure majority rule. The reasonableness of that belief is based, in part, on the different ways that elected officials choose to govern and the motivations that drive their votes. Also important for these purposes are the institutional safeguard built into a representative system discussed in Section B of Part II above, but those considerations apply more generally to the benefits of a republic over a democracy. The focus of this section, by contrast, is the ability of the legislature and individual legislators to protect specific interests within their district and across the state.

Several theories of representation have been proposed to explain how elected representatives view themselves vis-à-vis their constituents. At the most basic level, there are three different types of representative models. The first, the descriptive model, proposes that the elected official is not just a representative of his constituency but is in fact representative of that community. In other words, the official’s personal beliefs should correspond with those of her community. Voting her conscience means voting as her constituents would want. A second theory, closely related to the descriptive model, is the agency theory. Under this model, regardless of the representative’s own opinions and biases, he or she attempts to vote on matters in the

legislature in the way that he believes most of his constituents would have wanted. When necessary, then, the representative puts aside his personal viewpoints in favor of those held by the members of his district.

A third theory, called trustee theory, posits that representatives are elected based on their own unique qualifications and should thus be allowed to vote as they believe is best. A more paternalistic view of politics, the trustee is required to exercise her discretion as she believes is correct even when she knows that the majority of her constituents would vote the other way.¹⁷³ However, there is a significant limit to even the trustee's choice to vote against the interests of his constituents—self-interest. Public choice theory holds that legislators act with primarily one consideration in mind: reelection.¹⁷⁴ Without getting into the intricacies of the theory, the idea is that legislators structure their voting patterns so as to maximize the benefits conferred on their constituents while minimizing the costs to them, thereby increasing the legislator's popularity in her district.¹⁷⁵ Popularity come Election Day, should translate to reelection. Thus, under any theory of representation, rural legislators are likely to protect their constituents' interests when faced with potentially harmful legislation.

The above discussion only explains why representatives from rural districts might choose to side with their constituents on any given issue. It is likely, however, that if the rural population in the state is the minority, so too will rural legislators be in the minority at the statehouse. In other words, the same problem persists in the legislature as at the polls. A concept more closely related to those discussed in Part II, but saved specifically for this Section, is the concept of logrolling. Logrolling is, for lack of a more complete description, vote trading.¹⁷⁶ A legislator who would otherwise oppose a piece of proposed legislation may be persuaded into supporting it if by doing so he could win support for another piece of legislation (ordinarily a bill he is sponsoring).¹⁷⁷ The inverse is equally true, as well other vote combinations (support for opposition on another bill or opposition to an anti-rural bill for support of a future rural-neutral piece of legislation). This is a feature lacking in direct democracy—a voter cannot trade her vote on Measure 2 in return for another voter's support of Measure 1.¹⁷⁸ Logrolling, among other factors,¹⁷⁹ encourages legislators from urban areas—whose residents will not be adversely affected by the vote—to support the interests of rural localities.

Certainly, a legislative body will never perfectly represent rural interests. The reality is that one must be as concerned about a tyranny of the minority as a tyranny of the majority.¹⁸⁰ The issue, then, is whether the traditional legislative process better protects rural localities from majority tyranny than the initiative. Just about any procedural safeguard would be an improvement over the unmitigated pure democracy of the initiative, this is not a difficult threshold to cross.

VII. CONCLUSION

Politics is about winners and losers. In every election, whether voting on candidates or ballot measures, there will be a minority of the population disaffected by the outcome. That result is unavoidable, after all elections are, in the end, contests. But there must be limits on the disadvantages we are willing to impose. Initiatives have the capacity to cross that line in the context of urban/rural disputes given the population advantages often enjoyed by “city-slickers.” Because localities are unable to adequately protect their residents’ interests, certain basic reforms in the initiative process are warranted.

This Article has sought to do two things. The first is to further the work of others, such as Daniel Smith, in identifying rural communities as minority interests that can be adversely affected and disproportionately harmed by the use of direct democracy. The second, more difficult aim was to begin to theorize solutions to the problem short of eliminating the initiative process itself.

Notes

- * J.D., University of Colorado School of Law, 2003. This article is dedicated to my parents for all their love and support over the years.
- 1. Granted, however, those winners and losers are not always immediately identifiable. *E.g.*, *Bush v. Gore*, 531 U.S. 98 (2000); Peggy Lowe, *Beauprez Takes 7th*, ROCKY MTN. NEWS, Dec. 11, 2002, at 5-A.
- 2. See Daniel A. Smith, *Representation and the Spatial Bias of Direct Democracy in the American States*, 2-4, available at <http://www.fsu.edu/~statepol/conferences/2002/papers/SMITH-D.DOC> (last accessed May 25, 2003).
- 3. See Linda A. Malone, *Reflections on the Jeffersonian Ideal of an Agrarian Democracy and the Emergence of an Agricultural and Environmental Ethic in the 1990 Farm Bill*, 12 STAN. ENVTL. L. J. 3, 5 (1995) (discussing Thomas Jefferson’s hope for an agrarian America).
- 4. Thomas Lundmark, *Systemizing Environmental Law on a German Model*, 7 DICK. J. ENVTL. L. & POL’Y 1, 8 (1998) (noting in a discussion of environmental law that “[m]ost of the world’s population lives in cities, and most policy makers mean to protect city dwellers . . .”).
- 5. *E.g.*, Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677 (1997); Raymond Ku, *Consensus of the Governed: the Legitimacy of Constitutional Change*, 64 FORDHAM L. REV. 535, 577 (1995); Derrick A. Bell, Jr., *The Referendum: Democracy’s Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978-79); THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM AND RECALL* 90-99 (1989).
- 6. See, *e.g.*, Smith, *Representation and the Spatial Bias of Direct Democracy in the American States*, *supra* note 2, at 2-4.

7. Throughout this article I refer to “local governments” and “localities,” which in the United States are largely comprised of municipalities (cities), counties, and special districts. Lumping these different entities together certainly blurs some important distinctions between their organization, operation, and purposes. Nonetheless, for these purposes, those distinctions are not important.
8. See DANIEL A. SMITH, *TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY* (1998).
9. See generally Stephen B. Rodriguez, *Localism & Lawmaking*, 32 RUTGERS L. J. 627, 628-29 (2001).
10. See Nicole Nascenzi, *Fighting Ban Halts Seasonal Events*, TULSA WORLD, Nov. 10, 2002, at A-1 (discussing the effect the cockfighting ban will have on one small town in Oklahoma); *To the Editor*, DAILY OKLAHOMAN, Jan. 9, 2003, at 4-A (“The recent cockfighting vote appeared to be a mandate by city voters to change the lifestyle of their country cousins, who were doing nothing wrong until after cockfighting was made illegal.”).
11. Shaun Schafer, *Voters Back Ban on Cockfighting*, TULSA WORLD, Nov. 6, 2002, at A-1.
12. Randy Krehbiel, *Campaign Connection*, TULSA WORLD, Nov. 12, 2002, at A-4.; Paul English, *Largent’s Effect on Races Eyed*, TULSA WORLD, Nov. 10, 2002, at A-20; and Chuck Ervin, *Henry Defied Odds in Race Against Largent*, TULSA WORLD, Nov. 7, 2002, at A-7.
13. *AP Editors Rank 2002 News*, DAILY OKLAHOMAN, Dec. 28, 2002, at 5-A.
14. *Lock v. Falkenstine*, 380 P.2d 278 (Okla. Crim. App. 1963); see also Chuck Ervin, *Colorful Judge Molded Cockfighting’s History*, TULSA WORLD, Nov. 10, 2002, at A-22.
15. *Lock*, 380 P.2d at 283.
16. Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, THE BATTLE OVER CITIZEN LAWMAKING 109–10 (M. Dane Waters, ed. 2001).
17. *In re Initiative Petition No. 365*, 55 P.3d 1048 (Okla. 2002).
18. Chuck Ervin, *Cockfighting Ban on Nov. 5 Ballot*, TULSA WORLD, Aug. 21, 2002, at A-1.
19. For additional background on the election and history of cockfighting in Oklahoma, see Joseph Lubinski, Comment, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. COLO. L. REV. 1109 (2003); see also Pacelle, *supra* note 16, at 109–19.
20. Oklahoma Secretary of State, *State Questions*, available at <http://www.state.ok.us/~elections/02sq.pdf> (last accessed May 26, 2003).
21. Rod Walton, *Cockfighting: Restraining Order Continued in Adair, Sequoyah Counties*, TULSA WORLD, Dec. 20, 2002, at A-13.
22. *Opinion*, TULSA WORLD, Jan. 29, 2003, at A-16.
23. Marie Price, *Cockfighting: Shurden is a Sore Loser, Say Backers of Initiative Petition*, TULSA WORLD, Jan. 28, 2003, at A-7.
24. *Stage is Set for Battles over Cockfighting*, L.A. TIMES, Feb. 16, 2003, at A-26. (In discussing the cockfighting controversy in Oklahoma and New Mexico, stating that “It remains to be seen whether the perception of animal cruelty will outweigh the industry’s economic and entertainment benefits for rural communities.”).
25. Marie Price, *House Roundup: Education Lotter Plan to Get a Look*, TULSA WORLD, Feb. 12, 2003, at A-18.
26. Shaun Schafer, *Cockfighting: AG to Ask that Suits be Linked*, TULSA WORLD, Nov. 27, 2002, at A1; Walton, *supra* note 21.

27. *Stage is Set for Battles over Cockfighting*, *supra* note 24.
28. Associated Press, Tim Talley, *Attorney General Asks Supreme Court to Decide Cockfighting Issue*, 1/15/03 ASSOCIATED PRESS NEWSWIRE 10:21:00, Jan. 15, 2003.
29. See Humane Society of the United States, *What is Wrong with Cockfighting in Oklahoma?*, available at: <http://www.hsus.org/ace/11625> (last accessed April 15, 2003) (“Forty-seven states have banned cockfighting; it is legal only in Louisiana, Oklahoma, and parts of New Mexico, although gambling on cockfighting is illegal in all states. In November 1998, voters in Arizona and Missouri overwhelmingly approved initiatives to ban cockfighting. Most states provide felony-level penalties for illegal cockfighting, including Arizona and Missouri.”).
30. Walton, *supra* note 21.
31. John Greiner, *Court Postpones Cockfighting Hearing*, DAILY OKLAHOMAN, Feb. 6, 2003, at 5-A. Though tangential to the focus of this article, the lawsuits took an intriguing twist in the state supreme court. After the state attorney general sought a writ from the supreme court affirming the measure’s constitutionality, the plaintiffs’ attorney filed a motion asking all of the justices of the court to recuse themselves because of their ruling against the cockfighters in the case that allowed the measure onto the ballot in the first place. *Id.* By the end of 2003, the state courts still had not resolved the issue. Shaun Schafer, *Court Battles Continue over Cockfights*, TULSA WORLD, Nov. 8, 2003, at A-1; Janet Pearson, *One Year Later*, TULSA WORLD, Nov. 9, 2003, at G-1.
32. Chuck Ervin, *Cockfighting Fight Coming Up?*, TULSA WORLD, Dec. 8, 2002, A-25.
33. Marie Price, *Cockfighting: Panel Passes Measure on Vote*, TULSA WORLD, March 26, 2003, at A-13; see also Jack Money, *Cockfighting Proposal Headed to House*, DAILY OKLAHOMAN, March 26, 2003, at 6-A. One outraged Oklahoman suggested that reducing the penalty from a felony to a less-deterrent misdemeanor would essentially transform the ban into nothing more than a “fee” for cockfighting. Editorial, *People’s Will*, TULSA WORLD, March 27, 2003, at A-20 [hereinafter *People’s Will*].
34. One legislator, in fact, proposed a bill to make it more difficult to overturn the will of the people. Jack Money, *Senator Cheers Poll Results on Legality of Cockfighting*, DAILY OKLAHOMAN, Jan. 23, 2003, at 3-A.
35. Editorial, *Gut Check Panel OKs SQ 687 Overthrow Attempt*, DAILY OKLAHOMAN, Feb. 23, 2003, at 8-A.
36. *E.g.*, *People’s Will*, *supra* note 33; Call the Editor, *New Voter Asks: Why Bother?*, TULSA WORLD, Dec. 10, 2002, at A-2; Call the Editor, *Lawyer Jokes Finally Understood*, TULSA WORLD, Dec. 4, 2002, at A2; Call the Editor, *Why Bother Voting on Cockfighting?*, TULSA WORLD, Nov. 27, 2002, at A2.
37. Associated Press, Bill Status, ASSOCIATED PRESS NEWSWIRE 12:51:00, April 18, 2003.
38. Jack Money, *House Gives Cockfighting Bill New Life*, DAILY OKLAHOMAN, April 24, 2003, at 1-A; Tim Talley, *Bill Seeking Lower Cockfighting Penalties Passes House*, THE ASSOCIATED PRESS, April 23, 2003.
39. John Greiner, *Senate Rejects Cockfighting Penalty Changes*, DAILY OKLAHOMAN, May 20, 2003, at 7-A.
40. *Id.*
41. Opinion, *What a Surprise*, TULSA WORLD, May 17, 2003, at A-24
42. *State Poll Finds Support for Cockfighting Option*, Daily Oklahoman, Jan. 21, 2003, at 4-A.

43. See generally Rodriguez, *supra* note 9, at 628-29 (discussing California's Propositions 13 and 218 to demonstrate how statewide initiatives can tie the hands of local governments). As Rodriguez puts it, in recent elections, "there have been a number of initiatives designed to impact local government power, either by restricting or augmenting its use." *Id.* at 629. See also Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978). See also Daniel A. Smith, *Overturing Term Limits: The Legislature's Own Private Idaho?*, PS 1 (April 2003) (discussing term limits); Lubinski, *supra* note 19 (examining the increasing use of the initiative process by animal activists).
44. See CLAYTON P. GILLETTE & LYNN A. BAKER, LOCAL GOVERNMENT LAW 2 (2d ed. 1999).
45. *Id.* at 3.
46. Rodriguez, *supra* note 9, at 633-34.
47. GILLETTE & BAKER, *supra* note 44, at 3.
48. *Id.*
49. See *id.* at 3.
50. See GILLETTE & BAKER, *supra* note 44, at 6-10.
51. Several theories of representation and explanations for representative action are considered in the discussion of state legislative bodies, *infra* text and notes 173-75.
52. That said, many local governments do use direct democracy, both in the form of initiated and referred measures, in much the same way initiatives are used at the state level. Such use of direct democracy is not a concern for this paper, however, because in that circumstance it is only the members of the affected community voting on the issue. Though there will undoubtedly be a minority interest adversely affected, in most cases there will not be the same kind of urban/rural split within the county. For a discussion of local initiative powers, see GILLETTE & BAKER, *supra* note 44, at 732-76.
53. See, e.g., Rodriguez, *supra* note 9, at 636-42.
54. *Id.* at 627.
55. Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7-8 (1990).
56. A locality may sue, however, when the state interferes in matters of local concern, discussed *infra* text and notes 117-23. For example, Denver Mayor Wellington Webb threatened to sue the state of Colorado over legislation making certain gun laws uniform statewide. Julia C. Martinez, *Colorado on Brink of Easing Gun Laws After House Actions*, DENVER POST, March 14, 2003, at A-1.
57. Briffault, *supra* note 55, at 7.
58. Gillette & Baker, *supra* note 44, at 275-76 (quoting selection from JOHN F. DILLON, 1 COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 448-51 (5th ed. 1911)).
59. Briffault, *supra* note 55, at 8.
60. *Id.*
61. 207 U.S. 161, 178-79 (1907).
62. Like the initiative, home rule was the product of progressives. For example, Colorado voters passed a statewide home rule law via the initiative in the state's first foray into direct democracy in 1912. Daniel A. Smith & Joseph Lubinski, *Direct Democracy During the Progressive Era: A Crack in the Populist Veneer?*, 14 J. POL'Y HIST. 349, 356 (2002); see also City & County of

- Denver v. State, 788 P.2d 764, 766 (Colo. 1912).
63. For a general discussion of home rule, *see* GILLETTE & BAKER, *supra* note 44 at 304-52.
 64. Briffault, *supra* note 55, at 10.
 65. *See* JOHN MARTINEZ & MICHAEL E. LIBONATI, STATE AND LOCAL GOVERNMENT LAW: A TRANSACTIONAL APPROACH 96 (2000).
 66. *Id.*
 67. *See* Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 1-29 (1975), *reprinted in* GILLETTE & BAKER, *supra* note 44, at 305-08.
 68. Briffault, *supra* note 55, at 10.
 69. GILLETTE & BAKER, *supra* note 44, at 305-06.
 70. WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW: CASES AND MATERIALS 110 (4th ed. 1992).
 71. *Id.* at 305.
 72. Briffault, *supra* note 55, at 10.
 73. *Id.* at 8, 11; Rodriguez, *supra* note 9, at 637; *but see* GILLETTE & BAKER, *supra* note 44, at 309.
 74. *See* Terrance Sandalow, *The Limits of Municipal Power under Home Rule: A Rule of the Courts*, 48 MINN. L. REV. 643, 645 (1964) (“Home rule . . . is a method of distributing power between state and local governments.”), *reprinted in* GILLETTE & BAKER, *supra* note 44, at 308-11.
 75. Martinez and Libonati call these the powers of “initiative” and “immunity.” MARTINEZ & LIBONATI, *supra* note 65, at 93.
 76. *City & County of Denver v. State*, 788 P.2d 764, 767 (1990); MARTINEZ & LIBONATI, *supra* note 66, at 95.
 77. VALENTE & MCCARTHY, JR., *supra* note 70, at 114.
 78. *City & County of Denver*, 788 P.2d at 767 (internal citations omitted).
 79. *Id.* at 767-68; *State ex rel Haynes v. Bonem*, 845 P.2d 150, 156 (N.M. 1992); VALENTE & MCCARTHY, JR., *supra* note 70, at 110.
 80. VALENTE & MCCARTHY, JR., *supra* note 70, at 111.
 81. *Id.* at 110.
 82. *See, e.g.,* *Envirosafe Serv. of Idaho, Inc. v. County of Owyhee*, 735 P.2d 998, 1000-01 (Idaho 1987) (defining and describing implied preemption). *See also* GILLETTE & BAKER, *supra* note 44, at 366-71.
 83. *E.g.,* GILLETTE & BAKER, *supra* note 44, at 322-23 (discussing localities’ attempts to expand civil rights protections under their home rule authority).
 84. MARTINEZ & LIBONATI, *supra* note 65, at 94.
 85. Rodriguez, *supra* note 9, at 642-44.
 86. *Id.* at 642.
 87. *Id.* at 641-42.
 88. Also included in this “package” is the referendum and recall device. Because they are largely tangential to the topic of this paper, they have largely been excluded from the discussion to follow. For an introduction to these tools, *see* CRONIN, *supra* note 5.
 89. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1512 (1990); Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of*

- Legislating by Initiative*, 61 S. CAL. L. REV. 733, 733-36 (1988).
90. Robert Henry, *Deliberations about Democracy: Revolutions, Republicanism, and Reform*, 34 WILLAMETTE L. REV. 533, 554-55 (1998).
 91. For an overview of the operation and history of the initiative, see Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures that Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995); see also Lubinski, *supra* note 19.
 92. Judith F. Daar, *Direct Democracy and Bioethical Choices: Voting Life and Death at the Ballot Box*, 28 U. MICH. J.L. REFORM 799, 800 (1995).
 93. There is an exception to this rule in a minority of states that employ the indirect initiative. Under this system, after a measure is proposed, the state legislature has a sort of “right of first refusal” over it. Only if the legislature refuses to enact the measure does it go to the voters. For a greater discussion of the indirect initiative, WILLIAM N. ESKRIDGE, JR., ET AL., *LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 499 (3d ed. 2001); CRONIN, *supra* note 5, at 241-42.
 94. For those looking for a more thorough description of the initiative process more generally, see sources listed in note 91, *supra*.
 95. Collins & Oesterle, *supra* note 92, at 51.
 96. One common difference, however, is the number of signatures required to qualify the measure for the ballot. Many states require a higher number of signatures for constitutional amendments than statutes, however in some states the requirements are the same. Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 423 n.117 (2003). That it is only slightly more difficult, or no more difficult at all, to propose constitutional amendments via the initiative is troublesome to some commentators. E.g., Lynn A. Baker, *Constitutional Change and Direct Democracy*, 66 U. COLO. L. REV. 143, 146 (1995) (“Intuition suggests that it should be significantly more difficult to adopt a constitutional amendment than a statute. A state constitution is, after all, a fundamental law, which we therefore expect—and want—to be more permanent than the ever-changing, ordinary, statutory law.”).
 97. Collins & Oesterle, *supra* note 92, at 51-52.
 98. Baker *supra* note 96, at 153. While it is tempting to think of the initiative as a tool for increasing the rights held by members of society, just the opposite can be true. This is especially important for a study of local government. For example, in the 1980s and early 1990s several Colorado cities—including Denver and Boulder—enacted ordinances that prohibited discrimination based on sexual orientation. In response, a group of concerned conservative activists proposed Amendment 2, which sought to repeal any such anti-discrimination ordinances and prevent the enactment of future similar measures. The effect of the amendment, had it been allowed to stand, would have been twofold. Clearly, it would have negatively affected gay rights in the state. Important to this discussion, however, is the restriction Amendment 2 put on local governments’ right to increase civil rights protections within their communities. For additional background on Amendment 2, see STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2* (1994); see also *Evans v Romer*, 882 P.2d 1335 (Colo. 1994), *aff’d on other grounds Romer v. Evans*, 517 U.S. 620 (1996).
 99. Collins & Oesterle, *supra* note 91, at 51.
 100. Baker, *supra* note 96, at 153; Caroline J. Tolbert, et al., *Election Law and Rules for Using Initiatives*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 27 (1998)

- (“Although each state can set its own rules and procedures for the initiative, all such rules are subject to the constraints of the United States Constitution.”).
101. *Supra* note 96, alludes to this requirement.
 102. Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, in *CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES* 8 (Shaun Bowler et al. eds., 1998); *see also* CRONIN, *supra* note 5, at 62-66.
 103. Donovan & Bowler, *supra* note 102, at 8.
 104. *But see infra* text and notes 157-60.
 105. *See* Collins & Oesterle, *supra* note 91, at 58.
 106. *See id.* at 55:

Proponents often claim that the initiative is a more democratic way of governing than representative elections, that it is a way of perfecting democracy. We sometimes say that representative democracy is indirect democracy, while initiatives are a form of direct democracy. It is natural to assume that direct is better, more nearly perfect, than indirect—that the ideal of consent of the governed is better achieved by consenting to the laws themselves, rather than to representative lawmakers. This argument from the logic of democracy surely has much to do with the initiative’s popularity.
 107. Of course, some authors use the term “democracy” at a more abstract level. *E.g.*, JANE J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* 3 (1983) (“[The] combination of electoral representation, majority rule, and one-citizen/one-vote *is* democracy. Because this conception of democracy assumes that citizens’ interests are in constant conflict, I have called it “adversary” democracy.”).
 108. ESKRIDGE, JR., ET AL., *supra* note 93, at 499-501 (introducing the concept of direct democracy). Representative democracy has been defined as “that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.” David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative & Referendum Process*, 66 U. COLO. L. REV. 13, 20 (1995) (quoting JOSEPH A. SCHUMPETER, *CAPITALISM, SOCIALISM, AND DEMOCRACY* 269 (3d ed., 1950)).
 109. Douglas H. Hsiao, Note, *Invisible Cities: The Constitutional Status of Direct Democracy in a Democratic Republic*, 41 DUKE L. J. 1267, 1301-03 (1992); CRONIN, *supra* note 5, at 22; Donovan & Bowler, *supra* note 102, at 1.
 110. THE FEDERALIST NO. 51 (James Madison).
 111. THE FEDERALIST NO. 10. Introducing the topic, the author writes:

If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from

- the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.
112. *E.g.*, Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930, 940-41 (1988).
 113. *See supra* text and notes 110-12.
 114. *See* ESKRIDGE, JR., ET AL., *supra* note 93, at 501-05; CRONIN, *supra* note 5, at 35-37 (discussing the benefits of a representative democracy), 207-22 (listing the problems with direct democracy).
 115. Keith E. Whittington, *Yet Another Constitutional Crisis?*, 43 WM. & MARY L. REV. 2093, 2106 (2002) (noting the constitutional sources of gridlock and acknowledging complaints).
 116. T. Kyle King, *Close but No Cigar: A Reply to Professor Graglia*, 25 HARV. J.L. & PUB. POL'Y 369, 376 (rejecting the call for a nationwide initiative and stating that "Too much affinity for expeditiousness is what got us into this mess; we were much better off when what we now denounce as 'gridlock' was praised as 'deliberation' and the cumbersome nature and narrow focus of government were seen as virtues.").
 117. *See* CRONIN, *supra* note 5, at 79 -84 (discussing where voters get their information), 99-116 (examining the role of money in ballot contests).
 118. *Id.* at 70-77.
 119. *See* Eule, *supra* note 89, at 1520-21, 1526-27; *see also* Gillette, *supra* note 112, at 943; *see also* Rodriguez, *supra* note 9, at 666.
 120. GILLETTE & BAKER, *supra* note 44, at 461; *see also* Sherman J. Clark, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 450-54 (1998). Of course, there are those who argue that the initiative does in fact register voter intensity. Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from a Liberal Democratic Theory*, 88 CAL. L. REV. 395, 419 n.81 (2000) ("Supporters of real world plebiscites argue that citizen initiatives and referenda do reflect the intensity of voter preferences because only voters who care about the issue on the ballot will invest the time to go to the polls to vote.") (citing Gillette, *supra* note 112, at 968-69).
 121. GILLETTE & BAKER, *supra* note 44, at 461.
 122. Clark, *supra* note 120, at 450-51.
 123. *See* Smith, *Representation and the Spatial Bias of Direct Democracy in the American States*, *supra* note 2, at 3.
 124. *E.g.*, Ethan J. Leib, *Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch*, 33 RUTGERS L.J. 359 (2002); Netanel, *supra* note 120, at 395 (2000).
 125. *Pac. States Tel. & Tel. Co. v. State of Oregon*, 223 U.S. 118 (1912).
 126. *Oregon v. Paci. States Tel. & Tel. Co.*, 99 P. 427, 428 (1909), citing *Kadderly v. City of Portland*, 74 P. 710 (1903).
 127. U.S. CONST. art. IV, § 4.
 128. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 138; Henry, *supra* note 90, at 555.
 129. *Luther v. Borden*, 48 U.S. 1 (1849).
 130. *Pac. States Tel. & Tel. Co.*, 223 U.S. at 149-50; *see also* Hsiao, *supra* note 109, at 1291. For a general discussion of the Guaranty Clause, *see* Leong, *supra* note 5, 684-90; CRONIN, *supra* note 5, at 34-35.
 131. *Baker v. Carr*, 369 U.S. 186 (1962); *see also* Hsiao, *supra* note 109, at 1294.
 132. *E.g.*, Hsiao, *supra* note 109, at 1272; JOHN H. ELY, *DEMOCRACY AND DISTRUST* 111 (1980).

133. Hsiao, *supra* note 109, at 1291.
134. *Id.* at 1295, citing ELY, *supra* note 132, at 122-23.
135. *E.g.* State *ex rel.* Huddleston v. Sawyer, 932 P.2d 1145, 1157 (Or. 1997); State v. Manussier, 921 P.2d 473, 482 (Wash. 1996) (“*Pacific* still represents good law, and earlier cases decided by this court have been in accord with its holding.”).
136. *See supra* note 55 and accompanying text.
137. Arizonans for Official English v. Arizona, 520 U.S. 43, 64 (1997) (citations omitted). *See also* Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).
138. That said, there are doubtless circumstances in which a court would find the standing requirements were not met.
139. For an overview of direct democracy and its relation to the Equal Protection and Due Process Clauses, *see* ESKRIDGE, JR., ET AL., *supra* note 93, at 513-47.
140. Walton, *supra* note 21.
141. *See* ESKRIDGE, ET AL., *supra* note 93, at 513-47.
142. *See also* Lubinski, *supra* note 19 (describing the process of qualifying a measure for the ballot and citing initiative resource manuals from several states).
143. *Id.*
144. *See* David McCuan, *California’s Political Warriors: Campaign Professionals and the Initiative Process*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 61-71 (Shaun Bowler et al. eds., 1998).
145. After the Oklahoma Supreme Court decision in 2002 and before the election, ban opponents sought help from the federal courts, to no avail. At that time, they pressed many of the same claims as would be presented in the subsequent state litigation in 2003. Several of those claims, however, had already failed in other states. Michael Overall, *Rooster Fight is in Court Again*, TULSA WORLD, Sept. 11, 2002, at A-11.
146. *Id.*; *see also* Humane Society of the United States, *supra* note 29.
147. Assume also that there is at least a little hope for victory, such that the attorneys involved would be subject to neither sanction nor discipline for bringing and maintaining the case. *See, e.g.*, FED. R. CIV. P. 11; MODEL RULES OF PROF’L CONDUCT R. 3.1.
148. Elisabeth R. Gerber, *Pressuring Legislatures Through the Use of Initiatives: Two Forms of Indirect Influence*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 193 (Shaun Bowler, et al., eds. 1998).
149. Daniel Smith & Joseph Lubinski, Sponsoring “Counter-Majoritarian” Bills in Colorado, *available at* <http://www.ballot.org/resources/majoritarian.html>; Daniel A. Smith, *Homeward Bound?: Micro-Level Legislative Responsiveness to Ballot Initiatives*, 1 STATE POL. & POL’Y Q. 50 (Spring 2001).
150. The theory is that the plaintiffs, having kept the measure from taking effect while the case is pending, are merely maintaining the lawsuit until the legislature intervenes and “fixes” the problem.
151. *See supra* note 99 and accompanying text.
152. Changes to the process would generally require a constitutional amendment and a statewide vote of the people. Turning the legislature, therefore, would yield a referendum, not a new law. As such, activists could simply propose an initiative in the first instance without first going to the

- legislature as well
153. That said, other authors have been more ambitious in devising structural reforms for the initiative. For example, Cronin lists 14 proposals that would help mitigate the system's defects. CRONIN, *supra* note 5, at 234-40.
 154. Donovan & Bowler, *supra* note 102, at 8.
 155. Daniel Hays Loewenstein & Robert M. Stern, *The First Amendment and Paid Initiative Petition Circulators: A Dissenting View and a Proposal*, 17 HASTINGS CONST. L. Q. 175, 201-03 (1989)
 156. *Id.* at 215; Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y Q. 27, 51 (1996); *see also* CRONIN, *supra* note 5, at 235-36.
 157. Tolbert, et al., *supra* note 100, at 30.
 158. *Id.*
 159. Loewenstein & Stern, *supra* note 155, at 194-95 ("Numerous experiments conducted by psychologists have found that although agreement with the content is a significant variable influencing whether subjects will sign petitions, various other factors, such as the way in which the solicitor is dressed, and whether the subject has seen another person agree or decline to sign, influence the signing decision as much or more.").
 160. Idaho Coalition United For Bears v. Cenarrusa, 234 F. Supp. 2d 1159, 1164-65 (D. Idaho 2001) (relying on *Moore v. Ogilvie*, 394 U.S. 814 (1969), which struck down a geographic signature requirement for nominating candidates for office); *see also* Richard J. Ellis, *Signature Gathering in the Initiative Process: How Democratic Is It?*, 64 MONT. L. REV. 35, 88-89 (2003).
 161. Gallivan v. Walker, 54 P.3d 1069 (Utah 2002); *see also* Ellis, *supra* note 160, at 89-90.
 162. Aaron Lake, *1998 Legislative Review*, 5 ANIMAL L. 89, 109-10 (1999); *see also* Pacelle, *supra* note 16, at 116.
 163. Pacelle, *supra* note 16, at 116.
 164. However, some commentators have suggested that all initiated constitutional amendments should be subject to a super-majority requirement. For a discussion of the pros and cons of such a system, *see* GILLETTE & BAKER, *supra* note 44, at 148-58 (concluding simple majorities are the wiser method).
 165. *See* MARTINEZ & LIBONATI, *supra* note 65, at 140-51 (discussing different variations of home rule); Wayland R. Walker, Jr., *City of Baton Rouge v. Williams: The Louisiana Supreme Court Expands Home Rule Police Power*, 70 TUL. L. REV. 1751 (1996).
 166. *See* Rodriguez, *supra* note 9, at 636-42 (discussing generally the different avenues local governments might increase their sphere of power as against the state).
 167. For example, local control of gun control in Colorado was an important issue in 2003 as the state legislature passed two proposals making gun laws more uniform statewide. Julia C. Martinez, *Owens Signs 2 Gun Bills*, DENVER POST, March 19, 2003, at B-1; John Ingold, *Gun-Bill Fights All About Local Control vs. State Power*, DENVER POST, March 9, 2003, at B-1.
 168. *E.g.*, Kellie M. Smith, *Review of Selected 1998 California Legislation: Environmental Protection*, 30 MCGEORGE L. REV. 623, 628-29, n. 53, 56 (1999).
 169. *E.g.*, Julia C. Martinez, *Sweeping Gun Law Clears Hurdle*, DENVER POST, Jan. 14, 2003, at A-4 (quoting a state legislator who said, "To have conflicts in state law creates confusion . . . We need to have uniform firearm rules that apply to everyone.").

170. Geoffrey C. Hazard, Jr., *Preclusion in a Federal System: Reflections on the Substance of Finality*, 70 CORNELL L. REV. 642, 649 (1985).
171. For the pros and cons of judicial activism, generally, see Symposium, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139 *et seq.* (2002).
172. Indeed, according to some it is the judiciary's fault that home rule has not worked better. Briffault, *supra* note 55, at 16-18.
173. For an overview of all three theories, see ESKRIDGE, JR., ET AL., *supra* note 93, at 121; CRONIN, *supra* note 5, at 26-30.
174. GILLETTE & BAKER, *supra* note 44, at 8-9. Certainly, public choice is but one explanation for why legislators act the way they do. Other theories stress pluralism, proceduralism, and institutionalism. For a detailed overview of these theories, as well as public choice, see ESKRIDGE, JR., ET AL., *supra* note 93, at 48-81.
175. ESKRIDGE, JR., ET AL., *supra* note 93, at 55-59.
176. Rodriguez, *supra* note 9, at 656.
177. See *id.* at 656-57.
178. *Id.* In fact, one purpose of single-subject laws that limit the scope of an initiative is to prevent logrolling. GILLETTE & BAKER, *supra* note 44, at 763.
179. There are, of course, other influences exerted on legislators. These include lobbying, campaign contributions, and the legislator's conscience. Each of these influences, however, is also present, to some extent, in initiative campaigns. Voters are bombarded, perhaps confused, by the "lobbying" of television ads. Large contributions flood campaign coffers, which fund these advertisements. Conscience, too, affects the voter in filling out his ballot.
180. David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 644 (1994) (citing Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1, 3 (1971)).