

THE LOCAL LIBERTY CHARTER: RESTORING GRASSROOTS LIBERTY TO
RESTRAIN CITIES GONE WILD

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I. INTRODUCTION

*The end of law is not to abolish or restrain, but to preserve . . . freedom.*¹

John Locke

Since 1972, America has gained an average of almost two new local governments every day.² The mushrooming of local governments is outdone only by the growth in state and local spending, which has

¹ JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT § 57 (Peter Laslett ed., 1967) (1690).

² CLINT BOLICK, LEVIATHAN: THE GROWTH OF LOCAL GOVERNMENT AND THE EROSION OF LIBERTY 8 (2004); see U.S. CENSUS BUREAU, 2002 CENSUS OF GOVERNMENTS 5 (July 2002), http://ftp2.census.gov/govs/cog/2002COGprelim_report.pdf [hereinafter CENSUS, 2002 GOVERNMENTS]. Excluding “public school systems,” the growth in local governments has been nearly two per day since 1972. U.S. CENSUS BUREAU, LOCAL GOVERNMENTS AND PUBLIC SCHOOL SYSTEMS BY TYPE AND STATE, (Nov. 2, 2009), <http://www.census.gov/govs/cog/GovOrgTab03ss.html> [hereinafter CENSUS, PUBLIC SCHOOL SYSTEMS].

outstripped that of the federal government since 1970.³ Arizona is no exception.

“Special districts” in Arizona have burgeoned from just over thirty 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, which suggests 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.⁵ In fact, since 1998, Arizona’s local public payroll has ballooned ninety percent, exceeding the growth of the federal payroll.⁶ And, at the same time, local politicians have borrowed tens of millions of dollars for swimming pools, dog and skateboard parks, mountain bike trails, and waterslides.⁷

Despite their proliferating numbers and profligate spending, Arizona’s local governments function 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 ten percent higher than national rates.⁸ And local government bureaucracies are more intrusive, opaque and less accountable than ever, with Arizona’s public records request responsiveness 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. Since the fall of 2008, local property and sales tax revenues have plummeted.¹⁰ Yuma, for example,

³ BOLICK, *supra* note 2, at xiii, 8.

⁴ See CENSUS, PUBLIC SCHOOLS, *supra* note 2.

⁵ There is academic support for the position that municipalities spin-off special districts to avoid fiscal constraints. Barbara Coyle McCabe, *Special District Formation Among the States*, 32 ST. AND LOC. GOV’T REV. 121 (2000).

⁶ See *infra* Part III.

⁷ Susanna Canizo, *Little League Field Nearly Ready*, ARIZ. DAILY STAR, Mar. 16, 2004 (discussing park improvements and quoting 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*, ARIZ. DAILY STAR, Jan. 1, 2004; and Kimberly Matas, *Recreational Projects Viewed as Vital to Area’s Future*, ARIZ. DAILY STAR, Jan. 1, 2005, <http://www.azstarnet.com/sn/fromcomments/4070.php>, Section IV, subsection V, “The Right to Freedom from Crime.”

⁸ See Crime Statistics: Arizona, <http://www.cityrating.com/citycrime.asp?city=Phoenix&state=AZ>.

⁹ See *infra* note 60.

¹⁰ 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

faced a \$3 million budget shortfall for its 2009 fiscal year.¹¹ Between July and October 2008, Tempe's sales tax revenues reportedly slumped 9.2%.¹² A host of cities in Arizona and across the country have faced large budget deficits.¹³

In short, Arizonans face significant challenges that stem 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. That is why this article 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.

The Local Liberty Charter proposes enforceable individual rights aimed at restraining local governments gone wild.¹⁴ 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 article

Munshi, *Mesa Plans On Cutting Workers' Pay by 2 Percent*, E. VALLEY TRIB., Nov. 19, 2008, <http://www.eastvalleytribune.com/story/130848>.

¹¹ Joyce Lobeck, *City Faces \$3 Million Shortfall*, YUMA SUN, Nov. 18, 2008, http://www.yumasun.com/news/city_45924___article.html/yuma_shortfall.html.

¹² Mike Branom, *Tempe's Sales Tax Revenue Slumps 9.2% in Last 4 Months*, E. VALLEY TRIB., Nov. 18, 2008, <http://www.eastvalleytribune.com/story/130762>.

¹³ *Local Zeroes: Cities and States Are Facing Big Budget Deficits; It Is Partly Their Own Fault*, ECONOMIST, Nov. 13, 2008, http://www.economist.com/world/unitedstates/displaystory.cfm?story_id=12608223; League of Arizona City and Towns, *Making Difficult Budget Decisions in Tough Economic Times*, ARIZONA CITY & TOWN, Summer 2008, at 15, http://www.azleague.org/pdf/az_city_town_summer08.pdf (reporting an average estimated revenue shortfall of 8.8% among thirty-five reporting municipalities).

¹⁴ Goldwater Institute President Darcy Olsen should be credited with the original idea of applying an enforceable "Bill of Rights" framework to local government. Additionally, for their insights, comments, or challenging critiques, as the case may be, I thank Clint Bolick, Tom Patterson, Mayor Steve Bartlett, Professor David Cuillier, Steve Twist, Howard Husock, Mike Goodman, Mike Teufel, Richard Studwell, Robert Levy, William R. Knowlton, and Jordan Rose, E.J. McMahon, Mark Muro, Brian Brennan, and Mayor Steve Goldsmith. Lastly, I thank intern Ryan Jones for providing me with final footnote edits to this article.

proposes.¹⁵ The legal “rights” typically found at the local level more often add a layer of bureaucracy and regulation restricting, rather than protecting, private conduct.¹⁶ And although freedom-oriented local “bills of rights” have occasionally surfaced, they have either been toothless¹⁷ or exceedingly narrow in scope.¹⁸

But the Local Liberty Charter is obviously not written on a blank slate. The Arizona and United States Constitutions already eloquently recognize the most fundamental principles of individual freedom. Each protects life, liberty, and property with the promise of due process and equal protection under the law, and identifies crucial civil rights meant to prevent the worst abuses of government power.¹⁹ Each constitution declares that freedom of speech shall not be infringed—without an exception for campaign or commercial speech.²⁰ Each declares that contracts shall not be impaired—

¹⁵ See generally INT’L COUNCIL ON HUMAN RIGHTS POL’Y, LOCAL RULE: DECENTRALISATION AND HUMAN RIGHTS 2 (2002) (observing “[h]owever, 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”).

¹⁶ See e.g., Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make A Difference?*, 31 U. MICH. J.L. REF. 777, 787 n.79, 791-92 (1998) (observing “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.”).

¹⁷ 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. Ga. Act No. 174, Bill of Rights, City of East Point, Georgia, Charter (2007), available at <http://www.municode.com/Resources/gateway.asp?pid=10677&sid=10>.

¹⁸ 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. H.B. 3086, 50th Leg., 2d Sess., (Okla. 2006), 2006 WLNR 2118279.

¹⁹ Compare U.S. CONST., amends. II (right to bear arms), IV (no unreasonable searches or seizures), V (due process), and XIV (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”).

²⁰ Compare U.S. CONST., amend. I (“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 (“[e]very person may

without an exception for social engineering.²¹ 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.²²

Tragically, these liberty principles are not reliably enforced at any level of government.²³ Likewise, the Arizona Constitution's distinct guarantee of impartial and fiscally responsible government has proven illusory. 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 "City North project," local entrepreneurs were unable to stop Phoenix from showering \$97.4 million in subsidies on their future big business competition. This is despite Arizona's constitutional bans on special laws and special privileges, and its strident prohibitions on taxing, spending, and borrowing for private interests.²⁴

In fact, Arizona's political system has embraced a concentration of power and discretion 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. 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 government power—such as they are—scholars

freely speak, write, and publish on all subjects, being responsible for the abuse of that right").

²¹ Compare U.S. CONST., art. I, § 10 ("[n]o 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").

²² Compare U.S. CONST., amend. IX, with ARIZ. CONST., art. II, § 33.

²³ See, e.g., ROBERT LEVY & WILLIAM MELLOR, *THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM* (2008) (analyzing the twelve Supreme Court cases that undermined most of the core freedoms protected by the United States Constitution); RANDY BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* xii (2003) (discussing in great detail how the general reservation of individual rights set out in the Ninth Amendment to United States 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).

²⁴ ARIZ. CONST., art. II, §§ 9 ("[i]rrevocable grants of privileges, franchises or immunities"), 13 ("equal privileges and immunities"), art. IV, pt. 2, § 19 ("special laws"), art. IX, §§ 1 ("[s]urrender of power of taxation; uniformity of taxes"), 7 ("[g]ift or loan of credit; subsidies").

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.²⁵ That is why, in the next six sections, this article advocates checking the concentrated power of towns, cities, counties, and special districts with a Local Liberty Charter.

The second section of this article provides a succinct overview of the ten individual rights and twenty-five policy recommendations that comprise the Local Liberty Charter. The third section explains why the Local Liberty Charter is the natural next step for Arizona’s freedom movement. The fourth section makes the case for a fundamental reform of local governments, describing their irresponsible and abusive behavior with facts, reputable reports and case studies. The fifth section furnishes the theoretical basis for advocating a judicially-enforceable set of individual rights, as opposed to simply relying on local political processes to achieve reform. Each proposed individual right and policy is then detailed and analyzed in the sixth section. Finally, the seventh section furnishes a road map for implementing the article’s recommendations, and spots some of the issues that might be encountered along the way. The Appendix includes model charter amendments based upon this article, which were considered by the recently convened Scottsdale Charter Task Force in 2009.

II. OVERVIEW OF THE LOCAL LIBERTY CHARTER

Extremism in the defense of liberty is no vice. And moderation in the pursuit of justice is no virtue.

Barry Goldwater

A. *The Right to a Presumption of Liberty.*

- Protect Liberty with Meaningful Sunrise and Sunset Review.
- Ensure Prompt Regulatory Review.

Local government must be geared to govern adults who are presumed responsible for their own lives and well-being. Human dignity requires the freedom to make one’s own way in life—to face challenges, to succeed and

²⁵ Robert Lincoln, *Executive Decision-making by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STETSON L. REV. 627, 694, 698 (1996).

to fail, and to learn from both.²⁶ Economic prosperity requires the freedom to earn an honest living. For these reasons, the Local Liberty Charter robustly protects the freedom to speak, to make a living, and, yes, to just have fun—in other words, the freedom to act consistently with the equal freedom of others. To enforce this freedom, the recommended policy implementation is to codify what has been called 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.

B. The Right to Use and Enjoy Property

- Protect Property with Meaningful Sunrise and Sunset Review.
- Protect Property with Vesting of Rights at Purchase.
- Authorize Infill Development Without Regulatory Micromanagement.
- Replace Zoning with Privately Enforced Restrictive Covenants.

Property owners should have the right to use and develop their property as they see fit, so long as they do not violate the rights of others. No governmental action should restrict or deprive a person of any use of his or her 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 protections for property rights. The recommended policy implementations involve simplifying and eliminating land use regulations through sunrise and sunset review, as well as transforming zoning into a freedom-friendly legal framework.

C. The Right to Separation of Powers

- Divide the Departments of Local Government.
- Check Concentrated Power with Alternative Dispute Resolution.

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

²⁶ Douglas B. Rasmussen, *Why Individual Rights?*, in *INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING?* 113, 119-26 (Tibor R. Machan ed., 2001).

of power, consistent with the principle of separation of powers, while also recognizing the unique efficiency needs of local government. The recommended policy implementation is to check the concentration of power in local government by giving citizens who are aggrieved by quasi-judicial and administrative local government action the option to demand alternative dispute resolution over questions of regulatory interpretation and application.

D. The Right to Freedom from Crime

- Require Performance Benchmarking Based on Core Outcomes.
- Improve Performance with an Overtime Pool.
- Tax Credits for Private Security Services.
- Remedy Poor Performance with a Dose of Managed Competition.

Protecting citizens from crime is the core function of government because exercising the rights to life, liberty, and property require 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 implementations to protect that right are to require performance benchmarking for law enforcement, to use overtime to incentivize high performance, to grant tax credits to citizens for private security services, and, when all else fails, to contract-out failing departments to other localities.

E. The Right to Fiscal Responsibility

- Restrict the Business of Local Government to Government.
- Mandate Managed Competition.
- Restrict expenditures to an objective formula without loopholes.

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 mandates managed competition, restricts the growth of municipal expenditures to a function of population and inflation growth, and limits the business of local government to government.

F. The Right to Freedom from Favoritism

- Stop Favoritism with Meaningful Sunrise and Sunset Review.

Citizens are entitled to municipal services furnished or performed by impartial public servants uniformly applying general laws. 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.

G. The Right to Accountability

- Three Strikes and You're Out.

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.

H. The Right to Genuine Local Sovereignty

- Kick the Federal Funding Habit.
- Enforce Federalism by Demanding Local Coordination.

The addiction to federal money raises demand for unsustainable levels of government services, substitutes central planning for local programs, and distracts local government from core functions. Additionally, local governments do not routinely modify or derail new federal regulations. The recommended policy bars acceptance of federal funding to which strings attach, and obligates cities and towns to demand that federal agencies stop the implementation of onerous federal regulations.

I. The Right to Transparency

- Require a Statement of Authority for all Laws.
- Map Local Governmental Jurisdictions.
- Post All Financial Transactions Online.
- Post Regulatory Status Online and Disclose Enforcement History.
- Post Performance Benchmarking Online.

The Local Liberty Charter requires transparent local government because citizens are entitled to know what their government is doing, how, and why. 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.

J. The Right to Reboot Government

- Provide a Binding “None of the Above” Ballot Option.
- Dissolve Unaccountable Special Districts.
- Establish Objective Triggers for Mandatory Bankruptcy Filing.

Grassroots tyranny can become not only entrenched, but intractable. People must be able to firmly reassert their authority over local government, so the Local Liberty Charter includes the right to “reboot” local government. The recommended policy implementation empowers 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.

III. THE NEXT STEP IN ARIZONA’S FREEDOM AND RESPONSIBILITY
MOVEMENT

*Now, we Americans understand freedom. We have earned it, we have lived for it, and we have died for it. This Nation and its people are freedom’s model in a searching world. We can be freedom’s missionaries in a doubting world. But, ladies and gentlemen, first we must renew freedom’s mission in our own hearts and in our own homes.*²⁷

Barry Goldwater

In a sustained effort to reinforce the state and federal constitutions, Arizonans have already enjoyed a number of victories against abusive and irresponsible government. This provides fertile cultural and political

²⁷ Barry Goldwater, Presidential Nominee, Speech Accepting the Republican Presidential Nomination (July 16, 1964), <http://www.americanrhetoric.com/speeches/barrygoldwater1964rnc.htm>.

ground for the Local Liberty Charter to take root. State courts are starting to recognize that the Arizona constitution strongly protects property from the 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 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, Arizonans enacted the Victims’ 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

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*, in *GOLDWATER INST. ARIZ. ISSUE ANALYSIS*, at 4 (No. 174, 2002).

²⁹ *Roubos v. Miller*, 138 P.3d 735, 742 (Ariz. Ct. App. 2006) (citing *ARIZ. REV. STAT. ANN.* § 12-348 (2006)).

³⁰ *ARIZ. REV. STAT. ANN.* § 41-1001.01 (2008).

³¹ Janice K. Brewer, 2006 Ballot Propositions (Sept. 2006), <http://www.azsos.gov/election/2006/Info/pubpamphlet/english/prop207.htm>.

³² *ARIZ. CONST.* art. II, § 2.1.

³³ See, e.g., *ARIZ. REV. STAT. ANN.* § 42-17107 (2008); Ariz. State S. Issue Brief (Nov. 7, 2006) (discussing 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 S.B. 1235, 48th Leg., 2d Sess., (Ariz. 2008) ([a]n Act amending tit. 41, ch. 4, art. 3, *Ariz. Rev. Stats.*, by adding sec. 41-725; relating to state financial disclosure), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/laws/0312.htm>.

meetings,³⁵ and disclosure of disciplinary records for public officers and employees.³⁶

Arizonans have advanced economic liberty. In 2006, Arizona was ranked first 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 And to reinforce such freedoms, Arizona recently enacted a “Sunrise Act,” which announces the statewide public policy of restricting occupational regulation to genuine health and safety purposes.³⁹

Arizonans have implemented fiscal controls. Anticipating the taxpayer’s bill of rights movement, in 1978, Arizona enacted a “Tax and Expenditure Limitation,” which limited growth of government expenditures to a function of personal income growth at the statewide level, while population and inflation growth were limited at the local governmental level.⁴⁰ Additionally, “Proposition 106 limited the property tax rate to one percent of assessed value and mandated that assessments on property could increase by no more than ten percent annually.”⁴¹ 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 even 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.⁴³ More recently, Phoenix began surveying citizens to prioritize city services and measure

³⁵ BETTER GOVERNMENT ASSOCIATION (“BGA”), 2005 ANNUAL REPORT 16 (stating “[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”), www.bettergov.org/pdfs/2005annualreport.pdf (last visited April 7, 2010).

³⁶ H.R. 2159, 48th Leg., 2d Sess., (Ariz. 2008) ([a]n Act amending tit. 39, ch. 1, art. 2, Ariz. Rev. Stats., by adding sec. 39-128; relating to disciplinary records of public officers and employees), available at <http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/48leg/2r/laws/0277.htm>.

³⁷ Christy G. Black, *Appendix C: Economic Health of US States*, ECON. FREEDOM N. AM.: 2006 ANN. REP. 52 (2006), http://www.freetheworld.com/efna2006/EFNA2006_states.pdf.

³⁸ ARIZ. REV. STAT. ANN. § 41-1073 (2008).

³⁹ ARIZ. REV. STAT. ANN. § 32-4301 (2008).

⁴⁰ ARIZ. CONST. art. IX, §§ 17, 19 (2008); Michael J. New, *The Time is Now: A Taxpayer Bill of Rights for Arizona*, GOLDWATER INST. POL’Y REP. NO. 202, 2 (2005).

⁴¹ New, *supra* note 40, at 2.

⁴² New, *supra* note 40, at 3.

⁴³ A Conversation with Ronald Jensen (Sept. 1, 2000), http://www.fcpp.org/main/publication_detail.php?PubID=214.

performance.⁴⁴ The “Phoenix Model” has since inspired even more ambitious programs by such cities as Indianapolis, Indiana, Charlotte, North Carolina, and San Diego, California.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 the natural and *the necessary* next step for Arizona’s freedom and responsibility movement.

IV. LOCAL GOVERNMENTS GONE WILD

*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.*⁴⁶

Joseph D. McGoldrick

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—let alone special districts created by the Arizona State Legislature.⁴⁷ Arizona’s new Sunrise Act does not clearly apply to local governments, nor does it provide for a private enforcement action or invoke judicial review. Municipalities like 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.⁴⁸ Other cities, such as Peoria,

⁴⁴ Geoffrey F. Segal & Adam B. Summers, *Citizens’ Budget Reports: Improving Performance and Accountability in Government*, REASON POL’Y STUDY NO. 292, Mar. 2002, at 14-16.

⁴⁵ See *History of Managed Competition in Charlotte*, <http://www.charmeck.org/> (search “History of PCAC,” then follow “History of PCAC” hyperlink) (last visited Apr. 7 2010) [hereinafter *History of Managed Competition*]; A Conversation with Stephen Goldsmith (Apr. 4, 2001), http://www.fcpp.org/main/publication_detail.php?PubID=232; *Managed Competition: Proceed – with caution*, DELOITTE, Nov. 24, 2008, http://www.deloitte.com/view/en_CA/ca/article/0290a7d2770fb110VgnVCM100000ba42f00aRCRD.htm; SAN DIEGO MUN. CODE, ch. 2, art. 2, div. 37, §§ 22.3701-02 (2007).

⁴⁶ JOSEPH D. MCGOLDRICK, *THE LAW AND PRACTICE OF MUNICIPAL HOME RULE 1916-1930* 1 (1933).

⁴⁷ *Thompson v. Tucson Airport Auth., Inc.*, 786 P.2d 1024, 1025 (Ariz. Ct. App. 1989).

⁴⁸ See, e.g., Rob O’Dell, *Council To Look At Minidorm Dispute: Rules On Homes Near University May Be Imposed*, ARIZ. DAILY STAR, Apr. 24, 2007, <http://www.highbeam.com/doc/1G1-162515768.html>; Howard Fischer, *Test Case*, ARIZ.

are demanding the waiver of rights under Proposition 207 as a condition of allowing property development.⁴⁹ These facts underscore the need for comprehensive reform of Arizona's local governments.

A. *Local Governmental Growth is Unsustainable*

The available financial statistics paint a picture of local government payrolls and related unfunded pension liabilities growing unsustainably faster than fast-growing revenues and taxes. Over the past ten years, Arizona's numerous local governments have been rapidly expanding their payrolls, thereby increasing public union constituencies that depend on government and demand still more government from obliging politicians.⁵⁰ Since 1999, Arizona's local governmental payroll has grown ninety percent, consistently exceeding that of the federal government, and even the sum of inflation and state population growth.⁵¹ 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.⁵² Moreover, since 1998, Arizona's local governmental revenues—mostly local taxes—have been growing at rate that exceeds that of the federal government.⁵³ And at the same time that local governments have been increasing taxes and increasing revenues, unfunded pension liabilities for state and local government employees who are beneficiaries of the Arizona Public Safety Personnel Retirement Fund have also begun to increase rapidly.

DAILY SUN, Oct. 4, 2007,

http://www.azdailysun.com/articles/2007/10/04/news/20071004_front%20page_10.txt.

⁴⁹ Leonard C. Gilroy, *Annual Privatization Report 2007*, REASON FOUND. 107, <http://reason.org/files/0872af9fbd799ad9e31e1f1e7090cb92.pdf> (last visited Apr. 7, 2010).

⁵⁰ See generally E.J. McMahon & Fred Siegel, *Gotham's Fiscal Crisis: Lessons Unlearned*, PUB. INT. NO. 158, Winter 2005 at 97 (observing how growth of local government generates constituencies that depend on and promote more growth in local government).

⁵¹ U.S. CENSUS BUREAU, 2008 PUBLIC EMPLOYMENT DATA: LOCAL GOVERNMENTS: ARIZONA (2009), <http://www2.census.gov/govs/apes/08locaz.txt>; U.S. CENSUS BUREAU, 1999 PUBLIC EMPLOYMENT DATA: LOCAL GOVERNMENTS: ARIZONA (2001), <http://www2.census.gov/govs/apes/99locaz.txt>.

⁵² U.S. CENSUS BUREAU, STATE GOVERNMENT TAX COLLECTIONS: 2008: STATE: UNITED STATES SUMMARY (2009), <http://www.census.gov/govs/statetax/0800usstax.html>; U.S. CENSUS BUREAU, TABLE 1: NATIONAL TOTALS OF STATE AND LOCAL TAX REVENUE, BY TYPE OF TAX (2009), <http://ftp2.census.gov/govs/ntax/table1.pdf>.

⁵³ U.S. CENSUS BUREAU, TABLE 1: NATIONAL TOTALS OF STATE AND LOCAL TAX REVENUE, BY TYPE OF TAX (2009), <http://ftp2.census.gov/govs/ntax/table1.pdf>.

From 2006 to 2007 alone, the amount of net unfunded actuarial accrued liability in the Fund “increased from \$1,495,869,118 to \$2,439,798,768.”⁵⁴ But things have gotten far worse since then. Given the March 6, 2009 market value of its investments, the Arizona Public Safety Personnel Retirement Fund, at the time, was approximately forty-two percent funded. As shown by the proportion of such liabilities that are attributable to local governments in 2007, which is 87.07%, local governments likely account for most of the growth in unfunded pension liabilities.

The financial picture of Arizona’s local governments bears a disturbing resemblance to that of New York City’s government during the 1960s and 70s, which similarly showed continuous increases in taxes, payroll, and unfunded benefits until an economic downturn revealed the trend as financially unsustainable.⁵⁵ 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.⁵⁶

As discussed above, such “distributional politics” may have taken root in Arizona during the relative prosperity of the real estate bubble. At the very least, Arizona’s local governments have not deviated substantially from the growth trend line of local governments across the nation, which has been documented extensively elsewhere.⁵⁷ The City of Yuma’s recent desperate move to authorize “emergency” bonding offers a glimpse into the potential consequences of unsustainable local governmental growth.

⁵⁴ Ariz. Tax Res. Assoc. vol. 68, no. 2, Feb./Mar. 2008 NEWSL., 8.

⁵⁵ McMahan & Siegel, *supra* note 50, at 103-05.

⁵⁶ McMahan & Siegel, *supra* note 50, at 97-98.

⁵⁷ See BOLICK, *supra* note 2, at 12-19; CLINT BOLICK, GRASSROOTS TYRANNY, THE LIMITS OF FEDERALISM 6-7, 77, 79, 98 (1993).

1. Case Study: Yuma's "Emergency" Swimming Pool Complex Bonding

On September 19, 2007, the City of Yuma passed three resolutions authorizing the issuance of bonds worth several hundred million dollars for various infrastructure projects, including "a swimming pool complex."⁵⁸ Because Yuma labeled the bond issuance an "emergency," residents were led to believe it would occur immediately, preventing them from exercising their constitutional and statutory right to call a referendum and disapprove the bonding. But despite calling the bond issuance an "emergency," Yuma then proceeded to wait thirty days before issuing the bonds—the same amount of time ordinarily allowed for voters to exercise their right of referendum.

Yuma may have labeled its bond issuance an "emergency" to confuse the public and protect its financing gambit from voter disapproval. If so, Yuma's financing maneuver illustrates the lengths to which local governments in Arizona might go to avoid the consequences of their fiscal irresponsibility. But because the decline into financial "chaos" from the effects of distributional politics is "gradual," having taken over 40 years to culminate in New York City's near bankruptcy,⁵⁹ it is difficult or impossible for residents to anticipate, much less prevent, such financial gamesmanship—not least because it is exceedingly difficult to keep tabs on the precise size and scope of Arizona's local governments at any given time.

B. Local Governments are Secretive

Even as the need for transparency has been magnified by the difficulties brought on by the bursting real estate bubble, Arizona was recently ranked as fourth worst state in the nation with freedom of information compliance under its public records law.⁶⁰ Moreover, local governments in Arizona are notorious for refusing to share public information—even when such disclosure is mandated by law. Auditors of public records requests (also known as "Freedom of Information Requests") addressed to Arizona state agencies and local governments have reported the existence of "a government culture in which some workers believe the documents belong to

⁵⁸ See, e.g., Yuma City Res., Nos. R2007-56 (Sept. 19, 2007).

⁵⁹ McMahon & Siegel, *supra* note 50, at 109.

⁶⁰ Audits and Open Records Surveys, <http://www.nfoic.org/audits-and-open-records-surveys> (last visited Apr. 3, 2010).

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

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 produce 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 twenty-five percent of school districts ignored repeated requests for public records.⁶⁵ In fact, during a previous 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, and attempting to charge exorbitant fees.⁶⁶ Additionally, in 2004, fourteen percent of city and county managers’ offices did not comply with requests for information regarding expense documents.⁶⁷ “[N]early half the time, officials asked auditors why they wanted to see records”—rejecting some of the requests because the reason was “not good enough.”⁶⁸

It is well established that “[s]ecretiveness has helped elites and politicians keep corrupt practices under wraps in many countries.”⁶⁹ Such secretiveness is especially appalling in the United States, where the government is meant to be the servant of the people. This culture of secrecy is especially dangerous at the local level because local governments can

⁶¹ Daryl James, *Open & Shut Part 1: Information Often Under Lock And Key*, ARIZ. DAILY STAR, Dec. 19, 2004, <http://www.azstarnet.com/sn/related/53197>.

⁶² *Id.*

⁶³ *Id.*

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*, E. VALLEY TRIB., Dec. 21, 2004, <http://www.azstarnet.com/sn/related/53484>.

⁶⁶ Jacques Billeaud & Enric Volante, *Open & Shut: A Statewide Public Records Audit*, ARIZ. DAILY STAR, Jan. 22, 2002, <http://www.azstarnet.com/publicrecords/20122-police.html>.

⁶⁷ *Id.*

⁶⁸ Daryl James, *Open & Shut Part 1: Information Often Under Lock and Key*, ARIZ. DAILY STAR, Dec. 19, 2004, <http://www.azstarnet.com/sn/related/53197>.

⁶⁹ Cheryl W. Gray & Daniel Kaufmann, *Corruption and Development*, FIN. & DEV., Mar. 1998, at 7.

indulge in regulatory schemes with a speed and intimacy that cannot be matched by state government.

C. Local Governments Regulate Without Restraint

While not exactly nimble, local governments can enact new regulations through their typically unicameral councils much faster than the typically bicameral state legislature. Moreover, “[w]hile divided government—specifically, separate executive and legislative branches—is a mainstay of U.S. state and federal government . . . local governmental units are governed by boards holding both executive and legislative powers.”⁷⁰ Such concentrated local regulatory authority leads to regulatory absurdities demanded by a circus of special interests.

In fact, Peoria licenses circuses.⁷¹ Scottsdale licenses and regulates people who ply the “magic arts” trade.⁷² Not to be outdone, Mesa, Glendale, and Gilbert each license and regulate “fortunetellers.”⁷³ But local regulations are often not just absurd—they are often matched by a dollop of unaccountable bureaucratic discretion. Such wide authority results in unreliable and contradictory decision-making, to which Tucson developer Michael Goodman no doubt would attest.

1. Case Study: City of Tucson versus Michael Goodman

Michael Goodman (“Mike”) knows which diner in Tucson has the best Matzah ball soup, and will not hesitate to buy you a bowl to prove it. He also knows real estate, but not well enough to navigate the City of Tucson’s bureaucratic briar patch unscathed.⁷⁴ In August 2003, Mike met with Tucson’s Department of Development Services to discuss his plans to develop land he purchased from the City in 1993.⁷⁵ The land was within walking distance of the University of Arizona and he wanted to build eight

⁷⁰ Brian P. Brennan, Presentation at California State University, Sacramento: *Democracy Without Elections? The Cancellation Phenomenon In California’s Special Districts* (Mar. 2008), at 3.

⁷¹ PEORIA, ARIZ., CODE OF ORDINANCES, § 11-182 (2008).

⁷² SCOTTSDALE, ARIZ., CODE OF ORDINANCES, §§ 16-141, *et seq.* (2008).

⁷³ MESA, ARIZ., CODE OF ORDINANCES, §§ 5-19-1, *et seq.* (2008); GLENDALE, ARIZ., CODE OF ORDINANCES, art. 1, §§ 21-1, *et seq.* (2008); GILBERT, ARIZ., CODE OF ORDINANCES, art. IV, §§ 14-266 *et seq.* (2008).

⁷⁴ The following case study is based on an interview conducted with Michael Goodman (June 27, 2008), and the findings of fact rendered in *Goodman v. City of Tucson*, No. 2 CA-CV 2007-0057, 2007 WL 5613315 (Ariz. Ct. App. Dec. 17, 2007).

⁷⁵ Goodman, 2007 WL 5613315, at *2.

luxury duplexes for student housing, each on their own individual lot, rather than one giant apartment building. Eight individual duplexes would be more reflective of the neighborhood's character. He also wanted the financial flexibility that a mortgage on each lot could offer. After explaining his vision to the City officials, he submitted eight individual development plans corresponding to each proposed building. City officials had no objections and authorized Mike to reconfigure the existing ten lots into eight lots and issued building permits for six duplexes on individual lots.⁷⁶

By August 2005, Mike completed underground water and sewer systems for all of his eight lots. He also poured foundations, finished framing, and began installing rough mechanical and electrical systems for one duplex. However, Mike's good fortune ended that month when he approached the City for permission to allow access to a few of his duplexes through an existing City easement, which was on his property.⁷⁷ Soon afterwards, city officials cited him for failing to furnish the City with documents showing compliance with various storm water control regulations in violation of Tucson Code § 26-40(7)(a) and (b).⁷⁸ These storm water-related requirements were never previously required or mentioned, despite Mike's prior discussions with the City in August 2003 and the issuance of his building permits. Nevertheless, under economic pressure to continue his development, Mike agreed to provide what he thought were the demanded documents in January 2006.⁷⁹

Almost as soon as Mike submitted what he thought complied with the City's code, on February 27, 2006, Tucson'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.⁸⁰ This action was justified with the claim that the development of the eight duplexes was a "unified project" requiring a single plan of development.⁸¹ The City pretended to be surprised about Mike's eight duplex project, despite the fact that the City knew precisely what Mike's 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 Mike even to protect the framing of his in-progress construction from the elements until he secured new building permits. But

⁷⁶ *Id.*

⁷⁷ *Id.* at *3.

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *3.

⁸⁰ *Id.* at *4.

⁸¹ *Id.*

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. Mike was forced to fight.

First, he had to appeal the Zoning Administrator's decision to the Board of Adjustment—a committee consisting of members appointed by the Tucson City Council. He lost the decision after the City attorney directed the Board members to disregard Mike's vested rights in his building permits.⁸² Second, Mike appealed to state court. The state court upheld the Board of Adjustment's ruling.⁸³ Third, Mike appealed to the court of appeals. Finally, on December 17, 2007, he prevailed. The Court of Appeals ruled there was "no valid legal basis for the Zoning Administrator's revocation of Goodman's permits."⁸⁴ However, the damage had already been done.

Mike's existing foundation work, framing, mechanical, and electrical systems on two buildings had been exposed to the elements and vandalism for nearly two years, necessitating expensive repairs. He also incurred attorneys' fees in excess of \$100,000, and sustained losses exceeding \$500,000 in rental income while he fought to maintain the right to do what the City permitted him to do nearly five years prior. 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.

2. Case Study: Yavapai County versus Gary Lowry and Marian Carol

The experience of Gary Lowry ("Gary") and Marian Carol ("Marian") shows what often happens when citizens try to go along to get along.⁸⁵ Gary and Marian are non-denominational ordained ministers who organized the "Western Spirit Enrichment Center" as a non-profit religious organization.⁸⁶ As part of their ministry, they often invite guests to stay at their home, which is located on five acres of land, to furnish them with spiritual guidance.⁸⁷ They do not charge for lodging or food, but they do pass along the cost of coordinating guided tours of Sedona and the Grand

⁸² *Id.*

⁸³ *Id.* at *5.

⁸⁴ *Id.*

⁸⁵ The following discussion is based on Brief of Defendants-Appellees, *Lowry v. Yavapai County Ariz. Bd. of Supervisors*, No. 08-17408 (9th Cir. Apr. 24, 2009).

⁸⁶ *Id.* at 2.

⁸⁷ *Id.* at 2-4.

Canyon.⁸⁸ They had no idea this custom overstepped the bounds of what is a permissible use of their home in a rural Residential/Commercial Use district of Yavapai County.

In June 2007, Gary and Marian were told by officials at the Yavapai County Development Services Department that they must apply for a Bed and Breakfast Homestay Use Permit to invite guests to stay at their home for lodging and meals. They complied with the demand by paying \$525 for the permit and a \$155 fee to participate at the public hearing regarding their permit application.⁸⁹ The Assistant Director of the Department then cancelled the hearing. He explained that a Bed and Breakfast Permit was not the right permit and that Gary and Marian needed to apply for a Home Occupation Permit.⁹⁰ Again, they complied. Gary and Marian paid \$190 for the new permit. Two days later, County officials told Gary and Marian that the Home Occupation Permit was the wrong permit as well, and that they needed to apply for an \$875 Commercial Use Permit.⁹¹ When the County denied their request for a refund of the prior Bed and Breakfast permit fee, Gary and Marian demanded a hearing with the County Hearing Officer on the issue.

At the hearing, six months after first being told they were illegally operating, Gary and Marian were told they needed the original Bed and Breakfast permit, after all, and were fined \$100 for operating without it.⁹² In short, by trying to comply with the contradictory demands of local bureaucrats, Gary and Marian got nothing but the run-around and the opportunity to spend hundreds of dollars on application fees. There has been no accountability for the conduct of the public officials involved in this process. Unfortunately, Gary and Marian are far from alone.

The experiences of Gary, Marian, and Mike illustrate that broad discretionary regulatory authority at the local level is not harmless or neighborly. It can unpredictably cause considerable government resources to disrupt peaceful and economically productive activities for no real public purpose. Regardless of whether such authority is regularly abused, its mere existence casts a pall of uncertainty over legitimate pursuits. For every Gary, Marian, and Mike who presses his or her rights, there are many more people who give up and give in.

⁸⁸ *Id.*

⁸⁹ *Id.* at 4.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 5.

Such acquiescence results in the entrenchment of an unreasonable, if not an abusive, regulatory culture. A 2008 Silver State Bank/ASBA/O'Neil Associates survey asked businesspeople to evaluate the reputations of local governments in Arizona for their business-friendliness. Some of Arizona's largest local governments, including Tucson and Mesa, were overwhelmingly rated as unfavorable to business.⁹³ But businesses are not the only ones bearing the brunt of local overregulation. Local regulations often impact hardest those most in need of basic occupational opportunities.

3. Case Study: Local Occupational Regulation

Local governments in Arizona have a particularly pronounced desire to regulate sidewalk vendors into oblivion. Mobile vendors, peddlers, and transient merchants cannot do business in Phoenix, Tucson, Mesa, Glendale, Chandler, Gilbert, Tempe, or Peoria without a license.⁹⁴ Among other prerequisites, this occupational license typically requires extensive criminal background checks and proof of liability insurance with limits of up to \$1,000,000. Few in the business of peddling can obtain this amount of insurance coverage, so it is readily apparent that these laws are meant to deny access to the bottom rung of the opportunity ladder. The exclusionary effect of such licensure laws is further enhanced in places like Chandler, which requires license applications for transient merchants to be further supported by the statements of at least two residents.

The local power to restrict access to occupations is not limited to weird, dirty, or undesirable jobs. Glendale, for example, regulates even garage sales under its "occasional sales" license.⁹⁵ Scottsdale requires a permit, supported by \$1,000,000 in insurance coverage, to film public areas for motion pictures and television.⁹⁶ The same is true of Peoria, only it requires insurance coverage in the amount of \$3,000,000 for filming permits.⁹⁷ And

⁹³ SILVER STATE BANK/ASBA/O'NEIL ASSOCIATES ARIZONA ECONOMIC INDICATORS MONITOR: STATE SALES TAX INCREASE? (2008), <http://www.oneilresearch.com/publicdomain/aeim/AEIM2008Q2SalesTax.pdf>.

⁹⁴ GILBERT, ARIZ., CODE OF ORDINANCES, art. VI, §§ 14-166, *et seq.* (2008); PEORIA, ARIZ., CODE OF ORDINANCES, ch. 11, §§ 11-181, *et seq.* (2008); PHOENIX, ARIZ., CODE OF ORDINANCES, §§ 10-161, *et seq.* (2008); TUCSON, ARIZ., CODE OF ORDINANCES, art. II, §§ 7-26, *et seq.* (2008); CHANDLER, ARIZ., CODE OF ORDINANCES, ch. 20, §§ 20-1, *et seq.* (2008); TEMPE, ARIZ., CODE OF ORDINANCES, §§ 24-16, *et seq.* (2008); GLENDALE, ARIZ., CODE OF ORDINANCES, art. I, §§ 21-1, *et seq.* (2008).

⁹⁵ GLENDALE, ARIZ., CODE OF ORDINANCES, art. IV, §§ 21-151, *et seq.* (2008).

⁹⁶ SCOTTSDALE, ARIZ., CODE OF ORDINANCES, art. XIII, §§ 16-431, *et seq.* (2008).

⁹⁷ PEORIA, ARIZ., CODE OF ORDINANCES, ch. 11, § 11-191 (2008).

local governments' indulgences in overregulation are not limited to occupational freedom.

4. Case Study: Local Commercial Speech Regulation

Commercial speech—the freedom to propose, advertise, and discuss business transactions—was as important to the Founders of our nation as political speech.⁹⁸ Still, to this date, courts enforcing the federal and state constitutions fail to protect commercial speech as robustly as political speech. And this failure to enforce the basic freedom to communicate has led to all manner of absurd and stultifying speech regulations in Arizona.

For example, the town of Gilbert has an ordinance that prohibits “all signs not expressly permitted.”⁹⁹ Citizens must review a forty-seven page sign code and probably consult their attorneys before hoisting signs of any kind. Before placing notices, placards, and bills anywhere “calculated to attract the attention of the public,” Mesa requires citizens to be able to identify a local, state, or federal law that specifically authorizes them to do so.¹⁰⁰ Free-standing signs are prohibited in Yuma.¹⁰¹ Billboards are prohibited in Gilbert.¹⁰² Portable signs are either prohibited or strictly restricted to certain pre-approved contents in Chandler.¹⁰³ Peoria's distaste for communication related to commerce even extends to the point of excluding the “fine art” exception to sign regulations if—horrors—the art is combined with commercial purposes.¹⁰⁴ Only a very special kind of business enjoys the right to free speech using portable signs in Tempe because portable signs are permissible only for “boutiques” selling “primarily locally handcrafted goods.”¹⁰⁵ In sum, what begins as licensing, permitting, and regulating every possible economic activity in every possible way naturally leads—and has led—to banning billboards, restricting signage, and shutting down commercial speech about economic activities.

⁹⁸ Daniel E. Troy, *Advertising: Not “Low Value” Speech*, 16 YALE J. ON REG. 85, 88 (1999).

⁹⁹ GILBERT, ARIZ., CODE OF ORDINANCES, ch. 1, § 4.402(R) (2008).

¹⁰⁰ MESA, ARIZ., CODE OF ORDINANCES, § 5-6-2 (2008).

¹⁰¹ YUMA, ARIZ., CODE OF ORDINANCES, § 152-05(D) (2008).

¹⁰² GILBERT, ARIZ., CODE OF ORDINANCES, ch. 1, § 4.402(R)(11) (2008).

¹⁰³ CHANDLER, ARIZ., CODE OF ORDINANCES, §§ 39-8(A), 39-10 (2008).

¹⁰⁴ PEORIA, ARIZ., CODE OF ORDINANCES, § 14-34-4(A)(2) (2008).

¹⁰⁵ TEMPE, ARIZ., CODE OF ORDINANCES, ch. 9, §§ 3-406(B), 4-902(B)(10) (2008).

D. *Hard Paternalism is Knocking*

Local governments across the nation now openly embrace paternalism, having slid down the slippery slope of smoking bans. Eight years ago, for example, in the Maryland town of Friendship Heights, the drafter of an outdoor smoking prohibition, which was reported to be “the most restrictive of its kind in the United States,” did not even attempt “to justify the regulation on the basis of harm to others,” explaining that the law “restricted smokers’ liberty for their own good.”¹⁰⁶ Today, bans on fast food, smoking, happy hour, trans-fats, foie gras, hip-hop clothing, and dancing threaten to become performance benchmarks in the regulatory portfolio of local governments.¹⁰⁷ In fact, the word “nanny-state” applied to local

¹⁰⁶ Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 480 (2000).

¹⁰⁷ See, e.g., MESA, ARIZ., 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 (2007) (New York City prohibiting cell phones while driving, pornography on newsstands, expiration dates on gift-certificates, 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*, N.Y. TIMES, Jan. 20, 2008, at A22 (banning happy hour drink specials); Henry Miller, *Foolish Food Fads*, WASH. TIMES (D.C.), Jan. 3, 2008, at A13 (San Francisco imposes a tax on high-fructose corn syrup); Jordan Lite, *New Food Fight Over Calories. City Revives Push for Disclosure by Eateries*, N.Y. DAILY NEWS, Jan. 22, 2008, at 6 (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*, N.Y. TIMES, Jan. 27, 2008, at 1; Rod Boshart, *GOP’s Zieman Asks Dems to Slow Smoking Debate*, GAZETTE (Cedar Rapids, Iowa), available at 2008 WLNR 3511837; *Seniors May Get Doughnuts After All*, L.A. TIMES, Aug. 27, 2007, at F5 (ban of doughnuts at senior citizen’s centers); 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 banning saggy pants); Kathi Swarthout, Letter to the Editor, *The Insatiable Maw: If It’s Dough They Want, Then Dough They’ll Have*, SEATTLE TIMES, July 23, 2007, at B5 (trans-fat ban); Alexia Elejalde-Ruiz RedEye, *Commissioner Sets Sights on Bottled Water*, CHI. TRIB., Sept. 7, 2007, at 8 (attempting to end expenditures on water bottles); *Another La. Town Bans Saggy Pants*, FoxNews.com, Oct. 23, 2007, <http://www.foxnews.com/wires/2007/Oct23/0,4670,ODDSaggyPants,00.html>; Deborah Soderquist, Letter to the Editor, *Trans Fats: ‘Nutrition Cop’ Goes too far*, PORTLAND OREGONIAN, Jan. 10, 2007, at B07 (trans-fat ban); Echa Schneider, Letter to the Editor, *Secondhand Smoke Ordinance: Nanny-State Law*, ALAMEDA TIMES-STAR (CA), available at 2007 WLNR 17718493 (Oakland debating a ban on smoking within apartment buildings); Gil Smart, Editorial, *Extinguish Smoking Ban*, LANCASTER INTELLIGENCER J., July 1, 2007, at 1; Letters to the Editor, *Adults’ Rights Among Smoking Ban Worries*, FT. WAYNE J. GAZETTE (Ind.), Sept. 19, 2006, at 9A; *Summary Box:*

government is no longer a clever turn of phrase. It has ominously become a cliché from overuse.

Phoenix was recently ranked fourteenth in the nation on Reason Magazine's personal freedom index—in the upper half of the thirty-five major cities ranked, but behind such cities as Denver, Milwaukee, and Kansas City, which are hardly known for their libertine cultures.¹⁰⁸ With the recent passage of a statewide smoking ban, the hard paternalism wave has finally hit Arizona. The logic of paternalism will inexorably push local governments to shrink the scope of personal autonomy.¹⁰⁹

Smokers Fired up Over Health Department Bans, AP, Nov. 28, 2004, WV 22:00:38 (smoking bans); 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, May 15, 2006, at 29(1) (Chicago banning foie gras); James Colgrove & Amy Fairchild, Op-Ed, *Father Mike*, N.Y. TIMES, Oct. 22, 2006, available at 2006 WLNR 18329146 (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 J. CONST., Dec. 7, 2004, at 3JJ (indoor smoking bans); Kathy McCabe, *Salem Stands by Its Ban on Smoking April 1 Cutoff at Bars, Eateries to be Fought*, BOSTON GLOBE, Mar. 18, 2001, at 1 (Salem, MA bans smoking in bars and restaurants); Douglas Belkin, *Smoking Flags Going Up at Boca Area Beaches, Parks*, PALM BEACH POST, June 22, 1999, at A1 (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, July 22, 1999, at A14 (describing new anti-smoking ordinance); Elsa Brenner, *Battle Over Smoke Moves Outdoors*, N.Y. TIMES, June 21, 1998, at WC-1 (describing recent laws banning smoking in various public places); Marcia Meyers, *Smoking Limits Spread Outdoors*, BALT. SUN, Apr. 26, 1998, at A1 (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*, S.F. CHRON., May 11, 1998, at A13 (reporting on California municipal ordinances); Marv Balousek, *Smoking Ban May Expand: Proposal Includes Some Outdoor Areas*, WALL ST. J., Oct. 8, 1998, at A1 (discussing proposed antismoking ordinance); George Snell, *Health-Board Leader Firm on Smoking Law*, WORCESTER TELEGRAM & GAZETTE, Oct. 18, 1996, at B1 (describing the effects of a smoking ban in Worcester, MA); Richard Berman, *A Smoking Ban Goes Too Far*, RESTAURANT BUS., Dec. 10, 1996, at 169 (discussing outdoor smoking ban); Robert B. Nugent, *Fitchburg Board of Health Widens Smoking Ban*, WORCESTER TELEGRAM & GAZETTE, June 3, 1996, at B1.

¹⁰⁸ *What's the Matter With Chicago? and Seattle and New York and Boston . . . ?* (July 9, 2008), <http://reason.com/news/show/127481.html>.

¹⁰⁹ Pope, *supra* note 106, at 493 (observing “[o]ne 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

Liberty is a seamless web.¹¹⁰ 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, 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. Paternalism is more than a threat to human dignity; it represents a dangerous misallocation of scarce resources away from local government's core functions.

E. 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 typically ranged between five and ten percent higher than national rates.¹¹¹ As recently as 2000, property

C. McAlister, *Eating with Impunity*, ORLANDO SENTINEL, Dec. 22, 1996, at G1; Kelly D. Brownell, *Get Slim With Higher Taxes*, N.Y. TIMES, Dec. 15, 1994, at A29; Bill Reel, *A Buck a Pack Is a Helluva Whack*, NEWSDAY, Mar. 25, 1994, at A43; U.S. DEP'T OF HEALTH, EDUC. 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, Aug. 10, 1998, at 42; Joyce Howard Price, *New Battle About Evil Spirits*, INSIGHT ON NEWS, Feb. 1, 1999, at 40; Cori Vanchieri, *Lessons from the Tobacco Wars Edify Nutrition War Tactics*, 90 J. NAT'L CANCER INST. 420 (1998).

¹¹⁰ Timothy Sandefur, *Rights Are A Seamless Web*, 26 RUTGERS L. REV. 5 (2002); see also *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 522 (1972) ("the 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 138-39 (1985) ("[c]an 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?"); JAMES MADISON, *Property*, in JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999) ("[t]his 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 everything to which a man might attach a value and have a right; and which leaves to everyone 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").

¹¹¹ ARIZ. CRIM. JUST. COMM'N, ARIZONA CRIME TRENDS 2007: FACT SHEET (2007), http://azcjc.gov/pubs/home/UCR_Crime_One_pager_Dec_6_06.pdf.

offenses were forty-six percent higher than national rates.¹¹² A 2005 report, published by the Morrison Institute, ranked Arizona worst among all fifty states with regard to its rate of serious crimes, which includes murder, rape, robbery, aggravated assault, burglary, larceny, and auto theft.¹¹³

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.¹¹⁴ National statistics show nearly a five percent increase in homicides and almost a ten percent increase in robberies between 2005 and 2006.¹¹⁵

Notwithstanding recently reported declines in 2007, Arizona’s violent and property crime rates have shown similar signs of resurgence.¹¹⁶ Between 2004 and 2006, for example, Phoenix saw its homicide rate increase twelve percent and its robbery rate increase seventeen percent.¹¹⁷ These statistics show that focusing Arizona’s local governments on their core functions is a necessity. Nevertheless, Phoenix still pays police officers overtime to help stage media events.

1. Case Study: Phoenix Gun Buy-Backs versus Law Enforcement

Rather than focusing resources on crime prevention, Arizona’s police departments often participate in political grandstanding, such as when the City of Phoenix conducted a gun “buy-back” program on June 28, 2008.¹¹⁸ That day, gun-law expert and author of *The Arizona Gun Owner’s Guide*,

¹¹² ARIZ. CRIM. JUST. COMM’N, ARIZONA CRIME TRENDS 2007: FACT SHEET (2007).

¹¹³ ARIZ. STATE UNIV., RATE OF SERIOUS CRIME PER 100,000 POPULATION (2003), <http://www.asu.edu/copp/morrison/50statedata/01SeriousCrime.pdf>; see also ARIZ. CRIM. JUST. COMM’N, ARIZONA CRIME TRENDS: A SYSTEM REVIEW 12 (2005), http://acjc.state.az.us/pubs/home/Crime_Trends_2005.pdf.

¹¹⁴ William J. Bratton, *The Unintended Consequences of September 11th*, 1 POLICING 21-24 (2007).

¹¹⁵ Police Executive Research Forum, *A Gathering Storm—Violent Crime in America* 14 (Oct. 2006), http://www.policeforum.org/upload/Gathering-Storm-PRINT-Final_110473745_1027200610304.pdf.

¹¹⁶ *Id.*

¹¹⁷ 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.

¹¹⁸ Astrid Galvan, *S. Phoenix Gun Buyback Nets 100 Firearms*, ARIZ. REPUBLIC. June 29, 2008, <http://www.azcentral.com/community/phoenix/articles/2008/06/29/20080629buyback.html>.

Alan Korwin, and activist Rick DeStephens, traveled to three of the five “buy-back” locations. They reported that nearly all of the guns collected were “useless” and “worthless.”¹¹⁹ They spoke with the participants, most of whom readily admitted exchanging old junk for \$100 gift cards.¹²⁰ After the event, Korwin remarked, “[the] gang bangers are laughing at us.”¹²¹ The fact that each visited location was reportedly manned by eight police officers, likely receiving overtime pay, illustrates fundamental problems with the priorities given to policing by local governments in Arizona.¹²² The same problem with policing priorities is evidenced by Maricopa County (Arizona)’s draconian crackdown on illegal immigration.

2. Case Study: Local Law Enforcement versus Illegal Immigration in Maricopa County

As threatening as illegal immigration may be, enforcing federal immigration laws is just not a core function of local law enforcement.¹²³ But that is not what the Sheriff of Maricopa County thinks, declaring proudly in July 2007, “[w]e are quickly becoming a full-fledged anti-illegal immigration agency.”¹²⁴ Unfortunately, the County’s transformation into a federal agency has not been compatible with local responsibilities.

Maricopa County’s crackdown has reportedly led to the arrests of a number of “low-level participants in human smuggling rings.”¹²⁵ Yet, at the same time, “[r]ampant overtime spending on immigration operations drove” the Sheriff’s Office “into financial crisis and forced it to close facilities across the county.”¹²⁶ Meanwhile, the *East Valley Tribune* reports that between 2005 and July 2007, arrest rates dropped from 10.5% to 2.5% of investigations.¹²⁷ Moreover, during 2006 and 2007, “sheriff’s detectives did little or no investigation on at least thirty violent crime cases” and “patrol

¹¹⁹ Interview with Alan Korwin (Jul. 23, 2009).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ JJ Hensley, *Sheriff Arpaio May Lose Some Immigrant Authority*, ARIZ. REPUBLIC, Oct. 3, 2009, <http://www.azcentral.com/arizonarepublic/news/articles/2009/10/03/20091003arpaio-ice1003.html>.

¹²⁴ Ryan Gabrielson, *Reasonable Doubt Part II: Overtime Led to MSCO Budget Crisis*, E. VALLEY TRIB., July 10, 2008, <http://www.eastvalleytribune.com/story/120468>.

¹²⁵ Ryan Gabrielson, *Reasonable Doubt Part II: Key Findings of the Tribune’s Project*, E. VALLEY TRIB., July 10, 2008, http://www.eastvalleytribune.com/page/reasonable_doubt.

¹²⁶ *Id.*

¹²⁷ Ryan Gabrielson, *Reasonable Doubt Part IV: Public Safety Shortchanged*, E. VALLEY TRIB., July 12, 2008, http://www.eastvalleytribune.com/page/reasonable_doubt.

cars arrived late two-thirds of the time on more than 6,000 of the most serious calls for service.”¹²⁸ In short, while the Sheriff of Maricopa County fiddles with federal law enforcement, and Phoenix pays police officers overtime to collect junk firearms, Arizona’s cities are starting to burn.

V. ACTIVATE THE JUDICIARY

*The legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex. . . . [I]t is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.*¹²⁹

James Madison

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—meaning the judiciary must exercise a check on the political process. Specifically, each policy implementation recommended in this article 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.

But first, advocates of the Local Liberty Charter need to recognize that there are a variety of legal doctrines ordinarily requiring the judiciary to defer to local legislative and administrative decision-making exists, 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 “justiciability” can bar legal challenges deemed to have been brought “too soon,” even when common sense may suggest that further delay will not accomplish anything. To minimize the chance 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

¹²⁸ Ryan Gabrielson, *Reasonable Doubt Part II: Key Findings of the Tribune’s Project*, E. VALLEY TRIB., July 10, 2008, http://www.eastvalleytribune.com/page/reasonable_doubt.

¹²⁹ Bernard Siegan, *F.A. Hayek and Contemporary Legal Thought: Hayek and the United States Constitution*, 23 SW. U. L. REV. 469, 478 (1994) (quoting THE FEDERALIST NO. 48 (James Madison)).

challenge and also when that challenge can be brought. Also, 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.

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.¹³⁰ Democratic processes are merely one tool among many aimed at diffusing concentrations of power.¹³¹ The Founders recognized that unchecked democratic processes could themselves result in tyranny when they are captured by political factions or seized by irrational passions.¹³² The Founders 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.¹³³

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; however, such proximity does not sufficiently counteract the dangers of unchecked democratic processes.¹³⁴ Even in Arizona’s cities

¹³⁰ Michael W. McConnell, *Active Liberty: Interpreting Our Democratic Constitution*, 119 HARV. L. REV. 2387, 2393-94 (2006); see generally ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 249 (Henry Reeve trans., 1973).

¹³¹ Timothy 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).

¹³² THE FEDERALIST NO. 51, at 324 (Alexander Hamilton) (Mentor Books, 1961) (“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.”).

¹³³ Bernard Siegan, *F.A. Hayek and Contemporary Legal Thought*, 23 SW. U. L. REV. 469, 479-80, 482-83 (1994) (quoting THE FEDERALIST NO. 48 (James Madison)).

¹³⁴ See, e.g., Robert M. Bastress, Jr., *Localism and the West Virginia Constitution*, 109 W. VA. L. REV. 683, 685-86 (2007) (“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.”).

and towns, the power of the ballot box to constrain abusive government is overrated. Accordingly, as discussed in the next subsections, a structural counterweight against local political processes is needed to protect local residents and businesses from such dangers—and the judiciary is uniquely positioned to fulfill that need.

A. *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.¹³⁵ 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 many.¹³⁶ 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.¹³⁷ 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.¹³⁸ As a result, even the most conscientious city councilmember likely has the palpable sense that there is only one side of the issue.¹³⁹ This enables special interests to “capture” the legislative process to serve their narrow interests.

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

¹³⁵ 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).

¹³⁶ *Id.* at 478-79, 483.

¹³⁷ *Id.* at 483.

¹³⁸ JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FUNCTIONS OF CONSTITUTIONAL DEMOCRACY* (1992) (1962); Pritchard & Zywicki, *supra* note 135, at 481 n.294.

¹³⁹ Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 904 (2007) (discussing 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. 1994).

services.¹⁴⁰ 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.¹⁴¹

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.¹⁴² This is because larger jurisdictions tend to have more special interest groups competing for more special benefits. The objectives of these numerous special interest groups are also more likely to be incompatible.¹⁴³ Consequently, there is a greater chance that their lobbying efforts will balance or drown themselves out.¹⁴⁴ 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 because there are typically fewer people in the government to persuade.¹⁴⁵ 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 governments; local governments can also exercise such power legislatively more quickly.¹⁴⁶

The problem of factions is compounded by the threat of irrational voting. Ironically, the modern Arizonan metropolis or county may not be big enough to support the multiplicity of special interests needed for competing factions to cancel each other out. Further, most cities or counties 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. Consequently, the likelihood of any particular individual influencing a local election remains so minute that there is no anticipated cost associated with

¹⁴⁰ Mesa City Council Meeting (June 23, 2008), <http://www.mesachannel11.com/vod.php?show=404>.

¹⁴¹ Charles J. Wheelan, *Politics or Public Interest? Licensing and the Case of Respiratory Therapists*, PERSPECTIVES ON WORK, 42, 43 (2005).

¹⁴² ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 46 (Richard D. Heffner ed., 1956); Michael W. McConnell, *Active Liberty: A Progressive Alternative to Textualism and Originalism?*, 119 HARV. L. REV. 2387, 2395 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION).

¹⁴³ THE FEDERALIST NOS. 10, 51 (James Madison).

¹⁴⁴ BERNARD SIEGAN, ECONOMIC LIBERTIES AND THE CONSTITUTION 63 (2d ed. 2006).

¹⁴⁵ INT'L COUNCIL ON HUMAN RIGHTS POL'Y, LOCAL RULE: DECENTRALISATION AND HUMAN RIGHTS 29-30 (2002) (citing USAID Center for Democracy and Governance).

¹⁴⁶ Timothy Sandefur, *The Wolves and the Sheep of Constitutional Law: A Review Essay on Kermit Roosevelt's The Myth of Judicial Activism*, 23 J.L. & POL. 1, 5-6 (2007); see also SAM STALEY, BIGGER IS NOT BETTER 12 (1992), http://www.cato.org/pub_display.php?pub_id=1026&full=1.

voting for bad policies.¹⁴⁷ Accordingly, 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.¹⁴⁸

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.

B. 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,

¹⁴⁷ 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, 481 (1999).

¹⁴⁸ BRYAN CAPLAN, *THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES* 119-34 (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 politicians 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 id.* at 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. *Id.* 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.

the reality is that the effectiveness of such “Tiebout competition” has been oversold.¹⁴⁹ 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.¹⁵⁰ 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.¹⁵¹ 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.”¹⁵² 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.

¹⁴⁹ 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. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 885-86 (2007). 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.

¹⁵⁰ Paul W. Rhode & Koleman S. Strumpf, *Assessing the Importance of Tiebout Sorting: Local Heterogeneity from 1850 to 1990*, 93 AM. ECON. REV. 1449, 1648-77 (2003).

¹⁵¹ 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).

¹⁵² *Id.*

VI. THE LOCAL LIBERTY CHARTER

*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.*¹⁵³

Thomas Jefferson

Local politics, like state and national 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.¹⁵⁴ 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 itself.¹⁵⁵ 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.¹⁵⁶ 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.”¹⁵⁷ That is why this article advocates a *judicially-enforceable* Local Liberty Charter.¹⁵⁸

¹⁵³ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 245 (Merrill D. Peterson ed., 1984) (1781).

¹⁵⁴ Pritchard & Zywicki, *supra* note 135, at 483.

¹⁵⁵ Cf. SIEGAN, *supra* note 139, at 22 (observing “[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”).

¹⁵⁶ INT’L COUNCIL ON HUMAN RIGHTS POL’Y, *supra* note 15, at 35 (observing “[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”).

¹⁵⁷ Sir Edward Coke, *in* 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE, Vol. 1, 264, 265 n.3, 267 n.7, 279-80, 390-96, 399, 401, 404 n.28 (Steve Sheppard ed., 2003) (reprinting Dr. Bonham’s Case (1610) Hilary Term, 7 James 1, The Case of the Tailors of Habits &c. of Ipswich (1614) Michaelmas Term, 12 James 1, The Case of Monopolies (1602) Trinity Term, 44 Elizabeth I In the Court of King’s Bench); SIEGAN, *supra* note 139, at 14-15, 17.

¹⁵⁸ Siegan, *supra* note 129; INT’L COUNCIL ON HUMAN RIGHTS POL’Y, *supra* note 15, at 31.

A. *The Right to a Presumption of Liberty*¹⁵⁹

*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.*¹⁶⁰

Frederick Douglass

Self-ownership implies the right to freedom of action.¹⁶¹ But 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.

1. 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.”¹⁶² 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.¹⁶³

Unfortunately, legal precedents have yet to embrace this natural “presumption of liberty” interpretation of the Arizona State Constitution’s

¹⁵⁹ BARNETT, *supra* note 23.

¹⁶⁰ MARK J. SIMMONS & VALERIE CUNNINGHAM, THREE CENTURIES OF AFRICAN-AMERICAN HISTORY 130 (2004).

¹⁶¹ Douglas B. Rasmussen, *Why Individual Rights?*, in INDIVIDUAL RIGHTS RECONSIDERED: ARE THE TRUTHS OF THE U.S. DECLARATION OF INDEPENDENCE LASTING? 113, 119-26 (Tibor R. Machan ed., 2001).

¹⁶² ARIZ. CONST. art. II, § 33.

¹⁶³ BARNETT, *supra* note 23.

“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.¹⁶⁴ 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,¹⁶⁵ its predominance underscores the practical necessity of an additional legal framework for preserving liberty, especially those freedoms not specifically identified in the state constitution.

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.¹⁶⁶ Such laws typically require advocates to prepare a detailed report to a legislative

¹⁶⁴ See *Adams v. Bolin*, 247 P.2d 617, 625 (Ariz. 1952); *Earhart v. Frohmler*, 178 P.2d 436, 438 (Ariz. 1947).

¹⁶⁵ 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 the 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*, in GOLDWATER INST. POL’Y REP. (No. 214, 2006).

¹⁶⁶ “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 (ARIZ. REV. STAT. ANN. §§ 32-3101 to -08 (2009); COLO. REV. STAT. § 24-34-104.1 (2009); FLA. STAT. § 11.62 (2009); GA. CODE ANN. §§ 43-1A-1 to -1A-9 (2009); HAW. REV. STAT. § 26H-2 (2009); KAN. STAT. ANN. §§ 65-5001 (2009); ME. REV. STAT. ANN. tit. 32, §§ 60-J to -L, tit. 5, § 12015 (2009); MINN. STAT. §§ 214.001 to -.002 (2009); NEB. REV. STAT. §§ 71-6201 to -6229 (2009); N.M. STAT. §§ 12-9A-1 to -9A-6 (2009); N.C. GEN. STAT. §§ 120-149.1 to -149.6 (2009); S.C. CODE ANN. §§ 40-1-10 to -1-220 (2009); TENN. CODE ANN. §§ 4-29-101 to -29-122 (2009); TEX. CODE ANN. §§ 318.001 to -.003 (2009); UTAH CODE ANN. §§ 36-23-101 to -108 (2009); VT. STAT. ANN. §§ 3102-3107; VA. CODE ANN. §§ 54.1-100, 54.1-309 to -311; WASH. REV. CODE §§ 18.118.005 to -.900, 18.120, 18.120.010 to -.910 (2009); W. VA. CODE §§ 30-1A-1 to -1A-6 (2009)).

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 commonsense regulatory simplification.¹⁶⁷ 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.”¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰

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.¹⁷¹ Rather, it

¹⁶⁷ See Doug Kaplan, *Simplify, Don't Subsidize: The Right Way to Support Private Development*, in INSTITUTE FOR JUSTICE at 1 (No. 4, 2008); see also Curt Pringle, *Development Without Eminent Domain: Foundation of Freedom Inspires Urban Growth*, in INSTITUTE FOR JUSTICE at 1 (No. 2, 2007).

¹⁶⁸ Cf. Gerson, *supra* note 166, at 268-75.

¹⁶⁹ Cf. *id.*

¹⁷⁰ Cf. *id.*

¹⁷¹ Thaddeus Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 447 (2000) (“[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.”).

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. Additionally, regulations should be carefully crafted to target the sort of harm that is at least commensurate with the sort of harm associated with misdirected regulation.¹⁷²

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

1. The regulation's objective is to protect public health, safety, or welfare; it is not to restrain competent adults for their own good, nor is it to promote 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.

¹⁷² Numerous studies show regulation is seldom effective, and often counterproductive. See Ronald Coase, *Economists and Public Policy*, in *LARGE CORPORATIONS IN A CHANGING SOCIETY* 184 (J. Fred Weston ed., 1974); SIEGAN, *supra* note 139, at 46-47 (summarizing 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 (2002) (compiling studies of occupational regulation); Robert Hardaway, *Taxi and Limousines: The Last Bastion of Economic Regulation*, 21 *HAMLIN J. PUB. L. & POL'Y* 319, 382 (2000); Stanley J. Gross, *Professional Licensure and Quality: The Evidence*, in *CATO POL'Y ANALYSIS* (No. 79, 1986), available at <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* (July 2004).

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.¹⁷³

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. Finally, 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 take place later at a designated "sunset" date. (The Appendix provides an example of a model sunrise and sunset provision).

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.¹⁷⁴ 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

¹⁷³ These factors represent a fusion of the previous statutory models and the pro-liberty constitutional principles discussed in SIEGAN, *supra* note 139, at 40-41.

¹⁷⁴ Cf. Gerson, *supra* note 166, at 260 n.66, (citing William Lyons & Patricia K. Freeman, *Sunset Legislation and the Legislative Process in Tennessee*, 9 LEGIS. STUDIES Q. 151, 151-59 (1984)).

results.¹⁷⁵ 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.¹⁷⁶ 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.¹⁷⁷

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.”¹⁷⁸ 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.¹⁷⁹ Taken together, these safeguards will

¹⁷⁵ Compare *Gebbie v. Olson*, 828 P.2d 1170, 1173 (Wash. 1992) (rejecting the argument that the Sunrise Act of WASH. REV. CODE. § 18.120.010 (2009) (“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) (embracing 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).

¹⁷⁶ During such judicial review, the burden of persuasion should be placed squarely on the shoulders of the local government. *SIEGAN*, *supra* note 139, at 42 (argues that “[t]he responsibility for justifying a limit on liberty rests with the government entity seeking the limit”).

¹⁷⁷ Sandefur, *supra* note 131, at 27.

¹⁷⁸ Sandefur, *supra* note 131, at 26-27.

¹⁷⁹ 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 the danger of wrongly annulling a law exceeds the danger of wrongly upholding it.” Sandefur, *supra* note

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.

2. Ensure Prompt Regulatory Review with Automatic Approval

Freedom of action is impossible, lives can be ruined, and economic development will be hobbled when the government unreasonably delays furnishing necessary regulatory approvals. This fact is illustrated by the case study of Daryl Brown. Daryl is a native Arizonan who owns the highest rated landscape company in the Phoenix area on Angie's list.¹⁸⁰ He is a big bear of a man with an even temper—a fortunate characteristic because excessive regulatory delay in Maricopa County ruined him financially when he tried his hand at small-scale real estate development.

In 2006, he purchased property in unincorporated Maricopa County to build a single family home.¹⁸¹ He had to purchase the land before submitting a building permit because Maricopa County did not accept building permit applications for property that one did not own.¹⁸² Daryl did not anticipate a permitting problem since he was using “spec” plans—and, according to his architect, the plans were virtually identical to plans previously approved by the County on numerous prior occasions.¹⁸³

It took four months before his building permit application was returned to him, unapproved, for some minor revisions.¹⁸⁴ After making the revisions, Daryl then resubmitted the application; about a month later he was told for the first time that he needed to get a separate permit to build retention walls before he could start construction.¹⁸⁵ He then submitted his retention wall permit application.¹⁸⁶ Nearly a month later, he finally received the necessary approval to start building his spec single family home.¹⁸⁷

131, at 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.

¹⁸⁰ Interview with Daryl Brown, in Phoenix, Ariz. (Mar. 19, 2009).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

From the point of submitting his spec home plans, it took over five months for the County to approve the building of the same type of house that had often been approved on previous occasions.¹⁸⁸ This needless delay caused Daryl to pay months of additional interest on his mortgage.¹⁸⁹ Because of the delay, his construction was not completed until after the market crashed in June 2007.¹⁹⁰ Daryl was unable to sell the home and eventually lost it through foreclosure, losing his investment, loan payments (totaling to about \$25,000), and ultimately being forced to file personal bankruptcy.¹⁹¹

Just one policy reform would have saved Daryl from financial ruin: a deadline for regulatory processing with automatic approval if the deadline is not met. This is the reason why more than half 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.¹⁹² In Minnesota, for example, agencies and local governments have sixty days to approve or deny applications for permitting, licensure, zoning or other regulatory approval—and the “failure of an agency to deny a request within sixty days is approval of the request.”¹⁹³ 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.¹⁹⁴ This has resulted in mandated approval or

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *See, e.g.*, ALA. CODE §§ 11-19-14, 11-52-32 (1996); CAL. GOV'T CODE §§ 65920-65957.1 (West 1996); COLO. REV. STAT. §§ 31-23-215, 30-28-110(e) (1996); MINN. STAT. § 462.358(3)(b) (1996); MO. REV. STAT. §§ 64.245, 64.590, 64.830, 89.370, 89.420 (1996); R.I. GEN. LAWS §§ 45-23-9, 45-23-37(d) (1996); S.C. CODE ANN. § 6-7-1250 (1995); DEL. CODE ANN. tit. 6811, § 4811 (1995); KAN. STAT. ANN. § 12-752(B) (1996); LA. REV. STAT. ANN. § 33:113 (1996); N.M. STAT. ANN. § 3-20-7(e) (West 1996); N.Y. STAT. LAW § 32 (McKinney 1996); N.D. CENT. CODE § 40-48-21 (1996); OKLA. STAT. ANN. tit. 74, § 74-115 (West 1996); TENN. CODE ANN. § 13-4-304 (1995); TEX. LOC. GOV'T CODE ANN. § 212.009 (Vernon 1997); ALASKA STAT. § 29.40.110 (1995); MICH. COMP. LAWS § 5.04 (1996); MINN. STAT. § 462.358, Subdiv. 3b (1996); OHIO REV. CODE ANN. §§ 711.05-711.09 (West 1995); S.D. CODIFIED LAWS § 11-2-24.1 (1995); WIS. STAT. ANN. § 236.11 (West 1996); WYO. STAT. ANN. §§ 18-5-307 to -308 (1995).

¹⁹³ *See* MINN. STAT. § 15.99 (2009).

¹⁹⁴ *See* ARIZ. REV. STAT. ANN. § 41-1073 (2008).

denial periods for permitting and licensing of all kinds ranging from seven to 180 days.¹⁹⁵

The benefit from these reforms has been enhanced certainty in business planning and greater responsiveness by regulatory agencies.¹⁹⁶ The same benefits would be afforded to Arizonans if similar reforms were enacted here. Developers in the Phoenix area, for example, routinely allow “one year to work through city regulatory processes when the land is already appropriately zoned.”¹⁹⁷ If that process “can be whittled down to five or six months,” the prospects for redeveloping challenging neighborhoods will be greatly enhanced.¹⁹⁸ Moreover, setting strict deadlines for regulatory approval of all types of licenses and permits is clearly feasible. A recent review of the performance of sixty Arizona administrative agencies in nearly every regulatory field indicated that 99.5% of 852,382 applications were processed within established deadlines.¹⁹⁹ 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.

B. 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,

¹⁹⁵ 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 (2008) (stating Department of Respiratory Care will issue or deny licenses within 67 days); ARIZ. ADMIN. CODE § R13-9-104 (2008) (stating Department of Public Safety will issue various licenses in seven days from receipt of completed application).

¹⁹⁶ See Ben DiPietro, *Lawmakers Tinker with Automatic Permit Approval Law*, PAC. BUS. NEWS, Mar. 2, 2001, <http://pacific.bizjournals.com/pacific/stories/2001/03/05/story7.html> (noting 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”).

¹⁹⁷ Tara Ellman, *Infill: The Cure for Sprawl?*, in GOLDWATER INST. ARIZ. ISSUE ANALYSIS, at 6 (No. 146, 1997).

¹⁹⁸ See Rose, *supra* note 28, at 8-9.

¹⁹⁹ GOVERNOR’S REGULATORY REVIEW COUNCIL, AGENCY COMPLIANCE WITH LICENSING TIME FRAMES: JULY 1, 2006 THROUGH JUNE 30, 2007 (2007).

*which impartially secures to every man whatever is his own.*²⁰⁰

James Madison

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. 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.

1. 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.²⁰¹ 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.”²⁰² 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. In short, property rights in Arizona still run the risk of “death by a thousand paper cuts.”

Proposition 207 has an even larger loophole for those regulations that actually have a significant and immediate adverse impact on land values: it exempts previously existing land use regulations, as well as property

²⁰⁰ JAMES MADISON, *Property*, in JAMES MADISON: WRITINGS 515 (Jack N. Rakove ed., 1999).

²⁰¹ See 2006 Ballot Propositions, <http://www.azsos.gov/election/2006/Info/pubpamphlet/english/prop207.htm> (last visited Apr. 6, 2010).

²⁰² See Nick Dranias, *Sunrise Review for Property Restrictions Would Fill in Prop 207 Gaps*, GOLDWATER INST. DAILY EMAIL (Sept. 23, 2008), <http://www.goldwaterinstitute.org/article/2554>.

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.²⁰³ 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.²⁰⁴ 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.²⁰⁵

²⁰³ FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 355 (1960).

²⁰⁴ Robert Lincoln, *Executive Decision-making by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 *STETSON L. REV.* 627, 671 (1996).

²⁰⁵ *Compare with* BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 238 (2d ed. 2006).

2. Protect Property Rights with Immediate Vesting of Rights

The doctrine of vesting currently determines when a protected property right is acquired.²⁰⁶ 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.”²⁰⁷ Presently, no statutory law in Arizona specifies when property owners can safely rely upon existing zoning laws or land use approvals.²⁰⁸ 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.²⁰⁹ But the precise degree is difficult to ascertain under existing precedent.²¹⁰ 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.”²¹¹

Other states have statutes that clearly identify the event that causes vesting of property rights. Under Colorado law, for example, property rights vest immediately upon the approval of a site-specific development plan.²¹² 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.”²¹³ 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

²⁰⁶ See generally Jordan R. Rose et al., *Protecting Private Property: The Case for Vested Property Rights*, in GOLDWATER INST. POL’Y BRIEF (2004) (explaining the concept of vested property rights in Arizona).

²⁰⁷ *Id.* at 1, 2.

²⁰⁸ See *id.* at 2-3.

²⁰⁹ See *id.*

²¹⁰ 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 Sys., 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 a permit.

²¹¹ Rose, *supra* note 28, at 4.

²¹² COLO. REV. STAT. § 24-68-102 (2008).

²¹³ Rose, *supra* note 28, at 5.

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.²¹⁴ 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.²¹⁵ It is also 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 before the property is even purchased. For this reason, 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.

3. Authorize Infill Development without Regulatory Micromanagement

Borne of bureaucratic central planning, zoning inevitably lags on-the-ground economic reality. 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.²¹⁶

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

²¹⁴ Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 915 (2007).

²¹⁵ *Id.* at 916.

²¹⁶ SIEGAN, *supra* note 144, at 193.

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.²¹⁷ 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.²¹⁸ For example, in one neighborhood, the city determined that the existing sewer and roadways could support 9,500 housing units.²¹⁹ 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.²²⁰ 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.²²¹

Local governments in Arizona should be able to replicate Anaheim's overlay model based on existing statutory authority.²²² A number of Arizona cities, such as Mesa, already authorize "overlay zoning" to allow for higher-intensity land use.²²³ 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.²²⁴ 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.

One exception is the City of Sierra Vista, which recently passed an ordinance implementing the regulatory loosening Arizona law allows.²²⁵ Sierra Vista's policy broadly contemplates that it "may consider" wide-

²¹⁷ Pringle, *supra* note 167, at 15.

²¹⁸ *Id.*

²¹⁹ *Id.* at 6.

²²⁰ *Id.*

²²¹ *Id.* at 8-9.

²²² ARIZ. REV. STAT. ANN. § 9-499.10 (2008).

²²³ MESA, ARIZ., CODE OF ORDINANCES, §§ 11-10-1 to -10-11.

²²⁴ Gilroy, *supra* note 49, at 107.

²²⁵ SIERRA VISTA, ARIZ., INFILL INCENTIVE DISTRICT POLICY, Resolution 2005-079 (2005).

ranging waivers and other relief from the requirements of its development code.²²⁶ 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.²²⁷ 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.”²²⁸

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.

4. 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.²²⁹ 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?”²³⁰ 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.”²³¹ 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.”²³² 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

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Ellman, *supra* note 197, at 6.

²²⁹ BERNARD H. SIEGAN, *LAND USE WITHOUT ZONING* 222 (1972) (observing “[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”).

²³⁰ *Id.* at 10.

²³¹ *Id.*

²³² *Id.* at 16.

voluntary contract and are administered by homeowners associations.²³³ 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 cities²³⁴

Land use in 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. The process should involve essentially two phases: (1) sunset review of existing zoning restrictions, and (2) legislative transformation of surviving zoning restrictions into private restrictive covenants.

5. Phase One: 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 may otherwise unfairly restrict property rights to a greater extent than provided by existing zoning laws, which might

²³³ *Id.* at 75-82.

²³⁴ *Id.* at 75-76.

trigger the need for just compensation under Proposition 207.²³⁵ 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.

During Phase One 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). The outcome of such sunset review should be determined by the factors established under existing zoning laws.²³⁶

²³⁵ 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 POL'Y REP. (NO. 343, 2006).

²³⁶ 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.

Property owners who obtain 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. Also, 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.

6. Phase Two: Transforming Zoning Restrictions into Private Restrictive Covenants

Phase Two 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 (such as 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.²³⁷ 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

²³⁷ See ARIZ. REV. STAT. ANN. § 11-829(H) (2009) (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.

all parcels within 300 feet of their property. To protect subsequent reliance upon the chain of title, the law should also 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.

7. 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. This could be achieved 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.

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 seldom-checked 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.

C. 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.*²³⁸

James Madison

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.

1. 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

²³⁸ Siegan, *supra* note 129, at 479 (quoting THE FEDERALIST NO. 47 (James Madison)).

capacity to decide how regulations should be applied in particular cases.”²³⁹ But there have traditionally not been clear lines of demarcation between the legislative, judicial, and executive powers at the local level.²⁴⁰ This tradition arose when the scope of governmental power was much more strictly construed than it is today.²⁴¹ The tradition persists because courts have not yet recognized a constitutional requirement that local governments be organized consistently with separation-of-powers doctrine.²⁴² 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. Tom and Elizabeth Preston are just two entrepreneurs who fell down this rabbit hole.

After receiving zoning approval to expand their tattoo business in Tempe a couple of years ago, the Prestons signed a five year lease and invested \$30,000 to renovate the shop they intended to open. A neighborhood group then intervened and appealed the approval to the City Council. Because of such political pressure, the Council voted unanimously to deny the Prestons’ business permit. And, now, unless the Goldwater Institute succeeds in defending their right to earn an honest living, Tom and Elizabeth Preston will lose tens of thousands of dollars pursuing a peaceful and productive, if “non-traditional,” business.

In Arizona, as illustrated by the Prestons’ plight and Gilbert’s machinations, 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 . . . [that is] prospective, determining ‘what the law shall be in future cases.’”²⁴³

²³⁹ Lincoln, *supra* note 25, at 629; *see generally* SIEGAN, *supra* note 139, at 70.

²⁴⁰ Redelsperger v. City of Avondale, 87 P.3d 843, 847 (Ariz. Ct. App. 2004); *see also* Lincoln, *supra* note 25 at 629-31.

²⁴¹ Lincoln, *supra* note 25, at 663-64.

²⁴² *See, e.g.*, Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902); Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

²⁴³ Lincoln, *supra* note 25, at 633-34.

The same principle is reflected to some extent in Arizona law.²⁴⁴ 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.²⁴⁵ 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.”²⁴⁶ Such purportedly “legislative” actions are then subject to minimal judicial scrutiny when they are challenged in court.

As a result, local elected officials 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.”²⁴⁷

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.”²⁴⁸ Corruption is a real risk and, therefore, a substantial justification for diffusing concentrations of local power.²⁴⁹ Additionally, there are efficiency gains from defining the roles of distinct departments of local government.²⁵⁰ The recommendation

²⁴⁴ *Redelsperger*, 87 P.3d. at 847 (distinguishing 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.”).

²⁴⁵ *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 (Ariz. 1976).

²⁴⁶ *GP Prop’s Carefree Cave Creek, L.L.C. v. Town of Carefree*, No. 1 CA-CV 07-0133, 2008 WL 2246905 at *2 n.4 (Ariz. Ct. App. May 28, 2008).

²⁴⁷ *Lincoln*, *supra* note 25, at 698.

²⁴⁸ *Id.* at 652; *SIEGAN*, *supra* note 139, at 69-70, 72-73.

²⁴⁹ *INT’L COUNCIL ON HUMAN RIGHTS POL’Y*, *supra* note 15, at 29-30.

²⁵⁰ *Id.*; *A Conversation with Ronald Jensen*, *supra* note 43.

made here builds on the Phoenix Charter model, which mandates separation between elected officials and city administration.²⁵¹

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.²⁵² 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 legislative, 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 cases 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.

2. 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.

²⁵¹ A Conversation with Ronald Jensen, *supra* note 43; FRONTIER CTR. FOR PUB. POL’Y, *Winnipeg Can Learn from Phoenix*, NOTES FROM THE FRONTIER CTR. FOR PUB. POL’Y (Sept. 7, 2008).

²⁵² *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); *State v. Loughran*, 693 P.2d 1000 (Ariz. Ct. App. 1985).

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 non-legislative 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.²⁵³

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 to delay a final resolution, in order to cause citizens 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. Having to compete with the ADR

²⁵³ 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 Colo. Office of Smart Growth, Local Government Guide to Alternative Dispute Resolution, <http://www.dola.state.co.us/osg/adrguide.htm> (last visited Apr. 6, 2010).

option might also incentivize local governments to create administrative review processes that are more fair and responsive to their citizens.

D. 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

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 implementations to protect that right are to require performance benchmarking for law enforcement, to use overtime to incentivize high performance, and to contract out failing departments to other localities.

1. 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 fifty percent in homicides during his four years in office.²⁵⁴ Nevertheless, he laments that many of his crime-fighting achievements dissipated after he left office.²⁵⁵ That is why the Local Liberty Charter enforces the right to freedom from crime with specific policy implementations.

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

²⁵⁴ *Editor's page*, D MAGAZINE, Apr. 1, 1995, http://www.dmagazine.com/Home/1995/04/01/Editors_page.aspx.

²⁵⁵ Steve Bartlett, *The Crime Capital of America*, D MAGAZINE, Oct. 1 2005, http://www.dmagazine.com/Home/2005/10/01/OPINION_The_Crime_Capital_of_America.aspx.

goals for their police departments.²⁵⁶ 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.²⁵⁷ 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 1993.²⁵⁸ 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 United States 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.²⁵⁹ 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.²⁶⁰ And New York City, famous for its achievements in reducing crime beginning in the mid-1990s, used its CompStat system to focus on core crime rates.²⁶¹

Nevertheless, 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

²⁵⁶ GEOFFREY F. SEGAL & ADAM B. SUMMERS, CITIZENS’ BUDGET REPORTS: IMPROVING PERFORMANCE & ACCOUNTABILITY IN GOVERNMENT 20 (2002).

²⁵⁷ U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, WHAT IS COMMUNITY POLICING?, <http://www.cops.usdoj.gov/Default.asp?Item=36> (last visited Apr. 6, 2010).

²⁵⁸ U.S. GENERAL ACCOUNTING OFFICE, DEPARTMENT OF JUSTICE: STATUS OF ACHIEVING KEY OUTCOMES AND ADDRESSING MAJOR MANAGEMENT CHALLENGES 1 (2001) [hereinafter KEY OUTCOMES].

²⁵⁹ PHOENIX OFFICE OF ARTS AND CULTURE, CITY MANAGER’S EXECUTIVE REPORT 1 (2008).

²⁶⁰ ARIZONA CRIMINAL JUSTICE COMMISSION, CRIMINAL HISTORY RECORDS IN ARIZONA: 1997 TO 2005 TREND ANALYSIS 1 (2007), http://azcjc.gov/pubs/home/RQI_FactSheet_0707.pdf (citing ARIZ. REV. STAT. ANN. § 41-1750 (2009)).

²⁶¹ See VINCENT E. HENRY, THE COMPSTAT PARADIGM: MANAGEMENT ACCOUNTABILITY IN POLICING, BUSINESS AND THE PUBLIC SECTOR 318 (2002); WILLIAM BRATTON & PETER KNOBLER, TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC 224 (1998).

process is generally not tied to policing goals or budgeting consequences, with few exceptions.²⁶² 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 dispatches? 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.²⁶³ The performance "scorecard" should be balanced enough to achieve good police service while emphasizing simplicity.²⁶⁴

To keep things simple, benchmarks should be focused on a few *core* outcomes of good police service.²⁶⁵ 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.²⁶⁶ 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, with one year being Mayor Bartlett's preferred time frame for feasibly reforming the management of a police department. Policy-makers 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

²⁶² See, e.g., Minutes from Int'l Ass'n of Law Enforcement Planners, Sw. Chapter Meeting, Oro Valley, Ariz. (Nov. 16, 2004).

²⁶³ DAVID J. ROBERTS, LAW ENFORCEMENT TECH GUIDE FOR CREATING PERFORMANCE MEASURES THAT WORK: A GUIDE FOR EXECUTIVES AND MANAGERS 23-26 (2006).

²⁶⁴ *Id.* at 24.

²⁶⁵ Telephone Interview with Steve Bartlett, former mayor of Dallas, Tex. (July 16, 2008).

²⁶⁶ Cf. GEOFFREY F. SEGAL & ADAM B. SUMMERS, CITIZENS' BUDGET REPORTS 20 (2002).

benchmarking does not promote “bounty hunting” behavior.²⁶⁷ 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.”²⁶⁸ 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.

2. 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.

²⁶⁷ 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.” KEY OUTCOMES, *supra* note 258, at 2.

²⁶⁸ *Cf. id.* at 9.

3. 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.

Police departments have difficulty reaching crime-reduction goals because of systematic 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.

E. The Right to Fiscal Responsibility

[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.*²⁶⁹

Thomas Jefferson

Cities face a financial storm, and experts in municipal financial management have been sounding the alarm. Vallejo, California, for example, recently filed bankruptcy after being unable to meet financial obligations to its public sector unions.²⁷⁰ Including Vallejo, “[s]ince 1980, 32 cities and towns have declared bankruptcy.”²⁷¹ This figure does not include the near-bankruptcies of numerous other local governments, including New York City in 1975, Bridgeport in 1991, Orange County in 1994, and Pittsburgh in 1995.²⁷²

In fact, unsustainable local spending now rages across the country. The financial desperation among America’s local governments is so consuming that cities in Los Angeles County were recently caught trying to sell their promised federal stimulus checks at a discount for cash.²⁷³ This was either the municipal equivalent of seeking payday loans or a clever attempt to avoid the strings attached to federal money. Either way, it evidenced the lengths to which cities will go to avoid confronting a stark fiscal reality: without structural reforms, municipal insolvency will only be delayed. Knowing this, California’s firefighter union, California Professional Firefighters, recently moved to block cities from filing bankruptcy.²⁷⁴ If they succeed, cities may default on municipal bonds instead of cutting payroll and other expenses. Ultimately, taxpayers could be forced to foot the bill for yet another bailout—this time for holders and insurers of municipal bonds.

Against this backdrop, municipal finance expert Girard Miller has written:

²⁶⁹ Thomas Jefferson, President of the United States, First Inaugural Address (Mar. 4, 1801), available at http://avalon.law.yale.edu/19th_century/jefinaul.asp.

²⁷⁰ Girard Miller, *Benefits Beat: Avoiding Benefits Bankruptcy*, GOVERNING, May 2008, <http://www.governing.com/articles/0805gmillerb.htm>.

²⁷¹ Eric Weiner, *What Happens When City Hall Goes Bankrupt?*, NPR, Feb. 28, 2008, <http://www.npr.org/templates/story/story.php?storyId=60740288>.

²⁷² *Id.*

²⁷³ Jennifer Steinhauer, *Cities’ Plans to Swap Cash for Stimulus Are Stopped*, N.Y. TIMES, Mar. 11, 2009, <http://www.nytimes.com/2009/03/12/us/12swap.html>.

²⁷⁴ Bobby White, *California Cities Face Bankruptcy Curbs*, WALL ST. J., May 28, 2009, <http://online.wsj.com/article/SB124346998818460615.html>.

If it takes a bankruptcy to put the house in order, then so be it, although it's a sad commentary on government in America that some local officials can't run their communities like a sound business. As to the rest of the country, elected officials must invoke stronger discipline in their finances, or else Vallejo will be just the tip of the iceberg . . . it may be necessary for the state legislatures to step in and impose principles through rules to prevent abusive practices and financial foolishness.²⁷⁵

The "warning signs" of impending local government bankruptcy are "unfunded pension liabilities, an anemic economy, costly infrastructure repairs and falling property values."²⁷⁶ Most, if not all of these signs exist in Arizona right now. Even before the crash of 2008, the "trajectory" of currently unfunded liabilities to Arizona's public-sector employees retirement system was reportedly "[n]ot a pleasant sight right now" because "the system's unfunded liabilities (in other words, the overbearing ratio that is getting so many California towns in trouble) is at its worst level in 30 years."²⁷⁷ For these reasons, Arizonans cannot afford to be complacent about local governmental financial management. Men and women of action need to be proactive in establishing the foundations of sound fiscal policy for local government.

Simply put, 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 governing.

1. Restrict the Business of Local Government to Government

I have little interest in streamlining government or in making it more efficient, for I mean to reduce its size.

Barry Goldwater

²⁷⁵ Miller, *supra* note 270.

²⁷⁶ Weiner, *supra* note 271.

²⁷⁷ Doug MacEachern, *Municipalities Need to Get Handle on Public-Employee Liabilities*, ARIZ. REPUBLIC, Mar. 29, 2008, <http://www.azcentral.com/members/blog/dougmac/20392>.

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, if simple, tool for implementing the right to fiscal responsibility is simply to restrict the powers of local government to non-proprietary functions.²⁷⁸ In Arizona, there exists considerable case law 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.²⁷⁹ Put another way, under prevailing case law, a “competitive, commercial endeavor” is not a governmental function.²⁸⁰ Restricting local governments to those functions without which they would cease to be governmental bodies would preclude many unnecessary and expensive exercises of government power.

2. 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.²⁸¹ 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.²⁸²

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.²⁸³ 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

²⁷⁸ Cf. SIEGAN, *supra* note 139, at 57.

²⁷⁹ Book-Cellar, Inc. v. City of Phoenix, 721 P.2d 1169, 1171 (Ariz. Ct. App. 1986).

²⁸⁰ *Id.*

²⁸¹ See generally Robert Franciosi, *Garbage In, Garbage Out: An Examination of Private/Public Competition*, in GOLDWATER INST. ARIZ. ISSUE ANALYSIS (No. 148, 1998).

²⁸² WILLIAM D. EGGERS, *Competitive Neutrality: Ensuring a Level Playing Field in Managed Competitions*, REASON FOUND., HOW-TO GUIDE NO. 18, 4 (1998); A Conversation with Ronald Jensen, *supra* note 43.

²⁸³ EGGERS, *supra* note 282; A Conversation with Ronald Jensen, *supra* note 43.

clearly defined and the roles of all participants in the process are understood.”²⁸⁴

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.”²⁸⁵ Unlike privatization, managed competition encourages public entities to participate in the contract bidding process.²⁸⁶ 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.²⁸⁷ 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.²⁸⁸

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.²⁸⁹ As a result of this mandatory managed competition law many cities opted for private waste hauling services, which were the lowest bidders, but others restructured their own sanitation services departments 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 twenty-five percent rate reduction in solid waste services. This law provides a tested model for implementing the right to fiscal

²⁸⁴ Ronald Jensen, *Managed Competition—The Phoenix Experience*, FRONTIER CENTER FOR PUBLIC POLICY 3 (2000), <http://www.fcpp.org/publication.php/245>.

²⁸⁵ Sam Staley, *Bigger Is Not Better: The Virtues of Decentralized Local Government*, http://www.cato.org/pub_display.php?pub_id=1026&full=1; see also E.J. MCMAHON, ADRIENNE MOORE & GEOFFREY F. SEGAL, *Private Competition for Public Services: Unfinished Agenda in New York State*, in MANHATTAN INST. FOR POL’Y RES. CIVIC REPORT (No. 41, 2003).

²⁸⁶ Jensen, *supra* note 284.

²⁸⁷ A Conversation with Ronald Jensen, *supra* note 43.

²⁸⁸ MCMAHON, MOORE & SEGAL, *supra* note 285, at 41.

²⁸⁹ Lynn Merrill, *The Wild West’s Commercial Collection Show-Down*, WASTE AGE, Oct. 1, 1998, http://wasteage.com/mag/waste_wild_wests_commercial.

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 ten to thirty percent.”²⁹⁰ For example, Charlotte’s collection costs per ton of garbage were “[twenty-eight percent] less than the statewide average” in 2007 after implementing managed competition.²⁹¹ This mirrors the success of Phoenix’s use of managed competition for solid waste collection, which resulted in a thirty-eight percent decline in inflation-adjusted costs over the first fifteen years of the program.²⁹² A subsequent statistical analysis of forty-six 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.”²⁹³ Moreover, in Indianapolis, the savings to taxpayers from an aggressive policy of managed competition has been estimated at \$450 million over ten years.²⁹⁴ This track record recently led the mayor of San Diego to announce in May 2008 that the city would be contracting out at least eleven city functions pursuant to the city’s managed competition ordinance.²⁹⁵

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.²⁹⁶ Eventually, they

²⁹⁰ *History of Managed Competition*, *supra* note 45 (citing Elliot Sclar, *The Privatization of Public Services: Lessons from Case Studies* (2004)).

²⁹¹ 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> (last visited Feb. 28, 2010).

²⁹² E.S. Savas, *National Council for Public-Private Partnerships, Privatization and Public-Private Partnerships in Phoenix 1* (2003), http://ncppp.org/resources/papers/savas_phoenix.pdf; *see also* A Conversation with Ronald Jensen, *supra* note 43 (indicating that for the first ten years of the program, the cost of waste collection in Phoenix declined 4.5% per year).

²⁹³ ADRIAN MOORE & JAMES NOLAN, *Putting out the Trash: Measuring Municipal Service Efficiency in U.S. Cities*, 41 URBAN AFF. REV. 237 (2005).

²⁹⁴ A Conversation with Stephen Goldsmith, *supra* note 45.

²⁹⁵ Press Release, Mayor’s Office, City of San Diego, *Mayor Moves 11 City Functions Forward in Managed Competition Process* (May 2, 2008), <http://www.sandiego.gov/mayor/pdf/080502fs.pdf>.

²⁹⁶ Leonard C. Gilroy & Steve Stanek, *Sandy Springs Incorporates, Inspires New Wave of ‘Private’ Cities in Georgia*, REASON FOUNDATION, Nov. 1, 2006,

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.”²⁹⁷ The cost of this contract was “just above half” what residents previously paid to the County for public services when Sandy Springs was unincorporated.²⁹⁸

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.²⁹⁹

In fact, a quick review of the yellow pages 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).³⁰⁰ Public safety services, including fire and police

http://www.reason.org/commentaries/gilroy_20061101b.shtml; Ryan Mahoney, *Colorado Company in Line to Manage Sandy Springs*, ATLANTA BUS. CHRON., Sept. 16, 2005, http://atlanta.bizjournals.com/atlanta/stories/2005/09/19/story7.html?jst=cn_cn_lk.

²⁹⁷ Gilroy & Stanek, *supra* note 296.

²⁹⁸ *Id.*

²⁹⁹ McMahan & Siegel, *supra* note 50.

³⁰⁰ 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 twenty-five percent expense advantage over private companies. A Conversation with Stephen Goldsmith, *supra* note 45. 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. A Conversation with Stephen Goldsmith, *supra* note 45. 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

protection, should not be off the table.³⁰¹ 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).

3. Restrict Spending to an Objective Formula without Loopholes

In view of the bankruptcy of Vallejo, California, municipal finance expert Girard Miller observed, “[i]t 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.”³⁰² 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.”³⁰³ 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

competitive advantage. *History of Managed Competition*, *supra* note 45 (citing C. DeMaio & B. Badolato, *Competitive Sourcing: The Wait is Over, the Time is Now* (2003)).

³⁰¹ 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 fifty-seven 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 (last visited Apr. 6, 2010); See ROBERT W. POOLE, CUTTING BACK CITY HALL 71-72 (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, *supra* note 151, at 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. POOLE, *supra*.

³⁰² Miller, *supra* note 270.

³⁰³ Clint Bolick, *A Taxpayer’s Bill of Rights: A Natural Fit in the Arizona Constitution* 3, GOLDWATER INST. POL’Y BRIEF (2005).

revenues, adjusted by growth in population plus inflation.³⁰⁴ 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 taxing and spending programs to special districts to avoid expenditure limitations—which may explain the tripling of special districts in Arizona since 1980.³⁰⁵

In 2005, for example, Maricopa County spun off its hospital system to a newly-created special health care district.³⁰⁶ With the stroke of an accountant's pen, the county shifted what was then \$400 million in annual spending off its books and onto those of the new special district. Maricopa County quickly took advantage of that new-found money with hundreds of millions in fresh spending.³⁰⁷ Meanwhile, the County's newborn special district toddled along, levying more than \$40 million in new property taxes and spending more than \$400 million in its first fiscal year.³⁰⁸

Since then, Maricopa County and this district have saddled county taxpayers with more than \$150 million in new spending and taxes that would have otherwise been blocked by the state constitution's spending and property tax caps.³⁰⁹ It is doubtful that voters had any idea this would result when they approved the creation of the "Maricopa County Special Health Care District."

Special districts are the municipal equivalent of Enron partnerships. They have benign sounding names like "health care district," "water

³⁰⁴ ARIZ. CONST. art. 9, § 20.

³⁰⁵ See Nick Dranias, *Stop the Special District Shell Game*, GOLDWATER INST. DAILY EMAIL, June 18, 2009, <http://www.goldwaterinstitute.org/article/3164>.

³⁰⁶ State of Arizona Office of the Auditor General, *Special Health Care District to Take Over Medical Center's Operations*, MARICOPA COUNTY MEDICAL CENTER, June 30, 2004, http://www.auditorgen.state.az.us/Reports/Counties/Maricopa/Financial_Audits/Medical_Center/Financial_Audit_June_30_2004/Maricopa_County_Medical_Center_June_30_2004_Highlights-Financial_Audit.pdf.

³⁰⁷ DEBRA K. DAVENPORT, EXPENDITURE LIMITATION REPORT (2005), http://www.maricopa.gov/Finance/PDF/Financial%20Reporting/Publications/elr/Maricopa_County_June_30_2005_ELR.pdf.

³⁰⁸ Information on Maricopa County Special Health Care District, <http://www.mihs.org/board/GeneralInformation.html> (last visited Apr. 6, 2010).

³⁰⁹ DEBRA K. DAVENPORT, EXPENDITURE LIMITATION REPORT (2008), http://www.maricopa.gov/finance/PDF/Financial%20Reporting/Publications/elr/Maricopa_County_June_30_2008_ELR.pdf.

district,” and “stadium district,” all of which disarm voters when they appear on the ballot. But once formed, numerous special districts can overlap, making them exceedingly difficult for ordinary citizens to track, much less to hold politically accountable. Special districts operate below the political radar, while wielding broad taxing and spending authority.

It is no accident that the number of special districts in Arizona has tripled from around 100 in 1980 to more than 300 in 2009. When tax and spending caps were imposed in the early 1980s, those caps excluded most special districts. As a result, cities and counties remained free to avoid hard budgetary choices by spinning off expensive programs into special districts.

Fiscal responsibility will return to local government only when this shell game is stopped. The best solution is to eliminate the incentive to indulge unsustainable spending through the device of special districts. This requires closing the special district loophole in the state constitution’s spending and taxing caps.

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.³¹⁰ In essence, a formula equivalent to that of Colorado’s statewide Taxpayer Bill of Rights (TABOR) should be adopted for Arizona’s local governments.³¹¹ And 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.³¹² Colorado’s TABOR reform, for example, is estimated to have reduced statewide government spending by \$3.2 billion through 2003.³¹³ 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.³¹⁴ 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

³¹⁰ Clint Bolick, *A Taxpayer’s Bill of Rights*, in GOLDWATER INST. POL’Y REP. at 3 (No. 215, 2005).

³¹¹ New, *supra* note 40, at 4, 6.

³¹² *Id.*

³¹³ *Id.* at 6.

³¹⁴ Matthew Ladner, *How to Win the War on Poverty*, in GOLDWATER POL’Y REP. (No. 215, 2006), <http://www.goldwaterinstitute.org/Common/Img/PovertyStudy.pdf>.

extent to which government crowds out the extraordinarily more productive private sector. And 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.³¹⁵ 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. By forcing politicians to choose between spending on frivolous popular programs and critical government services, critics contend that a political dynamic is created that results in the overfunding of popular programs.³¹⁶ 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.

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."³¹⁷ 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 CPI, 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 ten

³¹⁵ Cf. New, *supra* note 40.

³¹⁶ TOM BROWN, THE EFFECTS OF TABOR ON MUNICIPAL REVENUES AND SPENDING IN COLORADO 2, 3 (2001).

³¹⁷ Andrew Reschovsky, *The Taxpayer Protection Amendment: A Preliminary Analysis 2* (La Follette Sch. of Pub. Affairs at the Univ. of Wisconsin-Madison, Working Paper No. 2006-003, 2006), <http://www.lafollette.wisc.edu/publications/workingpapers/reschovsky2006-003.pdf>.

percent, but the general CPI was five percent, TABOR language could provide that expenditures on policing may increase by ten 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 ten 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," and California saw a "Forty-eight percent increase in spending during Governor Gray Davis' first three years in office."³¹⁸ 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.

F. 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.*³¹⁹

Supreme Court Chief Justice Roger Taney³²⁰

³¹⁸ Michael New, *Reforming TABOR in Colorado*, CATO INST., May 2, 2004, http://www.cato.org/pub_display.php?pub_id=2637.

³¹⁹ CARL BRENT SWISHER, ROGER B. TANEY 366-67 (1935) (quoting memorandum from Chief Justice Roger Taney to President Andrew Jackson (June 20, 1836)).

³²⁰ Ironically, Taney is the author of the *Dred Scott* decision. Justice Taney's cognitive dissonance underscores the need for a clear rule against governmental favoritism.

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 that is the essence of the rule of law, but it promotes a predatory society—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.

A few years ago, through a complex deal involving the rebate of anticipated sales taxes, shopping mall developer Klutznik Company was promised nearly \$100 million from Phoenix to build another mega-mall known as City North. This outraged local entrepreneur Meyer Turken. Without a single government handout, Meyer had spent decades building his property maintenance company from nothing to over 40 employees. Meyer believed in fair play, not favoritism, so he was not about to let the City tax away the fruits of his labor just to give his earnings to an anointed private developer. Fortunately, Meyer’s outrage was transformed into righteous action, when the Goldwater Institute took his case, eventually losing the battle but winning the war against subsidies in the Arizona Supreme Court.³²¹

The court ultimately upheld the subsidy to City North because it considered prior precedent to be unclear—but in doing so, the court established principles that could strike down the vast majority of subsidies from the time of the decision forward.³²²

Still, the battle goes on. Mesa is still rushing to build a Cubs spring training stadium, convention center and hotel with tens of millions of dollars of government financing. Only fundamental local reform can stop the unfair and irresponsible policy of taxing productive businesses and successful entrepreneurs in order to subsidize grandiose projects the market does not demand and cannot independently sustain.

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

³²¹ Turken v. Gorden, 224 P.3d 158, 158 (Ariz. 2010).

³²² *Id.* (“[a]lthough we conclude that the agreement quite likely violates the Gift Clause, because language in our previous opinions could well have led the City to conclude that the agreement was constitutional, we today clarify our Gift Clause jurisprudence and apply our decision prospectively only”).

immunity.”³²³ 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.”³²⁴ And as discussed previously, Article IV, Section 19 prohibits “special laws.”³²⁵ 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.³²⁶

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.”³²⁷ 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”³²⁸ Taken together—especially in light of the recent City North decision—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. Therefore, 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,

³²³ ARIZ. CONST. art. II, § 9.

³²⁴ *Id.* § 13.

³²⁵ *Id.* § 19.

³²⁶ Mark Brnovich, *How the Arizona Constitution Protects Taxpayers: The Importance of Safeguarding Article IX*, in GOLDWATER INST. POL’Y REP., at 8, 11 (No. 196, 2004).

³²⁷ ARIZ. CONST. art. IX, § 1.

³²⁸ *Id.* § 7.

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.

G. The Right to Accountability

*I [would] rather live under severe laws than under any man's discretion.*³²⁹

Sir Edward Coke

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.

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."³³⁰ And as an unintended consequence of the constitutional bar on patronage hiring, local bureaucrats are shielded from discharge by local

³²⁹ Sir Edward Coke, in 3 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 1209 (Steve Sheppard ed., 2003).

³³⁰ Ronald N. Johnson, *Courts, A Protected Bureaucracy, and Reinventing Government*, 37 ARIZ. L. REV. 791, 792 (1995).

elected officials who may have been specifically elected to terminate them.³³¹ As a result, ordinary citizens are forced to submit to unaccountable local bureaucratic decision-making. And, if citizens choose to fight back, like developer Mike Goodman, they can spend hundreds of thousands of dollars in attorneys' fees simply to exercise their basic rights peaceably and productively.

1. Three Strikes and You're Out

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 an enforceable "Three Strikes and You're Out" rule. Specifically, the law should provide that non-elected 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 detrimental reliance 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.³³² In other words, a bureaucrat should be terminated if three violations of law and/or instances of detrimental reliance would not have happened "but for" his actions or omissions. Any bureaucrat who mistakenly issued building permits three or

³³¹ *Id.* at 822.

³³² 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 non-union 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.

more times to the substantial detriment of any future Mike Goodman would lose his job.

The resulting incentive structure would likely prevent public officials from engaging in arbitrary enforcement behavior or refusing to discharge their obligations under the Local Liberty Charter. Moreover, 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, which are incapable of consistent enforcement, to the attention of the political branches of government. And 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 hopes that difficult questions would go away. Lastly, implementing the right to accountability will no doubt afford local governments with clear authority to trim their workforces of employees who fail to uphold the highest standards of public conduct.

H. 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 demanding 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.

1. Kick the Federal Funding Habit

In fiscal year 2005–2006, Arizona local governments received just over \$1.2 billion in federal funding.³³³ 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.

³³³ U.S. CENSUS BUREAU, TABLE 1: STATE AND LOCAL GOVERNMENT FINANCES BY LEVEL OF GOVERNMENT AND BY STATE (2005 & 2006), http://www.census.gov/govs/estimate/0603azsl_1.html.

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.³³⁴ 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.³³⁵ 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 are attached.

2. Enforce Federalism by Demanding Local Coordination

Former Assistant U.S. Attorney Fred Kelly Grant, president of American Stewards of Liberty, 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.³³⁶

³³⁴ See generally PIETRO S. NIVOLA, TENSE COMMANDMENTS, FEDERAL PRESCRIPTIONS AND CITY PROBLEMS 95-97 (2002).

³³⁵ Benjamin Barr, *Arizona’s Struggle for Sovereignty: The Consequences of Federal Mandates*, in GOLDWATER INST., at 5 (Pol’y Rep. No. 227, 2008).

³³⁶ Federal Land Policy and Management Act, 43 U.S.C. § 1712(c)(9) (2000); 43 C.F.R. § 1610.3-1 (regulations implementing Federal Land Policy and Management Act); Clean Air

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 United States Bureau of Land Management to release wild horses that were possibly infected with equine infectious anemia onto public and private lands in Utah.³³⁷

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.³³⁸ For example, the Bureau of Land Management was forced 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.³³⁹ Furthermore, 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.³⁴⁰

In view of such success, implementing the right to genuine local sovereignty should involve adopting Grant's coordination approach.

Act, 42 U.S.C. §§ 7402(a), 7421 (2000); National Environmental Policy Act, 42 U.S.C. § 4331(b)(1) (2000); 40 C.F.R. § 1506.2(c) (regulations implementing National Environmental Policy Act); Clean Water Act, 33 U.S.C. §§ 1251(g), 1252(a) (2008); National Forest Management Act, 16 U.S.C. § 1604(a) (2009); Endangered Species Act, 16 U.S.C. § 1533(b)(1)(A) (2009); Wild and Scenic Act, 16 U.S.C. §§ 1271(c), 1282(b)(1) (2009); Soil and Water Resources Conservation, 16 U.S.C. § 2003(b) (2003).

³³⁷ *Uintah County v. Norton*, No. 2:00-CV-0482J (D.C. Utah, Sept. 21, 2001).

³³⁸ Fred Kelly Grant, *Successes of the County Planning Process in Owyhee County*, <http://www.stewards.us/CoordinatingCounties/cc-owyheesuccess.html> (last visited Apr. 6, 2010).

³³⁹ *Id.*

³⁴⁰ *Id.*

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.

I. *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 Madison³⁴¹

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.”³⁴² Transparency is perhaps the single most important feature of any government, both to prevent corruption but 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 implementations require 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.

1. 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.³⁴³ Moreover, the Better Government Association and National Freedom of

³⁴¹ James Madison, *Epilogue* to THE FOUNDERS’ CONSTITUTION, SECURING THE PUBLIC (The University of Chicago Press ed., 1987) (1822).

³⁴² David Cuillier, Conversation at First Amendment Society Meeting (July 10, 2008).

³⁴³ Citizen Access Project, http://www.citizenaccess.org/summary_by_state.html (last visited Feb. 28, 2010) (select “Arizona” from drop-down box).

Information Coalition gave Arizona's public records request responsiveness an "F" rating.³⁴⁴

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 no 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.

2. 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, and 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."³⁴⁵ 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.

3. 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

³⁴⁴ National Freedom of Information Coalition, Results and Criteria of BGA/NFOIC Survey, <http://www.nfoic.org/uploads/results1.pdf> (last visited Jan. 20, 2009).

³⁴⁵ Enumerated Powers Act, H.R. 1359, 110th Cong. (2007) would require Congress to specify the source of authority under the U.S. Constitution for the enactment of laws, and for other purposes.

difficult for ordinary citizens.³⁴⁶ 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.³⁴⁷

4. 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.³⁴⁸ This resulted in the exposure of graft, waste, and corruption on a massive scale. Similarly, the Local Liberty Charter should likewise require all local government finances to be publicly posted online in real time (as the revenues are received and the checks are cut) on an easily navigable website, in those jurisdictions where transactions are automatically logged in electronic bookkeeping software.³⁴⁹ In those jurisdictions where financial transactions are not automatically logged, on the other hand, then government finances should be accessible online based on not fewer than quarterly independent audits.³⁵⁰

5. 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

³⁴⁶ Fred Cutler & J. Scott Matthews, *Guesswork? Municipal Electoral Behaviour in a Federal Context: Vancouver 2003*, Remarks at the Meeting of the Canadian Political Science Association 13 (May 2003).

³⁴⁷ Byron Schlomach, *Piercing the Fog: A Call for Greater Transparency in State and Local Government*, in GOLDWATER INST. POL'Y REP., at 9 (No. 226, 2008).

³⁴⁸ Claudio Ferraz & Frederico Finan, *Electoral Accountability and Corruption in Local Governments: Evidence from Audit Reports*, 13, 18, 20 (INST. FOR THE STUDY OF LAB. DISC. No. 2843, 2007).

³⁴⁹ Schlomach, *supra* note 347, at 5-6.

³⁵⁰ Sunshine Review, *Transparency Checklist* (Oct. 21, 2009), http://sunshinereview.org/index.php/Ten-Point_Transparency_Checklist.

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 and offensive posture 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.

6. 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.³⁵¹ 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 competition³⁵²—should be online and updated as close to a real-time basis as is feasible.³⁵³

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. 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.³⁵⁴

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

³⁵¹ See Jonathan Walters, *Martin O'Malley Ran Baltimore by the Numbers, Can He Make It Work for All of Maryland?*, GOVERNING, Oct. 1, 2008, <http://www.governing.com/performance/performance.aspx?id=5826>.

³⁵² MCMAHON, MOORE & SEGAL, *supra* note 285, at 8.

³⁵³ Schlomach, *supra* note 347, at 8-9.

³⁵⁴ City of New York, Citywide Performance Reporting Tool, <http://www.nyc.gov/html/ops/cpr/html/home/home.shtml> (last visited Feb. 28, 2010).

delivery, and a decreased incidence of bribery.”³⁵⁵ Arizonans should have at least as much transparency in government as the citizens of Bangalore.

J. The Right to Reboot Local Government

Local politics can become wedded to bad government. The proper response is not necessarily to vote with one’s feet 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.³⁵⁶ A better response is to ensure that robust electoral tools exist to “reboot” local government gone wrong.

1. 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. That is why 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.³⁵⁷

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 as far back as 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.³⁵⁸ Moreover, the State of Nevada has long listed a non-binding NOTA option on its statewide office ballots.³⁵⁹ And in 1998, Puerto Rico included a NOTA option on a referendum for statehood—

³⁵⁵ Gray & Kaufmann, *supra* note 69, at 10.

³⁵⁶ STUTI KHEMANI, DEV. RES. GROUP, DECENTRALIZATION AND ACCOUNTABILITY: ARE VOTERS MORE VIGILANT IN LOCAL VS. NATIONAL ELECTIONS? 15 (1st 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’”).

³⁵⁷ Voters for None of the Above, About Voters for None of the Above (June 22, 2009), <http://www.nota.org/aboutvnota.htm>.

³⁵⁸ Mass. S.B. 456, H.B. 706 (2007).

³⁵⁹ NEV. REV. STAT. § 293.269 (2008).

which received more votes than any other option.³⁶⁰ These examples illustrate the feasibility of implementing a NOTA voting option. Nowhere would it make more sense to do so than in local governmental elections.

2. Require Dissolution of Unaccountable Special Districts

While the number of cities, towns, and counties has remained relatively steady, the number of “special districts” in Arizona has increased nearly tenfold since 1952, from around 30 to 301.³⁶¹ 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 appear to have been created to evade a systematic effort by Arizonans to impose fiscal discipline on local government.³⁶² 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. And yet, the few available studies indicate that the electorate generally does not meaningfully participate in special district elections, or even know what special districts do.³⁶³ This is dangerous because studies show local politicians behave badly when they do not fear electoral consequences.³⁶⁴ The Local Liberty Charter, therefore, proposes a rule that if fewer than ten percent of the qualified electorate votes in a special district election, the results should be discarded and a special election should be held. And if this phenomenon is repeated during the special election, then the district should be dissolved and its functions transferred to its organizing political entity.

3. Establish Objective Triggers for Mandatory Bankruptcy Filing

The City of Yuma’s issuance of “emergency” swimming pool complex bonding may foreshadow the future of gamesmanship in municipal finance, which is why Arizonans need a financial fail-safe reform to enable them to stop unsustainable growth and reassert their control over local government.

³⁶⁰ Mireya Navarro, *Looking Beyond Vote in Puerto Rico After ‘None of the Above’ is Top Choice*, N.Y. TIMES, Dec. 15, 1998, <http://www.nytimes.com/1998/12/15/us/looking-beyond-vote-in-puerto-rico-after-none-of-the-above-is-top-choice.html?pagewanted=1>.

³⁶¹ CENSUS, 2002 GOVERNMENTS, *supra* note 2.

³⁶² CENSUS, PUBLIC SCHOOLS, *supra* note 2.

³⁶³ Brennan, *supra* note 70, at 16.

³⁶⁴ Ferraz & Finan, *supra* note 348, at 27.

Michigan's "Local Government Fiscal Responsibility Act" of 1990 is the inspiration for such crucial reform.³⁶⁵ Michigan's Act 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.³⁶⁶ 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.³⁶⁷ Most significantly, the Act specifically authorizes citizens to request the appointment of an EFM through the filing of a petition

containing 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.³⁶⁸

With the bursting of the real estate bubble, Arizonans may soon be facing an economic environment similar to that faced by residents of Michigan in the 1970s and 80s.³⁶⁹ Fortunately, Michigan's Local Government Fiscal Responsibility Act establishes the feasibility of empowering citizens and responsible public officials to restructure local governmental finances gone wild. But there is not yet a need to duplicate the comprehensive statutory framework of Michigan's Local Government Fiscal Responsibility Act. This is because an equally-powerful, and long-

³⁶⁵ See MICH. COMP. LAWS. §§ 141.1201, *et seq.* (2008).

³⁶⁶ See, e.g., MICH. COMP. LAWS § 41.1a (2008) (providing powers of statutory township overridden by EFM Act); MICH. COMP. LAWS § 42.1a (2008) (providing powers of charter townships overridden by EFM Act); MICH. COMP. LAWS § 45.501a (2008) (providing powers of charter county overridden by EFM Act); MICH. COMP. LAWS § 46.1a (2008) (providing statutory powers of county boards of commissioners overridden by EFM Act); MICH. COMP. LAWS § 61.1c (2008) (providing statutory powers of villages overridden by EFM Act); MICH. COMP. LAWS § 81.1d (2008) (providing statutory powers of Fourth Class Cities overridden by EFM Act); MICH. COMP. LAWS § 117.1b (2008) (providing charter cities overridden by EFM Act); MICH. COMP. LAWS § 124.426 (2008) (providing that powers of Metropolitan Transport Agency overridden by EFM Act).

³⁶⁷ MICH. COMP. LAWS § 141.1212(1).

³⁶⁸ MICH. COMP. LAWS § 141.1212(1)(c).

³⁶⁹ Patricia Paruch, *Government Law*, 53 WAYNE L. REV. 435, 448 (2007).

established federal law, which can accomplish the same thing, already exists—Chapter 9 of the United States Bankruptcy Code.³⁷⁰

Chapter 9 has long applied to subdivisions of states, including local governments. It enables a local government to renegotiate obligations, restructure finances, to cease services, and contract-out departments.³⁷¹ 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 certain triggering events evidencing municipal insolvency occur. 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. And when this right is coupled with real-time financial transparency, knowledge would indeed be power to the people—because if public officials stick their heads in the sand despite triggering events that require bankruptcy filing, the citizenry could enforce the obligation directly and expeditiously through the court remedy of mandamus.

VII. 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.*³⁷²

Ronald Reagan

³⁷⁰ 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 re Mount Carbon Metro. Dist.*, 242 B.R. 18, 32 (D. Colo. 1999) (citing *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513 (1936)). The current legislation, 11 U.S.C. § 941, restricts Chapter 9 to voluntary declarations of bankruptcy that are only available when the municipal government is insolvent. *Mount Carbon*, 242 B.R. at 32.

³⁷¹ Miller, *supra* note 270.

³⁷² BRAD LIPS & DAN LIPS, *THE REAGAN VISION* 53 (2004).

The final questions are: Where should the revolution in local government take place? Who could spark it—legislators or the public? What level of government should be the focus for enacting the Local Liberty Charter? What methods could be used? The answer is all freedom lovers, inside and outside of government, at all levels and by all lawful means. 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.”³⁷³ 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 laws cannot bind future legislatures, such reform cannot be done 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 the state’s or federal government’s lawmaking power.

A. *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.³⁷⁴ 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.³⁷⁵ Based on this hierarchy, the passage of a statewide law is potentially the most potent way to secure reform.³⁷⁶ Moreover, it is the *only* way to reform counties

³⁷³ MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE* 272 (1980).

³⁷⁴ ARIZ. CONST. art. IV, pt. 1, § 1, cls. 2, 4, & 7; ARIZ. REV. STAT. ANN. §§ 19-123, 19-124, 19-141 (2008).

³⁷⁵ *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907).

³⁷⁶ 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 non-proprietary functions by statute may need to have an exception for “industrial pursuits” because the Arizona Constitution, Article II, Section 34, grants municipal corporations “the right to engage in industrial pursuits.”

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.³⁷⁷ 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 above, requires statewide legislative reform. Furthermore, the Arizona Supreme Court has emphasized that “[w]hen 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.”³⁷⁸ 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.³⁷⁹ 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.” The single subject 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.³⁸⁰ The test for compliance with the single subject rule is

³⁷⁷ Serkin, *supra* note 139, at 905, 907.

³⁷⁸ *City of Scottsdale v. Scottsdale Associated Merch., Inc.*, 583 P.2d 891, 892 (Ariz. 1978).

³⁷⁹ *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”).

³⁸⁰ *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 art. 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”).

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.”³⁸¹ The Local Liberty Charter should pass this test because each right discussed above buttresses and reinforces the other in counteracting the problems of faction and suboptimum voting incentives, and in achieving the goal of restructuring local government for freedom and responsibility.³⁸² Accordingly, the Local Liberty Charter, if enacted in a single statewide law, should survive single subject rule scrutiny. Nevertheless, the uncertainties of litigation may make it desirable to consider framing each right in independent statewide legislation—and to concurrently pursue local reform.

B. 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.³⁸³

³⁸¹ Kerby v. Luhrs, 36 P.2d 549, 554 (Ariz. 1934).

³⁸² 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.

³⁸³ *Constitutional Municipal Home Rule in Arizona* 33-35 (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 (2005); *see also* LEAGUE OF ARIZONA CITIES AND TOWNS, SO YOU GOT ELECTED . . . SO NOW WHAT? 23-24 (2004).

The Arizona Constitution lays out a process that authorizes charter organization and amendment for cities and counties.³⁸⁴ The local ballot initiative process can be used both to initiate the process of organizing city charters and to amend them directly.³⁸⁵ Organizing a new charter or amending an existing charter to include a Local Liberty Charter could effectively bind future local governmental action in the form of ordinances, resolutions, or executive decisions.³⁸⁶ Moreover, the scope of permissible charter amendments or new charters 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 and replacing zoning laws with restrictive covenants).³⁸⁷ This is because the grant of charter powers originates directly from the state

³⁸⁴ ARIZ. CONST. art. XIII, pt. 2, §§ 2, 3.

³⁸⁵ ARIZ. CONST. art. IV, pt. 1, § 1; art. 22, § 14; ARIZ. REV. STAT. ANN. §§ 19-123, 19-124, 19-143 (2008); LEAGUE OF ARIZONA CITIES AND TOWNS, EXPLORING CHARTER GOVERNMENT FOR YOUR CITY 1-2 (2000) (stating “[i]f 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”). Notably, there is a difference in opinion as to whether initiative petitions for charter amendments must be signed by fifteen percent of the qualified electorate, as is the general rule in local initiatives, ARIZ. CONST. art. IV, pt. 1, § 1(8), or twenty-five percent, as is the requirement for a petition to create a board of freeholders to organize a charter by citizen’s petition. ARIZ. CONST., art. XIII, pt. 2, § 2. The City of Prescott, for example, has taken the position that local initiatives proposing charter amendments must also obtain signatures from twenty-five percent of the qualified electorate. June 8, 2009 Letter from Prescott City Clerk (in Author’s possession). But most other cities recognize local initiatives proposing charter amendments need only obtain signatures from fifteen percent of the qualified electorate.

³⁸⁶ LEAGUE OF ARIZONA CITIES AND TOWNS, EXPLORING CHARTER GOVERNMENT FOR YOUR CITY 33 (2000).

³⁸⁷ 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*, 290 N.E.2d 546, 549, 551 (Ohio 1972) (“voters’ adoption of city charter amendment setting salaries of firefighters and police officers was exercise of legislative power,” and “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, 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 (Ariz. Ct. App. 1987), certainly includes the lesser power to offer the option of binding ADR for disputes over local quasi-judicial and administrative decisions.

constitution, which gives charter cities and counties the power to legislate on every subject not inconsistent with state statutory law.³⁸⁸

VIII. 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.*³⁸⁹

Ronald Reagan

The local regulatory hammer has become a magic wand for irresponsibly growing government's size, scope, and intrusiveness. At the same time, due to 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.

In response to local governments gone wild, the Local Liberty Charter declares that there are bounds beyond which government cannot go and responsibilities it cannot ignore.³⁹⁰ 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."³⁹¹ And it systematically advances a legal and policy framework to focus local public officials on that proclamation. The Local Liberty Charter thereby lays the foundation for shining cities of freedom and responsibility.

³⁸⁸ State v. Mercurio, 736 P.2d 819 (Ariz. Ct. App. 1987).

³⁸⁹ LIPS ET AL., *supra* note 372, at 73.

³⁹⁰ Timothy Sandefur, *Liberal Originalism: A Past For The Future*, 27 HARV. J.L. & PUB. POL'Y 489, 527-28 (2004) (arguing "there are things that are simply beyond the legitimate reach of any government").

³⁹¹ SIEGAN, *supra* note 139, at 7.

APPENDIX: PROPOSED LEGISLATION FOR ARIZONA TO ADOPT THE
LOCAL LIBERTY CHARTER

AN ACT

AMENDING TITLE 9, CHAPTER 4, ARTICLE 8, ARIZONA REVISED STATUTES, BY ADDING SECTION 9-501; RELATING TO AUTHORITY FOR MUNICIPALITIES TO ADOPT MODEL LOCAL LIBERTY CHARTER.

Be it enacted by the Legislature of the State of Arizona:

Section 1. Title 9, chapter 4, article 8, Arizona Revised Statutes, is amended by adding section 9-501, to read:

**ARIZONA REVISED STATUTES § 9-501 RELATING TO
AUTHORITY FOR MUNICIPALITIES TO ADOPT MODEL LOCAL
LIBERTY CHARTER.**

9-501. Authority to Adopt Model Local Liberty Charter

A. Findings and Purpose. The Legislature finds that the taxing, spending, regulatory, eminent domain, planning and zoning authority granted to municipalities may encourage the exercise of local governmental power that is threatening to genuine public health, safety and welfare, frustrating to economic development, inimical to fiscal responsibility, as well as overly centralized, bureaucratic, intrusive, and politicized. The Legislature further finds that public health, safety, and welfare justifies giving municipalities, local elected officials and citizens the option of adopting a model of limited local governance that is founded upon popular sovereignty, devoted to securing rightful liberty and geared to preventing misuse or abuse of governmental power. Accordingly, the Legislature herewith intends to grant municipalities the legal authority to adopt the “Model Local Liberty Charter” consisting of substantial and lasting limitations on their taxing, spending, regulatory, eminent domain, planning, and zoning authorities, which collectively are intended to maximize individual liberty and municipal fiscal responsibility.

B. Relationship to Contrary or Inconsistent Laws. The limitations that may be adopted in accordance with this section are intended to supersede and

control any contrary or inconsistent law; including, but not limited to, all contrary or inconsistent state statutes, administrative regulations, intergovernmental agreements, municipal charters, ordinances, resolutions or local rules, which have been previously enacted or promulgated by the State of Arizona, any state agency, any political subdivision of the state, the adopting municipality or any special district (as defined by Ariz. Rev. Stat. § 48-271.B), which would otherwise apply to persons, properties, or businesses within the jurisdiction of the adopting municipality. The specification of laws modified or displaced by this section are included only for purposes of convenience and illustration, and are not intended to limit the generality of the foregoing.

C. **Vested Rights Created.** A vested right under state law in the enforcement of the Model Local Liberty Charter shall be enjoyed by any person residing, owning property or operating businesses within the jurisdiction of the adopting municipality at the time the Model Local Liberty Charter is adopted and at any time thereafter. In the event of dissolution, disincorporation, or annexation of all or any part of the adopting municipality, the foregoing vested right shall be binding on and enforceable against any successor political subdivision of the state for a period of 20 years.

D. **Mode of Exercise.** For unincorporated municipalities, as well as municipalities incorporated under Ariz. Rev. Stat. §§ 9-101, et seq., the Model Local Liberty Charter may be adopted through municipal legislation or local initiative, which shall state in reasonably intelligible terms that the municipality is herewith adopting the Model Local Liberty Charter. For charter municipalities organized under Ariz. Rev. Stat. §§ 9-284, et seq., the Model Local Liberty Charter may be adopted through charter amendment as provided by law, stating in reasonably intelligible terms that the municipality is herewith proposing to adopt the Model Local Liberty Charter as a charter amendment. The Model Local Liberty Charter shall be effective within the jurisdiction of the adopting municipality upon adoption.

E. **Model Local Liberty Charter**

1. **The Right to a Presumption of Liberty.** The people have the right to be presumed free to act peaceably and honestly without legal restraint.

(a) **Guarantee of Timely Regulatory Processing.** At the outset of each fiscal year, the adopting municipality's chief executive officer shall determine and publish online in a conveniently accessible and searchable,

user-friendly public website format processing deadlines for all completed applications requesting regulatory approval of any kind; including, but not limited to, any regulations enacted or promulgated pursuant to Ariz. Rev. Stat. §§ 9-231, 9-234, 9-236, 9-240, 9-274, 9-276, 9-303, 9-441.02, 9-461, 9-461.05, 9-461.06, 9-461.07, 9-461.08, 9-461.10, 9-461.11, 9-461.12, 9-462.01, 9-462.03, 9-462.05, 9-462.06, 9-463.01, 9-463.06, 9-467, 9-468, 9-499.01, 9-500.05, 9-500.11, 9-806, and 9-1301. Deadlines shall be set for the shortest feasible period of time given the nature of the regulatory approval sought and the resources available to the municipality. No deadline shall be longer than one hundred twenty (120) days. The failure of the municipality to set a deadline as required herein or otherwise to approve or deny any application seeking regulatory approval within the published deadline shall result in the affected application being deemed approved by the municipality as of the date of submission. The municipality shall not seek waiver of any deadline or any such automatic approval from any applicant. The municipality is prohibited from claiming that an application for regulatory approval is incomplete unless it gives notice of the same to the applicant no later than the midpoint of the applicable processing deadline. The denial of any application for regulatory approval of any kind shall be timely furnished to the applicant in writing and it shall include a written disclosure of the disposition of all applications for approval submitted to the municipality under the same regulatory provisions within the immediately preceding one hundred eighty (180) days.

(b) Prohibition on Needless Regulation. The adopting municipality shall not impose regulation 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”) pursuant to Ariz. Rev. Stat. §§ 9-231, 9-234, 9-236, 9-240, 9-274, 9-276, 9-303, 9-441.02, 9-461, 9-461.05, 9-461.06, 9-461.07, 9-461.08, 9-461.10, 9-461.11, 9-461.12, 9-462.01, 9-462.03, 9-462.05, 9-462.06, 9-463.01, 9-463.06, 9-467, 9-468, 9-499.01, 9-500.05, 9-500.11, 9-806 and 9-1301, or any similar law presently existing or hereinafter enacted or promulgated, unless: (a) it is within the power of the adopting municipality to regulate the targeted activity or condition; (b) 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; (c) 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 (d) existing market forces, common law, ordinances, and statutes are

not sufficient to reasonably reduce the threat posed to public health, safety, or general welfare by the targeted activity or condition.

(c) **Least Restrictive Mode of Regulation Required.** If the adopting municipality finds regulation of a peaceful activity or condition 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, consistent with the following guidelines: (a) the regulation may furnish additional or augmented civil remedies to render common law or statutory civil actions more effective; (b) only 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; (c) only 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; (d) only 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; and (e) only 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. A given regulation reasonably reduces the threat posed to public health, safety, or general welfare only if: (a) the regulation is reasonably expected to substantially reduce or eliminate the threat it targets; (b) the regulation's benefits are roughly proportional to its short, medium, and long term costs; and (c) enforcement of the regulation is capable of performance-benchmarking.

(d) **Sunrise and Sunset Review Required.** On and after the effective date of adopting the Model Local Liberty Charter, proposed regulations of peaceful activities or conditions shall not be considered for enactment or promulgation unless the adopting municipality first finds that the proposed regulation is permissible under this subsection after a public hearing. Additionally, all existing legislation and administrative rules (and policies) regulating peaceful activities or conditions, which shall have been enacted or promulgated by the adopting municipality, shall expire and be regarded as repealed either on their specified expiration date or, if none, the latter of five years after the effective date of adopting the Local Liberty Charter or five years from their effective date, unless extended following a public

hearing at which adopting municipality finds that the regulation has fulfilled the criteria in this subsection.

(e) **Meaningful Judicial Review Required.** If a regulation is challenged on the basis that it was enacted, promulgated, or extended without first complying with this subsection, the court entertaining such challenge shall rule on the merits of the challenge without deference to any legislative, administrative, or executive finding concerning the regulation.

2. **The Right to Property.** The people have the right to be free to use and develop their properties as they see fit so long as they do not violate the rights of others.

(a) **Vested Rights Upon Purchase.** The municipality shall exercise its zoning and land use regulatory authority as if all lawful uses of real property existing at the time of such exercise are vested property interests of the owner of record.

(b) **Prohibition on Evading Proposition 207.** Advance waivers of claims and covenants not to sue under Proposition 207 (Ariz. Rev. Stat. § 12-1134), or the equivalent, shall not be sought by the municipality from any person as a condition of approving or processing any application seeking regulatory approval. And no covenant not to sue or advance waiver of claims under Proposition 207 (Ariz. Rev. Stat. § 12-1134), or the equivalent, shall be enforceable by the municipality without proof beyond a reasonable doubt that it was supported by an exchange of valuable consideration unrelated to the exercise or forbearance of any regulatory authority.

(c) **Limitations on Power of Eminent Domain.** When exercising its power of eminent domain, the municipality shall pay sufficient just compensation to place those having a property interest in the condemned property in as good an economic position as they would have been in, had the power of eminent domain not been exercised; accordingly, as components of just compensation, the municipality shall pay those having a property interest in the condemned property: (a) at least 110% of the property interest's fair market value; (b) all reasonable relocation expenses proximately caused or likely to be incurred because of the municipality's exercise of eminent domain; (c) all losses in personal or business income proximately caused or likely to be incurred because of the municipality's exercise of eminent domain; (d) all reasonable attorneys and expert fees and costs incurred by the property interest holder in the course of pre-litigation settlement

negotiations over the amount of just compensation; and (e) all litigation expenses incurred by the property interest holder, including reasonable attorneys and expert fees and costs, in the event a condemnation suit is filed and either: i) the suit is involuntarily dismissed or otherwise adjudicated unlawfully or unconstitutionally filed; or ii) the ultimate award of just compensation is 20% more than the municipality's initial offer.

(d) **Limitations on Impact Fees.** Notwithstanding Ariz. Rev. Stat. § 9-463.03 or any similar law, and in addition to any other limitation imposed by law, impact fees may only be imposed as a condition of permitting otherwise lawful real estate development if: (1) such new development requires the provision of new, augmented, or additional public facilities or services; and (2) the municipality's existing general tax revenues and generally imposed fees together with reasonably anticipated general tax revenues and generally imposed fees resulting from such new development are not sufficient to provide for or furnish such new, augmented, or additional public facilities or services.

(e) **Authority to Transition to Decentralized Land Use Regulation.** A municipality is herewith granted legal authority to designate all or a portion of the area within its jurisdiction for decentralized land use regulation and, with respect to such designated area, to abandon its planning and zoning authority under Ariz. Rev. Stat. §§ 9-461, 9-461.05, 9-461.06, 9-461.07, 9-461.08, 9-462.01, 9-462.03, 9-462.05, 9-462.06, or any similar statute or law, to unilaterally withdraw from any obligation to exercise planning or zoning authority under any intergovernmental agreement authorized by Ariz. Rev. Stat. §§ 9-461.11 or 9-461.12, or any similar statute or law, and to transition to decentralized land use regulation as provided in the following subsections:

(i) **Mode of Exercise.** The legal authority granted herein may be exercised through local municipal legislation or local initiative, which shall state in reasonably intelligible terms with respect to a clearly designated area within its jurisdiction that the municipality is abandoning its planning and zoning authority in perpetuity, withdrawing from any intergovernmental agreement obliging it to exercise such authority, and transitioning to decentralized land use regulation based on restrictive covenants and the common law of nuisance. The procedures established by general law governing local legislation or local initiatives shall be applicable to local legislation or local initiatives that propose transition to decentralized land use regulation. However, in addition to such procedures, the prior public notice required for any such proposed local law shall be at least as effective as the public notice

requirements applicable to municipal rezoning under Ariz. Rev. Stat. § 9-462.04.

(ii) Substance of Exercise. To effectively authorize the transition to decentralized land use regulation within the designated area based on restrictive covenants and the common law of nuisance, the local law shall reasonably detail two transitional implementation phases as follows:

(A) Phase One. Sunset Review of Existing Planning and Zoning Regulations.

1) Substantive Requirements. The local law shall require the municipality to modify or repeal (“sunset”) any land use restriction within the designated area, which stems from the municipality’s exercise of its planning or zoning authority and prohibits or conditionally restricts peaceful or the highest and best uses of private property, to allow those uses unless a preponderance of the evidence considered at a public sunset review hearing establishes: i) owners of properties located within 300 feet of the property in question reasonably and detrimentally relied upon the restriction in purchasing or improving their property and the fair market value of their property would be measurably and materially diminished by such modification or repeal; ii) the restriction is roughly proportional to the costs the restricted land use would otherwise impose on public infrastructure; or iii) the restriction is roughly proportional to that which would result from enforcing the common law of nuisance to protect health and safety.

2) Procedural Requirements to Sunset Existing Land Use Restrictions. Owners of private real property within the municipality’s designated area for decentralized land use regulation shall be given a reasonable opportunity after passage of the local law requiring transition to decentralized land use regulation to file sunset review applications with the municipality seeking modification or repeal of any land use restriction stemming from the municipality’s exercise of its planning or zoning authority, which prohibits or conditionally restricts the peaceful or highest and best uses of the owner’s private property. Applicants for sunset review shall be responsible for complying with public notice requirements applicable to the most analogous private rezoning application under Ariz. Rev. Stat. § 9-462.04. The local body responsible for rezoning shall then conduct a public hearing on each sunset review application to determine whether the challenged land use restriction must be modified or repealed under the previous subsection. All sunset review decisions shall be subject to administrative review without deference to the local body’s determination. The local law shall set

a reasonable deadline for interested parties to record final sunset review decisions against title to the affected real property; the failure to timely record such decisions shall be deemed the abandonment of any such sunset review application.

(B) Phase Two. Recordation of Zoning Map Applicable to Designated Area. Concurrently with the sunset review process, the local law shall authorize the municipality to record all or a portion of its zoning map, as it pertains to the designated area of decentralized land use regulation, in a format substantially equivalent to plats of subdivision, together with a printed statement of all restrictions on land uses entailed by the zoning map (which also specifies the objective factors, if any, established in the formerly governing zoning law allowing for modification of the restrictions of the specified zoning classifications by special exception, conditional use, variance or rezoning). Subsequently recorded sunset review decisions shall: a) refer to the document number of the recorded zoning map; b) be effective as of the date the zoning map is recorded; and c) shall be deemed to modify and supersede any contrary provision or classification of the zoning map and its accompanying statement. Upon recordation, the land use restrictions specified in the zoning map and related statement, as modified by recorded sunset review decisions, shall thereby become restrictive covenants against title to the burdened private properties specified in the zoning map, with the right to enforce such covenants presumptively running with title to all private properties within 300 feet.

1) Effect of Completion of Phases 1 and 2. The general law applicable to private restrictive covenants shall apply to restrictive covenants created by this process subject to two exceptions: a) the local law shall provide that owners of properties burdened by such restrictive covenants and their successors shall have standing to file a special action in any court of competent jurisdiction seeking a declaratory judgment granting a special exception, conditional use, variance, or rezoning under the objective factors of the previously governing zoning law; and b) in order to perfect the restrictive covenants established by this process against subsequent purchasers for value, the local law shall provide for a reasonable deadline by which property owners must record their enforcement rights as running with title to the benefitted properties and against title to all burdened properties by reference to the document number of the recorded zoning map; the failure to timely record such enforcement rights shall be deemed the abandonment of any related claim or right.

(iii) Effect of Exercise. A local law effectively exercising the legal authority granted herein shall have the effect of: a) granting owners and subsequent transferees of private real property located within the respective designated decentralized land use regulation area a vested property interest under state law in every land use not prohibited by the restrictive covenants on title generated by the transition to decentralized land use regulation or the common law of nuisance to protect health and safety; b) perpetually prohibiting the exercise of municipal planning and zoning powers directly or indirectly with respect to private real property located within the designated decentralized land use regulation area under Ariz. Rev. Stat. §§ 9-461, 9-461.05, 9-461.06, 9-461.07, 9-461.08, 9-462.01, 9-462.03, 9-462.05, 9-462.06, or similar statute or law; c) perpetually prohibiting the exercise of planning and zoning powers by any state agency, political subdivision of the state, special district or other local government within the designated decentralized land use regulation area that is similar to municipal planning and zoning powers under Ariz. Rev. Stat. §§ 9-461, 9-461.05, 9-461.06, 9-461.07, 9-461.08, 9-462.01, 9-462.03, 9-462.05, 9-462.06; d) perpetually prohibiting the municipality from exercising development moratorium authority in the designated decentralized land use regulation area under Ariz. Rev. Stat. § 9-403.06, or similar statute or law; and e) perpetually releasing the respective municipality from any obligation to exercise planning or zoning authority in the designated decentralized land use regulation area under any intergovernmental agreement authorized by Ariz. Rev. Stat. §§ 9-461.11 or 9-461.12, or similar statute or law.

3. The Right to Separation of Powers. The people have the right to be free from the undivided and unchecked combination of legislative, executive, and judicial authority in municipal government.

(a) Definitions. The powers of the municipality consist of the legislative (including the quasi-legislative), the executive (including the administrative), and the judicial (including the quasi-judicial). The legislative power of the municipality consists solely of the power to determine general public policy and to enact laws of general effect and uniform application (“general laws”). The executive power of the municipality consists solely of the power to administer and enforce general laws. The judicial power of the municipality consists solely of the power to adjudicate disputes or controversies concerning the appropriate application of general laws to specific persons and circumstances based on principles of law and equity.

(b) **Municipal Court Jurisdiction Over Judicial Action.** The Municipal Court of the adopting municipality, if any, shall have concurrent jurisdiction over any dispute or controversy arising whenever the legislative or executive departments of the municipality, or anyone employed, supervised, controlled or appointed by such branches (other than judicial officials and their employees), exercises or proposes to exercise the municipality's judicial power to determine the legal rights, privileges, or obligations of specific persons under general laws if any of the persons who are the subject of such action file a petition with the Court requesting the exercise of such jurisdiction and none of the persons who are the subject of such action have previously filed any other action relating to the same subject matter in a different venue. Proceedings conducted pursuant to such petition shall be in accordance with the rules of procedure generally applicable to Municipal Court proceedings or, if such rules have not been promulgated, then in accordance with the Arizona Rules of Civil Procedure. The Municipal Court shall have full power to adjudicate the dispute and issue appropriate legal or equitable remedies based on de novo consideration of the relevant law and facts. The decision of the Municipal Court relative to such disputes shall be final and appealable to the superior court of Maricopa County.

(c) **Cost-effective checks and balances through ADR.** If a municipality does not maintain a Municipal Court, the following checks and balances shall apply to the combination of legislative, executive, and judicial powers:

(i) **Exercise of Judicial Power by Legislative or Executive Departments.** Whenever the legislative or executive departments, and any councilmember, person, board, or commission employed, supervised, controlled, or appointed by such departments exercise or propose to exercise the municipality's judicial power, persons who are the subject of such action are entitled to compel the municipality to resolve any actual or potential controversy or dispute over such action through binding arbitration or adjudicative mediation by serving upon the municipality a written demand for binding arbitration or adjudicative mediation.

(ii) **Exercise of Executive Power by Legislative Department.** Whenever the legislative department, and any councilmember, person, board, or commission, employed, supervised, controlled, or appointed by the department (other than the mayor, municipality's chief executive officer, department heads, appointed officers, and unelected municipal employees who report to the municipality's chief executive officer) exercise or propose to exercise the municipality's executive power in matters unrelated to municipal personnel decisions (such as officer, department, and board

appointments as well as employment decisions), persons who are the subject of such action are entitled to compel the municipality to resolve any actual or potential controversy or dispute over such action through binding arbitration or adjudicative mediation by serving upon the municipality a written demand for binding arbitration or adjudicative mediation.

(iii) *Exercise of Legislative Power by Executive Department.* Whenever the executive department, or any person, board, or commission, employed, supervised, controlled, or appointed by the department, exercise, or propose to exercise the municipality's legislative power, persons whose legally protected interests are prejudiced by such action are entitled to compel the municipality to resolve any actual or potential controversy or dispute over such action through binding arbitration or adjudicative mediation by serving upon the municipality a written demand for binding arbitration or adjudicative mediation.

(iv) *Demand for Arbitration/Mediation.* To be effective, the written demand for arbitration or mediation must be served on the chief executive officer of the municipality within ten (10) days of discovery of the facts giving rise to the actual or potential controversy or dispute, it must specify the essential nature of the dispute, the specific remedy sought and also identify a reputable private or public alternative dispute resolution ("ADR") organization, such as the American Arbitration Association or any comparable ADR program organized by the Arizona Judicial Branch. Upon the municipality's receipt of the demand, the parties must then diligently participate in the arbitration or mediation process to ensure it is completed within ninety (90) days of initiation, during which time the status quo must be maintained and municipality may not take adverse action relating to the subject matter of the demand against the person submitting the demand. The parties shall mutually agree in good faith on arbitrators or mediators within seven (7) days of receipt of a list of available arbitrators or mediators from the ADR organization. Such dispute shall then be settled promptly by arbitration or mediation in accordance with the rules in effect at the time such demand is made, subject to the provisions of the Arizona Uniform Arbitration Act. The hearing shall be conducted outside of the municipality, but within the surrounding county, unless all parties consent to a different location. The decision of the arbitrator or mediator shall be final and binding. Each party shall initially bear their own attorneys fees and costs of arbitration or mediation; however, the person making the demand shall be awarded reasonable attorneys fees and costs if she prevails. If it becomes necessary for either party to enforce an arbitration decision through court process, administrative, and other costs of enforcing an arbitration decision,

including the costs of subpoenas, depositions, transcripts, and the like, witness fees, payment of reasonable attorney's fees, and similar costs shall be awarded to the prevailing party. All documents relating to the arbitration or mediation are public records and the hearing shall be open to the public.

4. The Right to Freedom from Crime. Preventing crime is a municipal government's core function and the people have a legitimate expectation of effective protection from crime by the municipality.

(a) For each fiscal year beginning after the adoption of the Model Local Liberty Charter, the municipal police department, if any, shall adopt performance benchmarking that targets and measures desired crime rates, crime clearance rates, public complaint rates, and response times both for individual precincts and for the municipality as a whole. The performance standards for such benchmarking shall require benchmarked statistics in each precinct and for the municipality as a whole to improve every month and also set an ultimate statistical fiscal year performance goal for each benchmarked statistic for each precinct and the municipality as a whole based on what is determined by the department to be a reasonable state of security. Fiscal year performance goals must be approved by a majority of the elected officials within municipality's legislative department.

(b) Benchmarked standards, goals, and statistics shall be published online as soon as practicable in a conveniently accessible and searchable, user-friendly public website format and updated frequently, as well as made immediately available for inspection and copying by the general public.

(c) Priority access to overtime benefits shall be given to police officers working in precincts where performance standards have been met. Police officers receiving such priority access to overtime shall perform overtime services in precincts where performance standards have not been met.

(d) If the municipal police department fails to meet performance standards in the majority of precincts or for the municipality as a whole for two consecutive fiscal years, then the council enact an appropriate ordinance offering tax credits by general law to any person who furnishes qualifying security services in the precincts in which performance standards have not been met in proportion to their public benefit as determined by uniform, objective and quantifiable standards.

(e) If the municipal police department fails to meet performance standards in the majority of precincts or for the municipality as a whole for five

consecutive fiscal years, then the provision of municipal policing services shall become subject to Managed Competition.

5. The Right to Fiscal Responsibility. The people have the right to financially sustainable municipal government and a municipal government that is no larger than necessary.

(a) Core Functions Funded First. Municipal functions without which the municipality would cease to exist as a governmental entity must be fully funded before funding any other municipal function or service.

(b) TEL Loophole Closed. For purposes of calculating the municipality's expenditure limitation under Article IX, Section 20(1) of the Arizona Constitution for the fiscal years beginning after adoption of the Model Local Liberty Charter, any authorization for the payment of monies, revenues, funds, fees, fines, penalties, tuitions, property, and receipts of any kind whatsoever received by or for the account of any special district (as defined under Ariz. Rev. Stat. § 48-271.B), organized on or after the first fiscal year after adoption of the Model Local Liberty Charter, which exist, furnish services or operate primarily within municipal boundaries, shall be included as a component of the municipality's "expenditure" under Article IX, Section 20(3)(c) of the Arizona Constitution.

(c) Tax Cap Loophole Closed. The maximum amount of ad valorem taxes levied by the municipality for the fiscal years beginning after adoption of the Model Local Liberty Charter, shall not exceed an amount two per cent greater than the difference between the amount in the immediately preceding fiscal year of ad valorem taxes levied by the municipality and ad valorem taxes or assessments levied by all special districts (or equivalent political subdivisions) organized on or after the first fiscal year after adoption of the Model Local Liberty Charter, which exist, furnish services or operate primarily within municipal boundaries.

(d) Managed Competition Mandate. As soon as practicable and no later than the second fiscal year after adoption of the Model Local Liberty Charter, the municipality shall furnish municipal services other than core public safety services through transparent, open competitive bidding for service contracts by independent contractors and municipal departments ("Managed Competition"). However, core public safety services provided by police officers and firefighters may be made subject to Managed Competition if approved by a majority of the elected members of the municipality's legislative department. The municipality's chief executive

officer shall have the sole responsibility for administering and monitoring any agreements with contractors. The municipality's chief executive officer shall be required to produce annual performance audits for contracted services, the cost of which must be accounted for and considered during the bidding process. In addition, the municipality's chief executive officer shall seek an independent audit every five (5) years to evaluate the municipality's experience and performance audits. In the event a service is awarded to an independent contractor through Managed Competition, impacted municipal employees will not be precluded or hindered from accepting employment with the independent contractor.

(i) As soon as practicable and no later than the second fiscal year after adoption of the Model Local Liberty Charter, the municipality's legislative department shall by ordinance provide for standards and processes ensuring transparent, open competitive bidding for contracts to furnish public services, as well as safeguarding against corruption and conflicts of interest.

(ii) The Managed Competition Independent Review Board. As soon as practicable and no later than the second fiscal year after adoption of the Model Local Liberty Charter, the municipality's chief executive officer shall appoint seven (7) members to the Managed Competition Independent Review Board. Four (4) shall be private citizens whose appointments shall be subject to council confirmation. Each shall have professional experience in one or more of the following areas: finance, law, public administration, business management, or the service areas under consideration by the municipality's chief executive officer. Three (3) shall be municipal staff including a staff designee, a municipal legislative department staff designee, and the municipal auditor and comptroller or staff designee. Such appointees shall not have any personal or financial interests which would create conflict of interests with the duties of a Board member. Members of the Board shall be prohibited from entering into a contract or accepting employment from an organization that secures a municipal contract through the managed competition process for the duration of the contract. The term of service for initial members of the Board shall not end before the third fiscal year after adoption of the Model Local Liberty Charter, and thereafter shall be determined by ordinance.

(iii) Pre-competition assessment. As soon as practicable and no later than the second fiscal year after adoption of the Model Local Liberty Charter, and thereafter as determined by ordinance, the municipality's chief executive officer will prepare an initial preliminary written Statement of Work for each municipal service to be put into Managed Competition. This

report will be transmitted to the Managed Competition Independent Review Board for its consideration and recommendations relative to request for proposal and contractual standards and contractor qualifications. In determining its recommendations, the Board shall consider such factors as the type of service provided, the abilities of the current and projected competitive market, potential efficiencies that could be achieved, and the capacity of the municipality to deliver essential services in the event of contractor default. The Board shall issue its initial recommendations as soon as practicable and no later than the third fiscal year after adoption of the Model Local Liberty Charter, and thereafter as determined by ordinance.

(iv) Minimum contract standards and contractor qualifications. In addition to standards and qualifications recommended by the Board, the municipality's chief executive officer shall require that any independent contractor providing services to the municipality meet minimum contract standards to be contained in the solicitation for services or request for proposal. The minimum contract standards shall include the following: (1) that the independent contractor provide proof that it maintains an adequate level of liability insurance consistent with municipal risk management requirements; (2) that the independent contractor has appropriate safety policies and procedures in place to protect the public and its employees in providing the service; (3) that the independent contractor will comply with all applicable employment and labor laws; (4) performance standards and consequences for non-performance, up to and including termination of the contract; (5) that the independent contractor designate appropriate personnel to monitor contract compliance; (6) that the independent contractor's employees must maintain the same certifications as will be required of municipal employees performing the same service; (7) that if background checks will be required of municipal employees performing a particular service, the independent contractor will perform background checks on employees performing those same services; (8) the same regulations and requirements of service delivery necessary to maintain service quality that will apply to a municipal department shall also apply to any independent contractor; (9) that the municipality shall unilaterally and immediately terminate the contract if the independent contractor enters into a contract with or employs a member of the Independent Review Board during the term of the contract with the municipality; and (10) that the municipality shall unilaterally and immediately terminate the contract if the independent contractor enters into a contract with or employs a former member of the Independent Review Board during the term of the contract with the municipality, if that former Board member participated in the selection process for that contract.

6. The Right to Freedom from Favoritism. The people have the right to local governance that does not grant anyone privileges or immunities not generally available on equal terms to all and that does not single anyone out for special punishments or disadvantages except as required by the uniform application of general laws.

(a) The municipality shall not subsidize private enterprise. A subsidy to private enterprise is an economic benefit, direct or indirect, granted by the municipality with the primary purpose or substantial effect of encouraging or maintaining particular or specific classes of ventures in which private persons have a substantial financial or ownership interest.

(b) Safe harbor. Economic benefits to private enterprise from the following shall not be considered a subsidy:

(i) Benefits from the municipality's performance of essential governmental functions; specifically, benefits from: (i) the municipality's provision and maintenance of public infrastructure for general public benefit and for actual public use; (ii) the municipality's performance of functions without which the municipality would cease to exist as a governmental body; (iii) the retention of private enterprise to perform functions of the type without which the municipality would cease to exist as a governmental body after a process of transparent, open competitive bidding; and (iv) the procurement of supplies and services from private enterprise for the municipality's ordinary business operations after a process of transparent, open competitive bidding.

(ii) Benefits from lower taxes and less regulation; specifically, benefits from: (i) the general and uniform relaxation or repeal of regulations; (ii) the general and uniform reduction or repeal of taxes, assessments, or fees; (iii) the relaxation or repeal of special regulations, which, if not relaxed or repealed, would otherwise subject specific individuals, entities, or classes of individuals or entities to regulatory burdens in excess of those imposed generally and uniformly; and (iv) the reduction or repeal of special taxes, assessments or fees, which, if not reduced or repealed, would otherwise subject specific individuals, entities or classes of individuals or entities to taxation, assessments or fees in excess of those imposed generally and uniformly

7. The Right to Accountability. The people have the right to effective recourse against unelected municipal personnel for wrongdoing in the

course of performing official duties. Accordingly, notwithstanding any rules prescribed by the civil service board, which are hereby superseded, all unelected municipal employees, appointed officers and department heads shall be held personally accountable to the residents of the municipality for their actions and omissions as described in this section. The municipality shall maintain public records in a conveniently accessible and searchable, user-friendly website format for public viewing of formal and informal written complaints brought or submitted by residents of the municipality against unelected municipal employees, municipal officers and department heads for the duration of their employment with the municipality. Additionally, the municipality shall maintain an interactive, conveniently accessible and searchable, user-friendly website allowing for residents of the municipality to evaluate the personal performance of each unelected municipal employee, municipal officer and department head for the duration of their employment with the municipality. Finally, the municipality shall immediately terminate the employment of any unelected municipal employee, appointed officer and department head found by a court of law or in a final arbitration or mediation decision to have tortiously or otherwise unlawfully caused substantial harm to any person on three or more occasions in the course of performing their official duties.

8. The Right to Genuine Local Sovereignty. The people have the right to require municipal government to act as an agent of federalism under the 10th Amendment to the United States Constitution to preserve liberty as a political subdivision of the State.

(a) No intergovernmental contractual relationship shall be entered into or be binding upon the municipality unless the municipality retains the right to rescind the contract upon no more than 60 days prior written notice.

(b) In the event the state of Arizona or the United States or any department or agency thereof proposes or acts to implement, enforce, expand, or extend any regulation or regulatory policy within municipal boundaries, the municipality shall exercise all lawful means of demanding such action be coordinated with less restrictive municipal plans and policies.

9. The Right to Transparency. The people have the right to know what municipal government is doing by the most effective feasible means of disclosure.

(a) Public Online Posting of Municipal Expenditures. No expenditure may be made by the municipality by cash, check, promissory note, warrant, IOU,

or other similar means, unless the amount of the expenditure, the purpose of the expenditure and the identity of the recipient of the expenditure is concurrently published online in a conveniently accessible and searchable, user-friendly public website format.

(b) **Publicity of records.** All records and accounts of every office, department or agency of the municipality shall be open for inspection by any citizen, any representative of a citizen's organization or any representative of the press at all reasonable times and under reasonable regulations established by the municipality's legislative department as guaranteed under the Arizona Public Records law, Ariz. Rev. Stat. §§ 39-101, et seq. Further, the municipality shall respond to all written public records requests in writing and with specific reference to each records request. The municipality shall fully comply with any written public records request within the compliance deadline specified in the request, or otherwise as soon as practicable. If there is a lawful basis for extending the time of compliance, partial compliance or noncompliance, the municipality shall within the deadline specified in the request, if one is specified, or otherwise as soon as practicable, furnish a written statement to the requestor signed by the municipality's chief executive officer or authorized designee detailing the reasons for the municipality's partial compliance, noncompliance, or requested compliance deadline extension, which specifies a reasonable alternative deadline, with specific reference to each records request.

10. **The Right to Reconstitute Government.** The people have the right to reconstitute local government.

(a) **The Right to Vote for None of the Above.** Within one election cycle after adoption of the Model Local Liberty Charter, the municipality shall enact a local law allowing residents for vote for "None of the Above" ("NOTA") in addition to qualified candidates running for office within its legislative department. The local law shall provide that if NOTA receives more votes than any other candidate, the competing candidates shall be disqualified from taking office during the current election cycle, and a special election must be called, with new candidates required to qualify and stand for election.

(b) **Mandatory Bankruptcy Filing.** If any of the following indicia of insolvency occurs, the municipality must cure the condition within thirty (30) days or, within the same period, file for bankruptcy protection under Chapter 9 of the United States Bankruptcy Code to restructure its finances:

(a) the municipality has one or more creditors with undisputed claims that have been unpaid 6 or more months after their due date, which, in the aggregate, exceed 10% of the municipality's annual general fund budget; (b) the municipality receives written notification from the trustee, actuary, or at least 10% of the beneficiaries of any pension, health, or other benefit fund that the municipality has not timely deposited its minimum obligation payment as required by law; (c) municipal employees have not been paid undisputed compensation due in cash or cash equivalents and it has been at least 14 days after the scheduled date of payment; (d) the municipality receives written notification from a trustee, paying agent, or bondholder of a default in a bond payment or a violation of 1 or more bond covenants; (e) the municipality has violated the conditions of any law governing the issuance of bonds or notes; or (f) a court has ordered an additional tax levy without the prior approval of the municipality's legislative department. If the municipality fails to comply with this section, residents comprising 10% of the electorate of the municipality in the most recent preceding citywide election may file an appropriate petition to enforce this provision in Municipal Court or by special action or mandamus proceeding in other courts of the Arizona Judicial Branch.