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# MONEY & POLITICS

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## MONEY & POLITICS

### CITIZENS' INITIATIVE: WHO SHALL GOVERN

Donald McInnis\*

#### TABLE OF CONTENTS

Introduction .....	70
The Founding Fathers.....	72
The Industrial Age.....	74
The Progressives.....	76
California Progressives.....	77
The Middle Class.....	79
The Populist Lesson .....	82
The New Reality.....	83
The Business of Citizens' Initiatives .....	84
The California Example.....	85
A Tool of the Wealthy .....	88
Under-Informed Citizens.....	90
The Local Initiative Process .....	91
Educating the Public on Initiatives .....	92
California Initiative Reforms.....	94
How to Improve Local Initiatives.....	95
What the Reforms do not address.....	99
Local Government Authority.....	100

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Campaign vs. Impartial Information. ....	102
Citizens' Initiative - Its Original Purpose.....	104
Conclusion.....	104

#### INTRODUCTION

The citizens' initiative is a power reserved to the people as a check on our form of constitutional representative democracy.<sup>1</sup> Through citizens' initiatives and referendums, the voters may propose laws and constitutional amendments, or reject legislation passed by their elected representatives.<sup>2</sup> As with most institutions of government, this form of direct democracy has evolved and is today a creature of its political environment. So powerful is the citizens' initiative process that it has been called the fourth branch of government.<sup>3</sup> But with this power has come a subversion of the original purpose of the initiative as first proposed over a hundred years ago.<sup>4</sup> Instead of serving as a means for ordinary people to counter the influence of big-money interests, these very interests have corrupted the initiative process to serve their own goals.<sup>5</sup> Large corporations, wealthy financiers, and well-financed special interest groups have taken over the initiative process, bypassing state and local representative governments.<sup>6</sup> This was not the intended use of the citizens' initiative.<sup>7</sup> This article is a call to action to preserve the original purpose of the initiative process by utilizing local government resources to enhance voter knowledge of the issues raised by initiatives. A better-informed electorate will not only increase voter turnout but also produce voter decisions that benefit the community as a whole. To accomplish this goal, the citizens' initiative must be reformed, beginning at the local government level.

Why choose to reform the citizens' initiative at the local level? Local government is the root of democracy. The local level is where the average citizen lives and is most affected socially, economically and

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1. CAL. CONST. art. IV, §1.

2. CAL. CONST. art. II, §§ 8-11; Glenn R. Schmitt, *David B. Magleby, Direct Legislation: Voting on Ballot Proposition in the United States*, 12 J. LEGIS. 122 (1985); BALLOTPEDIA, <https://ballotpedia.org> (last visited Feb. 13, 2019); NAT'L CONF. OF ST. LEGISLATURES, [www.ncsl.org](http://www.ncsl.org) (last visited Feb. 13, 2019).

3. TRACEY M. GORDON, PUB. POL'Y INST. OF CAL., *THE LOCAL INITIATIVE IN CALIFORNIA* 1-6 (2004).

4. *See id.* at 7.

5. *Id.* at 3.

6. *See* Linda Casey, *2016 Ballot Measures Overview*, FOLLOWTHEMONEY.ORG (Dec. 12, 2017), <https://www.followthemoney.org/research/institute-reports/2016-ballot-measures-overview>.

7. *See* GORDON, *supra* note 3, at 1-2.

politically. It is also where we feel and see the effects of the action or inaction of our elected representatives. Just as importantly, the majority of cities across the country use the initiative process.<sup>8</sup> The initiative is available in ninety-seven percent of Western cities, eighty-two percent of Northeast and Southern cities, and fifty-nine percent of the cities in the Central states.<sup>9</sup>

Unfortunately, even at this local level, well-financed special interests are using the initiative process to usurp essential administrative and legislative functions of local governments.<sup>10</sup> In particular, the local initiative process is being used to circumvent the legislative power of local governments to regulate growth and development.<sup>11</sup> This practice is prevalent in California.<sup>12</sup> In response, the League of California Cities is encouraging local governments to challenge in court the use of the initiative process to legislate land-use policy.<sup>13</sup> However, a danger in this approach is the courts may choose to limit or reduce the power of the citizens' initiative, setting a terrible precedent for limiting the voters' power to control our representative form of democratic government. There is a better way.

Christopher Achen, an eminent political scientist who has studied democracy and voter behavior, when asked why the electorate votes the way they do, said this:

[Voters] just don't have a lot of information, and so they substitute guesses and views of the world that make them feel comfortable. I think people are looking for ways to make sense of what is a very complicated reality out there . . . So they're doing the best they can but, as we said in the book, we think that we need institutional structures that would get them some help and do what the Federalist

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8. Mary Branham, *Elections 101: Initiatives, Referendums and Other Ballot Propositions*, THE COUNCIL OF ST. GOV'T (Sept. 26, 2014), <http://knowledgecenter.csg.org/kc/content/elections-101-initiatives-referendums-and-other-ballot-propositions>.

9. *Id.*

10. See Peter N. Brown, *The New Universe of Land Use Initiatives*, LEAGUE OF CAL. CITIES 1 (May 6, 2011) (This paper presents legal arguments against the use of initiatives for land use projects as they interfere with local government's "administrative functions" and as such are not a legal subject for initiatives).

11. See *id.* at 3-10, n.1. (Venoco Inc., an energy company headquartered in Denver, Colorado sought to expand an onshore drilling site located in the City of Carpinteria, California. In order to circumvent local ordinances requiring Venoco to obtain various permits and submit to the release of an environmental impact report, Venoco filed a sixty-page initiative titled the "Carpinteria Community Initiative" before the report was finalized, effectively suspending pending permit applications. The city attorney determined that the initiative would have the effect of undermining the initiative process and would mislead the public. He challenged the initiative but the court overruled the city attorney's challenge.)

12. See *id.*

13. *Id.* at 13, 34, 42.

Papers suggest should be done, which is to have a popular voice in government but to supplement it with the opinions of people with more expertise and more experience.<sup>14</sup>

The reforms suggested in this article are intended to provide governmental forums which can analyze and inform voters, in a factual, impartial, and unbiased way, of the issues raised by initiatives. In doing so, local governments are brought back into the initiative process and given a voice in the education of citizens on the effects initiatives will have on the community, the objective being to produce a better-informed electorate who can vote what is best for itself and the collective good. Such an objective is based on the democratic idea that the people *en masse* are the best defense against powerful interest groups and the influence of wealth in government.<sup>15</sup> Before we discuss how the citizens' initiative is to be reformed, we must first understand the origin of the citizens' initiative, the way it was used at the outset, and the way it is used now.

#### THE FOUNDING FATHERS

##### Fear of the Great Beast – The Turbulent Masses<sup>16</sup>

When reading the Declaration of Independence (1776) and the United States Constitution (1787), one is struck by the fact that the founding fathers never used the word “democracy.”<sup>17</sup> This is not an oversight on their part. In structuring the fledgling country's political and governmental system, these aristocratic, highly educated, propertied, white males held one central fear—tyranny: tyranny by government over the people, and tyranny by the majority over the few.<sup>18</sup> They believed that by limiting government, liberty would survive the

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14. Sean Illing, *Two Eminent Political Scientists: The Problem with Democracy is Voters*, VOX (Jan. 24, 2017), <https://www.vox.com/policy-and-politics/2017/6/1/15515820/donald-trump-democracy-brexit-2016-election-europe>. For further reading, see CHRISTOPHER ACHEN & LARRY BARTELS, *DEMOCRACY FOR REALISTS* (2017).

15. See generally Robert A. Dahl, *Chapter One: The Nature of The Problem*, in *WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY*, 1-4, (2d ed. 2005).

16. ALBERT JAY NOCK, *JEFFERSON 181-82* (1926) (Alexander Hamilton on democracy and the American people: “the turbulent and changing masses seldom judge or determine right”...the American people represent “a great beast”).

17. See U.S. CONST.; Declaration of Independence; Steve H. Hanke, *On Democracy Versus Liberty*, CATO INST. (Feb. 2011), <https://www.cato.org/publications/commentary/democracy-versus-liberty>.

18. Judith A. Best, *Legislative Tyranny and the Liberation of the Executive: A View from the Founding*, 17 *PRESIDENTIAL STUD. Q.* 697, 697 (1987) [hereinafter *Legislative Tyranny*]; James D. Best, *The Founders' Fear*, *WHAT WOULD THE FOUNDERS THINK?* (2010) [hereinafter *Founder's Fear*].

natural tendency of humanity to dictate how others should live.<sup>19</sup> Thus, under the new constitution, they decentralized the power of the federal government by separating the legislative, executive, and judicial branches, with each branch a check on the other, and later passed a Bill of Rights as protection against the government abusing the people.<sup>20</sup>

To avoid the evils of tyranny by the majority against the few, only the United States House of Representatives was elected by direct vote of the citizens.<sup>21</sup> And, not everyone could vote. Slaves, women, and men without property could not vote in most states. To further restrict the power of the masses, U.S. senators were appointed by state legislatures, which were controlled by the propertied elite.<sup>22</sup> The president was elected through the Electoral College.<sup>23</sup> The Electoral College electors were chosen by each of the states with the number of electors based on the number of federal senators and representatives apportioned to each state.<sup>24</sup> Each elector was to exercise his judgment on who should be president, with the knowledge of how the citizens of their state had voted.<sup>25</sup>

Obviously, the founding fathers had a fear of the uneducated masses and did not believe in direct democracy.<sup>26</sup> Instead, they instituted a republican form of democracy, where elected representatives were supposed to mediate between public opinion and what was best for the nation.<sup>27</sup> These elected representatives were to be educated men of substance and property, being part of the propertied aristocracy meant they had much to lose from the exercise of poor judgment and, supposedly because of their wealth, they would be more difficult to corrupt—it was this model of government in 1787 that the founding fathers believed would secure to the citizens their rights to life, liberty and property.<sup>28</sup>

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19. *Founders' Fear*, *supra* note 18.

20. See U.S. CONST. art. I-III; THEODORE J. LOWI ET AL., *Chapter 3: Federalism and the Separation of Powers*, in AMERICAN GOVERNMENT: POWER AND PURPOSE (12th ed. 2012); *Legislative Tyranny*, *supra* note 18 at 709; *Founders' Fear*, *supra* note 18. See generally JAMES D. BEST, *TEMPEST AT DAWN* (2010).

21. U.S. CONST. art. I, § 2. See *Legislative Tyranny*, *supra* note 18, at 705-06 (1987).

22. U.S. CONST. art. I, § 3.

23. U.S. CONST. art. I, § 1.

24. U.S. CONST. art. II, § 1.

25. *Id.*; Schmitt, *supra* note 2.

26. Hanke, *supra* note 17.

27. See *id.*

28. See Louis René Beres, *America Becomes What Its Founders Feared*, NAT'L INT. (May 1, 2016) <https://nationalinterest.org/feature/america-becomes-what-its-founders-feared-16000>; Hanke, *supra* note 17; RICHARD HOFSTADTER, *FOUNDING FATHERS: AN AGE OF REALISM*; RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT 3-5* (1948) [hereinafter *THE AMERICAN POLITICAL TRADITION*], *Gerry Shays' Rebellion*, SPRINGFIELD TECHNICAL COMMUNITY COLLEGE, <http://shaysrebellion.stec.edu>.

Even as the founding fathers devised their ideal system of democracy, profound changes were occurring that would forever change humanity and the United States' system of a democratic republic.

#### THE INDUSTRIAL AGE

Wealth and Power –

Each seeks the other. Each defines the other.

The industrial age changed everything.<sup>29</sup> This new era was a turning point in world history as it impacted almost every aspect of life across the world.<sup>30</sup> The Industrial Revolution first took root in Britain in the 1700s.<sup>31</sup> Over the next one hundred years, life shifted from agrarian communities to cities near manufacturing centers; workers no longer had to live on, own, rent or sharecrop land for their food.<sup>32</sup> Industrialization allowed people to live in cities and to make money through labor and commerce, which they used for housing, food, and clothing.<sup>33</sup> As agrarian-based societies collapsed, social, economic, and political upheaval followed.<sup>34</sup> The landed gentry had to adapt to the new order of business or fail.<sup>35</sup> Industrial-based commerce, not just land, was the new source of wealth.<sup>36</sup> The Industrial Revolution literally changed how wealth was created and distributed, and who exercised power.<sup>37</sup>

In the United States, the industrial age also brought huge concentrations of wealth, as raw capitalism reigned. In the 1800s, and especially after the end of the Civil War, a period of great economic expansion occurred.<sup>38</sup> Life in the United States shifted from the agrarian

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29. See *Industrial Revolution*, HISTORY (Oct. 29, 2009), <https://www.history.com/topics/industrial-revolution/industrial-revolution> [hereinafter *Industrial History*].

30. See *id.*

31. *Id.*

32. *Id.*

33. See Ankur Poddar, *Effects of the Industrial Revolution*, THE INDUSTRIAL REVOLUTION, <https://webs.bcp.org/sites/vcleary/modernworldhistorytextbook/industrialrevolution/ireffects.html> (last visited Feb. 13, 2019) [hereinafter *Effects of the Industrial Revolution*].

34. See *id.*

35. See *id.*

36. See Ankur Poddar, *Introduction to the Industrial Revolution*, THE INDUSTRIAL REVOLUTION, <https://firstindustrialrevolution.weebly.com/> (last visited Feb. 13, 2019) [hereinafter *Introduction to the Industrial Revolution*].

37. *Industrial History*, *supra* note 29; Rebecca Beatrice Brooks, *History of the Industrial Revolution*, HIST. OF MASSACHUSETTS BLOG (Feb. 20, 2018), <https://historyofmassachusetts.org/industrial-revolution/>.

38. See *Economic Growth and the Early Industrial Revolution*, U.S. HISTORY: PRE-COLUMBIAN TO THE NEW MILLENNIUM, <http://www.ushistory.org/us/22a.asp> (last visited Feb. 18, 2019).

countryside to urban centers which grew rapidly, with huge concentrations of immigrants seeking work in the cities.<sup>39</sup> This was particularly true in the northern states and the west.<sup>40</sup> The balance of power in the young country was experiencing a revolutionary transformation.

Industrialization created the rise of a new middle class of merchants, managers, accountants, lawyers, clerks, and workers necessary for the new urban life.<sup>41</sup> However, with the industrial age came the abusive use of human labor to manage and feed the needs of production and a growing use of money to influence government's elected representatives.<sup>42</sup> Federal, state, and local government officials were no longer the well-educated, idealistic, propertied men that "could not" be corrupted.

It is no wonder the 1800s saw the rise of political machines such as Tammany Hall in New York, Boston's Irish ward system run by Pat Maguire and later Michael Curley's united city machine, Boss Butler and the Big Cinch in St. Louis, James Pendergast in Kansas City, and San Francisco's graft-ridden machine run by Mayor Eugene Schmitz and the city's political boss, Aber Ruef.<sup>43</sup> Through patronage and bribery,

39. *Effects of the Industrial Revolution*, *supra* note 33.

40. DAVID A. SCHMIDT, *CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION* 5 (1989); *Effects of the Industrial Revolution*, *supra* note 33; *Introduction to the Industrial Revolution*, *supra* note 36.

41. *Effects of the Industrial Revolution*, *supra* note 33.

42. GARY B. NASH ET AL., *THE AMERICAN PEOPLE: CREATING A NATION AND A SOCIETY* (1986); JAMES L. OUTMAN & ELISABETH M. OUTMAN, *INDUSTRIAL REVOLUTION ALMANAC* (2003).

43. Walton E. Bean, *Boss Ruef, The Union Labor Party and the Graft Prosecution in San Francisco, 1901-1911*, 17 *PAC. HIST. REV.* 443-55 (1948) (During the prosecution of Abraham Ruef, his strongest critic, newspaper editor Fremont Older, was kidnapped, a witness's home was blown up, the police officer who arrested Ruef found dead in San Francisco Bay, and the prosecutor of Ruef was shot in the face in court. The young assistant prosecutor Hiram Johnson took over and convicted Ruef of corruption.). *See also* GERALD A. DANZER, *THE AMERICANS: RECONSTRUCTION TO THE 21<sup>ST</sup> CENTURY* 267-68 (2006); Robert E. Park, *The City: Suggestions for the Investigation of Human Behavior in the City Environment*, 20 *AM. J. SOC.* 577 (1915); *see* Abraham Ruef Trials: 1906-08 - Reformers Begin To Battle Ruef, Ruef Is Convicted, *LAW LIBRARY - AMERICAN LAW AND LEGAL INFORMATION*, <https://law.jrank.org/pages/2747/Abraham-Ruef-Trials-1906-08.html> (last visited Mar. 30, 2019); regarding Irish bosses Pat McGuire and Michael Curley *see* Andrew Marton, *Ward Bosses and Reformers: An Analysis of Boston's Irish Political Machine 1884-1914*, 1 *UNIV. OF MASS. UNDERGRADUATE HIST. J.* 1 (2017) <https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1010&context=umuhj>. *See also* James Pendergast, *WIKIPEDIA*, [https://en.wikipedia.org/wiki/James\\_Pendergast](https://en.wikipedia.org/wiki/James_Pendergast). *Bottoms Gang*, *WIKIPEDIA*, [https://en.wikipedia.org/wiki/Bottoms\\_Gang](https://en.wikipedia.org/wiki/Bottoms_Gang), *History of St. Louis (1866-1904)*, *WIKIPEDIA*, [https://en.wikipedia.org/wiki/History\\_of\\_St.\\_Louis\\_\(1866%E2%80%931904\)](https://en.wikipedia.org/wiki/History_of_St._Louis_(1866%E2%80%931904)).



often exercised freely and openly, political bosses throughout the nation's cities determined who ran for office and who stayed in office.<sup>44</sup>

A hundred years after the ratification of the U.S. Constitution, it was not democracy of the masses that was “the worst of all political evils,” as prophesized by Elbridge Gerry, one of the founding fathers of this country.<sup>45</sup> Instead, it was a representative system of government where the people no longer determined who would run for office and whose interests would be represented by the elected politicians.

#### THE PROGRESSIVES

Every Industrial Revolution brings along a learning revolution.<sup>46</sup>

In the late 1800s, the Progressivism movement emerged, and with it, a new idea of direct citizen involvement in our representative system of government.<sup>47</sup> The Progressives sought to eliminate many of the problems created by industrialization and its corrupting influx of money.<sup>48</sup> They specifically targeted uncontrolled capitalism, inhumane working conditions, urban slums, unsanitary handling and processing of food, disease, immigration, crime, corrupt banking practices, monopolies and trusts, political machines and their bosses, and the control of government by wealthy capitalists.<sup>49</sup>

For the first time, the capitalist's tenet of “the best government was the least government”<sup>50</sup> was challenged. Progressives demanded the

44. William V. Shannon, *The Political Machine I: Rise and Fall The Age of the Bosses*, 20 AM. HERITAGE, no. 4 (1969), <https://www.americanheritage.com/political-machine-rise-and-fall-age-bosses>; DANZER, *supra* note 43 at 267-68; Marton, *supra* note 43 at 3-4, 8. For a contemporary study on political boss machines, see Park, *supra* note 43.

45. THE AMERICAN POLITICAL TRADITION, *supra* note 28; For a biography on Elbridge Gerry, see *People – Elbridge Gerry*, SHAYS' REBELLION, [http://shaysrebellion.stcc.edu/shaysapp/person.do?shortName=elbridge\\_gerry](http://shaysrebellion.stcc.edu/shaysapp/person.do?shortName=elbridge_gerry) (last visited Feb. 13, 2019).

46. *Alexander De Croos Quotes*, BRAINY QUOTES, [https://www.brainyquote.com/quotes/alexander\\_de\\_croo\\_887159](https://www.brainyquote.com/quotes/alexander_de_croo_887159) (last visited Jan. 21, 2019).

47. *An Overview of Direct Democracy in the American States*, in CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 1-2 (Shaun Bowler et al. eds., 1998) [hereinafter CITIZENS AS LEGISLATORS].

48. *Picture This: California Perspectives on American History, Progressive Era: 1890-1920's: Progressive Political Reform*, OAKLAND MUSEUM OF CAL., <http://picturethis.museumca.org/timeline/progressive-era-1890-1920s/progressive-political-reform/info> [hereinafter *California Perspectives: Progressive Political Reform*].

49. SCHMIDT, *supra* note 40 at 7; CHARLENE WEAR SIMMONS, CAL. RES. BUREAU, CALIFORNIA'S STATEWIDE INITIATIVE PROCESS 2 (May 1997); *Progressive Era*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Progressive\\_Era](https://en.wikipedia.org/wiki/Progressive_Era) (last accessed Jan. 17, 2019) [hereinafter *Progressive Era Wiki*].

50. Henry David Thoreau, *The Rights and Duties of the Individual in Relation to Government* (1848); For clarification on the source of the quote, see THOMAS JEFFERSON FOUNDATION, INC., <https://www.monticello.org>; Eugene Volokh, *Who First Said: 'The Best*

expansion of the government's role in regulating economic, social, and political functions.<sup>51</sup> A hallmark of this movement was the institution of direct-democracy methods: the recall by citizens of elected politicians, the establishment of the primary election system, and the revolutionary idea of giving citizens direct access to the legislative process through the citizens' initiative and referendum, thereby bypassing corrupt governments.<sup>52</sup> As originally proposed, the initiative was a simple idea: a group of citizens sign a petition to put an issue on the ballot, and the electorate decides whether to enact the measure as a new law.<sup>53</sup>

#### CALIFORNIA PROGRESSIVES

All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.<sup>54</sup>

In response to the corrupt system of political machines, Californians approved a constitutional amendment establishing the direct primary election system in 1908.<sup>55</sup> The state legislature thereafter passed legislation creating the closed primary election system where voters, not party bosses, would choose who would run on a political party's ticket for office.<sup>56</sup>

The primary system opened the door for reformers who, in the November 1910 election, voted into office Progressive state legislators and their leader, Hiram Johnson, as governor.<sup>57</sup> A whirlwind of legislation followed. The Progressives established the popular election of U.S. senators, ending the practice of the legislature appointing

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*Government is that Which Governs Least'? Not Thoreau*, WASHINGTON POST, Sept. 6, 2017, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/06/who-first-said-the-best-government-is-that-which-governs-least-not-thoreau/?utm\\_term=.fabc8090eab0](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/06/who-first-said-the-best-government-is-that-which-governs-least-not-thoreau/?utm_term=.fabc8090eab0).

51. *California Perspectives: Progressive Political Reform*, *supra* note 48.

52. *See id.*

53. CITIZENS AS LEGISLATORS, *supra* note 47, at 5; STEVEN L. PIOTT, AMERICAN REFORMERS 1870-1920: PROGRESSIVES IN WORDS AND DEEDS 181 (2006); *The Progressive Era (1890-1920)*, THE ELEANOR ROOSEVELT PAPERS PROJECT, GEORGE WASHINGTON UNIV., <https://www2.gwu.edu/~erpapers/teaching/glossary/progressive-era.cfm>.

54. CAL. CONST., art. II, § 1.

55. James C. Findley, *Cross-Filing and the Progressive Movement in California Politics*, MT. SAN ANTONIO C., 12 POL. RES. Q., 699 (1959).

56. *Id.* For a history on the primary election system, see *Just the Facts, Primary Elections in California*, PUB. POL'Y INST. OF CAL. (2010).

57. *History of Initiative and Referendum in California*, BALLOTEDIA, [https://ballotpedia.org/History\\_of\\_Initiative\\_and\\_Referendum\\_in\\_California](https://ballotpedia.org/History_of_Initiative_and_Referendum_in_California) (last visited Feb. 13, 2019) [hereinafter *California Initiative History*]; Allan H. Clark, *The Real Hiram Johnson*, SAN DIEGO UNION TRIB., Sept. 30, 2003, <https://www.sandiegouniontribune.com/sdut-the-real-hiram-johnson-2003sep30-story.html>.

senators to Congress.<sup>58</sup> Legislation was passed allowing the cross-filing for Republican and Democratic candidates for office, further reducing the power of party bosses to determine who would run for political office.<sup>59</sup> On October 10, 1911, a constitutional amendment establishing a state initiative, referendum, and recall process was passed, giving California voters a power equal to that of their state legislators.<sup>60</sup> This form of direct democracy was in response to the Southern Pacific Railroad, big-business trusts, wealthy land owners, and their money, which controlled city and state governments.<sup>61</sup> Prior to the 1910 election, these big, wealthy business interests were so powerful that, as an example, once the transcontinental railroad had been completed in 1869, in the thirty-year period from 1879 to 1909, not one piece of legislation that was opposed by the Southern Pacific Railroad was passed by the state legislature.<sup>62</sup>

California Progressives also expanded the role of government in every aspect of Californians' lives. The Progressives created the Railroad Commission, ending Southern Pacific's monopolistic control of pricing for passenger and freight rates.<sup>63</sup> The Public Utilities Act and Commission was created to regulate all utilities, including railroads.<sup>64</sup> The Workman's Compensation, Insurance, and Safety Act was passed, under which the Industrial Accident Commission and State Compensation Insurance Fund were created to regulate and improve workers' lives.<sup>65</sup> In education, the Progressives instituted teacher pensions, free textbooks for public schools, comprehensive curriculums, and mandatory kindergartens, and provided aggressive support for the University of California.<sup>66</sup> And on October 10, 1911, voters passed Proposition 4, giving California women the right to vote.<sup>67</sup>

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58. See *California Initiative History*, *supra* note 57.

59. See *id.*

60. *Id.*

61. SIMMONS, *supra* note 49; PUB. POL'Y INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS-HOW DEMOCRATIC IS IT? 1 (2001) [hereinafter THE CALIFORNIA INITIATIVE PROCESS]; *California Initiative History*, *supra* note 57; *Picture This: California Perspectives on American History, Progressive Era: 1890-1920's*, OAKLAND MUSEUM OF CAL., <http://picturethis.museumca.org/timeline/progressive-era-1890-1920s>.

62. Owen Tipps, *Separation of Powers and the California Initiative*, 36 GOLDEN GATE U. L. REV. 185, 194 (2006); see also Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1184 (1998); *Politics of California Before 1900*, WIKIPEDIA, [https://en.wikipedia/wiki/Politics\\_of\\_California\\_before\\_1900](https://en.wikipedia/wiki/Politics_of_California_before_1900) (last accessed Jan. 20, 2019).

63. *California Perspectives: Progressive Political Reform*, *supra* note 48.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Picture This: California Perspectives on American History, Progressive Era: 1890-1920s: Women Suffrage*, OAKLAND MUSEUM OF CAL.,

The Progressive movement in California basically ended when the country entered World War I, “the war to end all wars.”<sup>68</sup> As a result of the Progressives’ efforts, Californians now had tools to deal with its economic, social, and political environment. This led to decades of economic expansion, supported and innovated by California’s advanced educational and working environment.<sup>69</sup> Within this structure, California has prospered and grown to be the fifth-largest economy in world.<sup>70</sup>

#### THE MIDDLE CLASS

“[M]iddle class Americans are an endangered species.”<sup>71</sup>

As World War I ended, the United States continued its economic expansion; laissez-faire was the nation’s mantra.<sup>72</sup> Corporations, supported by unrestricted bank practices and wildly speculative stock market financing, aggressively pursued the new technologies of automobiles, airplanes, electricity, and steel and petroleum production, and the expansion of manufacturing through innovated assembly systems.<sup>73</sup> Ten years of unrestricted economic growth came to an end

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<http://picturethis.museumca.org/timeline/progressive-era-1890-1920s/women-suffrage/info>; *California Initiative History*, *supra* note 57; see *Progressive Era Wiki*, *supra* note 49; *California Women Suffrage Centennial*, CAL. SECRETARY OF ST., <https://www.sos.ca.gov/elections/celebrating-womens-suffrage/california-women-suffrage-centennial/> (last visited Mar. 25, 2019).

68. The question as to when the Progressive Era ended in California is unsettled amongst historians. However, much of the progressive accomplishments in California were achieved during Governor Hiram Johnson’s tenure which ended when he was elected U.S. Senator in 1916. Thereafter much of the state’s interests concentrated on the war. Nationally many civil liberties were suppressed during the war much to the concern of the Progressives. *Progressive Era Wiki*, *supra* note 49.

69. *California Perspectives: Progressive Political Reform*, *supra* note 48.

70. Associated Press, *California is Now the World’s Fifth-Largest Economy, Surpassing United Kingdom*, L.A. TIMES, May 4, 2018, <https://www.latimes.com/business/la-fi-california-economy-gdp-20180504-story.html> [hereinafter *California is Now the World’s Fifth-Largest Economy*].

71. *Arianna Huffington Quotes*, BRAINY QUOTES, [https://www.brainyquote.com/search\\_results?q=arianna+huffington](https://www.brainyquote.com/search_results?q=arianna+huffington) (last visited Jan. 21, 2019).

72. See Carlos Lozada, *The Economics of World War I*, THE NAT’L BUREAU OF ECON. RESEARCH DIGEST, Jan. 2005, <https://www.nber.org/digest/jan05/jan05.pdf> (last visited Feb. 18, 2019).

73. See Jonathan Rees, *Industrialization and Urbanization in The United States 1880-1928*, OXFORD RES. ENCYCLOPEDIA OF AM. HIST., July 2016, <http://oxfordre.com/americanhistory/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-327> (discussing technology and innovation during the Industrial Revolution).

with the stock market collapse in 1929.<sup>74</sup> What followed was an international depression, as economies all over the world contracted.<sup>75</sup> The United States' economy did not begin to fully recover until the country's entry into World War II.<sup>76</sup>

After World War II, major social changes took hold in the United States.<sup>77</sup> As hundreds of thousands of fighting men came home, the federal government aggressively enrolled its citizen soldiers in the G.I. Bill, encouraging new civilian higher education and job training programs.<sup>78</sup> These programs and the continued funding of public K-12 education ensured the upward movement of the lower and middle classes in America.<sup>79</sup> Businesses retooled wartime production to civilian uses, unleashing thousands of new jobs and producing a national flood of consumer products, automobiles, and home construction.<sup>80</sup> Women entered or stayed in the nation's labor market in record numbers.<sup>81</sup> As a result, family wealth in America increased dramatically.<sup>82</sup> A new and vibrant middle class emerged throughout the country.<sup>83</sup> And California, now more than ever, was the land of golden opportunities and dreams.<sup>84</sup>

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74. See *Stock Market Crash of 1929*, HISTORY (May 10, 2010), <https://www.history.com/topics/great-depression/1929-stock-market-crash> (last visited Feb. 18, 2019).

75. *Id.*

76. *Id.*

77. See Mark Roth, *The Historic Roots of the Middle Class*, PITTSBURGH POST-GAZETTE, Nov. 20, 2011, <https://www.post-gazette.com/local/region/2011/11/20/The-historic-roots-of-the-middle-class/stories/201111200308>.

78. See *G.I. Bill*, HISTORY (May 27, 2010), <https://www.history.com/topics/world-war-ii/gi-bill> (last visited Feb. 18, 2019).

79. Roth, *supra* note 77.

80. See Claire Suddath, *The Middle Class*, TIME (Feb. 27, 2009), <http://content.time.com/time/nation/article/0,8599,1882147,00.html>.

81. See Mary M. Schweitzer, *World War II and Female Labor Force Participation Rates*, 40 J. ECON. HIST. 89, 90 (Mar. 1980) (After a return to peacetime conditions, "more women were in the labor force in 1950 than in 1940"); see also Claudia Goldin, *The Quiet Revolution That Transformed Women's Employment, Education, and Family*, AEA PAPERS AND PROCEEDINGS, 3-8 (Jan. 2006), <https://scholar.harvard.edu/goldin/publications/quiet-revolution-transformed-womens-employment-education-and-family>.

82. *History of the United States, Industrialization and reform (1870-1916)*, THEUSAONLINE.COM, <http://www.theusaonline.com/history/industrialization.htm>; Rees, *supra* note 73.

83. See Suddath, *supra* note 80.

84. James N. Gregory, "The Shaping of California History", UNIV. OF WASHINGTON, <http://faculty.washington.edu/gregoryj/California%20History.htm> (last visited Mar. 30, 2019); *The Postwar Economy: 1945-1960*, U. OF GRONINGEN, <http://www.let.rug.nl/usa/outlines/history-1994/postwar-america/the-postwar-economy-1945-1960.php> (last visited Mar. 30, 2019); see Suddath, *supra* note 80; see also Roth, *supra* note 77. For an in-depth analysis of the middle class following WWII, see OLIVER ZUNZ ET AL., *SOCIAL CONTRACTS UNDER STRESS: THE MIDDLE CLASSES OF AMERICA, EUROPE, AND JAPAN AT THE TURN OF THE CENTURY* (2002).

For the last fifty years, however, the middle class, created by the industrial age and expanded by Progressive policies, has been under attack.<sup>85</sup> In particular, the middle class has stagnated economically and shrunk in numbers, with little vertical movement from the lower class to fill its ranks.<sup>86</sup> All this has altered the distribution of wealth in the nation and the way that power is exercised by federal, state, and local governments.<sup>87</sup> California is no exception. The Golden State has become a land of great innovations, with huge concentrations of wealth from new industries. But it has also become a land of congested freeways, high taxes, expensive real estate, housing shortages, and low- and middle-income households that cannot afford to live the California Dream any longer.<sup>88</sup> How did this happen?

Sociologists, economists, and political scientists disagree as to the reason for the current condition of the middle class. One could argue it is due to the demise of the labor movement; the neutering of the public-education system by the charter school system, effectively abandoning the poorer classes to an inferior education; the financial and legal ingenuity of entrepreneurs for creating new business and investment models, which our courts and legislatures seem unable to cope with; and the free markets and world trade, which have adversely affected certain industries, displacing workers. Yet others contend there is a growing stalemate in government due to the gerrymandering of electoral districts, creating safe seats for politicians and ensuring one-party political control; or the expansion of the First Amendment to include the fictional “legal person” of corporations as having the right to political expression

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85. Sean Williams, *7 Reason the Middle Class Is in Serious Trouble*, THE MOTLEY FOOL (Sept. 17, 2016, 2:21 PM), <https://www.fool.com/investing/2016/09/17/7-reasons-the-middle-class-is-in-serious-trouble.aspx>.

86. See Eileen Ambrose, *Family Finances: Making It In The Middle Class*, SAN DIEGO UNION TRIB., June 26, 2018, <https://www.sandiegouniontribune.com/business/sns-201806070025—tms—kplngmpctnkm-a20180626-20180626-story.html>.

87. *Id.*; see also Williams, *supra* note 85. For an in depth study of today’s middle class, see PETER TEMIN, *THE VANISHING MIDDLE CLASS: PREJUDICE AND POWER IN A DUAL ECONOMY* (2017).

88. Maria L La Ganga, *Ordinary People Can’t Afford a Home in San Francisco. How Did it Come to This?*, THE GUARDIAN (Aug. 5, 2016), <https://www.theguardian.com/business/2016/aug/05/high-house-prices-san-francisco-tech-boom-inequality>; see also Eleanor Krause & Isabel V. Sawhill, *Seven Reasons to Worry about the American Middle Class*, BROOKINGS (June 5, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/06/05/seven-reasons-to-worry-about-the-american-middle-class/>; *California is Now the World’s Fifth-Largest Economy*, *supra* note 70; Conor Dougherty, *Boom and Gloom: An Economic Warning for California*, N.Y. TIMES, Feb. 13, 2018, <https://www.nytimes.com/2018/02/13/business/economy/california-recession.html>.

through corporate campaign finance.<sup>89</sup> Running through this litany of woes is an apparent common thread: there has been a huge influx of money into our political system.

#### THE POPULIST LESSON

We are free falling backward through time, reincarnating ourselves from our past<sup>90</sup>

If history is an accurate teacher, our circumstances in the first part of this twenty-first century are in many respects similar to that of the nineteenth and the first part of the twentieth centuries. Today, as then, high concentrations of wealth and the exercise of political influence through money have affected how the common person lives, works, and prospers. A century and a half ago, the new technologies of steam propulsion, railroads, electricity, telephones, automobiles, and airplanes, as well as the mass production of goods, created new barons of industry such as Cornelius Vanderbilt, Jay Gould, John D. Rockefeller, Andrew Carnegie, Leland Stanford, Andrew W. Mellon and J.P. Morgan, who collectively controlled most of the wealth and political power in this country.<sup>91</sup> Now, it is the so-called New Capitalists of the digital age, as well as industries, that have adapted to the economies of the twenty-first century—the one-half to one percent—which control nearly forty percent of the nation’s wealth.<sup>92</sup> Making matters worse is the fact that the wealthy top twenty percent own eighty-nine percent of this country’s wealth.<sup>93</sup> It is these privileged few who dictate how government functions, who pays what taxes, and how those taxes are spent.<sup>94</sup>

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89. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding that the First Amendment prohibits restricting independent expenditures by corporations for political purposes).

90. *Lorin Morgan-Richards Quotes*, GOODREADS, [https://www.goodreads.com/author/quotes/2943244.Lorin\\_Morgan\\_Richards](https://www.goodreads.com/author/quotes/2943244.Lorin_Morgan_Richards).

91. Elena Holodny, *19 Robber Barons Who Built and Ruled America*, BUS. INSIDER (May 11, 2016), <https://www.businessinsider.com/robber-barons-2016-5#andrew-mellon-built-huge-enterprises-in-aluminum-and-coke-and-later-served-as-us-treasury-secretary-12>.

92. See G. William Domhoff, *Wealth, Income, and Power*, WHO RULES AMERICA?, <https://whorulesamerica.ucsc.edu/power/wealth-new.html> (last updated Feb. 2013).

93. *Id.*

94. See *id.*; see also G. William Domhoff, *An Investment Manager’s View on the Top 1%*, WHO RULES AMERICA?, [https://whorulesamerica.ucsc.edu/power/investment\\_manager.html](https://whorulesamerica.ucsc.edu/power/investment_manager.html) (last updated Jan. 2012); G. William Domhoff, *An Investment Manager’s 2014 Update on the Top 1%*, WHO RULES AMERICA? (Jan. 2014), [https://whorulesamerica.ucsc.edu/power/investment\\_manager\\_2014.html](https://whorulesamerica.ucsc.edu/power/investment_manager_2014.html);

Christopher Ingraham, *The Richest 1% Now Owns More of the Country’s Wealth than at Any Time in the Past 50 Years*, WASHINGTON POST, Dec. 6, 2017, <https://www.washingtonpost.com/news/wonk/wp/2017/12/06/the-richest-1-percent-now->

A century ago, reformers used the primary election, initiative, referendum, and recall processes to wrest control of government from the wealthy capitalists of the time. As it did then, will a healthy infusion of direct democracy break the growing influence of wealth and allow the common people's voice to be heard? Or is our constitutional representative form of government really a plutocracy where society is ruled by people of great wealth through a system where money has the controlling vote? Is this the environment in which humanity now lives in the twenty-first century?

#### THE NEW REALITY

Nothing has ever become better by ignoring the reality<sup>95</sup>

Regrettably, the direct-democracy tools introduced a hundred years ago—the initiative and referendum processes—have been co-opted by big-money interests.<sup>96</sup> Billionaires, powerful financial institutions, large corporations, special-interests groups, and real estate barons, through the infusion of money, have come to dominate the initiative process. From 2006 to 2016, there has been a rising trend in the amount of money involved in ballot measures nationally.<sup>97</sup> In the 2012 general election, \$940 million was spent on 185 ballot measures in thirty-nine states.<sup>98</sup> In the 2016 general election, \$893 million was spent on 162 ballot measures in thirty-five states.<sup>99</sup> An analysis of the 162 ballot propositions in the 2016 election indicates that supporters of successful measures raised about three times the amount of money than did their opponents.<sup>100</sup> Similarly, opponents of failed propositions spent more money than did the supporters of the losing measures.<sup>101</sup> Legal entities spent more than individual donors in supporting and opposing initiatives.<sup>102</sup> All in all, non-individual contributors, such as corporations, trusts, PACs, and

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owns-more-of-the-countrys-wealth-than-at-any-time-in-the-past-50-years/?utm\_term=.08d7691578e3.

95. *Joe Kaeser Quotes*, BRAINY QUOTE, [https://www.brainyquote.com/authors/joe\\_kaeser](https://www.brainyquote.com/authors/joe_kaeser) (last visited Jan. 20, 2019).

96. *See* Casey, *supra* note 6 (but note that FollowTheMoney.org has only been following the influence of money in ballot measures since 2005).

97. *See id.*

98. *Id.*

99. *See id.*

100. *Id.*

101. *See id.*

102. *See* Casey, *supra* note 6 (but note that FollowTheMoney.org has only been following the influence of money in ballot measures since 2005).



lobbyist groups, accounted for eighty-five percent of all money raised nationally for ballot measures in 2016.<sup>103</sup>

*The Business of Citizens' Initiatives*

With the influx of money has come a new initiative industry to research, formulate issues, design ballot language, and develop marketing strategies for financially well-heeled economic, social and political interests.<sup>104</sup> This is not a new phenomenon. In 1997, the California Research Bureau (CRB) of the California State Library, in a study of the initiative process, noted that two California companies, Kimball Petition Management of Los Angeles and American Petition Consultants of Sacramento, ran the campaigns for all seven petitions for the November 1992 ballot.<sup>105</sup> The CRB report found that “nearly 75 percent of all initiatives on the California ballot [from 1982 to 1992] were qualified by one of these two companies.”<sup>106</sup> When analyzing the initiative industry nationally in the 1980s, David B. Magleby concluded this:

Reliance on the initiative industry accentuates the tendency of direct legislation to be used by groups with specialized interest or ample resources.<sup>107</sup>

This trend continues in the initiative process today. Between May 2012 and November 2013, corporations and wealthy Americans spent more than \$1 billion on ballot initiatives in just eleven states.<sup>108</sup> The result is that the common citizen is inundated at voting time with initiatives paid for by big money.<sup>109</sup> The Progressives' citizens'

103. *Id.* For spending trends in California, see SIMMONS, *supra* note 49, at 13-14; Chris Micheli, *How the Initiative and Referendum Processes Work in California*, INDEP. VOTERS NETWORK (Nov. 3, 2016), <https://ivn.us/2016/11/03/initiative-referendum-processes-california>; Tipps, *supra* note 62; *see also* CITIZENS AS LEGISLATORS, *supra* note 47, at 55-79; Manheim & Howard, *supra* note 62.

104. *See* Reid Wilson, *Initiative Spending Booms Past \$1 Billion as Corporations Sponsor Their Own Proposals*, WASHINGTON POST, Nov. 8, 2013, [https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/08/initiative-spending-booms-past-1-billion-as-corporations-sponsor-their-own-proposals/?noredirect=on&utm\\_term=.40b00b548993](https://www.washingtonpost.com/blogs/govbeat/wp/2013/11/08/initiative-spending-booms-past-1-billion-as-corporations-sponsor-their-own-proposals/?noredirect=on&utm_term=.40b00b548993); *see also* Listings: Initiative & Referendum Consultants, CAMPAIGNS & ELECTIONS, <https://www.campaignsandelections.com/politicalpages/categories/initiative-referendum-consultants>.

105. SIMMONS, *supra* note 49, at 9.

106. *Id.* at 13-14.

107. *Id.* at 10; David B. Magleby, *Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validations Procedures*, 2 J.L. & POL. 287, 311 (1985); *see also* DAVID B. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES (1984).

108. Wilson, *supra* note 104.

109. *See* CITIZENS AS LEGISLATORS, *supra* note 47, at 55-56.

initiative and referendum process is no longer the tool of the common voter.<sup>110</sup>

### *The California Example*

In California, the largest state that allows initiatives, the number of measures on ballots has skyrocketed over the years.<sup>111</sup> Since California consistently has the most direct-democracy measures on the ballot, it is worth examining in detail the California experience with direct democracy.

From 1912, the date of the first initiative, to 2017, 1,996 statewide initiatives were circulated in California.<sup>112</sup> Of these, approximately nineteen percent qualified for the ballot.<sup>113</sup> On average, there were fewer than 2.5 qualified initiatives per year from 1912 to 1969.<sup>114</sup> That has changed significantly since 1978.<sup>115</sup> In the twenty-five-year period from 1978 to 2003, 128 initiatives qualified for the statewide ballot.<sup>116</sup> In the ten years from 2003 to 2013, there were 100 state propositions on the ballot: sixty-eight citizens' initiatives, twenty-five legislative measures, six referendums, and one gubernatorial recall.<sup>117</sup> This is an average of twenty ballot measures per election cycle.

In November 2016, Californians had to make a decision on seventeen statewide ballot measures, including nine state statutes, four constitutional amendments, two statute/constitutional amendment combinations, one referendum, and one advisory question.<sup>118</sup> The subjects of these measures included repealing the plastic bag ban, use of recreational marijuana, revenue bonds, taxation, the death penalty, and

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110. Brian E. Adams, *Citizens, Interest Groups, and Local Ballot Initiatives* 40 POL. & POL'Y, no.1, at 44 (2012); CITIZENS AS LEGISLATORS, *supra* note 47, at 80.

111. FRED SILVA, PUB. POL'Y INST. OF CAL., THE CALIFORNIA INITIATIVE PROCESS: BACKGROUND AND PERSPECTIVE 3 fig. 2 (Nov. 2000), [https://www.ppic.org/content/pubs/op/OP\\_1100FSOP.pdf](https://www.ppic.org/content/pubs/op/OP_1100FSOP.pdf); THE CALIFORNIA INITIATIVE PROCESS, *supra* note 61.

112. *History of California Initiatives*, CAL. SECRETARY OF ST., <https://www.sos.ca.gov/elections/ballot-measures/resources-and-historical-information/history-california-initiatives/> (last visited Feb. 21, 2012).

113. *Id.*

114. Mark Baldassare, *Reforming California's Initiative Process*, AT ISSUE, PUB. POL'Y INST. OF CAL. 2 (2013) [hereinafter *Reforming California's Initiative Process*]. For a complete list of initiatives from 1966-2002, see Jessica M. Oliver et al., *California Initiative in Perspective 1966-2002*, ROSE INST. OF ST. AND LOCAL GOV'T, CLAREMONT MCKENNA COLLEGE (Oct. 2003).

115. *Id.*

116. *Id.*

117. *Id.*

118. Carson Bruno, *Is it Time to Reconsider California's Initiative System?*, EUREKA, HOOVER INSTITUTION (Aug. 30, 2016), <https://www.hoover.org/research/it-time-reconsider-californias-initiative-system>.

the cost of prescription drugs.<sup>119</sup> The number of measures does not include local initiative issues, which varied in number from county to county.<sup>120</sup>

In a 2013 Public Policy Institute of California survey, seventy percent of adults, and sixty-seven percent of likely voters, said there were too many propositions on the statewide ballot.<sup>121</sup> Further, eighty-three percent of likely voters believed the wording of initiatives was too complicated, leading to confusion as to what would happen if the initiative passed.<sup>122</sup> Given the number of initiatives on the ballot and the lack of information about the measures, why has the use of the initiative system continued to grow in California? Here are a few reasons:

1. There has been a decline in confidence in elected leaders and political institutions to solve problems.<sup>123</sup> In a series of surveys of California voters conducted in 1999 by the Public Policy Institute of California, only eleven percent of the people said they had a “great deal of confidence” in the state’s elected leaders.<sup>124</sup> The survey found six in ten said they had “some confidence” in their leaders, while three in ten reported “little or no” confidence.<sup>125</sup> The current opinion among Californians is that big-money interests run the state government.<sup>126</sup>

In a 2000 survey, seventy-five percent favored the initiative process over relying on the governor and the legislature, twenty-one percent, to pass state laws.<sup>127</sup> These numbers were reaffirmed in a 2013 Public Policy Institute of California survey which found that six in ten adults felt that decisions made by California voters were probably better than those made by the governor and state legislature.<sup>128</sup>

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119. *Id.*

120. *Id.*

121. *Reforming California’s Initiative Process*, *supra* note 114, at 5.

122. *Id.*

123. SIMMONS, *supra* note 49, at 16; see note 73 for PPIC 2008 and 2013 surveys on the same question.

124. MARK BALDASSERE ET AL., PUB. POL’Y INST. OF CAL., STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT 16 (Jan. 1999), [https://www.ppic.org/content/pubs/survey/S\\_199MBS.pdf](https://www.ppic.org/content/pubs/survey/S_199MBS.pdf).

125. *Id.*

126. MARK BALDASSERE ET AL., PUB. POL’Y INST. OF CAL., STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT 4 (May 2013), [https://www.ppic.org/content/pubs/survey/S\\_513MBS.pdf](https://www.ppic.org/content/pubs/survey/S_513MBS.pdf) [hereinafter STATEWIDE SURVEY May 2013].

127. SILVA, *supra* note 111, at 28.

128. STATEWIDE SURVEY May 2013, *supra* note 126, at 6.

2. The legislature and/or the governor seem to favor sending controversial issues or complex questions to the voters rather than deciding such issues themselves.<sup>129</sup>

3. Since the 1970s there has been a significant increase in special interest groups sponsoring initiatives.<sup>130</sup> Most Californians believe that the initiative system is controlled by these special interests.<sup>131</sup>

4. A professional initiative industry has developed which encourages wealthy individuals and special interest groups to seek the initiative approach when state leaders fail to address their favored issues.<sup>132</sup>

5. Opposing groups placed counter initiatives on the ballot in response to groups putting threatening measures on the ballot.<sup>133</sup>

6. Well-financed interest groups have used the threat of a ballot initiative to pressure politicians to enact laws that favor their special interests.<sup>134</sup> This most recently occurred in California, facing a series of local “soda tax” proposals by California cities, the beverage industry—Coca Cola, Pepsi, Dr. Pepper-Snapple and Red Bull—joined forces and placed a statewide initiative on the November 2018 ballot which, if passed, would require a two-thirds majority vote to pass any new local tax law.<sup>135</sup> The cities and Sacramento caved.<sup>136</sup> The state legislature passed a law prohibiting localities from enacting laws taxing any “sugary drink” for the next twelve years.<sup>137</sup> In return, the beverage industry

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129. SIMMONS, *supra* note 49, at 4; Micheli, *supra* note 103; Tipps, *supra* note 62, at 195-96.

130. See ELISABETH R. GERBER, PUB. POL’Y INST. OF CAL., INTEREST GROUP INFLUENCE IN THE CALIFORNIA INITIATIVE PROCESS (Nov. 1998), <https://www.ppic.org/publication/interest-group-influence-in-the-california-initiative-process/>.

131. *Reforming California’s Initiative Process*, *supra* note 114, at 5.

132. David Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 35-36 (1995); Micheli, *supra* note 103.

133. CITIZENS AS LEGISLATORS, *supra* note 47, at 109-10.

134. See GERBER, *supra* note 130, at 12.

135. David Dayen, *Hostage Situation in California Ends Peacefully as Lawmakers Pay Ransom to Big Soda Companies*, THE INTERCEPT (July 2, 2018), <https://theintercept.com/2018/07/02/soda-tax-ban-california/>.

136. *See id.*

137. *See id.*

withdrew its initiative from the November 2018 ballot.<sup>138</sup> David Dayen of Intercept.com summed it up well:

“[This] spectacle reflects the extreme power of money in California’s direct democracy process, where special interests use the ballot to obtain broad exemptions. . . .”<sup>139</sup>

The reaction by press and news sources was immediate. On July 2, 2018, newspaper headlines called the decision “stunning” (*New York Times*) and “extortion” (*Sacramento Bee*).<sup>140</sup> The *L.A. Times* said, “Shame on California lawmakers for caving into the soda industry.”<sup>141</sup> Even the internet reacted adversely to the stunning news:

- The Intercept.com: “Hostage situation in California ends peacefully as lawmakers pay Ransom to Big Soda Companies.”<sup>142</sup>
- NBCnews.com: “California Bows to Beverage Industry.”<sup>143</sup>

### *A Tool of the Wealthy*

Obviously, the increase in the use of the initiative process has created problems which the Progressives may not have foreseen when they brought this form of direct democracy to the people. For one, the initiative process has become extremely expensive to use.

In 1975, the cost to gather signatures to place a measure on the statewide California ballot was \$45,000.<sup>144</sup> In 1988, the cost was about \$800,000 and in 1996, the cost was \$1.75 million.<sup>145</sup> In 2006, the California Center for Governmental Studies found the cost to gather

138. *Id.*; Tom Philpott, *How Big Soda Strong-Armed California into Banning Soda Taxes* (July 6, 2018), MOTHER JONES, <https://www.motherjones.com/food/2018/07/how-big-soda-strong-armed-california-into-banning-soda-taxes/>.

139. Dayen, *supra* note 135.

140. Marion Nestle, *Big Soda strong-arms California: no more soda taxes for 12 years. Shame!*, FOOD POLITICS (July 2, 2018) <https://www.foodpolitics.com/2018/07/big-soda-strong-arms-california-no-more-soda-taxes-for-12-years-shame/>; see also Anahad O’Connor & Margot Sanger-Katz, *California, of All Places, Has Banned Soda Taxes. How a New Industry Strategy Is Succeeding.*, N.Y. TIMES, June 27, 2018, <https://www.nytimes.com/2018/06/27/upshot/california-banning-soda-taxes-a-new-industry-strategy-is-stunning-some-lawmakers.html>.

141. *Shame on California Lawmakers For Caving In to The Soda Industry*, L.A. TIMES, June 27, 2018, <https://www.latimes.com/opinion/editorials/la-ed-soda-tax-preemption-20180627-story.html>.

142. Dayen, *supra* note 135.

143. *California Bows to Beverage Industry, Blocks Soda Taxes*, NBC NEWS (June 29, 2018), <https://www.nbcnews.com/health/heart-health/california-bows-beverage-industry-blocks-soda-taxes-n887796>.

144. Micheli, *supra* note 103, at 6.

145. SIMMONS, *supra* note 49, at 9.

signatures to place a statewide initiative on the ballot ranged between \$2 million and \$2.8 million.<sup>146</sup>

Viewed another way, in order to gather signatures to place a measure on the ballot, it now costs \$1 to \$3 per signature for statewide and local initiatives.<sup>147</sup> The above figures do not include the costs to hire professional campaign and marketing companies, nor do they include the advertising campaign costs “for” and “against” the measures.

In 2012, the total campaign cost for Proposition 30, a measure to temporarily increase California’s income and sales taxes, was more than \$120 million.<sup>148</sup> Similarly, the total campaign cost for Proposition 32, to restrict political contributions by unions and corporations, was \$133 million.<sup>149</sup>

Obviously, average citizens can no longer afford to use the initiative system to express their needs. The system has become a tool of the wealthy, large corporations, and well-financed interest groups. Surveys since January 2001 have found that Californians believe special interests have “a lot of control over the initiative process in California.”<sup>150</sup> This was not the intention of the Progressives and reformers of the nineteenth and early twentieth centuries. The vision of volunteer citizen groups campaigning for change does not match the reality of today’s direct democracy and the initiative process.<sup>151</sup> Thomas Jefferson, a revolutionary advocate for democracy and an opponent of Alexander Hamilton’s anti-democratic, pro-business, strong centralized government, wrote in 1816:

The end of democracy will come when Government falls into the hands of lending institutions and moneyed incorporations.<sup>152</sup>

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146. Micheli, *supra* note 103, at 6.

147. Debra Bowen, *The California Initiative Process at its Centennial*, 47 CAL. W. L. REV. 255 (2011); Micheli, *supra* note 103.

148. Micheli, *supra* note 103.

149. *Id.*

150. MARK BALDASSERE ET AL., PUB. POL’Y INST. OF CAL., STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT 6 (Dec. 2015), [https://www.ppic.org/content/pubs/survey/S\\_1215MBS.pdf](https://www.ppic.org/content/pubs/survey/S_1215MBS.pdf).

151. Tipps, *supra* note 62, at 195; *see also* SILVA, *supra* note 111, at i; Adams, *supra* note 110 (for an analysis of local initiatives and special interest groups); Manheim & Howard, *supra* note 62 at 1190; Micheli, *supra* note 103.

152. This exact quotation has not been found in the writings of Thomas Jefferson. The quote is thought to be a consolidation of commentary made by Thomas Jefferson to William Giles Branch in a letter. *From Thomas Jefferson to William Branch Giles, 26 December 1825*, FOUNDERS ONLINE, <https://founders.archives.gov/documents/Jefferson/98-01-02-5771> (last visited Feb. 2, 2019). *See also The End of Democracy...(Spurious Quotation)*, THOMAS JEFFERSON FOUND., <https://www.monticello.org/site/research-and-collections/end-democracyspurious-quotation> (last visited Mar. 30, 2019).

*Under-Informed Citizens*

Another problem with California's modern-day initiative system concerns voter education. A 1990 *Los Angeles Times* survey found that eighty-four percent of those polled agreed "that an average voter cannot make an intelligent choice with so many issues being presented by initiatives."<sup>153</sup> A statewide survey conducted by the Public Policy Institute of California in 2000 found that a majority of Californians believe that voters are not receiving enough information to decide how to vote on initiatives.<sup>154</sup>

Since initiatives can cover important and complex issues, voters should ideally make their decisions in an atmosphere of extensive debate and deliberation. However, politics is a messy process and proponents and opponents do not always focus on issues raised by initiatives.<sup>155</sup> As a result, voters often receive inadequate information and therefore have low levels of awareness about the issues presented in initiatives.<sup>156</sup>

In a September 2008 Public Policy Institute of California survey, eighty-four percent of likely voters "agreed" that ballot initiative wording was "often too complicated and confusing for voters to understand what happens if the initiative passes."<sup>157</sup> When likely voters were asked the same question in September 2016, seventy-nine percent answered yes.<sup>158</sup> When independent voters were asked the same question, eighty-one percent answered yes.<sup>159</sup> Voters also just vote "no" on a ballot measure if they do not fully understand it or there are a lot of propositions on the ballot.<sup>160</sup> Studies have found the position of a measure on the ballot and decision fatigue can effect whether it passes or not.<sup>161</sup>

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153. George Skeleton, *Voters Say Initiatives are 'Out of Control'*, L.A. TIMES, Nov. 4, 1990, at A1; SIMMONS, *supra* note 49, at 16.

154. SILVA, *supra* note 111, at 26.

155. SIMMONS, *supra* note 49, at 11-12.

156. Victoria & Nina, *Initiative Process*, PARTICIPEDIA (June 2, 2010), <https://participedia.net/en/methods/initiative-process>.

157. MARK BALDASSERE ET AL., PUB. POL'Y INST. OF CAL., STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT (Sept. 2008), [https://www.ppic.org/content/pubs/survey/S\\_908MBS.pdf](https://www.ppic.org/content/pubs/survey/S_908MBS.pdf).

158. MARK BALDASSERE ET AL., PUB. POL'Y INST. OF CAL., STATEWIDE SURVEY: CALIFORNIANS & THEIR GOVERNMENT (Sept. 2016), [https://www.ppic.org/content/pubs/survey/S\\_916MBS.pdf](https://www.ppic.org/content/pubs/survey/S_916MBS.pdf).

159. *Id.*

160. See Ned Augenblick & Scott Nicholson, *Ballot Position, Choice Fatigue, and Voter Behavior*, 83 REV. OF ECON. STUD. 460-80 (2015).

161. *Id.*

In an extensive study of the initiative process, Dubois & Feeney concluded:

One critical problem with initiatives today is whether it is possible for the average voter, or even the extremely sophisticated voter, to understand issues and the policy choices as they are presented on the ballot and in the [voter] pamphlet.<sup>162</sup>

In fact, well-disseminated and accurate information has been said to be “a generic problem of direct democracy, particularly of initiatives.”<sup>163</sup>

This conclusion was reiterated by the Hoover Institution in its publication *Eureka*, on August 30, 2016, by Carson Bruno:

It may be controversial to say, but the average voter isn't that informed about their non-Presidential candidates and major policy issues . . . Truth be told, it can be hard for someone who's employed in the political or policy arena to be 100 percent informed on the candidates and issues.<sup>164</sup>

## THE LOCAL INITIATIVE PROCESS

### Ballot Box Planning

Most local initiatives cover topics of interest to local citizens, such as land use, governance, and safety.<sup>165</sup> Again, California's experience is instructive. The majority of all local initiatives in California concerned new development projects, limitations on neighborhood growth, land use and zoning issues.<sup>166</sup> Today, California cities and counties are the leader in initiative use in the nation.<sup>167</sup>

Many of the problems that afflict California's statewide initiative system also affect its local initiative process.<sup>168</sup> Big money is now using the local initiative process to circumvent local zoning and environmental and congestion regulations.<sup>169</sup>

Since the early 2000s, use of the local initiative process to avoid local land-use planning procedures has become commonplace in

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162. PHILIP DUBOIS & FLOYD FEENEY, LAWMAKING BY INITIATIVE: ISSUES, OPTIONS AND COMPARISONS 121 n.1 (1998); Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. OF ENVTL. L. & POL'Y 292, 310 n.60 (2001-2002).

163. See Selmi, *supra* note 162, at 310.

164. Bruno, *supra* note 118.

165. GORDON, *supra* note 3, at 22 n. 4.

166. *Id.* at 24.

167. *Id.* at iii, 22-32.

168. *Id.* at iv.

169. Selmi, *supra* note 162, at 294-97 (reconsidering the Use of Direct Democracy in Making Land Use Decisions); GORDON, *supra* note 3, at 4.



California.<sup>170</sup> In the past, local initiatives concerned amendments to legislatively enact ‘general land-use plans’ which governed development within the community.<sup>171</sup> These framework acts set the architecture for local land use, affecting zoning, growth, resource allocation, density, and the general quality of life for the community.<sup>172</sup>

A new trend has emerged where well-funded developers are using the initiative process to approve specific land-use projects.<sup>173</sup> By using the initiative process, developers are able to avoid the discretionary authority that cities and counties have over a project through their local development plans and ordinances.<sup>174</sup> As a consequence, growth management strategies have succumbed to “Ballot Box Zoning.”<sup>175</sup> Even the enforcement of environmental regulations is blocked, since the developer’s land-use plan is the result of a direct legislative act of the voters.<sup>176</sup>

### *Educating the Public on Initiatives*

A solution to today’s proliferation of ballot measures and the influence of money in the initiative system is to provide the voter with more accurate and unbiased information on the issues raised by initiatives, the rationale being that by making the voter more informed, the voter will make wise decisions when voting, no matter how much money is involved.

However, the last decade has seen a decline in the traditional methods by which the electorate gets information. Primary amongst the sources traditionally providing information about initiatives have been television, radio, newspapers, and magazines. Currently, the number of people using these forms of media has been trending down.<sup>177</sup> In the

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170. See Brown, *supra* note 10, at 1.

171. See *id.*

172. See *id.*

173. *De Vita v. Cty of Napa*, 9 Cal. 4th 763, 788 (1995) (approving use of initiatives to amend general development regulations); Brown, *supra* note 10, at 1.

174. See Brown, *supra* note 10.

175. GORDON, *supra* note 3, at 17-27; Adams, *supra* note 110, at 53-56.

176. *Tuolumne Jobs v. Super. Ct.*, 59 Cal. 4th 1029 (2014).

177. Molly Soat, *INFOGRAPHIC: Internet Replacing Traditional Media*, AMERICAN MARKETING ASSOCIATION, <https://auth.ama.org/publications/eNewsletters/Marketing-News-Weekly/Pages/infographic-internet-replacing-traditional-media.aspx> (last visited Mar. 25, 2019); Brad Hill, *The decline of radio(s)*, Kurt Hanson’s Radio & Internet News (Mar. 11, 2016), <https://rainnews.com/the-decline-of-radios>; *Newspapers Fact Sheet*, PEW RESEARCH CENTER (June 13, 2018), <http://www.journalism.org/fact-sheet/newspapers/>; Ricardo Gandour, *Study: Decline of Traditional Media Feeds Polarization*, COLUM. JOURNALISM REV. (Sept. 19, 2016). See generally AMY MITCHELL, JESSE HOLCOMB & RACHEL WEISEL, PEW RES. CENTER, STATE OF THE NEWS MEDIA 2016 (June 15, 2016), <http://www.pewresearch.org/wp-content/uploads/sites/8/2016/06/state-of-the-news-media-report-2016-final.pdf>.

four years from 2010 to 2014, television viewership is down six percent, print newspaper readership is down 25.6 percent, and print magazine readership is down nineteen percent.<sup>178</sup>

In addition, surveys have found the information provided by traditional media has been “sparse and virtually nonexistent for some ballot measures.”<sup>179</sup> This is particularly true when news coverage is dominated by elections for major political offices. Poor press coverage hurts democracy since traditional media provides one of the few sources of reliable, verifiable information about local ballot measures.

During the same period of 2010 to 2014, internet use was up 83.7 percent.<sup>180</sup> The criticism of social media and the coverage of news by the internet in general is that these sources are extremely diverse in numbers with like-minded followers, thus providing no contradictory viewpoints or debate of the issues. Social media also lacks traditional media’s third-party filtering of information sources, fact checking, and, in many instances, editorial judgment as to what stories should be put out over the internet.<sup>181</sup> All this brings into question the credibility of the information found on the internet.

With the decline of print media, the lack of in-depth analysis by TV reporters, the polarization of talk radio, and the questionable sources of information on social media, many voters find the sources of information available to them unreliable.<sup>182</sup>

However, reliable forums where debate can be open and vigorous exist at the local government level. Throughout the nation, county, city and district, legislative bodies have the investigative powers, financial

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178. Soat, *supra* note 177.

179. SIMMONS, *supra* note 49, at 11.

180. Soat, *supra* note 177.

181. Gandour, *supra* note 177; Hunt Allcott & Matthew Genzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSP. 211-15, 232-33 (2017); *see also* *Newspapers Fact Sheet*, *supra* note 177; 2018 *Ogilvy Media Influence Study*, OGILVY (June 18, 2018) [https://www.ogilvy.it/news/ogilvy\\_global\\_media\\_influence\\_survey\\_2018.html](https://www.ogilvy.it/news/ogilvy_global_media_influence_survey_2018.html), *discussed in* John McCarthy, *Journalists believe the public trusts traditional media 22% less than in 2016*, THE DRUM (June 18, 2018), <https://www.thedrum.com/news/2018/06/18/journalists-believe-the-public-trusts-traditional-media-22-less-2016>. *See also* Petter Bae Brandtzaeg & Asbjørn Følstad, *Trust and Distrust in Online Fact-Checking Services*, COMMUNICATIONS OF THE ACM, Sept. 2017, at 65, <https://cacm.acm.org/magazines/2017/9/220440-trust-and-distrust-in-online-fact-checking-services/>; Yvonne T. Chua, *Staying true to journalistic principles in an era of alternative facts*, MEDIA ASIA May 4, 2018, at 94; Janna Anderson & Lee Rainie, *The Future of Truth and Misinformation Online*, PEW RESEARCH CENTER (Oct. 19, 2017), <https://www.pewinternet.org/2017/10/19/the-future-of-truth-and-misinformation-online/>.

182. *See* SIMMONS, *supra* note 49; Soat, *supra* note 177. For an analysis of the use of “False News” in the 2016 U.S. election, *see* Matthew Ellis, *Social Media in the 2016 U.S. Presidential Election*, E-INTERNATIONAL RELATIONS (July 28, 2017), <https://www.e-ir.info/2017/07/28/social-media-in-the-2016-u-s-presidential-election/>.

resources, committee structures and expertise to analyze and debate the merits of propositions and provide useful information to voters. When Californians were asked in a 2013 poll if they would like to expand the role of government in their initiative process, they overwhelmingly answered yes.<sup>183</sup>

### *California Initiative Reforms*

#### Transparency and Education

Recognizing the problems facing the initiative process, the California legislature took steps to reform its statewide initiative system by passing the Ballot Initiative Transparency Act of 2014 (“Transparency Act”).<sup>184</sup> The Transparency Act established a three-step process to better educate its voters on statewide initiatives.<sup>185</sup>

**Step One:** Provide more useful information to the electorate.

1. The Transparency Act requires a plain-language state website where voters can get a brief summary of the initiative.<sup>186</sup> The state attorney general must prepare a title and summary statement for the initiative and allow a thirty-day *public comment period* on the proposed language before allowing proponents to circulate the petition for signatures.<sup>187</sup>
2. The website must list those who are “for” and “against” the measure, and the amount of money the top ten contributors have given to the campaigns.<sup>188</sup>
3. The state legislature must refer the initiative to appropriate committees of the Senate and Assembly, and hold joint public hearings on the ballot measure.<sup>189</sup> These hearings may prompt the legislature to enact its own statutes, thereby rendering the

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183. STATEWIDE SURVEY May 2013, *supra* note 126 at 10-11, 13.

184. See *Legislative Counsel’s Digest*, in S.B. 1253 (Cal. 2014) [hereinafter S.B. 1253 *Legislative Counsel’s Digest*] for an analysis of the Transparency Acts amendments to the CAL. ELECTIONS CODE §§ 9, 101, 9002, 9004, 9005, 9014, 9030, 9031, 9033, 9051, 9082.7, 9094.5, 9604, and 18621.

185. See *id.*

186. See *id.*

187. See generally CAL. ELECTIONS CODE §§ 9002-9006; see also S.B. 1253 *Legislative Counsel’s Digest*, *supra* note 184.

188. ELECTIONS § 9082.7; see S.B. 1253 *Legislative Counsel’s Digest*, *supra* note 184.

189. ELECTIONS § 9082.7; see S.B. 1253 *Legislative Counsel’s Digest*, *supra* note 184.

initiative unnecessary and saving the state considerable election expenses.<sup>190</sup>

**Step Two:** Amend flaws in the proposed initiative prior to the election.

During the thirty-day *public comment period*, the proponents of the proposed initiative may submit amendments to the measure in order to clarify the theme, purpose, or subject of the measure as originally proposed. It is hoped this period of public review and comment will improve the proposal and avoid court challenges to the initiative.<sup>191</sup>

**Step Three:** Extend the statutory time for filing, certification and vote on a measure.

To accomplish the objectives of studying proposed initiatives and holding public hearings, the Transparency Act has changed the number of days the proposed measure has before it must be sent to the Attorney General, the manner and time frame for collecting signatures, when joint legislative hearings are to be held, and when the measure can be certified for election.<sup>192</sup>

#### *How to Improve Local Initiatives*

##### Town Hall Democracy

If one of the functions of the representative form of government is to have elected officials examine, debate, and propose solutions to civic problems, then the citizens' initiative obviously takes part of that function away from elected representatives. In some instances, that is not a good idea. Elected officials perform vital civic functions. At the same time, the electorate should be able to voice their collective opinion on issues, as they do through the initiative system. Herein lies an inherent conflict between the initiative process and the system of local representative government. The solution is to involve the local governments in the process of educating the voter on issues raised by initiatives.

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190. See ELECTIONS § 9007; see also S.B. 1253 *Legislative Counsel's Digest*, *supra* note 184.

191. ELECTIONS § 9002.

192. See *id.* §§ 9005, 9014, 9030, 9031, 9033, 9034, 9082.7; see also S.B. 1253 *Legislative Counsel's Digest*, *supra* note 184. (The California elections Code section 9007 requires the appropriate committees of the Senate and Assembly to hold joint public hearing on the measure no later than 131 days prior to when the electorate vote on the state initiative).

The intent of the California legislature in passing the Transparency Act is to let the public know who sponsors the initiative, and to give the electorate more accurate, unbiased information on statewide initiatives. This article proposes a similar approach for local initiatives by using county, city, and district government resources as follows:

**Step One:** Educate the electorate on local initiatives.

1. Establish a government interactive website. The website will provide a short, plain-language summary of the measure. On the website the public can comment on the proposed initiative's title and summary statement before the petition is circulated for signatures.
2. The website must list those "for" and "against" the measure and, in descending order, the amount of money the top twenty contributors give to the initiative campaigns.
3. A link to the county registrar of voters should be part of the website so voters can sign the petition, if they so choose, to place the measure on the ballot. This will reduce, but not eliminate, the costly practice of using signature gatherers. The voter will be required to provide information verifying voter registration. This could be easily done once the citizen personally registers with the registrar of voters.
4. Conduct public hearings through local legislative bodies on all proposed initiatives prior to the measures being certified for the ballot. Research and analysis of an initiative and its impact on the community will be done by governmental employees or by retained impartial outside experts. This legislative review of the proposed measure will begin after the proponents of the initiative have gathered an initial number, ten to forty percent, of the required voter signatures to qualify the initiative for the ballot.

One positive result of requiring all initiatives to go through local government examination and public hearings is that proponents, knowing their measures will be examined carefully, should be prepared to explain the initiative and its objectives in the open forums. This should lead to clarity of the measure's purpose and how it will be implemented. In addition, public examination will also afford local legislative bodies the opportunity to enact legislation if they feel the proposed initiative has merit. As a result, the number of initiatives going to the electorate should be reduced.

**Step Two:** Amend flaws in the proposed local initiatives prior to certification.

1. Proponents should be allowed to clarify and make changes to the initiative to eliminate drafting errors or perceived unintended consequences of the proposed initiative.
2. Some jurisdictions may even consider allowing the proponents to amend the proposition during the government public hearing period if the proponents believe it would result in a better law. The practicality of allowing such amendments would depend on the percentage of qualifying signatures required prior to the measure progressing to public hearings, and whether proponents would lose the signatures already gathered.

**Step Three:** Adjust the statutory time limits for review, certification, and vote on a measure.

For the above recommendations to work, local governments will have to establish new time periods for when and how signatures will be gathered, initiatives will be studied, and public hearings will be conducted, and how quickly the initiative must go to the voter after being certified for the ballot.<sup>193</sup> Such an examination should not needlessly delay a qualified petition from going to the electorate in a timely manner. The examination process, therefore, has to begin early in the signature gathering phase.

**Step Four:** Publish an unbiased, educational report on the initiative.

After the public hearings are over, an unbiased, educational report should be prepared by the local legislative body and publicly published. The report should comply with California Elections Code Section 9212(a), which allows a local entity to comment on an initiative's effect upon its community and on existing government plans and regulations. Section 9212(a) reads, in part, the legislative body may refer the proposed initiative measure to any city agency or agencies for a report on any or all of the following:

- a. fiscal impact
- b. effect on the internal consistency of the county or city general and specific plans

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193. See S.B. 1253 *Legislative Counsel's Digest*, *supra* note 184.

- c. effect on the use of land, the impact on the availability and location of housing
- d. impact on funding for infrastructure of all types
- e. impact on the community's ability to attract and retain business and employment
- f. impact on the uses of vacant parcels of land
- g. impact on agricultural lands, open space, traffic congestion, existing business districts, and develop areas designated for revitalization, and
- h. any other matters the legislative body desires to be in the report.<sup>194</sup>

Currently, most local governments only comment on the fiscal impact of an initiative. This is usually done by the offices of county counsel, city attorney, or an attorney retained by a district government. These reports lack detail and are published in the voter's pamphlet which, by state and local law, are limited in word length.<sup>195</sup>

The reforms suggested would require local government agencies to provide a much more detailed report and to include the other issues listed in Section 9212(a). Further, in order for the local government to produce such a thorough report, the time for expert analysis, public hearings, and preparation of the report would have to be adjusted by law. Presently, Section 9212(a) requires that reports be completed within thirty days after the initiative has been certified for election.<sup>196</sup> As a consequence, under current law, the investigation, public hearings, and report would have to be done while the initiative is being circulated for signatures. Local governments are inclined not to expend time and money on an extensive analysis when they do not know if the measure will qualify for the ballot.<sup>197</sup> That is why the reform suggested requires proponents to submit the measure for analysis after collecting ten percent to forty percent of the required signatures. Local governments will have to decide what percentage of required signatures must be collected before the examination begins.

The California Transparency Act established a new time period for the statewide initiative process.<sup>198</sup> One change is that state agencies must examine an initiative and complete public hearings 131 days before the

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194. ELECTIONS § 9212(a) (California Elections Code Section 9111 is similar to Section 9212 except Section 9111 applies only to California counties).

195. *See id.* §§ 9202, 9203.

196. *Id.* § 9212(b).

197. *Id.*

198. *See S.B. 1253 Legislative Counsel's Digest, supra* note 184.

electorate votes on the measure.<sup>199</sup> Similar time periods should be adopted for the local initiative process.<sup>200</sup>

*What the Reforms Do Not Address*

Many would say that these reforms are not sufficient. Specifically, they do not eliminate money from the initiative process, nor do they give back local governments' control over land use and development planning. In particular, there is no provision for a study on the development's environmental impact on the community.

In view of the 2010 U.S. Supreme Court decision in *Citizens United v. Federal Election Commission* (Citizens United),<sup>201</sup> which ruled political spending by a corporation is allowed by the First Amendment, and the historic role wealth has played in American politics, it is unrealistic to assume that money and its influence are leaving politics any time soon. In fact, as a result of the Citizens United ruling, there has been a deluge of cash pouring into the political process by corporations and wealthy individuals.<sup>202</sup> Similarly, with the California Supreme Court decision in *Tuolumne Jobs v. Superior Court*,<sup>203</sup> environmental laws will continue to be circumvented by passage of laws through citizens' initiatives.

The suggested reforms are designed to allow the citizen body, as a whole, to control the initiative process through the education of the voter on how the process is being used, and what effect an initiative will have on the community. There are numerous initiatives, extensively funded by wealthy interests, the electorate has voted down. They have done so because in the voters' opinion the measures proposed were not in their interest. You cannot ask more of a democratic system than this.

One final point: Will the local governments be willing to expend the time and money to convene committees to examine and hold public hearings on all local initiatives being circulated for signatures? They should and must, or risk cleverly worded initiatives, with consequences not fully understood, being passed by voters at election time. Further, most county and city agencies are well aware of the initiatives being proposed. These agencies are already informally or, as in the unusual case of the City of Salinas, formally providing information to local legislative bodies on the effects such measures will have on the

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199. *Id.*

200. *See supra* notes 92 and 93.

201. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

202. Gabrielle Levy, *How Citizens United Has Changed Politics in 5 Years*, U.S. NEWS & WORLD REP. (Jan. 21, 2015), <https://www.usnews.com/news/articles/2015/01/21/5-years-later-citizens-united-has-remade-us-politics>.

203. *Tuolumne Jobs v. Super. Ct.*, 59 Cal. 4th 1029 (2014).



community. Such information is being provided since, once the initiative is certified to go to the voters, local legislative bodies must decide whether to enact the initiative into law or send it to the voters.<sup>204</sup> The reform suggested simply formalizes this process, makes it more transparent, and requires the local government to produce an unbiased, informative, factual report to the community about the initiative.

### *Local Government Authority*

#### A Duty to Educate the Voter

Local governments should have the authority to hold impartial forums to study, debate, and comment on issues raised by local initiatives. We need only look to California for the legal precedent and standards for using local governments' resources to better inform the electorate.

In 2009, the California Supreme Court took up the issue of whether a public entity may use public funds to educate voters on a public measure, such as a citizens' initiative.<sup>205</sup> In *Vargas v. City of Salinas*, the Supreme Court distinguished between a public entity providing information and actively campaigning for or against an initiative.<sup>206</sup>

The case arose when an initiative was certified to go before the voters regarding the repeal of the City of Salinas Utility Users Tax.<sup>207</sup> At a city council meeting in which the certified initiative was presented, the council decided to have staff prepare a report, as authorized by California Elections Code Section 9212, on the impact the proposed initiative would have on the municipality.<sup>208</sup> After completing its study of the initiative, the city council concluded if the initiative passed it would result in the closures of certain city facilities and termination of services.<sup>209</sup> In a pamphlet circulated to the citizens, the city specifically outlined those facilities and services which would be terminated if the initiative passed.<sup>210</sup> The city also reported the consequences of repealing the tax through a series of council meetings open to the public and through numerous publications, including the city's own newsletter.<sup>211</sup> The supporters of the effort to repeal the tax filed a lawsuit claiming the

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204. CAL. ELECTIONS CODES §§ 9118 (County), 9215 (City or District).

205. See *Vargas v. City of Salinas*, 46 Cal. 4th 1, 5-8 (2009).

206. *Id.*

207. *Id.* at 12.

208. *Id.* at 9.

209. *Id.* at 10-11.

210. *Id.* at 12.

211. *Vargas*, 46 Cal. 4th at 12 (2009).

municipality was spending taxpayer money in a campaign against the initiative in a violation of Government Code Section 54964.<sup>212</sup>

The California Supreme Court held Government Code Section 54964, which prohibits a public entity from spending public funds to advocate for or against a ballot initiative, does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot initiative.<sup>213</sup> The Supreme Court upheld an Appellate Court ruling that a county, city, or district can evaluate the merits of a ballot measure and make its views known to the public without violating Section 54964.<sup>214</sup>

In support of its opinion, the Supreme Court relied upon California Attorney General Opinion Number 73 (1990),<sup>215</sup> and the California legislative committee<sup>216</sup> that prepared Government Code Section 54964 in determining the intent of the legislature in passing Section 54964. The Supreme Court noted how the legislative committee report “is similar to decisions of the California courts that limit the expenditures of public agency funds for political purposes.”<sup>217</sup>

The Court held “as a general rule, a public agency cannot spend public funds to urge the voters for or against a ballot measure, unless the expenditure is explicitly authorized by law (*Stanson v. Mott*) . . . . In the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign.”<sup>218</sup>

The Court went on to clarify the general rule by quoting from the 1990 Attorney General Opinion, which explained that “[a] public agency . . . can use public funds to provide educational information to the public about a ballot measure.”<sup>219</sup>

After quoting the Attorney General Opinion, the California Supreme Court referenced the legislature’s intent in passing Section 54964, and concluded the law only prohibits the expenditure of public funds by a public official or agency which advocates for or against a proposition. Section 54964 does not prohibit the use of

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212. *Id.* at 5-8.

213. *Id.* at 14.

214. *Id.* at 15.

215. 73 Op. Cal. Att’y Gen. 255 (1990).

216. *Voter Registration: Prohibition on Use of Public Funds: Hearing on A.B. 2078 Before the Assemb. Comm. On Elections, Reapportionment, and Constitutional Amendments*, 1999-2000 Reg. Sess., at 2-3 (Cal. 2000).

217. *Vargas*, 46 Cal. 4th at 30 (quoting the legislative committee comments on section 54964).

218. *Id.*

219. 73 Op. Cal. Att’y Gen. 255 (1990).

public funds to educate, in a fair and impartial way, the public on issues raised by an initiative.<sup>220</sup>

In so finding, the Court reaffirmed its prior position in *Stanson v. Mott*, stating:

“[W]e explicitly recognize that a governmental agency ‘pursues a proper informational role when it’ authorizes an agency employee to present the department’s view of a ballot proposal at a meeting of [a private or public] organization, thus making it clear that it is permissible for a public entity to evaluate the merits of a proposed ballot measure and make its views known to the public. Accordingly, we agree with those Court of appeal decisions rendered after *Stanson* that explicitly have held that *Stanson* does not preclude a government entity from publicly expressing an opinion with regard to the merits of a proposed ballot measure, so long as it does not expend public funds to mount a campaign on the measure.”<sup>221</sup>

As if it had not made its point clear enough, the Court further held:

Indeed, upon reflection, it is apparent that in many circumstances a public entity inevitably will “take sides” on a ballot measure and not be “neutral” with respect to its adoption. For example, when a city council or county board of supervisors votes to place a bond or tax measure before the voters, it generally is quite apparent that the governmental entity supports the measure and believes it should be adopted by the electorate. Similarly, when a city council is presented with a local initiative petition that has been signed by the requisite number of voters and declines to enact the measure into law itself but instead places the matter on the ballot, in at least most cases a reasonable observer would infer that a majority of the council does not support adoption of the measure. Thus, the mere circumstance that a public entity may be understood to have an opinion or position regarding the merits of a ballot measure is not improper.<sup>222</sup>

#### *Campaign vs. Impartial Information.*

In *Vargas v. Salinas*, the California Supreme Court recognized that confusion may arise when distinguishing between “campaign” spending and proper “informational” activities.<sup>223</sup> It therefore reaffirmed its ruling in *Stanson v. Mott*, which stated:

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220. *Vargas*, 46 Cal. 4th at 30.

221. *Id.* at 36. *Stanson v. Mott*, 17 Cal. 3d 206 (1976).

222. *Vargas*, 46 Cal. 4th at 36.

223. *Id.* at 15.

With respect to some activities, the distinction is rather clear, thus, the use of public funds to purchase such items as bumper stickers, posters, advertising “floats,” or television and radio “spots” unquestionably constitutes improper campaign activity (citation omitted), as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure. On the other hand, it is generally accepted that a public agency pursues a proper “informational” role when it simply gives a “fair presentation of the facts” in response to a citizen’s request for information or, when requested by a public or private organization, it authorizes an agency employee to present the department’s view of a ballot proposal at a meeting of such organization.<sup>224</sup>

Accordingly, the California Supreme Court in *Stanson v. Mott*, and later in *Vargas v. City of Salinas*, provides the judicial authority and legal standard for how a county, city or district may use public funds to hold public hearings and publish a report on what an initiative means and its impact on the community.<sup>225</sup>

The California legislature, in passing the 2014 Transparency Act, has specifically authorized the type of fair and impartial analysis of initiatives on a statewide level that is being proposed in a modified form for the local initiative process. The state legislature followed the same rationale when it enacted Elections Code Section 9212, which specifically authorizes local legislative bodies, such as county boards of supervisors, city councils, and special districts, to undertake an analysis of the effects of an initiative on its constituents; and Elections Code Section 9282, which requires a ballot pamphlet be produced stating arguments for and against a ballot measure. There is no doubt that local legislative bodies have the right to analyze, hold hearings, and report on the effects initiatives will have on its constituency and government policies.

Following these California precedents, state and local governments should pass the necessary legislation and safeguards to allow governments to evaluate and educate the electorate on issues raised by initiatives and referendums in the direct-democracy process. Doing so will ensure not only greater voter participation at the polls but also wiser decisions on the part of the electorate.

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224. *Stanson*, 17 Cal. 3d at 221.

225. See also *Schroeder v. Irvine City Council*, 97 Cal. App. 4th 174 (2002) (a case prior to *Vargas*, wherein the Appellate Court ruled the Irvine City council could use public funds to educate electorate on an initiative and encourage voters to register to vote in the forthcoming election, even though the City opposed the initiative).

## CITIZENS' INITIATIVE - ITS ORIGINAL PURPOSE

The many are more incorruptible than the few<sup>226</sup>

The original purpose of the California initiative process was to provide a check on the system of representative government. It was a safeguard, allowing the people to correct the abuses of its representatives. The 1911 ballot argument in favor of the initiative process stated in part:

[The initiative] is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negate such measures as it may viciously or negligently enact.<sup>227</sup>

In his first inaugural address, on January 3, 1911, Governor Hiram Johnson echoed the Progressives' intent concerning how the initiative process was to be used, by stating:

I do not by any means believe the Initiative, the Referendum, and the Recall are the panacea for all our political ills, yet they do give the electorate the power of action when desired, and they do place in the hands of the People the means by which they may protect themselves.<sup>228</sup>

## CONCLUSION

This article has been about who should hold power—the wealthy few or the citizenry as a whole? Obviously, concentrating power in the hands of a few, even an educated few, is risky. Humans have a tendency to look out for their own interests, even at the risk of depriving others. This is why democracy relies on the many to control the few. A fundamental democratic principle is that the citizenry, as a whole, will make the right decision for the community. But for the many to make wise decisions, it is necessary they be engaged in and informed of the issues. It is therefore imperative that every tool necessary for the

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226. ARISTOTLE, *THE COMPLETE WORKS OF ARISTOTLE: THE REVISED OXFORD TRANSLATION*, VOL. 2 1251, 2041 (6th ed. 1984).

227. Voter Information Pamphlet, Special Elec., (Oct. 1911), argument in favor of Cal. Initiative and Referendum, Prop. 7.

228. Hiram Johnson, Governor of California, First Inaugural Address (Jan. 3, 1911), <http://governors.library.ca.gov/addresses/23-hjohnson01.html>.

education of the electorate be employed when asking the voter to enact laws through direct democracy.

The four reforms proposed in this article are designed to use government agencies and expertise to study and report in an unbiased way on issues raised by an initiative, and to provide public forums where those issues can be debated. In essence, this is doing nothing more than what is already informally, and in some instances formally, done by local governments. The big difference is that, after studying and debating the issues, the local government issues a factual, informative, and unbiased report on how the initiative will affect the community and the city's administration of its laws and policies. This is exactly what the City of Salinas did with the initiative to repeal its City Use Tax.

And, as in Salinas, the proponents and opponents, traditional media, internet news, social media commentary, and pundits can debate the issues, if they so choose. There is no guarantee that the real issues will be discussed, but unbiased, informative reports are hard to ignore. Nor is there a guarantee the voter will read, view, or follow the commentary that follows the release of a report. However, when issues are debated, discussed, and argued, the public appears to listen. They also seem to want to participate in and vote at the polls as a result. Presidential debates get large numbers of viewers as do debates on major political issues. After such events, people talk about them at the office, amongst friends, and over the dinner table, and they vote.

Mandating local government resources be used to analyze and educate the voters on issues raised by initiatives and referendums increases opportunities where decisions made by the electorate will be the best decisions possible. If this is done, we can secure the freedom promised by our system of government.

As we seek to better inform the electorate, we must be careful not to limit in any way the original intent of the initiative and referendum process—that purpose being to give the people the right to check the abusive exercise of power by their elected representatives. Such guard must be paramount, since at every turn big money will attempt to influence and corrupt, to their purpose, the independent, unbiased forums of our local governments. Done properly, the recommendations of this article can be used throughout the country to better inform the electorate on issues raised by the tools of direct democracy.