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California Local Initiatives and Referenda: An Argument For Keeping the Progressive Flame Burning

Patrick J. Borchers*

INTRODUCTION

Initiatives and referenda are an ingrained part of California political history and culture.¹ Born of the Progressive movement of the early twentieth century, direct democracy in many states, including California, is an enduring political concept.²

Broadly defined, initiative is the power of the electorate to legislate or amend the state constitution directly by collecting the signatures of a sufficient number of registered voters on a petition.³ With some

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1. Lee, *The Initiative and Referendum: How California Has Fared*, 68 NAT'L CIVIC REV. 69, 69 (1979).

2. See Price, *The Initiative: A Comparative State Analysis of a Western Phenomenon*, 28 W. POL. Q. 243, 243-45 (1975); Note, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A.L. REV. 1045, 1049-50 (1986).

3. Comment, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 925-27 (1975) [hereafter Comment, *California Initiative*]. The necessary number of signatures varies from state to state. See Price, *supra* note 2, at 246-47. In California, a statewide initiative requires the signatures of five percent of the voters casting votes in the last gubernatorial race to qualify legislation for the ballot, eight percent to qualify a constitutional amendment. CAL. CONST. art. II, § 8. Initiatives to place a county ordinance on a county ballot require the signatures of ten percent of the voters in the last gubernatorial race within the county's jurisdiction. CAL. ELEC. CODE § 3711 (West Supp. 1989). Initiatives to place an ordinance on a city ballot require the signatures of ten percent of the registered voters within the city. CAL. ELEC. CODE § 4011 (West Supp. 1989).

rare exceptions,⁴ if a petition drive collects enough signatures, the measure is placed on the ballot and requires a simple majority of the votes to become law.⁵ Referendum is the power of the electorate to refer legislation to itself for approval or disapproval after enactment by a legislative body.⁶ If a referendum petition receives sufficient signatures within a set time after passage of the legislation,⁷ the referred legislation becomes law only if approved by a majority of the voters casting ballots in the referendum election.⁸ The California Constitution guarantees the right of initiative and referendum, both locally and statewide.⁹ The Constitution speaks of initiative and referendum not as powers granted to the people, but rather as powers "reserved" by the people,¹⁰ terminology that courts have found significant.¹¹

Part I of this article reviews the history and development of the right of local initiative and referendum from its roots in the Progressive movement to the beginning of this decade. In Part II, the article assesses and discusses three important new limitations on California local ballot measures: preemption by state law, invalidity because of conflicts with local "general plans," and exclusive delegation to the local legislative body. Part III assesses the available empirical data on the effect of direct democracy on local political policy and the desirability of limiting the availability of local initiatives and referenda.

This article evaluates the trend of recent decisional law in California with regard to local initiatives and referenda. Despite the constitu-

4. See, e.g., CAL. CONST. art. XIII A, § 1(b) (two-thirds majority necessary to increase the bonded indebtedness of any local entity).

5. See Comment, *California Initiative*, *supra* note 3, at 925.

6. See Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1721 (1966) [hereafter Comment, *Scope*].

7. See, e.g., CAL. CONST. art. II, § 9 (California state-wide referenda require the signatures of five percent of the voters in the last gubernatorial race, and must be collected within ninety days of enactment); CAL. ELEC. CODE § 4051 (West Supp. 1989) (ten percent of registered voters within a city must sign a referendum petition within thirty days passage by the city council in order to refer an ordinance).

8. See Comment, *Scope*, *supra* note 6, at 1721.

9. See CAL. CONST. art. II, §§ 8-9, 11; art. IV, § 1.

10. *Id.*

11. See, e.g., *Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668 (1976); *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*, 18 Cal. 3d 582, 591, 557 P.2d 473, 135 Cal. Rptr. 41, (1976) ("Drafted in light of the theory that all governmental authority ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them."). Cf. Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 15 (1978) (terming the distinction a "fiction").

tional status of the right of local direct democracy, recent decisions have imposed new and substantial limitations on that right.¹² This article argues that these limitations are at odds with the historical roots of direct democracy, are doctrinally unsound and are unwise from a policy perspective.

I. THE DEVELOPMENT OF THE LOCAL INITIATIVE AND REFERENDUM IN CALIFORNIA

A. Progressive Roots

Although it can be traced to ancient Greece and New England town meetings,¹³ direct democracy made a significant impact in America in the early twentieth century as part of a package of Progressive reforms.¹⁴ In 1898, South Dakota became the first state to embrace the statewide popular initiative.¹⁵ Since that time, nearly half of the states have adopted some type of plebiscite mechanism.¹⁶

Reformist sentiment sweeping the country came to California in the early 1900's.¹⁷ At that time the Southern Pacific Railroad dominated, corrupted and bribed the state legislature, and all of California politics, to the exclusion of all other interests.¹⁸ Popular frustration

12. See *infra* notes 74-158 and accompanying text.

13. Brostoff, *Direct Democracy Makes Increasingly Good Sense*, 10 L. A. LAW. 64, 64 (June 1987).

14. See LEAGUE OF WOMEN VOTERS OF CALIFORNIA, *INITIATIVE AND REFERENDUM IN CALIFORNIA A LEGACY LOST? A STUDY OF DIRECT LEGISLATION IN CALIFORNIA FROM PROGRESSIVE HOPES TO PRESENT REALITY* (1984); CAL. SEC'Y OF STATE MARCH FONG EU, *A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS* (updated annually); Ertukel, *Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics*, 2 J. LAW AND POLITICS 313, 313 (1987); Lowenstein, *Campaign Spending and Ballot Propositions*, 29 UCLA L. REV. 505, 507-08 (1982); Price, *supra* note 2, at 243 n.2; Sirico, *The Constitutionality of the Initiative and Referendum*, 65 IOWA L. REV. 637, 638 (1980); Zimmerman, *The Initiative and Referendum: A Threat to Representative Government*, 8 URBAN L. AND POL'Y 219, 221 (1987); Comment, *Scope*, *supra* note 6, at 1717. See generally D. MAGELBY, *DIRECT LEGISLATION* (1984); L. TALLION, *AN HISTORICAL ANALYSIS OF THE INITIATIVE, REFERENDUM AND RECALL PROCESS* (1977); J. NAISBITT, *MEGATRENDS: THE NEW DIRECTIONS TRANSFORMING OUR LIVES*, 164-75 (1982) (discussing the effect of shifts from representative democracy to direct democracy).

15. Lowe, *Restrictions on Initiative and Referendum Powers in South Dakota*, 28 S.D.L. REV. 53 (1982); Sirico, *supra* note 14, at 638; Zimmerman, *supra* note 14, at 220.

16. Allen, *The National Initiative: A Preliminary Analysis*, 58 NEB. L. REV. 965, 1007 (1979); Sirico, *supra* note 14, at 638.

17. B. HYINK, S. BROWN & E. THACKER, *POLITICS AND GOVERNMENT IN CALIFORNIA* at 61 (9th ed. 1975) (hereafter B. HYINK). See generally M. WEATHERSON, *HIRAM JOHNSON: A BIO-BIBLIOGRAPHY* (1988).

18. B. HYINK, *supra* note 17, at 62.

with Southern Pacific hit the boiling point in reaction to the railroad's bullying of the 1906 California Republican Convention.¹⁹ Shortly thereafter, breakaway Republicans formed the "Lincoln-Roosevelt" league.²⁰ The League successfully sponsored the Direct Primary Act, which required political parties to nominate their candidates based upon the popular vote in a primary election, instead of through a state party convention.²¹

Encouraged by the possibility of nominating a Republican who was not a puppet of the railroad interests, the League began searching for appealing candidates.²² The League finally succeeded in drafting a reluctant young lawyer named Hiram Johnson.²³ Johnson was a San Francisco prosecutor, and had prosecuted successfully famous political boss Abe Ruef on a charge of bribing a San Francisco County Supervisor.²⁴ Johnson's major campaign promise was to "kick the Southern Pacific Railroad out of the Republican Party and out of State Government."²⁵

Aided by the inability of the old guard Republicans to settle on a single candidate, Johnson captured the Republican gubernatorial primary with almost fifty percent of the votes.²⁶ Aided by a strong Socialist third-party candidate, who siphoned almost fifteen percent of the general election votes from the Democratic candidate, Johnson captured the general election in November of 1910.²⁷ League Republicans also won majorities in both houses of the legislature.²⁸

The League Republicans came to power with a broad agenda. Among their legislative innovations during Johnson's first term were women's suffrage in state elections, shorter work days, workers' compensation, investment Blue Sky laws and statutes prohibiting political corruption.²⁹ No reform, however, was as essential to the

19. *Id.*

20. *Id.* See also H. JOHNSON, 1 DIARY LETTERS OF HIRAM JOHNSON at 9-10 (R. Burke ed. 1983) (hereafter H. JOHNSON).

21. B. HYINK, *supra* note 17, at 62; H. JOHNSON, *supra* note 20, at 10.

22. H. JOHNSON, *supra* note 20, at 10.

23. *Id.*

24. B. HYINK, *supra* note 17, at 62; H. JOHNSON, *supra* note 20, at 9. This was one of the most eventful episodes in California political history. The San Francisco graft prosecutions included repeated attempts to bribe witnesses and juries and the murder of a prosecutor in the San Francisco County Superior Courthouse. See generally F. HICHBORN, THE SYSTEM (1915).

25. B. HYINK, *supra* note 17, at 67.

26. H. JOHNSON, *supra* note 20, at 10-11.

27. *Id.* at 12.

28. *Id.*

29. *Id.* at 14-15.

Progressive agenda as the direct democracy trilogy: recall, referendum and initiative. In his first inaugural address Johnson declared:

And while I do not by any means believe the Initiative, the Referendum, and the Recall are the panacea for 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 protect themselves.³⁰

In a 1911 special election, the League-dominated state legislature put before the voters a measure to amend the state constitution to add provisions for these reforms.³¹ By a three to one margin, the voters approved the amendment.³² Perhaps because they carried out so much of their agenda in the four years spanning Johnson's first term as governor, the Progressives quickly passed the zenith of their influence in California. In 1912 the newly-formed national Progressive Party, popularly known as the "Bull Moose" Party, nominated Theodore Roosevelt as its presidential candidate, and Governor Johnson as its vice-presidential candidate.³³ Roosevelt and Johnson ran strongly despite their third party status, but charismatic Democratic nominee Woodrow Wilson won a majority of the electoral votes.³⁴ Johnson was re-elected to the statehouse in 1914, but resigned in 1916 to run successfully for the United States Senate, where he served until his death three decades later.³⁵

The great legacy of Johnson and the Progressives was the reduction of the distorting and un-democratic influences of corruption and big business on State and local government in California. One of their methods was to link more directly popular sentiment and political policy through women's suffrage, recall, referendum, initiative, direct primaries, and allowing political candidates to "cross-file" and thereby run in more than one political primary.³⁶ Two of the monuments that the Progressives left on the political landscape of California were the referendum and the initiative. Thus, the recent battles over the scope of local initiatives and referenda,³⁷ are, as one commentator concluded recently, battles to determine how long of a shadow Hiram

30. F. HICHBORN, *STORY OF THE SESSION OF THE CALIFORNIA LEGISLATURE OF 1911* at 93 n.115 (1911) (quoting the Jan. 4, 1911 inaugural address of Governor Johnson).

31. H. JOHNSON, *supra* note 20, at 14.

32. *Id.*

33. B. HYINK, *supra* note 17, at 64.

34. *Id.*

35. H. JOHNSON, *supra* note 20, at 19.

36. *Id.* at 13-15.

37. *See infra* notes 78-158 and accompanying text.

Johnson continues to cast over California politics.³⁸ Through the early 1980's, the Governor's shadow was long indeed.

B. Case law Development

From their inception, initiatives and referenda have been devices for short-circuiting representative government. In order to function effectively, these powers needed to be at least roughly co-extensive with the legislative authority of the governing body. Accordingly, the 1911 constitutional amendments were drafted broadly, containing few restrictions. The only express limit on the substance of an initiated law or constitutional amendment is that it may not "embrace more than one subject."³⁹ The only express limitation on the substance of a referendum is that it does not apply to urgency measures, legislation "calling elections . . . , providing for tax levies or appropriations for usual current expenses"⁴⁰

Beyond these limits, courts acting in the wake of the 1911 amendments generally took the view that initiatives and referenda could reach as far as the authority of the legislative body; therefore, state initiatives could reach to the limits of state authority, local initiatives to the limits of local authority.⁴¹ Accordingly, popularly-initiated legislation obviously does not have the power to override the federal constitution, or other strictures that apply equally to acts of the legislative body.⁴²

38. Fulton, *Ballot Box Zoning*, CAL. LAW. 42, 45 (May, 1988) ("if [a local growth control initiative is struck down], it will seem to the proponents of slow growth that Hiram Johnson's shadow is very short indeed.").

39. CAL. CONST. art. II, § 8 (former art. IV, § 1 (added 1911)). See also California Trial Lawyers Ass'n, Inc. v. Eu, 200 Cal. App. 3d 351, 360-61, 245 Cal. Rptr. 916, 921-22 (1988) (insurance initiative may not be submitted to voters because it violates the single subject rule). See generally Eastman, *Squelching Vox Populi: Judicial Review of the Initiative in California*, 25 SANTA CLARA L. REV. 529, 538-43 (1985) (discussing the availability of pre-election injunctions); Comment, *Pre-election Judicial Review: Taking the Initiative in Voter Protection*, 71 CALIF. L. REV. 1216, 1226-27 (1983) (discussing the availability of pre-election injunctions).

40. CAL. CONST. art. II, § 9 (formerly art. IV, § 1 (added 1911)). See also Geiger v. Board of Supervisors, 48 Cal. 2d 832, 837, 313 P.2d 545, 547 (1957) (referendum of a county sales and use tax not available).

41. See, e.g., Hunt v. City of Riverside, 31 Cal. 2d 619, 628, 191 P.2d 426, 431 (1948); Martin v. Smith, 176 Cal. App. 2d 115, 117, 1 Cal. Rptr. 307, 547 (1959); Ley v. Dominguez, 212 Cal. 587, 593, 299 P. 713, 715 (1931); McClure v. Nye, 22 Cal. App. 248, 251, 133 P. 1145, 1147 (1913).

42. See Comment, *Scope*, supra note 6, at 1724-25. See generally Borchers & Dauer, *Taming the New Breed of Nuclear Free Zone Ordinances: Statutory and Constitutional Infirmities in Local Procurement Ordinances Blacklisting the Producers of Nuclear Weapons Components*, 40 HASTINGS L.J. 87 (1988) (arguing that certain types of nuclear local free zone

The primary judicially-created limit on popular enactments restricted them to "legislative" actions, as opposed to "administrative" or "judicial" actions.⁴³ The animating principle behind this distinction was the courts' belief that popular enactments should be restricted to fairly broad declarations of policy.⁴⁴ In essence, the courts declared a "one-bite-at-the-apple" rule. In order to avoid undue interference with governmental functions, the electorate must act at the time when the fundamental policy is set, not at a later time when the local entity has passed the point of no return in implementing the already-declared policy.⁴⁵

The other substantial limitation on the use of local popular enactments was announced in *Hurst v. City of Burlingame*.⁴⁶ In *Hurst*, the California Supreme Court struck down an initiative enacting a city-wide zoning ordinance.⁴⁷ The court reasoned that the initiative was invalid because it enacted a zoning ordinance without affording the affected property owners a hearing as required by state law.⁴⁸ The court perceived a conflict between zoning law and initiative law, and resolved the conflict in favor of the zoning statutes because of their greater specificity.⁴⁹ The court also suggested in dictum that its holding was constitutionally-compelled, because failure to afford a hearing offended procedural due process.⁵⁰

As a practical matter, *Hurst* meant that zoning ordinances never could be the subject of an initiative, because of the impossible logistics of arranging for a statutory-complaint hearing before the ultimate decision-maker, the electorate. *Hurst* also led to the curious

ordinances, many of which are the product of direct democracy, conflict with state statutes and the federal constitution).

43. See Comment, *Scope*, *supra* note 6, at 1734-36. Other states have similar doctrines. See, e.g., Note, *Referendum and Rezoning*, Margolis v. District Court, 53 U. COLO. L. REV. 745 (1982); Note, *Zoning Initiative and Referendum—Delegation of Powers—A Board of County Commissioners' Approval of a Planned Unit Development is Legislative Action, Subject to Referendum; Sufficiently Precise Standards are Required for a Board of County Commissioners to Approve a Final Development Plan*, Peachtree Development Co. v. Paul, 67 Ohio St. 2d, 423 N.E.2d 1081 (1981), 51 U. CIN. L. REV. 149 (1982).

44. See, e.g., Simpson v. Hite, 36 Cal. 2d 125, 130-31, 222 P.2d 225, 229 (1950); McKevitt v. City of Sacramento, 55 Cal. App. 117, 124, 203 P. 132, 136 (1921).

45. See, e.g., Simpson, 36 Cal. 2d at 130-31, 222 P.2d at 228 (initiative ordinance designating a new site for a court house invalid because county had already entered into contracts for construction at the new site). See also Comment, *Scope*, *supra* note 6, at 1734-36.

46. 207 Cal. 137, 277 P. 308 (1929).

47. *Id.* at 140, 227 P. at 311.

48. *Id.*

49. *Id.* at 141, 227 P. at 311.

50. *Id.*

anomaly that voters could refer, but not initiate, zoning ordinances.⁵¹ The distinction drawn by the *Hurst* court was that in the case of a referred zoning ordinance a hearing necessarily had taken place at the time of enactment by the legislative body.⁵²

Beginning in 1974, with three decisions authored by Justice Matthew Tobriner, the California Supreme Court dismantled the *Hurst* doctrine, and pushed the scope of local initiatives and referenda to their outer boundaries.⁵³ In *San Diego Building Contractors Association v. City Council*,⁵⁴ the Court considered the validity of an initiated zoning ordinance in the City of San Diego. The court upheld the ordinance, distinguishing *Hurst* on the grounds that the City of Burlingame (the defendant in *Hurst*) was a general law city, and thus governed by state law procedures for ordinance enactment, while San Diego was a charter city, and bound only by its charter procedures.⁵⁵ After reviewing the San Diego charter, the court concluded that it did not require a hearing, or similar procedure, prior to the enactment of a zoning ordinance.⁵⁶ The court also specifically disapproved the *Hurst* dictum which implied that due process required notice and a hearing prior to the enactment of a zoning ordinance.⁵⁷

In *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*,⁵⁸ the court directly overruled *Hurst* on its holding that zoning initiatives, in general law cities, required a hearing as mandated by statute. At issue in *Livermore* was an initiative commonly known as the "SAVE" initiative, which prohibited the issuance of building permits within the city until local educational, sewage disposal, and water supply facilities met minimum standards.⁵⁹ The court began from the premise that the SAVE initiative was a zoning ordinance which, like the ordinance at issue in *Hurst*, would have required a statutory notice and hearing if enacted by the city council.⁶⁰ The court then criticized the incongruity generated by *Hurst*:

51. See *Dwyer v. City Council*, 200 Cal. 505, 253 P. 320 (1927).

52. *Hurst*, 207 Cal. at 142, 227 P. at 313 (In *Dwyer* "the city council had taken all of the required preliminary steps in order that the measure might become a valid city ordinance . . .").

53. See generally *Fulton*, *supra* note 38, at 43 (discussing the three Tobriner decisions).

54. 13 Cal. 3d 205, 529 P.2d 520, 118 Cal. Rptr. 146 (1974).

55. *Id.* at 215-16, 529 P.2d at 526, 118 Cal. Rptr. at 152.

56. *Id.* at 209, 529 P.2d at 522, 118 Cal. Rptr. at 148.

57. *Id.* at 216, 529 P.2d at 526-27, 118 Cal. Rptr. at 152-53.

58. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

59. *Id.* at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43.

60. *Id.* at 593-94, 557 P.2d at 474-75, 135 Cal. Rptr. at 44-45. The trial court made such a finding, and the Supreme Court did not question it, perhaps because of its eagerness to

At first glance it becomes apparent that something must be wrong with the reasoning in *Hurst*. Starting from a premise of equality—that voters possess only the same legislative authority as does the city council—*Hurst* arrived at the conclusion that only the council and not the voters had the authority to enact zoning measures.⁶¹

The court concluded that the *Hurst* court erroneously perceived a conflict between initiative law and the zoning statutes.⁶² The legislature intended to apply the procedural requirements governing zoning ordinance adoption only to city council action, not voter action.⁶³ The court reasoned that it made no more sense to impose the procedural framework of city council action on the voters than it did to impose the procedural framework of voter action on the city council.⁶⁴

Finally, and most importantly, the court held that its reading of the zoning laws was constitutionally-compelled. The *Livermore* majority concluded that the *Hurst* court erred in treating the perceived conflict between the zoning law and initiative law as “a conflict between two statutes of equal status.”⁶⁵ This analysis, the court reasoned, overlooked the fact that the initiative process is a “*right itself guaranteed by the Constitution*.”⁶⁶ To the extent that the zoning statutes conflicted with the right of the electorate to legislate on a

overrule *Hurst*. Nonetheless, a credible argument could be made that the SAVE initiative was not a zoning ordinance within the meaning of the Government Code sections cited by the Supreme Court. The SAVE initiative was a “performance standard” growth control initiative, requiring the city to solve basic service problems prior to continuing to allow development. See STANFORD ENVIRONMENTAL LAW SOCIETY, A HANDBOOK FOR CONTROLLING LOCAL GROWTH at 86 (1973); Deutsch, *Land Use Growth Controls: A Case Study of San Jose and Livermore, California*, 15 SANTA CLARA L. REV. 1, 14 (1974). Thus, the SAVE initiative did not change any land-use designations, nor necessarily prevent the issuance of any building permits. In these respects, the SAVE initiative does not resemble traditional zoning ordinances. This argument was, in fact, the primary argument made by counsel for the City of Livermore throughout the litigation. See, Appellants’ opening Brief, Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976) (authored by Maurice Engel), Appellants’ Petition for Hearing By the Supreme Court of the State of California, *Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (authored by Maurice Engel). The proponents of the SAVE initiative and the Sierra Club argued directly and vigorously for the overruling of *Hurst*. See Brief of Amici Curiae, Save All Valley Environments, Inc., and the Sierra Club In Support of Defendants and Appellants, *Livermore*, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (authored by Richard J. Fink).

61. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 593-94, 557 P.2d 473, 479, 135 Cal. Rptr. 41, 47.

62. *Id.* at 594, 557 P.2d at 479, 135 Cal. Rptr. at 47.

63. *Id.*

64. *Id.*

65. *Id.* at 594, 557 P.2d at 480, 135 Cal. Rptr. at 48.

66. *Id.* at 595, 557 P.2d at 481, 135 Cal. Rptr. at 49 (emphasis added).

footing equal to the city council, the court held that the zoning statutes were unconstitutional.⁶⁷

The third case in the Tobriner trilogy was *Arnel Development Co. v. City of Costa Mesa*.⁶⁸ In *Arnel* a neighborhood association circulated and passed an initiative to rezone sixty-eight acres of land within the city for single family residential use.⁶⁹ The plaintiffs, owners of the property, argued that the rezoning was not the proper subject of an initiative; they contended that rezoning is "administrative" or "adjudicatory" in nature, as opposed to legislative.⁷⁰ The plaintiffs premised their argument on the assertion that the relatively small size of the parcel, and the small number of owners, took the matter outside the scope of legislative action because the action did not implicate broad policy issues.⁷¹ The court rejected this argument, holding that the zoning of any parcel, no matter how small, required the exercise of political judgment characteristic of legislative action, and thus was appropriate for initiative or referendum.⁷² Finally, the court reiterated its holding in *San Diego Building Contractors* that due process did not require a notice or hearing prior to rezoning.⁷³

These cases represented the high water mark for California local initiatives and referenda. Since then the tide has ebbed considerably.

II. A NEW ERA OF LIMITS

This ebbing tide is most apparent in three areas. The first is the application of preemption doctrine to initiatives and referenda, the second is the newly-created requirement of general plan consistency, and the third is the "exclusive delegation" doctrine.

A. *Preemption by the Cortese-Knox Act*

California's Cortese-Knox Act⁷⁴ is a comprehensive and complicated legislative scheme to regulate inter-governmental land-use decisions within each county. The Act provides for a local agency

67. *Id.*

68. 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980).

69. *Id.* at 514, 620 P.2d at 567, 169 Cal. Rptr. at 905.

70. *Id.* at 514, 620 P.2d at 567-68, 169 Cal. Rptr. at 906.

71. *Id.* at 514-16, 620 P.2d at 567-68, 169 Cal. Rptr. at 906-07.

72. *Id.*

73. *Id.* at 521-22, 620 P.2d at 571, 169 Cal. Rptr. at 910.

74. CAL. GOV'T CODE §§ 56000-57550 (West Supp. 1989).

formation commission, commonly known as a "LAFCO," which has the exclusive authority within each county to make determinations on matters such as the planning sphere of cities within the county, annexations of land to cities, and the incorporation of new cities.⁷⁵

In *Ferrini v. City of San Luis Obispo*,⁷⁶ the electorate in San Luis Obispo qualified an initiative that would have prohibited all annexations unless approved by the voters at the next election.⁷⁷ Plaintiffs were landowners who had successfully petitioned LAFCO for annexation.⁷⁸ Plaintiffs argued that the forerunner legislation to the Cortese-Knox Act preempted the initiated legislation.⁷⁹

The court of appeal agreed. The court began by noting the comprehensive and exclusive nature of the legislation creating LAFCOs.⁸⁰ The court concluded that it was "persuaded that the Legislature's intent to occupy the field . . . is clearly established."⁸¹ Thus, the court held the city council would have no power to enact such legislation, and consequently, because of the coextensive reach of the electorate and the city council, the initiative was invalid.⁸²

Ferrini is sound doctrinally, and its holding that the Cortese-Knox Act has preemptive effect is uncontroversial.⁸³ Nevertheless, because of its broad language, *Ferrini* may have unintended consequences. The Cortese-Knox Act does not foreclose cities from making any decisions that affect annexations. For instance, a city council may assign land-use designations to property within its planning area, but not yet within the city boundaries. Such decisions may weigh heavily on a landowner's decision to seek annexation. An effect on annexation, however, should not be interpreted to prevent the initiation or referral of a land-use designation on property outside a city, but within the city's planning area. *Ferrini* simply holds that in cases in

75. CAL. GOV'T CODE § 56325 (West Supp. 1989).

76. 150 Cal. App. 3d 239, 197 Cal. Rptr. 694 (1983).

77. *Id.* at 242 n.2, 197 Cal. Rptr. at 696 n.2.

78. *Id.* at 242, 197 Cal. Rptr. at 696.

79. *Id.*

80. *Id.*

81. *Id.* at 246, 197 Cal. Rptr. at 698.

82. *Id.* at 248, 197 Cal. Rptr. at 700.

83. The holding is only uncontroversial if one accepts the premise that the authority of local electorates and local legislative bodies is co-extensive. A plausible argument can be made that local electorates ought to have broader authority than local legislative bodies, at least in the context of overriding state statutes, because of the constitutional foundation of the initiative and referendum powers. However, no cases have taken this "strong" view of the power of local electorates to act. Moreover, as this article points out, even the more modest assertion that local electorates and legislative bodies ought to have equal authority is in jeopardy because of recent judicial limitations.

which the city council may not act, the electorate's authority is circumscribed similarly;⁸⁴ *Ferrini* ought not be read more broadly.

Cases in the wake of *Ferrini* are now making their way up the appellate ladder.⁸⁵ The challenge will be to adopt a principled reading of the preemption doctrine.

B. Consistency With General Plans

Under California law, all general law (non-charter) cities must have a "general plan."⁸⁶ A general plan is a comprehensive planning document, which can be amended by a majority vote of the city council.⁸⁷ Zoning, and other planning ordinances, must be consistent with the general plan.⁸⁸

Recent case law has created a new requirement that initiatives and referenda conform to general plans. In *deBottari v. Norco City Council*,⁸⁹ a landowner applied to the city council for a general plan and zoning change, both of which were granted.⁹⁰ The general plan amendment was approved a mere two weeks before the zoning change.⁹¹ Following the zoning change, voters collected sufficient signatures on a petition to refer the zoning ordinance.⁹² The city council refused to repeal the ordinance or call for an election, arguing that either action risked having a zoning ordinance inconsistent with the general plan.⁹³

Plaintiff petitioned for a writ of mandate to compel the city council to repeal the zoning change or call for an election; the trial court denied the writ and the court of appeal affirmed. The court of appeal reasoned that general plan and ordinance consistency is the "linchpin of California's land use and development laws"⁹⁴ Further, the court referred to what it termed the "immutable effect" of the general plan,⁹⁵ and its "constitutional" nature with respect to land-

84. *Ferrini*, 150 Cal. App. 3d 239, 248, 197 Cal. Rptr. 694, 700.

85. *See, e.g.,* *Fulton*, *supra* note 38, at 45.

86. CAL. GOV'T CODE § 65860 (West Supp. 1989).

87. CAL. GOV'T CODE § 65300 (West Supp. 1989).

88. *See, e.g., id.* §§ 65860, 66473.5 (West Supp. 1989).

89. 171 Cal. App. 3d 1204, 217 Cal. Rptr. 790 (1985).

90. *Id.* at 1207, 217 Cal. Rptr. at 790.

91. *Id.* at 1207-08, 217 Cal. Rptr. at 792.

92. *Id.* at 1208, 217 Cal. Rptr. at 792.

93. *Id.*

94. *Id.* at 1213, 217 Cal. Rptr. at 795.

95. *Id.* at 1211, 217 Cal. Rptr. at 794 (quoting Note, *General Plans*, 26 HASTINGS L.J. 614, 622 (1974)).

use decisions.⁹⁶ Accordingly, the court concluded “that the referendum, if successful, would enact a clearly invalid zoning ordinance.”⁹⁷

It does not take an especially acute ear to hear echoes of the discredited *Hurst* doctrine in *deBottari*'s analysis.⁹⁸ Just as the *Hurst* doctrine imposed statutory strictures on the electorate, with which the electorate could not comply, so does the *deBottari* doctrine. The *deBottari* court went out of its way to create the impression that general plans are “sacred,” “immutable,” or equivalent to the Constitution. The record belies the truth. The landowner in *deBottari* sought and received the general plan change only two weeks before the zoning change.⁹⁹ City councils generally view the change of land-use designations within general plans as little more than a precursor to zoning changes, and the Norco City Council appears to be no exception to the rule.

Moreover, the suggestion that general plans are “immutable,” in the sense that the Constitution is immutable, is flatly wrong. As the court itself recognized, general plans may be, and are, amended several times per year upon a simple majority vote of the city council.¹⁰⁰ The court's suggestion that the referendum sought to enact an ordinance inconsistent with the general plan is equally erroneous. Quite to the contrary, the city council did the only “enacting;” the referendum proponents sought only to preserve the status quo.

The rule announced in *deBottari* is little more than an effort to throw statutory roadblocks in the way of the electorate's ability to affect land use decisions. In *Livermore*, the California Supreme Court rejected such a reading of the state's planning laws as implausible and unconstitutional.¹⁰¹ Perhaps because of these infirmities, *deBottari* apparently is not meeting with universal acceptance.

Recently, a Los Angeles Superior Court judge refused to follow *deBottari*, concluding that a city council could correct inconsistencies

96. *Id.* at 1212, 217 Cal. Rptr. at 795.

97. *Id.* at 1213, 217 Cal. Rptr. at 795.

98. *See supra* notes 57-63 and accompanying text.

99. 171 Cal. App. 3d at 1208, 217 Cal. Rptr. at 792.

100. *Id.* at 1213, 217 Cal. Rptr. at 795 (citing CAL. GOV'T CODE § 65361 (West Supp. 1989)).

101. *See supra* notes 57-66 and accompanying text. To make the absurdity complete, the *deBottari* decision amounts to little more than an insistence that the referendum proponents simply picked the wrong enactment to referend. The general plan change clearly is a decision subject to referendum. *See, e.g.,* *Yost v. Thomas*, 36 Cal. 3d 561, 685 P.2d 1152, 205 Cal. Rptr. 801 (1984). Under the *deBottari* rule, the referendum, had it been directed at the general plan, would have controlled over the inconsistent zoning ordinance.

between a general plan and zoning ordinances in a reasonable time.¹⁰² Even more recently, a court of appeals' decision purported to distinguish *deBottari*. In *Building Industry Association of San Diego v. Superior Court*,¹⁰³ a homebuilders trade association sought to invalidate an initiative setting numerical growth limits. The homebuilders made a two-pronged attack on the ordinance. First, they argued that it violated state statutes requiring all cities to accept their "fair share" of low and moderate income housing; second, they argued that the ordinance conflicted with the city of Oceanside's general plan.¹⁰⁴ The court of appeal agreed with the trial court's decision denying summary judgment to both sides.¹⁰⁵ The court concluded that the "fair share" issue presented factual issues requiring a trial.¹⁰⁶

However, the court suggested that conflict with the city's general plan was not sufficient to invalidate the ordinance.¹⁰⁷ Reviewing the case and statutory authority, the court concluded that "[a] declaration of invalidity of the ordinance is not a prescribed remedy" for inconsistency within the general plan.¹⁰⁸ In the final paragraph of the opinion, the court distinguished *deBottari*:

The basic factual situation in *deBottari* was that a repeal of the zoning ordinance there involved, if placed on the ballot as a referendum measure, would result in the subject property being zoned for the low density residential use while the amended general plan calls for higher residential density. Thus, in *deBottari* the court was concerned with a clear, immediate inconsistency between the zoning ordinance repeal which was the subject of the referendum, if adopted, and the amended general plan, resulting in the trial and appellate courts' refusing to order the referendum placed on the ballot. Since no such clear, immediate inconsistency between [the growth control initiative] and the [Oceanside] general plan is involved here, *deBottari* furnishes no authority for invalidating [the initiative].¹⁰⁹

This distinction is entirely unconvincing. *deBottari* simply announced a broad rule invalidating zoning initiatives and referenda inconsistent with general plans: Neither the clarity nor the immediacy

102. Fulton, *supra* note 38, at 45.

103. 211 Cal. App. 3d 277, 259 Cal. Rptr. 325 (1989).

104. *Id.* at 280, 259 Cal. Rptr. at 326.

105. *Id.* at 298, 259 Cal. Rptr. at 339.

106. *Id.* at 293-94, 259 Cal. Rptr. at 336-37.

107. *Id.* at 297, 269 Cal. Rptr. at 338.

108. *Id.*

109. *Id.* at 297-98, 259 Cal. Rptr. at 339.

of the conflict figured in the rationale. *Building Industry*, however, endorses the more sensible and constitutionally-sound rule that general plans may be brought into harmony with initiatives and referenda after the electorate has acted. Neither the clarity nor the immediacy of the conflict is or ought to be a factor. The *Building Industry* court was on the right track; it should have completed its journey by expressly disagreeing with *deBottari*.

Thus the ultimate influence of the *deBottari* analysis remains an open question. In any event, *deBottari* represents a significant retreat from the philosophy evidenced in *Livermore* and the other decisions of the 1970's, and announces a pernicious doctrine if widely followed.

C. Exclusive Delegation

The California Supreme Court recently imposed the most significant restriction on local initiatives and referenda. In *Committee of Seven Thousand v. Superior Court*,¹¹⁰ the California Supreme Court considered the initiative petition of a local citizens group, the Committee of Seven thousand ("COST"), to prohibit the City of Irvine from imposing any development fees to finance three superhighways, without first submitting the matter to the voters.¹¹¹ California Government Code section 66484.3 specifically allowed, but did not require, Orange County cities, such as Irvine, to impose such fees.¹¹² The section's plain language merely gave them the option:

the board of supervisors of the County of Orange and the city council of any city in that county *may*, by ordinance, require the payment of a fee . . . for purposes of defraying the actual or estimated costs of . . . constructing major thoroughfares.¹¹³

The court began by seizing upon the language of section 66484.3, which spoke only of "the board of supervisors" and "the city council" as having the authority to decide whether such fees were desirable.¹¹⁴ If the legislature specifically intended to allow only the legislative bodies of local entities to make these decisions, the court reasoned, then the statute precluded an initiative on the same topic.¹¹⁵

110. 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988).

111. *Id.* at 495, 754 P.2d at 709, 247 Cal. Rptr. at 363.

112. CAL. GOV'T CODE § 66484.3 (West Supp. 1989).

113. *Committee of Seven Thousand*, 45 Cal. 3d at 501, 754 P.2d at 713, 247 Cal. Rptr. at 367 (quoting California Gov't Code section 66484.3 (emphasis added)).

114. *Id.*

115. *Id.*

The court interpreted past decisions as requiring a strong inference of legislative intent to exclude popular action in cases in which the legislation specifically names the governing body, such the "board of supervisors" or "city council," as opposed to a more generic statutory reference, such as "governing body."¹¹⁶ The court further reasoned that past decisions gave the legislature greater authority to exclude popular action in matters of "statewide concern."¹¹⁷ The court concluded that because transportation was an issue of "statewide concern," and section 66484.3 made a "specific" reference to the legislative bodies of local entities, the legislature intended to preclude popular action, such as the COST initiative.¹¹⁸

Turning to the constitutional¹¹⁹ issue, the court concluded that section 66484.3, read as an exclusive delegation of authority to the city council, did not violate the constitutional guarantee of initiative and referendum. The court's discussion of the constitutional implications of this interpretation of section 66484.3 consisted primarily of an attempt to distinguish *Livermore*.¹²⁰ The court concluded that zoning, the issue in *Livermore*, was primarily a matter of municipal, as opposed to statewide, concern, and that "comments in that case must be read in that context."¹²¹ The court also cited *Ferrini*, and other preemption cases for the proposition that the legislature can limit local action, but did not appear to draw the conclusion that section 66484.3, or its companion statutes, were sufficiently pervasive to occupy the field in the same fashion as the Cortese-Knox Act.¹²²

116. *Id.* ("Review of the caselaw further suggests that the strength of the inference [of legislative intent to exclude popular action] varies according to the precise language used in the statute, a reference using generic language such as 'governing body' or 'legislative body' supporting a weaker inference than a specific reference to 'boards of supervisors' and 'city councils.'").

117. *Id.* at 505, 754 P.2d at 715, 247 Cal. Rptr. at 369 ("[The distinction between municipal affairs and statewide concerns] is an important factor in ascertaining legislative intent. . . .").

118. *Id.* at 509, 754 P.2d at 719, 247 Cal. Rptr. at 373.

119. Article II, section 11, of the California Constitution appears to exclude specifically charter cities, such as Irvine, from the scope of the right to initiative and referendum. However, it is settled law in California that all cities and counties are under the same constitutional obligation to allow initiatives and referenda, regardless of their status as charter or general law. *See, e.g.,* Community Health Ass'n v. Board of Supervisors, 146 Cal. App. 3d 990, 194 Cal. Rptr. 557 (1983); Atlas Hotels, Inc. v. Acker, 230 Cal. App. 2d 658, 41 Cal. Rptr. 231 (1964). Both the majority and the dissent in *Committee of Seven Thousand* assumed this premise, and discussed *Livermore* and other general law city precedents as if they were fully applicable in the charter city context.

120. *Committee of Seven Thousand*, 45 Cal. 3d at 510-11, 754 P.2d at 720-21, 247 Cal. Rptr. at 374-75.

121. *Id.* at 511, 754 P.2d at 720, 247 Cal. Rptr. at 374.

122. *Id.*

Finally, the court rejected COST's suggestion that state delegation to the legislative bodies of local entities was appropriate only in the context of regulation sufficiently pervasive to preempt.¹²³ COST argued that "exclusive delegation" was possible only in cases in which the state occupied the field, thereby converting the local legislative body into an administrative agency of the state.¹²⁴ The Court rejected the "administrative" and "legislative" terminology as "awkward and confusing."¹²⁵ The correct test, the court held, was simply whether the legislature evidenced an intent to exclude popular action.¹²⁶ If the legislature evidenced such an intent, and was acting in an area of statewide concern, initiatives and referenda are barred.¹²⁷

Justice Mosk, writing alone, dissented vigorously.¹²⁸ Justice Mosk sharply criticized the majority for abandoning the rule of resolving doubts in favor of popular action.¹²⁹ Justice Mosk also argued that the majority's test lacked analytical foundation, and that it ignored the constitutional status of the right of referendum.¹³⁰ His dissent reasoned that an exclusive delegation occurs only if the legislature acted to remove all discretion from the local entity, thus making the local entity's legislative body an administrative vehicle for carrying out a pre-ordained state policy.¹³¹ Justice Mosk pointed out the relevant statute, Government Code section 66484.3, "evidenced . . . no policy," but rather gave unfettered discretion to impose or not to impose development fees.¹³² Accordingly, Justice Mosk would have ordered the measure placed on the ballot.¹³³

Even a brief review reveals that there is something wrong with the majority's analysis. The right of local initiative and referendum is a right of constitutional dimension. Yet the majority held that in all issues of "statewide" concern, the legislature may abrogate this right simply by evincing an intent to do so. Constitutional rights, however, act as a check on *legislative* action, not the other way around. The *Livermore* court made it clear, and appropriately so, that legislation

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 513, 754 P.2d at 721, 247 Cal. Rptr. at 375.

127. *Id.*

128. *Id.* at 513, 754 P.2d at 721, 247 Cal. Rptr. 375 (Mosk, J., dissenting).

129. *Id.*

130. *Id.* at 513, 754 P.2d at 722, 247 Cal. Rptr. at 375 (Mosk, J., dissenting).

131. *Id.* at 516, 754 P.2d at 728, 247 Cal. Rptr. at 376 (Mosk, J., dissenting).

132. *Id.*

133. *Id.* at 518, 754 P.2d at 730, 247 Cal. Rptr. at 378 (Mosk, J., dissenting).

inconsistent with the constitutional right of local initiative and referendum is invalid. The doctrine announced by the *Committee of Seven Thousand* court is one of breath-taking breadth, and promises to stand *Livermore* on its head.

Even more startling, however, is the majority's treatment of the matter as if it were already settled California law. Consequently, a closer examination of the cases upon which the *Committee of Seven Thousand* court relied is warranted.

The first case relied upon by the majority for its "exclusive delegation" theory was *Riedman v. Brison*.¹³⁴ In *Riedman*, voters circulated an initiative petition calling for a vote on the question of whether the City of Long Beach should withdraw from the Metropolitan Water District of Southern California.¹³⁵ The *Riedman* plaintiffs, however, only asserted their right to initiative as it arose out of the *charter* of the City of Long Beach.¹³⁶ The Constitution was never mentioned, and the *Riedman* court quite correctly observed that a legislative action giving the decision exclusively to the governing bodies of local entities "is superior to and . . . controls *the charter provisions*."¹³⁷ This modest assertion is light-years from the assertion of the *Committee of Seven Thousand* court that legislative enactments control over *constitutional* provisions.

The second case cited by the majority in support of its "exclusive delegation" theory was *Simpson v. Hite*.¹³⁸ In *Simpson* the court considered a statute requiring boards of supervisors to select "suitable quarters" for superior and municipal courts.¹³⁹ After the Los Angeles County Supervisors had selected a site, and entered into substantial contractual obligations for its construction at that site, an initiative calling for a different site qualified for the ballot.¹⁴⁰ *Simpson*, however, like *Riedman*, apparently dealt only with a right of initiative conferred by a charter, not the Constitution.¹⁴¹ Moreover, unlike *Committee of Seven Thousand*, in *Simpson* the basic policy choice, that courts must have "suitable quarters," had been made by the legislature.¹⁴² Thus, *Simpson* is much closer to being a case in which

134. 217 Cal. 383, 18 P.2d 947 (1933).

135. *Id.* at 385, 18 P.2d at 947.

136. *Id.* at 386-87, 18 P.2d at 947-48.

137. *Id.* (emphasis added).

138. 36 Cal. 2d 125, 222 P.2d 225 (1951).

139. *Id.* at 127, 222 P.2d at 226.

140. *Id.*

141. *Id.* at 129, 222 P.2d at 228.

142. *Id.*

the governing body of a local entity lacked any substantial discretion, and truly was acting as an administrative agency of the state.¹⁴³ Finally, the *Simpson* court went to elaborate lengths to point out the substantial investment already made by the County in reliance upon building on the site chosen by the Board of Supervisors.¹⁴⁴ Thus, the traditional rationale for the administrative/legislative distinction comes into play: the basic policy choice had already been made, the initiative proponents waited too long.

The third decision cited by the majority in support of its “exclusive delegation” theory was *Geiger v. Board of Supervisors*.¹⁴⁵ In *Geiger*, the Butte County Board of Supervisors passed an ordinance imposing a sales and use tax on county residents. Petitioners circulated a referendum calling for its repeal.¹⁴⁶ The Court disposed of Petitioners’ argument that they had a constitutional right to referend by pointing out that the Constitution contains an express exception for legislation “providing for tax levies.”¹⁴⁷ The court confined its statutory discussion entirely to ascertaining whether the legislature intended to *expand* upon the constitutional right, and provide for referenda despite the lack of a constitutional obligation to do so.¹⁴⁸ Thus, *Geiger* has nothing to do with the issues presented in *Committee of Seven Thousand*. Plainly, the subject matter of the initiative in *Committee of Seven Thousand* did not fall within any express exception to the constitutional rights.

In the course of trying to find an “exclusive delegation” theory in the three cases discussed above, the court attempted to distinguish *Blotter v. Farrell*.¹⁴⁹ In *Blotter*, the court considered an initiative that sought to require the city council of Palm Springs to reapportion badly misapportioned city council districts.¹⁵⁰ At that time, Government Code section 34871 gave the “legislative body” of local entities the right to commence the redistricting process.¹⁵¹ With analytical clarity sorely missing in the *Committee of Seven Thousand* opinion, the *Blotter* court stated that the power to redistrict was “given directly to the city council and indirectly to the electors under their

143. *Id.*

144. *Id.* at 128, 222 P.2d at 227.

145. 48 Cal. 2d 832, 313 P.2d 545 (1957).

146. *Id.* at 834, 313 P.2d at 546.

147. *Id.* at 835, 313 P.2d at 547 (quoting former Article IV, section 1).

148. *Id.* at 837, 313 P.2d at 549.

149. 42 Cal. 2d 804, 270 P.2d 481 (1954).

150. *Id.* at 806, 270 P.2d at 482.

151. *Id.* at 809, 270 P.2d at 484 (quoting former California Government Code section 34871).

initiative powers by the Constitution of California.”¹⁵² Thus the *Blotter* court treated as obvious what the *Committee of Seven Thousand* court struggled so mightily not to see. The right of the local electorate to stand on a footing equal with their elected local representatives is a right guaranteed by the Constitution, and consequently acts of the state legislature cannot abrogate that right. The *Committee of Seven Thousand* court attempted to distinguish *Blotter* on the grounds that it involved a “municipal” affair, while the Irvine initiative impacted matters of “statewide” concern.¹⁵³ The *Committee of Seven Thousand* majority failed to recognize, however, that the legislature no more has the power to override the Constitution in matters of “statewide” concern than it does in matters of “municipal” concern.

An even more telling criticism of the majority’s “exclusive delegation” theory, however, is that all the cases relied upon by the court predate *Livermore* by almost two decades. In *Livermore*, the court finally made clear that the legislature does not have the power to substantially restrict the rights of direct democracy conferred by the 1911 amendments.¹⁵⁴ Before *Livermore* the point was at least debatable, particularly in light of the court’s decision in *Hurst v. City of Burlingame*,¹⁵⁵ which the *Livermore* court finally overruled. In fact, *Simpson v. Hite*, one of the chief cases relied upon by *Committee of Seven Thousand*, cited the since-discredited *Hurst* opinion for the proposition that “where a state act specifies the steps to be taken by a local body in enacting legislation, an initiative measure cannot be validly adopted unless such steps are taken.”¹⁵⁶ The authority relied upon by the *Committee of Seven Thousand* majority is from another era, when the interplay between legislation and the right of initiative and referendum was less clear. As the *Committee of Seven Thousand* court recognized, many of California’s planning laws, which *Livermore* and its progeny held to be the subject of popular action, contain language similar to the law that the court held barred the COST initiative.¹⁵⁷ The majority once again attempted to explain away this anomaly with its “statewide”/“mu-

152. *Id.*

153. *Committee of Seven Thousand*, 45 Cal. 3d at 503, 754 P.2d at 714, 247 Cal. Rptr. at 368.

154. See *supra* notes 58-67 and accompanying text.

155. 207 Cal. 134, 277 P. 308 (1929).

156. *Simpson*, 36 Cal. 2d at 134, 222 P.2d at 230-31.

157. *Committee of Seven Thousand*, 45 Cal. 3d at 510-13, 754 P.2d at 720-21, 247 Cal. Rptr. at 374-75.

nicipal” distinction.¹⁵⁸ This distinction, however, fares no better than in other parts of the opinion. The true basis for distinction is that while the *Livermore* court recognized the constitutional status of the initiative and referendum, the *Committee of Seven Thousand* court did not.

Committee of Seven Thousand and *deBottari* thus present unprecedented and substantial limitations on the right of local direct democracy in California. The next part discusses the desirability of imposing such limitations on local electorate.

III. POLITICAL IMPLICATIONS

As discussed in the previous part, the two major new limitations on California local initiatives and referenda — the requirements of general plan consistency and the “exclusive delegation” theory — are doctrinally unsound. Nevertheless, it may be that the doctrines, although products of poor legal reasoning,¹⁵⁹ represent good political policy. This part, however, argues the contrary proposition. The available empirical data suggest that local initiatives and referenda have a beneficial effect on political decision-making, and therefore must not be limited arbitrarily.

Most of the political science and legal literature concentrates on the effects of statewide initiatives, a political phenomenon that is not necessarily analogous to local direct democracy.¹⁶⁰ Despite this emphasis on statewide direct democracy, substantial data is available on local politics. Further, some useful comparisons can be drawn to statewide initiatives and referenda.

Three primary forces distort local *representative* government. The first is outright bribery and corruption of local elected representatives, the second is the effect of campaign contributions on representative elections, and the third is the politics of “interest groups.” Although the popular view may be that corruption, the first distorting force,

158. *Id.*

159. See *supra* notes 86-158 and accompanying text.

160. See, e.g., Allen, *supra* note 16, at 1007-38; Ertukel, *supra* note 14 (1987); Lee, *supra* note 1; Lowenstein, *supra* note 14; Magleby, *Ballot Access for Initiative Petitions and Popular Referendums: The Importance of Petition Circulation and Signature Validation Procedures*, 2 J. OF LAW & POLITICS 287 (1987); Price, *supra* note 2; Radabaugh, *Tendencies of California Direct Legislation*, 42 Sw. Soc. Sci. Q. 66 (1961); Sirico, *supra* note 14; Zimmerman, *supra* note 14; Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733 (1988) [hereafter Note, *Lousy*].

occurs infrequently, it is a substantial problem.¹⁶¹ Local initiatives and referenda act as a correcting influence on this distorting force. Most recent initiatives and referenda have related to land development issues,¹⁶² the most fertile source of corruption.¹⁶³ In all but the smallest communities, it is impracticable to purchase directly the votes of the electorate. Thus, local initiatives and referenda make decisions less predictable, and spread the authority to a far wider group than a city council or a county board of supervisors. Thus, as the Progressives recognized in the early part of the century, direct democracy short-circuits corruption.

The second major distorting influence on the decision-making of representative local government is the effect of campaign contributions on local representatives. The available evidence shows a substantial correlation between high campaign contributions in races for local elective office and favorable local decisions for the big spenders.¹⁶⁴ Local initiatives and referenda also correct for this distorting influence. The heavy campaign contributions in the representative elections do not buy any advantage in the plebiscite. Further, if it appears that big spenders in a representative race invested their money for the sole purpose of obtaining a favorable decision by the governing body, this may well become a substantial campaign issue if the decision later winds up in the hands of the electorate.¹⁶⁵

Interest groups are the third major distorting influence on local representative government. In her comprehensive study, Professor Zisk examined the decision-making dynamics of eighty-two city councils in the San Francisco Bay Area.¹⁶⁶ The study reveals that the

161. STANFORD RESEARCH INSTITUTE 1 CORRUPTION IN LAND USE BUILDING REGULATION at 48 (1978); NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, 1 CORRUPTION IN LAND USE AND BUILDING REGULATION iii, at 39 (1979) (corruption is especially likely in developing areas); Glenn, *State Law Limitations on the Use of Initiatives and Referenda in Connection with Zoning Amendments*, 51 S. CAL. L. REV. 265, 265-66 (1978) ("local politicians have demonstrated parochialism, favoritism, stupidity and greed in regulating land development").

162. Borwenger, *Land Use Planning By Initiative*, 9 L. A. LAW. 43 (Jan. 1987).

163. See *supra* note 161.

164. STANFORD RESEARCH INSTITUTE, *supra* note 161, at 48.

165. Interview with Donald G. Miller, former mayor of Livermore, California (April, 1989); interview with John Stein, former city council member of Livermore, California (April, 1989); interview with Bridget H. Borchers, President, Friends of the Vineyards (April, 1989); Personal Recollection of Author (hereafter collectively "Interviews") (recalling a successful 1982 hillside protection referendum and a 1989 vineyard protection referendum in Livermore, California in which referendum proponents pointed out the heavy contributions of developers to campaign funds of city council members voting in favor of general plan amendments relaxing hillside development standards).

166. B. ZISK, *LOCAL INTEREST POLITICS: A ONE-WAY STREET* (1973).

influences on local elected representatives are extremely complex and varied. Distinct, cohesive political groups, which Professor Zisk calls "interest groups," heavily influence approximately one-half of elected local representatives. The influence that these groups achieve varies, but does not appear to depend upon any one factor that easily can be termed democratic.¹⁶⁷ Rather, the strength of the interest group influence varies with some democratic factors, such as voting strength and size, and other undemocratic factors, such as economic power.¹⁶⁸ The precise effect of direct democracy on this interplay is impossible to evaluate accurately without a study as comprehensive as Professor Zisk's. Nonetheless, direct democracy has the effect of bringing into the political arena interest groups entirely left out of the local representative democratic process.¹⁶⁹ By drawing previously disenfranchised groups, direct democracy furthers the goal of broad political participation. Thus, although the picture lacks perfect clarity, local initiatives and referenda probably have a beneficial effect on the dynamics of interest group influence.

Moreover, there may be other beneficial effects to local direct democracy besides correcting for distorting influences. Critics have increasingly attacked the California statewide initiative process as a tool of specialized interests in which the more heavily-financed side wins.¹⁷⁰ Nevertheless, the institution of statewide initiatives has its vigorous defenders.¹⁷¹ However, the view that the statewide initiative is a process in which the big spenders always win is not entirely accurate. In his comprehensive study of statewide initiatives, Professor Lowenstein pointed out that big money can *defeat* a statewide initiative, but it usually cannot *pass* one.¹⁷²

Even this limited effect, however, may be less prevalent in local ballot measures. Although a more comprehensive study is called for, one city with an active history of direct democracy provides a useful starting point for analysis. Livermore, California, is a city of approximately 50,000 residents located forty miles southeast of San Francisco.¹⁷³ Since 1972, Livermore has voted on two popularly-

167. *Id.* at 19-25.

168. *Id.*

169. Deutsch, *supra* note 60, at 35; Stone, *Local Referendums: An Alternative to the Alienated Voter Model*, 29 PUB. OPIN. Q. 213, 218-19 (1965).

170. See, e.g., Zimmerman, *supra* note 14; Note, *Lousy*, *supra* note 160.

171. See, e.g., Allen, *supra* note 16; Price, *supra* note 2.

172. See Lowenstein, *supra* note 14.

173. Deutsch, *supra* note 60, at 12.

originated initiatives and two referenda, all dealing with land-use issues.¹⁷⁴

The first measure was the 1972 SAVE initiative, which was the subject of the California Supreme Court's opinion in *Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore*,¹⁷⁵ discussed earlier in this article. The SAVE initiative prohibited the issuance of building permits until the City met minimum standards for sewage disposal, educational facilities and water reserves.¹⁷⁶ Development interests, and a majority of the city council, vigorously opposed the SAVE initiative.¹⁷⁷ Out spent by a ratio of more than ten to one, initiative proponents nevertheless won with fifty-five percent of the vote, largely due to a group of approximately one hundred volunteers distributing hand bills door to door and making personal telephone calls.¹⁷⁸

The second measure was a 1982 referendum to overturn various general plan amendments, made by the city council, relaxing hillside development restrictions.¹⁷⁹ The prime beneficiary of this relaxation was a developer seeking to build sixty-five high-priced custom homes on the hillsides separating Livermore from the freeway passing by the city.¹⁸⁰ Development interests, once again, vigorously opposed the referendum.¹⁸¹ Out spent \$16,000 to \$1,200, a ratio of approximately thirteen to one, referendum proponents succeeded with the same strategy as the SAVE proponents: deploying a large number of volunteers to knock on doors.¹⁸² By a margin of fifty-four percent to forty-six percent, Livermore voters rejected relaxations on hillside development.¹⁸³

174. Interviews, *supra* note 165. Livermore also has had two referenda that have not gone to votes. In 1979, the city council increased the maximum residential lot coverage for new homes, but decreased the maximum coverage for the expansion of existing homes. Referendum proponents circulated a petition, arguing that it was a windfall to developers and decreased neighborhood stability. After the petition was certified by the city clerk as containing enough signatures to qualify the ballot, the council exercised its option to repeal the ordinance. In 1985 the city council voted to remove from the mayor the power to appoint city commission members, and vest it in the council. After a petition to referend this ordinance qualified, the council backed down. This referendum was unusual because the traditional roles were reversed. Fared with the first slow-growth city council in several years, development sources used direct democracy to come to the aid of the city's pro-development mayor.

175. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

176. Deutsch, *supra* note 60, at 14.

177. Interviews, *supra* note 165.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

The third measure was a 1986 initiative seeking to require a public vote before the city could enter into a joint powers agreement to fund a massive regional sewage pipeline.¹⁸⁴ Development interests, eager to expand regional sewage capacity, vigorously opposed the initiative.¹⁸⁵ Spending was increased dramatically from 1982; initiative proponents were out spent \$71,000 to \$4,000, a ratio of eighteen to one. This time the big money overcame the grassroots strategy, and the voters defeated the initiative fifty-one percent to forty-nine percent.¹⁸⁶

The fourth measure was a 1989 referendum to repeal zoning ordinances allowing high-priced custom homes on potential vineyard land. Out spent by development interests by the astonishing margin of \$160,000 to \$6,000, a ratio of twenty-seven to one, the grassroots strategy returned to its winning ways.¹⁸⁷ By a margin of fifty-one percent to forty-nine percent,¹⁸⁸ Livermore voters rejected the developments.¹⁸⁹

Thus, in three out of four instances, Livermore voters rejected development interests. These rejections came despite increasing spending by development interests and a city council that more often than not was aligned with the builders and developers.¹⁹⁰ Perhaps the general lessons that can be drawn from the Livermore experience are limited, but it illustrates a simple point. Local initiatives and referenda are a more truly grassroots phenomenon than statewide initiatives. Communities such as Livermore are small enough to allow for effective campaigning with almost no economic resources. Logistics make conducting such a campaign at the state level nearly impossible.

Finally, direct democracy may well have beneficial effects on the quality of representative democracy. States in which the electorate employs statewide initiatives frequently have legislatures that rate higher on standard measures of "accountability" and "effectiveness."¹⁹¹ One possible explanation for this correlation is that legislators who are aware of the possibility of popular action in the face of their inaction are more responsive to their constituents.¹⁹² Al-

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Price, *supra* note 2, at 257.

192. *Id.*

though, as discussed above, statewide and local direct democracy are not precisely parallel, there is no reason to believe that their interplay with representative democracy is radically different.

All this is not to suggest that local direct democracy is not without its critics. One group of commentators has criticized land-use direct democracy for having an "exclusionary effect" on low income and minority groups.¹⁹³ These commentaries, however, do not cite any empirical data that support their assertion that local electorates are more exclusionary in their land-use decisions than local politicians. In *Livermore*, for instance, the two referenda since 1972 were directed at high-priced, custom-lot residential developments.¹⁹⁴ Thus, in *Livermore*, the electorate has been engaged in the antithesis of exclusionary zoning. Even if local direct democracy does have an exclusionary effect, the solution does not lie in the broad limitations developed by the California courts in the 1980's. Rather, an appropriate solution would be to insulate some amount of low and moderate income development from referendum.

Another group of commentators makes the more general complaint that direct democracy, including local direct democracy, is an exercise of "raw" or "tyrannical" majoritarianism.¹⁹⁵ This argument is harder to deflect, in part because it is circular. The choice between a purely representative democracy, and a democracy that mixes direct and representative components, is ultimately a debate over political morality. Debates over political morality and theory are insoluble at a certain level because resolution requires agreement with respect to the "best" way to govern, which is a highly subjective inquiry. Thus, criticizing direct democracy for allowing a "tyranny" of the majority presupposes that there is something "wrong" with majority rule.¹⁹⁶ Even by its own terms, however, the "majority tyranny" criticism is overblown. Elected representatives are placed in, and removed from, office by the majority. Accordingly, representative democracy is only slightly less majoritarian in nature. The most important check on majority rule is judicial constitutional review, a check that applies equally to direct and representative decisions.¹⁹⁷

193. See, e.g., Goetz, *Direct Democracy in Land Use Planning: The State Response to Eastlake*, 19 PAC. L.J. 793, 814, 817-18 (1987); Bell, *supra* note 11; *Livermore*, 18 Cal. 3d at 596, 557 P.2d at 480, 135 Cal. Rptr. at 48 (Clark, J., dissenting).

194. See *supra* notes 179-89.

195. D. MAGELBY, *DIRECT LEGISLATION* (1984); Ertukel, *supra* note 14 (discussing various criticisms of direct democracy); Goetz, *supra* note 193, at 817-18.

196. See, e.g., Goetz *supra* note 193, at 817.

197. See *supra* note 42 and accompanying text.

More importantly, however, this article defends local direct democracy on limited grounds. The available data demonstrates that persons and entities willing to devote their large economic resources to local politics can, and do, increase the chances of local representative decisions favorable to them. These expenditures help big-spending persons and entities either directly, through bribery of local officials, or indirectly, through campaign contributions or enhanced status for their interest groups. This Part argues that local direct democracy is desirable because it corrects for the distorting influence of wealth and willingness to spend wealth on local politics. This argument presupposes the proposition that these distortions *should* be corrected for, and that wealthy persons and entities *ought* not be able to tip the scales in their favor. The proposition that government ought to treat equally all persons, regardless of economic status and willingness to invest economic resources in local politics, may or may not be self-evident. But self-evident or not, it lies close to the heart of American democracy.¹⁹⁸ Judged against this set of values, therefore, the new and broad limitations on California local direct democracy are bad political policy.

CONCLUSION

California local direct democracy was a product of the Progressive movement. It culminated in the constitutional embodiment of the rights of recall, initiate and referendum in the 1911 constitutional amendments. Courts interpreting these amendments generally placed legislative bodies and the electorate on an equal footing. The scope of judicial interpretation of these rights peaked around 1980, and since then the California courts have imposed a succession of limitations. The two most important limitations, the requirement of consistency with the general plan, and the "exclusive delegation" theory, are the product of badly flawed legal reasoning. Moreover, while the data is not complete, the available empirical evidence suggests that substantial limitations on the right of local initiative and referendum are indefensible from a political perspective.

198. The Declaration of Independence (U.S. 1776).

