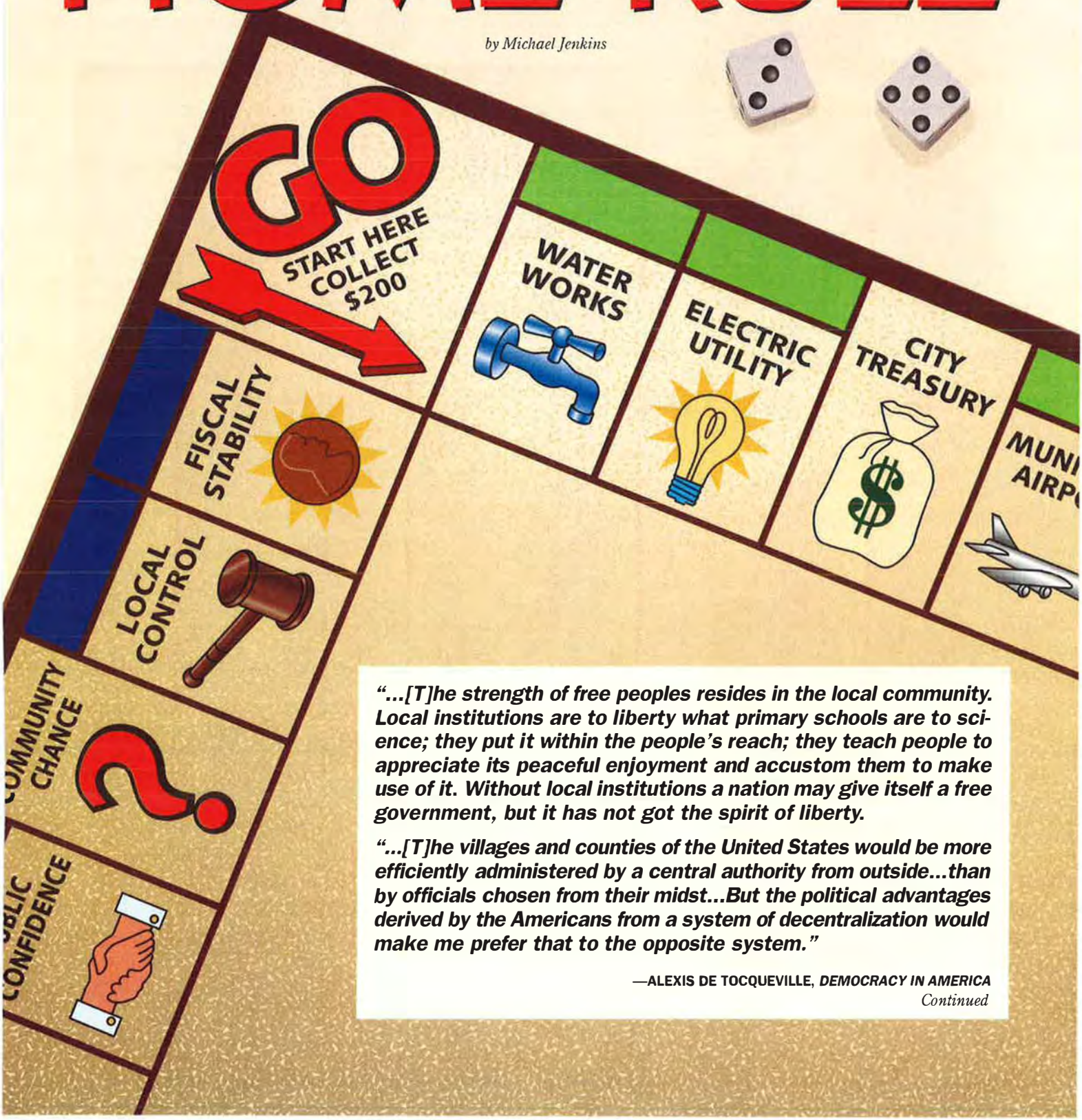
THERE'S NO PLACE LIKE HOME:

The Case For HOME RULE

by Michael Jenkins



"...[T]he strength of free peoples resides in the local community. Local institutions are to liberty what primary schools are to science; they put it within the people's reach; they teach people to appreciate its peaceful enjoyment and accustom them to make use of it. Without local institutions a nation may give itself a free government, but it has not got the spirit of liberty.

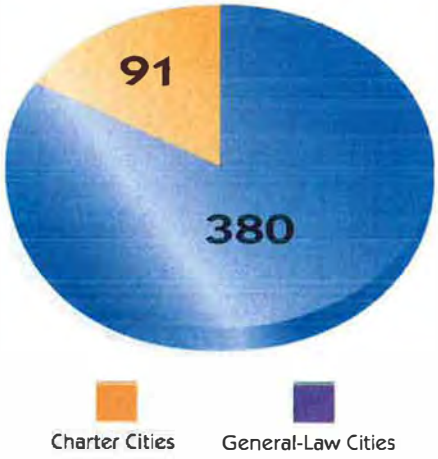
"...[T]he villages and counties of the United States would be more efficiently administered by a central authority from outside...than by officials chosen from their midst...But the political advantages derived by the Americans from a system of decentralization would make me prefer that to the opposite system."

—ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*

Continued

How California's Cities Are Governed

Ninety-one of the 471 cities in California are charter cities. Several general-law cities, among them the Orange County City of Westminster, are currently considering adopting a charter to protect themselves from state intrusion.



De Tocqueville's famous observations are echoed in the final report of the California Constitution Revision Commission (CCRC). The CCRC was formed in 1994 and completed its work in the spring of 1996. Its final recommendations were incorporated into two bills, SCA 39 and ACA 49, neither of which passed out of the legislature during the 1996 legislative session. The CCRC's final report included as a goal "...to encourage governmental decision-making at the level closest to the people." This goal is rooted in the truism that strong local government promotes an active citizenry, creativity and innovation in problem-solving, self-reliance and responsiveness.

Local Government is Under Attack

In the face of this truth, why are citizens nonetheless witnessing the crippling of local government in California? There are numerous reasons, but these three are most prominent:

- Unrestrained interference in essentially local matters by a state legislature that fears and distrusts strong and autonomous local government, supported by a judiciary that tends to favor preeminence of the state (see sidebar, *Obstacles to Progress*);
- Financial debilitation resulting from a combination of:
  - Legislative raids on traditional sources of revenue. For example, in the early 1980s, in order to balance the state budget, the legislature took more than $700 million in vehicle license fees previously allocated to local governments;
  - State control over the property tax;
  - Unfunded state mandates;
  - The success of tax- and spending-limitation ballot measures such as Propositions 4, 13, 62 and 218; and
- Dramatically increased use of the initiative to circumvent exercise of authority by elected officials. (See chart, page 7, *The Rise of the Initiative Process.*)

The state assumed control over the property-tax by constitutional amendment in 1978. The property-tax allocation formula was implemented first through SB 154 and then through SB 154 and then through AB 8. From 1992 to 1994, the legislature modified the allocation formula to shift more property-tax revenue to schools at the expense of local governments scrambling to balance their budgets.

Michael Jenkins is a partner with the Los Angeles-based law firm of Richards, Watson & Gershon, where he specializes in the practice of municipal law and serves as city attorney for the Southern California cities of Diamond Bar, Hermosa Beach, Rolling Hills and West Hollywood.

Local government is hopelessly hamstrung by the cumulative impact of these phenomena. It has made holding office an ordeal rather than an opportunity to serve one's community. It is no coincidence that civility in the local governmental arena has declined in the last decade in direct proportion to the increasing frustration of operating a government under such adverse circumstances.

The Problem

Local government in California is not inherently powerless. The problem is that the place of cities within the California constitutional framework is ill-defined. The lack of clear legal turf leaves cities vulnerable to interference, well-intentioned or otherwise, by the state. Moreover, the courts have dutifully protected, and probably enhanced beyond what is necessary for good democracy, the power of initiative. (See, for example, *Mervynne v. Acker,* 189 Cal.App.2d 558, 563 [1961].) The current wobbly state of local representative government is the result of such action.

Law professor Joan C. Williams attributes the uncertain and vulnerable status of cities to the fact that cities generally have no set place in the constitutional structure. She notes that when judges are asked to decide which entity's law should prevail over the other's in the event of a conflict, they tend to incorporate their attitudes toward governmental power that most often favors the higher, more powerful level — the state. As a consequence, she argues, the legal status of cities is more a function of political hierarchy than of what is a functionally appropriate division of power.

Defining Municipal Affairs: A Peculiar Methodology

Williams' observation is underscored by the convoluted and illogical test formulated by the California Supreme Court in defining "municipal affairs," those subjects that a char-

ter city may address free of interference by the state. There are two types of cities in California: charter cities, which possess "home rule" powers and which may legislate free of interference in matters of municipal affairs; and general-law cities, which are subject to the general laws of the state. (See chart at left, *How California's Cities Are Governed.*) The decision as to what constitutes a "municipal affair" is left to the courts.

In the absence of any real guidance in the state constitution or elsewhere, the courts historically have favored a narrow and debilitating interpretation of municipal affairs, perhaps because of a reverence for the supreme power of the state or a fear of inconsistent laws, which generally are presumed to result from strong local autonomy.

The current methodology used by the courts to define municipal affairs, first articulated in *California Federal Savings & Loan v. City of Los Angeles* and then in *Johnson v. Bradley,* is downright peculiar. As expressed in the 1992 Supreme Court decision in *Johnson v. Bradley,* the court first determines whether the conflicting state statute involves an issue of statewide concern — that is, whether it involves a "dimension demonstrably transcending identifiable municipal interests." If so, the court will uphold the law as applied to a charter city, as long as it is reasonably related to its objective and narrowly tailored.

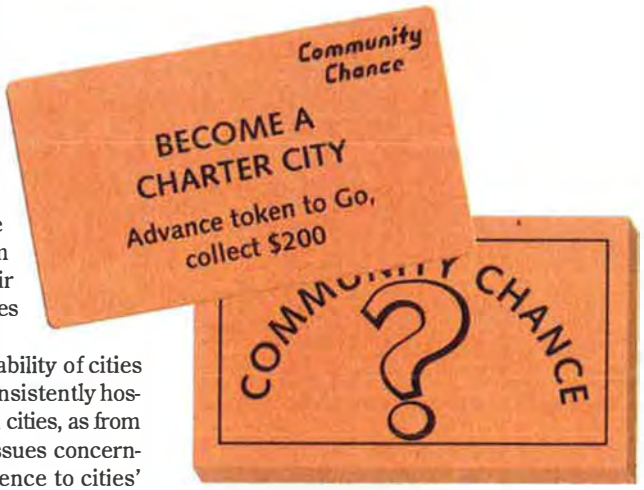
The court is taking a backwards approach to the issue. The focus on the statewide interest, rather than the municipal interest, is misplaced and the judicially adopted rule resolving doubts in favor of the authority of the state is hardly rational. The test should not depend on whether the legislature has pronounced an area of regulation to be of statewide significance and done a reasonably competent job of drawing up legislation. Rather, the test should more properly evaluate whether the local law transcends local interests or conflicts with paramount state policies. If not, it should be left intact.

Professor Daniel B. Rodriguez of Boalt Hall School of Law says this about the current articulation of the judicial test:

"The substitution of a multifaceted test for the rather piecemeal, functional approach of pre-*Cal Fed* decisions has contributed little to resolving the confusions of this constitutional provision. Moreover, there does not seem to be any more encouragement for local initiatives and creativity provided by the California courts' recent approaches...Local government continues to be at the mercy of uncertain judicial tests and of courts' reluctance to expand in substantial ways the boundaries of municipal power and of local sovereignty."

The Proposal

The alternative to this bleak state of affairs for local government is a constitutional reallocation of authority that does not necessarily enhance cities' power at the expense of the state but protects cities from unwarranted assaults on their sovereignty. Williams describes the concept in this way:



"The constitutional vulnerability of cities stems not so much from a consistently hostile attitude towards American cities, as from a tendency to decide basic issues concerning city status without reference to cities' peculiar resources and responsibilities.

"This venerable American tradition of deciding issues of city status by default should be replaced by an effort to define a suitable role for cities and other units of local government. In an age when 70 percent of all Americans live in metropolitan areas, and 40 percent of all funds are spent at the local level, it is time to reconsider the issue of city status on its merits."

A New Approach to Home Rule: Strengthening Cities

Along these lines, the CCRC proposed the following changes to the role of cities within the existing state constitutional framework — one in which the constitution itself sets limits on legislative interference in local matters, and which provides the courts with long-overdue guidance on how the competing interests of state and local governments should be balanced by creating a presumption in favor of the local exercise of authority. This presumption is based on these philosophical tenets:

- Areas of regulation that are local in character should be resolved whenever possible by the level of government closest to the people and best suited to respond to a community's particular needs;
- Fostering local action to address local challenges promotes innovation, citizen participation and problem-solving, which best serves the collective interests of the state's citizens; and
- The state and units of local government are equal partners in the governance of the same people, absolute in their respective spheres.

Under the proposal, the constitution would

Continued

Obstacles to Progress

A number of proposed or existing state laws constitute interference in essentially local matters, including:

- Shopping-cart legislation that requires local governments to hire private shopping cart retrieval services yet limits the amount they can charge grocery stores for their return;
- Anti-graffiti laws that prohibit local regulation of aerosol paint;
- Sign laws that prevent local governments from prohibiting the display of real estate "for sale" signs;
- "Fee" laws that limit the amount local governments may charge for services to an amount less than the cost of providing services;
- Laws that would outlaw local apartment and/or mobile home rent control;
- Laws that would prohibit otherwise lawful excise taxes on development; and
- Laws that require provision in local zoning ordinances to accommodate "granny flats" and "second units" on single-family zoned properties.

Reforming the Initiative Process

Healthy representative government cannot thrive in the face of unrestrained resort to the initiative process.

Frequently, initiatives are poorly drafted, neither completely read nor understood by those voting on them, voted on by a small percentage of the population that has the greatest interest in them and the most to gain by them, and expensive when they call for special elections and give rise to expensive litigation.

Most importantly, initiatives and mandatory referenda are anathema to the system of representative democracy. Leaders are elected so that they may lead responsibly —if they fail to do so, they should not be re-elected. The increasing popularity of term limits assures turnover on city councils. Between elections, city council meetings, and not the ballot box, are the most appropriate forums to influence local governmental action.

A number of reasonable proposals have been floated regarding the process, including the following:

- Requiring that the legislative body hold a public hearing on the initiative ordinance *prior* to circulation, in order to help gauge public reaction to it, give the body an opportunity to consider it before it is circulated, and provide the proponents with input that might improve the quality of the ordinance text;
- Increasing the percentage of signatures of electors required to qualify an initiative for the ballot;
- Limiting initiatives to the general municipal election every two years; and
- Requiring a super-majority vote for approval.

Any one or combination of these reforms would have a salutary effect on the quality of the initiative process as a tool for citizens, as opposed to special interests, to make policy.

include a presumption in favor of local exercise of power, which can only be overcome by showing either:

- The regulation has significant effect beyond the enacting jurisdiction's boundaries; or
- There exists a paramount need for statewide uniformity.

To demonstrate a significant effect beyond the jurisdiction's boundaries, parties challenging a local regulation must show that:

- The regulation affects significantly the health or behavior of people, or the operations of businesses or governments outside the boundaries of the city;
- The primary, as distinguished from incidental, purpose or effect of the regulation is to regulate activities beyond the city's territorial or jurisdictional limits; and
- The effect is real and quantifiable, rather than merely speculative or theoretical.

To demonstrate that the interest in statewide uniformity outweighs the presumption of local control, parties challenging a local regulation must show that:

- The lack of statewide uniformity in the area of regulation would present substantial obstacles to travel or to the ordinary and usual conduct of business within the state;
- Statewide uniformity is essential, not merely desirable, to advance an important policy of the state, and it is demonstrated that the means selected is narrowly tailored so as to accomplish its purpose with the least intrusion on local control feasible; and
- Statewide uniformity in the area will not significantly impair local individuality or the essential attributes of home-rule sovereignty.

Central to this proposal is that *all* cities possess these home-rule powers, not just charter cities. Adoption of a charter would be an option that would permit individuality in the form of governance, but should not be determinative of the existence of home-rule powers. While the courts would remain the arbiters of what constitutes a municipal affair versus a statewide concern, they would have far less discretion to substitute their own predilections of where power ought to lie for the above-described constitutional standard.

Should All Cities Have Home Rule?

An issue for discussion among city officials is whether the distinction between charter and general-law cities continues to make sense. Put another way, the issue is whether *all* cities should be the beneficiaries of home-rule authority and the presumption of local control.

Charter-city status historically has conferred two benefits upon cities: the authority to structure one's city as one chooses, and the ability to have some degree of protection from state usurpation of local policy prerogatives. An issue for discussion is whether the presumption of local control proposed in the article should apply irrespective of whether a city is charter or general-law. Another way to approach the issue would be to abolish the distinction altogether.

What Difference Would These Proposed Guidelines Make?

Ideally, they would dampen the legislature's enthusiasm for micromanagement. In a close case, the presumption in favor of municipal affairs would be determinative. Certainly in the case of the existing or proposed laws described in the sidebar, *Obstacles to Progress* (page 5), none involve areas where local control would have either an extraterritorial effect or offend a significant state policy — none would survive the proposed test. More importantly, the constitution should articulate a dynamic philosophy regarding the role of local government within the governmental system, regardless of whether one can predict what exact difference it will make in future cases.

If implementation of this proposal curtails somewhat the legislature's ability to achieve statewide conformity in some areas, that is the price of strong local government. Not only should it not be cause for concern, it should be expected and embraced, even it if makes governing this state a little messier or a little less manageable from the top down. After all, both state and local governments are governing the same people. They are partners. Local governments should not be

What Are Your Thoughts?

In a recent League survey of city officials, more than 48 percent of respondents felt that restoring home rule should be a key League priority. As these articles suggest, there are a number of policy issues that merit discussion among city officials. Some opportunities for such discussion include League division and department meetings, which provide members with a chance to share their thoughts with their representatives on League policy committees and the League board of directors.

More About Government Finance

For more information about options for government financing, see "Options for Restructuring Local Government Finance," June 15, 1995, *Making California's Governments Work,* League of California Cities Committee on Government Finance Reform; and *California Fiscal Reform: A Plan for Action,* California Business-Higher Education Forum, May 16, 1994.

competing either with the state legislature or with special-interest groups that seek to limit their authority.

There is a risk attendant to any such restoration of balance, which lies behind much of the fear associated with supporting healthy local institutions. The fear is that autonomous localities may not respect the rights of numerical or other minorities. The remedy for this is not perpetuating the debilitation of local government or allowing the legislature to intervene every time it gets the notion that some area of regulation is "important," but to keep intact the overarching authority of the state in the implementation of *truly* important statewide policies, such as prohibitions on discrimination, open-meeting laws and access to public records, worker protection laws, protection of natural resources, regulation of the insurance industry, management of the state highway system and the fair administration of justice. The state has more than enough to do without meddling in local matters.

Economic Independence Is Essential

These principles alone will not empower local government to do the job that it is uniquely suited to do. Economic empowerment is equally essential and requires dedication of certain revenue sources to cities, so that they are beyond the reach of the legislature when it attempts to balance the state budget on the backs of local government.

It is common knowledge that power tends to follow money, and the increasing control over locally grown revenues by the legislature has contributed mightily to the imbalance in governance. Much has been written about this (see sidebar, *More About Government Finance*). Some proposals to accomplish this have included:

- Allowing local agencies to levy and allocate the property tax within the 1-percent cap, or at a minimum, establish a permanent allocation formula;
- Extending to local agencies a larger share of the sales tax;
- Prohibiting the legislature from withholding vehicle license fee revenue;
- Prohibiting the shift from state to local governments existing or new program responsibilities and costs, or providing a workable vehicle to recover state-mandated costs; and
- Allow tax-sharing and burden-sharing (i.e., providing for housing) among neighboring local agencies.

Suffice it to say that the health of cities depends on a resumption of some control over locally raised taxes and the attendant predictability of revenues.

In Conclusion

California's cities are a precious resource, because they vest power closest to the people. Their individuality and viability depends on strengthening their position within the governmental system by shoring up their defenses against a variety of assaults from the outside. State legislators are not demons; local officials are not necessarily saints. But balance in governance must be restored, and those elected to govern local government must be allowed an opportunity to do the things that they can do best.

■

The Rise of the Initiative Process

Between 1986 and 1996, 89 voter initiatives qualified for inclusion on the ballot. By contrast, only 33 voter initiatives were placed on the ballot in the preceding decade, 1975 to 1985, and only 19 from 1964 to 1974. Source: M. Fong Eu, Secretary of State, *A History of the California Initiative Process,* March 1992.

Number of Ballot Initiatives