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REVIEW OF INITIATIVES BY THE CALIFORNIA SUPREME COURT, 2000–2010

*Gerald F. Uelman**

The single-subject rule has been part of the California Constitution since 1948. However, the California Supreme Court had never declared that an initiative violated this requirement until Senate of California v. Jones in 1999. This ruling seemed to suggest that the court would control the ambitions of the fourth branch of government—initiative drafters. Since Jones, the California Supreme Court, in six different cases, has examined initiatives for compliance with the single-subject rule and the prohibition on constitutional revisions. By reviewing all six of these cases, this Article explains that the original hope of Jones’s impact on initiatives was a mere fantasy because the single-subject rule and prohibition on constitutional revisions have again been reduced to historical artifacts.

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At the turn of the millennium, in a fit of pre-9/11 optimism, I greeted the California Supreme Court's decision in *Senate of California v. Jones*¹ as a harbinger of welcome and long-overdue change.² Although the "single-subject" requirement has been part of the California Constitution since 1948,³ *Jones* was the first California Supreme Court decision to declare that an initiative measure violated that requirement, forcing its removal from the ballot even though the necessary signatures to qualify it had been collected.⁴ The decision invalidated the Let the Voters Decide Act of 2000, which would have amended the California Constitution to reduce legislative salaries, mandated voter approval of any increases, and required the California Supreme Court to adopt plans for the decennial reapportionment of legislative and congressional districts.⁵ The conclusion that I authored in a 2001 article conjured up visions of George W. Bush standing on the deck of the USS *Abraham Lincoln* declaring "Mission Accomplished." I declared:

The California Supreme Court decision in *Jones* should send a strong message to the industry that drafts and promotes initiative measures as California's "fourth branch" of government. The door has been opened to greater use of pre-election review of procedural challenges to initiatives, lowering the threshold from the previously required "clear showing" of invalidity to a "strong likelihood" of invalidity. The requirement that initiatives embrace a single subject has finally grown some teeth because of the court's willingness to look beyond the language of the initiative itself to extraneous evidence of "logrolling," and due to the analysis of the potential for voter confusion or deception that closely resembles the "public understanding" test

While *Jones* avoided the question of whether the initiative at issue was a constitutional revision, there are compelling reasons to give this question the same access to

1. 988 P.2d 1089 (Cal. 1999).

2. See Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 1000, 1010 (2001).

3. *Id.* at 999; see CAL. CONST. art. II, § 8(d).

4. See Uelmen, *supra* note 2, at 999.

5. *Id.* at 1004.

pre-election review as the single-subject question, and to enforce it with similar vigor.⁶

This Article briefly reviews the California Supreme Court decisions since *Jones* that have addressed this issue to demonstrate the extent to which I was fantasizing when I looked to the court to control the ambitions of our fourth branch of government. The single-subject rule and the prohibition of constitutional revision through initiatives have again been reduced to historical artifacts, and the pre-election review of initiatives has been severely limited. In the eleven years since *Senate v. Jones*, the California Supreme Court has addressed the appropriateness of pre-election review or examined initiatives for compliance with the single-subject rule or the prohibition of constitutional revision through initiatives six times.

1. *Manduley v. Superior Court*⁷

In this case, the California Supreme Court upheld Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, after voters approved it.⁸ A strong single-subject challenge was presented; it focused on the inclusion of amendments greatly expanding the Three Strikes law to include a number of offenses that had nothing to do with gang violence or juvenile crime.⁹ Proposition 21 “broadened the circumstances in which prosecutors are authorized to file charges against minors 14 years of age and older in the criminal division of the superior court, rather than in the juvenile . . . court.”¹⁰ Relying on the approach enumerated in *Jones*, the plaintiffs argued that there was no public understanding of the breadth of Proposition 21’s provisions.¹¹ The majority opinion by Chief Justice George¹² rejected that argument, finding one line in the legislative analyst’s analysis and one in the attorney general’s official summary mentioning that the initiative “designates additional crimes as violent

6. *Id.* at 1024–25.

7. 41 P.3d 3 (Cal. 2002).

8. *Id.* at 8–9.

9. *See id.* at 27–28.

10. *Id.* at 38 (Moreno, J., concurring).

11. *Id.* at 31 n.12 (majority opinion) (rejecting plaintiffs’ argument that the initiative constituted an instance of “logrolling,” or combining in a single measure several unrelated provisions that might not have garnered majority support if considered separately).

12. *Id.* at 8.

and serious felonies”¹³ He wrote, “We must assume the voters duly considered and comprehended these materials.”¹⁴ Justice Moreno, however, responded in a concurring opinion that should have been labeled a dissent. He wrote:

[W]hile it is to be hoped that voters carefully study their ballot guides, the realistic premise behind the single-subject rule is that many voters do not, and the ballot measures should be simple enough to be fairly well described in the title and summary. The less rigorously we enforce the single-subject rule, the more we are compelled to rely on implausible assumptions about voters’ understanding of a ballot measure’s intricacies.

This lack of notice to voters is especially troublesome because the Three Strikes law is itself a substantial and controversial piece of legislation, the amendment of which merits the careful attention of the voters.¹⁵

2. *Costa v. Superior Court*¹⁶

In this case, the California Court of Appeal, Third Appellate District, granted a pre-election review of Proposition 77, one of several reapportionment schemes that have proposed using retired judges to draw the boundaries.¹⁷ After examining Proposition 77, the court removed it from the ballot on the ground that there were discrepancies between the version circulated to the voters and the version submitted to the attorney general for the ballot.¹⁸

The California Supreme Court reversed and ordered the initiative placed on the ballot, finding that the discrepancies were minor and inadvertent.¹⁹ The court also noted that people do not read an initiative measure before they sign a petition anyway, so no one was fooled.²⁰ The voters defeated the measure, and although that rendered the case moot, the supreme court wrote an opinion to

13. *Id.* at 31 (internal quotation marks and brackets omitted).

14. *Id.* at 32 (quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1085 (Cal. 1990)).

15. *Id.* at 39 (Moreno, J., concurring).

16. 128 P.3d 675 (Cal. 2006).

17. *Id.* at 681–82.

18. *Id.* at 683.

19. *Id.* at 696–97.

20. *See id.* at 699.

further explain its pre-election ruling.²¹ That opinion declared that although the court of appeal was wrong on the merits, it was correct to grant a pre-election review. The supreme court declared:

[B]ecause the question at issue in such a case is whether the initiative measure has satisfied the constitutional or statutory procedural prerequisites necessary to qualify it for the ballot, it is logical and appropriate for a court to consider such a claim prior to the election, because if the threshold procedural prerequisites have not been satisfied the measure is not entitled to be submitted to the voters. Unlike a challenge to the substantive validity of a proposed measure, it cannot properly be suggested that it would be premature to consider such a claim prior to the election, because the focus of the issue is solely upon whether the measure has qualified for the ballot, and not upon the validity or invalidity of the measure were it to be approved by the voters.²²

Costa was a 4–3 decision authored by Chief Justice George,²³ and the majority included a justice of the court of appeal sitting by designation.²⁴ Justices Kennard and Moreno dissented on the ground that *any* variation between the language circulated for signature and the language submitted to the attorney general should invalidate the initiative²⁵ without the court inquiring whether the difference was minor or major. Justice Werdegar dissented on the ground that the supreme court should not render opinions in cases that are moot.²⁶

3. *Californians for an Open Primary v. McPherson*²⁷

While this case did not directly involve a popular initiative, it did involve a constitutional requirement analogous to the single-subject rule.²⁸ When the legislature refers constitutional amendments to the people for a vote, the California Constitution requires that

21. *Id.* at 684.

22. *Id.* at 685.

23. *Id.* at 675–76.

24. *Id.* at 702.

25. *See id.* (Kennard, J., concurring and dissenting).

26. *See id.* at 708 (Werdegar, J., concurring and dissenting).

27. 134 P.3d 299 (Cal. 2006).

28. *Id.*

“[e]ach amendment shall be so prepared and submitted that it can be voted on separately.”²⁹ In this case, the legislature designed its proposed amendments to subvert a popular initiative that had qualified for the ballot that would require open primaries.³⁰ The legislature proposed an alternative, more restrictive open primary combined with a measure to accelerate bond repayments.³¹ The bond measure was calculated to make the voters think that the measure would “save them millions of dollars.”³²

Once again, the California Court of Appeal, Third Appellate District, invalidated the measure on a pre-election review, but instead of withdrawing it from the ballot entirely, the court fashioned a remedy of bifurcation, requiring the two amendments to be submitted to the voters separately.³³ After the voters adopted both measures, the California Supreme Court granted review and vacated the court of appeal’s judgment.³⁴ Holding that the separate-vote requirement should be construed consistent with the single-subject rule, the supreme court agreed that the two amendments violated the rule, but that there was no constitutional authority for the bifurcation remedy that the court of appeal fashioned.³⁵ Then, although the measures had been submitted to the voters in violation of the constitution, the court concluded it would be inappropriate to invalidate them since the voters had separately approved them.³⁶ By eliminating the remedy of bifurcation for single-subject violations, however, the court upped the ante for pre-election review of single-subject challenges.

4. *Independent Energy Producers Association v. McPherson*³⁷

Proposition 80 was fashioned in the wake of California’s electricity meltdown, which was widely blamed on deregulation.³⁸ The proposition would have granted extensive new powers to the

29. CAL. CONST. art. XVIII, § 1.

30. *Californians for an Open Primary*, 134 P.3d at 301.

31. *Id.*

32. *Id.* at 301 n.3.

33. *Id.* at 301.

34. *Id.* at 331.

35. *See id.* at 330.

36. *Id.* at 331.

37. 136 P.3d 178 (Cal. 2006).

38. *See id.* at 182.

Public Utilities Commission (PUC) to regulate energy producers.³⁹ The Independent Energy Producers Association brought suit to invalidate the measure on the ground that the California Constitution grants “plenary power, unlimited by the other provisions of this constitution”⁴⁰ to the *legislature* to grant additional powers to the PUC.⁴¹ The California Court of Appeal, Third Appellate District, granted pre-election review, reasoning that the challenge was not to the measure’s substantive terms but to whether the initiative’s procedural device was even available to do what Proposition 80 proposed.⁴² The court of appeal ruled “Proposition 80 is unquestionably invalid on its face because . . . it runs afoul of a plain and unambiguous provision of our state Constitution . . . that effectively precludes use of the initiative process to accomplish what Proposition 80 proposes to do.”⁴³ The court concluded that “preelection review is proper, indeed essential.”⁴⁴

The California Supreme Court reversed, restoring the measure to the ballot.⁴⁵ Proposition 80 was defeated.⁴⁶ Then, as in *Costa*, the court issued an opinion after the election despite the case being moot.⁴⁷ Unlike in *Costa*, however, the court held that pre-election review was not appropriate.⁴⁸ While Chief Justice George authored⁴⁹ a persuasive opinion grounded in legislative history, he also distinguished much of the language in *Jones* that encouraged pre-trial review of initiatives.⁵⁰ Chief Justice George said that the language granting plenary authority to the legislature was not intended to deny that power to the initiative process.⁵¹ He wrote:

39. *Id.*

40. *Id.* at 180 (quoting CAL. CONST. art. XII, § 5).

41. *Id.*

42. *Id.* at 182–83.

43. *Id.* at 183.

44. *Id.*

45. *Id.*

46. Lynda Gledhill, *Attempt to Restore Regulation of Utilities Fails to Generate Voters’ Support*, S.F. CHRON., Nov. 9, 2005, at A17, available at http://articles.sfgate.com/2005-11-09/news/17399129_1_energy-policy-energy-giants-independent-energy-producers.

47. *Indep. Energy*, 136 P.3d at 180.

48. *See id.*

49. *Id.* at 179.

50. *Id.* at 184–85.

51. *See id.* at 188.

[A] contention that an initiative measure is invalid because the measure cannot lawfully be enacted through the initiative process is a type of claim that generally will *not* become moot if the initiative is approved by the voters at the election. Because this type of claim is potentially susceptible to resolution either before or after an election, there is good reason for a court to be even more cautious than when it is presented with the type of procedural claim at issue in *Costa* before deciding that it is appropriate to resolve such a claim prior to an election rather than wait until after the election. Of course, as this court noted in *Senate v. Jones*, potential costs are incurred in postponing the judicial resolution of a challenge to an initiative measure until after the measure has been submitted to and approved by the voters, and such costs appropriately can be considered by a court in determining the propriety of preelection intervention. Nonetheless, because this type of challenge is one that can be raised and resolved after an election, deferring judicial resolution until after the election—when there will be more time for full briefing and deliberation—often will be the wiser course.⁵²

This language, of course, does not bode well for pre-election review regarding the claim that an initiative undertakes a constitutional revision.

5. *Bighorn-Desert View Water Agency v. Verjil*⁵³

This case is difficult to reconcile with *Independent Energy*, although the California Supreme Court decided the two cases only thirty-five days apart.⁵⁴ Here, in a pre-election review, the California Court of Appeal, Fourth Appellate District, invalidated a San Bernardino County initiative that would have required voter approval for future increases in water rates.⁵⁵ The supreme court agreed, reasoning that although voters had the power to lower water rates by initiative, the Bighorn-Desert View Water Agency's Board's attempt to limit future increases violated the exclusive delegation rule, which

52. *Id.* at 184–85 (footnote omitted) (citations omitted).

53. 138 P.3d 220 (Cal. 2006).

54. *Id.* at 220; *Indep. Energy*, 136 P.3d at 178.

55. *Verjil*, 138 P.3d at 222–23.

bars initiative measures that infringe on the power of the agency's governing board to set its water-delivery rates and charges.⁵⁶ In addressing the appropriateness of pre-election review, however, Justice Kennard's unanimous opinion⁵⁷ simply asserted,

When a significant part of a proposed initiative measure is invalid, the measure may not be submitted to the voters. Accordingly, the trial court correctly determined that the initiative could not be placed on the ballot, and it properly granted judgment for the Agency, and the Court of Appeal correctly affirmed the trial court's judgment, although its reasoning differed substantially from the reasoning we use here.⁵⁸

There is no mention of Chief Justice George's opinion in *Independent Energy*, which Justice Kennard had joined.⁵⁹

6. *Strauss v. Horton*⁶⁰

This ruling is well known to everyone because it upheld Proposition 8, which amended the California Constitution to overrule the California Supreme Court's decision in *In re Marriage Cases*,⁶¹ and because it again outlawed gay marriages in California. What is not widely appreciated, however, is the *Strauss* opinion's narrowing of the arguments available to challenge an initiative measure seeking to revise the constitution. Chief Justice George rejected the argument that an initiative depriving citizens of a fundamental right is a constitutional revision. The chief justice concluded that only a measure that makes "far reaching changes in the nature of our basic governmental plan"⁶² or "substantially alter[s] the basic governmental framework set forth in our Constitution" can qualify as a constitutional revision.⁶³ In her concurring opinion, Justice Werdegar correctly asserted, "[t]his is wrong."⁶⁴ She explained:

56. *Id.* at 230.

57. *Id.* at 221

58. *Id.* at 230.

59. *Indep. Energy*, 136 P.3d at 194.

60. 207 P.3d 48 (Cal. 2009).

61. 183 P.3d 384 (Cal. 2008).

62. *Strauss*, 207 P.3d at 98 (quoting *Amador Valley Joint Union High Sch. v. State Bd. of Equalization*, 22 Cal.3d 208, 223 (1978)).

63. *Id.* at 98 (quoting *Legislature of Cal. v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991)).

64. *Id.* at 124 (Werdegar, J., concurring).

In fact, until today the court has gone only so far as to say that a “qualitative revision *includes* one that involves a change in the basic plan of California government, i.e., a change in its fundamental structure or the foundational powers of its branches.⁶⁵ . . . Today, the majority changes “*includes*” to “*is*,” thus foreclosing other possibilities.⁶⁶

At oral argument, Justice Moreno asked whether repealing the equal protection clause of the California Constitution would be a constitutional revision.⁶⁷ Counsel for the interveners responded that a simple majority could amend the state constitution by initiative to eliminate the guarantee of equal protection of the laws.⁶⁸ In his passionate dissent in *Strauss*, Justice Moreno concluded that:

[R]equiring discrimination against a minority group on the basis of a suspect classification strikes at the core of the promise of equality that underlies our California Constitution and thus represents such a drastic and far-reaching change in the nature and operation of our governmental structure that it must be considered a ‘revision’ of the state constitution⁶⁹

The problem with this argument is that *In re Marriage Cases* had just created the fundamental protection that Justice Moreno extolled. Thus, Justice Moreno seemed to be saying that the California Supreme Court can revise the constitution, but the legislature or the people cannot unless they convene a constitutional convention.

CONCLUSION

In reviewing the summation of these six cases, it is readily apparent that *Jones* was not a harbinger of change, but was instead a hiccup of sorts, probably inspired by the California Supreme Court’s distaste for taking on the job of redistricting. Pre-election review is again a matter of judicial grace, with no consistency in how it is dispensed. *Manduley* restored the single-subject rule to its amorphous, ineffective past.⁷⁰ A claim that a measure works as a

65. *Id.* at 124–25 (quoting *Eu*, 816 P.2d at 1318).

66. *Id.* at 125.

67. *See id.* at 138 (Moreno, J., concurring and dissenting).

68. *Id.*

69. *Id.* at 129 (internal quotation marks omitted).

70. *See Manduley v. Superior Court*, 41 P.3d 3, 32 (Cal. 2002).

constitutional revision has been taken off the table for pre-election review and has been severely restricted by Chief Justice George's sleight of hand in *Strauss*.

I find it quite ironic that the chief justice has often been heard to bemoan the abuse of California's initiative process. When inducted into the American Academy of Arts and Sciences last year in Boston, he used the occasion to address "the perils of direct democracy."⁷¹ He posed this rhetorical question, with little mystery as to how he would answer it:

A student of government might reasonably ask: Does the voter Initiative . . . remain a positive contribution in the form in which it now exists in 21st century California? Or, despite its original objective—to curtail special interests . . . has the voter Initiative now become the tool of the very types of special interests it was intended to control, and an impediment to the effective functioning of a true democratic process?⁷²

I would pose another rhetorical question for the chief justice: To what extent does the unbridled power of the initiative in twenty-first century California reflect the California Supreme Court's failure to enforce the constitutional limits on its use?

To conclude, I would like to return to a metaphor I first employed while greeting *Jones* as our potential savior:

The initiative has thus become a fourth branch of government, with its own industrial complex available to draft and qualify measures on a recurring basis. Like the carnivorous plant in the movie *Little Shop of Horrors*,⁷³ the initiative industry opens its mouth in anticipation of every election, says, "feed me!" and then grows larger. Each time Californians go to the polls, they expect to encounter a dozen ballot propositions, to determine questions as basic as who should go to jail, who should be executed, who

71. Ronald M. George, Chief Justice, Cal. Supreme Court, Induction Ceremony at the American Academy of Arts & Sciences: The Perils of Direct Democracy: The California Experience 7–9 (Oct. 10, 2009), available at <http://www.amacad.org/publications/bulletin/winter2010/ceremony.pdf>.

72. *Id.* at 9.

73. *LITTLE SHOP OF HORRORS* (Warner Bros. 1986).

should pay taxes and how much they should pay, and who can marry whom.⁷⁴

In November 2010, we rejected proposals to legalize marijuana,⁷⁵ junk the reform of redistricting now underway,⁷⁶ repeal the Global Warming Solutions Act of 2006,⁷⁷ and fund state parks with a vehicle-registration surcharge.⁷⁸ We approved a proposal to allow the legislature to enact a budget with a simple majority.⁷⁹ Some of these are good ideas; some are bad. The problem with deciding which are which by the initiative process is that the enactment of an initiative, and often the defeat, takes the issue off the legislative table. Our ability to regulate and fine-tune the application of any changes is eliminated. The only way we can amend an initiative is with another initiative.⁸⁰

74. Uelmen, *supra* note 2, at 999–1000.

75. CAL. SEC'Y OF STATE, CALIFORNIA GENERAL ELECTION: OFFICIAL VOTER INFORMATION GUIDE 92 (2010), *available at* <http://cdn.sos.ca.gov/vig2010/general/pdf/english/complete-vig.pdf> (providing the proposed text of Proposition 19).

76. *Id.* at 115 (providing the proposed text of Proposition 27).

77. *See id.* at 106 (providing the proposed text of Proposition 23).

78. *Id.* at 97 (providing the proposed text of Proposition 21).

79. *Id.* at 113 (providing the proposed text of Proposition 25).

80. *People v. Kelly*, 222 P.3d 186 (Cal. 2010).