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## Is the California Civil Rights Initiative: A Wolf in Sheep's Clothing: Distinguishing Constitutional Amendment from Revision in California's Initiative Process

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# IS THE CALIFORNIA CIVIL RIGHTS INITIATIVE A WOLF IN SHEEP'S CLOTHING?: DISTINGUISHING CONSTITUTIONAL AMENDMENT FROM REVISION IN CALIFORNIA'S INITIATIVE PROCESS

## I. INTRODUCTION

In turn-of-the-century California, the Southern Pacific Railroad Company had a stranglehold on state politics.<sup>1</sup> To return control of the government to the people, the progressive faction of the Republican party led a statewide movement toward direct democracy.<sup>2</sup> In 1911 this movement culminated in the overwhelming adoption by California voters of a constitutional amendment reserving to the people the legislative power of initiative.<sup>3</sup> Currently, California is by far the most active of the states that use the initiative process, and "the initiative . . . has increasingly come to dominate California political culture."<sup>4</sup> The California power of initiative allows the "electors to propose statutes and amendments to the Constitution and to adopt or reject them."<sup>5</sup> As such, California is one of only a few states permitting constitutional amendments by initiative.<sup>6</sup> The

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1. See JOSEPH R. GRODIN ET AL., *THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE* 69 (1993).

2. See *id.*

3. See *id.*

4. *Id.*; see also Marilyn M. Minger, Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879, 879 (1991) ("[I]n March 1991 there were at least forty initiative reform proposals pending in the [California] state legislature.").

5. CAL. CONST. art. II, § 8(a). The electors propose an initiative by presenting to the Secretary of State a petition that sets forth the text of the . . . statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

*Id.* § 8(b). "The Secretary of State shall then submit the measure at the next general election . . . or at any special statewide election held prior to that general election." *Id.* § 8(c).

6. See GRODIN, *supra* note 1, at 69. Also, California is the only state in

initiative power, however, does not permit the people to make major, far-reaching changes—so-called “revisions”—to their constitution.<sup>7</sup> Theory holds that only the legislative houses should propose revisions because they can draft and consider them with the more informed judgment of experience and institutional competence.<sup>8</sup>

Even so, California courts only rarely and reluctantly strike initiative measures as invalid attempts at constitutional revision.<sup>9</sup> They state that it is their “solemn duty to jealously guard the precious initiative power, and to resolve any reasonable doubts in favor of its exercise. . . . [A]ll presumptions favor the validity of initiative measures and . . . such measures must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears.”<sup>10</sup> Whether this “solemn duty” stems from the courts’ reverence of the initiative process or from their fear of angering the same voting public that elects the justices to the bench will never be resolved. Over time, however, the courts developed a two-part test to distinguish appropriate initiative amendment measures from invalid revisions.<sup>11</sup> Because of their solemn duty—based on reverence or fear—to guard the initiative power, courts apply this test very strictly, and initiative measures almost always survive challenge, no matter what these initiatives may do.

Recently, the “people” of California crafted,<sup>12</sup> qualified,<sup>13</sup> and

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which the legislature cannot modify a statutory amendment adopted by initiative unless the initiative so provides. *See id.*

7. *See infra* notes 30-31 and accompanying text; GRODIN, *supra* note 1, at 70.

8. *See infra* notes 32-41 and accompanying text.

9. The California Supreme Court has held only *twice* in modern history that an initiative constituted a revision. *See* Joseph Goldberg, Note, *Raven v. Deukmejian: A Modern Guide to the Voter Initiative Process and State Constitutional Independence*, 28 SAN DIEGO L. REV. 729, 729 (1991).

10. *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 501, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283, 287 (1991).

11. *See infra* notes 42-93 and accompanying text.

12. Glynn Custred, a teacher in the California State University system, and Tom Wood, the executive director of the California Association of Scholars, authored the initiative. *See* Glynn Custred & Tom Wood, *Racial, Gender Preferences Hurt Everybody*, S.F. CHRON., Jan. 19, 1995, at A21.

13. *See* Dave Leshner, *Preference Ban Qualifies for Fall Ballot*, L.A. TIMES, Apr. 17, 1996, at A3. The CCRI “was officially qualified for the Nov. 5 ballot . . . by Secretary of State Bill Jones.” *Id.*; *see also* Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1493 (N.D. Cal. 1996), *preliminary injunction vacated, stay denied as moot, remanded*, 110 F.3d 1431 (9th Cir. 1997) *reh’g denied*, 122 F.3d 692 (9th Cir. 1997), *petition, for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 29, 1997) (No. 97-369), *cert. denied*, 66 U.S.L.W. 3316 (U.S. Nov. 3, 1997) (No. 97-396) (explaining that, after qualifying as an initiative constitutional amendment, Proposition 209 was placed on California’s November 5, 1996, general election

passed<sup>14</sup> Proposition 209, the California Civil Rights Initiative (CCRI), thereby "amending" their constitution. The CCRI's operative clause provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."<sup>15</sup> Proponents label the CCRI as an amendment that simply guarantees "equality of opportunity" and eliminates the "group entitlements . . . that underlie the current racial and ethnic spoils system."<sup>16</sup> Opponents, however, fear that the initiative will affect far-reaching, negative, qualitative changes to the California Constitution beyond what its supporters say to the press.<sup>17</sup>

This Comment does not address the serious affirmative action issues involved with the CCRI. Rather, it focuses on whether the CCRI improperly revises, rather than amends, the California Constitution. Section II outlines the permissible methods of amending and revising the constitution. Section III details California's two-part test for distinguishing constitutional amendment from revision. Section IV concludes that the CCRI would not affect either a quantitative or qualitative revision of the California Constitution under the current test, even though it does propose substantial qualitative changes. Section V states that California's safeguards against improper revision by initiative fail and, furthermore, proposes changes to the initiative process that would prevent misuse. Lastly, Section VI outlines some of the justifications which support the proposed changes to the initiative constitutional amendment process.

## II. CHANGING THE CALIFORNIA CONSTITUTION: AMENDMENT VERSUS REVISION

Changes to the California Constitution take two basic forms: amendment and revision.<sup>18</sup> Although the constitution itself does not specifically define revision and amendment,<sup>19</sup> case law provides some

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ballot).

14. "On November 5, 1996, the voters of California enacted Proposition 209 into law, with 4,736,180 votes (54%) cast in favor of the initiative and 3,986,196 votes (46%) cast in opposition." *Coalition for Econ. Equity*, 946 F. Supp. at 1495.

15. CAL. CONST. art. I, § 31(a).

16. Custred & Wood, *supra* note 12, at A21.

17. See Erwin Chemerinsky & Laurie Levenson, *Sex Discrimination Made Legal*, L.A. TIMES, Jan. 10, 1996, at B9.

18. See CAL. CONST. art. XVIII, §§ 1-2.

19. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equaliza-*

guidance. "[T]he term 'amendment' implies such an addition or change within the lines of the original instrument [constitution] as will effect an improvement, or better carry out the purpose for which it was framed."<sup>20</sup> Revisions, on the other hand, contemplate comprehensive changes to the constitution. A revision involves "far reaching changes in the nature of our basic governmental plan"<sup>21</sup> and alters the "underlying principles" upon which the constitution rests.<sup>22</sup> Even though the constitution does not specifically define revision or amendment, it does lay out the procedures by which to accomplish them.

### A. Authority to Amend the California Constitution

The people of California vest the state's legislative power in the legislature, but they "reserve to themselves the powers of initiative and referendum."<sup>23</sup> Courts label the people's reserved initiative power as "one of the most precious rights of our democratic process."<sup>24</sup> The people's reserved power to change the constitution, however, extends only to amendments, not revisions.<sup>25</sup> Article XVIII states that "[t]he electors may *amend* the Constitution by initiative",<sup>26</sup> it does not allow revision. The legislature may likewise propose amendments to the constitution by a two-thirds vote of each house.<sup>27</sup> The proposed amendment must then be submitted to the voters for popular ratification.<sup>28</sup> Amendments may also be initiated during a constitutional convention proposed by the legislature and approved by voters.<sup>29</sup>

### B. Authority to Revise the California Constitution

Only the legislature may revise the California Constitution. It

tion, 22 Cal. 3d 208, 222, 583 P.2d 1281, 1285, 149 Cal. Rptr. 239, 243 (1978).

20. *Livermore v. Waite*, 102 Cal. 113, 118-19, 36 P. 424, 426 (1894).

21. *Amador*, 22 Cal. 3d at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244.

22. *Livermore*, 102 Cal. at 118-19, 36 P. at 426.

23. CAL. CONST. art. IV, § 1.

24. *Amador*, 22 Cal. 3d at 248, 583 P.2d at 1302, 149 Cal. Rptr. at 259.

25. See *Livermore*, 102 Cal. at 117, 36 P. at 425-26; *Amador*, 22 Cal. 3d at 221, 583 P.2d at 1284, 149 Cal. Rptr. at 242.

26. CAL. CONST. art. XVIII, § 3 (emphasis added).

27. See CAL. CONST. art. XVIII, § 1.

28. See *id.*

29. See *id.* § 2. "If the majority [of citizens] vote yes on that question [whether to hold a constitutional convention], within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable." *Id.*

may do so by legislative proposal and popular ratification, like the amendment process above,<sup>30</sup> or by calling for a constitutional convention approved by the voters.<sup>31</sup>

### 1. Rationale: Why citizens may not revise the California Constitution by initiative

The constitution grants the legislature alone the power of revision because comprehensive changes to the state's governmental structure "require more formality, discussion and deliberation than is available through the initiative process."<sup>32</sup>

The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature.<sup>33</sup>

Therefore, the underlying principles and substantial entirety of the constitution must not change unless the changes are carefully considered and debated by both legislative houses and then ratified by a majority of the voters.

Unlike traditional legislation, initiatives do not undergo a "systematic refining process, in which facts are collected, assumptions challenged, and analysis performed."<sup>34</sup> Citizen drafters, not always skillfully, write initiatives involving extensive and complex social issues. These initiatives often serve the drafters' own interests rather than those of society as a whole.<sup>35</sup>

Fearing some of the same problems, the framers of the United States Constitution rejected a direct, populist democracy<sup>36</sup> in favor of

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30. *See id.* § 1.

31. *See id.* § 2.

32. *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 506, 816 P.2d 1309, 1316, 286 Cal. Rptr. 283, 290 (1991).

33. *Livermore v. Waite*, 102 Cal. 113, 118, 36 P. 424, 426 (1894).

34. Minger, *supra* note 4, at 886 (citation omitted). "[T]he simple truth is that representative lawmaking includes, as part of its process, formal deliberation and debate. The state initiative process does not." Catherine A. Rogers & David L. Faigman, "And to the Republic for Which it Stands": *Guaranteeing a Republican Form of Government*, 23 HASTINGS CONST. L.Q. 1057, 1063 (1996).

35. *See Minger, supra* note 4, at 886.

36. *See Daniel M. Warner, Direct Democracy: The Right of the People to Make Fools of Themselves; The Use and Abuse of Initiative and Referendum, A Local Government Perspective*, 19 SEATTLE U. L. REV. 47, 48 (1995). James Madison described a pure, populist democracy as a "society consisting of a small

republican, representative government<sup>37</sup> that would, as James Madison wrote, "enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial [partisan] considerations."<sup>38</sup> The Constitution's Guarantee Clause embodies this idea and assures that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."<sup>39</sup>

One form of direct democracy is legislation by initiative.<sup>40</sup> This Comment will not address whether the initiative process itself violates the Constitution's guarantee of a republican form of government, a topic of much debate.<sup>41</sup> But, to avoid a major reshaping of California's Constitution, government, and society, under the influence of the inherent problems and dangers explained above, the people should not directly legislate constitutional revisions—substantial changes—using the initiative process. Instead, these changes should flow from the legislative houses or a constitutional convention where ideas can be refined and enlarged and can evolve into appropriate responses to complex, difficult policy matters.

### III. DISTINGUISHING AMENDMENT FROM REVISION: CALIFORNIA'S TWO-PART TEST

Because the people may use their initiative power to amend but

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number of citizens, who assemble and administer the government in person," rather than elected officials who gather to represent everyone. THE FEDERALIST NO. 10, at 133 (James Madison) (Benjamin Fletcher Wright ed., 1966).

37. James Madison defined a republic as "a government in which the scheme of representation takes place." THE FEDERALIST NO. 10, at 133 (James Madison) (Benjamin Fletcher Wright ed., 1966).

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

*Id.* at 133-34.

38. *Id.* at 134.

39. U.S. CONST. art. IV, § 4.

40. See Warner, *supra* note 36, at 48.

41. See Rogers & Faigman, *supra* note 34, at 1059 (concluding that the modern state initiative process is a per se violation of the Guarantee Clause). Compare Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 COLO. L. REV. 749 (1994) (arguing that the initiative does not violate the Guarantee Clause because the essential aspect of republican government is majority rule).

not revise the constitution, California courts have developed a two-part test to distinguish amendment from revision within the definitions noted above. Courts examine the face of the measure in question in order to determine the quantitative and qualitative effects of the proposed changes.<sup>42</sup>

#### A. Part I: Quantitative Effects Test

The first part of the amendment/revision test asks whether the proposed "enactment . . . is so extensive in its provisions as to change directly the 'substantial entirety' of the Constitution by the deletion or alteration of numerous existing provisions."<sup>43</sup> A court looks only at the number of constitutional provisions changed or deleted and does not consider what substantive effect any of the changes could have.

For example, the California Supreme Court found that an initiative "consist[ing] of 12 separate sections . . . in the nature of separate articles divided into some 208 subsections . . . set forth in more than 21,000 words"<sup>44</sup> which would repeal or alter "at least 15 of 25 articles"<sup>45</sup> was an invalid attempt at revision.<sup>46</sup> Conversely, a measure having "limited quantitative effect, repealing only one constitutional section . . . and adding another . . . was not 'so extensive . . . as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions."<sup>47</sup> The initiative in question properly attempted to amend rather than revise the constitution.<sup>48</sup> The California Supreme Court also upheld a proposed initiative amendment "compris[ing] approximately 400 words and . . . limited to [a] . . . single subject."<sup>49</sup>

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42. See *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 506-10, 816 P.2d 1309, 1316-19, 286 Cal. Rptr. 283, 290-93 (1991).

43. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 223, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978).

44. *McFadden v. Jordan*, 32 Cal. 2d 330, 334, 196 P.2d 787, 790 (1948).

45. *Id.* at 345, 196 P.2d at 796.

46. See *id.*

47. *Brosnahan v. Brown*, 32 Cal. 3d 236, 260, 651 P.2d 274, 288, 186 Cal. Rptr. 30, 44 (1982) (quoting *Livermore v. Waite*, 102 Cal. 113, 118-19, 36 P. 424, 429 (1894)).

48. See *id.* at 261, 651 P.2d at 289, 186 Cal. Rptr. at 45.

49. *Amador*, 22 Cal. 3d at 224, 583 P.2d at 1286, 149 Cal. Rptr. at 244; see also *Raven v. Deukmejian*, 52 Cal. 3d 336, 351-52, 801 P.2d 1077, 1086-87, 276 Cal. Rptr. 326, 335-36 (1990) (holding that an initiative deleting no existing constitutional language and affecting only one article was not so quantitatively extensive as to amount to a constitutional revision but holding that the initiative was a qualitative revision).



### 1. The single-subject rule

Although the quantitative effects test seems very mechanical, a related component of the initiative amendment process—the single-subject rule—offers some insight into its rationale. Under the California Constitution, “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”<sup>50</sup> In other words, voters should consider and vote on issues independently. Narrowly focused issues, instead of broad, compound, complicated ones, help voters to understand what they are voting for and encourage informed discussion of those issues.<sup>51</sup> The single-subject rule “keep[s] the initiative process under control.”<sup>52</sup> Its design prevents logrolling,<sup>53</sup> vote dilution,<sup>54</sup> and voter confusion.<sup>55</sup>

In limiting the number of constitutional provisions that a single initiative may add, delete, or alter, the quantitative effects test touches on many of the same issues as the single-subject rule. The quantitative limitation, while restricting the physical scope of an initiative, in turn helps to assure that provisions are narrowly focused and understandable by voters, rather than complex and inscrutable. Like the single-subject rule, the quantitative effects test effectively combats logrolling, vote dilution, and voter confusion as described above. The quantitative limitation helps to keep constitutional changes by initiative “under control.”<sup>56</sup> A voting public better able to

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50. CAL. CONST. art. II, § 8(d).

51. See Minger, *supra* note 4, at 895.

52. *Id.*

53. “Logrolling” denotes two different methods of misleading voters in the initiative process. *Id.* at 885. First, “coalition-building logrolling” occurs when initiative drafters include disparate provisions encouraging minority factions to join in support of a measure so that it passes. *Id.* Thus, individual measures not having majority support are able to win approval. A second type of logrolling occurs when drafters bury an unpopular provision—a rider—in a very complex or popular measure. *See id.* They do this hoping that the popular provision will “carry the unpopular provision into law or that the complex measure will obfuscate the issue.” *Id.*

54. When a voter must cast a single yes or no vote to decide many issues, the power of that vote is diluted. *See id.* at 892. Voters may end up approving a portion of a proposal that they would not have had they been able to vote on issues separately. *See id.* Citizens cannot consider and vote on issues separately but rather must decide whether to approve a compound proposal by somehow balancing portions they want greatly against those they do not favor. *See id.*

55. *See id.* at 886-92.

56. The quantitative effects limitation perhaps keeps better control of initiative amendments than the single-subject rule. The California Supreme Court employs a very lenient test to determine whether a provision encompasses a single subject. “[A]n initiative measure will not violate the single-subject require-

analyze and discuss more focused initiative proposals can perhaps identify and reject constitutional amendments<sup>57</sup> driven solely by the "temporary or partial considerations"<sup>58</sup> that James Madison and the framers of the United States Constitution feared.

### B. Part II: Qualitative Effects Test

The second part of the amendment/revision test investigates a proposal's qualitative effects and asks whether it would "accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision."<sup>59</sup> Even a very simple, short proposal not affecting widespread deletions, additions, or changes can have a drastic qualitative effect. For instance, "an enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change."<sup>60</sup>

In *Raven v. Deukmejian*<sup>61</sup> the court invalidated a proposed initiative under the qualitative branch of the test. The initiative affected only one article of the constitution but required California courts to construe "certain enumerated criminal law rights . . . consistently with the United States Constitution and . . . to afford [no] greater rights to criminal or juvenile defendants than [were] afforded by the federal Constitution."<sup>62</sup> The initiative would have vested all judicial power relating to criminal defense rights in the Federal Constitution and United States Supreme Court and divested the California judici-

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ment if, despite its varied collateral effects, all of its parts are 'reasonably germane' to each other." *Amador*, 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248 (emphasis added); see *Minger*, *supra* note 4 (arguing that courts should apply the single-subject requirement more strictly); see also *Raven v. Deukmejian*, 52 Cal. 3d 336, 356-66, 801 P.2d 1077, 1090-97, 276 Cal. Rptr. 326, 339-46 (1990) (Mosk, J., concurring & dissenting) (concurring that the initiative improperly attempted to revise the California Constitution but dissenting and arguing that the initiative also violated the single-subject rule).

57. See *Goldberg*, *supra* note 9, at 739-40. "Lack of knowledge and interest in the initiative measure will prevent rational voting. Many times the subject matter and language of the initiative are so complex or lengthy that it [the initiative] may never be thoroughly read or completely understood." *Id.* at 740 (footnote omitted).

58. THE FEDERALIST NO. 10, at 134 (James Madison) (Benjamin Fletcher Wright ed., 1966).

59. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 223, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978).

60. *Id.*

61. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

62. *Id.* at 342-43, 801 P.2d at 1081, 276 Cal. Rptr. at 330.

ary of all authority in this area.<sup>63</sup> It would have deprived the California Constitution of its "substance and integrity . . . as a document of independent force,"<sup>64</sup> would have affected an underlying principle of the constitution,<sup>65</sup> and would have accomplished an impermissible revision.<sup>66</sup>

On the other hand, in *People v. Frierson*<sup>67</sup> the California Supreme Court held that an initiative placing language in the constitution stating that the death penalty was a permissible punishment was an amendment rather than a revision.<sup>68</sup> Much like the initiative in *Raven*, the *Frierson* initiative, in essence, "required California courts deciding capital cases to [read] the state's 'cruel and unusual punishment clause' consistently with the federal Constitution."<sup>69</sup> The court held, however, that even after passage, the judiciary "retain[ed] broad powers of judicial review of death sentences . . . [and] unrestricted authority to measure and appraise the constitutionality of the death penalty under the federal Constitution."<sup>70</sup> This change did not affect the underlying principles of the California Constitution and was "not so broad as to constitute a fundamental . . . revision."<sup>71</sup>

In *Raven* the court believed that the challenged measure was too fundamental a change in the preexisting governmental plan to occur through the initiative process.<sup>72</sup> The initiative was a broad attack on the state court's authority to interpret and enforce criminal rights under the California Constitution. As such, it constituted a revision and deserved, at the very least, the consideration, debate, and institutional competence of the legislature before proposal and ratification.<sup>73</sup> On the other hand, although the measure in *Frierson* also required California courts to defer to the United States Supreme Court

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63. See *id.* at 352, 801 P.2d at 1087, 276 Cal. Rptr. at 336.

64. *Id.*

65. "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." CAL. CONST. art. I, § 24.

66. See *Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338.

67. 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

68. See *id.* at 187, 599 P.2d at 614, 158 Cal. Rptr. at 308.

69. See Goldberg, *supra* note 9, at 739.

70. *Frierson*, 25 Cal. 3d at 187, 599 P.2d at 614, 158 Cal. Rptr. at 307.

71. *Id.*; see also *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (holding that the initiative known as the Victims' Bill of Rights was a proper amendment of the constitution rather than an invalid revision).

72. See *Raven*, 52 Cal. 3d at 354-55, 801 P.2d at 1089, 276 Cal. Rptr. at 338. See *supra* notes 61-66 and accompanying text for rationale.

73. Some argue, however, that even if the legislature initiated the *Raven* measure, it would probably violate the California Constitution's mandate of state constitutional independence. See Goldberg, *supra* note 9, at 738-39.

and Constitution, it involved only an isolated subject.<sup>74</sup> The *Frierson* initiative targeted capital cases alone rather than criminal rights as a whole.<sup>75</sup> In contrast to *Raven*, the *Frierson* measure did not achieve far-reaching, fundamental changes in California's governmental plan by vesting a great deal of state judicial power in the federal system.<sup>76</sup> The *Frierson* initiative thus qualified as an amendment which the people alone were permitted to propose and ratify,<sup>77</sup> while the *Raven* initiative did not.<sup>78</sup>

The distinctions drawn by the courts between the *Raven* and *Frierson* initiatives seem strained—both vest discretion of the California judiciary in the United States Constitution and Supreme Court. Perhaps California politics at the time of the *Frierson* initiative can help to explain them.

In 1972, in *People v. Anderson*, the California Supreme Court found that the death penalty was cruel and unusual and that it violated the California Constitution.<sup>79</sup> At that time the court noted that the death penalty was “unnecessary to any legitimate goal of the state and [was] incompatible with the dignity of man and the judicial process.”<sup>80</sup> This outlawing of capital punishment angered the people of California who supported the death penalty in large numbers, and “[t]he clear intent of the electorate in adopting section 27 [the *Frierson* initiative providing that capital punishment was constitutional in California] was to circumvent *Anderson*.”<sup>81</sup>

When making their ruling, the *Frierson* justices most likely realized that “[a]lmost always, the political winds blow in favor of execution.”<sup>82</sup> These justices face election, and “[w]hile some public officials have been elected despite anti-death-penalty beliefs, they are the exception rather than the rule.”<sup>83</sup> Simply, these justices wanted to keep their jobs. To invalidate the *Frierson* initiative, which helped revital-

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74. See *Frierson*, 25 Cal. 3d at 186-87, 599 P.2d at 613-14, 158 Cal. Rptr. at 307-08.

75. See *id.*

76. See *id.*

77. See *supra* notes 67-71 and accompanying text.

78. See *supra* notes 61-66 and accompanying text.

79. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

80. *Id.* at 656, 493 P.2d at 899, 100 Cal. Rptr. at 171.

81. *Frierson*, 25 Cal. 3d at 185, 599 P.2d at 612, 158 Cal. Rptr. at 306.

82. Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 362 (1996). Surveys show that approximately 80% of Americans favor the death penalty. See *id.*

83. *Id.* (footnote omitted).

ize capital punishment in California, could have hurt their chances at the polls. Indeed, just seven years later, the California electorate voted California Supreme Court Chief Justice Rose Bird and two of her colleagues out of office following a period where the "California Supreme Court had reversed sixty-four of the sixty-eight capital sentences it had reviewed."<sup>84</sup>

Even in the face of these politics, the strained distinction stands, and *Raven* remains the only example of an initiative struck down as an invalid attempt at qualitative revision.<sup>85</sup> But when measuring any initiative against the court's amendment/revision tests, it is important to keep in mind the politics of the day and the driving forces behind the initiative in question. It appears that they can also affect the outcome of an amendment/revision challenge and the validity of a constitutional change by initiative.

C. *The Revision Must Appear on the Face of the Challenged Measure: An Overlay on the Qualitative and Quantitative Effects Tests*

Citing earlier California Supreme Court decisions, the court in *Legislature v. Eu*<sup>86</sup> explained a component of the amendment/revision test that overlays both the quantitative and qualitative parts. "[T]o find . . . a revision, it must *necessarily or inevitably appear from the face* of the challenged provision that the measure will substantially alter the basic governmental framework set forth in our Constitution."<sup>87</sup> Although the initiative's challengers predicted a weakened legislature resulting in a profound change in government structure from the proposed term limits and budgetary restraints, the *Eu* court rejected their argument. It noted that these "long-term consequences . . . [and] future effects of that measure . . . are simply unfathomable at this time."<sup>88</sup> To the court, the consequences predicted by the initiative's challengers were simply "conjectural and speculative."<sup>89</sup>

Because courts do have a "solemn duty to jealously guard the precious initiative power,"<sup>90</sup> the *Eu* court held that the "very uncertainty [of the consequences] inhibit[ed the court] from holding that a

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84. *Id.* at 363.

85. See Goldberg, *supra* note 9, at 729 (noting that courts have only struck down two initiatives as improper revisions).

86. 54 Cal. 3d 492, 816 P.2d 1309, 286 Cal. Rptr. 283 (1991).

87. *Id.* at 510, 816 P.2d at 1319, 286 Cal. Rptr. at 293.

88. *Id.*

89. *Id.* at 511, 816 P.2d at 1319, 286 Cal. Rptr. at 293.

90. *Id.* at 501, 816 P.2d at 1313, 286 Cal. Rptr. at 287.

constitutional revision ha[d] occurred in this case.”<sup>91</sup> Courts “*must* [resolve] . . . all doubts in favor of the initiative process.”<sup>92</sup> So, courts cannot, based on pure conjecture, find an impermissible revision. If, however, an initiative such as the one in *Eu* “ultimately produces grave, undesirable consequences to our governmental plan, the Legislature or the people are empowered to propose a new constitutional amendment to correct the situation.”<sup>93</sup> The courts, however, will not interfere.

#### IV. THE CALIFORNIA CIVIL RIGHTS INITIATIVE: AMENDMENT OR REVISION?

Is the CCRI an attempt to improperly revise the California Constitution by initiative? The CCRI is a short provision with language that appears straightforward.

##### THE CALIFORNIA CIVIL RIGHTS INITIATIVE

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

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91. *Id.* at 510, 816 P.2d at 1319, 286 Cal. Rptr. at 293; *see also* Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (stating that the court would not speculate on the effect of Proposition 8, an initiative, and that the mere possibility that it might result in substantial change to government functions is not a proper ground for invalidating the measure); *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (stating that the challenged initiative was not an improper revision because nothing on its face necessarily or inevitably compelled the dire consequences predicted by the challengers).

92. *Eu*, 54 Cal. 3d at 512, 816 P.2d at 1320, 286 Cal. Rptr. at 294 (emphasis added).

93. *Id.* (citations omitted).

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.<sup>94</sup>

Although short and seemingly simple, this powerful language would drastically change a number of fundamental constitutional tenets. Current jurisprudence, however, would not recognize the CCRI as either a quantitative or qualitative revision of the California Constitution. Thus, presently the CCRI qualifies as an acceptable initiative amendment of the California Constitution.

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94. CAL. CONST. art. I, § 31.

In addition, the politics that appeared to influence the court in *People v. Frierson*<sup>95</sup> could also come into play here.<sup>96</sup> Fifty-four percent of voters approved the CCRI,<sup>97</sup> and a court invalidation of the initiative would upset those voters. Justices facing reelection would likely have this in the back of their minds as they reviewed the CCRI.

A. *The CCRI Would Not Affect a Quantitative Revision of the California Constitution*

Does the CCRI affect a quantitative revision of the California Constitution by affecting its substantial entirety? The CCRI consists of approximately 300 words, adds one section containing eight subsections,<sup>98</sup> and, on its face, affects approximately two sections of the current California Constitution.<sup>99</sup> It deals with only one subject—equal protection.<sup>100</sup> The quantitative effect of the CCRI is similar to that of the questioned measure in *Amador Valley Joint Union High School District v. State Board of Equalization*, which also contained approximately 400 words and dealt with only a single subject—taxation.<sup>101</sup> The quantitative effect of the CCRI also resembles the quantitative effect of the initiative in *Raven v. Deukmejian*, which deleted no existing constitutional language and affected only one article.<sup>102</sup> Both the *Raven* and *Amador* courts held that the challenged initiatives did not constitute quantitative constitutional revisions.<sup>103</sup> In contrast, the court in *McFadden v. Jordan* labeled an initiative containing over 21,000 words, 208 subsections, and affecting 15 of 25 articles of the California Constitution an improper attempt at a quantitative revision.<sup>104</sup> Accordingly, the 300-word CCRI resembles those validated in *Amador* and *Raven* and does not seem so extensive as to change directly the substantial entirety of the constitution by

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95. 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

96. See *supra* notes 79-84 and accompanying text.

97. See *infra* note 200.

98. See CAL. CONST. art. I, § 31.

99. See Erwin Chemerinsky, *Preliminary Report on the Impact of the Proposed California Civil Rights Initiative* (last modified June 1, 1996) <<http://www.aclu-sc.org/ccri.html>> (stating that the CCRI would amend Article I, §§ 7-8, California's equal protection and nondiscrimination provisions).

100. See CAL. CONST. art. I, § 31.

101. See 22 Cal. 3d 208, 224, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978).

102. See 52 Cal. 3d 336, 351, 801 P.2d 1077, 1086-87, 276 Cal. Rptr. 326, 335-36 (1990).

103. See *id.*; *Amador*, 22 Cal. 3d at 224, 583 P.2d at 1286, 149 Cal. Rptr. at 244.

104. See *McFadden v. Jordan*, 32 Cal. 2d 330, 334, 196 P.2d 787, 790 (1948).



the deletion or alteration of numerous existing provisions. As such, the CCRI would not affect a quantitative revision of the California Constitution.

*B. The CCRI Would Not Affect a Qualitative Revision of the California Constitution*

The qualitative analysis looks at the language of the CCRI and its substantive effect on the California Constitution. CCRI clause (a) provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."<sup>105</sup> The CCRI's remaining sections mandate exceptions to clause (a), remedies, and other provisions to implement clause (a). Does the CCRI affect a qualitative revision of the California Constitution so as to make far-reaching changes in the nature of California's basic governmental plan? The inquiry is much more complex than the quantitative one. This section approaches the analysis from equal protection and separation of powers angles—both fundamental principles of the California government and Constitution. Although the CCRI effects important qualitative changes in these areas, current California law would not recognize or invalidate the initiative as an impermissible constitutional revision.

1. Equal protection for gender discrimination

California's equal protection guarantees flow from two sections of its constitution. Article 1, section 7 states: "A person may not be . . . denied equal protection . . ." <sup>106</sup> According to Article 1, section 8, "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."<sup>107</sup> In addition, both the California Constitution—before the CCRI—and case law treat gender as a suspect classification.<sup>108</sup> Therefore, when the government uses gender-

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105. CAL. CONST. art. I, § 31(a).

106. *Id.* § 7.

107. *Id.* § 8.

108. See *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 17, 485 P.2d 529, 539, 95 Cal. Rptr. 329, 339 (1971). In this case, the California Supreme Court looked at other classifications designated as suspect by the United States Supreme Court and found that gender was "properly placed among them." *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.

Sex, like race and lineage, is an immutable trait . . . locked by the acci-

based criteria in its decisions, the standard of review is strict scrutiny.<sup>109</sup> “[T]he state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose.”<sup>110</sup> Courts frequently refer to this level of review as strict in scrutiny, fatal in fact—meaning that challenged measures rarely, if ever, satisfy its requirements.<sup>111</sup> Thus, pre-CCRI, the California Legislature and people faced a daunting, if not insurmountable burden, when choosing to enact laws containing any sort of gender-based classification.

In contrast, although clause (a) of the CCRI mandates a total prohibition of discrimination and preferential treatment,<sup>112</sup> clause (c) allows “bona fide qualifications based on sex which are *reasonably necessary* to the normal operation of public employment, public education, or public contracting.”<sup>113</sup> “This is language characteristic of rational basis review . . . [which] is enormously deferential to the government and rarely are government actions invalidated under it.”<sup>114</sup> Although CCRI proponents argue otherwise,<sup>115</sup> many agree

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dent of birth [and is a characteristic which] frequently bears no relation to ability to perform or contribute to society . . . . [T]he whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members . . . [w]here the relation between characteristic and evil to be prevented is . . . tenuous . . . . [O]utdated social stereotypes result in invidious laws or practices . . . [and] the stigma of inferiority and second class citizenship associated with them . . . . [H]istorically [women have] labored under severe legal and social disabilities.

*Id.* at 18-19, 485 P.2d at 540, 95 Cal. Rptr. at 340.

109. *See id.* at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339.

110. *Id.* at 16-17, 485 P.2d at 539, 95 Cal. Rptr. at 339 (citations omitted).

111. *See Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring) (stating that “conventional ‘strict scrutiny’ [is] scrutiny that is strict in theory, but fatal in fact”).

112. *See* CAL. CONST. art. I, § 31(a). “The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.” *Id.*

113. *Id.* § 31(c) (emphasis added).

114. Chemerinsky, *supra* note 99, at 7.

115. *See* David B. Oppenheimer, *Affirmative Deception Redux: Crossing Swords over Clause (c) of the CCRI*, THE RECORDER, May 22, 1996, at 5. Supporters say that clause (c)'s initial words, “Nothing in this section,” limit its effect to the CCRI only, and that clause (c) would not modify any other provisions of the constitution. *See id.* They argue that the CCRI is “solely limited to abolishing preferences.” CALIFORNIA CIVIL RIGHTS INITIATIVE/YES ON PROPOSITION 209, CLAUSE (C): WHAT IT IS AND WHY IT'S INCLUDED (1996). Since equal protection provisions are one section of the state constitution, and the CCRI would become a separate section, the CCRI would not affect the equal protection provisions which currently “restrict all classifications based on sex to those that meet

that, as a constitutional modification, the "CCRI would change the standard of review in gender discrimination cases and substantially lessen the constitutional protection against sex-based discrimination in education, contracting, and employment . . . . [The] CCRI would *eviscerate* the California Constitution's current protection against gender discrimination."<sup>116</sup>

As a recent and specific constitutional provision, the CCRI would control those currently in place.<sup>117</sup>

[A]ny court dealing with an issue of discrimination or preference in the area of contracting, education, or employment will be required to apply its provisions and not the prior California Constitution which it modifies. Thus, any court dealing with any issue of gender discrimination . . . under the California Constitution will be required to apply clause (c).<sup>118</sup>

Would this evisceration of California's protection against gender discrimination affect a qualitative revision of the constitution? The CCRI constitutionalizes language that severely diminishes the civil rights of women and restructures the political process, making it very difficult for women to restore these lost rights and protections or even attain the same level of protection that other groups enjoy under California law.

For example, suppose the CCRI had not been proposed, and the California Supreme Court decided itself to lessen *only* protection against gender discrimination by changing the equal protection standard of review from strict scrutiny to rational basis. Here, because the court's holding does not become part of the constitution, women could "petition . . . government representatives to . . . amend [the new standard] or retain [the old standard] . . . [and would face] the same burdens as those faced by any constituent seeking preferential [or equal] treatment for any group."<sup>119</sup> "Typically, this burden involves

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the strict scrutiny test." *Id.* The existing equal protection provisions, they claim, would "remain in full force." *Id.*

116. Chemerinsky, *supra* note 99, at 7 (emphasis added).

117. See Legislature of Cal. v. Eu, 54 Cal. 3d 492, 510, 816 P.2d 1309, 1319, 286 Cal. Rptr. 283, 293 (1991) (stating that the California Constitution is changed by a measure that on its face alters its terms).

118. Chemerinsky, *supra* note 99, at 7. This Comment does not address the Federal Supremacy Clause issues also affecting the standard of review for gender discrimination.

119. Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1498 (N.D. Cal. 1996), *preliminary injunction vacated, stay denied as moot, remanded*, 110 F.3d 1431 (9th Cir. 1997), *reh'g denied*, 122 F.3d 692 (9th Cir. 1997), *petition for cert.*

directly petitioning and lobbying the specific representatives or policymakers with authority”<sup>120</sup> to make such changes. Only a “simple majority vote [of the legislative body] or executive decision” would be needed to overrule the court’s holding.<sup>121</sup> The women petitioners could also use this same procedure if either a legislative or initiative statute had changed the standard of review to strict scrutiny.<sup>122</sup>

On the other hand, if the language lowering the standard of protection for *only* gender discrimination was adopted in a constitutional amendment, like the CCRI, women “who wish to petition their government [to change the standard] . . . face a considerably more daunting burden.”<sup>123</sup> To restore their equal protection rights, they would have to amend the California Constitution either by initiative or by supermajority legislative proposal and voter ratification.<sup>124</sup> This places a very heavy burden on women that other groups, not similarly affected by the constitutional amendment, would not have to overcome.<sup>125</sup> Other groups interested in changing their equal protection standard of review, as in the case above, would need only to petition their legislature for simple majority approval of their request. No constitutional amendment, legislative supermajority, or voter ratification is needed. As in this example, by constitutionalizing rational basis review for gender discrimination, the CCRI restructures the normal legislative process to essentially exclude women on the issue of equal protection.<sup>126</sup>

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filed 66 U.S.L.W. 3171 (U.S. Aug. 29, 1997) (No. 97-369), *cert. denied*, 66 U.S.L.W. 3316 (U.S. Nov. 3, 1997) (No. 97-396).

120. *Id.*

121. *Id.*

122. *See id.*

123. *Id.*

124. *See id.* at 1498-99.

125. *See id.* In 1996 amending the constitution by initiative required the gathering of 693,230 valid signatures and approximately 50% more “raw” signatures. *See id.* at 1498. The costs of obtaining sufficient valid signatures and minimally staffing a few offices just to qualify an initiative for submission to voters runs from \$500,000 to \$1.5 million. *See id.* Then, a majority of voters must approve the initiative. *See id.* In California, “[t]o reach at least 10 million voters directly, a campaign would have to talk to 1,000 voters each day for 30 years.” *Id.* at 1499. A legislative constitutional amendment must garner two-thirds approval by both the California Senate and Assembly and then, in the next statewide election, by a majority of voters. *See id.* at 1498-99. This is also extremely time-consuming and expensive. *See id.*

126. *See Romer v. Evans*, 116 S. Ct. 1620 (1996) (holding that an amendment to the Colorado Constitution precluding any government action to protect homosexuals violated the Equal Protection Clause because the amendment made it more difficult for one group of citizens, homosexuals, to seek aid from the government).

James Madison's fears of a pure democracy echo strongly here.<sup>127</sup> The CCRI involves complex social issues that its drafters and California voters feel very strongly about but perhaps are not qualified and do not have the constitutional authority to impose on the whole of society. Whether because of unskilled drafting, misunderstanding of the measure and the constitution, or desire, the "people" have effectively pushed women outside of the normal political process for equal protection legislation. With such possible serious consequences, no matter what they result from, it seems imperative to "enlarge the public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial [partisan] considerations."<sup>128</sup> The CCRI should qualify as a constitutional revision and require legislative proposal.

Although the CCRI constitutionalizes language that seriously disadvantages women, it does not, however, under the current test, amount to a revision. The CCRI does not accomplish the type of far-reaching changes in the nature of California's *basic* governmental plan like those identified by the *Raven* court, the only example of an invalid qualitative revision by initiative.<sup>129</sup> The CCRI does not vest all judicial power in the legislature nor does it deprive the California Constitution of its substance and integrity by linking a large portion of it to federal law. According to the California courts, only these types of qualitative changes amount to impermissible revisions.<sup>130</sup>

The CCRI is a more "isolated" provision resembling the initiative measure upheld by the *Frierson* court as a valid amendment.<sup>131</sup> The *Frierson* initiative amendment dealt only with capital punishment and was "not so broad as to constitute a fundamental . . . revision."<sup>132</sup> Likewise, since the CCRI "only" reduces the California Constitution's equal protection guarantee and changes the normal political process for one class of people, it therefore permissibly amends, rather than revises, the constitution under current jurisprudence.

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127. See *supra* notes 32-39 and accompanying text.

128. THE FEDERALIST NO. 10, at 134 (James Madison) (Benjamin Fletcher Wright ed., 1966).

129. See *supra* notes 61-66 and accompanying text.

130. See *supra* notes 61-66 and accompanying text.

131. See *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

132. *Id.* at 187, 599 P.2d at 614, 158 Cal. Rptr. at 307.

## 2. Separation of powers

The separation of powers doctrine is rooted in the writings of Charles-Louis de Secondat Montesquieu and John Locke.<sup>133</sup> Montesquieu described a tyrannical government as one where a single individual acting without law “draws everything along by his will and his caprices,”<sup>134</sup> and Locke noted that “[w]here-ever Law ends, Tyranny begins.”<sup>135</sup> The separation of powers doctrine establishes that none of the three branches of the government can exercise or unduly restrict the power vested or inherent in another branch.<sup>136</sup> An important function of the doctrine is to prevent the type of tyranny that Montesquieu and Locke discussed.<sup>137</sup> If an established government branch can only act “in accordance with general rules set down in advance by others, the [branch’s] opportunities for arbitrary [tyrannical] action are reduced.”<sup>138</sup> On the other hand, if the same branch performs executive, legislative, and judicial functions, the opportunities for arbitrary, discriminatory, and tyrannical action increase significantly.<sup>139</sup>

In accordance with this, the California Constitution provides that “[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”<sup>140</sup> The constitution also defines the membership of each of the three branches and the type of power each branch can exercise.<sup>141</sup> “The supreme executive power of this State is vested in the Governor . . . [who] shall see that the law is faithfully executed.”<sup>142</sup> “The judicial power . . . is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts.”<sup>143</sup> “The legislative

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133. See Peter E. Quint, *The Separation of Powers Under Nixon: Reflections on Constitutional Liberties and the Rule of Law*, 1981 DUKE L.J. 1, 39-40.

134. CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* bk. 2, ch. 1, at 10 (Anne M. Cohler et al. trans., eds. 1989) (emphasis omitted).

135. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 400 (Peter Laslett ed., 1960) (emphasis omitted).

136. See Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 33 EMORY L.J. 685, 694-96 (1984).

137. See Quint, *supra* note 133, at 40.

138. *Id.*

139. See *id.*

140. CAL. CONST. art. III, § 3.

141. “The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them.” Stanley Mosk, *Raven and Revision*, 25 U.C. DAVIS L. REV. 1, 16 (1991) (citation omitted).

142. CAL. CONST. art. V, § 1.

143. *Id.* at art. VI, § 1.

power of this State is vested in the California Legislature[,] . . . but the people reserve to themselves the powers of initiative and referendum."<sup>144</sup>

*a. the CCRI's effect on the judicial branch's essential function of interpreting and enforcing the constitution*

By reserving the power of initiative and referendum, the people of California are able to exercise a limited amount of legislative power.<sup>145</sup> When the "people" of California proposed the CCRI, they exercised their reserved legislative power.<sup>146</sup> The people acting as legislature drafted clause (g) which states "the remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law."<sup>147</sup> This section not only prohibits the California courts from using sex- or race-based remedies to enforce clause (a) of the CCRI, but its broad language also forbids courts from using them to enforce any other constitutional or statutory provision, including federal law. In addition, clause (d), in stating that "[n]othing in this section shall be interpreted as invalidating any court order or consent decree which is *in force as of the effective date of this section*,"<sup>148</sup> provides that the CCRI can be used to invalidate any court order or decree entered *after* the CCRI's effective date. Does the CCRI allow the people acting as the legislature to divest the California judiciary of an important part of its inherent and essential power to enforce the constitution and therefore revise the basic separation of powers in the California government?

It is "[t]he obligation of the judicial branch of government to enforce the provisions of the constitution even as against legislative and executive actions."<sup>149</sup> Courts have an inherent power to enforce

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144. *Id.* at art. IV, § 1.

145. *See supra* notes 1-7 and accompanying text.

146. *See supra* notes 1-7 and accompanying text.

147. CAL. CONST. art. I, § 31(g).

148. *Id.* § 31(d) (emphasis added).

149. *County of Orange v. Heim*, 30 Cal. App. 3d 694, 726, 106 Cal. Rptr. 825, 852 (1973) (citing with approval *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); *see also Stander v. Kelley*, 250 A.2d 474, 478 (Pa. 1969) (holding that it is the "traditional and inherent power of the Courts to decide all questions of Constitutionality"); Mosk, *supra* note 141, at 16 (citation omitted) ("The judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . .").

constitutional rights, and the "fundamental separation of powers doctrine embodied in article III, section 3 of the California Constitution . . . forbids any . . . legislative usurption of traditional judicial authority."<sup>150</sup> "It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct."<sup>151</sup> The ability to order a specific remedy or punishment can be an integral part of the judiciary's inherent powers.<sup>152</sup> If so, the legislature, or people acting by initiative, may not deprive the courts of their important remedy without transgressing separation of powers.

For example, the Florida Supreme Court observed "that the power to punish for contempt exists independently of any statutory grant of authority[,] as essential to the execution and maintenance of judicial authority."<sup>153</sup> This is because "courts have authority to do things that are absolutely essential to the performance of their judicial functions."<sup>154</sup> Relying on a decision by the United States Supreme Court, the Florida court noted that the exercise of the contempt power is subject to reasonable regulation [by the legislature, but] "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."<sup>155</sup> The court held that the legislature violated the doctrine of separation of powers embodied in the Florida Constitution when it attempted to forbid courts from using indirect criminal contempt.<sup>156</sup> The legislature's order "constitute[d] an unconstitutional infringement on a court's inherent power . . . to carry out the judicial function of punishing by indirect criminal contempt."<sup>157</sup>

The race- and sex-based remedies eliminated by CCRI clauses (g) and (d) resemble contempt. They are an integral part of the

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150. *Mandel v. Myers*, 29 Cal. 3d 531, 547, 629 P.2d 935, 944, 174 Cal. Rptr. 841, 850 (1981) (holding invalid a legislative redetermination of damages already adjudicated by court).

151. *Mosk*, *supra* note 141, at 16 (citation omitted).

152. *See People v. Superior Court*, 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996) (holding that if the statute covering dismissal of prior felony offenses were interpreted to allow court to take action only upon motion of prosecuting attorney, statute would violate separation of powers, and interpreting three strikes statute in accordance, so as not to violate separation of powers).

153. *Walker v. Bently*, 660 So. 2d 313, 318 (Fla. 1995).

154. *Id.* at 320 (quoting *Makemson v. Martin County*, 491 So. 2d 1109, 1113 (Fla. 1986)).

155. *Id.* at 319 (quoting *Young v. United States (ex rel. Vuitton Fils S.A.)*, 481 U.S. 787, 799 (1987) (emphasis omitted)).

156. *See id.* at 316-17.

157. *Id.* at 320.



California courts' essential, inherent duty to enforce and interpret the constitution, specifically the equal protection guarantees.<sup>158</sup> By completely forbidding the use of these remedies, the people, acting as the legislature, have usurped the judiciary's inherent power to enforce its constitutional obligation.<sup>159</sup> Therefore, the CCRI would drastically change the separation of powers provision contained in article III, section 3.<sup>160</sup> By permitting the people, acting as legislature, to usurp essential judicial power, the CCRI appears to accomplish far-reaching changes in the nature of our basic governmental plan.

Under current law, however, the CCRI does not affect a qualitative revision of the separation of powers mandate of the California Constitution. Again, courts are duty-bound to uphold the people's precious power of initiative whenever possible. California citizens have a "sovereign right to impose restrictions on the judiciary."<sup>161</sup> Only when such restrictions are so broad and fundamental that they rise to the level of a constitutional revision do the people lose this right.<sup>162</sup>

The CCRI does not attempt a qualitative change in the judiciary nearly so broad as the one invalidated in *Raven*.<sup>163</sup> The *Raven* measure would have "abolished the doctrine of independent state grounds with respect to at least thirty-two constitutional rights,"<sup>164</sup> by vesting much of the California judiciary's institutional power in the United States Supreme Court and federal law. In contrast, the CCRI, on its face, affects "only" the courts' authority over equal protection rights and does not link them to federal law like the initiative in *Raven*.

As mentioned above, the CCRI more closely resembles the initiative measure upheld by the *Frierson*<sup>165</sup> court, which stated that the death penalty was constitutional and required California courts to

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158. "[C]ontempt[] is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law." *United States v. Grossman*, 1 F.2d 941, 943 (N.D. Ill. 1924).

159. "[L]egislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Brydonjack v. State Bar*, 208 Cal. 439, 444, 281 P. 1018, 1020 (1929).

160. See CAL. CONST. art. III, § 3.

161. Goldberg, *supra* note 9, at 740.

162. See *id.*

163. *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

164. Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95, 130 (1993).

165. *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979).

interpret capital punishment in accordance with federal law.<sup>166</sup> Opponents of the *Frierson* initiative argued that it “contemplate[d] ‘removal of judicial review’ of the death penalty from a carefully built state constitutional structure, thereby resulting in ‘a significant change in a principle underlying our system of democratic government [that] can only be accomplished by constitutional revision.’”<sup>167</sup>

But, cautioning against “too strict a construction of the revision rule,”<sup>168</sup> the court validated the initiative as a proper amendment.<sup>169</sup> The *Frierson* initiative was an “isolated provision . . . achiev[ing] no far-reaching, fundamental change in the governmental plan.”<sup>170</sup> The initiative did not “involve[] a broad attack on the state court’s authority.”<sup>171</sup> The *Frierson* court stated that it still “retain[ed] broad powers of judicial review . . . to assure . . . proper[] and legal[] impos[ition] and to safeguard against arbitrary or disproportionate treatment. In addition [it still] possess[ed] unrestricted authority to measure and appraise the constitutionality of the death penalty under . . . guidelines established by the United States Supreme Court.”<sup>172</sup>

The CCRI orders the judiciary to invalidate any measure in violation of it, prohibits courts from using race- and sex-based remedies to enforce any violation of state or federal law, and invalidates improper court action. But under the *Raven/Frierson* analysis, it is not a broad attack on the judiciary’s fundamental powers to uphold the constitution. The California courts still have the authority to interpret and uphold the CCRI and to measure and appraise the constitutionality of challenged measures or programs under guidelines established by the CCRI. The CCRI is a relatively isolated provision compared to that in *Raven*, and its effect on the judiciary’s essential power to enforce the constitution would survive an amendment/revision challenge.

#### *b. concentration of power*

As noted above, the California Constitution forbids one branch of government from exercising power committed to another

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166. *See id.* at 187-88, 599 P.2d at 614, 158 Cal. Rptr. at 308.

167. *Id.* at 186, 599 P.2d at 614, 158 Cal. Rptr. at 307.

168. *Id.* at 187, 599 P.2d at 614, 158 Cal. Rptr. at 307.

169. *See id.*

170. Goldberg, *supra* note 9, at 740.

171. *Id.*

172. *Frierson*, 25 Cal. 3d at 187, 599 P.2d at 614, 158 Cal. Rptr. at 307.

branch.<sup>173</sup> When proposing the CCRI, the people of California exercised their reserved legislative power of initiative.<sup>174</sup> The legislature has the power to make laws and declare public policy.<sup>175</sup> The duty of enforcement and administration of legislative acts falls on the executive branch.<sup>176</sup> The people as legislature made the CCRI "self-executing."<sup>177</sup> A self-executing constitutional provision "supplies sufficient rule by which right given may be enjoyed or duty imposed enforced."<sup>178</sup> The mandates of the CCRI were to be effective immediately upon popular ratification without any sort of executive oversight.<sup>179</sup> Does the CCRI, a legislative initiative by the California people, also exercise or usurp executive power through its use of a self-executing provision, and therefore revise the separation of powers and initiative power mandates of the constitution?

California courts have developed a test, used specifically in the initiative context, to distinguish legislative acts from executive/administrative acts: "Legislative acts generally are those which declare a public purpose and make provisions for the ways and means of its accomplishment. Administrative acts, on the other hand, are those which are necessary to carry out the legislative policies and purposes already declared by the legislative body."<sup>180</sup> Setting aside the separation of powers issue for a moment, it is important to note that if the CCRI did attempt to exercise true executive power, it would automatically be invalid. The people's power of initiative extends only to legislative measures, not to administrative or executive acts. "The people have reserved the right to legislate, not to determine how previously enacted public policies will be administered or

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173. See CAL. CONST. art. III, § 3.

174. See *id.* at art. IV, § 1.

175. See *id.* at art. IV.

176. See *id.* at art. V.

177. CAL. CONST. art. I, § 31(h). "This section shall be self-executing." *Id.*

178. BLACK'S LAW DICTIONARY 1360 (6th ed. 1990).

179. "Proposition 209 [CCRI] is a self-executing amendment to the California Constitution that imposes an affirmative duty to comply . . . [and] 'compliance is coerced by the threat of enforcement . . .'" *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1491 (N.D. Cal. 1996), *preliminary injunction vacated, stay denied as moot, remanded*, 110 F.3d 1431 (9th Cir. 1997) *reh'g denied*, 122 F.3d 692 (9th Cir. 1997), *petition for cert. filed* 66 U.S.L.W. 3171 (U.S. Aug. 29, 1997) (No. 97-369), *cert. denied*, 66 U.S.L.W. 3316 (U.S. Nov. 3, 1997) (No. 97-396) (quoting *Lake Carriers' Ass'n v. MacMullan*, 406 U.S. 498, 508 (1972)).

180. *Fishman v. City of Palo Alto*, 86 Cal. App. 3d 506, 509, 150 Cal. Rptr. 326, 327-28 (1978) (holding that ordinance modifying parking facility development plans was an administrative act not subject to the initiative or referendum powers).

executed.”<sup>181</sup> Any initiative attempting to exercise executive power is improper and invalid.<sup>182</sup>

Courts, on several occasions, have found that local initiatives constituted executive/administrative acts. The California Supreme Court noted that “[p]rescribing the policy and duty [that county board of supervisors shall provide suitable quarters for municipal and superior courts] was the legislative act of the state; carrying out the policy by performing the duty [of providing such quarters] is an administrative function.”<sup>183</sup> The Colorado Supreme Court similarly held that where the voters had already approved the public policy to build a new city hall and raise taxes, an initiative dictating the location of a schoolhouse to be remodeled as the city hall and prohibiting certain uses of tax money related to administrative matters was invalid.<sup>184</sup>

Conversely, under this test, the CCRI declares new policy and makes provisions for the ways and means of its accomplishment. It provides that the “state shall not discriminate . . . or grant preferential treatment”<sup>185</sup> and provides remedies and directions to the court to enforce this immediately upon ratification.<sup>186</sup> The CCRI does not simply implement existing public policy as did the measures in the examples above. It lays down rules, gives them the force of law, and qualifies as a legislative act.

As a self-executing provision, the CCRI excludes the executive branch’s input. The CCRI, an initiative crafted by partisan citizens involving complex social issues,<sup>187</sup> contemplates serious changes to the California government and citizens’ rights. But it effectively excludes the executive branch’s input with its self-executing provision by imposing an immediate affirmative duty to comply. A non-self-executing constitutional amendment, on the other hand, can “[lie]

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181. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987) (holding that where voters approved policy to build new city hall and raise taxes, an initiative dictating schoolhouse to be remodeled as city hall was administrative and invalid); see CAL. CONST. art. IV, § 1.

182. See *Blackwell*, 731 P.2d at 1253; see also *Simpson v. Hite*, 36 Cal. 2d 125, 129, 222 P.2d 225, 228 (1950); *Housing Auth. v. Superior Court*, 35 Cal. 2d 550, 557, 219 P.2d 457, 460-61 (1950).

183. *Simpson*, 36 Cal. 2d at 130, 222 P.2d at 228.

184. See *Blackwell*, 731 P.2d at 1254; see also *Witcher v. Canon City*, 716 P.2d 445, 451 (Colo. 1986) (holding that a measure to lease a portion of a park for a suspension bridge was an improper and invalid executive/administrative act carrying out the previously established policy of transferring all operational and maintenance responsibilities for the bridge to a private company).

185. CAL. CONST. art. I, § 31(a).

186. See *id.* § 31(b)-(h).

187. See *supra* notes 23-41 and accompanying text.

dormant for years”<sup>188</sup> until the legislature or people enact implementing legislation or until the executive branch issues an order or regulation to interpret, implement, or give administrative effect to the amendment.<sup>189</sup>

Requiring further executive action to implement initiative constitutional amendments provides the same safeguards of which James Madison spoke.<sup>190</sup> Executive action theoretically provides a filter with which to enlarge public views and make sure that they are, in fact, in society’s best interest. Executive action would also combat the tyrannical concentration of power that Montesquieu and Locke feared.<sup>191</sup> If both the people, as legislature, and the executive branch must act to propose, ratify, and execute the CCRI, it would prevent a single individual acting without law from “draw[ing] everything along by his will and his caprices.”<sup>192</sup> But since the CCRI does not attempt to exercise executive/administrative power under the current judicial test, it would not effect a qualitative revision of the separation of powers or initiative power sections of the California Constitution. As such, neither the executive nor legislative “filters” are necessary for adoption or implementation of the CCRI, and it qualifies as a permissible constitutional amendment by initiative.

## V. PROPOSAL

In 1911 California Governor Hiram Johnson fought for the adoption of the initiative and succeeded in amending the constitution to secure the people this right.<sup>193</sup> The people’s power to propose amendments to their constitution is a very important one that the judiciary should protect.<sup>194</sup> California citizens cannot always rely on a legislature that is by nature slow, cumbersome, and beholden to

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188. *Coalition for Econ. Equity*, 946 F. Supp. at 1491-92.

189. See BLACK’S LAW DICTIONARY 568-69, 1360 (6th ed. 1990).

190. See *supra* notes 32-41 and accompanying text.

191. See *supra* notes 133-39 and accompanying text.

192. MONTESQUIEU, *supra* note 134, at 10 (emphasis omitted).

193. See Mosk, *supra* note 141, at 1. Justice Mosk cast a concurring and dissenting vote in *Raven v. Deukmejian*, 52 Cal. 3d 336, 356, 801 P.2d 1077, 1090, 276 Cal. Rptr. 326, 339 (1990) (Mosk, J., concurring & dissenting). While he agreed that the proposed initiative did attempt an impermissible revision, he felt, unlike the majority, that the initiative also violated the single-subject rule. See *id.* (Mosk, J., concurring & dissenting). By mandate of the California Constitution, “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” CAL. CONST. art. II, § 8(d).

194. See Mosk, *supra* note 141, at 1. The initiative “was generally deemed a landmark development in democracy.” *Id.*

special interest groups to address their concerns promptly, if at all. When Californians desire constitutional amendments, they should be able to initiate these changes themselves.<sup>195</sup> Correctly, the courts “jealously guard the precious initiative power”<sup>196</sup> to amend the constitution.

Unfortunately, this jealous protection has led courts to develop tests which are not sensitive enough to recognize when an initiative proposes very serious, revision-like changes to the constitution.<sup>197</sup> “As a result, initiatives can easily overcome substantive restrictions and can be broadly interpreted even if they restrict or conflict with pre-existing rights.”<sup>198</sup> For example, as explained above, the CCRI conceivably affects both equal protection and separation of powers in California but would most likely survive an amendment/revision challenge. The CCRI’s two authors proposed serious changes to the constitution that voters probably did not fully understand<sup>199</sup> but did approve.<sup>200</sup>

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195. “The initiative was clearly intended not merely as a right granted to the people, but a power the people reserved.” *Id.*

196. *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 501, 816 P.2d 1309, 1313, 286 Cal. Rptr. 283, 287 (1991).

197. *See Van Cleave, supra* note 164, at 129. “The California Supreme Court has not only broadly interpreted specific provisions of initiatives in an attempt to further the presumed will of the voters, but has also loosely applied the two principal restrictions on the use of the initiative, the ‘no revision rule’ and the ‘single-subject rule.’” *Id.*

198. *Id.*

199. *See Sandy Sohcot, Guest Opinion, Between the Lines of the Civil Rights Initiative*, S.F. BUS. TIMES, May 24, 1996, at 39. The president of the San Francisco Bay Area Chapter of the National Association of Women Business Owners implored California voters to take a closer, more careful look at the CCRI and its effects.

[T]he majority of citizens are fair-minded people who truly want equal opportunity for all citizens, who embrace diversity, and who seek fairness in all of our public policies. I am deeply disturbed by the soundbite promises of proponents of the California Civil Rights Initiative that this initiative is for fairness. I believe this initiative has nothing to do with civil rights, nor is it designed to further fairness, but instead is preying on current fears and uncertainties to further the special interests and specific beliefs of a minority of the population. I implore all citizens to read between the lines, to engage in healthy debate, and demand . . . truth and fairness.

*Id.*

200. “On November 5, 1996, the voters of California enacted Proposition 209 into law, with 4,736,180 votes (54%) cast in favor of the initiative and 3,986,196 votes (46%) cast in opposition.” *Coalition for Econ. Equity v. Wilson*, 946 F. Supp. 1480, 1495 (N.D. Cal. 1996), *preliminary injunction vacated, stay denied as moot, remanded*, 110 F.3d 1431 (9th Cir. 1997). The racial and gender breakdown of the ratification was as follows:

This Comment proposes changes to preserve the California people's power of initiative and, at the same time, guard against improper and ill-conceived revisions. These changes would prevent the reshaping of California's constitution, government, and civil rights structure under the influence of the inherent problems and dangers of direct democracy—the initiative process—that James Madison identified.<sup>201</sup>

The people should not directly legislate constitutional revisions—substantial changes—using the initiative process. Instead, these changes should flow from the legislative houses or a constitutional convention where ideas can be refined and enlarged from partisan, poorly drafted, sometimes unintelligible measures which voters cannot truly understand. This way, constitutional amendments can evolve into appropriate responses to complex, difficult policy matters. The California Supreme Court should modify the qualitative part of the current test so that it is sensitive enough to recognize an initiative that makes far-reaching constitutional changes aside from a total restructuring of the government or constitution.

#### A. A More Sensitive Qualitative Effects Test

In its current state, the qualitative effects test is as crude in identifying improper constitutional changes as a surgeon performing delicate surgery with a very dull blade. It asks only whether a proposed initiative would “accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision.”<sup>202</sup> By definition, nothing much short of governmental reorganization qualifies as a revision. Less drastic changes to the constitution, however, can seriously affect California citizens and their government. These “lesser” changes also demand “more formality, discussion and

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VOTER	YES VOTES	NO VOTES
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

*Id.* at n.12.

201. *See supra* notes 32-39 and accompanying text.

202. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 223, 583 P.2d 1281, 1286, 149 Cal. Rptr. 239, 244 (1978).

deliberation than is available through the initiative process”<sup>203</sup> and should qualify as impermissible revisions.

To distinguish amendments from revisions, courts should ask two questions: 1) whether the initiative in question would change or diminish basic civil rights of Californians as a whole or of a specific, identifiable group; and 2) whether it would diminish or reallocate the power granted by the constitution to any of the three governmental branches. If a proposed initiative does either, courts would label it a revision and invalidate it. With this revised qualitative test in place, courts could identify and invalidate initiatives proposing very basic and important changes to Californians’ rights and government—initiatives that would not trigger the current test.

1. CCRI clause (c): an improper attempt to revise the California Constitution under the proposed qualitative effects test

Although clause (c) of the CCRI<sup>204</sup> threatens to “*eviscerate* the California Constitution’s current protection against gender discrimination,”<sup>205</sup> it would not, under the current test, amount to a revision. Even though it would constitutionalize language that places women outside the normal political process, the CCRI does not mandate far-reaching changes in the nature of California’s basic governmental plan or repeal or alter the substantial majority of the existing constitution like those initiatives invalidated by the *Raven* and *McFadden* courts.<sup>206</sup>

Under the proposed guidelines, however, the CCRI would constitute an invalid attempt at revision by initiative. The CCRI changes and diminishes the basic civil rights of a specific, identifiable group—

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203. *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 506, 816 P.2d 1309, 1316, 286 Cal. Rptr. 283, 290 (1991).

204. “Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.” CAL. CONST. art. I, § 31(c).

205. Chemerinsky, *supra* note 99, at 7 (emphasis added).

206. The *Raven* court invalidated an initiative that vested all state judicial power relating to criminal defense rights in the Federal Constitution and United States Supreme Court and divested the California Constitution and judiciary of all power in this area. *See Raven v. Deukmejian*, 52 Cal. 3d 336, 352, 801 P.2d 1077, 1087, 276 Cal. Rptr. 326, 336 (1990). This initiative failed the current qualitative test. *See id.* The *McFadden* court struck a 21,000 word measure which repealed or altered at least 15 of 25 articles of the constitution. *See McFadden v. Jordan*, 32 Cal. 2d 330, 330-34, 196 P.2d 787, 787-90 (1948). This initiative failed the quantitative part of the current test. *See id.*



women. It would "substantially lessen constitutional protection [for women] against sex-based discrimination in education, contracting, and employment."<sup>207</sup> The proposed qualitative test would prohibit the California people, speaking through two authors,<sup>208</sup> from making these types of changes to the rights of a discrete group. The newly-labeled revision would require the consideration and debate of both houses of the legislature.<sup>209</sup> In theory, the California Senate and Assembly would recognize the discriminatory effect of CCRI clause (c) and vote in sufficient numbers against submission to voters for the necessary popular ratification.<sup>210</sup>

2. CCRI clauses (d), (g), and (h): an improper attempt to revise the California Constitution under the proposed qualitative effects test

Even though CCRI clauses (d),<sup>211</sup> (g),<sup>212</sup> and (h)<sup>213</sup> arguably affect the California Constitution's separation of powers mandate,<sup>214</sup> they, like CCRI clause (c), would not qualify as revisions under the current qualitative effects test. They effectively diminish the power of the judicial branch to perform a constitutional duty and allow the people acting as legislature to also exercise executive power. Under existing jurisprudence, however, the clauses do not make far-reaching changes to California's basic governmental plan or repeal or alter a substantial majority of the constitution.<sup>215</sup>

On the other hand, the more sensitive qualitative effects test would recognize CCRI clauses (d), (g), and (h) as invalid revisions of the constitution by initiative. In these provisions, the people acting as legislature attempt to diminish and reallocate power held by two

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207. Chemerinsky, *supra* note 99, at 7.

208. *See supra* note 12.

209. *See* CAL. CONST. art. XVIII, § 1.

210. "The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution." *Id.*

211. *Id.* at art. I, § 31(d). "Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section." *Id.*

212. *Id.* § 31(g). "The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California anti-discrimination law." *Id.*

213. "This section shall be self-executing." *Id.* § 31 (h).

214. *See id.* at art. III, § 3. "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." *Id.*

215. *See supra* notes 133-72 and accompanying text.

branches of the California government—judicial and executive. By prohibiting the use of race- and sex-based remedies, CCRI clauses (d) and (g) usurp and diminish the court's ability to carry out its essential duty to enforce and interpret the California Constitution, especially the equal protection guarantees.<sup>216</sup> CCRI clause (h)'s self-executing provision excludes executive branch input by declaring complex new policy and providing the ways and means of its enforcement.<sup>217</sup> With these effects in mind, the proposed qualitative effects test would recognize CCRI clauses (d), (g), and (h) as invalid revisions and prohibit their proposal by the people of California. As revisions, these changes, like the one proposed in CCRI clause (c), would have to pass through the California Legislature for supermajority approval before submission to voters for popular ratification or be ratified during a constitutional convention.<sup>218</sup>

#### VI. PROPOSED CHANGES TO THE QUALITATIVE EFFECTS TEST WOULD PREVENT A VOCAL MINORITY FROM MAKING ILL-CONSIDERED CHANGES TO THE CALIFORNIA CONSTITUTION

The CCRI demonstrates the problems of California initiative jurisprudence as it currently stands. As explained above, the people acting as legislature both employed legislative power and excluded the executive branch's input when proposing the CCRI which, among other things, diminishes essential judicial power and reduces the constitutional protection for women against sex-based discrimination. As a permissible amendment under current case law,<sup>219</sup> it needed the signatures of only eight percent of voters to qualify for the ballot<sup>220</sup> and needed the approval of only a majority of those voting for adoption.<sup>221</sup> This "majority"—just over thirteen percent of eligible voters in the 1994 statewide election<sup>222</sup>—may well constitute far fewer than

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216. "[It is] the obligation of the judicial branch of government to enforce the provisions of the constitution even as against legislative and executive actions." *Orange County v. Heim*, 30 Cal. App. 694, 727, 106 Cal. Rptr. 825, 852 (1973) (citing with approval *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)); see also *Stander v. Kelley*, 250 A.2d 474, 478 (Pa. 1969) (holding that it is the "traditional and inherent power of the Courts to decide all questions of Constitutionality").

217. See BLACK'S LAW DICTIONARY 1360 (6th ed. 1990).

218. See *supra* notes 18-31 and accompanying text.

219. The CCRI neither affects far-reaching changes to California's basic governmental plan nor changes or repeals a substantial majority of the California Constitution. See *supra* notes 98-192 and accompanying text.

220. See CAL. CONST. art. II, § 8(a).

221. See *id.* at art. II.

222. In the 1992 presidential election, the percentage of eligible adults who

the true majority of the people of California for which it purports to act. In essence, a vocal minority, driven by special interests,<sup>223</sup> could place changes into the constitution, out of the normal reach of the legislature,<sup>224</sup> which would affect the distribution of power in the government and disadvantage a distinct group of citizens. A minority of California people should not have the power to incorporate these types of changes into the constitution.

By modifying the qualitative effects portion of California's test distinguishing allowable amendments from impermissible revisions, courts will have the authority to invalidate initiative measures which propose serious changes to the constitution. Courts would ask whether the initiative in question changes or diminishes basic civil rights of Californians as a whole or of a specific, identifiable group, or whether it diminishes or reallocates the power granted by the constitution to any of the three governmental branches. If an initiative does any of these things, courts would label it a revision and invalidate it.

Without requiring total government or constitutional restructuring, the new standard identifies changes more properly considered by a legislature possessing judgment of experience and institutional competence and those which "require more formality, discussion and

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voted increased to 55%. See David G. Savage, *High Voter Turnout Reverses 32-Year Slide*, L.A. TIMES, Nov. 5, 1992, at A36. Despite an increase in recent elections, voter turnout has generally decreased from a high in 1960 of 63.1%. See *id.* Voter turnout for California's June 7, 1994 primary election was "the lowest ever for a statewide election." Associated Press, *June 7 Turnout Is a Record Low for Statewide Election*, L.A. TIMES, July 23, 1994, at A22. Only 35% of California's registered voters participated in this election, representing only 26% of Californians eligible to vote. See *id.* This 26% "decided the fates of 776 candidates for state office, nine statewide measures and numerous local races." *Id.* Extrapolating from these figures, anything over 13% of eligible voters would constitute a "majority" able to ratify proposed measures and elect candidates.

223. See Sohcot, *supra* note 199 (stating that the CCRI "prey[s] on current fears and uncertainties to further the special interests and specific beliefs of a minority of the population").

224. Because the CCRI becomes part of the constitution, the legislature could only amend or repeal it by two-thirds vote of each house and submission to voters for popular ratification. See CAL. CONST. art. XVIII, § 1. It would prohibit the legislature from reestablishing safeguards against gender discrimination in education, contracting and employment and from reestablishing the courts' gender and race-based remedies, except by constitutional amendment. See generally *Romer v. Evans*, 116 S. Ct. 1620 (1996) (invalidating, as a violation of equal protection of the laws, a Colorado measure which constitutionalized language making it more difficult for one group of citizens, homosexuals, than for all others to seek aid from the government).

deliberation than is available through the initiative process.”<sup>225</sup> It would prevent thirteen percent<sup>226</sup> of Californians from placing language in their constitution which could seriously, and in the case of the CCRI, negatively affect the citizens and the government of California.

## VII. CONCLUSION

The people of California reserved to themselves the legislative power of initiative when trying to gain greater control of their state government.<sup>227</sup> Californians' current use of the initiative power, however, often comes at a cost—a cost that the voters most likely do not realize when they approve overreaching initiative “amendments.” California citizens actually lose a certain amount of the controls of a tripartite government—controls contained in the separation of powers mandate of the California Constitution that prevent the people and the branches of the government from exercising or usurping power allocated to others.<sup>228</sup> They lose this control to whatever self-interested, partisan minority has used the legislative power of initiative to successfully “amend” the constitution in a poorly-drafted, overbroad manner.<sup>229</sup>

There is widespread disillusionment with government, politicians, and politics. But the California Constitution's system of checks and balances—both on the power of the people and the three branches of the government—actually protects voters against the dismantling of the government and society by unskilled hands.<sup>230</sup> Pushing the processes for constitutional change to, and sometimes past, their limits may seem to combat an unresponsive legislature. But it is actually short-sighted and can damage both individual rights and the government's balance of power.<sup>231</sup>

The people's power of initiative allows them to “propose statutes and amendments to the Constitution and to adopt or reject them.”<sup>232</sup> It, however, does not allow California citizens to revise—make more substantial changes to—their constitution. Unfortunately, as it

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225. *Legislature of Cal. v. Eu*, 54 Cal. 3d 492, 506, 816 P.2d 1309, 1316, 286 Cal. Rptr. 283, 290 (1991).

226. *See supra* note 222.

227. *See* CAL. CONST. art. IV, § 1; *supra* notes 1-3.

228. *See* CAL. CONST. art. III, § 3; *supra* notes 133-44 and accompanying text.

229. *See supra* notes 34-39 and accompanying text.

230. *See supra* notes 34-39, 133-44 and accompanying text.

231. *See supra* notes 98-192 and accompanying text.

232. CAL. CONST. art. II, § 8(a).

stands, the California courts' test to distinguish permissible constitutional amendment by initiative from impermissible revision is not sensitive enough to recognize very serious changes to the constitution which fall short of almost total governmental or constitutional reorganization. It allows small minorities of Californians, with money, resources, and contacts, to propose and adopt significant constitutional changes with relative ease. The CCRI, which with legislative initiative power interferes with the court's essential duty to enforce the constitution, excludes executive input, and drastically diminishes protection against gender discrimination, qualifies as an amendment under existing case law.<sup>233</sup>

By modifying the qualitative effects test, courts could screen such measures from the initiative process. They could invalidate, as revision, any initiative which changes or diminishes basic civil rights of Californians as a whole or of a specific, identifiable group or diminishes or reallocates the power granted by the constitution to any of the three governmental branches. They could have invalidated the CCRI before it became part of the California Constitution.

The initiative power is important; the courts should preserve and protect it. But they should not guard it blindly, to the detriment of California's government and citizens. They should use the modified test to properly identify constitutional changes which deserve and require more formality than the initiative process offers, measures which undermine the structure of California's government and the rights of its people, measures such as the California Civil Rights Initiative.

*Julia Anne Guizan\**

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233. See *supra* notes 96-190 and accompanying text.

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