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## The Falcon Cannot Hear the Falconer: How California's Initiative Process Is Creating an Untenable Constitution

Rudy Klapper

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# THE FALCON CANNOT HEAR THE FALCONER: HOW CALIFORNIA'S INITIATIVE PROCESS IS CREATING AN UNTENABLE CONSTITUTION

*Rudy Klapper\**

*Californians have always cherished the idea that ultimate political power lies in the people, an idea best represented by the state's hugely influential initiative process. Today, however, that initiative power threatens to spiral out of control, thanks in large part to the California Supreme Court's inability to construe appropriate limits on it. This has created an unbalanced government where the rights of minorities are easily circumscribed and the financial and political infrastructure of the state is in danger of buckling under the combined weight of dozens of initiatives. This Article argues that the judiciary's haphazard interpretation of various rules and regulations regarding the initiative has created a situation where the necessary checks and balances in a republican system are in danger of being subverted. Furthermore, this Article proposes stricter standards for the initiative process and encourages the court to turn a more discerning eye onto the wave of initiatives generated each year. Embracing a more stringent initiative will preserve the importance of the people's power while still safeguarding the rights of all who call California home.*

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\* J.D., May 2014, Loyola Law School, Los Angeles; B.S., Music Industry, minor in Business Law, May 2011, University of Southern California. Enormous thanks to Karl M. Manheim, Professor of Law, whose expertise and knowledge was a massive influence and an invaluable helping hand along the way, and to my editor Karen Roche, without whose assistance and guidance this Article would never have made it to publication. I also want to thank the staff and editors of the *Loyola of Los Angeles Law Review* for all their input and work, particularly Marleina Paz, Scott Klausner, Robert Shepard, and Cameron Bell. Finally, to my family, who made sure I went to law school and stayed there.

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## I. INTRODUCTION

*It's not hard to let it go from a mess to the masses.*<sup>1</sup>

From California's first constitutional convention in 1849, Californians have cherished the idea that power ultimately lies in the people.<sup>2</sup> Indeed, the idea of popular sovereignty—that power in the government inherently lies with the people it is meant to govern—has been a key facet of the United States political system since the framers of the Federal Constitution first articulated the idea in 1787.<sup>3</sup> That idea of popular sovereignty is also reflected in California's initiative power, which has allowed its people to directly propose statutes and amendments to the California Constitution since 1911.<sup>4</sup>

Today, however, the people's initiative power<sup>5</sup> threatens to spiral out of control. The initiative process and the resulting substantial changes it has made to the state constitution have reduced the state government to a gridlocked, impoverished entity.<sup>6</sup> Initiatives often worsen the very problems they ostensibly aim to fix.<sup>7</sup> Indeed, the ideals that the people's initiative stood for when it was created have been transformed; rather than allowing the people to fight against controlling elites in government, ballot initiatives have become a favored instrument of those same controlling interests.<sup>8</sup> This threatens to upset the necessary balance between direct democracy—a form of government whereby the people, not their elected representatives, create the laws and policies<sup>9</sup>—and the

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1. PHOENIX, LISZTOMANIA, *on* WOLFGANG AMADEUS PHOENIX (V2 Records 2009).

2. CAL. CONST. art. II, § 1.

3. "We the People of the United States . . . do ordain and establish this Constitution for the United States of America." U.S. CONST. pmbl.; *see also* Abraham Lincoln, President of the United States, Gettysburg Address (Nov. 19, 1863) ("[G]overnment of the people, by the people, for the people, shall not perish from the earth.").

4. CAL. CONST. art. II, § 8.

5. *See id.*

6. Byron Williams, *Voters Have Had a Major Hand in Creating Dysfunctional Government*, CONTRA COSTA TIMES (May 26, 2012), [http://www.contracostatimes.com/columns/ci\\_20716383/byron-williams-voters-have-had-major-hand-creating](http://www.contracostatimes.com/columns/ci_20716383/byron-williams-voters-have-had-major-hand-creating).

7. *Id.*

8. *The Perils of Extreme Democracy*, THE ECONOMIST, Apr. 20, 2011, *available at* <http://www.economist.com/node/18586520>.

9. Robert Longley, *Direct Democracy*, ABOUT.COM, <http://usgovinfo.about.com/od/thepoliticalsystem/a/Direct-Democracy.htm> (last visited Feb. 6, 2013).

system of checks and balances inherent in a republican government.<sup>10</sup>

California's initiative system was designed to protect the people from the machinations of controlling interests like the Southern Pacific Railroad, the dominant corporate power in early twentieth-century California.<sup>11</sup> The initiative power opened a new avenue that allowed proposed legislation to become law, uninhibited by controlling corporate views.<sup>12</sup> The unhindered growth of the initiative process, however, has turned this initial purpose on its head, at times harming the people instead of protecting them. Today, initiatives are often funded by the same "well-heeled corporate interests" that early twentieth-century Progressives would have blanched at.<sup>13</sup>

The California Supreme Court, whose self-proclaimed role has always been to "jealously [guard] the sovereign people's initiative power,"<sup>14</sup> has shaped the parameters of the initiative and referendum power since the creation of the initiative.<sup>15</sup> However, far from clarifying the extent and limits of the people's initiative power, the court's decisions have instead resulted in a hundred years of uncertainty.<sup>16</sup> Although the court has attempted to be a guiding force for California's ballot initiative process, the court's loose application of various limitations on the initiative has allowed narrow, hastily assembled majorities to do as they please.<sup>17</sup> This has opened up California to the possibility of a pure majoritarian government vulnerable to factions and passing fads, one that potentially undermines core values of both republican government and the California Constitution itself.<sup>18</sup> California's disastrous and ultimately

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10. See THE FEDERALIST NO. 10 (James Madison).

11. Karl M. Manheim, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1187 (1998).

12. *Id.*

13. See *id.* at 1190 ("[T]he insurance industry spent \$88 million dollars on California initiatives in 1988—more than George Bush spent on his entire presidential campaign . . .").

14. *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982).

15. See *infra* Part II.D.

16. See Ray L. Ngo, *The Elephant in the Room: A Critique of California's Constitutional Amendment Process That Gave Birth to the Baby Elephant (Proposition 8) and a Call For Its Reform*, 33 T. JEFFERSON L. REV. 235, 244–52 (2011).

17. See Angela Chrysler, *Proposition 8 and the Need for California Constitutional Amendment Initiative Reform: Tolerance Requires Time and Deliberation*, 37 HASTINGS CONST. L.Q. 591, 606 (2010).

18. See THE FEDERALIST NO. 10 (James Madison) (Clinton Rossiter ed., 1961).

failed flirtation with a constitutional ban on same-sex marriage is just one example of an initiative process run amok.”<sup>19</sup>

Three vital constitutional limitations on the initiative power strive to maintain the balance between direct democracy and republicanism: the distinction between a constitutional revision and an amendment, the “single-subject” rule, and the legislature’s ability to amend an initiative statute.<sup>20</sup> However, the California Supreme Court’s various and often inconsistent decisions on these limitations have failed to preserve the principles these limitations reflect.<sup>21</sup> One result of these decisions is that the initiative power may subvert the California Constitution’s avowed goal of protecting the minority from the majority.<sup>22</sup>

In an ideal democracy like the one envisioned by the framers of the initiative process,

the freedom of the individual can only be legitimately constrained by the State insofar as the State’s action is the product of the people’s will . . . Every participant, regardless of their own moral viewpoint, must be willing to listen to others, to give her opponents’ arguments a fair-minded hearing . . . [and] must not fail to respect the dignity of her fellow citizens.<sup>23</sup>

California’s current system of direct democracy, however, allows a bare majority to erode the essence of the California Constitution without the opportunity for both sides to be heard.<sup>24</sup> Given that republicanism’s essential nature is to prevent the “tyranny of the majority,”<sup>25</sup> this is an untenable position. If both direct democracy and republicanism are to have a place in California government,<sup>26</sup> then the distinctions and relationship between the two should be

19. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

20. *See infra* Part II.

21. *E.g.*, *Amwest Surety Insurance Co. v. Wilson*, 906 P.2d 1112 (Cal. 1995); *Strauss*, 207 P.3d 48; *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990); *Brosnahan v. Brown*, 651 P.2d 274 (Cal. 1982); *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281 (Cal. 1978); *see infra* Part II.C.1–3.

22. *See Strauss*, 207 P.3d at 129 (Moreno, J., dissenting).

23. Anna Marie Smith, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. REV. 517, 586–87 (2010).

24. *Strauss*, 207 P.3d at 129 (Moreno, J., dissenting).

25. JOHN STUART MILL, *ON LIBERTY* 10 (Prometheus Books 1986) (1859).

26. It is unlikely that the current initiative system will be changed. *See Jim Sanders, Bill to Stiffen Ballot-Initiative Rules Dies*, THE SACRAMENTO BEE, Aug. 30, 2012, at A4.

clearly defined and easily discernible. The power of one should not be allowed to overwhelm the other.

This Article suggests that the judiciary should moderate the people's initiative power so as to correct the imbalance that exists between the legislative initiative power and the legislature. Instead of enabling an initiative system where a well-funded group can campaign for the bare majority needed to take minority rights away,<sup>27</sup> the court should strive for a system similar to the legislature's, where careful thought and a thorough vetting process are required before any hastily assembled proposition is made into law. The court should cast aside its preference for isolated technical rules and instead look at each initiative on a case-by-case basis to determine whether it meets or violates the three important principles that govern initiatives. It should construe these principles strictly and invalidate propositions that violate them. Only by doing this can the court restore the proper balance between the people's legislative power and the legislature's and ensure that the exercise of direct democracy will be restricted to its constitutionally mandated boundaries.

Part II discusses the competing theories of republicanism and direct democracy and the history leading up to the enactment of the California ballot initiative.<sup>28</sup> It identifies the structural components of the initiative process, examines how the California Supreme Court has handled the three limitations on the initiative power, and explores how the court's decisions have shaped the initiative process.

Part III argues that the court's haphazard interpretation of the people's initiative power and the various limitations on it have given that power a dangerously broad reach. This has directly led to the flooding of the political process with initiatives, which in turn has promoted the reckless expansion and inefficiency of the California state government. Part III also argues that the electorate's broad power to enact fundamental changes, which results from the court's technical formulation of the rules governing initiatives, encroaches on California's system of republicanism and threatens to leave a government where the bare majority is in control. Government by a bare majority without any consideration or protection for minorities

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27. See *infra* Part II.C.1.c.

28. CAL. CONST. art. IV, § 1.



is a perversion of the republican system California and the United States were meant to embody.

Finally, Part IV proposes that the court should forsake its preference for using technical, formalistic rules in isolation and instead subject each initiative to a stricter application of the three principles governing the initiative system. The court's approach should further the purpose of the overriding constitutional division of power between the electorate and the legislature by delineating clear and sharp lines between the conflicting ideas of republicanism and direct democracy. Additionally, Part IV advises the California legislature to attempt to modify the initiative process so as to provide a thoughtful approach—one that enhances rather than subverts reasoned analysis of an initiative's effects. This part also suggests possible limitations on the people's initiative power that will nevertheless maintain the initiative as the important, powerful tool of popular sovereignty it was intended to be.

## II. HISTORY AND DEVELOPMENT OF THE INITIATIVE

No discussion of the people's initiative power can begin without an explanation of the competing theories of republicanism and direct democracy and how these two ideals contributed to the founding of California and the Progressive movement that birthed the initiative.<sup>29</sup> Since the initiative's creation in 1911, the California Supreme Court's interpretation of its use and limits has evolved to reflect three primary limitations on the initiative's power: the revision-amendment distinction,<sup>30</sup> the single-subject rule,<sup>31</sup> and the legislature's ability to amend an initiative statute.<sup>32</sup>

### A. *The Conflicting Ideals of Republicanism and Democracy*

The framers of the U.S. Constitution were well aware of the dangers of democracy in its pure or idealized form—namely anarchy if the people were allowed to exercise unlimited control.<sup>33</sup> As a result, they did not provide any mechanism for direct change by the

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29. See *infra* Part II.A–B.

30. See *infra* Part II.C.1.

31. See *infra* Part II.C.2.

32. See *infra* Part II.C.3.

33. See *id.*; see also JOHN STUART MILL, ON LIBERTY 10 (Prometheus Books 1986) (1859) (speaking of the “tyranny of the majority” that greatly influenced the Federalists in the writing of the Federal Constitution).

people, either at the legislative or constitutional levels.<sup>34</sup> Instead, they advocated for a republic, a form of government in which there is an organized scheme of representation to effectuate the people's will.<sup>35</sup> This concept of representation via an elected legislative body—and a “proper structure”<sup>36</sup> that included the tripartite system of legislature, executive, and judiciary—was considered necessary to achieve a government that could equally balance the various factions that composed it.<sup>37</sup> In this republican system, every change in the law must come from the representatives the people elect, and there is no direct method of amending the Constitution.<sup>38</sup> This ponderous system of checks and balances prevents, or at least restrains, a majority from enacting laws contrary to the interests of underrepresented factions.<sup>39</sup>

Political theorists at the time the Constitution was framed frequently warned against John Stuart Mill's “tyranny of the majority,” which they regarded as “among the evils against which society requires to be on its guard.”<sup>40</sup> It is those everyday factions where citizens “united and actuated by some common impulse of passion, or of interest”<sup>41</sup> must be controlled by republican constitutional design.<sup>42</sup> Thus, while a controlling majority can be

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34. See U.S. CONST. art V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments . . . [which must be] ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof . . .”).

35. THE FEDERALIST NO. 10, at 81 (James Madison) (Clinton Rossiter ed., 1961).

36. *Id.* at 80–81.

37. See THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.”); see also THE FEDERALIST NO. 10 at 80–81 (James Madison) (Clinton Rossiter ed., 1961) (noting that pure democracies have often been marked by violence and contention and have generally not lasted as long as more stable republican forms of government).

38. Congress may propose an amendment by a two-thirds majority in both houses, in which case it must then be ratified by three-quarters of the states via either their legislatures or a constitutional convention. Two-thirds of the state legislatures may also propose an amendment by calling a constitutional convention, which must then also be ratified by three-quarters of the states to pass into law. See U.S. CONST. art. V.

39. See Smith, *supra* note 23, at 564.

40. JOHN STUART MILL, ON LIBERTY 10 (Prometheus Books 1986) (1859).

41. THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., Penguin Books 1987).

42. See Smith, *supra* note 23, at 564.

expected in the course of regular legislative activity,<sup>43</sup> the Constitution's rigorous procedures for fundamental change safeguard the forms and tenets of government from those majority factions the framers feared so much.<sup>44</sup>

However, while republicanism triumphed as the form of government embodied in the U.S. Constitution, other framers, particularly those protective of individual states' rights, still championed a system of direct democracy.<sup>45</sup> Thomas Jefferson, perhaps the best-known of the Anti-Federalists, wrote that "[t]he mass of the citizens is the safest depository of their own rights and . . . the evils flowing from the duperies of the people are less injurious than those from the egoism of their agents . . . ."<sup>46</sup> This distrust of government not directly controlled by the populace manifested itself in several state governments.<sup>47</sup> Jefferson himself advocated for a periodic review of the entire constitution rather than the difficult amendatory process adopted by the Federalists.<sup>48</sup> Jefferson argued that "no society can make a perpetual constitution," explaining that "[e]very constitution, then, and every law, naturally expires. . . . If it be enforced longer, it is an act of force and not of right."<sup>49</sup> According to Jefferson, only through greater citizen control—via a direct democracy-like system of periodic constitutional review—could a state's governing organ accurately reflect the will and changing mores of its people.<sup>50</sup>

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43. James Madison made a distinction between everyday conditions "in which passions and factions predominate" and those "great and extraordinary occasions" wherein the people might be so moved as to rise up and involve themselves in constitutional lawmaking. *THE FEDERALIST* NO. 49, at 314–15 (James Madison) (Clinton Rossiter ed., 1961).

44. *Id.*

45. Smith, *supra* note 23, at 565.

46. Letter from Thomas Jefferson to John Taylor (May 28, 1816), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 668, 672–73 (Adrienne Koch & William Peden eds., 1944).

47. DAVID D. SCHMIDT, *CITIZEN LAWMAKERS* 25–26 (1989).

48. See THOMAS JEFFERSON, *POLITICAL WRITINGS* 596 (Joyce Appleby & Terence Ball eds., 1999).

49. *Id.*; see also Smith, *supra* note 23, at 567 (explaining Jefferson's stance on a form of direct democracy that used the periodic constitutional convention as an appropriate exercise of political power and the difficulty of establishing an acceptable constitution without it).

50. See Smith, *supra* note 23, at 567.

*B. Progressivism and the Birth of the Initiative*

At the close of the nineteenth century, the government of California was hopelessly fractured and inefficient.<sup>51</sup> Although the Second Constitutional Convention of 1878–79 had resulted in numerous reforms aimed at curbing the influence of special interests, and prescribed serious restrictions on both legislative and corporate power,<sup>52</sup> the reforms had little effect.<sup>53</sup> In 1880, just a year after the Convention concluded, nearly every position of power in the California government was tied to the controlling special interest of the era, the Southern Pacific Railroad.<sup>54</sup> The railroad chose most of the state and local candidates for public office, openly sold and traded judgeships at will, and was the largest landowner in the state.<sup>55</sup> The overwhelming corruption and power the Southern Pacific exercised over California politics led one commentator to liken the state to a “Banana Republic,”<sup>56</sup> where no legislation was passed or struck down without the omnipotent corporation having a say in it.<sup>57</sup>

Having seen few benefits from the 1878–79 constitutional convention, Californians experienced profound distrust and animosity toward the established legislature as the nineteenth century drew to a close.<sup>58</sup> Many found inspiration in the Progressive movement, which played a fundamental role in shaping the governments of many Western states.<sup>59</sup> Its adherents believed that direct democracy could be beneficial in eradicating widespread

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51. See Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11, 29–30 (1997).

52.

Among the significant transformations of power was the establishment of “home rule” for California cities. This reform sought to decentralize power in the mistrusted state government by guaranteeing local autonomy . . . . [C]ontrolling the railroad corporations “was undoubtedly one of the major purposes for which the constitutional convention was called.”

Manheim, *supra* note 11, at 1183 (quoting CARL BRENT SWISHER, *MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878–79*, 112 (New York: Da Capo Press, 1969)).

53. Manheim, *supra* note 11, at 1184.

54. “Scarcely a vote was cast in either house that did not show some aspect of Southern Pacific ownership, petty vengeance, or legislative blackmail.” GEORGE E. MOWRY, *THE CALIFORNIA PROGRESSIVES* 63 (1951).

55. See *id.* at 11–13.

56. Manheim, *supra* note 11, at 1185.

57. MOWRY, *supra* note 54, at 63.

58. See Manheim, *supra* note 11, at 1185–86.

59. See Persily, *supra* note 51, at 15, 20.

dishonesty in government.<sup>60</sup> They pointed to the American tradition of town hall meetings and the success of the Swiss canton system abroad.<sup>61</sup> As one writer made clear, the type of crooked government the Progressives rallied against fit the Southern Pacific “Banana Republic” of California to the letter:

[T]here has arisen in our midst in recent years a powerful plutocracy composed of the great public-service magnates . . . who have succeeded in placing in positions of leadership political bosses that are susceptible to the influence of corrupt wealth. . . . [T]he government has become largely a government of privileged wealth, for privileged interests, by the lawlessness of the privileged ones and their tools, with the result that the people are continually exploited and corruption is steadily spreading throughout all the ramifications of political life.<sup>62</sup>

These ideals found root in the merchant middle class of Southern California and a leadership of conservative Republican professionals.<sup>63</sup> As a direct result of the state’s corruption and the inability of the legislature to extricate itself from corporate control, this group would spearhead the reform movement that eventually led to the election of Republican governor Hiram Johnson and a number of other Progressive legislators in 1910.<sup>64</sup> Johnson in turn called a special election “to fulfill his promise that powerful private interests would never again dominate state government.”<sup>65</sup> The ballot initiative was one of several successful amendments to the California Constitution as a result of that special election.<sup>66</sup> California became one of the first states to enable lawmaking by initiative.<sup>67</sup> The 1911 ballot pamphlet informing voters of the initiative laid out—in plain,

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60. See Manheim, *supra* note 11, at 1186.

61. Persily, *supra* note 51, at 15.

62. FRANK PARSONS ET AL., A PRIMER OF DIRECT-LEGISLATION 7 (1906) (reprinted from THE ARENA, May, June, and July 1906).

63. MOWRY, *supra* note 54, at 22.

64. See Manheim, *supra* note 11, at 1186–87.

65. *Id.* at 1187.

66. Others passed in that election included the powers of referendum and recall. See *The Vote on Amendments No's 4, 7, 8, 16 in the State*, SAN FRANCISCO CHRONICLE, Oct. 11, 1911, at A1.

67. Only South Dakota (1898), Utah (1900), and Oregon (1902) preceded California in allowing the initiative. See Persily, *supra* note 51, at 16.

convincing terms—its promoters' goal of reasserting the people's will:

It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negative such measures as it may viciously or negligently enact.<sup>68</sup>

The Progressive ideals championed by Governor Johnson and his Republican supporters during the initiative campaign emphasized the “popular skepticism and restlessness with established authorities” that had been a hallmark of California politics since its founding.<sup>69</sup> They also offered strong, convincing arguments for direct democracy in the wake of a republican system of government that had become hopelessly and openly crooked.<sup>70</sup>

Thus, it would seem that Thomas Jefferson's idea—that the constitution should be an organ flexible to the changing needs of those it governs—is in accordance with California's system of amendment by ballot initiative.<sup>71</sup> However, Jefferson believed that such flexible review and change to the Constitution should apply to the organ as a whole.<sup>72</sup> Jefferson preferred “an integrative approach in which the whole document can be voted down in favor of an entirely different draft,” not one in which a single issue such as same-sex marriage is placed on its own before the electorate.<sup>73</sup> Jefferson's approach would allow such an issue, proposed as part of a larger constitutional convention, to be entertained and debated by both its proponents and its opponents—the former would be allowed to present justifications, while the latter would no doubt point out that the amendment would violate an essential principle like equal

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68. OFF. OF CAL. SEC'Y OF STATE, SPECIAL ELECTION VOTER INFORMATION GUIDE: CONSTITUTIONAL AMENDMENT NUMBER 22 (1911) (providing statements by State Senator for the 34th District Lee C. Gates and Assemblyman for the 59th District William C. Clark).

69. Manheim, *supra* note 11, at 1174.

70. *Id.* at 1187.

71. See Smith, *supra* note 23, at 568.

72. THOMAS JEFFERSON, POLITICAL WRITINGS 596 (Joyce Appleby & Terence Ball eds., 1999).

73. Smith, *supra* note 23, at 568.

protection.<sup>74</sup> Indeed, Jefferson's idea of a periodic constitutional convention more resembles the measured debate and deliberative thinking that characterizes regular legislative activity and not the simplistic mechanism of initiatives.<sup>75</sup> Jefferson would surely see the difference between his system of a constitutional convention reflecting "historical developments, empirical experience, and improvements in knowledge" and a process as exceedingly casual as California's amendment by initiative.<sup>76</sup>

Despite the inconsistencies between the Jeffersonian philosophy and the Progressive movement, the Progressives nonetheless strongly believed in the Jeffersonian ideal that the common man could be rationally involved in successful self-government.<sup>77</sup> They argued that individual factions could not dominate the community because the different individuals constituting the community created a body where "[n]o one selfish interest is powerful enough to overcome all the others; they must wear each other away until general welfare, according to the views of the majority acting, is substituted for the individual selfish interest."<sup>78</sup> The Progressives idealistically believed that this would prevent "hasty or unwise community action," trusting that

no individual will ever vote for, or willingly assent to, a change, unless satisfied that that change will directly benefit him individually, or that the action will bring improved general welfare to the community. . . . [C]ommunity action determines the average of individual interests, and secures the greatest good for the greatest number.<sup>79</sup>

The Progressives wholeheartedly believed that the initiative power provided the best tool available for reaching their goal of a government free of corruption and open to the common man.<sup>80</sup> Not

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74. *Id.*

75. *See id.* at 569.

76. *Id.* at 568.

77. *See* Persily, *supra* note 51, at 27–28; *see also* Chrysler, *supra* note 17, at 599 ("We find that happiness, enlightenment [sic] and prosperty [sic] among the people increase in precisely the same ration [sic] as do their power, influence, and participation in government." (quoting John Randolph Haynes, an early twentieth-century California Progressive)) (internal quotation marks omitted).

78. Jonathan Bourne, *Functions of the Initiative, Referendum, and Recall*, 43 ANNALS AM. ACAD. POL. & SOC. SCI. 3, 11 (1912).

79. *Id.* at 12.

80. *See* Persily, *supra* note 51, at 28.

until the initiative was codified and the California Supreme Court began to shape the contours of its power did it become clear that this ease of changing the constitution created multiple new challenges for the state.<sup>81</sup> To understand how this occurred, it is necessary to first examine the initiative process itself.

### C. Procedure of the Initiative

To begin the initiative process, sponsors write a petition containing the text of the proposed statute or constitutional amendment and send it to the Secretary of State<sup>82</sup> of California.<sup>83</sup> The attorney general then writes an impartial title<sup>84</sup> and summary for inclusion on the petitions that are circulated to citizens.<sup>85</sup> That petition must be certified as signed by citizens eligible to vote in California, in a number equal to 5 percent (for a statute) or 8 percent (for an amendment) of the votes for all candidates for governor at the most recent election.<sup>86</sup> If the requisite number of signatures is collected, the Secretary of State then submits the measure to the voters at the next general election, at least 131 days after the initiative has qualified.<sup>87</sup> Following that, proponents and opponents of a ballot measure provide arguments favoring or opposing the initiative.<sup>88</sup> Although these arguments cannot ordinarily be checked for accuracy or altered, a challenger may petition a court to order changes in an argument's language.<sup>89</sup>

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81. See Manheim, *supra* note 11, at 1188.

82. At the local level, the petition is sent to the City or Country Clerk. TRACY M. GORDON, PUBLIC POLICY INSTITUTE OF CALIFORNIA, THE LOCAL INITIATIVE IN CALIFORNIA 9 (2004), [http://www.ppic.org/content/pubs/report/R\\_904TGR.pdf](http://www.ppic.org/content/pubs/report/R_904TGR.pdf).

83. SECRETARY OF STATE, STATEWIDE INITIATIVE GUIDE 1 (2011), <http://www.sos.ca.gov/elections/ballot-measures/pdf/initiative-guide.pdf>.

84. There have been a number of lawsuits challenging just how impartial or accurate these attorney general titles and summaries actually are. See John Diaz, *Loading the Ballot Language*, SFGATE, Jan. 29, 2012, <http://www.sfgate.com/opinion/diaz/article>Loading-the-ballot-language-2759736.php#page-1>. Partisan attorney generals have been known to be selective in their descriptions and use loaded language to sway voters one way or another. *Id.*

85. *Id.*

86. CAL. CONST. art. II, § 8(b).

87. *Id.* § 8(c).

88. *About Ballot Arguments*, SECRETARY OF STATE, OFFICIAL VOTER INFORMATION GUIDE, <http://voterguide.sos.ca.gov/voter-info/about-ballot-arguments.htm> (last visited Feb. 6, 2013).

89. *Id.*



Furthermore, a proposed initiative may not encompass more than one subject—the “single-subject” rule.<sup>90</sup> An initiative also may not exempt a district from its effects based upon either the measure’s approval or rejection or the percentage of votes cast in the district. Nor may an initiative contain any alternative provisions which would become law “depending upon the casting of a specified percentage of votes for or against the measure.”<sup>91</sup> No individual may be named to office via an initiative, nor may a private corporation be named to perform any function or duty.<sup>92</sup> Finally, an initiative may only amend the constitution, not propose revisions to it.<sup>93</sup> This Article focuses only on the two main constitutional restrictions on the initiative—the single-subject rule and the revision-amendment distinction—as well as the legislature’s limited ability to amend an initiative statute.

#### D. Structure of the Initiative

From its days as an idealistic tool of the Progressive movement, the ballot initiative has grown into a force to be reckoned with in California politics.<sup>94</sup> Since its inception, a total of 1,759 initiatives have been proposed for the California ballot, and 360 of them have been submitted to the voters.<sup>95</sup> Counting both legislative and initiative amendments, the court in *Strauss* noted that the California Constitution has been amended more than 500 times since 1879.<sup>96</sup> At one point, the California Constitution had ballooned to 95,000 words, making it one of the largest governing instruments in the world, although it has been trimmed somewhat since then.<sup>97</sup> In contrast, the U.S. Constitution consists of only 7,818 words and has been amended only sixteen times since the Bill of Rights in 1791.<sup>98</sup>

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90. CAL. CONST. art. II, § 8(d).

91. *Id.* §§ 8(e)–(f).

92. *Id.* § 12.

93. *Id.* art. XVIII, § 3.

94. See Manheim, *supra* note 11, at 1190 (“[The initiative] is the driving force in California politics and lawmaking.”).

95. *History of California Initiatives: Initiative Totals by Year*, CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, <http://www.sos.ca.gov/elections/ballot-measures/history-initiatives-info.htm> (follow “Initiative Totals by Year” hyperlink) (last visited Sept. 19, 2012).

96. *Strauss v. Horton*, 207 P.3d 48, 60 (2009).

97. Pat Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance*, in CALIFORNIA CONSTITUTION REVISION COMMITTEE, CONSTITUTION REVISION HISTORY AND PERSPECTIVE 3, 6 (1996), <http://www.californiacityfinance.com/CCRChistory.pdf>.

98. *Id.*

Nowadays, the transformation of the initiative process from a tool to curb special interests and ensconced, unscrupulous politicians to a preferred tool of those same special interests and politicians and has led it to become something Governor Hiram Johnson would barely recognize.<sup>99</sup> Initiatives, long considered the primary tool of grassroots organizations striving for change against established powers, are now commonly used by “well-heeled special interests” to push for favorable change in state law.<sup>100</sup> Indeed, even the Southern Pacific Railroad contributed \$500,000 to an environmental bond initiative in the hopes of receiving some of the bond funds to upgrade its own tracks with public money.<sup>101</sup> Attempts to stiffen the requirements of the initiative power to make it more difficult to amend the state constitution, such as by increasing the number of voter signatures required, have failed.<sup>102</sup> Given how dominant and widespread the initiative process has become in California politics, it seems that the initiative as a powerful, driving legislative force is here to stay.<sup>103</sup>

### 1. The Revision-Amendment Distinction

Even before the birth of the initiative power, courts long held that the electorate could only amend the constitution, not effect a revision to it.<sup>104</sup> Revisions were considered such fundamental changes to the constitution that they were only proper in the setting of a constitutional convention called by the people.<sup>105</sup> Over the course of the century since the initiative power granted the people direct lawmaking power, courts have refined the distinction between what constitutes a revision and what constitutes an amendment.<sup>106</sup>

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99. Peter Schrag, *Take the Initiative, Please: Referendum Madness in California*, THE AMERICAN PROSPECT, (Dec. 19, 2011), <http://prospect.org/article/tak-initiative-please-referendum-madness-california>.

100. *Initiatives: Use and Abuse*, L.A. TIMES, Apr. 19, 1998, at M4.

101. Schrag, *supra* note 99.

102. Sanders, *supra* note 26.

103. *Id.*

104. *See* Livermore v. Waite, 36 P. 424, 425–26 (Cal. 1894).

105. *Id.*

106. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009); Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990); Amador v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978); McFadden v. Jordan, 196 P.2d 787 (Cal. 1948).

*a. Revision and amendment defined*

California is one of many states with a dual-function constitution—one both fundamental (or “constitutive”) and legislative.<sup>107</sup> Provisions deemed fundamental deal “with the frame of and declaring the general principles of the republican form of government.”<sup>108</sup> A change to such a fundamental provision is known as a revision.<sup>109</sup> The revision process is “purposefully cumbersome to implement”<sup>110</sup> and requires calling a constitutional convention.<sup>111</sup> In contrast, the legislative function deals with “the law of the state”<sup>112</sup> and encompasses all matters that a legislature and electorate normally pass. The majority of the California Constitution’s 95,000 words fall under this heading and include regular legislature activity as well as an unusually substantial number of initiative language, ranging from tax codes to education funding to rate regulation—the “everyday operations” of lawmakers.<sup>113</sup> Changes to such legislative provisions may be considered “amendments.”<sup>114</sup> As noted above, the initiative power is confined to the adoption of statutes and constitutional amendments only.<sup>115</sup>

The California Supreme Court first clarified the distinction between a revision and an amendment in *Livermore v. Waite*,<sup>116</sup> over a decade before the initiative power was written into the California Constitution. The court described the difference between a constitutional revision and an amendment passed by the legislature thus:

The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment . . . . The very term “constitution” implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will

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107. Manheim, *supra* note 11, at 1220.

108. *Los Angeles Gas & Elec. Co. v. Los Angeles County*, 132 P. 282, 283 (Cal. 1913).

109. Manheim, *supra* note 11, at 1221–22.

110. *Id.* at 1221.

111. CAL. CONST. art. XVIII, § 2.

112. *Los Angeles Gas & Elec. Co.*, 132 P. at 283.

113. *See* Manheim, *supra* note 11, at 1221–22.

114. *Id.*

115. CAL. CONST. art. XVIII, § 3.

116. 36 P. 424 (Cal. 1894).

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. On the other hand, the significance of the term “amendment” implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed . . . [and] the changed condition of affairs . . . or the changes of society or time, may demand an enlargement of some of these limitations, or an extended application of its principles.<sup>117</sup>

It was not until decades later that the court held the same distinction set forth in *Livermore* applied not only to ballot matters put forward by the legislature but also to initiatives.<sup>118</sup> The Great Depression and the resulting turmoil it brought to California gave rise to the “ham-and-eggs” initiatives of the late 1930s and 1940s, a movement ostensibly tailored to fighting for the rights of the elderly.<sup>119</sup> The most famous of these initiatives was a 21,000-word behemoth entitled the “California Bill of Rights” that the California Supreme Court removed from the ballot in *McFadden v. Jordan*, three months before the election.<sup>120</sup> The ballot measure at issue in *McFadden* was a prime example of an initiative that affected the “substantial entirety” of the constitution and a wide variety of functions, and thus was not an acceptable use of the initiative power.<sup>121</sup> Given that the initiative contained 208 sections and repealed or altered fifteen of twenty-five existing articles, it was not surprising that the court held the initiative effected “such extensive alterations in the basic plan and substance of our present Constitution” as to constitute an improper revision to it.<sup>122</sup>

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117. *Id.* at 426.

118. *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948).

119. For an illuminating look at the history and trends that contributed to the rise of the “ham-and-eggs” movement see R. Michael Alvarez et. al., *The “Ham and Eggs” Movement in Southern California: Public Opinion on Economic Redistribution in the 1938 Campaign* (Ctr. for the Study of Law and Politics, Working Paper No. 12, 2003), available at <http://lawweb.usc.edu/centers/cslp/assets/docs/cslp-wp-012.pdf>.

120. 196 P.2d 787 (Cal. 1948).

121. *Id.* at 797.

122. *Id.*

*b. The two-pronged modern revision-amendment analysis*

The modern analysis of the revision-amendment distinction was set forth with clarity thirty years after *McFadden* in *Amador Valley Joint Union High School District v. State Board of Equalization*.<sup>123</sup> To provide a more helpful roadmap to determine whether a particular constitutional enactment is a revision or an amendment, the California Supreme Court in that case developed a two-part analysis that looked to both the quantitative and qualitative effects of the proposition.<sup>124</sup> An initiative that 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” constitutes a quantitative revision.<sup>125</sup> The initiative in *McFadden* is a textbook case of a proposition that effects such wholesale change to the constitution as to be a quantitative revision under the *Amador* standard.<sup>126</sup>

A qualitative enactment may also prove to be unconstitutional, assuming it “accomplish[es] such far reaching changes in the nature of our basic governmental plan as to amount to a revision.”<sup>127</sup> A change from republican governance to direct democracy, or a measure preventing local governments from controlling their own affairs or finances free of interference by the state legislature, would be an example of an impermissible qualitative revision.<sup>128</sup> These types of fundamental changes to government structure, or impingements on essential constitutional rights, could only be effected through the political power of a constitutional convention, not by an initiative.<sup>129</sup>

Consider the case of Proposition 13, a 1978 initiative that’s main purpose was to require a two-thirds legislative majority for the passage of any new tax.<sup>130</sup> The court found that, despite the considerable changes the proposition wrought in the area of taxation, the changes functioned narrowly enough to institute a new method of taxation and held that such a limited purpose was well within the

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123. 583 P.2d 1281, 1283 (Cal. 1978).

124. *Id.* at 1286.

125. *Id.*

126. *See id.*

127. *Id.*

128. *Id.* at 1287.

129. Manheim, *supra* note 11, at 1226.

130. *Amador*, 583 P.2d, at 1284.

bounds of the people's initiative power.<sup>131</sup> The proposition only affected one article of the constitution and thus was not a quantitative revision.<sup>132</sup> Furthermore, despite Proposition 13's substantial change to the state's entire taxation mechanism and the new requirement of a two-thirds vote for future tax changes, the court held that the qualitative effect was neither substantial nor novel enough to constitute a full-scale qualitative revision.<sup>133</sup>

In its decision, the court spoke glowingly of its mission to "liberally construe[] [the initiative power] to promote the democratic process,"<sup>134</sup> emphasizing that the role of the initiative was to act as a "legislative battering ram" which may be used to cut through normal legislative red tape and "strike directly toward the desired end."<sup>135</sup> Despite the court's downplaying the effect of Proposition 13, however, the initiative severely hurt the ability of local governments to tax and manage their own revenues, transferring much of that role to the state government.<sup>136</sup> In essence, *Amador* stated that it was acceptable for an initiative to uphold "fairly dramatic alterations in the distribution of powers."<sup>137</sup> Nevertheless, even these dramatic alterations were viewed as operating merely "within a relatively narrow range to accomplish a new system of taxation"—certainly a novel change, but not a prohibitively substantial one in the court's eyes.<sup>138</sup>

Aside from *McFadden*, the only other time the court has struck down a proposition for constituting an impermissible revision was in *Raven v. Deukmejian*.<sup>139</sup> The proposition at issue in that case, Proposition 115, was known as the "Crime Victims Justice Reform Act" and consisted of numerous comprehensive reforms ostensibly related to the criminal justice system.<sup>140</sup> One such change qualified

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131. *Id.* at 1289.

132. *Id.* at 1286.

133. *Id.* at 1289.

134. *Id.* at 1283.

135. *Id.* at 1289.

136. The two-thirds vote requirement Proposition 13 instituted for the passage of any new taxes created "an insurmountable obstacle built on populist allergy to any kind of new levy." Kevin O'Leary, *The Legacy of Proposition 13*, TIME, June 27, 2009, <http://www.time.com/time/nation/article/0,8599,1904938,00.html>.

137. Manheim, *supra* note 11, at 1226.

138. *Amador v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978).

139. 801 P.2d 1077 (Cal. 1990).

140. *Id.* at 1079.

Article I, Section 24<sup>141</sup> by stating that specific criminal procedural rights in the state constitution “shall be construed by the courts of this state in a manner consistent with the Constitution of the United States.”<sup>142</sup> The intended effect was to prevent California courts from interpreting the state constitution as granting criminal defendants more expansive rights than they enjoyed under the federal Constitution.<sup>143</sup> The court found that this single change was an illegal revision under the qualitative *Amador* prong.<sup>144</sup>

While the *Amador* court approved Proposition 13’s profound alteration of California’s taxation systems,<sup>145</sup> it jealously guarded its own independent interpretive powers in *Raven*, calling Proposition 115’s effect on that power “devastating.”<sup>146</sup> It explained that Proposition 115 would “severely limit[] the independent force and effect of the California Constitution”<sup>147</sup> such as to “substantially change our preexisting governmental framework”;<sup>148</sup> that is, effect a qualitative revision. It seems that the court’s own independent interpretive power is not to be disturbed, despite the fact that deferring to the U.S. Supreme Court in interpreting state constitutional language that is similar to federal constitutional language is nothing new.<sup>149</sup> This is especially interesting in light of

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

142. *Raven*, 801 P.2d at 1086.

143. *Id.* at 1087. By the 1980s, the U.S. Supreme Court had started to substantially curtail the constitutional rights developed by the Warren Court. Interview with Karl M. Manheim, Professor, Loyola Law Sch., in L.A., Cal. (Jan. 24, 2013). Many state courts began resorting to state constitutional rights as a way to preserve the status quo. *Id.* Proposition 115 was one such example, an initiative designed to stop a practice of more expansive criminal rights. *Id.* Another technique involved strong and often virulent attacks against sitting justices on the state supreme court, which is what happened to Chief Justice Rose Bird and two other associate justices in 1986. Larry D. Hatfield, *Ex-Chief Justice Rose Bird Dies*, SFGATE, Dec. 5, 1999, <http://www.sfgate.com/news/article/Ex-Chief-Justice-Rose-Bird-dies-3055490.php#page-1>. The campaign was a direct result of the justices’ stance against the death penalty. *Id.* Seen against this backdrop, *Raven v. Deukmejian* can be seen as the California Supreme Court striking back. Interview with Karl M. Manheim, Professor, Loyola Law Sch., in L.A., Cal. (Jan. 24, 2013).

144. *Raven*, 801 P.2d at 1087–88.

145. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978).

146. *Raven*, 801 P.2d at 1087.

147. *Id.* at 1088.

148. *Id.* at 1086.

149. *Id.* at 1088.

the court's previous acceptance of initiatives that constricted the judiciary's power.<sup>150</sup>

*c. Narrowing of the qualitative prong*

*Strauss v. Horton*<sup>151</sup> narrowed what it meant for an initiative to work a revision under the qualitative prong.<sup>152</sup> Proposition 8, at issue in *Strauss*, was a voter initiative that arose as a response to the court's holding in *In re Marriage Cases*<sup>153</sup> that same-sex couples enjoyed the same fundamental right to marry, under the state constitution, as did opposite-sex couples.<sup>154</sup> Accordingly, to overrule that case, opponents of same-sex marriage had to remove that constitutional protection.<sup>155</sup> Proposition 8 did just that, adding the following section to the California Constitution: "Only marriage between a man and a woman is valid or recognized in California."<sup>156</sup> Opponents of Proposition 8 raised the issue that the initiative constituted an impermissible revision of the constitution, as it abridged a right that the court had just declared fundamental under the privacy and due process rights of the constitution.<sup>157</sup> The court, however, disagreed, holding that a change to the constitution can only be considered a qualitative revision when it affects governmental organization and structure and not when the change is one that affects a fundamental principle of social organization like equal protection.<sup>158</sup>

As it stands now, the court's technical approach to distinguishing between what constitutes a permissible amendment and what constitutes an impermissible revision allows for the

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150. See *In re Lance W.*, 694 P.2d 744 (Cal. 1985); *People v. Frierson*, 599 P.2d 587 (Cal. 1979). *In re Lance W.* challenged the 1982 Proposition 8 restriction of the judicially created exclusionary rule as an improper revision, but the court held it to be a mere amendment and in doing so implicitly authorized the people to prescribe rules of procedure and of evidence. 694 P.2d at 752. The initiative at issue in *People v. Frierson* added a provision to the California Constitution declaring the death penalty not to be cruel or unusual punishment—preventing the judiciary from interpreting the cruel and unusual standard itself—and was said to be an amendment, not a revision. 599 P.2d at 613–14. However, only three justices signed the lead opinion on the case. *Id.*

151. 207 P.3d 48 (Cal. 2009).

152. *Id.* at 114.

153. 183 P.3d 384 (Cal. 2008).

154. *Id.* at 385.

155. See *Strauss*, 207 P.3d at 59.

156. *Id.*

157. *Id.*

158. *Id.* at 127 (Werdegar, J., concurring).



removal of a fundamental constitutional right (even one recently classified as such by the same court) from a minority group by a majority vote.<sup>159</sup> In other words, the very idea of protecting minority rights from majority impairment is subject to majority rule.<sup>160</sup> The court has not hesitated, however, to strike down an amendment that attempts to reduce the court's own powers, like independent judicial review, as an impermissible modification of government structure or organization.<sup>161</sup> Presently, the court's formalistic analysis of the revision-amendment distinction does not follow the same spirit as the constitutional safeguards first put in place by California's founders.<sup>162</sup>

## 2. The "Single-Subject" Rule

The single-subject rule prevents an initiative from being submitted to voters if it covers more than one issue.<sup>163</sup> The rule was designed to prevent overly complex measures from confusing the electorate, whether through deceptive ballot descriptions or the sheer amount of text often present within an initiative.<sup>164</sup> However, the California Supreme Court's lax treatment of the single-subject rule over the years has made the rule a virtually toothless restriction.<sup>165</sup> As it stands today, the single-subject rule remains a toothless bar to the passage of an initiative.<sup>166</sup>

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159. Ngo, *supra* note 16, at 247.

160. *Strauss*, 207 P.3d at 129 (Moreno, J., dissenting).

161. *See* *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990).

162. "[G]overnment was instituted for the protection of minorities [and] [t]he majority of any community . . . [is] to be restrained from infringing upon the rights of the minority." J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849 22 (1850) (statement by delegate William Gwin in an effort to involve the minority populations in the drafting of a state constitution). "The drafters of our Constitution never imagined, nor would they have approved, a rule that gives the foundational principles of social organization in free societies, such as equal protection, less protection from hasty, unconsidered change than principles of governmental organization." *Strauss*, 207 P.3d at 124 (Werdegar, J., concurring).

163. CAL. CONST. art. II, § 8(d).

164. Marilyn E. Minger, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879, 879–80 (1991).

165. *Id.* at 880.

166. Gerald F. Uelman, *Review of Initiatives by the California Supreme Court, 2000–2010*, 44 LOY. L.A. L. REV. 659, 661 (2011).

*a. Creation and purpose of the single-subject rule*

Article II, Section 8(d) of the California Constitution holds that “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”<sup>167</sup> The bloated proposition at issue in *McFadden* led directly to the passage of this amendment.<sup>168</sup> The idea of a single-subject rule, however, was not new<sup>169</sup> and had been a part of the legislature’s lawmaking process for decades.<sup>170</sup> The single-subject rule was intended to eliminate “the possibility of such confusion inasmuch as it will limit each proposed amendment to one subject and one subject only.”<sup>171</sup> Indeed, the single-subject rule has long attempted to accomplish two goals: (1) reducing voter confusion;<sup>172</sup> and (2) preventing two or more dissimilar measures from being combined into a single act to facilitate its passage through a governing body that might otherwise more carefully scrutinize the separate provisions.<sup>173</sup> Without stringent enforcement of a single-subject rule, courts must instead assume that voters understand all the various complexities and effects of a ballot measure.<sup>174</sup>

*b. The reasonably germane test:  
A broad application of the single-subject rule*

The court’s first opinion applying the single-subject rule set the tone for how it would interpret the rule for the next sixty years: as

167. CAL. CONST. art. II, § 8(d).

168. The California Supreme Court decided *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948), on August 3, 1948. The ballot measure adding the single-subject rule to the constitution was approved on March 26, 1948. *See id.* for a discussion of the initiative.

169. Consider the Roman law *Lex Caecilia Didia*, which first prohibited *lex satura*, or laws containing unrelated provisions, in 98 B.C. Kurt G. Kastorf, *Logrolling Gets Logrolled: Same-Sex Marriage, Direct Democracy, and the Single-Subject Rule*, 54 EMORY L.J. 1633, 1640 (2005). The first American single-subject rule came about in 1844 in New Jersey and soon became a fixture in many other states. *See* N.J. CONST. art. IV, § 7 para. 4; Millard H. Ruud, *No Law Shall Embrace More Than One Subject*, 42 MINN. L. REV. 389, 389–90 (1958).

170. *See* CAL. CONST. art. IV, § 9. There is, however, one important difference between the two rules in that the legislature must state the subject in the title of a bill, whereas an initiative does not have such a requirement. *Compare* CAL. CONST. art. IV, § 9 *with* CAL. CONST. art. II, § 8 (highlighting that while the legislature must state the subject in the title of a bill, an initiative does not have such a requirement).

171. *Id.*

172. A “mismatch between voters’ perception of what an initiative does and that measure’s actual effect.” Kastorf, *supra* note 169, at 1641.

173. This practice is known as “logrolling.” *See id.*

174. Uelmen, *supra* note 166, at 662.

broadly and as expansively as possible.<sup>175</sup> The court in *Perry v. Jordan* held that

[p]rovisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act . . . [and] [t]he Legislature may insert in a single act all legislation *germane* to the general subject as expressed in its title and within the field of legislation suggested thereby.<sup>176</sup>

This language is known as the “reasonably germane” requirement and was borrowed from an interpretation of the legislative single-subject rule.<sup>177</sup> The “reasonably germane” test is the guidepost for all of the court’s subsequent decisions regarding the initiative single-subject rule.<sup>178</sup>

The court showed just how relaxed a “general subject” could be in *Brosnahan v. Brown*.<sup>179</sup> The proposition at issue in that case, also called Proposition 8,<sup>180</sup> was a multifaceted criminal justice reform measure aimed specifically at strengthening and bolstering the rights of those affected by crime.<sup>181</sup> While much of the proposition dealt with victims’ rights, bail, diminished capacity, truth-in-evidence, prior convictions, plea bargaining, and other such “criminal justice”-related provisions, section 28, subdivision (c) declared the “inalienable right [of public school students and staff] to attend campuses which are safe, secure and peaceful.”<sup>182</sup> Petitioners in the case argued that such a right is an “undefined, amorphous concept,” which was not sufficiently tethered to the idea of criminal justice reform to fall within the single-subject of the proposition.<sup>183</sup> The court, however, disagreed.<sup>184</sup> Upholding the “reasonably germane” standard articulated in *Perry*, the court held that

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175. *Perry v. Jordan*, 207 P.2d 47, 50 (Cal. 1949) (emphasis added).

176. *Id.*

177. *Evans v. Superior Court*, 8 P.2d 467, 469 (Cal. 1932).

178. *Manheim*, *supra* note 11, at 1208.

179. 651 P.2d 274 (Cal. 1982).

180. Not to be confused with the Proposition 8 later at issue in *Strauss*. See *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

181. *Brosnahan*, 651 P.2d at 280.

182. *Id.* at 278.

183. Petitioners noted that the right to safe schools is one that could fall under any number of divergent hazards from acts of nature and acts of war to more mundane ones like building code violations. *Id.* at 280.

184. *Id.* at 281.

Proposition 8's safe-schools provision sufficiently "aimed at, and [was] limited to[] the single subject of safety from *criminal* behavior."<sup>185</sup> The court noted that its own precedent on the issue had painted the single-subject rule in broad swaths,<sup>186</sup> and to construe the single-subject rule any more tightly would contradict the court's stated mission to "avoid an overly strict judicial application of the single-subject requirement, . . . frustrat[ing] legitimate efforts by the people to accomplish integrated reform measures."<sup>187</sup> Yet the purpose of the single-subject rule is to prevent such "integrated reform measures" that may constitute logrolling or cause greater voter confusion with complex, tenuously related provisions.<sup>188</sup>

The past decade has confirmed that the single-subject rule remains a virtual nonentity.<sup>189</sup> In *Manduley v. Superior Court*,<sup>190</sup> the court held that Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998, did not violate the single-subject rule.<sup>191</sup> Although Proposition 21 ostensibly dealt strictly with gang violence and juvenile crime, the measure added a number of amendments to the constitution, expanding the "Three Strikes" law to include several offenses that were not related to gang violence or any other sort of juvenile crime.<sup>192</sup> Instead of analyzing whether these provisions were in fact reasonably germane to the subject of gang violence and juvenile crime, the court noted that the attorney general's summary of Proposition 21 explicitly designated the additional crimes as violent and serious felonies, automatically making them worthy of longer sentences.<sup>193</sup> The court held that no voters could have been fooled, fulfilling one of the primary purposes of the single-subject rule. Therefore, the court reasoned, all of the

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185. *Id.*

186. The court specifically recalled its discussion of the legislative single-subject rule in *Evans v. Superior Court. Brosnahan. Id.* at 280. There, the court had upheld a measure that included a number of disparate subjects including wills, succession details, administration and distribution of decedents' estates, and the roles and procedures of guardianships of minors and incompetents and found that they were all reasonably germane to probate law. *See Evans v. Superior Court*, 8 P.2d 467 (Cal. 1932).

187. *Brosnahan*, 651 P.2d at 283 (quoting *Amador v. State Board of Equalization*, 583 P.2d 1281 (Cal. 1978)).

188. Minger, *supra* note 164, at 908–09.

189. *Id.* at 880.

190. 41 P.3d 3 (Cal. 2002).

191. *Id.* at 9.

192. Uelmen, *supra* note 166, at 661.

193. *Manduley*, 41 P.3d at 31.

provisions were “reasonably germane to the common purpose of reducing gang-related and juvenile crime.”<sup>194</sup> Justice Moreno concurred but noted the obvious problem inherent in the court’s analysis of *Manduley*: simply put, it is unrealistic to assume that voters carefully scrutinize their ballot guides and understand the measures they are voting on.<sup>195</sup>

The single-subject rule remains a lightly regarded rule, one the court would prefer to apply broadly for fear of restricting the people’s experiment with direct democracy.<sup>196</sup>

### 3. The Legislature’s “Ability” to Amend Initiatives

Unless an initiative expressly provides for it, the California legislature may not amend initiative statutes by passing another statute.<sup>197</sup> California is the only ballot-initiative state that restricts the legislature from amending an initiative statute,<sup>198</sup> a reminder of just how deeply seated California’s distrust of the legislature was when the initiative process was first instituted.<sup>199</sup> Courts have honored this restriction quite deferentially, in a nod to the judicial view that the electorate’s power to enact direct legislation is a fundamental right that should be left undisturbed by the legislature.<sup>200</sup> For practical reasons, however, initiative drafters have long permitted the legislature to amend an initiative if the amendment “furthers” the initiative’s “purposes.”<sup>201</sup> The traditional rationale is that it is more efficient to allow the legislature to provide technical fixes to amendments than to hold another inconvenient, expensive election just to amend a poorly worded statute.<sup>202</sup>

What exactly constitutes a statute that “furthers the purpose” of an initiative amendment? In *Amwest Surety Insurance Co. v. Wilson*,<sup>203</sup> the court had to answer this question to determine whether

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194. *Id.* at 33.

195. *Id.* at 38–39 (Moreno, J., concurring).

196. Minger, *supra* note 164, at 880.

197. See CAL. CONST. art. II, § 10(c).

198. Manheim, *supra* note 11, at 1197.

199. *Id.*

200. See *Rossi v. Brown*, 889 P.2d 557, 560 (Cal. 1995) (quoting *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976)); *Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm’n*, 799 P.2d 1220, 1235 (Cal. 1990).

201. Manheim, *supra* note 11, at 1199.

202. *Id.*

203. *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1120 (Cal. 1995). Proposition 103 essentially included a cutback of insurance rates to 80 percent of the rate from the year prior to the

a legislative amendment to the recently passed Proposition 103 actually “furthered the purpose” of the initiative’s stated goal of insurance reform. The court held that the limitation that the legislature’s statutory amendment to the initiative must further its purpose necessarily requires a heightened level of judicial review, lest the legislature be able to subvert the entire process by weakening initiative statutes once they are enacted.<sup>204</sup> The court also noted in dicta that a heightened review was necessary to prevent future initiative drafters from feeling compelled to remove the legislature’s ability to amend the initiative entirely.<sup>205</sup> The court explained that while the legislative power is generally absolute, it is diminished where the constitution has established limitations upon that power.<sup>206</sup> Such restrictions must be strictly construed.<sup>207</sup> Under a heightened review, the court quickly shot down Amwest’s argument that the amendment, by clarifying whether the proposition applied to surety insurance, did, indeed, further the initiative’s purpose; instead, the court concluded, the legislature had “altered its terms in a significant respect.”<sup>208</sup>

By applying a heightened standard of review to the question of whether the legislature’s statutory amendment was permissible, the judiciary essentially second-guessed the legislature’s policy judgment.<sup>209</sup> Furthermore, by setting strict limits on the legislature’s ability to amend initiatives, the court unequivocally held that the electorate’s legislative power is superior to that of the legislature.<sup>210</sup> This has been expressly noted by the California Supreme Court.<sup>211</sup> The partiality to the people’s direct power may be a result of the fact that direct legislation is the closest the people can get to self-governance, whereas the political power in Article II, Section 1

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initiative’s passage. See CAL. INS. CODE §§ 1861.01, 1861.05 (West 2012). It also instituted a strict rate approval system that required a notification to the public of the requested change and prohibited any rate that was “excessive, inadequate, unfairly discriminatory or otherwise in violation” of the code. *Id.* § 1861.05.

204. See *Amwest*, 906 P.2d at 1112, 1119.

205. *Id.* at 1119–20.

206. *Id.* (quoting *Martin v. Riley*, 123 P.2d 488 (Cal. 1942)).

207. *Id.*

208. *Id.* at 1123.

209. *Manheim*, *supra* note 11, at 1199.

210. *Id.* at 1202.

211. “The people’s reserved power of initiative is greater than the power of the legislative body.” *Rossi v. Brown*, 889 P.2d 557, 574 (1995).

of the constitution is merely theoretical self-governance accomplished by representatives, not the people directly.<sup>212</sup>

### III. THE UNCONTROLLABLE INITIATIVE

The California Supreme Court has loosely applied important principles governing the initiative power and has been notably unsuccessful in reining in the initiative process.<sup>213</sup> This has led to an electorate power that seems to have very few actual restrictions and that sabotages the original purposes of the initiative.<sup>214</sup>

Furthermore, if both direct democracy and republicanism have a place in California government, then the distinctions and relationship between the two should be pronounced and easily discernible. As it stands now, they are not.<sup>215</sup> Due to the court's loose refereeing of the initiative system, bare voter majorities may do as they please, upsetting the balance between direct democracy and the checks-and-balances system of republican government.<sup>216</sup> Unfettered initiative power creates a majoritarian direct democracy model that threatens to subvert the ideal of a republican government, which is structured to protect the rights of all within the government equally, not at the expense of one majority-minority faction or another.<sup>217</sup>

#### *A. The Court's Regulation of the Initiative Has Rendered the Initiative's Boundaries Practically Nonexistent*

The court's interpretations of the single-subject rule and the revision-amendment distinction are either so broad as to be a virtual paper tiger or too formalistic and inflexible to adequately limit the scope of the people's power, as the framers of the initiative process intended.<sup>218</sup> The court's strict regulation of the legislature's power under the "to further the purpose" doctrine, furthermore, has created a legislature inferior in its power to that of the electorate's.<sup>219</sup> By

212. Manheim, *supra* note 11, at 1217.

213. *See infra* Part II.D.

214. *See generally* Bourne, *supra* note 78, at 3 (discussing the six original functions of the initiative power as described by its creators).

215. *See infra* Part III.B.

216. *See infra* Part III.B.

217. *See* Chrysler, *supra* note 17, at 606–07.

218. *E.g.*, Strauss v. Horton, 207 P.3d 48 (Cal. 2009); Raven v. Deukmejian, 801 P.2d 1077 (Cal. 1990); Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281 (Cal. 1978); *see infra* Part II.C.1–2.

219. *E.g.*, Amwest Sur. Ins. Co. v. Wilson, 906 P.2d 1112 (Cal. 1995); *see infra* Part II.C.3.

maintaining these antiquated sets of technical definitions, the court has sanctioned radical shifts in the distribution of legislative and political powers and failed to stay true to the original progressive spirit of the initiative.<sup>220</sup>

1. The Qualitative Test Was Read So Narrowly in *Strauss* as to Defeat the Purpose of Separating a Revision from an Amendment

While the qualitative and quantitative prongs of *Amador* remain a useful tool for determining whether an initiative is a revision or an amendment, *Strauss* unnecessarily narrowed the qualitative test.<sup>221</sup> This has created a shortsighted definition of “revision” and a political arena where the initiative power has the authority to abrogate a foundational constitutional principle of law.<sup>222</sup> The ability of a bare majority of a populace to remove a fundamental right previously recognized under the constitution’s equal protection clause flies in the face of basic republican theory and shows how the court, in yielding to the will of the people, has subjected the California Constitution to the whims of a majority interest.<sup>223</sup>

*a. The current distinction between a revision and an amendment is needlessly technical and shortsighted*

By refusing to strictly construe a revision as one that affects a fundamental constitutional principle such as equal protection, the California Supreme Court is implicitly condoning direct majoritarian lawmaking by the electorate without the regular deliberative functions that legislative lawmaking allows.<sup>224</sup> Bare majorities can easily propose and pass legislation without regard to the interests, concerns, or needs of others.<sup>225</sup> This is direct democracy at its most anti-republican—ignoring the common weal in favor of the

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220. See *infra* Part III.A.4.

221. In short, an initiative may be considered an amendment if it affects a fundamental right like privacy, due process, or equal protection, but will be voided as an impermissible revision if it enacts a far-reaching change to governmental structure. *Strauss*, 207 P.3d at 102.

222. Recent Cases, *Equal Protection—Same-Sex Marriage—California Supreme Court Classifies Proposition 8 as “Amendment” Rather than “Revision,”* 123 HARV. L. REV. 1516, 1518 (2010) [hereinafter *Equal Protection*].

223. THE FEDERALIST NO. 10, at 58, 123 (James Madison) (Isaac Kramnick ed. Penguin Books 1987).

224. Chrysler, *supra* note 17, at 607.

225. *Id.* at 606.



majority's personal viewpoints and biases.<sup>226</sup> Even if such legislation were construed as merely a narrowly defined, limited exception, as the term "marriage" was in *Strauss*, the approval of such a measure—expressly discriminating against one group's right to use a specific term—is a sufficiently harmful mark to impose second-class citizenship on that group.<sup>227</sup> The court's approval of Proposition 8 as an amendment to the California Constitution sent a loud and clear message not only to gay and lesbian Californians, but to all minority groups—your rights, no matter how fundamental, may be erased from the constitution at the whim of a bare majority of the electorate.<sup>228</sup>

The court was wrong in *Strauss* to hold that a bare majority of the electorate voting to take away a fundamental right is not a revision of the California Constitution.<sup>229</sup> The court's verbal gymnastics in the case tried to sidestep the fact that the court had held the marriage right to be fundamental months earlier in *In re Marriage Cases*.<sup>230</sup> Based on the court's logic, the equal protection clause, long considered a fundamental part of the constitution,<sup>231</sup> would be subject to the whims of legislative action.<sup>232</sup> Laws depriving Californians of fundamental rights could now be passed on the basis of suspect classifications such as race or religion, as *Strauss* did on the basis of sexual orientation.<sup>233</sup>

No matter how one defines the right being taken away, the court's narrow definition of "revision"—as applying only to changes to a governmental plan or framework—seemed specially designed to categorically exempt initiatives like Proposition 8.<sup>234</sup> By changing

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226. E-mail from Karl M. Manheim, Professor of Law, Loyola Law Sch., to author (Jan. 25, 2013, 4:44 PM) (on file with author).

227. Ngo, *supra* note 16, at 249.

228. *Id.*; see also ERIC AVILA, POPULAR CULTURE IN THE AGE OF WHITE FLIGHT: FEAR AND FANTASY IN SUBURBAN LOS ANGELES 232 (2004) (discussing how the anti-tax initiative Proposition 13, which effectively defunded a number of public schools, successfully passed partially due to a large number of white parents pulling their kids out of public schools and sending them to private schools as a result of desegregated school busing and equalized public school funding).

229. *Strauss v. Horton*, 207 P.3d 49, 122 (Cal. 2009).

230. 183 P.3d 384, 433 (Cal. 2008).

231. "Equal protection principles lie at the core of the California Constitution and have been embodied in that document from its inception." *Strauss*, 207 P.3d at 129 (Moreno, J., dissenting).

232. Brief for Karl M. Manheim as Amicus Curiae Supporting Petitioners at 23, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (Nos. S168047, S168066, S168078).

233. *Id.*

234. *Strauss*, 207 P.3d at 124 (Werdegar, J., concurring).

the court's earlier description of a qualitative revision from one that *includes* a change in the basic plan of California government to one that *is* a change in the basic plan of California government, *Strauss* imprudently forecloses all other possible ways to effect a revision.<sup>235</sup> Thus, a change to the constitution that does not affect the constitution's structure or framework must, by the court's inflexible and unflinching logic, be an amendment.<sup>236</sup> This would still restrict laws that change the role of the judiciary, a part of the "constitutional scheme or framework" of government, as the proposition struck down in *Raven* did.<sup>237</sup> However, it opens other essential constitutional principles to almost limitless attack by initiatives.<sup>238</sup>

*b. The court's formalistic, rigidly technical approach to distinguishing permissible constitutional amendments from impermissible constitutional revisions subverts the goals of the constitution's drafters*

The drafters of California's constitution wholeheartedly believed that "government was instituted for the protection of minorities [and that t]he majority of any community is . . . to be restrained from infringing upon the rights of the minority."<sup>239</sup> By applying a formalistic, carefully circumscribed definition to the term "revision," however, the court has done more than just "jealously [guarding] the sovereign people's initiative power";<sup>240</sup> it is yielding to the will of the majority and subjecting the California Constitution to "the turbulency and weakness of unruly passions."<sup>241</sup> As Justice Werdegar noted in *Strauss*: "The drafters of our Constitution never imagined, nor would they have approved, a rule that gives the foundational principles of social organization in free societies, such as equal protection, less protection from hasty, unconsidered change than principles of governmental organization."<sup>242</sup> The idea that a

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235. *Id.* at 125.

236. *Id.* at 134 (Moreno, J., dissenting).

237. *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990).

238. Brief for Karl M. Manheim, *supra* note 232, at 23–24.

239. BROWNE, *supra* note 162, at 22 (statement by delegate William Gwin in an effort to involve the minority populations in the drafting of a state constitution).

240. *Brosnahan v. Brown*, 651 P.2d 274, 277 (Cal. 1982).

241. THE FEDERALIST NO. 10 (James Madison).

242. *Strauss v. Horton*, 207 P.3d 48, 124 (Cal. 2009) (Werdegar, J., concurring). Despite Justice Werdegar's conclusion that the initiative could not modify fundamental constitutional principles like equal protection, she nevertheless held that Proposition 8 did not affect equal

mere majority of voters is enough to subvert a highly regarded, implicitly American principle such as equal protection contrasts with the basic goals of a constitution, which is meant to carry guarantees that every citizen under its laws can count on.<sup>243</sup>

The court's attempt to avoid these issues in *Strauss*<sup>244</sup> contradicts its prior reasoning in *In re Marriage Cases*.<sup>245</sup> No matter how narrow or limited the court may have attempted to construe Proposition 8 to be, its cutting away of a fundamental part of full equality "strikes at the core of, and thus fundamentally alters, the guarantee of equal treatment that has pervaded the California Constitution since 1849."<sup>246</sup> Theoretically, a proposition that prohibits usage of the term "marriage" by African-Americans or Asian-Americans would be within the initiative power, assuming it received more than 50 percent of the popular vote.<sup>247</sup> Taken to its logical conclusion, the court's ruling in *Strauss* would enable the electorate to restrict the right of assembly or the right to free speech—say, banning the protest or criticism of government—of a federally protected suspect class like African-Americans.<sup>248</sup> In short, what *Strauss* allows is the complete threatening of a minority group's rights, so long as it does not affect the court's definition of what constitutes the "structure" or "governmental plan" of the constitution.<sup>249</sup>

*Strauss* is not consistent with the foundational principle of equal protection in our government or the deeply rooted American concept of allowing an independent judiciary to interpret and enforce the

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protection because restricting access to the term "marriage" was simply "[d]isagreement over a single, newly recognized, contested application of a general principle." *Id.* at 128.

243. William N. Eskridge, *Foreword: The Marriage Cases—Reversing The Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CAL. L. REV. 1785, 1842 (2009).

244. By classifying Proposition 8 as a "narrow exception" the court simply reserved the term marriage for opposite-sex couples and left all the substantive benefits of marriage for same-sex couples under a nominal name such as "domestic partnership." *Strauss*, 207 P.3d at 63.

245. Which quite accurately noted that "draw[ing] a distinction between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership) impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple. *In re Marriage Cases*, 43 Cal. 4th 757, 782 (2008).

246. *Strauss*, 207 P.3d at 131 (Moreno, J., dissenting).

247. Ngo, *supra* note 16, at 252.

248. *Id.* at 248.

249. *Id.*

constitution as it affects fundamental freedoms.<sup>250</sup> Indeed, it stands in stark contrast to *Raven*, where the court steadfastly protected its own judicial power.<sup>251</sup> The state judiciary jealously guards its precious and private power to interpret the California Constitution as it sees fit, unconstrained by federal courts or the initiative process.<sup>252</sup> The fact that the court did not see a structural constitutional feature like equal protection as deserving the same safekeeping it affords itself shows a disconcerting disconnect in the court's reasoning and is an inexplicably limited application of the qualitative prong of *Amador*.<sup>253</sup>

## 2. The "Reasonably Germane" Single-Subject Rule Is No Limitation at All

Under the current interpretation of the single-subject rule, analyzing an initiative has become an increasingly complicated calculation for the average voter.<sup>254</sup> As the California Supreme Court has interpreted it, the "reasonably germane" limitation is no limitation at all.<sup>255</sup> Far from preventing logrolling or reducing voter confusion, this loose application of the single-subject rule has only furthered opportunities for logrolling<sup>256</sup> and has vastly increased the potential for voter confusion.<sup>257</sup>

### *a. The "reasonably germane" standard has furthered opportunities for logrolling*

The court's lax interpretation of the "reasonably germane" standard has made it easier to mislead the electorate about the true, full effects of a measure.<sup>258</sup> Generally speaking, it is only those few people who are intimately involved with a measure who have zealously studied it and know how it will likely affect their own interests.<sup>259</sup> Most voters would not possess such information and

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250. *In re Marriage Cases*, 183 P.3d 384, 455 (Cal. 2008) (Kennard, J., concurring); see Brief for Karl M. Manheim, *supra* note 232, at 25.

251. *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990).

252. *Id.*

253. See *Strauss v. Horton*, 207 P.3d 48, 134 (Moreno, J., dissenting).

254. Minger, *supra* note 164, at 909.

255. See *id.* at 880.

256. Increasingly complex measures united under a nebulous concept increase the ease of "burying unpopular riders in complex measures." *Id.* at 908.

257. *Id.*

258. *Brosnahan v. Brown*, 651 P.2d 274, 293 (Cal. 1982) (Bird, J., dissenting).

259. *Id.* at 292.

likely would not have the time or interest necessary to fully inform themselves about a measure.<sup>260</sup> The single-subject rule was intended to clarify the effect of a proposition in comprehensible, concise language, yet the court's acceptance of broad, inchoate terms to satisfy the rule has allowed logrolling to continue.<sup>261</sup>

By allowing disparate sections to be united under an indeterminate, overly general term, the court has undermined one of the main goals of the single-subject rule—preventing logrolling<sup>262</sup>—and created a number of potential pitfalls.<sup>263</sup> There is the potential that voters will be oblivious to the total contents of an initiative's separate provisions.<sup>264</sup> The combination of numerous provisions, often affecting totally different parts of the constitution and effecting various, unrelated changes under a nebulous heading, deprives voters of their ability to vote independently on the merits of each separate section.<sup>265</sup> Furthermore, an unconstrained single-subject rule allows an initiative to pass because of aggregated minorities who may support separate provisions, not a true majority who favor any or all of an initiative's provisions—a populist analogue to the kind of logrolling common in the legislature.<sup>266</sup>

Increasingly amorphous terms expand a general concept to the point where any initiative can comply with the single-subject rule.<sup>267</sup> The attorney general's description of the proposition at issue in *Brosnahan* noted that the Victims' Bill of Rights included "potential" as well as actual victims of crime—as dissenting Chief Justice Bird noted, "'potential victims' of crime includes all of us in virtually every aspect of our lives."<sup>268</sup> This could lead to an initiative that may encompass "hundreds of unconnected statutes, countless

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260. *Id.*

261. Minger, *supra* note 164, at 885.

262. *Id.*

263. *Brosnahan*, 651 P.2d at 293 (Bird, J., dissenting).

264. *Id.*

265. *Id.*

266. *Id.*; see also STANLEY R. KAMINSKI & ELINOR L. HART, BLOOMBERG BNA, LOG ROLLING VERSUS THE SINGLE SUBJECT RULE (2012), available at [http://www.duanemorris.com/articles/static/kaminski\\_hart\\_bloombergbna\\_022812.pdf](http://www.duanemorris.com/articles/static/kaminski_hart_bloombergbna_022812.pdf) (describing the process of logrolling in the legislature and states' attempts to deal with the process by legislative single-subject rule. Much like the initiative single-subject rule, these restrictions often fail to curtail substantial logrolling).

267. *Brosnahan*, 651 P.2d at 296 (Bird, J., dissenting).

268. *Id.*

rules of court and volumes of judicial decisions, [and] completely alter the complex interrelationships of our society.”<sup>269</sup>

Indeed, it is entirely possible that some voters in *Brosnahan* intended to favor better protection for victims of crime without favoring a repeal of numerous sections of the state’s Evidence Code, some of which allowed victims of crime to be subjected to invasive cross-examining involving their private lives.<sup>270</sup> Instead of placing these separate proposals in separate initiatives with their own, clearly defined subjects, drafters deprived voters a chance to analyze, discuss, and vote on the separate provisions—the exact opposite of what the single-subject rule was supposed to accomplish regarding logrolling.<sup>271</sup> Far from restricting logrolling, California courts actually promote its use by accepting umbrella terms such as “potential victims” and “criminal justice” as appropriate single-subject descriptions.<sup>272</sup>

While the legislative single-subject rule and the initiative single-subject rule are similar in that they both present weak obstacles to logrolling efforts,<sup>273</sup> they differ as to what happens after the bill is created.<sup>274</sup> Legislation is constantly and consistently amended between introduction and its eventual passage into law, whether through careful compromise or extensive deliberation.<sup>275</sup> Initiatives, on the other hand, are campaigned for and voted on, but go through no amendatory process and remain virtually the same from creation to the ballot box.<sup>276</sup> Thus, while both single-subject rules appear similar on the surface, the initiative is still far away from the realities of legislative lawmaking.<sup>277</sup> It would require a stricter application of the single-subject rule to bring the initiative power in line with the rule’s purpose and provide a counterpart to the deliberative process a republican legislature already goes through.<sup>278</sup>

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269. *Id.*

270. *Id.* at 300.

271. *Id.* at 300–01.

272. *Id.* at 297.

273. *See infra* note 316 and accompanying text.

274. E-mail from Karl M. Manheim, Professor of law, Loyola Law Sch., to author (Jan. 25, 2013, 17:13 PST) (on file with author); *see also infra* notes 354–57 and accompanying text (discussing other differences between the legislative single-subject rule and the initiative’s single-subject rule).

275. *See* sources cited *supra* note 273.

276. *Id.*

277. *Id.*

278. *Id.*

*b. The “reasonably germane” standard has vastly increased the potential for voter confusion*

The court’s adoption of the broad, “reasonably germane” legislative single-subject standard of *Evans*,<sup>279</sup> although not surprising,<sup>280</sup> has had the unfortunate effect of obfuscating the full purpose of many initiatives.<sup>281</sup> One can easily imagine a voter reading the preamble of the initiative at issue in *Brosnahan*, which stated that the proposition was intended “to strengthen procedural and substantive safeguards for victims in our criminal justice system,”<sup>282</sup> and voting for that worthy cause without knowing all of the myriad components that may fall under such a generous heading or the costs associated with them.

When confronted with a multifaceted proposition tackling many subjects, like those at issue in *Brosnahan*, the average voter must make a series of complex calculations to sufficiently weigh the initiative’s pros and cons.<sup>283</sup> It is true that every law involves such a weighing process,<sup>284</sup> but the current single-subject rule only confuses that analysis by allowing many different issues to be put to a single vote.<sup>285</sup> Instead of preserving the initiative power of the people and their right to be fully informed before voting, the judicial interpretation of the “reasonably germane” standard promotes

279. *See Evans v. Superior Court*, 8 P.2d 467, 469 (Cal. 1932).

280. “[T]he [single-subject] provision is not to receive a narrow or technical construction in all cases, but is to be construed liberally to uphold proper legislation . . .” *Perry v. Jordan*, 207 P.2d 47, 50 (Cal. 1948). Much as the California Supreme Court is reluctant to intrude on the legislative right to legislate, so does the court not wish to impinge on the expressly reserved legislative power of the electorate. *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112, 1117 (Cal. 1995).

281. This stands in stark contrast to the single-subject rule’s original purpose—the original pamphlet describing the proposed single-subject rule in 1948 noted that “[t]he busy voter does not have the time to devote to the study of long, wordy, propositions and must rely upon such sketchy information as may be received through the press, radio, or picked up in general conversation.” CALIFORNIA OFFICE OF SECRETARY OF STATE, *BALLOT PAMPHLET 8* (1948); *see supra* Part III.A.2.a.

282. *Brosnahan v. Brown*, 651 P.2d 274, 280 (Cal. 1982).

283. Minger, *supra* note 164, at 909.

284. *See Daniel Lowenstein, California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 958 (1983) (noting that weighing the positives and negatives of something is “inherent in the passage of most laws”).

285. Minger, *supra* note 164, at 908–09 (“For example, when multiple subjects are presented by provisions A, B, and C in a single initiative, the voter cannot merely decide if she likes or dislikes provision A or provision B—she must decide if she likes provision A more than she dislikes provision B or if she dislikes provision B more than she likes provisions A and C combined.”).

deception by initiative drafters.<sup>286</sup> Far from narrowing an initiative's breadth, this judicial approach encourages drafters to lump dissimilar provisions under an uninformative catchphrase.<sup>287</sup> Furthermore, it allows initiative sponsors to slip in potentially undesired provisions that fit under the umbrella term, infringing on a voter's freedom of choice.<sup>288</sup> All of these problems go against the spirit of the single-subject rule, which directly attempted to avoid the dangers inherent in propositions overloaded with separate issues.<sup>289</sup>

Despite the obvious difficulty the average voter has in accurately digesting modern-day initiatives,<sup>290</sup> the California Supreme Court seems determined to convince itself that voters are well prepared to deal with such multifaceted proposals.<sup>291</sup> According to the court, so long as an initiative's provisions are "reasonably germane" to one another, there can be no possibility of voter confusion.<sup>292</sup> To put it lightly, this is a gross overestimation of voter knowledge.<sup>293</sup> The average voter is exposed only to the official materials in the ballot pamphlet and generally has no knowledge of the origin or the significance of the language describing an initiative's law.<sup>294</sup> Unlike the legislative process, where a bill must pass through legislative debate and public hearings before it is passed, an initiative does not pass through such a rigorous system: it is presented to the voter as is.<sup>295</sup> The voter receives a pamphlet containing pages and pages of material, usually written by lawyers and described in technicalities and with titles that often have little to

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286. *Brosnahan*, 651 P.2d at 293–94 (Bird, J., dissenting).

287. *Id.* at 293.

288. *Id.*

289. *McFadden v. Jordan*, 196 P.2d 787 (Cal. 1948).

290. See Araceli MartÁnez Ortega, *Busting Through Ballot Confusion in California*, NEW AM. MEDIA (Oct. 24, 2012), <http://newamericamedia.org/2012/10/busting-through-ballot-confusion-clear-explanations-of-key-cas-initiatives.php>.

291. See Uelmen, *supra* note 166, at 661–62.

292. "Generally, the drafters who frame an initiative statute and the voters who enact it may be deemed to be aware of the judicial construction of the law that served as its source." *In re Harris*, 775 P.2d 1057, 1060 (Cal. 1989). "We must assume the voters duly considered and comprehended these materials." *Manduley v. Superior Court*, 41 P.3d 3, 32 (Cal. 2002) (quoting *Raven v. Deukmejian*, 801 P.2d 1077, 1085 (Cal. 1990)).

293. Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 968 (1994).

294. *Id.*

295. Minger, *supra* note 164, at 926.



do with what the initiative actually seeks to achieve.<sup>296</sup> For the average voter unfamiliar with the intricacies of an initiative, this simply is not a practical way to learn enough to make an informed decision.<sup>297</sup> Voters are not experienced in interpreting the numerous proposals that make up a modern initiative in a manner that would allow them to avoid confusion.<sup>298</sup> They do not have the time or resources necessary to devote themselves to studying propositions—often long, wordy, and containing unfamiliar language.<sup>299</sup> This leads to initiatives passed without the full understanding of the people who passed them.<sup>300</sup>

This problem arises from the court's original error of commingling the legislative single-subject rule of *Evans* with the new initiative single-subject rule.<sup>301</sup> Simply put, the two are too different to be used in the same way.<sup>302</sup> The legislative single-subject rule has a title requirement; the initiative does not.<sup>303</sup> A violation of the single-subject rule in the legislature will invalidate the part of a bill not covered by the title; a violation in an initiative will void the entire proposition.<sup>304</sup> The judicial practice of taking the same "canon of construction" that embodies the legislative single-subject rule and applying it to the initiative single-subject rule assumes that those who voted on the initiative single-subject rule knew of the previous single-subject rule and had the "intent for uniformity and consistency."<sup>305</sup> This presumption ignores the electorate's reality and its limited time to sift through endless, confusingly worded paperwork, and assumes their intent for the same standard.<sup>306</sup>

Thus, when courts fail to account for how the electorate analyzes and understands an initiative's text and purpose, they also fail to account for the electorate's intent in passing the initiative.<sup>307</sup>

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296. Ortega, *supra* note 290.

297. *Id.*

298. Sutro, *supra* note 293, at 973.

299. CALIFORNIA OFFICE OF SECRETARY OF STATE, *supra* note 281, at 8–9.

300. Uelmen, *supra* note 166, at 670.

301. Sutro, *supra* note 293, at 966.

302. Compare CAL. CONST. art. II, § 8, with CAL. CONST. art. IV, § 9.

303. Compare CAL. CONST. art. II, § 8(d), with CAL. CONST. art. IV, § 9.

304. Compare CAL. CONST. art. II, § 8(d) ("An initiative measure embracing more than one subject may not . . . have any effect."), with CAL. CONST. art. IV, § 9 ("If a statute embraces a subject not expressed in its title, only the part not expressed is void.").

305. Sutro, *supra* note 293, at 966.

306. *Id.*

307. *Id.* at 971–72.

The electorate may intend the general purpose without meaning to affirm each component part of the initiative.<sup>308</sup> This in turn leads to further, reckless expansion of government, as voters turn to new ballot measures to overcome the unforeseen problems raised by old ones.<sup>309</sup> Instead of acting as a limit on the draftsmen of initiative measures, the single-subject rule has evolved into a phantom restriction, one that allows initiative proposals to be presented in a format that prevents voters from making fully informed decisions.<sup>310</sup> Until the court adjusts its definition of the “reasonably germane” standard, the single-subject rule will remain a toothless constitutional relic, one that hardly prevents voters from being misled as to the effects of a proposition and subverts the rule’s original purpose.<sup>311</sup>

### 3. The Judiciary’s Heightened Standard of Review for Legislative Amending of Initiatives Threatens to Further Marginalize the Legislature’s Power

The court’s deference to the initiative power and its strict review of any legislative statute that attempts to amend an initiative have essentially made the electorate’s political power greater than that of the legislature.<sup>312</sup> By applying a strict standard of review to legislative amendments of initiative statutes while retaining only a rational basis review of legislative amendments to the legislature’s own statutes, the court has made it difficult for the legislature to operate effectively or efficiently.<sup>313</sup> The legislature is helpless to modify initiatives as needed, aside from the strict adherence to the “to further the purpose” doctrine.<sup>314</sup> The initiative power effectively hamstring the legislative branch of government.<sup>315</sup>

The initiative is a political power that is “reserved” by the people, not expressly delegated to the people.<sup>316</sup> Thus, as a reserved

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308. *Id.*

309. Ray Ring, *Western Voters Love Ballot Initiatives—and Sometimes Make A Mess*, HIGH COUNTRY NEWS, Oct. 31, 2011, [http://www.hcn.org/issues/43.18/western-voters-love-ballot-initiatives-and-sometimes-make-a-mess/print\\_view](http://www.hcn.org/issues/43.18/western-voters-love-ballot-initiatives-and-sometimes-make-a-mess/print_view).

310. *Brosnahan v. Brown*, 651 P.2d 274, 301 (Cal. 1982) (Bird, J., dissenting).

311. CAL. OFFICE OF SEC’Y OF STATE, BALLOT PAMPHLET 8–9 (1948).

312. Manheim, *supra* note 11, at 1202.

313. See Jennifer Steinhauer, *Top Judge Calls Calif. Government ‘Dysfunctional’*, N.Y. TIMES, Oct. 10, 2009, [http://www.nytimes.com/2009/10/11/us/11calif.html?\\_r=0](http://www.nytimes.com/2009/10/11/us/11calif.html?_r=0).

314. *Amwest Sur. Ins. Co v. Wilson*, 906 P.2d 1112, 1119–20 (Cal. 1995).

315. Steinhauer, *supra* note 313.

316. See CAL. CONST. art. II, § 1; art. IV, § 1 (West, Westlaw through all 2012 Reg. Sess. laws, Gov. Reorg. Plan No. 2 of 2011–2012, and all propositions on 2012 ballots).

form of political power, it should be subject to some limits, as is every other branch of government.<sup>317</sup> For example, the exercise of popular sovereignty—best represented in the twin constitutional conventions California held in the latter half of the nineteenth century—is inherent in the people and allows them to create and regulate government institutions.<sup>318</sup> The people’s initiative power, on the other hand, is a subset of popular sovereignty, not equal to the full exercise of political power inherent in a constitutional convention but similar to another subset of political power like the legislature’s ability to pass bills.<sup>319</sup> As such, it should be subject to strictly defined limits, as is the government.<sup>320</sup> The court’s heightened scrutiny under the “further the purpose” standard of review for legislative amendments of initiative statutes, even if legitimate,<sup>321</sup> has essentially made this subset of popular sovereignty an overwhelmingly powerful force in California politics, to the detriment of the other branches of government.<sup>322</sup> In a so-called republican system of government, this tremendous deference to the exercise of the initiative power veers dangerously close to full-blown direct democracy instead of the limited power originally envisioned by the constitutional text.<sup>323</sup>

Although California has long adhered to the idea that ultimate power lies in the people,<sup>324</sup> the court’s overriding deference to the initiative power and its positioning of this power on a higher plane than the legislature’s has blurred the separation of powers essential in a republican government.<sup>325</sup> Much as the court is within its rights when it considers state action and reviews initiatives for constitutionality,<sup>326</sup> the legislature’s ability to amend legislation—

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317. See Ngo, *supra* note 16, at 260.

318. See Manheim, *supra* note 11, at 1190–92.

319. *Id.* at 1195.

320. *Id.* at 1195–96.

321. The judiciary has largely ignored the legislature’s portrayals of whether a legislative proposal is in fact just another passing of a popularly repealed law or whether a legislative statute is or is not an amendment to an initiative. See *Amwest Sur. Ins. Co. v. Wilson*, 906 P.2d 1112, 1119 (Cal. 1995); *Martin v. Smith*, 1 Cal. Rptr. 307, 311 (1959); *Bartosh v. Bd. of Osteopathic Exam’rs*, 186 P.2d 984, 988 (1947).

322. Tim Rutten, *What’s California’s Problem? Its People*, L.A. TIMES, Oct. 14, 2009, <http://articles.latimes.com/2009/oct/14/opinion/oe-rutten14>.

323. See *infra* Part III.B.

324. See *supra* Part II.

325. Manheim, *supra* note 11, at 1202–06.

326. Ngo, *supra* note 16, at 264.

whether passed by itself or by the people—should fall within its rights as the legislative branch.<sup>327</sup>

The obeisance to the initiative at the expense of the legislature has created a dysfunctional government environment in which special interest-funded initiative measures have changed much of the structure of the constitution and the state's laws, doing away with legislative fact-finding and deliberation.<sup>328</sup> In 2012, eleven propositions made it to the California ballot.<sup>329</sup> Four of them were largely funded by wealthy individuals, while others were primarily challenged by wealthy critics with millions of dollars worth of advertising at their command.<sup>330</sup> Although the financial elite have always had a hand in initiatives, they are now involving themselves in greater numbers and with a broader resource base than ever before, building coalitions that increase the chances that their initiatives will be passed; thus, small groups play an outsized role in setting government policy.<sup>331</sup> Given the marginalizing of the legislature by the initiative process and the increasing role wealthy interests play in initiative campaigns, it does not seem unrealistic to believe a return to the age where special interests controlled government—the same age that necessitated the initiative itself—is possible and even likely.<sup>332</sup>

#### 4. The Initiative Has Deviated from Its Original Purpose

The court's haphazard interpretation of various rules has ignored one of the original purposes of the initiative—to defeat legislative congestion—and has instead transformed the initiative process into its own sort of legislative blockage.<sup>333</sup> The ballot initiative as envisioned by the Progressive movement looked to defeat the hamstringing of legislatures by powerful special interest groups such

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327. *Id.* at 264–65.

328. Steinhauer, *supra* note 313.

329. Normitsu Onishi, *California Ballot Initiatives, Born in Populism, Now Come From Billionaires*, N.Y. TIMES, Oct. 16, 2012, <http://www.nytimes.com/2012/10/17/us/politics/california-ballot-initiatives-dominated-by-the-very-rich.html?pagewanted=all>.

330. *Id.*

331. *Id.*

332. *Id.*

333. Rutten, *supra* note 322.

as the Southern Pacific Railroad.<sup>334</sup> The current, barely regulated initiative system, however, has created a political environment where nearly any kind of initiative can be proposed, voted on, and defended with ease.<sup>335</sup>

This kind of system has perverted the initiative process from its original status as a “legislative battering ram”<sup>336</sup> and a tool initially aimed at controlling special interests.<sup>337</sup> Now, the initiative process itself may hinder the legislature from legislating effectively, and the same kinds of powerful special interests that once dominated legislative processes are now in charge of the initiative.<sup>338</sup> The sizable influence of special interest groups able to fund and campaign for initiatives has created a system of dysfunctional overuse of the initiative system.<sup>339</sup> Individual donors have been contributing for and against various initiative measures with tens of millions of dollars, amounts usually reserved for companies and political action committees (“PACs”).<sup>340</sup> Consumer Watchdog president Jamie Court remarked, “Hiram Johnson would probably be turning over in his grave.”<sup>341</sup> At this point, the initiative process in California is a corruption of what the Progressives intended when they instituted the initiative system.<sup>342</sup>

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334. See *Final Talk Made by the Governor*, SAN FRANCISCO CHRONICLE, Oct. 8, 1911, at 57; see also Manheim, *supra* note 11, at 1185–88 (describing the political situation and pseudo-“Banana Republic” atmosphere that existed in California and directly led to the adoption of the initiative).

335. Lisa Pampuch, *Ballot-box Budgeting Just the Beginning of California's Initiative Woes*, MY POINT EXACTLY (Apr. 24, 2012), <http://mypointexactly.wordpress.com/2012/04/24/ballot-box-budgeting-just-the-beginning-of-californias-initiative-woes/>.

336. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978).

337. See *supra* Part II.B.

338. See Manheim, *supra* note 11, at 1190 (“Southern Pacific Railroad—the target of the 1911 initiative process—has recently sponsored its own ballot measures.”).

339. Aaron Sankin, *Prop 39: Bringing Jobs Into California Or More Ballot Box Budgeting?*, HUFFINGTON POST (Oct. 23, 2012), [http://www.huffingtonpost.com/2012/10/22/prop-39-brining-jobs-into\\_n\\_1990232.html](http://www.huffingtonpost.com/2012/10/22/prop-39-brining-jobs-into_n_1990232.html).

340. The 2012 California ballot had more millionaire and billionaire wealth behind it than any other ballot in history. Onishi, *supra* note 329. One example is hedge-fund billionaire Tom Steyer, who contributed \$21 million of his own money in support of Proposition 39 in 2012. Sankin, *supra* note 339.

341. Onishi, *supra* note 329.

342. Rutten, *supra* note 322; see also CONSTITUTIONAL AMENDMENT 22, in CALIFORNIA BALLOT PAMPHLET, SPECIAL ELECTION (Oct. 11, 1911) (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 59th District) (describing how opponents of the initiative will likely be “servants of special interests” and those who scoff at the idea of self-government).

The ease of placing initiatives on the ballot, plus lax limitations by the courts, has resulted in an environment where one merely “needs money, not a good idea”<sup>343</sup> Persistently low voter turnouts usually mean that measures rise or fall based on a relatively small number of votes, which in turn allows sponsors to fashion shrewdly targeted advertising campaigns to encourage their measures’ passage.<sup>344</sup> This has led to what former Oregon Attorney General Dave Frohnmayer called “tribal politics,” which are based upon fundamentally undemocratic, sectarian ideals and rooted “in the exploitation of divisions of class, cash, gender, region, ethnicity, morality, and ideology—a give-no-quarter and take-no-prisoners activism that demands satisfaction and accepts no compromise.”<sup>345</sup>

It is important to make a distinction between these collective passions, perhaps rooted in racial or sexual prejudices, and what eighteenth-century philosopher David Hume called the “passion of interest,”<sup>346</sup> or a universal “love of gain” to further the benefit of all a government’s citizens.<sup>347</sup> A passion of interest had a well-defined economic meaning in Hume’s time,<sup>348</sup> while collective passions built on ethnic loyalties, or by religious and moral outrage, “divide ‘us’ from ‘them’ without any personal target.”<sup>349</sup> Now, those “passions of interest” can be subverted and used by a majoritarian voting bloc to

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343. Jessica Levinson, *Ballot Initiatives Have Harmed California*, KCET (Jan. 23, 2012), [http://www.kcet.org/updaily/socal\\_focus/commentary/would-you-like-to-save-california.html](http://www.kcet.org/updaily/socal_focus/commentary/would-you-like-to-save-california.html).

Signature-gathering has become a commercial enterprise as well—competition to get a superior service is high, with signatures sometimes coming in at three dollars each. Nannette Miranda, *Signature Gathering Gets Costly for Tax Initiative*, KGO-TV NEWS (Mar. 19, 2012), <http://abclocal.go.com/kgo/story?section=news/politics&id=8587347>. This has led to citizen initiatives, once a volunteer event, becoming “hijacked” by groups with \$2 or \$4 million to spend on their own concerns. *Id.* For the average citizen, getting a measure on the ballot is close to impossible. *Id.* This has also led signature-gathering companies to forsake potentially less-funded statewide petitions in favor of more lucrative local ballot petitions that may pay a premium for signatures. Joe Mathews, *Price of Ballot Initiative Signatures Plummets*, NBC SAN DIEGO (Feb. 7, 2012), <http://www.nbcsandiego.com/blogs/prop-zero/Petitions-Circulators-Signatures-Gatherers-Ballot-Initiatives-Measures-Taxes-Budget-Green-Energy-138810329.html>.

344. *Id.*

345. Dave Frohnmayer, *The New Tribalism*, OLD OREGON, Autumn 1992, at 16.

346. Hans A. Linde, *When Initiative Lawmaking Is Not ‘Republican Government’: The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 32 (1993).

347. DAVID HUME, A TREATISE ON HUMAN NATURE (T.H. Green & T.H. Grose eds., 1878).

348. See FELIX RAAB, THE ENGLISH FACE OF MACHIAVELLI 237 (1964); see also GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 83–86, 190–92 (1981) (explaining the difference and semantics of economic passions of interest and individual “passions” like pride and ambition).

349. Linde, *supra* note 346, at 32.

deprive others of their fundamental rights based on a certain social prejudice, allowing various factions to divide “us” from “them” with relative ease.<sup>350</sup> If the initiative system is expected to operate as it was intended to in our republican government, its validity depends on its ability to avoid the kind of misuse that deliberative institutions like the legislature were meant to protect.<sup>351</sup>

##### 5. The Initiative’s Harmful “Ballot Box Budgeting” Effect

The California Supreme Court’s broad interpretation of the initiative power, and significant deference to its use, has complicated not only the state’s political process but also its fiscal situation.<sup>352</sup> The ease with which an initiative can be drafted, sponsored, campaigned for, and passed, along with the strong safeguards against intervention by the executive or legislative branches, have made “ballot box budgeting” an all-too-easy quick fix to California’s budget problems—fixes that, more often than not, lead to more problems.<sup>353</sup>

A short explanation of ballot box budgeting is in order. Until very recently,<sup>354</sup> California, unlike most states, required a supermajority before the legislature could pass a budget.<sup>355</sup> This made it exceedingly difficult for a majority party to get the amount of concessions and agreements necessary to pass a budget plan.<sup>356</sup> Predictably, this ponderous process frustrated California voters, leading many to turn to the initiative power to tackle budget problems—even after the supermajority requirement was eliminated.<sup>357</sup> Voters are able to pass a budget via an initiative with

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350. See Chrysler, *supra* note 17, at 600–01.

351. Linde, *supra* note 346, at 34.

352. Pampuch, *supra* note 335.

353. Jessica A. Levinson, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 693 (2010).

354. Voters changed the supermajority requirement in 2010. Anthony York, *Voters Pass Prop. 25, Allowing Legislative Majority Vote to Pass California Budget*, L.A. TIMES (Nov. 3, 2010), <http://latimesblogs.latimes.com/california-politics/2010/11/voters-pass-prop-25-allowing-legislative-majority-vote-to-pass-california-budget.html>.

355. *Supermajority Vote Requirements to Pass the Budget: A Legisbrief*, NAT’L CONFERENCE OF STATE LEGISLATURES (Oct. 2008), <http://www.ncsl.org/issues-research/budget/supermajority-vote-requirements-to-pass-the-budget.aspx>. Only Arkansas and Rhode Island have a supermajority requirement for the passage of a budget. Levinson, *supra* note 353, at 691. The population of both states combined is about 3.8 million—California’s equals about 37 million. *Id.*

356. *Id.*

357. Of the states that allow some sort of initiative process, less than half permit budgeting by initiative. NAT’L CONFERENCE OF STATE LEGISLATURES, INITIATIVE AND REFERENDUM IN THE

only a simple majority, as with any other initiative.<sup>358</sup> This process, called “ballot box budgeting,” has hampered the legislature by undermining the regular budget process and substituting a process that aims to do well but instead, often makes things worse.<sup>359</sup> What was once solely “the work of elected officials who have the benefit of hearings, staff analysis and institutional memory has been given to voters to make what is tantamount to a snap decision.”<sup>360</sup>

Proposition 98 is a good example. That successful measure on the November 1988 ballot required that a certain minimum percentage of the state budget be spent on public education, essentially mandating an increase in education spending.<sup>361</sup> The mandatory spending floor placed enormous pressure on all other facets of the state budget, from the prisons to the courts.<sup>362</sup> The initiative happened to pass at a moment when California was generating unexpectedly high tax revenues.<sup>363</sup> \$1 billion of this extra income, which the legislature might have channeled into the areas where it was most needed, was instead completely allocated to education.<sup>364</sup> Whether a given allocation of funds makes sense or not at the time it passes, codifying budgeting decisions in this way effectively cripples the legislature’s ability to adjust for future changes—which is exactly what happened when the next recession hit the state’s underfunded reserves.<sup>365</sup> As one would expect, budgetary issues like these caused by initiatives have put California

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21ST CENTURY: FINAL REPORT AND RECOMMENDATIONS OF THE NCSL I&R TASK FORCE, 17–20 (July 2002), available at [http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR\\_report.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/irtaskfc/landR_report.pdf).

358. Levinson, *supra* note 353, at 692.

359. Pampuch, *supra* note 335.

360. *Id.*

361. *California Proposition 98, Mandatory Education Spending (1988)*, BALLOTPEDIA (Sept. 20, 2012), [http://ballotpedia.org/wiki/index.php/California\\_Proposition\\_98,\\_Mandatory\\_Education\\_Spending\\_\(1988\)](http://ballotpedia.org/wiki/index.php/California_Proposition_98,_Mandatory_Education_Spending_(1988)).

362. Kevin O’Leary, *How the Initiative Culture Broke California*, TIME (Feb. 26, 2010), <http://www.time.com/time/nation/article/0,8599,1968141,00.html>.

363. “In a nutshell: Prop 98 ties school funding, in part, to year-to-year changes in state revenue. But the year-to-year changes projected by this year’s budget deal ended up being wrong, making it seem as though revenues are growing faster than projected, thus guaranteeing schools more money.” John Myers, *\$21 Billion Deficit Now, Worse Later*, KQED (Nov. 18, 2009), <http://blogs.kqed.org/capitalnotes/2009/11/18/21-billion-deficit-now-worse-later/>.

364. *Id.*

365. *Id.*



in an increasingly “tightening straitjacket” of its people’s own making.<sup>366</sup>

The inability of a vast body like the electorate to collectively implement a rational financial plan has made it difficult for the legislature to budget properly, either by tying up sizable portions of the budget or by making it difficult to properly allocate funds in a shifting economic climate.<sup>367</sup> The average voter is likely unaware of the full consequences of such initiatives, which are often marketed to voters in ways that emphasize limited tax impacts or their mandates to spend on worthy subjects like education, and not their overall fiscal impact.<sup>368</sup> This has led to a pervasive attitude of “something for nothing,”<sup>369</sup> where voters feel compelled to vote for measures they believe will benefit them with no explanation of how the propositions’ potential costs will be funded.<sup>370</sup>

An example of this is Proposition 37. This failed 2012 initiative attempted to mandate certain labeling and advertising procedures for genetically modified food.<sup>371</sup> Its fiscal impact was described in vague, simplistic terms, with an indeterminate explanation of costs.<sup>372</sup> According to the proposition’s sponsors, annual state costs for the regulation of labels for genetically engineered foods were estimated to rise anywhere from a few hundred thousand dollars to over \$1 million.<sup>373</sup> The sponsors acknowledged potential costs to state and local governments for litigation-related expenses arising from violations of the measure.<sup>374</sup> However, the proposition suggested, also in vague terms, that such violations might pay for

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366. O’Leary, *supra* note 362.

367. See Levinson, *supra* note 353, at 696–97; see also William M. Lunch, *Budgeting by Initiative: An Oxymoron*, 34 WILLAMETTE L. REV. 663, 669 (1998) (describing the difficulty for legislators in balancing the competing interests of various initiative measures with the need to create a balanced state budget); Kevin O’Leary, *The Citizen Assembly: An Alternative to the Initiative*, 78 U. COLO. L. REV. 1489, 1491–92 (2007) (“[T]he biggest negative is the cumulative effect of ballot measures—some of them constitutional amendments nearly cast in stone—that severely hamstring state legislators and governors from doing their jobs.”).

368. Ring, *supra* note 309.

369. Interview with Joe Matthews, Writer, L.A. TIMES, in L.A., Cal. (Oct. 17, 2012).

370. A summary of Proposition 37’s estimated fiscal impact on state and local government indicates “increased annual state costs ranging from a few hundred thousand dollars to over \$1 million to regulate the labeling of genetically engineered foods,” plus additional potential costs to state and local governments due to litigation arising under possible violations of the law. *Id.*

371. California Proposition 37, *Mandatory Labeling of Genetically Engineered Food* (2012).

372. *Id.*

373. *Id.*

374. *Id.*

themselves, thanks to court filing fees required of each party filing in the case.<sup>375</sup>

This problem highlights a major difference between the lawmaking power of the legislature and that of the electorate: the popular vote does not go through the same mechanisms of hearings, committee studies, amendments, and compromises that constitute the safeguards of a diverse, deliberative legislature.<sup>376</sup> This is particularly relevant in an area like the budget, where legislators often must anticipate how one part of a budget may affect another; voters, in contrast, are more likely to see each measure in a vacuum.<sup>377</sup> This essential difference highlights the fundamental flaw in ballot-box budgeting and is indicative of the larger problem: using the unrestricted initiative power in an attempt to fix problems that would be better served by a more deliberative governing process.

*B. The Initiative's Form of Direct Democracy  
Threatens to Subvert Our Republican Government*

If both direct democracy and republicanism have a place in California government, then the distinctions and relationship between the two should be pronounced and easily discernible. As it stands now, they are not.<sup>378</sup> The electorate's increasing power thanks to the court's loose refereeing of the initiative system essentially places the people's initiative power on a higher plane than that of the other branches of government, beyond the reach of the traditional system of checks and balances.<sup>379</sup>

Republicanism's role as a bulwark for minority rights is one of its shining characteristics.<sup>380</sup> The California Supreme Court's decisions, however, most notably *Strauss*, have eroded that bulwark.<sup>381</sup> Reading the revision-amendment distinction narrowly so as to "subject[] minority rights to a nondeliberative bare majority vote" goes against the very principles California was founded on, subverting republican values with the worst traits of direct

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375. *Id.*

376. Linde, *supra* note 346, at 34.

377. Levinson, *supra* note 353, at 699.

378. Hans A. Linde, *Practicing Theory: The Forgotten Law of Initiative Lawmaking*, 45 *UCLA L. REV.* 1735, 1755 (1998).

379. *See* Chrysler, *supra* note 17, at 606–09.

380. *See* THE FEDERALIST NO. 10, at 123 (James Madison) (Isaac Kramnick ed., Penguin Books 1987).

381. *Strauss v. Horton*, 207 P.3d 48, 140 (Cal. 2009) (Moreno, J., dissenting).

democracy.<sup>382</sup> In a representative system of government, the principles of separation of powers, bicameralism, and veto powers, among others, prevent majority rule from becoming majority tyranny.<sup>383</sup> Normally, judicial review would serve as an appropriate check on direct democracy.<sup>384</sup> The court's failure to appropriately protect minority rights—as in *Strauss* with a strict judicial review of Proposition 8's effects—upsets the careful balance between republicanism and direct democracy in California, tilting the scale dangerously in favor of direct majoritarian rule.<sup>385</sup>

The Progressives who instituted the ballot initiative believed that the ostensibly conflicting ideals of republicanism and direct democracy could coexist, seeing direct legislation as “a structural improvement on representative government . . . [that would] fight and confound special interest.”<sup>386</sup> Those same Progressives would no doubt be surprised, however, by how that spirit of careful, thoughtful community action has been corrupted by the modern-day ballot initiative in California. Voters may have only a few months, at most, to learn of and educate themselves about an upcoming initiative.<sup>387</sup> The most common medium through which a voter can gather information about an initiative is through the corporate media, which likely have their own biases and agendas.<sup>388</sup> The average voter will likely not be engaged in exchanges of information with her neighbors or be required to listen to the arguments of those who hold opposing views or give reasons for her own position.<sup>389</sup> Those who are more familiar than most with the minute details and pros and cons of an initiative are likely to have gained that information by themselves or through informal networks of similarly situated family and friends.<sup>390</sup>

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382. *Equal Protection*, *supra* note 222, at 1522.

383. *Chrysler*, *supra* note 17, at 604.

384. *Id.* at 609.

385. *See id.* at 604.

386. *Chrysler*, *supra* note 17, at 599.

387. The Secretary of State must place a qualifying initiative on the ballot as long as there are at least 131 days before the date of the next general election. CAL. CONST. art. II, § 8(c).

388. *Smith*, *supra* note 23, at 572.

389. *Id.* Nor will they be required to read the text of the initiative itself, nor its title and summary, nor the pro and con arguments contained in the voting materials. E-mail from Karl M. Manheim, Professor of Law, Loyola Law Sch., to author (Jan. 25, 2013, 4:44 PM) (on file with author). The idea that voters are fully informed on the issues is an outdated and idealized notion that likely hasn't existed since the eighteenth-century New England town halls. *Id.*

390. *Id.*

When it comes time to decide on a ballot measure, California voters can vote “yes,” vote “no,” or stay home and ignore the issue entirely.<sup>391</sup> This is a far cry from the spirit of community action “resulting in analysis and deduction”<sup>392</sup> that the Progressives imagined, and it stands in stark contrast to the Jeffersonian model of convention, where speakers may “convey the nuances of their position, the order of their preferences, and their emerging support for alternative proposals.”<sup>393</sup> In private, individuals’ prejudices are more easily acted on than in an open, public environment like a representative congress.<sup>394</sup> This creates an environment where it is easy for initiatives to succeed on the basis of class, money, gender, locale, morality, and ethnicities—indeed, the majority of initiatives are used to enact views based on those criteria.<sup>395</sup> As initiatives proliferate and the judiciary’s reluctance to impose meaningful restrictions on the initiative power grows, the electorate’s power increases at the expense of the legislature.<sup>396</sup>

What *Strauss* has created—and what the court’s broad interpretation of the initiative power may lead to in the future—is law that undermines the very first sentence of the California Constitution: “All people are by nature free and independent *and have inalienable rights.*”<sup>397</sup> This outcome, too, conflicts with the Jeffersonian ideal of direct democracy, in which the majority would not have the ability to pass any law that would fundamentally reshape the social contract and infringe on an individual’s rights.<sup>398</sup> By allowing a bare majority of the electorate to circumvent the normal constraints of republicanism that would have surely defeated a measure such as the one at issue in *Strauss*,<sup>399</sup> the current initiative system “invites appeals to private prejudices that are denied and disclaimed in an open or representative process.”<sup>400</sup> While the Progressives created the initiative to serve an ideal of an interested citizenry that had the inclination and time to continuously participate

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391. *Id.*

392. Bourne, *supra* note 78, at 11.

393. Smith, *supra* note 23, at 572.

394. Linde, *supra* note 378, at 1744.

395. *Id.* at 1738–39.

396. *Id.* at 1737.

397. CAL. CONST. art. I, § 1 (emphasis added).

398. JEFFERSON, *supra* note 72, at 189.

399. In fact, it already did. *In re Marriage Cases*, 183 P.3d 384, 384 (Cal. 2008).

400. Linde, *supra* note 378, at 1744.

in politics and lawmaking, without regard for self-interest,<sup>401</sup> most individual voters who participate in the initiative process are eminently self-interested.<sup>402</sup> Nevertheless, courts continue to interpret the initiative power as generously as possible, allowing prejudiced views to dominate without any sort of inhibition at the ballot box.<sup>403</sup> “The self-selected private lawmakers are ‘the least accountable branch’ . . . free by design to make law in ‘ignorance and self-deception.’”<sup>404</sup> This is just what James Madison and other Federalists feared most about direct democracy.<sup>405</sup>

A proper democratic society must be able to strike a careful balance between a process that permits amendments reasonable in their scope and effect, without becoming so permissive as to be susceptible to incessant propositions threatening the social contract.<sup>406</sup> Doing so would help prevent individuals, minority or otherwise, from being deprived of their rights.<sup>407</sup> If a state is going to allow a form of direct democracy to constitute a major part of the legislative process, that allowance must limit measures motivated by reasons abhorred and feared by those who designed a republican form of government.<sup>408</sup> *Strauss* instead threatens to send California down a path where direct majoritarian power overwhelms that of the original republican government.<sup>409</sup>

#### IV. RECOMMENDATIONS

An examination of the California Supreme Court’s rulings over the years and the overwhelming power the initiative system has gained in twenty-first-century California makes it clear that our state system of direct democracy threatens to overwhelm the ideal of republican government enshrined in the U.S. Constitution.<sup>410</sup> *Strauss* demonstrates that California’s lack of procedural or subject-matter

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401. *Id.* at 1739–40.

402. For example, there is a crucial difference between voting to reduce taxes on your constituent base and voting to reduce taxes on yourself. *Id.* at 1742.

403. See *Strauss v. Horton*, 207 P.3d 48, 138–40 (Cal. 2009) (Moreno, J., dissenting).

404. Linde, *supra* note 378, at 1744.

405. See THE FEDERALIST NO. 10, at 58 (James Madison) (Isaac Kramnick ed., Penguin Books 1987).

406. Smith, *supra* note 23, at 576.

407. *Id.*

408. Linde, *supra* note 346, at 21.

409. See Ngo, *supra* note 16, at 245–48.

410. See *supra* Part III.B.

limitations may even cause conflicts with the U.S. Constitution's basic federal rights and recognized suspect classes.<sup>411</sup> Our initiative system is both extremely powerful and extremely inflexible—limiting its power while increasing its flexibility is the only way to return California's ballot initiative process to a level commensurate with republican tripartite government and the legislature's own power. A stricter pre-election review; a more stringent revision-amendment distinction; the potential involvement of the legislature; a deliberative, longer initiative process; and a sharper line limiting what the electorate can accomplish through the initiative process can help establish a clearer border between the reach of the electorate's power and that of the legislature.<sup>412</sup>

*A. The Court Should Cast Aside Its Preference for Using Technical, Formalistic Rules in Isolation, as It Did in Strauss*

The “qualitative” prong of the revision-amendment distinction should be more strictly construed; if there is any doubt that an initiative is a revision, it should be struck down. This will prevent any questionable amendments that on the surface may present only a few lines' worth of change to the California Constitution, but in effect could abridge a fundamental, protected right or impinge on the rights of a protected suspect class. The judiciary's role in protecting minority rights would be better served with a more expansive reading of California precedent so as to define fundamental rights like equal protection and due process as essential components of the structure or framework of government.<sup>413</sup> Indeed, Justice Werdegar's revision-amendment standard from her concurrence in *Strauss* articulated such an idea.<sup>414</sup> The court would be better served by classifying any measure, however narrow, that discriminates against a minority group in any way as a revision of the foundational principle of equal protection.<sup>415</sup>

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411. Ngo, *supra* note 16, at 269; *see also* *Reitman v. Mulkey*, 387 U.S. 369 (1967) (dealing with a controversial California initiative—Proposition 14—that permitted racial discrimination in housing and was struck down by the U.S. Supreme Court as encouraging discrimination and thus violating a basic federal right).

412. *See infra* Part IV.A–B.

413. *Equal Protection*, *supra* note 222, at 1516.

414. *Strauss v. Horton*, 207 P.3d 48, 124 (Cal. 2009) (Werdegar, J., concurring).

415. *Equal Protection*, *supra* note 222, at 1521.

Similarly, by applying a new perspective on the single-subject rule's "reasonably germane" standard, the number of frivolous, logrolling initiatives may be reduced while clearing up issues of voter confusion.<sup>416</sup> Specifically, if there is a question as to whether a measure's provisions align under the "reasonably germane" standard, the court should favor a narrow construction rather than a liberal one that may implicate a whole variety of laws under a general, catchall term.<sup>417</sup> An initiative should not be passed simply because its drafters were able to come up with a name broad enough to feasibly encompass all of the initiative's various sections.<sup>418</sup> Although decades of precedent buttress the current "reasonably germane" standard, by construing an initiative more narrowly the court will not be in danger of prohibiting "the sovereign people from either expressing or implementing their own will on matters of such direct and immediate importance to them. . . ."<sup>419</sup> Instead, the court will be supporting the expression and implementation of the people's will by construing initiatives as closely as possible to how they were presented to the voters, rather than allowing the people to be fooled by vague terms like "criminal justice" and "advertising."<sup>420</sup>

While it would be inefficient to expect the court to look at each initiative that comes before it on a case-by-case basis, more pre-election review would cut down on the number of potentially unconstitutional initiatives before they are presented to the voters and discussed by the electorate. There is a potential "ripeness" problem in such reviews—a valid concern that a claim based on an anticipated future injury should not be reviewed.<sup>421</sup> If an initiative has not yet been passed by the voters or not even presented to them (and may eventually be voted down), then courts will likely be wary of reviewing the issue.<sup>422</sup>

This argument likely would have arisen if Proposition 8 had been reviewed before its enactment. If the constitutional amendment prohibiting same-sex couples from marrying had not yet passed, then

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416. Minger, *supra* note 164, at 928–30.

417. *Id.* at 928.

418. *Id.* at 929.

419. *Brosnahan v. Brown*, 651 P.2d 274, 281 (Cal. 1982).

420. Minger, *supra* note 164, at 929.

421. Ngo, *supra* note 16, at 267.

422. *Id.*

how could they have suffered an injury from it?<sup>423</sup> However, as the initiative process stood in 2008, a bare majority was permitted to strip away a fundamental right via a constitutional amendment.<sup>424</sup> Thus, the process of amending the California Constitution to permit something like that creates “a proximate, real-world link between California’s constitutional amendment process and the resulting harm on gay men and lesbians.”<sup>425</sup> Looking at the initiative process itself as a potential source of harm, rather than merely at the amendment language, can help solve any ripeness issues for those looking for more pre-election review of initiative statutes that may toe the line of certain initiative restrictions like the revision-amendment distinction.<sup>426</sup>

*B. The Initiative Power Should Be Modified  
to Clearly Delineate the Lines Between  
Republicanism and Direct Democracy*

The structure of the initiative should be modified to further the overriding purpose of dividing constitutional power between the people and the legislature, making sure to delineate clear and sharp lines between the conflicting ideas of republicanism and direct democracy. One way to make this happen is to change the format of an initiative to require the input of the legislature before initiatives go to a popular vote.<sup>427</sup> The state of Massachusetts uses an indirect initiative process for its constitutional amendments.<sup>428</sup> In order to amend the state constitution, an amendment must be supported by a quarter of the legislature at two constitutional conventions, which are simply joint meetings of the state’s House of Representatives and Senate.<sup>429</sup> The first convention may modify the amendment via a three-fourths vote, while the second convention cannot modify the amendment at all.<sup>430</sup>

An example of this process in action occurred in 2004, when a Massachusetts group attempted to amend the state constitution to ban

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423. *Id.*

424. *Id.* at 268–69.

425. *Id.* at 269.

426. *Id.*

427. *See* Chrysler, *supra* note 17, at 615–16.

428. *Id.* at 613.

429. *Id.*

430. MASS. CONST. art. XLVIII, § 4.



same-sex marriage.<sup>431</sup> Although the amendment passed the first convention, it failed 157 votes to 39 in the second.<sup>432</sup> This is a fine example of the citizens of a state attempting to amend its constitution but failing after sufficient time had passed.<sup>433</sup> This additional time between meetings allowed for a proper amount of deliberation and discussion regarding the amendment and led to involved legislators finding it antithetical to the rights of a minority group.<sup>434</sup> Involving the state legislature in an amendment ensures that any change to the state's constitution is carefully reviewed and openly debated.<sup>435</sup> This is preferable to voters having to deal with a firestorm of conflicting media campaigns preceding an instantaneous decision on election day, made in the secrecy of a voting booth.<sup>436</sup> This "sober second thought"<sup>437</sup> is just the kind of meticulous, reasoned approach that Jefferson advocated in his vision of direct democracy and the opposite of what often occurs in California's hyperactive initiative process.<sup>438</sup>

Alternatively, California could require a longer delay between the time a proposal is first proposed and the time it finally comes to a vote.<sup>439</sup> In this system, the electorate could debate the issue, much as the legislature debates the issue under the Massachusetts system.<sup>440</sup> In June 2011, Oregon became the first state to pass an innovative process called "Citizens' Initiative Review," in which a citizen panel of eighteen to twenty-four people meets for a week, hears testimony on all sides of a measure, summarizes it, and then writes both a pro argument and a con argument.<sup>441</sup> This allows more time for debate and discussion between an initiative's becoming eligible and the election, as opposed to the rapid, 131-day minimum turnaround in

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431. Raphael Lewis, *After Vote, Both Sides in Debate Energized*, BOSTON GLOBE, Sept. 15, 2005, [http://www.boston.com/news/local/massachusetts/articles/2005/09/15/after\\_vote\\_both\\_sides\\_in\\_debate\\_energized](http://www.boston.com/news/local/massachusetts/articles/2005/09/15/after_vote_both_sides_in_debate_energized).

432. *Id.*

433. Chrysler, *supra* note 17, at 615.

434. *Id.*

435. Ngo, *supra* note 16, at 271.

436. *Id.*

437. Chrysler, *supra* note 17, at 611, 615.

438. See Smith, *supra* note 23, at 572.

439. See Chrysler, *supra* note 17, at 615.

440. *Id.* at 613-14.

441. See Ore. House Bill 2643, available at <http://www.leg.state.or.us/11reg/measpdf/hb2600.dir/hb2634.en.pdf>.

California.<sup>442</sup> While this is a good move to a more involved, open, direct democracy, it should be only the first step in a movement designed to build a more deliberate infrastructure for the initiative process.

While the Oregon system simply allows citizens' voices to be heard, allowing those same citizens to propose alternatives to the initiative would present more options and greater opportunities for debate.<sup>443</sup> The initiative scheme in place in Switzerland, widely regarded as the birthplace of the initiative, uses such a process to give voters choices beyond a simple "yes" or "no" at the polls.<sup>444</sup> Like the Massachusetts system, the Swiss initiative structure is indirect, requiring an initiative to be presented to the Federal Assembly (the Swiss version of Congress), which then determines whether the measure is valid and whether the assembly supports it.<sup>445</sup> If the assembly supports the initiative, the initiative is presented to the electorate for a vote; if the assembly does not, however, both the initiative and a counter-draft designed by the Federal Assembly are placed on the ballot and the electorate may vote on which one they prefer.<sup>446</sup>

These institutional safeguards do allow the Swiss legislature to impede the initiative process, oftentimes slowing an initiative's passage by several years.<sup>447</sup> Only about 10 percent of initiatives that make it to the ballot are accepted by both the people and the legislature.<sup>448</sup> However, using this same counter-draft proposal—not with the California legislature but with a panel of California citizens, along the lines of Oregon's system—would permit differing viewpoints to be heard without the potential prohibitive influence of the legislature.<sup>449</sup> This would increase the opportunity for deliberation as well as the time between the creation of an initiative

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442. See Chrysler, *supra* note 17, at 615.

443. See Ore. House Bill 2643, available at <http://www.leg.state.or.us/11reg/measpdf/hb2600.dir/hb2634.en.pdf>.

444. JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* 3 (Stanford Univ. Press 2000).

445. See MICHAEL GALLAGHER & PIER VINCENZO ULERI, *THE REFERENDUM EXPERIENCE IN EUROPE* 188 (MacMillan Press Ltd. 1996).

446. *Id.* A similar system is in place in Washington State. See *Direct Democracy: The Initiative and Referendum Process in Washington*, THE LEAGUE OF WOMEN VOTERS OF WASHINGTON ED. FUND, (Oct. 2002), <http://www.lwvwa.org/pdfs/studies/init-ref-study.pdf>.

447. See GALLAGHER & ULERI, *supra* note 445, at 188.

448. Chrysler, *supra* note 17, at 611.

449. *Id.*

and the election.<sup>450</sup> The debate between opponents and proponents of a measure would create mediating stages that might prevent extreme proposals from winning a majority vote.<sup>451</sup> The Swiss initiative system imposes another burden by requiring a double-majority vote for an initiative to pass into law.<sup>452</sup>

Other states have instituted subject-matter restrictions that limit what an initiative can propose.<sup>453</sup> As the *Strauss* court pointed out, there are currently no such limitations on the type of constitutional amendments that can be proposed or what sections of the state constitution are off-limits to amendment.<sup>454</sup> The initiative power should be amended to add subject-matter restrictions, thus forbidding any constitutional amendment that could conceivably affect a basic federal right or impinge on a federally protected suspect class such as homosexuals.<sup>455</sup> California could also maintain the current subject-matter standard and add a heightened voting requirement for initiatives that amend the actual constitution, much as the Swiss system requires.<sup>456</sup> By leaving a bare majority vote in place for initiative legislation, and imposing a greater majority approval for initiatives proposing constitutional amendments, the initiative will still be a powerful tool of legislation for the electorate, but California Constitution—the foundation of the state’s government—will become more stable and harder to change.<sup>457</sup>

### *C. The Proposed Changes Will Not Subvert the People’s Initiative Power*

When California first drafted its constitution in 1849, it required a majority of each house of the legislature to concur on a proposed amendment in two separate legislative sessions before the amendment could be submitted to the voters.<sup>458</sup> The changes

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450. *See id.* at 611–12.

451. *Id.* at 611.

452. A double-majority vote requires a majority of the population and a majority of the cantons (the Swiss counterpart to a state). GALLAGHER & ULERI, *supra* note 445, at 188.

453. *See Strauss v. Horton*, 207 P.3d 48, 108–09 (Cal. 2009) (using the constitutions of Massachusetts and Mississippi as examples of voter initiatives that prohibit constitutional amendments that affect rights contained in the state’s bill of rights).

454. *Id.* at 109–10.

455. Ngo, *supra* note 16, at 270.

456. *See* GALLAGHER & ULERI, *supra* note 445, at 188.

457. Ngo, *supra* note 16, at 270–71.

458. *Strauss v. Horton*, 207 P.3d 48, 80–81 (2009).

proposed above will not return California to its roots, where passing a constitutional amendment was a rigorous and slow process that barely involved the people.<sup>459</sup> None of these proposals will take away the precious initiative power that, despite its many problems, has afforded so much positive growth and change in California's society and government.<sup>460</sup> What these changes will do is engender a spirit of reflection, accountability, and sober, reasoned discussion when it comes to changing the California Constitution.<sup>461</sup> These changes will also return the initiative to a level where the electorate's legislative power is commensurate with that of the legislature, and the lines between direct democracy and republicanism are clearly set and defined.<sup>462</sup>

## V. CONCLUSION

As it stands now, California's ballot initiative process faces very little effective regulation from the courts, despite the enumerated restrictions ostensibly designed to limit the people's power.<sup>463</sup> The California Supreme Court's distinction between what constitutes a revision and what constitutes an amendment is needlessly narrow, endangering fundamental principles of our government, such as equal protection, and opening up the door for future restriction of essential rights by a majoritarian group.<sup>464</sup> The court's interpretation of the single-subject rule's "reasonably germane" standard has reduced the rule to something initiative drafters pay lip service to, increasing voter confusion and increasing the number of bloated, convoluted initiatives.<sup>465</sup> The court's heightened standard of review of legislative amendments modifying initiative statutes has firmly established the electorate on a level above that of the legislature and hampered the legislature's ability to edit bills for efficiency, budgetary considerations, or other important governmental

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459. See Manheim, *supra* note 11, at 1184–85.

460. The initiative process in California has shepherded numerous progressive reforms as well as social and cultural ones over the years, particularly in the field of labor—eight-hour work days for women, restrictions on child labor, and the establishment of an Industrial Accident Board have all come about from the initiative process. RICHARD J. ELLIS, *DEMOCRATIC DELUSIONS: THE INITIATIVE PROCESS IN AMERICA* 187 (Univ. Press of Kan. 2002).

461. See Chrysler, *supra* note 17, at 616.

462. See Linde, *supra* note 378, at 1760.

463. See *supra* Part II.C.1–3.

464. See *supra* Part III.A.1.

465. See *supra* Part III.A.2.

concerns.<sup>466</sup> Furthermore, issues arising from the proliferation of initiatives, such as ballot box budgeting, have only continued to hamstring the effective functioning of government.<sup>467</sup> Finally, the original aims of the initiative have been corrupted by the court's passive enforcement of its own various rules, creating a system of majoritarian direct democracy that threatens to subvert our constitutionally mandated republican government.<sup>468</sup>

A stricter consideration of the revision-amendment distinction, a more lenient standard of pre-election review, greater involvement and collaboration with the legislature, allowing proposal alternatives, and potentially instituting a double-majority voting system or subject-matter restrictions, would all contribute to the goal of returning the initiative to the role that its originators intended.<sup>469</sup> Until Californians provide for an initiative process that enhances rather than subverts rational, deliberative thought and discussion, there will be no way to rein in California's initiative process and maintain the necessary balance between direct democracy and republicanism.

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466. *See supra* Part III.A.3.

467. *See supra* Part III.A.5.

468. *See supra* Part III.A.4, Part III.B.

469. *See supra* Part IV.