JEFFERSON MEMORIAL LECTURE

SPRING 2012, UC BERKELEY

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Associate Justice, California Supreme Court

LIVING WITH DIRECT DEMOCRACY:

The California Supreme Court and the Initiative Power — 100 Years of Accommodation

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> *Justice Werdegar has been an eloquent and highly respected voice in the vital dialogue of recent years regarding constitutional principle and democratic governance. Her contributions both to scholarship and to the jurisprudence of California's high court are of enduring importance, and her lecture will deal with an issue — the initiative power in relation to the judicial role — which has been a key feature of conflicts over modern-day legal process in our state.*
>
> — Harry N. Scheiber

Thank you, Professor Scheiber and Chancellor Birgeneau, for your generous introductions. And good afternoon to all of you. I'm delighted to be with you today, back at my alma mater. And I'm deeply honored to have been invited to deliver the Spring 2012 Jefferson Memorial Lecture, as I'm aware of the many distinguished speakers who have preceded me.

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* Associate Justice, California Supreme Court. This article is a slightly revised version of the Jefferson Memorial Lecture delivered by Justice Werdegar on March 20, 2012, at the invitation of the Graduate Council of UC Berkeley. Introductions were delivered by Jefferson Lectures Committee chair Harry N. Scheiber, the Riesenfeld Professor of Law and History; and Robert Birgeneau, chancellor of UC Berkeley. [The article is styled in accordance with the California Style Manual published by the Supreme Court.]

Thomas Jefferson, although not a true proponent of direct democracy, is the founding father most frequently quoted by those who are. Thomas Cronin, in his book "Direct Democracy: The Politics of Initiative, Referendum, and Recall," tells us that Jefferson, more than most of the founding fathers, was willing to place his trust in the wisdom and goodness of the majority. As long as citizens were informed, he believed, as long as they had good schools and good newspapers, they could be entrusted with their own governance.[1] According to editor Horace Greeley, writing in 1838, the cardinal principle of Jeffersonian Democracy, the political theory that takes his name, was that "the People are the sole and safe depository of all power, principles and opinions which are to direct the Government."[2] This principle is echoed in our state Constitution, which declares, "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[3]

As we know, the framers of the U.S. Constitution, wary of the potential excesses of direct democracy, in the end established a republic, that is, an indirect democracy, a representative democracy. James Madison, writing in the Federalist Papers in support of the Constitution, pushed strongly for a barrier between what he described as the passions of the popular will and sober governance of the nation through a legislative branch. Pure democracies, he wrote, "have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths."[4] There was nothing in direct democracy, he was concerned, "to check the inducements to sacrifice the weaker party or an obnoxious individual."[5] As Cronin puts it, "Even Jefferson's faith in the mass of the people was tempered," first by his recognition of a "natural

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[1] Cronin, Direct Democracy: The Politics of Initiative, Referendum, and Recall (1989) page 40 (hereafter Cronin).

[2] Greeley, *Editorial,* The Jeffersonian (Feb. 17, 1838) page 287, quoted and cited in Wikipedia <http://en.wikipedia.org/wiki/Jeffersonian_democracy> (as of Mar. 20, 2012).

[3] California Constitution, article II, section 1.

[4] The Federalist No. 10, page 81 (James Madison) (Clinton Rossiter, ed. 1961).

[5] *Ibid.*

aristocracy" who would be best equipped to govern, and second by his concern that the "urban masses" would be easily corrupted.[6]

Yet an impulse toward direct democracy has been a part of our political history throughout. Some view direct democracy as complementary to our republican form of government, others see it as in direct conflict. But this question is not for the courts; more than a century ago the United States Supreme Court held that questions about the guaranty clause of the Constitution — the clause guaranteeing the states a republican form of government — are the province of politics, not law.[7]

The challenge for the courts, as I will discuss, is to effectuate the will of the people as expressed through direct democracy, while holding true to the fundamental principles of our Constitutions, federal and state. Hence the title of my speech: *Living with Direct Democracy: The California Supreme Court and the Initiative Power — 100 Years of Accommodation*.

In the next few minutes I would like to touch on the history of the initiative, the limits on the power, and how the California Supreme Court has responded to legal challenges to initiative measures. My comments, I should note, reflect my personal assessment only and should not be taken as speaking for the court, nor do they indicate in any way how the court — or I — would rule in any particular future case involving an initiative.

HISTORY

One hundred years ago, in a dramatic move toward direct democracy, the citizens of California approved a state constitutional amendment giving themselves the power of the initiative — the power of voters, on their own, to initiate laws and amend the Constitution independent of the Legislature. As is now familiar, the initiative and its attendant provisions were

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[6] Cronin, page 19.

[7] *Pacific Telephone Co. v. Oregon* (1912) 223 U.S. 118; see generally Miller, Direct Democracy and the Courts (2009) page 34 (hereafter Miller); Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution* (1998) 31 Loyola L.A. L.Rev. 1305, 1305–1306.

enacted as reforms in reaction to the stranglehold on California politics of the Southern Pacific Railway.[8]

California was not the first state to allow for voter initiatives. In the 1880's and '90's a strong populist movement emerged in the country, particularly in the West and Midwest, and with it a push for direct democracy or direct legislation by the people.[9] As Thomas Cronin tells us in his book, because direct democracy was initially promoted by groups regarded as cranks — groups such as socialists and single-issue groups — incumbent legislators tended to dismiss the measures as too radical, but by the late 1890's the numbers of converts were increasing throughout the West.[10] Proponents claimed direct democracy devices would diminish the impact of corrupt influence on the Legislature and would induce legislators to be more attentive to public opinion.[11] The initiative was viewed as a means to "increase government responsiveness to the will of the people and encourage greater citizen participation."[12]

Heeding the call, in 1898 the State of South Dakota became the first state in the country to incorporate the initiative process into its Constitution.[13]

But there was opposition. As a push for the initiative developed in California, the Los Angeles Times asserted that the " 'ignorance and caprice and irresponsibility of the multitude' would be substituted for the 'learning and judgment of the Legislature'; radical legislation would result, and business and property rights would be subject to constant turmoil at the hands of agitators."[14] In Colorado, the Denver Republican lamented, " 'The initiative and referendum both conflict directly with the representative principle, and to the extent to which they may be applied representative government will be overthrown. . . . Must [the people of Colorado] adopt every new fangled

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[8] See Comment, *Putting the "Single" Back in the Single Subject Rule: A Proposal for Initiative Reform in California* (1991) 24 U.C. Davis L.Rev. 879, 882 and footnote 16 (hereafter *Putting the "Single" Back*); see generally Broder, Democracy Derailed (2000) pages 38–41.

[9] Miller, page 24.

[10] Cronin, page 50.

[11] *Id.*, page 53.

[12] *Putting the "Single" Back*, *supra*, 24 U.C. Davis L.Rev. at pages 881–882.

[13] Cronin, table 3.1, page 51; see generally Miller, page 25.

[14] Cronin, page 52.

notion which may be experimented with in some other state? Let Oregon be foolish if it wants to, but let Colorado always be sober and sane.' "[15]

It was not to be. The experiment proliferated. And today 24 states — including foolish Oregon and sober and sane Colorado — as well as the District of Columbia have the initiative procedure.[16] Today, no longer an experiment, direct democracy is an established part of the fabric of our California state government.

In this centennial year, many have asked whether the power of the initiative has hurt or helped California. Much can be said on that topic — much has been said — and you perhaps have your own ideas. My focus, however, will be not on the merits of the process, but the challenges it poses for the courts.

Now, to illustrate the scope of the issue, I'd like to start with a quiz.

What do the following laws have in common: the death penalty, the limit on property tax, the right to privacy, the two-thirds requirement for increasing taxes, guaranteed financing for education, the establishment of a state lottery, term limits, tribal gaming rights, reapportionment by citizen committee, the ban on affirmative action, the ban on same-sex marriage, the top-two candidate open primary? Of course: They were all enacted by constitutional initiative.

But many of these provisions have something else in common as well. It's that after passage, they were challenged in court, and it was given to the courts to either uphold or invalidate them. This is a daunting task. Any court that invalidates an initiative opens itself to the charge that it is "thwarting the will of the people." I've been there, and I'll have more to say about it later.

This, then, is the story of the initiative process, a process often dubbed our "Fourth Branch of Government."[17]

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15 *Ibid.*

16 Miller, pages 35–36 and table 1, page 36.

17 See generally Shrag, *The Fourth Branch of Government? You Bet.* (2001) 41 Santa Clara L.Rev. 937; Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones* (2001) 41 Santa Clara L.Rev. 999 (hereafter *Handling Hot Potatoes*).

LEGISLATURE INITIATED VERSUS SIGNATURE INITIATED

Let me start by explaining that there are two types of initiatives — those originating with the Legislature and those proposed by the voters. All of the legislative initiatives deal with constitutional amendments.[18] Our concern today is *voter* initiatives. Voter initiatives can deal with both constitutional amendments and statutes.[19] And once enacted, they can be changed only by another voter initiative, unless they authorize legislative amendment, which they seldom do.[20]

That a simple majority of voters can amend the state Constitution[21] is one of the salient aspects of the California initiative process. A recent, high profile example of this power occurred four years ago, on November 4, 2008, when a majority of voters passed Proposition 8, restricting marriage to a man and a woman. In so doing, they overruled the California Supreme Court's decision in the so-called *Marriage Cases* that same-sex marriage was a protected right under the state Constitution.[22]

Nor was Proposition 8 the first time the voters exercised their right to reverse a state Supreme Court constitutional decision. After the court in 1972 declared the death penalty unconstitutional under the state Constitution,[23] the voters passed an initiative reinstating capital punishment.[24] And after the court held that the state Constitution required busing to alleviate school segregation,[25] the voters repudiated the decision, enacting a constitutional amendment that barred court-ordered busing except when necessary to remedy a federal constitutional violation.[26]

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18 California Constitution, article XVIII, section 1.

19 California Constitution, article II, section 8, subdivision (a).

20 *Id*., section 10, subdivision (c).

21 *Id*., section 10, subdivision (a).

22 *In re Marriage Cases* (2008) 43 Cal.4th 757.

23 *People v. Anderson* (1972) 6 Cal.3d 628.

24 California Constitution, article I, section 27; see *People v. Frierson* (1979) 25 Cal.3d 142, 188–189 (conc. opn. of Mosk, J.).

25 *Crawford v. Board of Education* (1976) 17 Cal.3d 280.

26 California Constitution, article I, section 7, subdivision (a).

CONSTITUTIONAL LIMITATIONS ON THE POWER OF THE INITIATIVE:

The Prohibition Against a Revision of the Constitution and the Single Subject Rule

Revision

Broad as it is, however, the initiative power is not without limits. First, a voter initiative can only *amend* the Constitution, it cannot *revise* it. The difference is that an amendment is intended only for narrowly targeted changes to the Constitution, whereas a revision effects broad structural changes in our governmental framework.[27] Only a constitutional convention or a *legislative* initiative can effect changes substantial enough to be called "revisions."[28] This restriction on initiatives is rooted in the idea of the Constitution as an instrument of a permanent and abiding nature that should not be lightly altered.[29] Comprehensive changes to the Constitution "require more formality, discussion, and deliberation than is available through the initiative process."[30] A constitutional convention or a Legislature-proposed revision serves as a bulwark against improvident or hasty change.[31]

The second limit is that an initiative must address one subject only.[32] Enforcing these limits is the responsibility of the courts.

Speaking first to revisions, when an initiative is challenged as effecting too fundamental or sweeping a change, how do we decide whether it is a permissible amendment or a prohibited revision of the Constitution? The test is this: A measure revises the Constitution when it substantially alters the basic governmental framework set forth in our Constitution;

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[27] *Strauss v. Horton* (2009) 46 Cal.4th 364, 413, 441.

[28] California Constitution, article XVIII, sections 1, 2; see generally *McFadden v. Jordan* (1948) 32 Cal.2d 330, 332–333; Mosk, *Raven and Revision* (1991) 25 U.C. Davis L.Rev. 1, 1–8 (hereafter Mosk); Grodin, *Popular Sovereignty & Its Limits* (2011) 44 Loyola L.A. L.Rev. 623, 623–632.

[29] *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 333.

[30] *Legislature v. Eu* (1991) 54 Cal.3d 492, 506 (citing with approval a suggestion in *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 349–350).

[31] *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 347.

[32] California Constitution, article II, section 8, subdivision (d).

when it undertakes a wholesale alteration of our constitutional structure.[33] The analysis has a dual aspect: the court looks to the *quantitative* effects of the measure on the Constitution — how much of the written document does it actually alter or replace, and its *qualitative* effects — how significant or how broad are its changes to the substantive provisions of the Constitution.[34]

In the Proposition 8 case, the opponents of the initiative asserted that restricting marriage to a man and a woman revised the Constitution; they argued that Proposition 8 fundamentally altered a foundational constitutional principle of law, that is, the basic right of same-sex couples to equal protection.[35] The court disagreed. *Quantitatively*, the initiative added only a single sentence to the Constitution: "Only marriage between a man and a woman is valid or recognized in California." *Qualitatively*, the court reasoned, Proposition 8 removed from a same-sex couple's state constitutional rights only one right: the right to have their union designated "marriage." This restriction, the court concluded, did not have even a minimal effect on the governmental plan or framework of California that existed before the amendment. So, on neither basis — quantitative or qualitative — was the initiative a revision.[36] Hence, Proposition 8 was within the power of the people to enact. The court's analysis, as well as its conclusion, I should note, were not without dissent.[37]

On only two occasions has the court struck an initiative as effecting a revision of the Constitution.[38]

The first case, in 1948, involved an ambitious initiative entitled the California Bill of Rights. Comprising 21,000 words, the initiative contained

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[33] *Strauss v. Horton*, *supra*, 46 Cal.4th at page 441.

[34] *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223 (hereafter *Amador Valley*).

[35] See *Strauss v. Horton*, *supra*, 46 Cal.4th at page 442.

[36] *Id*. at pages 440–447.

[37] See *id*. at page 477 (conc. opn. of Werdegar, J., criticizing the court's analysis); *id*. at page 483 (conc. & dis. opn. of Moreno, J., dissenting from the court's analysis and conclusion). For a review of the court's decisions on revisions and amendments, see *id*. at pages 427–440.

[38] *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1014–1016 (citing *McFadden v. Jordan*, *supra*, 32 Cal.2d 330, and *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336).

208 subsections, which were to be added to 15 of the 25 constitutional articles. The measure dealt with such disparate subjects as gambling, civic centers, mining, fishing, city budgets, liquor control, senate reapportionment, and taxes on oleomargarine. Some called it the Ham and Eggs initiative because of the varied subjects it encompassed.[39] The court held the measure was so multifaceted as to compel the conclusion it was a revision, rather than a permissible amendment to the Constitution.[40]

The other case involved the Crime Victims Justice Reform Act, Proposition 115 on the June 1990 primary ballot. The Crime Victims Justice Reform Act dealt with numerous matters of criminal procedure, including increasing the number of felonies that would support a charge of first degree felony murder, increasing the number of special circumstances that would elevate a first degree murder to a capital crime, expanding the use of hearsay testimony, declaring the right of the people of the state to a speedy trial, granting the people the right of discovery, and the like.[41] The court upheld most of the Reform Act.[42] But one key provision, the court held, was invalid as a revision. This was the provision that would have amended the Constitution to require state courts — our court — to follow federal court interpretations of criminal constitutional rights; it would have "vested all judicial interpretive power [on the subject] in the United States Supreme Court."[43] Although the provision was quantitatively modest, affecting only one article of the Constitution,[44] from a qualitative standpoint, the court stated, the effect would be "devastating."[45] It would unduly restrict judicial power and "would substantially alter the substance and integrity of the state Constitution as a document of independent force and effect."[46]

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[39] See Grodin, In Pursuit of Justice: Reflections of a State Supreme Court Justice (1989) page 107 (hereafter Grodin); *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1014–1015, 1022.

[40] *McFadden v. Jordan*, *supra*, 32 Cal.2d at pages 349–350; see *Brosnahan v. Brown* (1982) 32 Cal.3d 236, 252–253.

[41] *Raven v. Deukmejian*, *supra*, 52 Cal.3d 336.

[42] *Id*. at page 349.

[43] *Id*. at page 352, italics omitted.

[44] *Id*. at page 351.

[45] *Id*. at page 352.

[46] *Ibid*. For one justice's view of the single subject and revision analysis in *Raven v. Deukmejian*, see Mosk, *supra*, 25 U.C. Davis L.Rev. 1.

The question of revision is sure to recur. Several months ago, 34 years after its enactment, attorneys filed a new lawsuit challenging Proposition 13, not in its entirety, but the provision that requires a two-thirds vote of the Legislature to raise taxes. The argument is that by requiring a two-thirds vote, Proposition 13 "restructured California's basic governmental plan" in that it grants a minority of legislators a veto over the majority's exercise of the core legislative power to raise revenue by taxation.[47]

Single Subject Rule

The second limitation on voter initiatives is the single subject rule. Likely prompted by the infamous California Bill of Rights, the so-called Ham and Eggs initiative, the voters in 1948 amended the state Constitution to add the single subject requirement for initiatives.[48] The Constitution now provides that "[a]n initiative measure embracing more than one subject may not be submitted to the voters or have any effect."[49] The test as to whether an initiative violates the single subject rule is whether all of its parts are "reasonably germane" to a common theme, purpose, or subject; do the component parts have a reasonable and common sense relationship in furtherance of a common purpose.[50] You can see that the 1948 California Bill of Rights initiative would have flunked this test.

But with just one exception, all initiatives challenged in the Supreme Court for violation of the single subject requirement have passed the test.[51]

For example, the 1982 Victims' Bill of Rights passed. A wide-ranging criminal justice initiative, this measure guaranteed victims of crime the right to restitution, declared a right to safe schools, declared what evidence

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47 The trial court rejected the challenge and the Court of Appeal affirmed. (*Young v. Schmidt* (Cal. Ct.App., July 24, 2012, B230629 [nonpub. opn.]) 2012 WL 3013900, petn. for review denied Nov. 20, 2012.)

48 *Amador Valley*, *supra*, 22 Cal.3d at page 229.

49 California Constitution, article II, section 8, subdivision (d).

50 *Amador Valley*, *supra*, 22 Cal.3d at pages 229–230; *Senate of the State of Cal. v. Jones* (1999) 21 Cal.4th 1142, 1157 (hereafter *Senate v. Jones*); *Californians for an Open Primary v. McPherson* (2006) 38 Cal.4th 735, 764, footnote 29.

51 The Courts of Appeal, in contrast, on two occasions have held an initiative in violation of the single subject rule. (*California Trial Lawyers Assn. v. Eu* (1988) 200 Cal. App.3d 351; *Chemical Specialties Manufacturers Assn., Inc. v. Deukmejian* (1991) 227 Cal.App.3d 663.)

was admissible in trials, abolished the defense of diminished capacity, limited the right to bail, and restricted plea bargaining. The various provisions, the court held, had a reasonable and common sense relationship in furtherance of a common purpose, the purpose of promoting public safety and the rights of crime victims.[52] And the 1990 Crime Victims Justice Reform Act also passed. Although the court struck the judicial power article as a revision — that was the article requiring state courts to follow federal court precedent in matters of fundamental criminal rights — the court declared the act's many other provisions did not violate the single subject rule.[53] Why? Because they were unified by the purpose of abrogating certain judicial decisions of the Supreme Court — our decisions — that were deemed unduly expansive of criminal defendants' rights.[54]

Other examples abound. The court rejected single subject challenges to Proposition 9, the 1974 Political Reform Act;[55] Proposition 140, the Political Reform Act of 1990;[56] and Proposition 21, the Gang Violence and Juvenile Crime Prevention Act of 1998.[57] In all these cases the court followed the principle, first stated in 1949, that the single subject rule should "be construed liberally to uphold proper legislation, all parts of which are reasonably germane."[58]

But there has been one exception. This occurred in 1999, 56 years after the Constitution was amended to impose the single subject rule.[59] The initiative was Proposition 24, the proposed Let the Voters Decide Act, slated to be placed on the March 2000 ballot. The measure would have amended the Constitution to reduce legislative salaries, mandate voter approval of any increases in salary, and transfer reapportionment from the Legislature to the California Supreme Court. Reapportionment was the sleeper. As the challengers of the measure observed, Proposition 24 presented a classic example of "logrolling" — that is, the joining of one measure that's of primary interest to the proponent with an unrelated measure the proponent views

52 *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 247.

53 *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 349.

54 *Id*. at page 348.

55 *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 41, 43.

56 *Legislature v. Eu*, *supra*, 54 Cal.3d at pages 512–514.

57 *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 581.

58 *Perry v. Jordan* (1949) 34 Cal.2d 87, 92.

59 *Senate v. Jones*, *supra*, 21 Cal.4th 1142.

as politically popular, simply for the purpose of increasing the likelihood the initiative will be adopted.[60] In the Proposition 24 case, the measure of interest to the proponent was the transfer of reapportionment power from the Legislature to the Supreme Court; the measure thought to be politically popular was the cutting of legislators' salaries.[61] The court agreed the measure was invalid. The court stated that the underlying purposes of the single subject rule are to prevent joinder of disparate measures for improper tactical purposes — logrolling — and to minimize voter confusion and deception. It was not enough, the court held, that each of the sections had a provision for voter approval, as declared in its title "Let the Voters Decide."[62] Legislative salaries and reapportionment were two distinct issues; combining the two would cause voter confusion and obscure the electorate's intent with regard to each of the separate subjects.[63]

This case, *Senate v. Jones*, was the first, and to date the only, Supreme Court case to invalidate an initiative for violation of the single subject rule.

THE COURT'S APPROACH TO INTERPRETING INITIATIVES

People v. Romero

As you can see, most of the initiative measures challenged in court are politically charged. They involve redistricting, term limits, legislative pay, the death penalty, same-sex marriage, Three Strikes, affirmative action. These are issues that deeply divide the citizens of our state. Once a majority of the electorate has passed a measure, those opposed to it often file a lawsuit challenging its legality, hoping to win in court what they didn't win at the ballot box. So unwillingly, reluctantly, the court is thrust into the middle of a political thicket. Our task is to resolve the challenge according to the law, without regard to any personal political or policy preference, and without

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[60] *Id*. at page 1151; see generally *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1004–1005.

[61] *Senate v. Jones*, *supra*, 21 Cal.4th at page 1151.

[62] *Id*. at pages 1162–1163.

[63] *Id*. at pages 1167–1168.

regard to the political impact of our decision — be it on ourselves or on the state.

How daunting is our task? The late Supreme Court Justice Otto Kaus, reflecting on the pressure that accompanies the court's duty to resolve a legal challenge to an initiative when the justices must face the voters in a retention election, observed that it's like "finding a crocodile in your bathtub when you go in to shave in the morning. You know it is there, and even though you try not to think about it, it is hard to think about much else while you're shaving."[64] And former Justice Joe Grodin has described these cases as "political hot potatoes for the judicial branch," explaining that "the initiative measure, once adopted, has behind it the political force of the electorate at large. It is one thing for a court to tell a *legislature* that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another."[65] In the view of the late Justice Stanley Mosk, "Over the years to an almost universal extent, initiatives have been judicially untouchable."[66]

Why this difficulty with ruling on initiatives? Because in the event the court invalidates an initiative measure, it subjects itself to the criticism, deeply felt, that the court — an unelected body, and one little understood, I might add — is thwarting the will of the people. As one commentator has observed, "In the Populist mind, judicial review [of ballot initiatives] raises the specter of arrogant, elitist, insular judges usurping power from . . . the people themselves."[67]

I experienced this reaction early in my tenure on the California Supreme Court. Soon after I was appointed to the court, in the wake of the notorious and tragic Polly Klaas kidnapping and murder, the voters by statutory initiative passed what is familiarly known as the Three Strikes law, popularized by the phrase "Three Strikes and You're Out." The voter pamphlet explained that under the Three Strikes law, if a criminal has been

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64 *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at page 1003.

65 Grodin, page 105, italics added.

66 Mosk, *supra*, 25 U.C. Davis L.Rev. 1; see generally *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1000–1004.

67 Miller, *Courts As Watchdogs of the Washington State Initiative Process* (2001) 24 Seattle U. L.Rev. 1053, 1084–1085.

convicted of two serious or violent felonies, on his third conviction of a felony — any felony — he would be out, out of commission and behind bars for a fixed, mandatory term. The trial judge could neither grant probation nor modify the sentence. Opponents challenged the law as a violation of the separation of powers, depriving judges of their traditional sentencing discretion.[68]

For reasons unknown to me, then Chief Justice Malcolm Lucas assigned the case to me, the newest member of the court. Ultimately, after briefing and oral argument, the court, in a unanimous opinion, held that contrary to the assertion of its proponents, the Three Strikes law did not eliminate a judge's discretion to select an appropriate sentence for third strikers.

The morning after our opinion was released, as I was driving to work, I happened to tune in to a popular radio talk show. The entire program was devoted to the court's opinion and how outrageous it was. And every newspaper in the state that day, in reporting on the court's decision, referenced the widespread view that the court had thwarted the will of the voters."[69]

Notwithstanding the initial public outcry, the court's approach in the Three Strikes case is a good illustration of the court's respect for the initiative process. In the Three Strikes case, we merely *interpreted* the initiative, we didn't invalidate it. Although we interpreted it in a way that differed from voter expectations, we did so in a manner that assured its constitutionality. We held that the law did not eliminate a judge's discretion to select an appropriate sentence for three-timers. Had we held otherwise, had we held that the initiative *did* deprive the court of discretion, as the voters thought it had, we would have had to decide whether it was constitutional, a question seriously in doubt. Rather than invalidating the law, we thus preserved it with our interpretation.[70]

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[68] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 508–509 (hereafter *Romero*).

[69] See, e.g., Gunnison, *Angry Supporters of '3 Strikes' Say "The Court has ignored will of voters,"* S.F. Chronicle (June 21, 1996), page A17; Ainsworth, *Senate GOP Leader Urges Justices' Ouster,* S.F. Recorder (June 21, 1996), page 1. See generally Vitiello and Glendon, *Article III Judges and the Initiative Process: Are Article III Judges Hopelessly Elitist?* (1998) 31 Loyola L.A. L.Rev. 1275, 1285–1286 and footnote 84 (discussing the political response to the *Romero* decision).

[70] *Romero*, *supra*, 13 Cal.4th at pages 509, 513, 530.

Our approach in the Three Strikes case reflects the court's general approach in interpreting initiatives: we are mindful that an initiative measure is an expression of the will of the people, and that as the unelected third branch of government, it behooves us to uphold the people's will whenever we possibly can without doing violence to our state or federal Constitutions. As we stated in the 1978 case upholding the validity of Proposition 13, "It should be borne in mind that notwithstanding our continuing representative and republican form of government, the initiative process itself adds an important element of direct, active, democratic contribution by the people."[71]

Consistent with this approach, the California Supreme Court over the years has, with few exceptions, upheld the validity of every initiative constitutional amendment brought before us. In so doing, we have expressed great deference to the people's expression of their will through the process of the initiative.

The power of the initiative, the court has stated, "must be *liberally construed* . . . to promote the democratic process. . . . [I]t is our solemn duty jealously to guard the sovereign people's initiative power, it being one of the most precious rights of our democratic process."[72]

Nevertheless, we will, when we must, invalidate an initiative that is inconsistent with the state or federal Constitution. I've touched on the cases where the court found that an initiative was procedurally invalid as constituting a revision of the Constitution[73] or violating the single subject rule.[74] But we look to the substance of the initiative measure as well. Our deference to the initiative process does not extend to overlooking substantive constitutional violations. As has often been observed, the courts are the only institutional check there is on the otherwise unfiltered majoritarian initiative process.[75]

A case in point is the 1964 ballot Proposition 14. Proposition 14 amended the state Constitution in essence to authorize discrimination in

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71 *Amador Valley*, *supra*, 22 Cal.3d at page 228.

72 *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 241, internal quotation marks omitted.

73 *McFadden v. Jordan*, *supra*, 32 Cal.2d 330.

74 *Senate v. Jones*, *supra*, 21 Cal.4th 1142.

75 See Miller, page 2; see generally *id.*, pages 79–100.

housing. In a decision later validated by the United States Supreme Court, we held the proposition violated the Equal Protection Clause of the United States Constitution.[76]

As we explained in the *Marriage Cases,* the Constitution itself constitutes the *ultimate* expression of the people's will, and it reflects restraints that the people themselves have imposed upon their own ability, through a transient majority of the moment, to enact laws in violation of that fundamental document.[77] Professor Jesse Choper, quoted in the *Marriage Cases,* has observed that "'the Court should review individual rights questions, unabated by its judgment about whether a particular result will be subject to criticism, hostility, or disobedience.'"[78] And this we endeavor to do.

Pre-Election Challenges

Let me touch briefly on pre-election challenges. Pre-election challenges generally are disfavored, the view being that we should avoid invalidating an initiative before the electorate has had the opportunity to speak to it. "A court that intervenes to keep a measure off the ballot is perceived as obstructing the expression of the popular will."[79] If the measure doesn't pass, we need never consider it. If it does, that's time enough to resolve a challenge.

The Proposition 14 housing discrimination case I just mentioned initially came to the court as a petition for mandamus to keep the proposition off the ballot, and we declined to intervene. Although we noted the provision raised grave constitutional questions, we stated it would be more appropriate to pass on those questions after the election "'than to interfere with the power of the people to propose laws and amendments to the Constitution and to adopt or reject the same at the polls.'"[80] After it passed, we ruled it unconstitutional.[81] Similarly, we rejected a pre-election petition to prevent placement on the ballot of the 1982 Victims' Bill of Rights, on

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[76] *Mulkey v. Reitman* (1966) 64 Cal.2d 529, affirmed *sub nom. Reitman v. Mulkey* (1967) 387 U.S. 369.

[77] *In re Marriage Cases*, *supra*, 43 Cal.4th at page 852.

[78] *Id.* at page 850.

[79] Grodin, page 106.

[80] *Mulkey v. Reitman*, *supra*, 64 Cal.2d at page 535.

[81] *Id.* at page 545.

the ground it violated the single subject rule.[82] The measure passed and we subsequently upheld it.[83]

Although the court will not intervene before an election to decide a constitutional challenge to the substance of an initiative measure, we will accept a pre-election challenge to an initiative on procedural grounds if there is a "clear showing of [its] invalidity,"[84] or a "strong likelihood" that it violates the single subject rule[85] such that it should not even be presented to the voters. This was the case with the initiative that sought to transfer reapportionment from the Legislature to the Supreme Court. The petitioners argued it violated the single subject rule and we agreed. The Constitution, you will remember, states that "an initiative embracing more than one subject *may not be submitted to the electors* or have any effect,"[86] thus implicitly authorizing pre-election review in appropriate cases.[87] We engaged in pre-election review as well with the 1948 California Bill of Rights, the so-called Ham and Eggs initiative, where we stated that it was "clear beyond question" that the proposed initiative amounted to an impermissible proposed revision, rather than amendment of our Constitution.[88] And we will intervene to consider an objection that the subject matter of the initiative is not appropriate to the initiative process.[89]

Of course, pre-election review poses several problems for the court. A pre-election challenge is often filed in our court within a matter of weeks — perhaps days — before critical dates in the election process. This requires that we accelerate every aspect of our decision process, including the briefing, the preparation by the assigned justice of a memorandum on the case, the written responses of the other six justices, the scheduling of

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82 *Brosnahan v. Eu* (1982) 31 Cal.3d 1, 4.

83 *Brosnahan v. Brown*, *supra*, 32 Cal.3d 236.

84 *Brosnahan v. Eu*, *supra*, 31 Cal.3d at page 4.

85 *Senate v. Jones*, *supra*, 21 Cal.4th at page 1154.

86 California Constitution, article II, section 8, subdivision (d), italics added.

87 *Senate v. Jones*, *supra*, 21 Cal.4th at page 1153.

88 *McFadden v. Jordan*, *supra*, 32 Cal.2d at pages 331–332.

89 See *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687 (initiative compelling state Legislature to ask Congress to convene a constitutional convention did not propose a statute); *Legislature v. Deukmejian* (1983) 34 Cal.3d 658 (redistricting initiative violated constitutional limit on frequency of redistricting). See generally Grodin, pages 105–107; *Handling Hot Potatoes*, *supra*, 41 Santa Clara L.Rev. at pages 1020–1024.

oral argument, and the post-argument deliberation and preparation of the opinion, or opinions if the decision is not unanimous. We manage, but it strains the court's resources, and certainly is not a favored mode of deliberation of what can be complex issues.

Do We Treat Initiatives Differently Than We Treat Statutes?

The question often arises whether the court treats initiatives differently than legislative enactments. Some argue we should; that as the only check on initiatives, the courts should give them special review, a heightened scrutiny. Others maintain that as the expression of direct democracy we should accord initiatives special deference.[90] We have rejected both approaches. We long ago declared that initiative statutes are to be given the same liberal construction as legislative statutes,[91] but that they are entitled to no greater deference. In his opinion for the court in the *Marriage Cases,* the Chief Justice declared that just because Proposition 22, the statutory restriction on same-sex marriage, had been enacted directly by the voters, it "neither exempts the statutory provision from constitutional scrutiny nor justifies a more deferential standard of review."[92] Although some question our consistency in adhering to this principle of no special deference, our intent is to do so.

TENSION BETWEEN THE INITIATIVE POWER AND THE COURTS

As you can see, there is an inevitable tension between the initiative process and the courts. Whereas the role of the initiative is to translate the popular will into law, the role of the courts is to hold firm against the wishes of the majority when necessary to preserve fundamental constitutional principles.

These disparate roles can create, as one commentator has described it, a "polarized conflict between citizens and the courts,"[93] as illustrated by the dissension in California over the past decade concerning the definition of marriage.

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90 See Miller, pages 89–92.

91 *Gage v. Jordan* (1944) 23 Cal.2d 794, 799; see *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 332.

92 *In re Marriage Cases*, *supra*, 43 Cal.4th at page 851.

93 Miller, page 221.

In the year 2000 the voters approved Proposition 22, which enacted a statute declaring, "Only marriage between a man and a woman is valid or recognized in California." Because it was an initiative statute, the Legislature had no power to change it, so opponents sued in court. The California Supreme Court declared the statute invalid under the state Constitution.[94] Six months later, proponents qualified for the ballot as a state constitutional amendment Proposition 8, restricting marriage to a man and a woman. The proposition passed, whereupon opponents challenged it in court. In 2009 the California Supreme Court upheld the amendment as within the power of the people to enact.[95] So at this moment in California, by state constitutional edict, marriage is permitted only between a man and a woman. Now the case is in federal court, plaintiffs arguing that Proposition 8 offends the *federal* Constitution. The federal district court agreed, and in February of this year the court of appeals affirmed,[96] but the ban remains in effect until the federal appellate decision is final.

Proposition 8 was not the first initiative to succeed in overturning a decision of the state Supreme Court. The ballot argument in favor of an earlier Proposition 8, the 1982 Victims' Bill of Rights, explained the initiative would " 'overcome some of the adverse decisions by our higher courts,' [decisions] which had created 'additional rights for the criminally accused and placed more restrictions on law enforcement officers.' "[97] In upholding the measure, the court acknowledged it appeared "to reflect public dissatisfaction with several prior judicial decisions in the area of criminal law."[98]

And again, the preamble to the 1990 Proposition 115, the Crime Victims Justice Reform Act, stated that " 'we the people . . . find that it is necessary to reform the law as developed in numerous California Supreme Court decisions . . . .' "[99] Upholding the initiative against a single subject challenge, we found that its unifying theme was the abrogation of particular holdings of the court "that the initiative's framers deemed unduly expansive of

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94 *In re Marriage Cases*, *supra*, 43 Cal.4th 757.

95 *Strauss v. Horton*, *supra,* 46 Cal.4th 364; see generally Miller, pages 3–13.

96 *Perry v. Brown* (9th Cir. 2012) 671 F.3d 1052, rehearing en banc denied 681 F.3d 1065 (June 5, 2012), petition for certiorari filed July 30, 2012.

97 *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 248.

98 *Ibid*.

99 *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 342.

criminal defendants' rights."[100] And I earlier mentioned the initiatives that abrogated our opinions that the death penalty violated the state Constitution and that busing was necessary to alleviate school segregation.

In upholding these initiatives, the court recognized that while it might disagree with the wisdom of the measures, "it is not [the court's] function to pass judgment" on their soundness. "In our democratic society," the court has stated, "in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will . . . ."[101]

PROBLEMS WITH THE INITIATIVE POWER

With all of its benefits, direct democracy has problems, as has been widely discussed elsewhere. With respect to the courts, the foremost problem is that it places the judiciary in the delicate but necessary position of serving as a check on the passions of the majority as expressed through initiatives unfiltered by legislative or executive review.

Post-election litigation over the validity of initiatives, in the words of one commentator, has "become an institutionalized feature of the state's initiative system[,] . . . a regular strategy for initiative opponents . . . ."[102] "Normally, a court exercising judicial review overturns the decisions of another branch of the government, but, when it strikes down an initiative, it overrides the people themselves."[103] As the conflict between direct democracy and the courts as guardians of fundamental rights plays out in court, the counter-majoritarian role of the courts is highlighted to the frustration of the majority and the detriment of the judiciary, insofar as "the people come to see judges as political actors rather than as neutral interpreters of the law."[104] The conflict and attendant perception, in turn, "poses real threats to the independence of state judges."[105]

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100 *Id*. at page 347.

101 *Brosnahan v. Brown*, *supra*, 32 Cal.3d at page 248; *Raven v. Deukmejian*, *supra*, 52 Cal.3d at page 347.

102 Miller, page 109.

103 *Id*., page 2.

104 *Id*., pages 221–222; see generally Miller, chapter 3, The Counter-Majoritarian Power, pages 75–100.

105 Miller, page 222.

CONCLUSION

In closing, I return to the concept of the initiative process as the fourth branch of government. Under this construct, we have our traditional three branches — the executive, the legislative and the judicial, and then we have a fourth branch — the electoral in the form of the initiative. Our forefathers designed the three branches of government to provide checks and balances on one another, to enable each to curtail excesses engaged in by their sister branches. Recognition of a fourth branch can, if you will, be viewed as consistent with the principle of checks and balances. Certainly the initiative places a check on the Legislature and the Executive; that was its original intent. And the judicial branch, however seldom and however reluctantly, may be seen as placing in turn a check on the initiative.

But the initiative process can also be viewed, as many do, as inimical to our republican form of government, weakening the legislative branch, empowering a majority to impose its will on a minority, and placing the courts in the untenable position of holding firm against the voice of the people when our Constitutions so require.

Either way, direct democracy through the initiative is here to stay, and as long as it is, the responsibility of the courts is to temper the will of the people — the fourth branch — when necessary to honor our fundamental constitutional principles, but only so much and no more. As we declared over forty years ago, "The right of initiative is precious to the people and is one which the courts are zealous to preserve to the fullest tenable measure of spirit as well as letter."[106]

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[106] *McFadden v. Jordan*, *supra*, 32 Cal.2d at page 332.