

Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California

INTRODUCTION

The people of California reserve for themselves, via the California Constitution, the right to legislate by initiative.¹ Yet California's initiative process is increasingly "out of control."² In the November 1990 election, for example, the voters rejected ten of the thirteen initiatives which appeared on the ballot. While in some cases the voters' action may have reflected the measures' merits, many agreed that voter confusion and impatience with the sheer volume of statutory text were more decisive determinants.³ One legislator read the election results as a "clear indictment of the initiative process."⁴ Indeed, in March 1991 there were at least forty initiative reform proposals pending in the state legislature.⁵

¹ CAL. CONST. art. IV, § 1. Section 1 provides: "The legislative power of this State is vested in the California Legislature . . . , but the people reserve to themselves the powers of initiative and referendum." The initiative, referendum, and recall processes are often collectively called "direct democracy." See H. GOSNELL, *DEMOCRACY: THE THRESHOLD OF FREEDOM* 252 (1948).

² Salzman, *Hiram's Folly?*, 4 GOLDEN ST. REP., Oct. 1988, at 7.

³ California Supreme Court Justice Mosk, commenting on the initiative process in his dissent in *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990), stated:

[O]ne cannot fail to observe widespread disenchantment with the modern initiative process. At the November 6, 1990 General Election, 10 of the 13 initiatives on the ballot were defeated by the voters, some perhaps on the merits, but some undoubtedly because of prolix texts that were perplexing to all but the measures' authors.

Id. at 356, 801 P.2d at 1090, 276 Cal. Rptr. at 339 (Mosk, J., concurring and dissenting).

⁴ Price & Waste, *Initiatives: Too Much of a Good Thing?*, 22 CAL. J. 117, 117 (1991) (quoting State Senator Milton Marks).

⁵ *State's Initiative System Under Attack: Dozens of Plans Aim at Reform*, Sacramento Bee, Mar. 31, 1991, at A3, col. 2 [hereafter *Under Attack*].

The problem of voter confusion stemming from complex initiative measures is not new. In 1948 the legislature, with voter approval, sought to remedy this problem by enacting the single-subject rule, which limits initiatives to a single subject. Yet the rule has been ineffective in controlling the initiative process because courts have been unwilling to enforce it. This Comment argues that a stricter application of the single-subject rule is necessary to maintain and fortify citizen influence in the initiative process.

As the California Supreme Court applies the rule today, it is a virtual nullity.⁶ The court is reluctant to apply the single-subject rule because it fears that to do so will impinge upon the people's prerogative to legislate through initiative.⁷ This Comment contends that the assumption that less restriction means a stronger initiative process is erroneous.⁸ At the very least the supreme court should carefully analyze the shaky foundation on which single-subject rule precedent is built.⁹ This Comment proposes a minor amendment to the single-subject rule to encourage this process.

Part I examines the initiative process in California. It analyzes the problems inherent in the process, particularly voter confusion, and discusses the single-subject rule as a solution to these problems. Part II analyzes the failure of the single-subject rule to fulfill its promise and lays the blame squarely on the supreme court and its reluctance to enforce the rule. After detailing the methods by which the court evades meaningful single-subject review, Part II criticizes the assumptions underlying the court's permissive approach. Part III proposes an amendment to the single-subject rule designed to encourage the court to re-evaluate its approach to single-subject review.

I. THE CALIFORNIA INITIATIVE

A. *The Initiative Process*

California's initiative process allows anyone who can gather the large number of signatures required¹⁰ to propose a law or consti-

⁶ See *infra* notes 102-51 and accompanying text (discussing how courts rarely find an initiative out of compliance with single-subject rule).

⁷ See *infra* notes 98-100 and accompanying text.

⁸ See *infra* notes 165-82 and accompanying text.

⁹ See *infra* notes 184-201 and accompanying text.

¹⁰ To qualify a measure enacting or amending a statute, proponents must

tutional amendment¹¹ and place it on the ballot.¹² If a majority of voters approves the proposal, it becomes law.¹³

The California Legislature and the California voters adopted

gather signatures equal to 5% of all votes cast for gubernatorial candidates in the last election. CAL. CONST. art. II, § 8(b). In years 1983 through 1987 this equaled 393,817 valid signatures. See LEAGUE OF WOMEN VOTERS OF CALIFORNIA, INITIATIVE AND REFERENDUM IN CALIFORNIA: A LEGACY LOST? 108 (1984) [hereafter LEAGUE OF WOMEN VOTERS]. To qualify a constitutional amendment, proponents must gather signatures equal to 8% of all votes cast for gubernatorial candidates in the last election. CAL. CONST. art. II, § 8(b). In years 1983 through 1987 this equaled 630,107 valid signatures. See LEAGUE OF WOMEN VOTERS, *supra*, at 108. Each county registrar then determines the number of valid signatures. CAL. ELEC. CODE § 3521 (West Supp. 1991). If the petitions contain a sufficient number from all counties, the secretary of state certifies the measure for the next appropriate election. See *id.* § 3514 (West 1977).

¹¹ CAL. CONST. art. II, § 8(a). Section 8(a) states that “[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.” California and other states permit the voters to use the initiative process to enact both constitutional amendments and statutes. Some states limit the use of the process to statutes, and a few limit it to constitutional amendments. See Note, *The Judiciary and Popular Democracy: Should Courts Review Ballot Measures Prior to Elections?*, 53 FORDHAM L. REV. 919, 919 & n.1 (1985) (discussing states’ initiative processes).

¹² Historically, initiative measures could be enacted either directly or indirectly. Under the direct initiative process proponents gather the requisite number of signatures on petitions. The secretary of state then submits the measure to the voters at the next appropriate election. M. EU, SECRETARY OF STATE, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 2 (1988). Under the indirect initiative process proponents also gather the requisite number of signatures, usually less than required to qualify a direct initiative, after which the secretary of state submits the measure to the legislature for action. *Id.* If the legislative action does not satisfy the proponents, the secretary of state submits the measure to the voters at the next statewide election. *Id.*

Californians had the option of using either the direct or indirect initiative until 1966, when the indirect initiative process was repealed. *Id.* Between 1912 and 1966 only 19 indirect initiatives were titled and summarized (2.8% of all initiatives), and only four qualified to the legislature (2% of all qualifying initiatives). *Id.* at 8. The “extreme delay . . . between the completion of signature gathering and final submission of the measure to the voters” may have contributed to voter reluctance to use the indirect initiative. Comment, *The Scope of the Initiative and Referendum in California*, 54 CALIF. L. REV. 1717, 1720 n.19 (1966).

¹³ CAL. CONST. art. II, § 10(a). Section 10(a) provides: “An initiative statute . . . approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise.”

the initiative process in 1911.¹⁴ In doing so, California joined a nationwide initiative movement which sought to put the power to legislate in the hands of the people.¹⁵ The initiative process was introduced in California at a time when special interests had a stranglehold on the legislature.¹⁶ The process was intended to return government control to the people of California.¹⁷ Supporters¹⁸ also argued that access to the initiative process would increase government responsiveness¹⁹ to the will of the people²⁰ and encourage greater citizen participation.²¹

¹⁴ The electorate ratified the initiative process in a special election in October 1911. LEAGUE OF WOMEN VOTERS, *supra* note 10, at 26.

¹⁵ Between 1898 and 1918, 18 other states incorporated the initiative process into their constitutions or statutes. See D. MAGLEBY, DIRECT LEGISLATION: VOTING ON BALLOT PROPOSITIONS IN THE UNITED STATES 38-39 (1984). One commentator characterized the movement to adopt the initiative process as "surg[ing] through the United States gathering momentum." H. GOSNELL, *supra* note 1, at 253.

¹⁶ In 1911 the Southern Pacific Railroad controlled the California Legislature. Riley, *Government By Initiative*, GOV'T EXECUTIVE, Oct. 1988, at 34.

¹⁷ See D. SCHMIDT, CITIZEN LAWMAKERS: THE BALLOT INITIATIVE REVOLUTION 26 (1989) (contending voters effectively use initiatives to control policies and change government structure). The initiative has been described as a "legislative battering ram" to be used "where the ordinary machinery of legislation ha[s] utterly failed." *Amador Valley Joint Union High School Dist. v. State Bd. Of Equalization*, 22 Cal. 3d 208, 228, 583 P.2d 1281, 1289, 149 Cal. Rptr. 239, 247 (1978) (emphasis omitted).

¹⁸ Socialists, labor groups, populists, and progressives championed the process. See D. SCHMIDT, *supra* note 17, at 5-10 (discussing advent of initiative process).

¹⁹ See *id.* at 26 (asserting mere filing of initiative petition often pushes legislators to act). With the increase in communication and education, progressive reformers thought that people could exert more influence on their governments using the initiative process. LEAGUE OF WOMEN VOTERS, *supra* note 10, at 4. The supporters of such direct democracy processes "felt that the government should be brought back to the arms of the 'uncorruptible' people. They felt that representative democracy was failing to 'represent' the whole people, and was becoming, rather, a representative of special interests." H. GOSNELL, *supra* note 1, at 253.

²⁰ Supporters and opponents continue to debate whether the initiative process serves "the will of the people." D. SCHMIDT, *supra* note 17, at 25-26. Critics of the initiative process contend that the results of an initiative election reflect only the will of the voters in the particular election and that this vote has virtually no bearing upon the will of the people at large. Comment, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CALIF. L. REV. 1473, 1502 (1987).

²¹ For about 100 years after the American Revolution people believed

Since 1911 California citizens have used the initiative process to varying degrees.²² In the last twenty years, however, use of the initiative process has increased dramatically.²³ At the same time, the political and technological environment surrounding the process has changed significantly. Modern elections are marked by "high technology, mass media campaigning, the rise of the professional political consultant, and the evolution of special interest politics."²⁴ In this environment, the problems to which the initiative process is vulnerable, such as voter deception and voter confusion, have flourished despite the existence of a constitutional provision confining initiatives to a single subject.

B. *Inherent Problems*

The people of California place great value on their right to legislate by initiative.²⁵ Nevertheless, many acknowledge problems with the way the initiative process is used today.²⁶ These include

that an election's purpose is to choose leaders, not to get people involved in government affairs. T. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 7-8 (1989). Supporters of the initiative process, on the other hand, viewed it as a means of increasing voter interest and encouraging debate on important issues that voters might not otherwise discuss. *Id.* at 11.

²² See M. EU, *supra* note 12, at 9-10. From 1912 to 1918 proponents tried to qualify 44 measures; in the 1920s, 53 measures; in the 1930s, 67 measures; in the 1940s, 42 measures; in the 1950s, 17 measures; in the 1960s, 38 measures; in the 1970s, 138 measures; and in the 1980s, 266 measures. *Id.*

²³ From 1912 through the 1960s, a period of almost 50 years, proponents tried to qualify 261 measures, while in the 20 years spanning the 1970s and 1980s, proponents tried to qualify 404 measures. *Id.* Experts report that the reasons for the increased use of the process include the legislature's unresponsiveness to serious problems and to special interest groups. Ertukel, *Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics*, 2 J.L. & POL. 313, 315-16 (1985) (summarizing initiative problems and reforms discussed at 1984 symposium). Other reasons for the increased use of the process include its usefulness to politicians as a stepping stone to political fame, *id.*, and in developing favorable environments for future action. LEAGUE OF WOMEN VOTERS, *supra* note 10, at 33.

²⁴ Ertukel, *supra* note 23, at 313.

²⁵ See *infra* note 75 and accompanying text.

²⁶ Common Cause, the League of Women Voters, members of the state legislature, the California Fair Political Practices Commission, and the California Business Roundtable concluded that many problems stem from excessive costs and deceptive campaign practices. Ertukel, *supra* note 23, at

domination by special interests,²⁷ voter ignorance of ballot measures,²⁸ and the deterioration of representative government.²⁹ A more fundamental problem, however, is that initiative measures often mislead the public and confuse voters.³⁰ The result is a

313; *see also* E. Patashnik, California's Initiative Process in the 1990s: Laying the Groundwork for Reform 1-2 (May 1989) (unpublished manuscript) (copy on file with U.C. Davis Law Review) (stating problems include "big money," slick advertising, and professional campaigners).

²⁷ One commentator observes that "[t]he initiative, intended for use by citizens' groups, is increasingly a tool of well-organized, well-financed special interests." Ertukel, *supra* note 23, at 313. The November 1988 ballot "shows clearly who uses the initiative: economic interests against one another, consumer organizations against the moneyed groups, and public officials who have failed to get their way through representative government." Salzman, *supra* note 2, at 7. Even as early as 1939 commentators observed that "[t]he initiators of propositions have usually been pressure organizations representing interests . . . which have been unable to persuade the legislature to follow a particular line of action. . . . It appears that now well-financed interest-groups initiate measures more frequently than do spontaneously created reform-groups." V. KEY & W. CROUCH, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA* 565-68 (1939), *quoted in* H. GOSNELL, *supra* note 1, at 256-57.

²⁸ D. MAGLEBY, *supra* note 15, at 140. Most voters acknowledge that they have inadequate information when making choices on ballot propositions. *Id.* at 197.

²⁹ Some argue, as did James Madison, that any kind of direct democracy is unwise altogether because of the danger of the rule of the majority. *THE FEDERALIST* No. 10 (J. Madison) (C. Rossiter ed. 1961). Madison wrote:

A common passion or interest will, in almost every case, be felt by a majority . . . and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. . . . [S]uch democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property.

Id. at 81. Professor Magleby, an expert on the initiative process, notes that with increased use of the initiative process "[t]he quality of representation ultimately will suffer" *New Forces Take Political Initiative*, *Washington Post*, July 3, 1984, at A1, col. 5, A10, col. 1 [hereafter *New Forces*]; *see also* Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 *S. CAL. L. REV.* 733 (1988) (arguing U.S. Constitution guarantees representative government and courts should declare direct initiative process unconstitutional). *See generally* *NOMOS XXXII MAJORITIES AND MINORITIES 1* (J. Chapman & A. Wertheimer eds. 1990) (exploring long-standing issues of "[t]he presuppositions of majority rule, the justification of majority rule, the status of majorities and minorities as social groups, [and] the desirability of institutional constraints on majorities").

³⁰ Voter confusion generally refers to confusion about the measure's actual content. A difference exists "between the voters' knowledge about

dilution of citizens' individual votes.

1. Logrolling

"Logrolling" is a term traditionally used to denote methods of misleading voters in the initiative process. It encompasses two different types of initiative abuse. "Coalition-building" logrolling³¹ occurs when drafters of an initiative include disparate provisions to encourage minority factions to join together in supporting a measure so that it achieves enough support to pass.³² While commentators generally consider the evil of coalition-building logrolling to be that measures that do not have majority support are able to win approval,³³ an even greater evil may be that such measures dilute the power of each vote.³⁴

The other type of logrolling occurs when proponents bury an unpopular provision, known as a "rider,"³⁵ in a very popular or complex measure, hoping that the popular measure will carry the unpopular provision into law or that the complex measure will obfuscate the issue. The obvious evil of a successful rider is that the proponent has pulled the wool over the voters' eyes.³⁶ These problems traditionally associated with the initiative process continue today.

the broad issue involved and their knowledge about the proposition itself." D. MAGLEBY, *supra* note 15, at 140.

³¹ Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 958-59 (1983).

³² This type of logrolling permits measures to become law that, standing alone, are incapable of commanding support. Note, *Enforcing the One-Subject Rule: The Case for a Subject Veto*, 38 HASTINGS L. J. 563, 563 & n.1 (1987).

³³ Lowenstein, *supra* note 31, at 958-60.

³⁴ This Comment uses the term "vote dilution" in a manner distinct from its meaning in the context of minority voting power. See Engstrom, Taebel & Cole, *Cumulative Voting As a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 469-70 (1989) (defining vote dilution of minority groups). This Comment submits that the power and effectiveness of an individual citizen's vote is diluted when she is called upon to decide a multitude of issues by casting a single yes or no vote on a complex measure. See LEAGUE OF WOMEN VOTERS, *supra* note 10, at 62-63. See generally *infra* notes 73-74 and accompanying text (discussing vote dilution).

³⁵ Ruud, *"No Law Shall Embrace More Than One Subject,"* 42 MINN. L. REV. 389, 391 (1958); see also Lowenstein, *supra* note 31, at 961-62.

³⁶ See *infra* notes 160-62 and accompanying text.

2. Voter Confusion

As anyone who has tried to wade through a California ballot pamphlet in the last few years can attest, voter confusion is a problem in California.³⁷ Throughout the initiative process both proponents and opponents place a low priority on helping voters understand the issues.³⁸ From the drafting stage through the titling and summary of the bill to the campaign itself, deceit is as easy, if not easier, to dispense than truth. When unnecessary voter confusion is added to complex initiative measures and to complex statutory prose, the process becomes truly out of control.

An initiative's potential for confusing the voters begins in the drafting stage. Even though attorneys skilled in drafting ballot measures are increasingly writing ballot measures,³⁹ initiatives, unlike legislation, do not generally undergo a "systematic refining process, in which facts are collected, assumptions challenged, and analysis performed."⁴⁰ Drafters write measures to serve their own interests,⁴¹ and not always skillfully.⁴² Initiative proposals

³⁷ See CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION (Nov. 6, 1990), CALIFORNIA SUPPLEMENTAL BALLOT PAMPHLET, GENERAL ELECTION (Nov. 6, 1990) (totalling 213 pages of text, including 13 initiative measures); CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION (June 5, 1990), CALIFORNIA SUPPLEMENTAL BALLOT PAMPHLET, PRIMARY ELECTION (June 5, 1990) (totalling 117 pages of text, including 7 initiative measures). For a description of a law professor's first encounter with the California initiative process, see Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1508-09 (1990) (describing how author mistook one of three ballot pamphlets for phone book).

³⁸ In fact, California is at a point where measure proponents and opponents are *trying* to confuse the voters in order to win at the polls. One commentator notes that while "industry has long used the initiative as a way of gaining from the voters what it could not get from the Legislature," its new tactic is to introduce competing or counter-measures. Ainsworth, *Initiative Wars: If You Can't Beat 'Em, Swamp 'Em*, 21 CAL. J. 147, 147 (1990). He notes that it is "possible that a counter-initiative can be a success — win or lose at the ballot box. . . . [T]he counter measure could confuse voters so much that they defeat all measures." *Id.* Defeat benefits industry, according to this commentator, because it maintains the status quo. *Id.* at 149.

³⁹ E. Patashnik, *supra* note 26, at 10.

⁴⁰ *Id.* Proponents may obtain help from state officials in drafting a measure, but they seldom do. *Id.*

⁴¹ The initiative "offer[s] opportunities galore to individuals and entrepreneurs, but handicap[s] labor unions, political parties and other groups that seek to bring disparate parts of society into some compromise." *New Forces*, *supra* note 29, at A10, col. 1; see also *Brosnahan v. Brown*, 32 Cal.

may contain inconsistencies,⁴³ unwitting conflicts with existing laws,⁴⁴ ambiguities,⁴⁵ and questionable public policy bases.⁴⁶

3d 236, 266, 651 P.2d 274, 292, 186 Cal. Rptr. 30, 48 (1982) (Bird, C.J., dissenting) (stating only drafters have input into measure). Moreover, "there is no review of the proposal before it is finalized for the ballot and no opportunity for those whose interests may be affected to be heard." Note, *The California Initiative Process: A Suggestion for Reform*, 48 S. CAL. L. REV. 922, 927 (1975). A Florida court, analyzing that state's application of the single-subject rule, stated that "opportunity for input in the drafting of a proposal is not present under the initiative process and this is one of the reasons the initiative process is restricted to single-subject changes" *Fine v. Firestone*, 448 So. 2d 984, 988 (Fla. 1984). Professor Magleby describes initiative measures as "'all or nothing' proposals which are often oversimplified and appeal[ing] to the emotions. They are seldom good substitutes for the legislative process." *Ballot Initiatives: Sloppy Laws from Special Interests*, *Christian Science Monitor*, Aug. 16, 1982, at 7, col. 1 [hereafter *Sloppy Laws*]; see also *infra* note 46 and accompanying text.

⁴² Professor Magleby notes that "many propositions that pass are so poorly conceived and written that they are thrown out by the courts." *Sloppy Laws*, *supra* note 41, at 7, col. 1.

⁴³ For instance, one section of an unsuccessful 1972 proposition, the Clean Environment Act, contained an inadvertent double negative. Note, *supra* note 41, at 930 n.48. The error changed the meaning of the section, converting the intended maximum amount of a gasoline ingredient into a required minimum. *Id.* (citing example as support for contention that direct initiative makes bad law and arguing it should be abolished in favor of indirect initiative).

⁴⁴ Because any initiative that is passed by the voters supersedes conflicting laws, see CAL. CONST. art. II, § 10(c) (allowing legislature to amend or repeal an initiative statute only when voters approve the change); *supra* note 13, unforeseen conflicts with existing laws can result in the measure having a greater impact than originally contemplated. The California Constitution states that for a legislative measure "[a] section of a statute may not be amended unless the section is re-enacted as amended," CAL. CONST. art. IV, § 9, meaning that a statute cannot be implicitly amended or repealed. The constitution has no such requirement for initiative measures, and no cases directly decide whether initiatives are subject to article IV, § 9. *Brosnahan v. Brown*, 32 Cal. 3d 236, 283-84, 651 P.2d 274, 303-04, 186 Cal. Rptr. 30, 59-60 (1982) (Bird, C.J., dissenting).

⁴⁵ For example, the governor's staff found 40 ambiguities in Proposition 13, the successful 1978 property tax initiative. LEAGUE OF WOMEN VOTERS, *supra* note 10, at 40.

⁴⁶ Due to the nature of the process, ballot measures often reflect extreme positions rather than compromises. E. Patashnik, *supra* note 26, at 11; see *supra* note 41. An illustrative measure is Proposition 13, the 1978 property tax initiative which cut property taxes to the point that schools, roads, libraries, and parks suffered tremendously. See generally LaVally, *Proposition 13, Ten Years Later*, 19 CAL. J. 175 (1988) (discussing impact of Proposition

Additionally, the subject matter of an initiative can attempt to address extensive and complex social issues.⁴⁷

The title and summary process also adds to voter confusion. The title and summary are intended to assist voters who are asked to sign initiative petitions in understanding the proposed initiative. As a practical matter, however, the title and summary do little to reduce the confusion, and may even add to it. After drafting a proposal, its proponents submit it to the attorney general.⁴⁸ In turn the attorney general prepares a "title and summary,"⁴⁹ to appear on the petitions circulated for qualifying signatures.⁵⁰ The title and summary process involves reducing the proposed measure, no matter what its length, complexity, or composition, to 100 words.⁵¹ When the text of a measure is thousands of

13). Proposition 13 decimated local governments' budgets. *Id.* at 175. As a consequence, one county considered abolishing itself, two others closed libraries, and one closed the only public hospital serving several rural counties. *Id.* at 175-76. The passage of Proposition 13 shut down the fiscal system of the legislature. Address by Lenny Goldberg, University Extension, University of California at Davis, Seminar on The California Initiative Process: Current Controversies and Prescriptions (Mar. 23, 1990) (summary of proceedings on file with U.C. Davis Law Review). It also may have encouraged increased resort to the initiative process by requiring a two-thirds vote in the legislature to pass reasonable tax measures: because of the increased difficulties in getting legislative approval, people often resort to the initiative process when they see a need for increased funds. *Id.*

⁴⁷ In 1948 a commentator critical of the process noted that "[m]any of the most important problems . . . are incapable of being decided in the most beneficial manner by the whole people. Direct legislation is a most meager substitute for representative government." H. GOSNELL, *supra* note 1, at 261. Modern voters are in accord. A 1982 California poll found that 78% of the people felt that many important issues are too complicated to be decided by a simple yes or no vote. Ertukel, *supra* note 23, at 331. A more recent poll found about the same percentage of people think that "propositions have become too complex to be understood by most voters." *1990 Ballot Pamphlet—It Takes a College Degree*, L.A. Times, Nov. 4, 1990, at A3, col. 1, at A33, col. 1 [hereafter *College Degree*].

⁴⁸ CAL. ELEC. CODE § 3502 (West Supp. 1991).

⁴⁹ CAL. ELEC. CODE § 3503 (West 1977).

⁵⁰ CAL. ELEC. CODE § 3507 (West Supp. 1991). The attorney general, however, may write a different title for the ballot than the one appearing on petitions. *Id.* § 3530 (West 1977). The ballot title need not provide information for the voter as to what a yes or no vote means. One example of the confusion this rule can foster is the 1980 measure *outlawing* rent control which was titled "Rent Control." D. MAGLEBY, *supra* note 15, at 143-44. The title inferred that a yes vote favored rent control. *Id.* at 143.

⁵¹ CAL. ELEC. CODE § 3502 (West Supp. 1991). In spite of this attempt to

words long,⁵² a mere 100 words cannot begin to inform the voter of the measure's content. By law, the summary need not elucidate all the points that the proposed measure entails.⁵³ The more topics the measure addresses, therefore, the more general the 100-word summary, and the more likely the summary will provide only a general overview.⁵⁴

As the final step in the initiative process, the campaign also tends to confuse rather than enlighten voters. Once a measure qualifies for the ballot, the public begins examining and discussing the measure. Proponents and opponents spend vast sums to influence voters,⁵⁵ but in the end the voters must rely on their own faculties to sort out neutral information from partisan distor-

distill the measure's provisions into a manageable form, most voters cannot even understand the official title and summary of the proposal. Ertukel, *supra* note 23, at 318-19.

⁵² This length is not unusual. For example, the initiative measure at issue in one case consisted of 12 separate sections and 208 subsections, and contained over 21,000 words. *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 54, 599 P.2d 46, 62-63, 157 Cal. Rptr. 855, 872 (1979) (Manuel, J., dissenting).

⁵³ The title and summary need not contain a complete catalog of all the measure's provisions. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 243, 583 P.2d 1281, 1298, 149 Cal. Rptr. 239, 256 (1978). Indeed, one court found that if a measure satisfies the single-subject rule, an incomplete title is inconsequential. *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 968, 250 Cal. Rptr. 320, 324 (1988).

⁵⁴ Because § 3502 firmly limits the summary to 100 words, a broad measure gives rise to a general summary. CAL. ELEC. CODE § 3502 (West Supp. 1991).

⁵⁵ Initiative campaign costs run into the millions of dollars. Initiative proponents and opponents spent more than \$130 million on initiative campaigns in California in 1988. Kushman, *Initiative, Once a Last Resort, Now Often First*, *Sacramento Bee*, Feb. 12, 1990, at A1, col. 1, A14, col. 1 [hereafter *Initiative, First Resort*]. In qualifying a measure proponents choose to take on the rigors and expense of the campaign. If equally vested opponents exist, they are forced to launch a long and costly campaign, assuming they have the resources. Note, *supra* note 41, at 933. The more complex and far reaching the measure, the more resources opponents must have to fight it. *Id.* A measure's opponents commonly raise doubts about a measure based on its complexity and then urge a no vote based on these doubts. D. MAGLEBY, *supra* note 15, at 142. This technique is effective because confused or undecided voters often vote no. *Id.* In the past, opponents merely tried to defeat a measure. *Initiative, First Resort, supra*, at A14, col. 3. Now they often sponsor competing initiatives. *Id.*

tion.⁵⁶ If the measure is complex or contains multiple subjects, distinguishing neutral information from distortion becomes more difficult.⁵⁷

Voters⁵⁸ generally obtain their information about ballot measures from three sources:⁵⁹ (1) the ballot pamphlet;⁶⁰ (2) television, newspapers, and radio news;⁶¹ and (3) paid advertisements.⁶² At least two-thirds of the voters do not use the ballot pamphlet.⁶³ News coverage of initiatives is often sloppy and lacking in analysis.⁶⁴ Images from advertising dominate the media,⁶⁵ yet advertisements generally fail to analyze issues care-

⁵⁶ See *infra* note 62. In 1972 an initiative opponent noted that "we are witnessing in proposition after proposition, a repeated and deliberate misleading of the public . . ." *The Initiative Process: Public Hearing Before the Assembly Comm. on Elections and Reapportionment*, California Legislature, Assembly 24 (Oct. 10, 1972) (statement of Charles O'Brien, with Californians Against Higher Taxes). Professor Magleby notes that the "void of usable information for many ballot measures . . . leads to a form of electoral roulette, where voters make snap judgments based on very little information." *College Degree*, *supra* note 47, at A34, col. 1.

⁵⁷ A compound initiative is more difficult to understand because "[t]he readability of textual materials depends upon the number of ideas expressed and their complexity [among other things] . . ." D. MAGLEBY, *supra* note 15, at 137-38.

⁵⁸ For the most part, the electorate is a " 'distorted sample' of the people as a whole." Comment, *supra* note 20, at 1503. Not surprisingly, less educated persons are under-represented in deciding most propositions. D. MAGLEBY, *supra* note 15, at 121. Magleby also notes that the current initiative process threatens the democratic system because "[p]articipants . . . tend to be the better educated, affluent voters who can figure out the language." *New Forces*, *supra* note 29, at A10, col. 4.

⁵⁹ Ertukel, *supra* note 23, at 322. Sometimes, however, voters seek not information, but rather "a personality or group" supporting the measure whom the voter feels she can trust. *Campaign '88*, 19 CAL. J. 513, 515 (1988).

⁶⁰ A recent poll in California found that "most voters expect to spend less than two hours reading the pamphlet before [the] election." *College Degree*, *supra* note 47, at A34, col. 1.

⁶¹ Television and newspapers are the primary sources of voter information. D. MAGLEBY, *supra* note 15, at 131-32.

⁶² Paid advertising is "designed to manipulate opinions by appealing to voters' emotions rather than to provide useful information on the issues." Note, *supra* note 29, at 741. A professional campaigner states, "We . . . affect the way people vote . . . based on how we define the issue in their minds." Ertukel, *supra* note 23, at 323 (quoting George Young).

⁶³ D. MAGLEBY, *supra* note 15, at 136.

⁶⁴ T. CRONIN, *supra* note 21, at 117-18.

⁶⁵ *Id.* at 118.

fully or reveal all of a measure's possible consequences.⁶⁶ Instead, advertisements tend to feature emotional slogans designed to persuade, not educate.⁶⁷ Thus, when a proponent adopts a slogan that misrepresents the actual measure,⁶⁸ and the voter cannot discern the difference for herself, she casts a vote that is at least uninformed and at worst not the vote she would have cast had she understood the measure.

While legislators have built procedures into the initiative process in an attempt to keep it accessible to the voters,⁶⁹ confusion remains a potent element. Campaigns often cloud the issues rather than clarify them.⁷⁰ The ballot pamphlet contains both the

⁶⁶ See Note, *supra* note 29, at 741-42. All media, but especially television, is used "at least as much to distort as to inform." *Sloppy Laws*, *supra* note 41, at col. 3.

⁶⁷ See *Sloppy Laws*, *supra* note 41, at col. 3. Regardless of whether a voter's information comes from advertising, highly emotional 30-second Madison Avenue spots do influence the voter's understanding of the measure. E. Patashnik, *supra* note 26, at 16. The logical result is that 30-second sound bites can determine significant public policies. See *California Greening*, U.S. NEWS & WORLD REP., Nov. 5, 1990, at 35.

⁶⁸ Slogans used in California campaigns do not always provide accurate information about what issues measures address. Examples of recent campaign slogans include: "Drive the Hog from the Road" (in support of measure giving tax breaks to bus and truck companies); "They're at it again" (in opposition to measure imposing smoking regulations); "For Farmworkers' Rights" (in support of measure *restricting* farmworkers' rights). LEAGUE OF WOMEN VOTERS, *supra* note 10, at 110.

⁶⁹ Features of the process designed to insure an informed electorate include: requiring the initiative to qualify at least 131 days before the election, CAL. ELEC. CODE § 3514 (West 1977), requiring a summary of the chief points of the proposed measure, *id.* § 3503, requiring the summary to include an estimate of the financial impact of the measure, *id.* § 3504, requiring the legislative analyst to provide an analysis of the proposed measure which must appear in the voter's ballot pamphlet, *id.* § 3572 (West Supp. 1991), requiring the analysis to include a forecast of any increase or decrease in revenue or cost to state or local government resulting from passage of the initiative, *id.*, and requiring the analysis to be written so it is easily understood by the average voter, *id.* Although legislators have designed parts of the process to facilitate voter understanding of the issues, a large gap exist between intention and reality. For example, even though the law requires the ballot pamphlet to be written so the average voter can easily understand it, this requirement is not generally fulfilled. See D. MAGLEBY, *supra* note 15, at 138 (discussing how difficult voter pamphlet is to read).

⁷⁰ The 1990 November ballot contained several measures that were placed on the ballot to confuse the issues in the minds of the voters. McKenna, *Ballot Bowl*, 21 CAL. J. 376, 376 (1990). Critics claim that

measure's full text⁷¹ and the legislative analyst's impartial analysis; yet this material is often beyond the understanding of the average voter.⁷² Thus, the process leaves many voters confused about a measure's true content.

3. Vote Dilution

When a voter is asked to cast a single vote to decide many issues, the power of that vote is diluted.⁷³ The outcome of a vote on unrelated proposals contained in a single measure does not necessarily reflect the will of the community as to an individual proposal. Laws may be enacted that only a small minority of the community would have chosen had the voters been allowed to vote yes or no on each issue separately. Instead of being able to judge and vote on provisions separately, citizens must calculate whether there are some proposals they want badly enough to accept others they don't really favor. The alternative many choose is simply voting no on the entire measure.⁷⁴

Even though these problems threaten the vitality of the initiative process, California citizens are far from abandoning it.⁷⁵

initiatives are sometimes "designed to muddy the reform waters and confuse voters." *Id.* One commentator characterized the November 1990 ballot as "continu[ing] California's infamous tradition of initiative wars." *Under Attack*, *supra* note 5, at col. 3.

⁷¹ In 1981 an assemblyperson introduced a bill in a failing cause that would have permitted the text of a measure to be omitted from pamphlet if it were more than 16 pages long. A.B. 1956, Cal. Assembly, 1981-82 Regular Sess. (1981).

⁷² A commentator describes the California voter pamphlet as full of "impenetrable prose." T. CRONIN, *supra* note 21, at 82. One study found that voters required from two years of college to two years of graduate school to understand the ballot pamphlet. Note, *supra* note 29, at 740; see also *College Degree*, *supra* note 47.

⁷³ According to one California Supreme Court Justice, the single-subject rule was "intended to . . . guarantee that each subject would receive proper and independent voter consideration." *Schmitz v. Younger*, 21 Cal. 3d 90, 98, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 521 (1978) (Manuel, J., dissenting); see Ruud, *supra* note 35, at 390 (stating that purpose of single-subject rule was to "secure to every distinct measure . . . a separate consideration and decision, dependent solely upon its individual merits," quoting *Minnesota v. Cassidy*, 22 Minn. 312, 322 (1875)).

⁷⁴ See *supra* note 55 and accompanying text (discussing voters' tendency to vote no on confusing measures).

⁷⁵ A 1982 poll showed that 80% of Californians "regard statewide propositions as good for California." Ertukel, *supra* note 23, at 331. Campaign consultant George Young noted that if anyone proposed any

The initiative process is an important democratic right in California,⁷⁶ but it is weakened considerably when people do not understand the issues upon which they are called to vote.⁷⁷ An election is a show of the will of the people;⁷⁸ it gives citizens a chance to participate, express their will, and effectuate change. Thomas Jefferson believed that if citizens were informed, they could be trusted to govern themselves.⁷⁹ Voters' misunderstanding of the issues before them dilutes the important right to enact legislation.⁸⁰ When a citizen's vote, or lack thereof, stems from confusion or ignorance, the exercise is rendered meaningless and its nobility is tarnished.⁸¹ The single-subject rule embodies an attempt to make the initiative process more comprehensible and responsive to the electorate.

drastic changes in the initiative process, the people of California would revolt. *Id.* at 334. Yet citizens may be ready to endure some restrictions on the process. *See Price & Waste, supra* note 4, at 117 ("[T]he convergence of a number of factors indicates that for the first time this century the time may be ripe for significant initiative reform."). In 1990 the voters rejected an initiative that would have made reforming the initiative process more difficult. *Id.* at 118. Even advocates of a strong process acknowledge that "some reform . . . is probably warranted." *Under Attack, supra* note 5, at A3, col. 2.

⁷⁶ *Raven v. Deukmejian*, 52 Cal. 3d 336, 341, 801 P.2d 1077, 1080, 276 Cal. Rptr. 326, 329 (1990); *Brosnahan v. Brown*, 32 Cal. 3d 236, 241, 651 P.2d 274, 277, 186 Cal. Rptr. 30, 33 (1982); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 41, 599 P. 2d 46, 50, 157 Cal. Rptr. 855, 859 (1979); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 248, 583 P.2d 1281, 1301-02, 149 Cal. Rptr. 239, 259 (1978); *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563, 11 Cal. Rptr. 340, 344 (1961).

⁷⁷ *See infra* notes 178-79 and accompanying text.

⁷⁸ *See supra* note 20 and accompanying text.

⁷⁹ T. CRONIN, *supra* note 21, at 40. Jefferson further asserted that if the people were not informed enough to be wise voters, the solution was to inform them. D. SCHMIDT, *supra* note 17, at 40.

⁸⁰ *See Brosnahan v. Brown*, 32 Cal. 3d at 266-68, 651 P.2d at 292-93, 186 Cal. Rptr. at 48-49 (Bird, C.J., dissenting).

⁸¹ *See generally* D. MEIKLEJOHN, *FREEDOM AND THE PUBLIC: PUBLIC AND PRIVATE MORALITY IN AMERICA* (1965). Meiklejohn notes the necessity of private persons participating in public activities to preserve the freedom Americans cherish. "[T]he division between private and public interest can . . . claim a pedigree in our most revered authorities. Yet . . . the fully free life for Americans requires . . . participation in the affairs of the nation." *Id.* at 4.

C. *The Single-Subject Rule*

Over forty years ago, California lawmakers recognized and sought to remedy the problems inherent in the initiative process.⁸² To address the problems of voter confusion and logrolling,⁸³ in 1948 the legislature, with voter approval,⁸⁴ amended the state constitution to restrict each initiative to a single subject.⁸⁵

⁸² Over the years, legislators have introduced over 275 bills to address various problems in the initiative process. See F. FEENEY & P. DUBOIS, *IMPROVING THE INITIATIVE PROCESS: OPTIONS FOR CHANGE* (California Policy Seminar Research Report) app. B (1991) (forthcoming) (detailing many bills introduced to modify initiative process). Proposals in early unsuccessful bills included: increasing the number of signatures required to qualify a measure, A.C.A. 8, Cal. Assembly, 40th Sess. (1913), eliminating the direct initiative process and leaving only the indirect process, S.C.A. 56, Cal. Senate, 40th Sess. (1913), prohibiting paid petition circulators, A.B. 16, Cal. Assembly, 41st Sess. (1915), requiring the authors of ballot arguments to be designated by petitions signed by 100 persons, S.B. 73, Cal. Senate, 41st Sess. (1915), and providing that a measure could be kept off the ballot by a petition containing twice as many signatures as needed to qualify it, A.C.A. 17, Cal. Assembly, 42nd Sess. (1917).

⁸³ The ballot argument in favor of the single-subject rule stated:

The purposes sought to be achieved are: . . . Simplification and clarification of issues presented to the voters.

. . . If improper emphasis is placed upon one feature and the remaining features ignored, or if there is a failure to study the entire proposed amendment, the voter may be misled as to the over-all effect of the proposed amendment.

[The single-subject rule] entirely eliminates the possibility of such confusion inasmuch as it will limit each proposed amendment to one subject and one subject only.

CALIFORNIA VOTERS PAMPHLET, GENERAL ELECTION NOV. 2, 1948, PART I ARGUMENT 8 [hereafter *VOTERS PAMPHLET 1948*].

⁸⁴ An overwhelming majority of voters, 67.2%, approved the single-subject rule. *Raven v. Deukmejian*, 52 Cal. 3d 336, 364, 801 P.2d 1077, 1095, 276 Cal. Rptr. 326, 344 (1990) (Mosk, J., concurring and dissenting).

⁸⁵ CAL. CONST. art. IV, § 1c (1948, amended 1966) (current version at CAL. CONST. art. II, § 8(d)). Section 1c provided:

Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose.

Id. The current version at § 8(d) states, "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect." *Id.* art. II, § 8(d).

Single-subject advocates borrowed the single-subject concept from a simi-

The rule's rationale is that narrowly focused issues help voters grasp the issues, encouraging informed discussion.⁸⁶ As one commentator has suggested, "[a] government which is the instrument and expression of freedom must respond to, indeed must foster, the searching and unrestricted discussion of all public affairs."⁸⁷ The single-subject rule embodies the principle that voters should consider and vote on each issue independently.⁸⁸ The rule seeks to prevent vote dilution by deterring initiative proponents from forcing voters to decide major compound issues with a single yes or no vote. The single-subject rule is thus a method of keeping the initiative process under control: it is designed to prevent logrolling and voter confusion, and to enable people to discuss measures, make informed choices, and get the

lar rule for legislative enactments. CAL. CONST. art. IV, § 9. For the text of art. IV, § 9, see *infra* note 192. By 1982, 41 state constitutions contained a single-subject rule for laws enacted by their legislatures. 1A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, § 17.01 (Sands rev. 1985). Legislative bodies have used the single-subject rule for hundreds of years. Professor Ruud reports a law enacted in Rome in 98 B.C. that prohibited the proposal of laws containing unrelated provisions. Ruud, *supra* note 35, at 389. Professor Ruud notes the purpose behind the single-subject rule for legislative enactments: "By limiting each bill to a single subject, the issues presented by each bill can be better grasped and more intelligently discussed." *Id.* at 391. See generally *id.* at 389-447 (examining history, purpose, and meaning of single-subject rule).

⁸⁶ See LEAGUE OF WOMEN VOTERS, *supra* note 10, at 62-63. The League of Women Voters suggests that the single-subject rule should accomplish three things in accordance with its original design: (1) prevent proponents from forcing voters to decide major compound issues with a single yes or no vote; (2) prevent proponents from attaching unpopular proposals to proposals with wide popular support for the purpose of promoting the unpopular proposal; (3) encourage discussion by focusing measures on single topics. See *id.* (advocating narrower interpretation to accomplish purposes). In a dissenting opinion Justice Manuel of the California Supreme Court commented that the single-subject rule "was intended to protect voters from misleading and confusing initiatives." *Schmitz v. Younger*, 21 Cal. 3d 90, 98, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 521 (1978) (Manuel, J., dissenting).

⁸⁷ D. MEIKLEJOHN, *supra* note 81, at 101.

⁸⁸ Advocates of the single-subject rule believed that the busy voter did not have time to study long, wordy propositions. VOTERS PAMPHLET 1948, *supra* note 83, at 8-9. Advocates considered voter confusion and lack of information inherent in the initiative process. *Id.* They also believed that the single-subject rule minimized the danger of placing improper emphasis on one of the measure's features while ignoring others. *Id.*

most for their votes. The single-subject rule as the courts apply it, however, fails to further these goals.

II. THE COURT'S EVISCERATION OF THE SINGLE-SUBJECT RULE

The single-subject rule has not fulfilled its promise.⁸⁹ The primary reason for the rule's failure to control the initiative process is that the California Supreme Court is reluctant to enforce it. In over forty years, the court has never invalidated an initiative measure for violating the single-subject rule.⁹⁰ On the other hand, it

⁸⁹ For example, Proposition 8, the 1982 initiative entitled the Victim's Bill of Rights, was upheld as containing a single subject. *See infra* note 102 (discussing Proposition 8 and decision upholding it). Yet one law professor, a student of the initiative process, concluded that the voters certainly did not understand *all* of the different parts of the initiative. Interview with Floyd F. Feeney, Professor of Law, University of California at Davis, in Davis, Cal. (Mar. 21, 1990).

⁹⁰ Recent supreme court cases upholding initiative measures against single-subject challenge include: *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (upholding "Crime Victims Justice Reform Act," Proposition 115 on June 1990 primary election ballot); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (upholding insurance regulation initiative, Proposition 103 on November 1988 election ballot); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (upholding "The Victims' Bill of Rights," Proposition 8 on June 1982 primary election ballot); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 599 P. 2d 46, 157 Cal. Rptr. 855 (1979) (upholding Political Reform Act of 1974, Proposition 9 on June 1974 primary election ballot); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (upholding Jarvis-Gann initiative, Proposition 13 on June 1978 election ballot). In addition, recent court of appeal cases upholding measures include: *Kennedy Wholesale v. Board of Equalization*, 216 Cal. App. 3d 707, 727, 265 Cal. Rptr. 195, 206 (1989), *review granted*, 787 P.2d 95, 267 Cal. Rptr. 114 (1990) (upholding Tobacco Tax Initiative, Proposition 99 on November 1988 election ballot because provisions are germane to "reduction of disease, environmental damage and economic costs to the state which result from tobacco use"); *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 250 Cal. Rptr. 320 (1988) (upholding Insurance Reform and Consumer Protection Act of 1988, Proposition 100 on November 1988 election ballot).

The California Supreme Court has, however, recently invalidated a *legislative* measure because it did not comply with the single-subject rule. *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 742 P.2d 1290, 240 Cal. Rptr. 569 (1987). In *Harbor* the court found that "fiscal affairs" was too broad in scope to be an appropriate subject and therefore failed the "excessive generality" test as stated in the initiative case of *Brosnahan v. Brown*. *Id.* at 1100-01, 742 P.2d at 1303-04, 240 Cal. Rptr. at 582-83. In addition, the appellate courts

has recently validated measures that arguably contain multiple subjects.⁹¹

From its first opinion in 1949 applying the single-subject rule⁹² to its most recent in 1990,⁹³ the California Supreme Court has given the rule a relaxed interpretation. Its ruling upholding Proposition 115, an initiative measure approved in the November 1990 election, is typical. Proposition 115, by its own subtitles, included the following "topics":⁹⁴ preliminary hearings, independence of state constitutional rights, duties and rights of prosecutors, joinder, hearsay, discovery, voir dire, the felony-murder rule, special circumstances, sentencing for juveniles, and the new crime of torture.⁹⁵ Although the court struck a portion of the

recently invalidated two initiative measures under the single-subject rule. *Chemical Specialties Mfrs. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (1991) (holding "Public's Right to Know Act" violated single-subject rule and therefore could be given no effect even though approved by voters); *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (1988) (holding "Insurance Cost Control Initiative of 1988" violated single-subject rule and could not therefore appear on ballot).

⁹¹ *Raven v. Deukmejian*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990) (upholding Proposition 115 on November 1990 ballot, discussed *infra* notes 94-97 and accompanying text); *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982) (upholding Proposition 8 on the June 1982 ballot, discussed *infra* note 102).

⁹² *Perry v. Jordan*, 34 Cal. 2d 87, 207 P.2d 47 (1949).

⁹³ *Raven*, 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326.

⁹⁴ The court suggested that a variety of "topics" can still be considered a single subject as long as there is a common theme unifying them. *Id.* at 347, 801 P.2d at 1083-84, 276 Cal. Rptr. at 332-33.

⁹⁵ *See id.* at 364-65, 801 P.2d at 1096, 276 Cal. Rptr. at 345 (Mosk, J., concurring and dissenting). The list in text is a distillation of the list of subjects which Justice Mosk found Proposition 115 to contain:

postindictment preliminary hearings, the independence of state constitutional rights, the granting of constitutional rights to the prosecution, joinder, hearsay at preliminary hearings, "reciprocal" discovery, voir dire, voir dire pilot projects, cross-examination of hearsay declarants at preliminary hearings, the felony-murder rule, procedural and substantive law relating to special circumstances, the corpus delicti of a felony-murder special circumstance, life imprisonment without possibility of parole for 16- and 17-year-old juveniles who commit special circumstance murders, a new crime of torture, punishment for the new crime of torture, abrogation of the prosecution's duty to provide certain discovery in felony cases, offers of proof for defense witnesses at preliminary hearings, immediate writ review of delays in preliminary hearings, sufficiency of hearsay as a basis

proposition as a revision of the state constitution,⁹⁶ it found the remaining provisions did not violate the single-subject rule. The court stated that “although the provisions of Proposition 115 seem somewhat disparate, . . . they reflect a consistent theme or purpose to nullify particular decisions of our court affecting various aspects of the criminal justice system.”⁹⁷

The reason the court is so reluctant to invalidate initiatives under the single-subject rule is that it is convinced that doing so would impinge upon the right of the people in the initiative process.⁹⁸ It fears that judicial interference will weaken the value of the right to legislate by initiative. The court acknowledges a duty to preserve zealously that right to its fullest measure in spirit as well as in fact⁹⁹ and has concluded that achieving this end means

for probable cause at preliminary hearings, joinder of offenses and “cross-admissibility” of evidence, appointment of “ready” counsel, setting of trial in felony cases, maintenance of joinder cases, rules for “reciprocal” discovery, prohibition against striking a special circumstance, abrogation of the prosecution’s duty to provide certain discovery in misdemeanor cases, and immediate writ review of delays in felony trials.

Id.

⁹⁶ *Id.*, at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338. The electors can amend the constitution through the initiative process, but they can revise it only by convening a constitutional convention. *See id.* at 349, 801 P.2d at 1085, 276 Cal. Rptr. at 334. The court found that the portion of the measure that was a constitutional revision was severable because the measure contained a severance clause. *Id.* at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338.

⁹⁷ *Id.* at 348, 801 P.2d at 1084, 276 Cal. Rptr. at 333. It is interesting to compare the different levels of generality that may be used to characterize what constitutes the subject of Proposition 115. Justice Mosk’s list, quoted *supra* note 95, is a highly specific list of subjects. On a continuum of generality, the more generalized list of subjects set forth *supra* in text accompanying note 95 falls somewhere between Justice Mosk’s detailed listing and the *Raven* majority’s single “consistent theme or purpose” of the “promotion of the rights of actual and potential crime victims. *Id.* at 347, 801 P.2d at 1084, 276 Cal. Rptr. at 333. *See infra* notes 103-09 and accompanying text for a discussion of the difficulty in defining “subject.”

⁹⁸ *See* Lowenstein, *supra* note 31, at 965 (contending greatest danger of strict single-subject rule application is infringement on right of initiative).

⁹⁹ *Raven*, 52 Cal. 3d at 341, 801 P.2d at 1080, 276 Cal. Rptr. at 329; *Brosnahan v. Brown*, 32 Cal. 3d 236, 241, 651 P.2d 274, 277, 186 Cal. Rptr. 30, 33 (1982); *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d 33, 41, 599 P. 2d 46, 50, 157 Cal. Rptr. 855, 859 (1979); *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208,

restricting the initiative process as little as possible.¹⁰⁰ To the extent that the single-subject rule represents a restriction on the initiative process, the court is loathe to enforce it. The court's review of initiatives under the rule, therefore, is highly permissive.¹⁰¹

The court employs various methods to circumvent rigorous single-subject review. Yet the assumptions underlying the court's permissive approach are open to question. First, the court's belief that a hands-off approach to the initiative process preserves the electorate's power is contradicted by the reality of the initiative process today. Second, the loose standard it employs in single-subject review is derived from precedent reviewing legislative enactments, a standard inappropriate for reviewing initiative measures because of the different problems initiatives involve.

A. Methods the California Supreme Court Uses To Avoid Invalidating Initiatives Under the Single-Subject Rule

The supreme court uses several artifices to avoid invalidating initiatives under the single-subject rule. Indeed, with these methods it can avoid altogether a meaningful application of the rule. These artifices include the broad manner of defining "subject," the loose relationship allowed between the measure's provisions and its "subject," the failure to distinguish between a measure's subject and objective, and the preference for delaying review until after an election.¹⁰² These artifices allow the court to sidestep

248, 583 P.2d 1281, 1301-02, 149 Cal. Rptr. 239, 259 (1978); *McFadden v. Jordan*, 32 C.2d 330, 332, 196 P.2d 787, 788 (1948).

¹⁰⁰ In ruling on Proposition 8, the court stated, "In our democratic society in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will on matters of . . . direct and immediate importance . . ." *Brosnahan v. Brown*, 32 Cal. 3d at 248, 651 P.2d at 281, 186 Cal. Rptr. at 37 (citations omitted).

¹⁰¹ Indeed, some courts, while purporting to engage in single-subject review, merely go through the motions; in reality they do not apply the rule. In contrast, in Florida the courts recognize that the single-subject rule is a restriction on the initiative process designed to "direct the electorate's attention to one change which may affect only one subject," and so they apply the rule more strictly. *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984).

¹⁰² The litigation challenging Proposition 8, a 1982 initiative known as the Victims' Bill of Rights, exemplifies how courts apply the single-subject rule to a measure that arguably consists of multiple subjects. Proposition 8's opponents had originally challenged the measure prior to the election,

serious review of complex initiative measures.

claiming the number of valid qualifying signatures was insufficient. *Brosnahan v. Eu*, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982). The legislature had passed an urgency measure lowering the number of valid signatures required to qualify this particular measure. *Id.* The petitioners challenged that legislation and the constitutionality of the measure, alleging *inter alia* that it violated the single-subject rule. *Id.* at 2, 641 P.2d at 200, 181 Cal. Rptr. at 100. The majority refused to reach that issue, declaring that judicial review for single-subject compliance was more appropriate after the election. *Id.* at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101.

After voters approved the measure in the June 1982 election, opponents of Proposition 8 again challenged it as violating the single-subject rule. *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982). In a four-to-three decision, the California Supreme Court upheld the measure. Proposition 8's numerous provisions addressed various topics under the rubric of "criminal justice." *Id.* at 252, 651 P.2d at 283, 186 Cal. Rptr. at 39. For the full text of the initiative, see CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION 33, 56 (June 8, 1982) [hereafter BALLOT PAMPHLET 1982]. Justice Mosk found the measure contained at least 12 subjects, as enumerated in the attorney general's title and summary. *Brosnahan v. Brown*, 32 Cal. 3d at 299, 651 P.2d at 313, 186 Cal. Rptr. at 69 (Mosk, J., concurring and dissenting). Proposition 8's official title and summary read:

CRIMINAL JUSTICE. INITIATIVE STATUTES AND CONSTITUTIONAL AMENDMENT. Amends Constitution and enacts several statutes concerning procedural treatment, sentencing, release, and other matters for accused and convicted persons. Includes provisions regarding restitution to victims from persons convicted of crimes, right to safe schools, exclusion of relevant evidence, bail, use of prior felony convictions for impeachment purposes or sentence enhancement, abolishing defense of diminished capacity, use of evidence regarding mental disorder, proof of insanity, notification and appearance of victims at sentencing and parole hearings, restricting plea bargaining, Youth Authority commitments, and other matters.

BALLOT PAMPHLET 1982, *supra*, at 32.

The proponents had entitled the initiative "The Victims' Bill of Rights." *Id.* at 33. Proponents described the subject of their measure as protecting the public from criminal activity. In dissent, Justice Mosk pointed out that all of criminal law is concerned with protecting the public from criminal activity, and that the stated subject was in reality the objective of the measure. *Brosnahan v. Eu*, 31 Cal. 3d at 10-11, 641 P.2d at 205-06, 181 Cal. Rptr. at 105-06. The legislative analyst summarized the bill under the following headings: Restitution, Safe Schools, Evidence, Bail, Prior Convictions, Longer Prison Terms, Defenses of Diminished Capacity and Insanity, Victim Statements, Plea Bargaining, Exclusion of Certain Persons from Sentencing to the Youth Authority, and Mentally Disordered Sex Offenders.

1. Defining "Subject" Broadly

One of the ways the court avoids applying the single-subject rule is to define "subject" so broadly that it can encompass a multiplicity of topics. The court is aided in this tactic by the fact that the term "subject," in the context of the single-subject rule, does not lend itself easily to definition.¹⁰³ One can only define a sub-

BALLOT PAMPHLET 1982, *supra*, at 32, 54-55. The analyst described the proposal as altering criminal justice procedures, criminal punishments, and constitutional rights. *Id.* at 32.

The California Supreme Court upheld the measure, ruling that all of Proposition 8's provisions were reasonably germane to the subject of "promoting the rights of actual or potential crime victims." *Brosnahan v. Brown*, 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36. In other words, the court allowed the measure to stand because all the provisions were somehow relevant to the objective of protecting the public from criminal activity. Yet the question remained whether the voters understood the measure's scope. *See id.* at 271, 651 P.2d at 295, 186 Cal. Rptr. at 51 (Bird, C.J., dissenting) (suggesting voters were not aware measure could also harm victims); *see also supra* note 89 (suggesting voters were not aware of all provisions of Proposition 8).

Chief Justice Bird dissented in both *Brosnahan v. Eu* and *Brosnahan v. Brown*, arguing in both cases that the measure contained multiple subjects. *Brosnahan v. Brown*, 32 Cal. 3d at 262-81, 651 P.2d at 290-302, 186 Cal. Rptr. at 46-57 (Bird, C.J., dissenting); *Brosnahan v. Eu*, 31 Cal. 3d at 17, 641 P.2d at 209-10, 181 Cal. Rptr. at 109-10 (Bird, C.J., dissenting). She characterized the initiative as a "grab bag of proposals . . . too diverse and unrelated" to be valid under the single-subject rule. *Id.* at 17, 641 P.2d at 209-10, 181 Cal. Rptr. at 110 (stating that provisions of Proposition 8 did not form a cohesive whole).

The supreme court clearly delineated the direction it was going with the single-subject rule when it decided *Brosnahan v. Brown*. The court religiously followed that direction in its next decision involving a questionably single-subject initiative. *See Raven v. Deukmejian*, 52 Cal. 3d 336, 346-49, 801 P.2d 1077, 1083-85, 276 Cal. Rptr. 326, 332-34 (1990); *supra* notes 93-97 and accompanying text. One problem with that direction, however, is that the court may have chosen it through a result-driven contortion of single-subject rule analysis. It can be said with a fair amount conviction that the *Brosnahan* court was not about to invalidate the "Victim's Bill of Rights." In addition to all of the usual reasons behind the court's aversion to invalidating measures under the single-subject rule, the political momentum behind the measure was considerable. The legislature had passed an urgency measure lowering the number of signatures this particular measure needed to qualify, making it clear it was in favor of the measure being put to the voters. *See Brosnahan v. Eu*, 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101. Further, 56% of the voters approved the measure. *Brosnahan v. Brown*, 32 Cal. 3d at 263, 651 P.2d at 290, 186 Cal. Rptr. at 46.

¹⁰³ Professor Lowenstein points out that one can consider any mixture of

ject's level of generality in relation to other subjects.¹⁰⁴ For example, "general welfare" is a broad subject that contains other subjects; "criminal justice" is a narrower subject within "general welfare;" "pretrial procedures" and "bail guidelines" are still narrower subjects within "criminal justice." The level of generality the legislature had in mind when it adopted the single-subject rule is far from clear.¹⁰⁵ Moreover, because one cannot define subject except in relation to something else, verbal formulation of a specific, enforceable standard remains elusive.

In response to these difficulties, the court has adopted arbitrary methods of defining an initiative's subject. One such method is to allow the proponents to define the subject or purpose in the measure itself.¹⁰⁶ Another is to define a subject as any group of provisions that shows dissatisfaction with recent court decisions in a particular area of law.¹⁰⁷ The court has declared that it will not

concepts and items a single subject since one can define subject broadly enough to encompass anything. See Lowenstein, *supra* note 31, at 938-42 (discussing difficulty of defining subject). Professor Lowenstein suggests that equally valid definitions of subject along a continuum could be, for example, "University Education" and "Philosophy." *Id.* at 940. While either level of generality could conceivably be considered a subject in itself, to consider "University Education" in any meaningful way, it would have to be broken down into smaller components of some kind. See *generally* Note, *supra* note 32, at 572 (characterizing definition of subject as circular).

¹⁰⁴ Lowenstein, *supra* note 31, at 938-39 (asserting that one cannot define "subject" by any "objective demarcation of the human mind").

¹⁰⁵ The ballot argument in favor of the single-subject rule merely stated that the rule "will limit each proposed amendment to one subject and one subject only." See VOTERS PAMPHLET 1948, *supra* note 83, at 8-9.

¹⁰⁶ See *Brosnahan v. Brown*, 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36. The court stated that the general object of Proposition 8 was to promote "the rights of actual or potential crime victims. As explained in the initiative's preamble, the 10 sections were designed to strengthen procedural and substantive safeguards for victims in our criminal justice system." *Id.*; see also *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 360-61, 245 Cal. Rptr. 916, 921 (1988). Yet the court might not invariably accept an initiative's self-expressed purpose. See *infra* note 162 and accompanying text (discussing appellate court's rejection of self-expressed subject of "Insurance Cost Control Initiative of 1988").

¹⁰⁷ See *Raven v. Deukmejian*, 52 Cal. 3d 336, 347, 801 P.2d 1077, 1084, 276 Cal. Rptr. 326, 333 (1990) ("A subsidiary unifying theme underlying [this proposition] is that all the foregoing changes appear directed toward abrogating particular holdings of this court that the initiative's framers deemed unduly expansive of criminal rights."); *Brosnahan v. Brown*, 32 Cal. 3d at 248, 651 P.2d at 281, 186 Cal. Rptr. at 37 ("We are reinforced in our conclusion that [this proposition] embraces a single subject by observing

permit a subject that is excessively general,¹⁰⁸ but the line needs to be drawn somewhat short of that. Certainly, a measure's provisions should be more related than merely capable of bearing some broad label.¹⁰⁹

2. Using Loose Standards of Relatedness

Once the court defines "subject" at the appropriate level of generality, it then evaluates whether the provisions of the measure are sufficiently related to each other and to the measure's subject. In performing this evaluation, the California Supreme Court currently uses a "reasonably germane" standard: an initiative measure consists of a single subject if all of its provisions are "reasonably germane" to each other or to a single subject or purpose.¹¹⁰

that the measure appears to reflect public dissatisfaction with several prior judicial decisions in the area of criminal law.").

¹⁰⁸ In *Brosnahan v. Brown* the court concluded that the single-subject rule "forbids joining disparate provisions which appear germane only to topics of excessive generality such as 'government' or 'public welfare.'" *Brosnahan v. Brown*, 32 Cal. 3d at 253, 651 P.2d at 284, 186 Cal. Rptr. at 40. This was also the court's rationale in invalidating a legislative enactment under the legislative single-subject rule. *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 742 P.2d 1290, 240 Cal. Rptr. 569 (1987) (holding legislative enactment invalid under single-subject rule because "fiscal affairs" is excessively general subject).

¹⁰⁹ *Raven v. Deukmejian*, 52 Cal. 3d at 363-64, 801 P.2d at 1095, 276 Cal. Rptr. at 344 (Mosk, J., concurring and dissenting) (criticizing court's analysis in *Brosnahan*). Justice Mosk stated that the requirement is one "of substance rather than [one of] label." *Id.* at 360, 801 P.2d at 1093, 276 Cal. Rptr. at 342 (emphasis in original). An example of how the court will use a label to encompass a broad range of topics comes from Proposition 8, the Victim's Bill of Rights, discussed *supra* note 102. One of the provisions in Proposition 8 declared that public school students and staff have an "inalienable right" to safe schools. *Brosnahan v. Brown*, 32 Cal. 3d at 243, 651 P.2d at 278, 186 Cal. Rptr. at 34. Opponents of Proposition 8 argued that the safe schools provision "concerns an entirely unrelated matter, isolated from criminal behavior, and therefore embraces a separate subject." *Id.* at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36. The court, however, found that a careful reading of the preamble indicated the proponents intended that students and staff should be safe from criminal behavior; therefore the measure did not encompass more than a single subject. *Id.* at 247-48, 651 P.2d at 280-81, 186 Cal. Rptr. at 36-37.

¹¹⁰ *Raven v. Deukmejian*, 52 Cal. 3d at 346, 801 P.2d at 1083, 276 Cal. Rptr. at 332 (holding measure satisfies single-subject rule if all parts are reasonably germane); *Brosnahan v. Brown*, 32 Cal. 3d at 245, 651 P.2d at 279, 186 Cal. Rptr. at 35 (1982) (same); *Fair Political Practices Comm'n v.*

The court generally finds single-subject compliance if the measure's stated subject encompasses all of the measure's provisions.¹¹¹ In applying this standard, the court has found that provisions bearing only the slightest connection to each other are reasonably germane.¹¹² In one case the court reasoned that a narrower construction of the rule would limit voters to initiatives containing only brief general statements.¹¹³ Under existing case law, however, only the most extreme initiatives are subject to invalidation;¹¹⁴ complex initiatives containing numerous topics

Superior Court, 25 Cal. 3d 33, 43, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979) (same); *Amador Valley Joint Unified High School Dist. v. State Bd. of Equalization* 22 Cal. 3d 208, 229-30, 583 P.2d 1281, 1290, 149 Cal. Rptr. 239, 248 (same); *Perry v. Jordan*, 34 Cal. 2d 87, 92-93, 207 P.2d 47, 49-50 (1949) (same).

In its latest ruling under the single-subject rule the court seems to have further encumbered an already difficult task by applying a new formulation of the standard: all provisions in a measure must "reflect a consistent theme." *Raven*, 52 Cal. 3d at 348, 801 P.2d at 1084, 276 Cal. Rptr. at 333.

¹¹¹ Anthony Miller, California's Chief Deputy Secretary of State in 1989, stated, "As long as you can come up with one concept to include all the parts, it's probably okay." *Environmental Groups Offer Their Dream List*, L.A. Times, Oct. 11, 1989, at A1, col. 2, A20, col. 6.

¹¹² See, e.g., *Raven*, 52 Cal. 3d at 348, 801 P.2d at 1084, 276 Cal. Rptr. at 333 (approving measure even though provisions "somewhat disparate"); see also *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 359, 245 Cal. Rptr. 916, 921 (1988) (stating reasonably germane standard is "undeniably liberal").

¹¹³ *Brosnahan v. Brown*, 32 Cal. 3d at 246, 651 P.2d at 279-80, 186 Cal. Rptr. at 35-36.

¹¹⁴ Lowenstein, *supra* note 31, at 949-53. Professor Lowenstein argues that application of the single-subject rule to invalidate only extreme measures is appropriate because the single-subject rule was a response to an extreme measure, a 1948 initiative entitled the California Bill of Rights. *Id.* at 950-51. The California Bill of Rights included provisions regulating pensions, gambling, taxes, oleomargarine, healing arts, civic centers, the legislature, elections, public lands and waters, and surface mining. It was struck down shortly before the single-subject rule was enacted, on the ground that it was actually a constitutional revision and not appropriate for the initiative process. *McFadden v. Jordan*, 32 Cal. 2d 330, 334-40, 196 P.2d 787, 790-93 (1948). Lowenstein's conclusion that the rule was aimed at extreme cases is also based on a statement by the rule's legislative author that this was the reason behind the rule. See Lowenstein, *supra* note 31, at 949 n.55. The legislative author's stated reason, however, says little about the reasons other legislators and citizens voted to adopt the single-subject rule. The argument in the 1948 ballot pamphlet in favor of the single-subject rule does not mention extreme cases. See *VOTERS PAMPHLET 1948*, *supra* note 83, at 8-9. The ballot argument, which may have been persuasive

are likely to be upheld.¹¹⁵

Several commentators and dissenting California Supreme Court justices have suggested an alternative “functionally related” standard. This standard would require an initiative’s provisions to be “functionally related in furtherance of a common underlying purpose.”¹¹⁶ “Functionally related” provisions are

to many voters, stated that the purpose of the rule is to “simplif[y] and clarif[y] . . . issues presented to the voters.” *Id.* at 8.

Professor Lowenstein also argues that the single-subject rule as applied to legislative measures had long been construed to apply only to extreme measures and that the “rule’s proponents no doubt supposed that the same result could be accomplished by adopting a similar rule for initiatives.” Lowenstein, *supra* note 31, at 951. Lowenstein finds this conclusion confirmed by *Perry v. Jordan*, 34 Cal. 2d 87, 207 P.2d 47 (1949), the first case in which the court interpreted the single-subject rule, and which Lowenstein characterizes as “as a contemporary interpretation.” Lowenstein, *supra* note 31, at 952.

While *Perry* may well have been the court’s interpretation in 1949, it may no longer be an appropriate approach. As a matter of constitutional doctrine, increased understanding and changes in social realities invite reinterpretation of constitutional provisions. Compare, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (finding racial segregation does not violate fourteenth amendment) with *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (finding that in modern context of education fourteenth amendment prohibits segregated schools).

¹¹⁵ For example, in a single-subject challenge the court upheld the Political Reform Act of 1974, which contained the following provisions: establishment of the Fair Political Practices Commission; disclosure requirements for candidates’ significant financial supporters; limitations on campaign spending; regulations for lobbyist activities; rules relating to conflict of interest; rules relating to voter pamphlet arguments; and rules positioning candidates on the ballot. *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d 33, 37, 599 P.2d 46, 47-48, 157 Cal. Rptr. 855, 856-57 (1979) (holding measure contains single subject though several provisions were previously invalidated as violating United States Constitution); see also *supra* notes 94-97 (discussing *Raven v. Deukmejian*), 102 (discussing *Brosnahan v. Brown*) and accompanying text.

¹¹⁶ *Brosnahan v. Brown*, 32 Cal. 3d at 271, 651 P.2d at 295, 186 Cal. Rptr. at 51 (Bird, C.J., dissenting) (suggesting all provisions must be functionally related); *Brosnahan v. Eu*, 31 Cal. 3d 1, 9, 641 P.2d 200, 204, 181 Cal. Rptr. 100, 104 (1982) (Mosk, J., concurring and dissenting) (same); *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d at 50, 599 P.2d at 55, 157 Cal. Rptr. at 864 (Tobriner, J., concurring) (same); *Schmitz v. Younger*, 21 Cal. 3d 90, 100, 577 P.2d 652, 656, 145 Cal. Rptr. 517, 521 (1978) (Manuel, J., dissenting) (same); Comment, *The California Initiative Process: The Demise of the Single-Subject Rule*, 14 PAC. L.J. 1095 (1983) (endorsing functionally related standard as superior to reasonably germane standard).

interdependent; they rely on each other to be effective.¹¹⁷ In a recent case the supreme court concluded that “functionally related” was merely one level of relationship between provisions that would satisfy the reasonably germane standard.¹¹⁸ Thus, while all functionally related provisions will satisfy the reasonably germane standard and thereby comply with the single-subject rule,¹¹⁹ many provisions that are not functionally related will

¹¹⁷ Lowenstein, *supra* note 31, at 946. Functionally related means that “the effectiveness of one provision in accomplishing its purpose must be influenced in some manner by the existence of the other provisions.” *Id.* In other words, each provision would be unable to operate effectively without the others.

For example, the court found the provisions of Proposition 13, a 1978 initiative designed to limit property taxes, to be functionally related. *See* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978). Proposition 13 contained four distinct sections: the first section limited the tax rate applicable to real property, the second section limited the assessed value of real property, the third section limited the methods by which the legislature could change any state taxes, and the fourth section restricted local governments from imposing other local taxes. *Id.* at 218, 583 P.2d 1283, 149 Cal. Rptr. 241. The third section consisted of two parts: (1) requiring the legislature to pass any increase in tax rates or change in methods by a two-thirds majority, and (2) forbidding the legislature from imposing any new property taxes. *Id.* at 220, 583 P.2d at 1284, 149 Cal. Rptr. at 242.

The objective of the measure was to lower property taxes. The court found that each section was necessary to ensure that taxes lost from lowering taxes on real property would not be assessed elsewhere, thereby thwarting the objective of lowering property taxes. *Id.* at 231, 583 P.2d at 1290-91, 149 Cal. Rptr. at 248-49. The first section (limit on tax rate), the second section (limit on assessed value), and the second part of the third section (no new property taxes) are clearly interdependent: if any one of those sections is not in place, the others do not have the desired effect. That is to say, if there is no limit on the tax rate, then it does not matter that there is a limit on the assessed property value or a prohibition on new property taxes because new revenues could be raised by increasing the tax rate. *Id.*

¹¹⁸ Brosnahan v. Brown, 32 Cal. 3d at 248-49, 651 P.2d at 281, 186 Cal. Rptr. at 37. The court stated that “interdependence merely illustrated *one type* of multifaceted legislation which would meet the single subject test.” *Id.* (emphasis in original); *cf.* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248 (holding challenged initiative valid under both reasonably germane test *and* functionally related test).

¹¹⁹ Brosnahan v. Brown, 32 Cal. 3d at 248-49, 651 P.2d at 281, 186 Cal. Rptr. at 37.

nonetheless will be valid because they are reasonably germane.¹²⁰

Neither the reasonably germane nor the functionally related standard adequately furthers the policies of the initiative process and the purposes of the single-subject rule. The reasonably germane standard provides too much latitude for drafters. "Germane" means relevant¹²¹ or pertinent.¹²² Relevance can be found when provisions have a very tenuous relationship.¹²³ Requiring a more direct relationship would provide a more appropriate standard.¹²⁴ For example, requiring that the legislature approve *any* tax increase with a two-thirds majority might be *relevant* to lowering property taxes, but it is not directly related

¹²⁰ *Id.* (stating functionally related relationship not essential for single-subject validity).

¹²¹ WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 514 (1985).

¹²² BLACK'S LAW DICTIONARY 618 (5th ed. 1979).

¹²³ Despite this definition of the term "germane," the case from which the reasonably germane standard derives uses language indicating the relationship between provisions must be more direct than some relevance:

Provisions governing projects *so related and interdependent as to constitute a single scheme* may be properly included within a single act. . . . [A] single act [may include provisions] germane to the general subject as expressed in its title and within the field of legislation suggested thereby. . . . The general purpose of a statute being declared, the details provided for its accomplishment will be regarded as necessary incidents. . . . A provision which . . . has a *necessary and natural connection with such purpose* is germane within the rule.

Evans v. Superior Court, 215 Cal. 58, 62-63, 8 P.2d 467, 469 (1932) (citations omitted, emphasis added). Justice Mosk has suggested that this case referred to relations among provisions, not merely to labels broad enough to encompass all parts. *Raven v. Deukmejian*, 52 Cal. 3d 336, 362, 801 P.2d 1077, 1094, 276 Cal. Rptr. 326, 343 (1990) (Mosk, J., concurring and dissenting).

¹²⁴ This is the standard adopted by Florida. Florida requires that provisions have a direct relation to the subject of the initiative. *Fine v. Firestone*, 448 So. 2d 984, 988-89 (Fla. 1984). In Florida, however, initiatives are limited to constitutional amendments. *Id.* at 989. The direct relationship requirement derives from express language in the Florida Constitution: "any . . . revision or amendment [to the constitution] shall embrace but one subject and matter *directly* connected therewith." FLA. CONST. art. XI, § 3 (emphasis added). In contrast, Florida's single-subject rule for legislative enactments states, "Every law shall embrace but one subject and matter *properly* connected therewith" *Id.* art. III, § 6 (emphasis added). In *Fine* the court held that the language regarding legislative enactments is broader than the language regarding initiatives. *Fine v. Firestone*, 448 So. 2d at 988-89.

this objective. For the two provisions to be directly related the objective must be broadened to that of lowering taxes in general.

In an arena where the issues are often complex, measures consisting of several topics falling under such broad subjects as those allowed by the reasonably germane standard create a vast potential for voter confusion. Even Professor Lowenstein, a defender of the court's application of the single-subject rule, agrees that "[i]n the case of a wildly diverse measure that makes major revisions of law in several unrelated areas, the diversity is likely to be a source of complexity, whatever the intrinsic simplicity or complexity of the separate provisions."¹²⁵ Whatever test is applied should require at least that the measure be "a coherent enactment in and of itself."¹²⁶

The reasonably germane standard as the court applies it permits too many issues to be put to a single vote. It thus furthers opportunities for logrolling — coalition-building to pass compound measures unable to stand on their own, and burying unpopular riders in complex measures. The courts and some commentators downplay this effect, suggesting that while the single-subject rule is an ineffective tool for managing logrolling, logrolling is inherent in the process: "Most choices in life involve trade-offs, and there is no reason to expect voting on initiatives to be any different."¹²⁷

It is true that voters must weigh the benefits of a measure

¹²⁵ Lowenstein, *supra* note 31, at 956. Professor Lowenstein was apparently referring to extreme measures such as the one invalidated in *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1948), discussed *supra* note 114, when he wrote about "law in . . . unrelated areas." Yet in light of his analysis of the subjectivity of defining a subject, *see supra* notes 103-04 and accompanying text, it seems obvious that determining whether areas of law are unrelated involves subjective judgments that will vary with the situation and the person making the decision.

¹²⁶ *Raven*, 52 Cal. 3d at 364, 801 P.2d at 1095, 276 Cal. Rptr. at 344 (Mosk, J., concurring and dissenting). A coherent enactment standard might be what is required to draw a distinction between, on the one hand, enactments that modify in a single measure the constitution and various statutory codes, *see id.* at 357, 801 P.2d at 1090, 276 Cal. Rptr. at 339 (reviewing initiative amending constitution, penal code, evidence code, and civil procedure code), and on the other, those that create a new code, *Evans v. Superior Court*, 215 Cal. at 60, 8 P.2d at 468 (reviewing enactment creating a probate code), or part of a code, *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 37, 599 P.2d 46, 47, 157 Cal. Rptr. 855, 856 (1979) (reviewing initiative expanding government code).

¹²⁷ Lowenstein, *supra* note 31, at 958; *see also Raven*, 52 Cal. 3d at 348,

against the burdens. With a multisubject measure, however, weighing benefits and burdens becomes a highly complex calculation. If one contemplates the benefits and burdens of a single action, one considers its beneficial and detrimental impacts. When multiple subjects are involved, however, one must contemplate not only the impact of each separate subject, but also how those impacts weigh against each other. 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.

The functionally related standard is equally unacceptable because it is too strict. While the reasonably germane standard fails to further the specific goals of the single-subject rule — preventing logrolling, voter confusion, and vote dilution — the functionally related standard fails to serve the broader goal of the initiative process — empowering the electorate. A strict application of the functionally related standard would mean that a measure would violate the single-subject rule if each provision were not necessary to give the others effect.¹²⁸ While such a standard would probably produce more coherent measures,¹²⁹ it would

801 P.2d at 1085, 276 Cal. Rptr. at 334 (noting that weighing benefits and burdens is “inherent in the passage of most laws”).

¹²⁸ See *supra* note 117 and accompanying text.

¹²⁹ On six occasions justices who favored applying the functionally related test have voted to declare initiative measures unconstitutional. Lowenstein, *supra* note 31, at 946 & n.39. The measures that would have failed the functionally related test are the same measures that have sparked the most single-subject rule controversy. These measures include: the measure known as the Victims’ Bill of Rights, discussed in *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); see also *supra* note 102, the Political Reform Act of 1974, discussed in *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979); see also *supra* notes 52, 115, and a measure containing provisions (1) making it unlawful for any teacher to strike, (2) prohibiting campaign contributions by teachers’ organizations, and (3) preventing tax revenues from being used to provide transportation for the purpose of racially balancing public schools, discussed in *Schmitz v. Younger*, 21 Cal. 3d 90, 577 P.2d 652, 145 Cal. Rptr. 517 (1978) (Manuel, J., dissenting). In *Schmitz* the majority did not address whether the measure in question complied with the single-subject rule. *Id.* at 93, 577 P.2d at 653, 145 Cal. Rptr. at 518. The attorney general had decided that the proposed measure concerned more than one subject, and he had refused to prepare a title and

deny the electorate the ability to deal with broad social problems through the initiative process.¹³⁰ Provisions could only be combined in a single measure if they were interdependent, that is to say if they gave each other life, not if they merely had additive value.¹³¹

Professor Lowenstein, in a well-reasoned article, contrasts the reasonably germane standard with the functionally related standard.¹³² After discussing both the political and judicial history of the single-subject rule, he comes down squarely in favor of the reasonably germane standard.¹³³ He proposes, however, that the standard be refined: “the provisions of a measure should be regarded as ‘reasonably germane’ if, in the public understanding, they bear some relationship to each other.”¹³⁴ While Professor Lowenstein’s proposal might be a small step in the right direction, it does not go far enough.¹³⁵ It does not sufficiently address

summary. *Id.* at 92, 577 P.2d at 653, 145 Cal. Rptr. at 518. The majority held that preparing the title and summary was a ministerial action that the attorney general could not refuse to perform; he could challenge a measure only by “timely and appropriate legal action.” *Id.* at 92-93, 577 P.2d at 653, 145 Cal. Rptr. at 518. Meanwhile, Justice Manuel in dissent did reach the single-subject issue, finding that the initiative did not comply with the single-subject rule. *Id.* at 101, 577 P.2d at 658, 145 Cal. Rptr. at 523 (Manuel, J., dissenting).

In a seventh instance, the dissenting justice who would have struck down the measure, while not articulating the functionally related test, suggested that reasonably germane provisions must be interrelated at some level. *Raven*, 52 Cal. 3d at 364, 801 P.2d at 1095, 276 Cal. Rptr. at 344 (Mosk, J., concurring and dissenting) (stating that “the ‘reasonably germane’ test must contain as its ultimate criterion whether an initiative measure is internally interrelated as a whole and parts”). Justice Mosk found that the measure did not meet the reasonably germane test as he defined it. *Id.* at 364-65, 801 P.2d at 1095-96, 276 Cal. Rptr. at 344-45.

¹³⁰ Lowenstein, *supra* note 31, at 957. Lowenstein views the functionally related standard as “stringent” and claims that it would “introduce an important new element of inflexibility” into the process. *Id.* at 945-46. He acknowledges, however, that some limits on the process are appropriate because the process “was never designed as a wholesale instrument of law revision.” *Id.* at 957.

¹³¹ *Id.* at 946.

¹³² *Id.* at 945-47.

¹³³ *Id.* at 938.

¹³⁴ *Id.* at 970.

¹³⁵ In fact, it is not apparent that this “popular understanding” proposal goes anywhere. Lowenstein compares his new standard to both the reasonably germane and the functionally related standards by applying it to several measures the courts have considered. *Id.* at 972-75. In two of the

the goals that the proponents of the single-subject rule contemplated.¹³⁶ The most appropriate standard lies somewhere between the functionally related and the reasonably germane standards, and might be termed a “directly related” standard.¹³⁷ Yet, no matter what standard most appropriately furthers the goals of the single-subject rule, if the court is resistant to single-subject review, the verbal formulation will be irrelevant.

3. Failing to Distinguish Between a Measure’s Subject and Objective

Another way the court avoids applying the single-subject rule is through lack of precision and consistency in the way it defines certain terms. The court typically uses the terms “subject” and “objective” interchangeably,¹³⁸ although the California Constitution specifies that “initiative measures having more than one *sub-*

three comparisons he makes, the traditional reasonably germane test and his “popular understanding” variation produce the same results. The two measures that would pass both tests are the Political Reform Act of 1974, reviewed in *Fair Political Practices Comm’n v. Superior Court*, 25 Cal. 3d 33, 599 P.2d 46, 157 Cal. Rptr. 855 (1979); *see supra* notes 52, 115, and Proposition 8, the Victim’s Bill of Rights, reviewed in *Brosnahan v. Brown*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982); *see supra* note 102.

The initiative that did not easily survive Lowenstein’s popular understanding test, the measure reviewed in *Schmitz v. Younger*, contained provisions (1) making it unlawful for any teacher to strike, (2) prohibiting campaign contributions by teachers’ organizations, and (3) preventing tax revenues from being used to provide transportation for the purpose of racially balancing public schools. *Schmitz v. Younger*, 21 Cal. 3d 90, 577 P.2d 652, 145 Cal. Rptr. 517 (1978). This measure was never evaluated by the court under the reasonably germane standard. *See supra* note 129. Lowenstein found that the initiative might come out differently under the traditional reasonably germane standard and his “popular understanding” variation, but was unsure that it would survive either one. Lowenstein, *supra* note 31, at 974-75. The fact that the antibusing provision looks like a rider on the provisions dealing with teachers in itself strengthens the case for invalidating the measure. The failure of the popular understanding test to provide a clear answer regarding the measure’s invalidity suggests that its refinement of the reasonably germane test is no improvement at all.

¹³⁶ *But see* Lowenstein, *supra* note 31, at 949-53 (declaring aim of single-subject rule proponents was merely to eliminate extreme cases); *supra* note 114 and accompanying text.

¹³⁷ *See supra* note 124 (describing Florida’s directly related standard).

¹³⁸ *See, e.g.*, *Brosnahan v. Brown*, 32 Cal. 3d 236, 247, 651 P.2d 274, 280, 186 Cal. Rptr. 30, 36 (1982) (upholding measure in which each provision “bears a common concern, ‘general object’ or ‘general subject’”).

ject may not be submitted to the electors or have any effect.”¹³⁹ Instead of requiring that provisions be reasonably germane to a subject, the court requires only that provisions be reasonably germane to the promotion of the measure’s objective.¹⁴⁰

The terms “subject” and “objective,” however, have distinctly different meanings: “subject” denotes the measure’s subject matter, while “objective” denotes the measure’s purpose or aim.¹⁴¹ A measure’s objective is potentially much broader than its subject.¹⁴² For example, if an initiative’s subject is property tax, all of its provisions must relate to property tax. If courts define the subject as the “objective of lowering property tax,” however, any provision that somehow relates to lowering property tax would be valid.¹⁴³ Requiring that provisions relate to a common objective

¹³⁹ CAL. CONST. art. II, § 8(d) (emphasis added).

¹⁴⁰ For example, in *Raven* the measure was upheld because the provisions “reflect[ed] a consistent theme or purpose.” *Raven v. Deukmejian*, 52 Cal. 3d 336, 348, 801 P.2d 1077, 1084, 276 Cal. Rptr. 326, 333 (1990).

¹⁴¹ Ruud, *supra* note 35, at 394-96.

¹⁴² Proposition 8 proponents used the term “subject,” though protecting the public from criminal activity is really the objective of the bill. *Brosnahan v. Eu*, 31 Cal. 3d 1, 10-11, 641 P.2d 200, 205-06, 181 Cal. Rptr. 100, 105-06 (1982) (Mosk, J., concurring and dissenting); *see also supra* note 102 (discussing validation of Proposition 8 as encompassing single subject of protection of public from criminal activity).

¹⁴³ This was precisely the case with Proposition 13, which contained four distinct sections: (1) a limit on the tax rate applicable to real property; (2) a limit on the assessed value of real property; (3) a limit on the methods by which the legislature could change any state taxes, requiring the legislature to pass any increase in tax rates or change in taxation methods by two-thirds majority and forbidding the legislature to impose any new property taxes; and (4) a restriction on local governments’ ability to impose other local taxes. *See supra* note 117.

Proposition 13’s subject was property tax. *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 232, 583 P.2d 1281, 1291-92, 149 Cal. Rptr. 239, 249-50 (1978). The first part of section three (requiring a two-thirds legislative majority) and the fourth section (restricting other local taxes) do not relate to property taxes. While those sections might be relevant to lowering property taxes, they are not related to the subject of property taxes.

The objective of the measure was to lower property taxes. The entire measure is related to achieving that objective. In *Amador*, the court found that each section was necessary to ensure that taxes lost from taxing real property would not be assessed elsewhere. *Id.* at 231, 583 P.2d at 1290-91, 149 Cal. Rptr. at 248-49. Forbidding local governments to assess taxes elsewhere, however, goes to the objective of lowering taxes in general, not to the subject of lowering property taxes.

does not necessarily mean that a measure having multiple subjects will be upheld, especially if a court is truly examining a measure to determine if it is compound. If a court is searching for ways to uphold the measure, however, the interchangeable use of "subject" and "objective" provides a convenient means for doing so.

4. Postponing Review Until After the Election

The final way the court avoids applying the single-subject rule is through its stated judicial preference for postponing single-subject review until after the voters have spoken.¹⁴⁴ By law opponents may challenge the validity of a proposed measure either before its submission to the voters or after a successful election.¹⁴⁵ The California Supreme Court, however, prefers reviewing single-subject challenges after, rather than before, elections.¹⁴⁶ It perceives pre-election review as an interference with the election process.¹⁴⁷

Yet the court invariably upholds measures reviewed after their

¹⁴⁴ While it is a very strong preference, it is not an absolute prohibition. See *California Trial Lawyers Ass'n v. Eu*, 200 Cal. App. 3d 351, 357, 245 Cal. Rptr. 916, 919 (1988) (finding "no absolute prohibition on preelection review").

¹⁴⁵ CAL. CONST. art. II, § 8(d). "An initiative measure embracing more than one subject *may not be submitted to the electors* or have any effect." *Id.* (emphasis added). Opponents may challenge a measure's legal sufficiency on the bases of form, title, and summary requirements, as well as single subject and nonrevision requirements. Comment, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CALIF. L. REV. 1216, 1227 (1983) (arguing pre-election review of initiatives for single-subject rule, form, and nonrevision compliance is necessary for adequate voter protection); see also *California Trial Lawyers Ass'n*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (holding initiative proposal unconstitutional for violating single-subject rule before initiative qualified for ballot). See generally Comment, *supra*, at 1225-28 (discussing pre-election review).

¹⁴⁶ Courts will entertain a pre-election single-subject challenge only upon a "clear showing of invalidity." *Brosnahan v. Eu*, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982); *Schmitz v. Younger*, 21 Cal. 3d 90, 92-93, 577 P.2d 652, 653, 145 Cal. Rptr. 517, 518 (1978).

¹⁴⁷ The court has "frequently observed [that] it is usually more appropriate to review constitutional . . . challenges to . . . initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise." *Brosnahan v. Eu*, 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101. *But see* Comment, *supra* note 145, at 1229 (stating that California courts' "refusal to review compliance with the single-subject . . . requirement[] until after the election threatens to

approval by the voters.¹⁴⁸ In postelection review judges' reluctance to invalidate a measure increases because they are reviewing a measure already approved by the electorate.¹⁴⁹ One commentator argues that in reality the timing of the review determines the validity of the measure.¹⁵⁰ The court's preference for

invalidate desired legislation on the basis of defects that are readily curable").

¹⁴⁸ See *Brosnahan v. Eu*, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982); *California Trial Lawyers Ass'n*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916; *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 250 Cal. Rptr. 320 (1988). But see *Chemical Specialties Mfrs. Ass'n v. Deukmejian*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (1991) (invalidating measure in postelection review).

¹⁴⁹ Judge Puglia of the Third District Court of Appeal authored opinions for two initiative single-subject challenges in 1988 in which he commented on the court's approach to timing of review. In *Insurance Industry Initiative Campaign Committee*, which upheld a measure in pre-election review, he stated that "[a]lthough we address the merits of the petition we believe it would be well within our discretion to deny the petition on the grounds that the initiative process has advanced to a point where preelection review is inappropriate . . ." *Insurance Indus. Initiative Campaign Comm.*, 203 Cal. App. 3d at 964 n.2, 250 Cal. Rptr. at 322 n.2. In *California Trial Lawyers Association*, one of the few pre-election review cases and the only pre-election review case in which a court has invalidated a measure, Judge Puglia was willing to review the merits of the case before the election because the proponents had not progressed very far into the process. Judge Puglia noted that, while postelection review is preferable, the circumstances in the instant case were much different than in *Brosnahan v. Eu*:

By the time the [*Brosnahan*] court rendered its decision, the proponents had gathered over 600,000 signatures on petitions, the Secretary of State had undertaken the process of signatures verification, and a superior court had ordered the measure certified and placed on the June ballot. In contrast, at the time the instant petition was filed matters had not advanced beyond the stage of collecting signatures.

California Trial Lawyers Ass'n, 200 Cal. App. 3d at 357, 245 Cal. Rptr. at 919 (citation omitted). The extent to which the proponents had advanced in the process, however, was not the only factor in invalidating the measure: the court also found what it considered a conspicuous violation of the single-subject rule. See *infra* notes 160-62 and accompanying text.

¹⁵⁰ Comment, *supra* note 145, at 1217. Once voters have approved a measure, "it acquires an almost irrebuttable presumption of validity." *Id.* Chief Justice Bird suggested that the majority opinion in *Brosnahan v. Brown* assumed that "the passage of a proposition somehow creates a conclusive presumption in favor of its constitutionality." *Brosnahan v. Brown*, 32 Cal. 3d 236, 296, 651 P.2d 274, 311, 186 Cal. Rptr. 30, 67 (1982) (Bird, C.J., dissenting). But see *infra* notes 152-58 and accompanying text (discussing case in which initiative invalidated after election).

postelection review undermines the safeguards single-subject advocates intended to provide California voters, because post-election review provides no review at all.¹⁵¹

While the supreme court prefers postelection review and has never invalidated an initiative measure under the single-subject rule, two recent court of appeal decisions have departed from the supreme court's pattern. One case is notable because the court invalidated the measure after the voters had passed it, and the other because the court was willing to review the measure before the election.

In the most recent case, *Chemical Specialties Manufacturers Association v. Deukmejian*,¹⁵² the court invalidated a measure after its approval by the voters.¹⁵³ The measure, entitled the "Public's Right To Know Act," was passed by the voters as Proposition 105 in the November 1988 general election.¹⁵⁴ The court determined that while the measure's widely disparate provisions¹⁵⁵ all related to the measure's subject of truth in advertising, they were not "reasonably related to each other for purposes of the single-subject rule."¹⁵⁶ The subject was simply too broad. The "number and scope of topics germane to advertising," the court wrote, "is virtually unlimited."¹⁵⁷ It is unclear whether *Chemical Specialties* is

¹⁵¹ Comment, *supra* note 145, at 1233 (concluding postelection review is illusory). California's "lenient review of an initiative's [single-subject] compliance . . . undermines the valuable voter protection intended by the requirement[]." *Id.* at 1229.

¹⁵² 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (1991).

¹⁵³ *Chemical Specialties* is the first decision since the single-subject rule was adopted to strike down a measure passed by the voters for violating the rule. See Markell, *Appeal Court Declares 'Right-to-Know' Measure Void*, Daily Recorder, Feb. 12, 1991, at 1, col. 1, col. 4.

¹⁵⁴ *Chemical Specialties*, 227 Cal. App. 3d at 666, 278 Cal. Rptr. at 129.

¹⁵⁵ Proposition 105 contained provisions requiring: (1) warnings about safe disposal of household toxics in any advertising of the product, (2) clear notice in any advertising offering private insurance to supplement Medicare that the supplemental insurance is not government-sponsored, (3) certain disclosures in nursing home contracts and advertising, (4) identification of the major source of funding in any advertisement for or against an initiative or referendum, and (5) disclosure in all stock offerings of the corporation's association with South Africa. *Id.* at 666-67, 278 Cal. Rptr. at 129-30.

¹⁵⁶ *Id.* at 671, 278 Cal. Rptr. at 133.

¹⁵⁷ *Id.* at 670-71, 278 Cal. Rptr. at 133. Note, however, that the supreme court has not employed this approach. Neither the Crime Victims Justice Reform Act reviewed in *Raven*, nor the Victims' Bill of Rights reviewed in *Brosnahan*, was subjected to a test of how many topics might be capable of

the harbinger of things to come; for reasons equally unclear, the supreme court has declined to review the decision.¹⁵⁸

In the other case, *California Trial Lawyers Association v. Eu*,¹⁵⁹ the

being germane to the subject of the rights of potential and actual crime victims.

¹⁵⁸ *Court: Prop. 105 'Unconstitutional'; Too Many Subjects*, Daily Recorder, Apr. 30, 1991, at 1, col. 2. In light of the supreme court's general single-subject approach, however, it seems inconsistent that the court let *Chemical Specialties* stand. Consider that Proposition 105 was an initiative approved by the voters. The courts have never invalidated such a measure before, believing that to do so would interfere with the rights of the people to make their own choices about what is good for them. The supreme court has stated, "In our democratic society in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will on matters of such direct and immediate importance to them as their own perceived safety." *Brosnahan v. Brown*, 32 Cal. 3d 236, 248, 651 P.2d 274, 281, 186 Cal. Rptr. 30, 37 (1982).

Similarly, it can be argued that in approving Proposition 105 the people determined that it is in their own best interests to be protected from false advertising. Proposition 105's preamble indicated that access to accurate information helps the public protect itself from harm to its health and finances. *Chemical Specialties*, 227 Cal. App. 3d at 671, 278 Cal. Rptr. at 133. Previously the supreme court has given considerable weight to an initiative's stated objectives contained in the preamble. *See infra* notes 162, 192. In *Chemical Specialties*, however, the appellate court went beyond the words of the preamble to discover what, "[i]n actuality, the measure seeks." *Id.* The supreme court might easily have rejected such an approach in favor of a more literal one.

In *Brosnahan*, the supreme court stated that when the "goal [has a] readily discernible common thread which unites all the . . . provisions in advancing its common purpose" it satisfies the single-subject rule. *Brosnahan v. Brown*, 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36. *See generally supra* note 102 (discussing provisions of initiative reviewed in *Brosnahan*). Clearly, Proposition 105 has the readily discernible and expressed goal of "truth in advertising," a common thread of disclosure. *Chemical Specialties*, 227 Cal. App. 3d at 671, 278 Cal. Rptr. at 133. Letting the appellate court's finding of a single-subject violation stand strengthens the argument some make that single-subject challenge outcomes may sometimes depend on the substantive content of the measure involved. *See infra* note 170.

¹⁵⁹ 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (1988). *California Trial Lawyers* involved the "Insurance Cost Control Initiative of 1988," which was sponsored by an association of insurance companies. *Id.* at 354, 245 Cal. Rptr. at 917. Its stated purpose was to "rein in the constantly increasing premiums charged to California purchasers of liability insurance." *Id.* at 358, 245 Cal. Rptr. at 920. The measure sought to accomplish this objective by "establishing . . . a 'no fault' system of automobile insurance, placing limitations on the awards available to injured persons, controlling attorneys'

court reviewed and invalidated the measure before the election.¹⁶⁰ The court stated that it was willing to do so because the proponents had not progressed very far in the qualifying process.¹⁶¹ The major flaw in the measure invalidated in *California Trial Lawyers* was that it contained two obvious, offensive riders that were not encompassed by the measure's expressed purpose.¹⁶² While *California Trial Lawyers* does show that the single-

contingency fees, requiring arbitration of disputed claims, and 'rolling back' premiums for a two-year period." *Id.* at 358-59, 245 Cal. Rptr. at 920.

¹⁶⁰ The court noted that "no court of this state has undertaken such prior review." *Id.* at 357 n.2, 245 Cal. Rptr. at 919 n.2. The court continued, however, that "since we believe the initiative presents a palpable transgression of the single-subject rule, and perceive no overriding circumstances which militate against pre-election review, we shall reach the merits of the petition [before the election]." *Id.* at 357, 245 Cal. Rptr. at 919.

¹⁶¹ See generally *supra* notes 10, 48-54 and accompanying text (describing process of qualifying initiatives for ballot).

¹⁶² See *California Trial Lawyers*, 200 Cal. App. 3d at 360-61, 245 Cal. Rptr. at 921-22. The two offending provisions provided: (1) that insurance companies would be limited in making campaign contributions to public officials only to the extent other citizens were, and (2) that "[a]ny elected state official who receive[d] any lawful campaign contribution . . . [would] not be disqualified thereby from participating in any decision affecting any interests of the donor." *Id.* at 356, 245 Cal. Rptr. at 918. The provisions were located "near the middle of a 120 page document, and consist[ed] of two brief paragraphs which [bore] no connection to what precede[d] or follow[ed]." *Id.* at 360, 245 Cal. Rptr. at 921. One of the proponents' mistakes was to state too narrowly the purpose of the initiative in the preamble. While the proponents argued before the court that the provisions should be allowed because the measure dealt generally with insurance industry practices, the court stated that "the express purpose of the initiative is to control the cost of insurance, not generally to regulate the practices of the insurance industry." *Id.* at 360-61, 245 Cal. Rptr. at 921. Even an express purpose of "insurance industry practices" might not have been a large enough umbrella to cover the offending provisions, however, because the court noted that those provisions were "a paradigm of the potentially deceptive combinations of unrelated provisions at which the constitutional limitation on the scope of initiatives is aimed." *Id.* at 360, 245 Cal. Rptr. at 921.

Yet the court has accepted such subjects as "the rights of actual or potential crime victims," *Brosnahan v. Brown*, 32 Cal. 3d 236, 247, 651 P.2d 274, 280, 186 Cal. Rptr. 30, 36 (1982), and "political practices," *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 43, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979). In light of these broad yet valid subjects, one has to wonder what is wrong with a subject such as "insurance practices." Several insurance initiatives that have withstood single-subject

subject rule is on the books for some reason, the court's opinion may simply serve to instruct proponents how to proceed with a truly multisubject initiative: state the purpose in the preamble broadly enough to encompass all the provisions¹⁶³ and once the initiative becomes public, collect signatures quickly.¹⁶⁴

B. The Court's Questionable Rationale for Permissive Single-Subject Review

The effect of the methods the court uses in applying the single-subject rule is very deferential and permissive review of initiative measures. This Comment contends that this review constitutes no review at all. This section discusses and criticizes the rationale underlying the court's hands-off approach.

1. Reluctance To Impinge on Voters' Rights

The court's default position — to let an initiative measure stand¹⁶⁵ — is based on its underlying assumption that the people have more power in an unwieldy and uncontrolled initiative pro-

rule challenge seem to embrace subjects less general than "insurance practices." One appellate court found "insurance practices . . . perceive[d] as unfair to consumers" to be an appropriate subject. *Insurance Indus. Initiative Campaign Comm. v. Eu*, 203 Cal. App. 3d 961, 966, 250 Cal. Rptr. 320, 323 (1988). Another found "the cost of insurance or the regulation thereof" to be an appropriate subject. *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805, 842, 771 P.2d 1247, 1270, 258 Cal. Rptr. 161, 184 (1989).

The reliance of the *California Trial Lawyers* court on the expressed purpose of a measure, like others before and since, encourages proponents to create ever more broad umbrella purposes. See *supra* note 106 and accompanying text. Justice Mosk, perceiving this tendency, criticized a recently validated measure as consisting of "disparate topics . . . held together with a seductive title designed for voter appeal." *Raven v. Deukmejian*, 52 Cal. 3d 336, 357, 801 P.2d 1077, 1090, 276 Cal. Rptr. 326, 339 (1990) (Mosk, J., concurring and dissenting). While Professor Lowenstein has suggested that a stricter implementation of the single-subject rule would cause drafters merely to manipulate their measures, Lowenstein, *supra* note 31, at 965-66, in practice under the court's current loose approach drafters merely need manipulate the title or preamble.

¹⁶³ See *supra* note 162 and accompanying text.

¹⁶⁴ See *supra* note 149.

¹⁶⁵ "It has long been our judicial policy to apply a liberal construction to [the initiative] power whenever it is challenged in order that the right be not improperly annulled." *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 41, 599 P.2d 46, 50, 157 Cal. Rptr. 855, 859 (1979) (quoting *Mervynne v. Acker*, 189 Cal. App. 2d 558, 563-64, 11 Cal. Rptr. 340, 344 (1961)).

cess than they do in a more restricted process.¹⁶⁶ This assumption, however, does not stand up under closer examination.

An unrestricted process does not categorically result in a strong initiative.¹⁶⁷ When lack of regulation causes voter confusion and dilutes each vote, the right to legislate through initiative is weak-

¹⁶⁶ Another assumption that courts make, in spite of considerable evidence to the contrary, is that voters comprehend what it is they are voting on. The *Raven* court stated that “[w]e must assume the voters duly considered and comprehended” the measure. *Raven v. Deukmejian*, 52 Cal. 3d 336, 349, 801 P.2d 1077, 1085, 276 Cal. Rptr. 326, 334 (1990). The *Brosnahan* court stated that the assumption that the people did not know what they were doing when voting on Proposition 8 was “improbable.” *Brosnahan v. Brown*, 32 Cal. 3d 236, 252, 651 P.2d 274, 283, 186 Cal. Rptr. 30, 39 (1982). The *Amador* court stated that “the advance publicity and public discussion [of Proposition 13] and its predicted effects were massive. The measure received as much public attention as any other ballot proposition in recent years. These circumstances would seem to dilute the risk of voter confusion or deception . . .” *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 231, 583 P.2d 1281, 1291, 149 Cal. Rptr. 239, 249 (1978) (citation omitted).

Proposition 13, however, was the only initiative measure on the June 1978 ballot, see *M. EU*, *supra* note 12, at 33, though the ballot also contained two bond measures and ten legislative constitutional amendments for voter ratification. See CALIFORNIA VOTERS PAMPHLET, PRIMARY ELECTION (June 6, 1978). In contrast, the November 1988 ballot on which Proposition 8 appeared included 20 initiatives and 9 bond acts. *A California Journal Analysis: November 1988 Ballot Propositions*, 19 CAL. J. 427, 427-42 (1988) [hereafter *November 1988 Proposition Analysis*].

Another fact throwing into doubt the courts’ underlying assumption of voter comprehension is that it is becoming an election strategy to try to confuse the voters. See *supra* note 38. The November 1988 ballot, for example, contained five initiatives concerned with regulating automobile insurance. *November 1988 Proposition Analysis*, *supra*, at 439-42. The November 1990 ballot contained two competing measures aimed at taxing alcohol, two competing measures aimed at regulating timber harvests, two competing measures aimed at limiting legislators’ terms, and two competing measures aimed at the environment. *A California Journal Analysis: November 1990 Ballot Propositions*, 21 CAL. J. 429, 429-41 (1990).

¹⁶⁷ In fact, the legislature has restricted the initiative process with enabling legislation in several ways. One way access to the process is restricted is by the required filing fee. See *Gray v. Kenny*, 67 Cal. App. 2d 281, 285-86, 153 P.2d 961, 962-63 (1944) (holding reasonable filing fee not unconstitutional burden on initiative process). The signature requirement to qualify a measure for the ballot is another example of such a restriction. Professor Magleby notes that “[t]he signature requirement is justified in part to keep the ballot manageable and to ensure that frivolous . . . issues . . . do not frustrate the voters.” Magleby, *Ballot Access for Initiatives and Popular Referendums: The Importance of Petition Circulation and Signature Validation*

ened rather than strengthened.¹⁶⁸ As long as judges remain convinced that regulation undermines the initiative process, however, courts will continue to resolve reasonable doubts in favor of the drafters¹⁶⁹ through “liberal construction.”¹⁷⁰ Professor Lowen-

Procedures, 2 J.L. & POL. 287, 288 (1985); see also *supra* note 130 (Lowenstein noting propriety of some restriction).

¹⁶⁸ Professor Magleby argues that “[t]he people who rule in [the initiative process] are those who have mastered the process at the petition-qualification and voting stages.” D. MAGLEBY, *supra* note 15, at 199. If a citizen does not understand the process or does not possess the resources to initiate it, her concerns cannot translate into an initiative. *Id.* When the process permits most citizens to participate only through a diluted vote, the courts are not effectively protecting the right to the initiative process. “[W]hen voters are asked to evaluate 25 to 30 separate and sometimes conflicting ballot measures, often on the basis of a 30-second television commercial, they are getting not more democracy but less.” Schrag, *Initiative Madness*, THE NEW REPUBLIC, Aug. 22, 1988, at 18, 19.

¹⁶⁹ The court has characterized resolving reasonable doubt in favor of the drafters as resolving reasonable doubt in favor of the initiative. See *Brosnahan v. Brown*, 32 Cal. 3d at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33. In guarding the people’s initiative power “we are required to resolve any reasonable doubts in favor of the exercise of this precious right.” *Id.* (emphasis and citations omitted). Ironically, judges want to protect the right of the people to legislate from all infringement and so will not impose stricter regulations on the process. See *supra* note 165. Yet for other reasons they completely rewrite or invalidate measures that voters have passed. E. Patashnik, *supra* note 26, at 21; see *infra* note 172 (discussing instances in which measures voters passed were substantially changed by courts). Of the 10 initiatives approved by California voters between 1964 and 1982, six were found unconstitutional, while a seventh, Proposition 13, “lost much of its effectiveness through court interpretation.” *Sloppy Laws*, *supra* note 41, at 7, col. 2.

¹⁷⁰ While courts generally give a liberal construction to initiatives under the single-subject rule, this is not always the case. In the most recent single-subject case the court of appeal found that “truth in advertising” was too broad a subject. *Chemical Specialties v. Deukmejian*, 277 Cal. App. 3d 663, 671, 278 Cal. Rptr. 128, 133 (1991); see *supra* notes 152-58 and accompanying text. Some suggest that the application of the single-subject rule hinges more on the substantive issues of the initiative rather than on whether it contains a single subject. Professor Lowenstein states that “one cannot be certain . . . that [the court’s] views on the merits of an initiative may [not] affect how present or future members of the court interpret the single-subject rule.” Lowenstein, *supra* note 31, at 937. Justice Mosk suggested that the four justices who formed the majority upholding Proposition 8, the Victims’ Bill of Rights, had “yielded to ‘panic and myopia’ in . . . [the] ‘war on crime.’” *Brosnahan v. Brown*, 32 Cal. 3d at 298, 651 P.2d at 312, 186 Cal. Rptr. at 68 (Mosk, J., dissenting). A comparison between the subject of two measures that have been upheld (the

stein argues that the California Supreme Court's approach is essentially correct: "The initiative is the people's instrument, and the people are not abused by a measure that is too diverse if in their eyes the measure deals with a single problem or subject area, however narrow or broad."¹⁷¹ This statement, while theoretically appealing, does not reflect reality. In reality, "the people" are largely excluded from using the initiative process.

This exclusion occurs primarily in two ways. First, measures that voters do not comprehend continually find their way onto the ballot.¹⁷² Second, simply inaugurating the initiative process is a very expensive proposition. The resources required to qualify a measure for the ballot render the process largely beyond the reach of the average citizen,¹⁷³ and should quickly disabuse anyone of the notion that the initiative is "the people's instru-

rights of potential and actual crime victims) and the subject of a measure that was invalidated (truth in advertising, which could be restated as the rights of television viewers as consumers), lends support to this argument. This is especially so in light of the great deference that courts show toward measures once they have been passed by the voters. *See supra* 144-49 and accompanying text.

¹⁷¹ Lowenstein, *supra* note 31, at 970.

¹⁷² *See, e.g., supra* note 89. Even when voters pass initiative measures, they do not always end up with the law for which they thought they were voting. For example, in the June 1988 election, California voters approved two measures designed to limit the amount of contributions to any one candidate, prohibit the transfer of money between candidates, and establish a system of public financing for elections. *Campaign Financing Revisited*, 21 CAL. J. 265, 265 (1990). After numerous lawsuits the "effects of the various provisions of both measures on actual campaign practices have changed substantially" *Id.*

¹⁷³ Although citizens may band together to increase their power and effectiveness, the general rule is that special interest groups with vast resources put initiative measures on the ballot. Ertukel, *supra* note 23, at 313; *see supra* note 27. This tendency has been apparent for some time. In 1948 one commentator wrote:

It was thought by many of the sponsors of direct government that 'the people' would circulate petitions and place proposals on the ballot. . . . It has not been difficult for organized groups to secure sufficient petitions to present measures to the people, but it has been almost impossible for citizen groups interested in good government to initiate and carry through a successful program.

H. GOSNELL, *supra* note 1, at 256-57 (citations omitted) (omission in original). *But see* D. SCHMIDT, *supra* note 17, at 37 (stating that what is special interest group to one is citizen's group to another).

ment.”¹⁷⁴ Qualifying a ballot measure can cost hundreds of thousands of dollars.¹⁷⁵ While the cost of qualifying measures discourages individual citizens from initiating the process, the initiative endures as an ideal tool for special interest groups.¹⁷⁶ Given enough resources, proponents can put almost any measure before the voters.¹⁷⁷

The prohibitive costs of inaugurating an initiative leave the actual power of most people in their right to vote on initiatives,

¹⁷⁴ Lowenstein, *supra* note 31, at 970.

¹⁷⁵ In 1984 signature-gathering firms charged from \$500,000 to \$1,000,000 to place a proposition on the ballot. D. MAGLEBY, *supra* note 15, at 64. As a result of the high costs, an industry has developed around qualifying measures. Petition circulators, initiative drafters, lawyers specializing in challenging or defending initiatives, and political consultants have created an industry dependent on the initiative process. *Initiative, First Resort, supra* note 55, at A1, col. 1. Some political consultants eye the California initiative scene as a pot of gold at the end of the rainbow because the initiative is big business in California. *Id.* at A14, col. 1. Initiative campaigns attract professional campaigners because the amounts of money involved “absolutely dwarf” the amounts spent on candidates. *Id.* One commentator worries that “[a]s the initiative industry grows, it may begin to seek out and encourage initiative . . . business. Groups who would not otherwise use the process may be contacted and offered a bargain rate for an initiative campaign all the way from petition drive to legal challenge in the courts.” D. MAGLEBY, *supra* note 15, at 76.

¹⁷⁶ Commenting on the initiative process today, Larry Berg, Director of the Unruh School of Politics at the University of Southern California, states that initiatives do not grow out of large public uprisings. *Initiative, First Resort, supra* note 55, at A14, col. 4. The advent of initiative professionals takes the process even farther from individual citizens and vests it in “the hands of the wealthiest or best-organized interests.” *Id.*

¹⁷⁷ If a proponent is willing to pay enough money, “they’ll get you on the ballot. It can be any screwball measure, but they’ll get you on.” *Id.* Voters will sign almost any petition, whether or not they agree with the proposal or even understand it. T. CRONIN, *supra* note 21, at 63-64. Most voters do not even read the petition. *Id.* One study found that only about half the people who sign a petition vote yes on that initiative. D. MAGLEBY, *supra* note 15, at 63 (citing H. BAUS & W. ROSS, *POLITICS BATTLE PLAN* 61 (1968)). One advertisement in a California political magazine “guarantee[s] specific numbers of *valid* signatures on a money-back basis.” *Instant Initiative Qualification*, 21 CAL. J. 25 (1990) (advertisement) (emphasis in original). The company, Advanced Voter Communications, claims it can “fully qualify a Constitutional Amendment . . . in 45 days.” *Id.* Because of the resources required, organized interests maintain a clear advantage over individuals. D. MAGLEBY, *supra* note 15, at 58. Thus, if a test for the effectiveness of the initiative process “is equal access in placing an issue on the ballot, the initiative . . . fail[s].” *Id.*

not in their ability to place initiatives on the ballot.¹⁷⁸ For a citizen's vote to be meaningful, the vote must be informed — not merely an abstention or negative vote bred of uncertainty — and it must be undiluted — not merely a single compromise vote on a multiplicity of subjects.¹⁷⁹

Strict enforcement of the single-subject rule does not mean that the people's power in the initiative process will be diminished. In fact it means quite the opposite. A restrictive single-subject rule would regulate the drafters and ensure the integrity of the process, thereby preserving the people's power in the process.¹⁸⁰ A strict application would compel proponents to articulate the issues more clearly.¹⁸¹ It is true that a more restrictive approach would increase the burdens on proponents by requiring them to qualify separate measures for varied concerns. Yet balanced against this is the voters' right of informed involvement in the process. Unfortunately, the California Supreme Court has failed to recognize that proponents and voters may possess competing interests in the initiative process.¹⁸²

¹⁷⁸ California Supreme Court Chief Justice Bird stated that “[t]he single-subject requirement . . . operates not as a limit on the people's reserved power to legislate by initiative, but as a *limit* on the *draft[ers]* of *initiative measures*.” *Brosnahan v. Brown*, 32 Cal. 3d 236, 280, 651 P.2d 274, 301, 186 Cal. Rptr. 30, 57 (1982) (Bird, C.J., dissenting) (emphasis in original).

¹⁷⁹ Chief Justice Bird reasoned,

If the voters are confused or misled, or if they vote for or against a proposal because they favor or oppose one or two of its provisions [perhaps the most publicized ones], the initiative process has not served to implement the will of the people. Rather, it has sanctioned a warped expression of the wishes of some of those people, while *thwarting* the will of the majority.

Id. at 281, 651 P.2d at 301-02, 186 Cal. Rptr. at 57-58 (Bird, C.J., dissenting) (emphasis in original); *see supra* notes 73-80 and accompanying text (discussing vote dilution).

¹⁸⁰ *Brosnahan v. Brown*, 32 Cal. 3d at 280, 651 P.2d at 301, 186 Cal. Rptr. at 57 (Bird, C.J., dissenting).

¹⁸¹ By compelling proponents to articulate issues clearly, the single-subject rule acts as a “constitutional equivalent of a truth-in-advertising requirement.” *Brosnahan v. Brown*, 32 Cal. 3d at 297, 651 P.2d at 311-12, 186 Cal. Rptr. at 67 (Bird, C.J., dissenting).

¹⁸² Just as a legislature controlled by special interests led to the adoption of the initiative process in 1911, so too should an initiative process increasingly dominated by special interests be reformed. The initiative process, once “a product of reform, is itself the target of reformers.” Ertukel, *supra* note 23, at 313.

2. Reasoning from the Legislative Arena

The court also defers to an initiative's drafters because the permissive reasonably germane standard was imported virtually intact from jurisprudence reviewing legislative enactments under a separate single-subject rule; under that rule the court generally defers to the legislature.¹⁸³ While a permissive application of such a rule in the legislative arena is appropriate, its appropriateness in the initiative arena is questionable, given textual differences in the two rules and basic differences between the legislative and initiative processes.

The supreme court applies the single-subject rule identically to both initiatives and legislative enactments.¹⁸⁴ The court has adopted this approach in developing the reasonably germane standard for initiative measures, relying on cases that applied the single-subject rule to legislative enactments.¹⁸⁵ This approach dates from the first case to interpret the single-subject rule for initiative measures, *Perry v. Jordan*,¹⁸⁶ which concluded that the rule should operate the same for initiatives as it operates for legislative measures.¹⁸⁷ Since then, the court has relied on *Perry* for the proposition that it is appropriate to apply the single-subject rule to initiatives in the same manner that it is applied to legislative enactments.¹⁸⁸

¹⁸³ The legislative single-subject rule had long been construed by the courts to apply only in extreme cases. Lowenstein, *supra* note 31, at 951.

¹⁸⁴ See *Perry v. Jordan*, 34 Cal. 2d 87, 92, 207 P.2d 47, 49-50 (1949) (concluding single-subject rule should apply to initiatives as it applies to legislative enactments because the problem it addresses is "not new in this state").

¹⁸⁵ See *Brosnahan v. Brown*, 32 Cal. 3d at 246, 651 P.2d at 280, 186 Cal. Rptr. at 36 (relying on *Evans v. Superior Court*, 215 Cal. 58, 8 P.2d 467 (1932), which applied single-subject rule to legislative enactment establishing Probate Code); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 38, 599 P.2d 46, 48, 157 Cal. Rptr. 855, 857 (1979) (relying on *Evans*); *Perry v. Jordan* 34 Cal. 2d at 92-93, 207 P.2d at 49-50 (relying on *Evans* and *Robinson v. Kerrigan*, 151 Cal. 40, 90 P. 129 (1907), which applied single-subject rule to legislative enactment establishing land title certification procedures).

¹⁸⁶ 34 Cal. 2d 87, 207 P.2d 47 (1949).

¹⁸⁷ *Id.* at 93, 207 P.2d at 49-50.

¹⁸⁸ See *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d at 38, 599 P.2d at 48, 157 Cal. Rptr. at 857; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 230, 583 P.2d 1281, 1290, 149 Cal. Rptr. 239, 248 (1978). The court has reasoned that because the people granted legislative power to the legislature and also

The long line of precedent holding that the single-subject rule should be applied identically to legislative and initiative measures remains largely unquestioned. The court considers this precedent “both venerable and current.”¹⁸⁹ Yet the *Perry* court never analyzed how the single-subject rule should be applied to initiatives other than to state that “[w]hen the scope and meaning of words or phrases in a statute have been repeatedly interpreted by the courts, there is some indication that the use of them in a subsequent statute in a similar setting carries with it a like construction.”¹⁹⁰ The court did not address whether the rules’ relevant “words or phrases” were the same, nor did it address whether the settings in which the rules apply were similar. Instead, it blindly relied on a myriad of cases applying the single-subject rule to legislative enactments.¹⁹¹

If the *Perry* court or its followers had examined the differences in text and setting, they would have found the words different and the settings dissimilar. First, the text of the single-subject rule that applies to legislation differs from that of the rule that applies to initiatives.¹⁹² Second, and more significant, the legislative and

reserved it for themselves, “there is no reason to hold that the people’s power is more limited than that of the Legislature” *Fair Political Practices Comm’n*, 25 Cal. 3d at 42, 599 P. 2d at 51, 157 Cal. Rptr. at 860.

¹⁸⁹ *Brosnahan v. Brown*, 32 Cal. 3d at 246, 651 P.2d at 280, 186 Cal. Rptr. at 36 (noting that “underlying thesis was enunciated by us fifty years ago”). Another court stated that “*Perry* has been expressly or impliedly followed, without deviation, in the years that followed [it].” *Raven v. Deukmejian*, 52 Cal. 3d 336, 362, 801 P.2d 1077, 1094, 276 Cal. Rptr. 326, 343 (1990) (Mosk, J., concurring and dissenting).

¹⁹⁰ *Perry v. Jordan*, 34 Cal. 2d 87, 93, 207 P.2d 47, 50 (1949) (citation omitted).

¹⁹¹ *Id.* at 92-93, 207 P.2d at 49-50. See *supra* note 114 for a discussion of the dubious weight *Perry* should be given in the contemporary political context.

¹⁹² Legislative enactments require that the title state the subject. CAL. CONST. art. IV, § 9. Section 9 states:

A statute shall embrace but one subject which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended.

Id. Initiatives do not require that the title state the subject. *Id.* art. II, § 8(d). For text of section 8(d), see *supra* note 85. While it might be argued that this extra limitation in the rule for legislative enactments means that the rule for initiatives should not be as limited, the better argument is that the rule for initiatives should be analyzed independently, with the first step

initiative processes are markedly different.¹⁹³ The legislative pro-

being to determine how best to further the goal of a strong initiative for the people.

Perhaps betraying some confusion between the two single-subject rules, the *Perry* court went so far as to determine that the initiative's subject was adequately covered in the title, even though that is not required by the single-subject rule for initiatives. *Perry*, 34 Cal. 2d at 95, 207 P.2d at 51. In fact, many of the cases upon which the modern standard is founded address whether the subject is appropriately expressed in the title. *Perry*, 34 Cal. 2d at 92-93, 207 P.2d at 50 (citing *Barber v. Galloway*, 195 Cal. 1, 231 P. 34 (1924)) ("having one general object, if fairly indicated in the title"); *Estate of Wellings*, 192 Cal. 506, 519, 221 P. 628, 634 (1923) ("[p]rovisions . . . which are logically germane to the title"); *Treat v. Los Angeles Gas Corp.*, 82 Cal. App. 610, 613, 256 P. 447, 448 (1927) ("germane to the general subject as expressed in its title"). Apparently, the modern analog is that courts allow proponents to define the subject of their measures in the preamble. See *supra* note 162 and accompanying text. *But cf.* *Harbor v. Deukmejian*, 43 Cal. 3d 1078, 1096-97, 742 P.2d 1290, 1300-01, 240 Cal. Rptr. 569, 579-80 (1987) (concluding legislative single-subject rule and title rule are independent requirements); *Robinson v. Kerrigan*, 151 Cal. 40, 50-51, 90 P. 129, 133 (1907) (holding all subjects in legislative enactments need not be expressed in title as long as they are germane to "general subject there expressed").

¹⁹³ Initiatives are drafted by proponents with a vested interest in the specific issues. See *supra* notes 41-46 and accompanying text. Legislators cannot amend a law enacted by initiative without the approval of the voters. CAL. CONST. art. II, § 10(c). Section 10(c) provides: "The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." *Id.* These restrictions place an extraordinary burden on anyone who finds the law objectionable and wants to change it. See Note, *supra* note 41, at 931.

The legislature operates in a very different way. *Id.* Each bill undergoes committee hearings in both houses, debate in both houses, and is subject to veto by the governor. *Schmitz v. Younger*, 21 Cal. 3d 90, 99, 577 P.2d 652, 657, 145 Cal. Rptr. 517, 522 (1978). Hearings allow proponents to learn the strengths and weaknesses of a position as perceived by the opposition. Note, *supra* note 41, at 930. Information about strengths and weaknesses gives proponents a chance to compromise, discover inconsistencies, and determine whether the proposal has been tried before. *Id.* at 930-31. Legislative staff help legislators understand the measures and the issues. *Schmitz*, 21 Cal. 3d at 99, 577 P.2d at 657, 145 Cal. Rptr. at 522. Moreover, the legislature amends laws created by legislative enactment by these same procedures. In contrast to the initiative process, which consumes enormous amounts of resources, see *supra* note 55, the legislative process is the routine business of the legislature. See Note, *supra* note 41, at 931-32.

Professional legislators have the time and resources to enable them grasp compound issues. On the other hand, the average voter is often

cess itself is a restriction on a measure.¹⁹⁴ The initiative process, however, is not similarly restrictive.¹⁹⁵ The legislative process lends itself to compromise, encompassing input from a spectrum of viewpoints.¹⁹⁶ Initiatives, on the other hand, usually originate from a limited agenda.¹⁹⁷

Further, the consequences of multiple subjects in a single measure vary in these different arenas. When a legislative enactment exceeds a single subject, the California Constitution requires the court to sever the offending provisions while the remainder of the measure takes effect.¹⁹⁸ When an initiative measure encompasses more than a single subject, the entire measure is void.¹⁹⁹ Courts have not considered carefully the differences between the two processes, nor analyzed fully whether the single-subject rule should apply uniformly in both arenas. The disparity between these processes and the rule's effects warrants different standards of single-subject review.

In sum, it is appropriate for the supreme court to re-evaluate its approach to the single-subject rule. First, the court has not

overwhelmed by the complexity and scope of a measure. *See supra* notes 3, 47, 89 and accompanying text. Confusion leads the voter to lose interest in the measure, if not the process. *See supra* note 58 and accompanying text. One study showed that a significant percentage of voters who actually voted declined to cast votes on initiative measures. Note, *supra* note 29, at 758.

¹⁹⁴ *See* *Fine v. Firestone*, 448 So. 2d 984, 989 (Fla. 1984). Moreover, while logrolling is generally considered one of the evils of multiple subject measures, *see supra* notes 31-36 and accompanying text, Professor Lowenstein suggests that logrolling presents different concerns in the legislative context than it does in the initiative context. Lowenstein, *supra* note 31, at 959-60. This difference between the initiative and legislative processes also supports the argument that the single-subject rule should be applied differently to each process.

¹⁹⁵ Moreover, laws enacted through the initiative process prevail over conflicting laws enacted through legislative procedures, *see* CAL. CONST. art. II, § 10(a); *see also supra* note 44.

¹⁹⁶ For a discussion of the scrutiny a legislative measure must endure, *see* Comment, *supra* note 116, at 1102-03. The legislative process, in theory, provides mechanisms to uncover ambiguities, internal contradictions, and foolish ideas. E. Patashnik, *supra* note 26, at 10.

¹⁹⁷ The inflexibility of the initiative process often results in initiatives which represent "the most extreme form of law which is considered politically expedient." *Schmitz*, 21 Cal. 3d at 99, 577 P.2d at 657, 145 Cal. Rptr. at 522 (Manuel, J., dissenting). This inflexibility leaves other interested parties only the expression of a yes or no vote. *Id.*

¹⁹⁸ CAL. CONST. art. IV, § 9.

¹⁹⁹ *Id.* art. II, § 8(d).

examined whether its policies best achieve its underlying goal of preserving the initiative power of the people.²⁰⁰ It should explore whether a new approach might not better further this goal. Second, the court has never fully analyzed the application of the single-subject rule solely with reference to initiatives.²⁰¹ Instead, it has adopted the rhetoric, holdings, and reasoning from cases dealing with legislative enactments.²⁰² It is entirely appropriate to analyze the rules differently because both the wording of the rules and the processes to which they apply are so different.²⁰³

III. REVITALIZING THE INITIATIVE PROCESS THROUGH CLARIFICATION OF THE SINGLE-SUBJECT RULE

The supreme court should recognize that restrictions on the initiative process do not necessarily mean less power for the people; in fact appropriate restrictions may increase the electorate's power. This Comment therefore urges the court to adopt a new perspective when reviewing single-subject rule challenges — resolving reasonable doubts in favor of the voters through a narrow construction of initiative measures, rather than resolving doubts in favor of the drafters through a liberal construction.²⁰⁴

Because forty-three years of precedent may impede the development of such a new perspective for no better reason than inertia, it may take a constitutional amendment to open the door and invite a new analysis. One option for such an amendment is to explicitly distinguish the single-subject requirement for initiatives from the single-subject rule for legislation. Article II, section 8(d) of the California Constitution might be amended to read, “an initiative measure, as distinct from a legislative measure, which embraces more than one subject may not be submitted to the voters or have any effect.”²⁰⁵ Of course it is difficult to determine

²⁰⁰ See *supra* notes 98-100 and accompanying text.

²⁰¹ See Lowenstein, *supra* note 31, at 943 (stating that in *Perry* “the court upheld the initiative in question without extensive analysis”); see also *supra* notes 190-91 and accompanying text.

²⁰² See *supra* notes 185-88 and accompanying text.

²⁰³ See *supra* notes 192-99 and accompanying text.

²⁰⁴ See *supra* note 169 and accompanying text.

²⁰⁵ While this amendment does nothing further to ensure that the supreme court engage in pre-election review, it does not seem appropriate to add to the constitution “and we really mean it” after the phrase “may not be submitted to the voters.” If the court is given the license to re-examine the issues, it may well find that pre-election review is appropriate.

what change a narrow as opposed to liberal construction of the single-subject rule would have on the outcome of single-subject challenges. The goal, however, is to prevent the perpetuation of cases upholding initiatives merely because someone has found a label broad enough to cover their disparate provisions, and to encourage review that requires “coherent enactment[s].”²⁰⁶

Under this standard, the two measures recently invalidated by the appellate courts would likewise be invalid.²⁰⁷ One of these initiatives included an undesirable and unrelated rider buried in pages of text.²⁰⁸ The other initiative had tried to evade single-subject compliance with a label — “advertising” — so broad as to be virtually meaningless.²⁰⁹ Moreover, under this standard, two measures the supreme court found to be in compliance with the single-subject rule²¹⁰ would likely be invalidated. These inappropriately upheld measures had defined their subjects by broad labels designed to encompass their diverse provisions.²¹¹ They were not coherent enactments, but rather grab-bag measures designed to address a number of problems within a single sphere but certainly not within one subject as envisioned by the single-subject rule.

CONCLUSION

The initiative process is out of control in California. Voters are often unable to comprehend all that an initiative measure proposes to accomplish, and they are often asked to vote on a multitude of issues by casting a single ballot. One way to improve the

²⁰⁶ Justice Mosk stated that “[a] standard that focuses on whether the measure is capable of bearing some label is simply empty. . . . [T]he rule requires a coherent enactment.” *Raven v. Deukmejian*, 50 Cal. 3d 336, 364, 801 P.2d 1077, 1095, 276 Cal. Rptr. 326, 344 (1990) (Mosk, J., concurring and dissenting); *see also supra* note 126.

²⁰⁷ *See supra* notes 152-64 and accompanying text.

²⁰⁸ Proposition 105, reviewed in *Chemical Specialties Mfrs. Ass’n v. Deukmejian*, 227 Cal. App. 3d 663, 278 Cal. Rptr. 128 (1991); *see supra* notes 154-57 and accompanying text.

²⁰⁹ The “Insurance Cost Control Initiative of 1988,” reviewed in *California Trial Lawyers Ass’n v. Eu*, 200 Cal. App. 3d 351, 245 Cal. Rptr. 916 (1988); *see supra* note 162 and accompanying text.

²¹⁰ Proposition 115, reviewed in *Raven v. Deukmejian*, 52 Cal. 3d, 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990); *see supra* notes 94-97 and accompanying text, and Proposition 8, reviewed in *Brosnahan v. Brown*; *see supra* note 102.

²¹¹ *See supra* notes 106, 109 and accompanying text.

level of voter comprehension and reduce vote dilution is by limiting measures to a single subject. This rule is already part of the California Constitution; the problem is that the supreme court does not enforce it. Its justification is that the initiative process is a stronger right for the people if the judiciary does not interfere with the voters' decisions and choices. This is a misguided assumption based on a false reality. The reality is that the power most people have in the initiative process is through their vote. When a vote is cast in confusion or is diluted by deciding too many issues, the electorate loses its power in the initiative process.

The court must be encouraged to take a fresh look at applying the single-subject rule, to re-evaluate its definition of subject and the relationship it requires between an initiate's provisions. The court has never fully examined these standards. Without even rejecting the reasonably germane test, the court could effectively reinstate the single-subject rule by applying it more rigorously and abandoning its present permissive approach. A constitutional amendment expressing that initiative measures and legislative measures are different should be sufficient to open the door to earnest judicial analysis.

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