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ESSAY

Raven and Revision

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INTRODUCTION

When Governor Hiram Johnson inspired the adoption of the initiative in California in 1911 and succeeded in having the state constitution amended to assure that "the people reserve to themselves the powers of initiative and referendum,"[1] it was generally deemed a landmark development in democracy. The initiative was clearly intended not merely as a right granted to the people, but a power the people reserved.

Over the years to an almost universal extent, initiatives have been judicially untouchable. Cases too numerous to mention have insisted that initiatives are to be liberally construed in order to endorse the electors' vote. Perhaps that deference is vanishing.

The proliferation of complicated initiative measures on every

* Associate Justice, California Supreme Court. I acknowledge the major contribution to this essay of Dennis Peter Maio (J.D., Yale Law School, 1981).

[1] CAL. CONST. art. IV, § 1.

ballot, the carelessness—or occasional iniquity—with which some propositions are conceived and written has caused some second thoughts about the sanctity of a measure merely because it won a place on the ballot. Some commentators, notably former Justice Hans Linde of the Oregon Supreme Court, have gone so far as to declare that the initiative institutionally violates article IV, section 4 of the United States Constitution, which guarantees every state "a republican form of government."[2] It is an intriguing problem, not considered by the United States Supreme Court since 1849.[3] Whether direct democracy is inconsistent with a republican form of government is a significant subject for analysis but it is beyond the scope of this more limited essay.

At the June 5, 1990 Primary Election, the voters approved an initiative constitutional amendment and statute designated on the ballot as Proposition 115—the self-styled "Crime Victims Justice Reform Act." *Raven v. Deukmejian*[4] presented the California Supreme Court with a two-fold challenge to the initiative. The petitioners claimed that the entire measure was facially invalid because it violated the California Constitution's single-subject rule.[5] They also claimed that one section of the measure was facially invalid because it revised the California Constitution, contrary to article XVIII. The court rejected the single-subject challenge[6]—continuing in its refusal to enforce the rule.[7] I dissented on that point. The court proceeded to sustain the revision challenge. I concurred. The purpose of this essay is to set out some of my thoughts on the matter.

I. AMENDMENT AND REVISION UNDER ARTICLE XVIII

Article XVIII of the California Constitution, "Amending and

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[2] *See, e.g.*, Hans A. Linde, *When Is Initiative Lawmaking Not "Republican Government"?*, 17 HASTINGS CONST. L.Q. 159, 166, 169-73 (1989).

[3] *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849).

[4] 801 P.2d 1077 (Cal. 1990).

[5] CAL. CONST. art. II, § 8(d).

[6] 801 P.2d at 1083-85.

[7] *See* Marilyn E. Minger, Comment, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879, 896-928 (1991) (discussing California Supreme Court's failure to enforce single-subject rule); *see also* Brosnahan v. Brown, 651 P.2d 274 (Cal. 1982) (holding that intiative did not violate single-subject rule although it added sections covering several topics because all topics addressed same policy).

Revising the Constitution,"[8] establishes the exclusive procedures whereby the California Constitution may be amended or revised.[9] Under article XVIII, an amendment may be effected *only* by a Legislative proposal or a popular initiative. And a revision may be effected *only* by a Legislative proposal or a constitutional convention. It follows that a popular initiative may amend *but may not revise*.[10]

The California Constitution does not define "amendment" or "revision" in express terms. Almost 100 years ago, in *Livermore v. Waite*,[11] the court suggested their meaning. At that time, article XVIII provided "two methods" for effecting changes in the constitution.[12] Revision could be accomplished only by constitutional convention and amendment only by Legislative proposal.[13]

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[8] The article provides in its entirety as follows:

> Sec. 1. The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution and in the same manner may amend or withdraw its proposal. Each amendment shall be so prepared and submitted that it can be voted on separately.
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> Sec. 2. The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution. If the majority vote yes on that question, within 6 months the Legislature shall provide for the convention. Delegates to a constitutional convention shall be voters elected from districts as nearly equal in population as may be practicable.
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> Sec. 3. The electors may amend the Constitution by initiative.
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> Sec. 4. A proposed amendment or revision shall be submitted to the electors and if approved by a majority of votes thereon takes effect the day after the election unless the measure provides otherwise. If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.

CAL. CONST. art. XVIII.

[9] *See* Livermore v. Waite, 36 P. 424, 425 (Cal. 1894) ("[The constitution] can be neither revised nor amended except in the manner prescribed by itself.").

[10] Brosnahan v. Brown, 651 P.2d 274, 288 (Cal. 1982); Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284 (Cal. 1978).

[11] 36 P. 424 (Cal. 1894).

[12] *Id.* at 425-26.

[13] CAL. CONST. art. XVIII (1879) (repealed 1970). Before its repeal, the article provided in part as follows:

The *Livermore* court proceeded thus:

> Under the first of these methods the entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States. . . . The constitution itself has been framed by delegates chosen by the people for that express purpose, and has been afterwards ratified by a vote of the people, at a special election held for that purpose; and the provision in article 18 that it can be revised only in the same manner, and after the people have had an opportunity to express their will in reference thereto, precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision. The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like

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> Sec. 1. Any amendment or amendments to this Constitution may be proposed in the Senate or the Assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their Journals, with the yeas and nays taken thereon; and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such manner, and at such time, and after such publication as may be deemed expedient. . . . If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon such amendment or amendments shall become a part of this Constitution.
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> Sec. 2. Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. . . . At a special election to be provided for by law, the Constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. . . . [I]t shall be the duty of the executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the voters cast at such special election, to be the Constitution of the State of California.

CAL. CONST. art. XVIII (1879) (repealed 1970).

> permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.[14]

In *McFadden v. Jordan*,[15] the court considered whether an initiative measure, the so-called "California Bill of Rights," would, if approved, effect an amendment or a revision of the California Constitution. At the threshold, the *McFadden* court set out the principles stated in *Livermore*. It then proceeded to determine their applicability to initiatives:

> The initiative power reserved by the people by amendment to the Constitution in 1911 (art. IV, § 1) applies only to the proposing and the adopting or rejecting of "laws and amendments to the Constitution" and does not purport to extend to a constitutional revision. That amendment was framed and adopted long after the decision in *Livermore v. Waite*. By well established law it is to be understood to have been drafted in the light of the *Livermore* decision. . . . "[A] familiar and fundamental rule for the interpretation of a legislative statute is that it is presumed to have been enacted in the light of such existing judicial decisions as have a direct bearing upon it." It is thus clear that a revision of the Constitution may be accomplished only through ratification by the people of a revised constitution proposed by a convention called for that purpose . . . . Consequently if the scope of the proposed initiative measure . . . now before us is so broad that if such measure became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention . . . .[16]

"The differentiation [between *amend* and *revise*]," the *McFadden* court went on to explain,

> is not merely between two words; more accurately it is between two procedures and between their respective fields of application. Each procedure, if we follow elementary principles of statutory construction, must be understood to have a substantial field of application, not to be . . . a mere alternative procedure in the same field. Each of the two words, then, must be understood to denote, respectively, not only a procedure but also a field of application appropriate to its procedure. The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided

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[14] *Livermore*, 36 P. at 426.

[15] 196 P.2d 787 (Cal. 1948), *cert. denied*, 336 U.S. 918 (1949).

[16] *Id.* at 789-90 (citations omitted) (quoting Estate of Moffitt, 95 P. 653, 654 (Cal. 1908)).

> the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. We find nothing whatsoever in the language of the initiative amendment of 1911 (Art. IV, § 1) to effect a breaking down of that difference. On the contrary, the distinction appears to be scrupulously preserved by the express declaration in the amendment (particularly in the light of the *Livermore* case . . .) that the power to propose and vote on "amendments to the Constitution" is reserved directly to the people in initiative proceedings, while leaving unmentioned the power and the procedure relative to constitutional revision . . . .[17]

Among other things, observed the *McFadden* court, the "California Bill of Rights" would add what were in actuality 12 articles in 208 sections with over 21,000 words to a document containing 25 articles in 347 sections with about 55,000 words; repeal or substantially alter at least 15 of those 25 articles; treat a minimum of 4 new topics; and substantially curtail the functions of both the legislative and executive branches.[18]

"Applying the long established law to any tenable view of the facts which have been related," the *McFadden* court concluded,

> it is overwhelmingly certain that the measure now before us would constitute a revision of the Constitution rather than an amendment or "such an addition or change within the lines of the original instrument as will effect an improvement or better carry out the purposes for which it was framed."[19]

Next, in *Amador Valley Joint Union High School District v. State Board of Equalization*,[20] the court addressed whether Proposition 13, which added article XIII A to the California Constitution, was amendatory or revisory. It stated:

> Taken together our *Livermore* and *McFadden* decisions mandate that our analysis in determining whether a particular constitutional enactment is a revision or an amendment must be both quantitative and qualitative in nature. For example, an enactment which is so extensive in its provisions as to change directly the "substantial entirety" of the Constitution by the deletion or alteration of numerous existing provisions may well constitute a revision thereof. However, even a relatively simple enactment may accomplish such far reaching changes in the nature of our

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17 *Id.* at 797-98.

18 *Id.* at 796.

19 *Id.* at 799 (quoting Livermore v. Waite, 36 P. 424, 426 (Cal. 1894)).

20 583 P.2d 1281 (Cal. 1978).

> basic governmental plan as to amount to a revision also.[21]

Applying the foregoing standard, the court determined that Proposition 13 had insufficient qualitative or quantitative effect to amount to a revision of the state charter.[22]

Then, in *People v. Frierson*,[23] a plurality of the court considered in dictum whether a 1972 initiative measure was amendatory or revisory. The measure added section 27 to article I of the California Constitution, which validates the death penalty as a permissible punishment under that instrument. The plurality concluded that the initiative effected an amendment only:

> In *Amador Valley*, we observed that "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision . . . ." Section 27, however, accomplishes no such sweeping result. . . . [W]e retain broad powers of judicial review of [individual] death sentences . . . . In addition, we possess unrestricted authority to measure and appraise the constitutionality of the death penalty under the federal Constitution . . . .[24]

Next, in *Brosnahan v. Brown*,[25] the court addressed whether Proposition 8, the self-styled "Victims' Bill of Rights," was amendatory or revisory. Applying the "dual analysis" of *Amador*, which "examin[es] both the quantitative and qualitative effects of [an initiative measure] upon our constitutional scheme,"[26] the court concluded that "Proposition 8 did not accomplish a 'revision' of the Constitution within the meaning of article XVIII."[27]

Finally, in *In re Lance W.*,[28] the court considered whether article I, section 28, subdivision (d), which Proposition 8 added to the California Constitution, abrogated the exclusionary rule as a remedy for violation of a criminal defendant's right to freedom from unreasonable searches and seizures under section 13 of article I; and if so, whether it was revisory. The court answered the first question in the affirmative and the second in the negative. On the

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21 *Id.* at 1286.

22 *Id.* at 1289.

23 599 P.2d 587 (Cal. 1979) (plurality opinion).

24 *Id.* at 614 (dictum) (citation omitted) (quoting Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978)).

25 651 P.2d 274 (Cal. 1982).

26 *Id.* at 288.

27 *Id.* at 289.

28 694 P.2d 744 (Cal. 1985).

latter point, it reasoned in substance that the exercise by the people of the legislative power to

> restrict[] . . . judicial authority to fashion nonstatutory rules of evidence or procedure governing admission of unlawfully seized evidence does not, either qualitatively or quantitatively, "accomplish such far reaching changes in the nature of [judicial authority] as to amount to a revision" of the Constitution[29]

because such power is constitutionally recognized and its use in this matter does not amount to "a sweeping change either in the distribution of powers made in the organic document or in the powers which it vests in the judicial branch . . . ."[30]

In view of the case law, the definitional standard applicable for purposes of article XVIII of the California Constitution is as follows. A "revision" denotes a change that is qualitatively or quantitatively extensive, affecting the "underlying principles upon which [the constitution] rests" or the "substantial entirety of the instrument."[31] By contrast, an "amendment" denotes a change that is qualitatively and quantitatively limited, making a modification "within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed."[32]

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[29] *Id.* at 755 (quoting Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1284 (Cal. 1978)).

[30] *Id.* at 756.

[31] Livermore v. Waite, 36 P. 424, 426 (Cal. 1894); *accord* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1285-86 (Cal. 1978); McFadden v. Jordan, 196 P.2d 787, 790 (Cal. 1948), *cert. denied*, 336 U.S. 918 (1949); *see In re* Lance W., 694 P.2d 744, 755 (Cal. 1985); Brosnahan v. Brown, 651 P.2d 274, 288-89 (Cal. 1982); People v. Frierson, 599 P.2d 587, 613-14 (Cal. 1979) (plurality opinion) (dictum).

[32] Livermore v. Waite, 36 P. 424, 426 (Cal. 1894); *accord* Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1285 (Cal. 1978); McFadden v. Jordan, 196 P.2d 787, 797-98 (Cal. 1948), *cert. denied*, 336 U.S. 918 (1949); *see In re* Lance W., 694 P.2d 744, 755-56 (Cal. 1985); Brosnahan v. Brown, 651 P.2d 274, 288-89 (Cal. 1982); People v. Frierson, 599 P.2d 587, 613-14 (Cal. 1979) (plurality opinion) (dictum).

It could perhaps be argued that the definitional standard may require modification. In *Livermore*, the court reasoned in substance that "revision" denoted qualitatively or quantitatively extensive change because the process of revision as then defined, i.e., by constitutional convention, was exceptionally difficult. *See* 36 P. at 425-26. In *McFadden*, the court adhered to that reasoning because its predicate still obtained. *See* 196 P.2d at 789. In *Amador Valley*, the court recognized that a change had been wrought: formerly, "a constitutional revision could be accomplished *only* by the elaborate procedure of the convening of, and action by, a constitutional

II. The Construction of Section 3 of Proposition 115

Section 3 of Proposition 115 would have added language to article I, section 24 of the California Constitution. Section 24 provides as follows:

> Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.
>
> This declaration of rights may not be construed to impair or deny others retained by the people.

Section 3 of Proposition 115 would have inserted the following paragraph between the original two:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

The paragraph quoted above appears susceptible of two, and only two, general interpretations. The first possible reading treats the second sentence of the paragraph as controlling the first and understands the verb "construe" expansively: all rights under the California Constitution—including, *but not limited to*, the rights specified—are abrogated as independent guaranties for criminal defendants; they remain only as conduits for analogous

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convention" 583 P.2d at 1285 (emphasis in original); now, a constitutional revision can also be effected by the relatively simple procedure of legislative proposal. *Id.* at 1284-85. The court termed the change "significant." *Id.* at 1285. But it apparently failed to appreciate the precise "significance" of the change. Because the process of revision as now defined is little, if at all, more difficult than the process of amendment, "revision" might perhaps be deemed to denote a change that is little, if at all, more extensive than that accomplished by "amendment." In a word, if an "amendment" is a modification "within the lines of the original instrument," a "revision" is any change beyond those lines.

federal constitutional rights. For convenience, I shall refer to the foregoing as the "right-abrogating construction."

The second possible reading treats the first sentence of the paragraph as controlling the second and understands the verb "construe" strictly: all rights under the California Constitution are preserved in their full force and effect; California courts, however, may not interpret any of the specified rights for any criminal trial so as to afford greater protection than its federal constitutional counterpart. For convenience, I shall refer to the foregoing as the "interpretation-limiting construction."

III. Section 3 of Proposition 115: Amendatory or Revisory?

As I have explained above, section 3 of Proposition 115 appears susceptible of two general interpretations.[33] The question now is whether section 3 would have revised the California Constitution under either or both of these readings.

A. Section 3 as Revisory Under the Right-Abrogating Construction

Read in accordance with the right-abrogating construction, section 3 of Proposition 115 would have revised the California Constitution because of its effect on articles I and XVIII of that instrument.

1. Effect on Article I

Article I of the California Constitution bears the title "Declaration of Rights." The declaration is fundamental to our organic law. It assumes that all government power in the state, together with the branches that wield that power, is subject to the rights declared by the people.

It is manifest that the rights of article I of the California Constitution are not dependent on the United States Constitution. Independence is implied by the fact that article I contains rights that are additional to, broader than, or different from the rights contained in the federal Constitution. For example, section 28 of article I contains a "bill of rights for victims of crime." For its part, the federal charter has no analogous provision. Also, section 16 of article I declares that in civil actions as well as criminal, "[t]rial by jury is an inviolate right and shall be secured to all

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[33] *See supra* part II.

. . . ." By contrast, the Seventh Amendment provides that in civil actions "the right to trial by jury shall be preserved," but only "in suits at common law, where the value in controversy shall exceed twenty dollars." Further, section 4 of article I states affirmatively that "[f]ree exercise and enjoyment of religion without discrimination or preference are guaranteed"—evidently against nongovernmental as well as governmental action. The First Amendment, however, merely provides in negative fashion that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The independence of the rights of article I of the California Constitution is not only implied in their substance, but also expressed in the plain language of the instrument itself. As noted, section 24 of article I states in pertinent part: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." This language was added when the voters approved a legislative constitutional amendment measure designated as Proposition 7 on the ballot at the November 5, 1974 General Election. Proposition 7 derived from recommendations of the California Constitution Revision Commission. In the analysis, the Legislative Analyst correctly described the added language as merely a "clarification of existing law."[34]

Further, the history of the Declaration of Rights establishes its independence. The Declaration of Rights of the present constitution, which dates to 1879, derives from the Declaration of Rights of the original constitution, which dated to 1849.[35] The framers of the constitution of 1849 plainly intended that the rights contained in their declaration would not depend on the United States Constitution for their meaning and effect.

The framers' intent was apparently occasioned by legal practicalities. In the celebrated case *Barron v. Baltimore*,[36] the United States Supreme Court unanimously concluded, in an opinion by Chief Justice John Marshall, that the Bill of Rights did not apply to the states and hence did not protect the people against their state governments. The *Barron* holding was clearly, albeit

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[34] CALIFORNIA VOTERS PAMPHLET, GENERAL ELECTION 26 (Nov. 5, 1974) (emphasis omitted).

[35] *See* Christian G. Fritz, *More Than "Shreds and Patches": California's First Bill of Rights*, 17 HASTINGS CONST. L.Q. 13, 13-14 (1989). *Compare* CAL. CONST. art. I *with* CAL. CONST. of 1849, art. I.

[36] 32 U.S. (7 Pet.) 243 (1833).

impliedly, acknowledged in the debates on the Declaration of Rights.[37]

The intent of the framers, however, was also deeply rooted in the political culture of the times. The primary political relationship, of course, was conceived to be between the people of the several states and their state governments. *Barron* reveals as much. In that relationship, the people were the master and the government was the servant.[38] The people had the authority to positively affirm rights for themselves and to impliedly burden government to secure those rights against public and, apparently, private infringement.[39] In a word, the people were sovereign, and popular sovereignty demanded rights independent from the federal charter.

The framers of the constitution of 1879, as well as those of the constitution of 1849, plainly intended that their Declaration of Rights would not depend on the United States Constitution for its meaning and effect. As noted above, they derived their declaration from the "independent" declaration in the constitution of 1849. Further, at the constitutional convention of 1878-1879,

> [t]here was explicit consideration given to the idea of independence of the states in regard to definition of rights. To rely solely upon the national Constitution as the sole "charter of our liberties," one of the conservative delegates thus declared, "is a mistake historically, a mistake in law, and it is a blunder all around." The state constitution, [another delegate] argued, "is as much or more the charter of our liberties than the Constitution of the United States."[40]

Read in accordance with the right-abrogating construction, section 3 of Proposition 115 plainly would have revised the California Constitution because of its effect on article I. As the

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[37] *See* J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION IN SEPTEMBER AND OCTOBER, 1849, at 294 (1850) ("The fact that [these rights are guaranteed] in the Constitution of the United States does us no good here; for it has been decided by the Supreme Court of the United States that these provisions only apply in the United States Courts." (statement of Myron Norton, Chairperson, Standing Committee on the Constitution)).

[38] *See* Fritz, *supra* note 35, at 24-25, 32-33.

[39] *Id.* at 31.

[40] Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L.Q. 35, 78 (1989) (quoting DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 238, 1182 (1880)).

discussion above reveals, the Declaration of Rights of article I is a fundamental part of the state charter. And section 24 is a fundamental part of article I: it affirms the independence of the rights declared therein. Section 3 of Proposition 115 would have repealed section 24 of article I, in substance if not in words. Such a change, of course, is qualitatively extensive, affecting the "underlying principles upon which [the California Constitution] rests."[41] Therefore, it is revisory.

2. Effect on Article XVIII

As explained above, article XVIII of the California Constitution comprises the rules laid down by the people in accordance with which they may amend or revise their organic law.[42] It must therefore be deemed a fundamental part of the instrument. Read in accordance with the right-abrogating construction, section 3 of Proposition 115 also would have revised article XVIII of the California Constitution.

Section 1 of article II of the California Constitution declares what is plainly the basic political principle of the state charter—popular sovereignty: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."

Article XVIII furthers the principle of popular sovereignty by allowing the people, and only the people, to amend or revise their state charter. Section 3 would have undermined that principle. Insofar as it would have abrogated all state constitutional rights as independent guaranties for criminal defendants in criminal trials, and preserved them only as conduits for analogous federal constitutional rights, the provision would effectively have allowed the people *of the United States* to amend or revise the Constitution *of California*. Such a change is qualitatively extensive, affecting the "underlying principles upon which [the California Constitution] rests."[43] Therefore, it is revisory.[44]

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[41] Livermore v. Waite, 36 P. 424, 426 (Cal. 1894); *see supra* text accompanying note 31.

[42] *See supra* notes 8-10 and accompanying text.

[43] *Livermore*, 36 P. at 426; *see supra* text accompanying note 31.

[44] Even if section 3 of Proposition 115 did not effect a revision of the California Constitution but was merely amendatory, it would still be invalid. In *Livermore*, the court held:

> The legislature was not authorized by the framers of the

B. Section 3 as Revisory Under the Interpretation-Limiting Construction

Read in accordance with the interpretation-limiting construction, section 3 of Proposition 115 would have revised the California Constitution because of its effect on articles I and VI of that instrument.

1. Effect on Article I

From its genesis in the original Constitution of California, the Declaration of Rights of article I is rooted in egalitarianism.[45] Proof—if proof be needed—is furnished by section 18 of article I of the Constitution of 1849: "Neither slavery, nor involuntary servitude, unless for the punishment of crimes, shall ever be tolerated in this State." That provision, of course, preceded the Thirteenth Amendment to the United States Constitution by more than 15 years. Plainly, egalitarianism is one of the underlying principles of article I and indeed the California Constitution as a whole.

Thus, all persons have the same rights under the California Constitution. Because of the supremacy clause, those guaranties may grant no less protection than their federal counterparts.[46] But because of their independent source, they can—and in fact do—grant more.

> constitution, nor do the terms of that instrument permit it, to propose any amendment that will not, upon its adoption by the people, become an effective part of the constitution; nor is it authorized to propose an amendment which, if ratified, will take effect only at the will of other persons, or upon the approval by such persons of some specific act or condition.

36 P. at 427. Nor—I may add—have the people allowed themselves to propose such an amendment by initiative. Put simply, an amendment must be determinate and noncontingent—such as "a declaration by the people of a principle or of a fact" or "a limitation or a rule prescribed for the guidance of . . . the departments to which the sovereignty of the people has been intrusted." *Id.*

Section 3 of Proposition 115 is not such: it is indeterminate and contingent, subject to substantive change whenever the pertinent federal constitutional rights are increased, decreased, or otherwise affected, whether through formal amendment or merely through interpretation by the United States Supreme Court. Stated otherwise, section 3 comprises words alone without original intent or fundamental meaning: it incorporates by reference the unknown and the unknowable.

[45] *See* Fritz, *supra* note 35, at 24.

[46] *See* U.S. CONST. art. VI, § 2.

Each person owns, as it were, a book of state constitutional rights. The chapters are entitled "Due Process of Law," "Equal Protection of the Laws," and so on. The first pages of each chapter contain the substance of the corresponding chapter in the book of federal constitutional rights. The remaining pages may contain more. Section 3 of Proposition 115 would have undermined egalitarianism: had the provision not been invalidated, all persons would not have had the same rights under the California Constitution.

An illustration: *A* is a litigant in a civil action; *D* is a criminal defendant in a criminal action. Both, of course, have a state constitutional right to the equal protection of the laws under article I, section 7, subdivision (a). In construing that right for *A*—to use the metaphor presented above—a court would have had to look through the whole chapter in *A*'s book of state constitutional rights. By contrast, in construing the right for *D*, it could not have looked beyond the first pages.

Another illustration: *P* is the people in a criminal action; *D* is the defendant in the same action. Both have a state constitutional right to due process of law—*D* under section 7, subdivision (a) and section 15 of article I; *P* under section 29 of article I. In construing that right for *P* at trial—to use the metaphor again—a court would have had to look through the whole chapter in *P*'s book of state constitutional rights. But in construing the same right for *D* at the same trial, it could not have looked beyond the first pages.

As shown, section 3 of Proposition 115 would have undermined egalitarianism, which is fundamental to the Declaration of Rights of article I and to the California Constitution as a whole. Such a change is qualitatively extensive, affecting the "underlying principles upon which [the California Constitution] rests."[47] Therefore, it is revisory.

2. Effect on Article VI

The California Constitution establishes the state's basic governmental plan. Article III, section 3 of the California Constitution identifies the three powers of government—legislative, executive, and judicial. Articles IV through VI define the branches of government that wield those powers—the Legisla-

[47] *Livermore*, 36 P. at 426; *see supra* text accompanying note 31.

ture,[48] the Governor,[49] and the judiciary,[50] respectively.

The nature of the three powers and the function of the three branches have been settled since virtually the inception of our polity. In *Nougues v. Douglass*,[51] the court stated:

> The three great departments are essentially different in their constitution, nature, and powers, and in the means provided for each by the Constitution, to enable each to perform its appropriate functions. These three departments are all equally necessary to the very existence of the government.
>
> The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. It is primarily [*sic*] and original, antecedent and fundamental, and must be exercised before the other departments can have anything to do. Its exercise is a condition *precedent*, and the exercise of the executive and judicial functions are conditions *subsequent*. The legislative power makes the laws, and then, after they are so made, the judiciary expounds and the executive executes them.
>
> The Constitution is itself a law, and must be construed by some one. Each department must be kept within its appropriate sphere. There must, then, from the very nature of the case, be a power lodged somewhere in the government to construe the Constitution in the last resort. The different departments cannot be each left the sole and conclusive judge of its own powers. If such was the case, these departments must always contest and always be in conflict; and this cannot be the case in a constitutional government, practically administered.
>
> The judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort, in those cases not expressly, or by necessary implication, reserved to the other departments. It would be idle to make the Constitution the supreme law, and then require the judges to take the oath to support it, and after all that, require the Courts to take the legislative construction as correct.[52]

It follows that

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48 *See* CAL. CONST. art. IV, § 1.

49 *See id.* art. V, § 1.

50 *See id.* art. VI, § 1 ("The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts."). For present purposes, this provision is substantially similar to its predecessor, which bore the same numbering. And *that* provision is substantially similar to *its* predecessor in the original constitution, which also bore the same numbering.

51 7 Cal. 65 (1858).

52 *Id.* at 69-70 (emphasis in original).

> [t]he judicial function is to "declare the law and define the rights of the parties under it." To determine "what shall be adjudged or decreed between the parties, and with whom is the right of the case, is judicial action." "A determination of the rights of an individual under the existing laws" is an exercise of judicial power. An essential element of judicial power, distinguishing it from legislative power, is that it requires "the ascertainment of existing rights." "It is not to be disputed that, as a general proposition, the judicial function is the determination of controversies between parties." "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end."[53]

Considering the nature of the judicial power and the function of the judiciary in California, and the "established [fact] that our Constitution is 'a document of independent force,' "[54] compels the conclusion that it is the courts of this state that are entrusted with the construction of the state charter, "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions."[55]

Read in accordance with the interpretation-limiting construction, section 3 of Proposition 115 would have revised the California Constitution because of its effect on article VI of that instrument. Perhaps section 3 of Proposition 115 might not have changed the substance of any of the state constitutional rights specified in article VI. But it would have prohibited the courts from treating those rights as having any substance whatever beyond that which their federal constitutional analogues possess. In terms of the metaphor used above: when a court construed one of the specified state constitutional rights of a criminal defendant in a criminal trial, it could have looked to the pertinent chapter in the book of state constitutional rights, but could not have looked beyond the first pages. For all intents and purposes, the provision would have barred the courts from construing any of the specified state constitutional rights, and would have compelled them instead to construe their federal constitutional counterparts.

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53 Marin Water & Power Co. v. Railroad Comm'n, 154 P. 864, 867 (Cal. 1916) (citations omitted).

54 Allen v. Superior Court, 557 P.2d 65, 67 (Cal. 1976) (quoting People v. Disbrow, 545 P.2d 272, 281 (Cal. 1976); People v. Brisendine, 531 P.2d 1099, 1113 (Cal. 1975)).

55 Reynolds v. Superior Court, 528 P.2d 45, 49 (Cal. 1974) (footnote and citations omitted).

"The judiciary, from the very nature of its powers and the means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . . ."[56] Section 3 of Proposition 115, however, would have stripped the courts of that right, at least when they were called on to interpret any of the specified state constitutional rights for a criminal defendant in a criminal trial.

"The judicial function is to 'declare the law and define the rights of the parties under it.' "[57] But section 3 of Proposition 115 would have prevented the courts from carrying out their task in many criminal cases: when they were asked to construe state constitutional law and state constitutional rights, they could have construed only *federal.*

"An essential element of judicial power . . . is that it requires 'the ascertainment of existing rights.' "[58] Section 3 of Proposition 115, however, would have removed that element for many criminal defendants: the court could have ascertained only federal constitutional rights.

" 'A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.' "[59] Section 3 of Proposition 115 would have effectively barred such inquiry by prohibiting courts from interpreting existing state constitutional rights as independent guaranties.

Finally, it is the courts of this state that are entrusted with the construction of the state constitution, "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions."[60] In many criminal cases, section 3 of Proposition 115 would have removed the independent power from the courts and drained the state charter of its independent force.

A change such as that described above is qualitatively extensive, affecting the "underlying principles upon which [the Califor-

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56 Nougues v. Douglass, 7 Cal. 65, 70 (1858).

57 *Marin Water,* 154 P. at 866 (quoting Frasher v. Rader, 56 P. 797, 797 (Cal. 1899)).

58 *Id.* at 867 (quoting People *ex rel.* Dean v. Board of Supervisors, 55 P. 131, 132 (Cal. 1898)).

59 *Id.* (quoting Prentis v. Atlantic Coast Line, 211 U.S. 210, 226 (1908) (Holmes, J.)).

60 Reynolds v. Superior Court, 528 P.2d 45, 49 (Cal. 1974).

nia Constitution] rests."[61] Therefore, it is revisory.

CONCLUSION

The lesson of *Raven v. Deukmejian* is bittersweet. Regrettably, the court continues in its refusal to enforce the single-subject rule. But it has now clearly shown that it will not follow such a course with regard to the revision requirements. In this matter at least, it has committed itself to preserving the integrity of our organic law. May it persevere.

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[61] Livermore v. Waite, 36 P. 424, 426 (Cal. 1894); *see supra* text accompanying note 31.