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James M. Fischer

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Ballot Propositions:* The Challenge of Direct Democracy to State Constitutional Jurisprudence

By JAMES M. FISCHER**

Introduction

A review of recent literature and judicial decisions suggests that we are seeing another "born again" phenomenon—a state constitutional jurisprudence.¹ This conclusion, however, is incorrect. Although state constitutional jurisprudence has been eclipsed in several areas by federal constitutional jurisprudence, it never died. Notwithstanding the federal shadow, state constitutional jurisprudence remains a vibrant, viable area of legal enterprise and endeavor.² State courts have independently proceeded to develop many of the constitutional standards that are commonly, though erroneously, believed to have

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¹ Ballot Proposition is used here as a generic term to refer to both initiatives and referendums. Initiatives are ballot propositions that are voter-initiated, whereas referendums are legislature-initiated. In each case, the constitutional ballot proposition requires majoritarian approval before it becomes effective. Moreover, since legislature-sponsored referendums can hardly be seen as countermajoritarian, the origin of the ballot proposition is of little significance when appraised regarding its effect upon state constitutional jurisprudence.

² Professor of Law, Southwestern University School of Law. J.D., 1973, Loyola University of Los Angeles. This is the product of a presentation delivered on January 8, 1983 to the Constitutional Law Section of the American Association of Law Schools at the Association's Annual Meeting in Cincinnati, Ohio.

1. Ironically, it was a 1977 article published in the Harvard Law Review by a United States Supreme Court Justice that spurred popular attention toward reliance upon state constitutions as a counterpoint to the federal Constitution. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). A bibliography of recent literature on the use of state constitutions can be found in Development of the Law—The Interpretation of State Constitutional Rights, 95 Harv. L. Rev. 1324, 1328 n.20 (1982) [hereinafter cited as Development].

2. See Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873 (1976). Indeed, it was the continued vibrancy of state constitutional jurisprudences that, in part, inspired Justice Brennan’s call for renewed attention to state constitutions. Brennan, supra note 1. Justice Brennan also saw reliance upon state constitutions as a means of offsetting what he perceived as reduced concerns on the part of the Supreme Court for the protection of individual liberties. Brennan, supra note 1, at 495, 498-500.
originated in the Supreme Court. For example, state courts have devised standards that guarantee separation of church and state in public schools and protect interracial marriages from state negation.\(^3\) In many respects, the Supreme Court has been more a follower than a leader.\(^4\)

State constitutional jurisprudence is influenced, however, by one structural device not present in its federal counterpart: the ballot constitutional proposition.\(^5\) Amending the federal Constitution is an arduous task.\(^6\) Amending state constitutions is, by comparison, an everyday occurrence.\(^7\) Development of a state constitutional jurisprudence oper-

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7. As of 1978, voters at the state level had approved 464 out of 1252 ballot propositions. Moreover, in the past decade the rate of use of ballot propositions has increased. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice and the First Amendment*, 29 *UCLA L. Rev.* 505, 509, n.7 (1982). See also Comment, *California’s Constitutional Amendomania*, 1 *Stan. L. Rev.* 279 (1949) (noting that in a 70 year period ending in 1946, 439 amendments were proposed to the California Constitution; of those proposals, 246 were ratified).

State experience with state constitutional amendments can be compared with the 11 successful amendments (Amendments XVI to XXVII) and two serious, but unsuccessful amendments (proposed Equal Rights Amendment and proposal to overrule Child Labor Tax Case, 259 U.S. 20 (1922) and Hammer v. Dagenhart, 247 U.S. 251 (1918)) to the federal Constitution during the same time period (approximately 1900-78). Only four of the successful amendments were directed at Supreme Court decisions: Amendment XI (1798), negating Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793); Amendment XIV (1868), negating Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856); Amendment XVI (1913), negating Pollock v. Farmers Loan & Trust Co., 157 U.S. 429 (1895); and Amendment XXVI (1971), negating Oregon v. Mitchell, 400 U.S. 112 (1970).
ates under a regime of popular supervision that is not present at the federal level. The role that popular supervision will play in the future growth of state constitutional jurisprudence is the subject of this Article.

Ballot constitutional propositions have not been used to advance a consistent legal philosophy or legal order; rather, ballot constitutional propositions generally represent reactions to singular or thematic developments in state constitutional jurisprudence. State constitutional jurisprudence has been described as result-oriented. It is not surprising that the product of a result-oriented jurisprudence may meet with ad hoc majoritarian reaction and rejection. This Article reviews present protections for state constitutional jurisprudence from majoritarianism, and discusses areas of law that could be developed to provide additional safeguards.

A review of scholarly works, particularly those on the California initiative process where use of the ballot proposition has been common, supports the conclusion that there are no practical legal constraints on the use of ballot propositions to effect changes in state constitutional law. This is not to say that the federal Constitution does not impose content constraints over popular supervision of state constitutional jurisprudence. Nor does it suggest that ballot propositions are an effective means of changing state law so that it mirrors majoritarian views. Just the opposite is true. Federal law does impose content limitations on ballot propositions, and majoritarian use of ballot propositions to change state constitutional law from that wrought by state courts has been noticeably ineffective.

I. The Ballot Proposition Process

The ballot proposition process refers to the stages in which a proposition is proposed, submitted to the voters, and popularly approved.

8. The instrumentalist or result-oriented jurisprudence is reviewed and critiqued in Collins, Reliance on State Constitutions—Away From a Reactionary Approach, 9 Hastings Const. L.Q. 1 (1982).

This process is largely unfettered by state or federal constitutional limitations. Popular supervision of state constitutional jurisprudence, through the use of ballot propositions, has not been marked by meaningful legal constraints upon the means employed to exercise that supervision.

A. Limitations on the Amendment Process Arising Under State Constitutions

State constitutions are marked by the looseness by which they can be amended. Some commentators have suggested that there are structural reasons for this phenomenon. These commentators point to functional differences between the federal Constitution and state constitutions: the federal charter is identified as primarily concerned with institutional arrangements; state constitutions are identified as concerned with safeguarding all manner of grants and privileges to the people.

The structural differences between the federal Constitution and state constitutions are not meaningful. Institutional arrangements are of fundamental concern to state constitutions. Any analysis of state constitutions must begin by acknowledging the great diversity of state charters. State constitutions vary significantly in length. Some, by their attention to detail and minutia, contrast strongly with the federal charter. Many states, however, have constitutions that parallel the federal charter by emphasizing the allocation of power rather than the

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10. See supra notes 7-9 and accompanying text.
11. See, e.g., Development, supra note 1, at 1355.
12. See, e.g., id. What these commentators often overlook, however, is that the differences between the federal Constitution and state constitutions are often the result of ballot propositions, rather than their cause. See Comment, California’s Constitutional Amendomania, supra note 7, at 280, “Qualitatively, even greater changes are made in the Constitution by amendomania. The range of subjects covered is vastly enlarged. Although the traditional constitution states only an outline of government and political rights, the California Constitution now covers economic and social subjects as well. For example, some of the matters commonly treated in amendments to the California Constitution are education, corporations, public money, eminent domain, the Railroad Commission, counties, municipalities, and prohibition.” Id. (emphasis added).
14. For example, the Louisiana (201,000 words), New York (58,000 words) and California (45,000 words) Constitutions evidence a type of “superheavy” constitution.
identification of fundamental or substantive rights. The ease with which a constitution may be amended appears to bear little relation to its size or structure.

Early twentieth century progressivism is sometimes suggested as a root cause for easy constitutional amendment by ballot proposition. Distrust of "distant" legislatures, that were believed to be controlled by special interests, caused citizens to call for a popular panacea—citizen participatory democracy. Ironically, at least in California, there is a history of ballot propositions being used to rectify "illiberal" state court decisions rather than legislative decisions.

Neither the validity nor the significance of the progressive paternity is clear. Not all states with progressive traditions provide for ballot propositions, and some states without progressive traditions do provide for ballot propositions. In fact, there is a tendency to place too much emphasis upon the progressive tradition and majoritarian consequences of ballot propositions. Every constitution contains provisions allowing it to be amended. The most common method is legislative sponsorship, followed by majority approval by the electorate. The use of a process that bypasses the legislature hardly makes the matter more or less majoritarian. It is the relative ease by which state constitutions can be amended by a temporary majority that poses a challenge to state constitutional jurisprudence, not the particular method by which majoritarian views are implemented.

15. For instance, the New Jersey (12,000 words), Alaska (12,000 words), and Rhode Island (6,500 words) Constitutions are similar to the federal document.

16. See generally E. Oberholtzer, The Referendum in America (2d ed. 1912); W. Dodd, The Revision and Amendment of State Constitutions (1910).

17. Wheeler, Changing the Fundamental Law, in Salient Issues of Constitutional Revision 56 (1961); see Comment, California's Constitutional Amendment, supra note 9, at 282 ("The origin of amendomania in California lies principally in the Californians' historical distrust of their Legislature.").

18. See Comment, supra note 9, at 283; see generally V. Key & W. Crouch, The Initiative and Referendum in California 425, 432 (1939).

19. White, Amendment and Revision of State Constitutions, 100 U. Pa. L. Rev. 1132, 1133 (1952). Moreover, it is not always required that the prescribed method of changing the constitution be followed. See Gatewood v. Mathews, 403 S.W.2d 716, 719-22 (Ky. 1966). The court in Gatewood reasoned that strict compliance to procedures prescribed by the Kentucky Constitution was required only when the prescribed procedures were used. The procedures were not, however, exclusive. Thus, where they were not used failure to comply with them was irrelevant. The Gatewood case is inconsistent with several prior cases which had required strict compliance with constitutionally prescribed procedures for amending the Kentucky Constitution. Harrod v. Hatcher, 281 Ky. 712, 715, 137 S.W.2d 403, 407 (1940); Arnett v. Sullivan, 279 Ky. 720, 721, 132 S.W.2d 76, 80, (1939) ("Constitutions should never be amended or disregarded . . . except in the manner pointed out in the constitution itself . . . ").
1. Qualification Requirements

In order to qualify a measure for consideration by the electorate, proponents of the initiative ballot proposition must first draft the measure and submit it to state officials for review. This review is designed to insure that the measure complies with state law regarding the topic and format of ballot propositions. State officials also may title the measure and prepare a summary of the measure's contents.

Next, the necessary number of signatures to qualify the measure for electorate consideration must be secured. The required number of signatures varies from three percent to fifteen percent of the electorate; the percentage is usually based upon the number of votes cast at the last statewide election for a particular public office. Those individuals signing the petition to qualify the measure as a ballot proposition must be currently registered voters. In addition, the requisite number of signatures must be gathered within a specified time period.

The measure's proponents then submit the signed petitions to state officials for tabulation and verification. If the requisite number of signatures has been obtained, the measure is assigned a proposition number.
number and placed on the ballot for the next state-wide election. Alternatively, a special election may be called to pass upon the ballot proposition. It is at this pre-election point that challenges regarding compliance with the formalities of ballot proposition qualification are made. After the election, issues relating to petition qualification generally are treated as either mooted by the measure's defeat or "cured" by the measure's passage.

2. Ratification Requirements

The percentage of votes necessary to pass a ballot proposition varies, as does the baseline against which that percentage is computed. Percentage requirements run from fifty percent plus one to seventy-five percent. The baseline also varies: one approach is to use the total number of votes cast on the ballot proposition itself; another approach is to use the total number of votes cast for a particular office, such as governor. In the past, contests for elected office usually generated more votes than did ballot propositions; hence, using the votes cast on a

27. CAL CONST. art. II, § 8(c) (West 1954) (Governor may call special statewide election for consideration of the ballot proposition).
28. See Comment, Judicial Review of Initiative Constitutional Amendments, supra note 9, at 469-74 (noting that challenges can be based upon (1) the form of the petition; (2) the validity of the signatures; (3) the sufficiency of the circulator's affidavits; or (4) the propriety of state action taken in connection with reviewing a petition's sufficiency or preparing a title and summary). The qualification process itself may be subject to abuse, including the use of "dodger cards" that cover up the approved ballot proposition summary with a more appealing statement, the use of false or misleading summaries, and the forging of signatures. See Public Hearings on the Initiative Process Before the California Assembly Elections and Reapportionment Committee 2, 32, 48 (Oct. 10, 1972); see also Comment, Pre-election Judicial Review supra note 9, at 1217 (arguing for greater use of pre-election scrutiny of initiatives).
30. N.M. CONST. art. VII, § 3 (1978 Pamp.) requires a three-fourths majority as a condition precedent to amendment of the state constitution. A further requirement that the amendment also receive a two-thirds majority in each county was held unconstitutional in State ex rel. Witt v. State Canvassing Bd., 78 N.M. 682, 688-89, 437 P.2d 143, 149-50 (1968) because the requirement violated the "one man-one vote" standard of Baker v. Carr, 369 U.S. 186 (1962). See also ILL. CONST. art. XIV, § 3 (three-fifths of those voting on the amendment or 30% of those voting in the election); NEB. CONST. art. III, § 4 (majority of those voting on the amendment and 35% of those voting in the election must vote on the amendment); NEV. CONST. art. XIX, § 2 (voters must approve amendment twice).
particular office as the baseline made ratification difficult.\textsuperscript{32} Recently, however, some ballot proposition contests have been generating more votes;\textsuperscript{33} consequently, ratification of ballot propositions has been easier. Supermajority requirements for ballot proposition ratification have been upheld,\textsuperscript{34} but it appears that the supermajority requirement itself may be set aside by a simple majority vote.\textsuperscript{35}

3. \textit{Ballot Proposition Constraints}

a. Scope

Although ballot propositions can be used to \textit{amend} a state constitution, they cannot be used to \textit{revise} a state constitution. For example, in \textit{McFadden v. Jordan},\textsuperscript{36} the California Supreme Court declared invalid a ballot proposition that would have repealed fifteen of the existing twenty-five articles of the California Constitution and would have created five new provisions. The line dividing an amendment from a revision, however, is neither clear nor defined.

In \textit{Amador Valley Joint Union High School District v. State Board of Equalization},\textsuperscript{37} the California Supreme Court set forth a quantitative and qualitative test to distinguish an amendment from a revision. Under the quantitative test, a ballot proposition is deemed a revision when its provisions are so extensive that they change directly a substantial portion of the constitution by deletion or alteration of numerous existing provisions.\textsuperscript{38} Under the qualitative test, a revision occurs only when the initiative accomplishes far-reaching changes that alter the nature of the basic plan of government.\textsuperscript{39}

Courts in other jurisdictions have approached the revision issue differently. For instance, in a Florida case,\textsuperscript{40} a series of proposed

\begin{itemize}
\item \textsuperscript{32} See generally Laughlin, \textit{A Study in Constitutional Rigidity I}, 10 U. Chi. L. Rev. 142 (1943); Sears & Laughlin, \textit{A Study in Constitutional Rigidity II}, 11 U. Chi. L. Rev. 374 (1944).
\item \textsuperscript{33} See J. Naisbitt, \textit{Megatrends} 181-94 (Warner Books ed. 1984). This has occurred, however, when election for contested offices and ballot propositions were combined. Special elections held only for the purpose of voting upon a ballot proposition may result in a substantially reduced voter turnout.
\item \textsuperscript{34} Gordon v. Lance, 403 U.S. 1 (1971).
\item \textsuperscript{36} 32 Cal. 2d 330, 196 P.2d 787 (1948), \textit{cert. denied sub nom.} Allen v. McFadden, 336 U.S. 918 (1949).
\item \textsuperscript{37} 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).
\item \textsuperscript{38} \textit{Id.} at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244.
\item \textsuperscript{39} For example, under this qualitative test, a ballot proposition vesting all judicial power in the legislature presumably would be considered a revision of the constitution.
\item \textsuperscript{40} Rivera-Cruz v. Gray, 104 So. 2d 501 (Fla. 1958).
\end{itemize}
amendments were tied together so that all of the amendments had to be approved or else all would be deemed denied. The court held that such an arrangement constituted an improper attempt to circumvent the prohibition against the revision of the state constitution by amendment.41 Other courts have simply held that the terms "amendment" and "revision" are synonymous.42

An offshoot of the principle barring revision by ballot proposition is the single subject requirement.43 The objective of this requirement is to prevent the adoption of a provision furthering an undesirable policy solely because it is joined with another provision independently supported by voters. Although in California the single subject requirement is contained in the state constitution,44 the judiciary has been responsible for determining the actual limits imposed by the requirement. California courts have interpreted the constitution liberally so that few ballot propositions have been struck down under the single subject requirement.

In California, a ballot proposition is deemed to comply with the single subject requirement if its provisions are "reasonably germane to each other and to the general purpose or object of the initiative."45 In

41. Id. at 504-05.
43. The single subject requirement is quite common at both the statutory and constitutional levels. See generally Ruud, No Law Shall Embrace More Than One Subject, 42 MINN. L. REV. 389 (1958); Comment, The California Initiative Process: The Demise of the Single-Subject Rule, 14 PAC. L.J. 1095 (1983) (criticizing the common, liberal application of the single subject rule to legislative acts and initiatives).
44. CAL. CONST. art. II, § 8, subd. (d) provides: "An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."
FPPC v. Superior Court, the California Supreme Court applied this rule in reviewing a ballot proposition that prescribed certain political reforms. The court held that the ballot proposition did not violate the single subject requirement even though the proposition (1) created a fair political practices commission; (2) created disclosure requirements for election campaigns; (3) imposed election expenditure limitations; (4) enacted conflict of interest rules; (5) placed limitations on lobbyist activities; (6) imposed rules regarding ballot positions for election candidates and voter pamphlet summaries of arguments; and (7) specified audit and sanction procedures in aid of the Act's enforcement.

Not all states follow the California interpretation. See, e.g., Floridians Against Casino Takeover v. Let's Help Florida, 363 So. 2d 337 (Fla. 1978) (proposed amendment must be functionally unitary). See infra note 51 and accompanying text.


47. Id. at 43, 599 P.2d at 51, 157 Cal. Rptr. at 860. In Brosnahan v. Brown, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982), discussed infra at text accompanying notes 48-49, the court addressed the importance of FPPC v. Superior Court, thus: "Petitioners, sensing the evident inconsistency between FPPC and their own present position, characterize the FPPC lead opinion as a mere 'plurality' opinion entitled to little weight. Yet six of the seven justices in that case voted to sustain the multifaceted provision of the Fair Political Practices Act against a single-subject attack. It was only Justice Manuel who dissented on this point. His observations regarding the Act's multifarious character and his conceptual differences with his six colleagues are very revealing for, in his view: 'The regulation of the election process, no matter how broadly defined, has little to do with the regulation of the day-to-day activities of lobbyists. The adoption of codes governing conflicts of interest in all state agencies . . . is yet another matter. Although each of these might conceivably form a part of a unified legislative program directed toward the policy objective of "political reform," each concerns an entirely different and discrete subject.'

"If Justice Manuel's characterization of the Fair Political Practices Act is accurate, and if we are to follow our own precedent, our holding in FPPC necessarily controls the disposition of the present case, for on their face the various provisions of Proposition 8 certainly are no less germane, interdependent or interrelated than the provisions of the statute which we so recently sustained in FPPC against a similar single-subject attack.

"Petitioners argue that because Proposition 8 is designed to protect the rights of potential as well as actual victims of crime, its objective somehow thereby becomes too broad. Yet surely the Fair Political Practices Act which we readily upheld in FPPC was subject to the same criticism, for it too was aimed at protecting the general citizenry in their role as potential victims of political corruption. Obviously, the fact that a multifaceted measure seeks to protect the general public from harm (whether from present or future criminal acts, political corruption or excessive taxation) presents no constitutional impediment to its validity.

"Petitioners speculate that the multiplicity of Proposition 8's provision enhanced the danger of election 'logrolling,' whereby certain groupings of voters, each constituting numerically a minority, but in aggregate a majority, may approve a measure which lacks genuine popular support in order to secure the benefit of one favored but isolated and severable position. Yet, as we emphasized in FPPC, such a risk 'is inherent in any initiative containing more than one sentence or even an "and" in a single sentence unless the provisions are redundant . . . .'" Id. at 250-51, 651 P.2d at 282, 186 Cal. Rptr. at 38.
More recently, in *Brosnahan v. Brown*, the court examined a ballot proposition that addressed such diverse subjects as school safety, restitution by convicted defendants to crime victims, bail, diminished capacity, rules of evidence in criminal proceedings, and plea bargaining. The court found that each of the subjects had a common concern:

[T]he 10 sections were designed to strengthen procedural and substantive safeguards for victims in our criminal justice system . . . . Proposition 8 constitutes a reform aimed at certain features of the criminal justice system to protect and enhance the rights of crime victims.

Thus, the single subject challenge was rejected and the proposition was upheld.

The court in both *FPPC* and *Brosnahan* did not require the specific matter contained in the ballot initiative to form an interlocking package. In each case, the court allowed ballot propositions to address comprehensively a variety of topics and still remain within the single subject requirement. In general, it appears that most jurisdictions follow this California approach.

It is questionable whether a loose single subject rule should be applied to ballot propositions adopted by initiative. In *Brosnahan*, the majority placed considerable reliance upon *Evans v. Superior Court*. The California Legislature had enacted the entire Probate Code by a single act. The act was challenged as violative of the single subject requirement, then only applicable to legislation. The court in *Evans* upheld the act:

Numerous provisions, having one general object, if fairly indicated in the title, may be united in one act. Provisions governing projects so related and interdependent as to constitute a single scheme may be properly included within a single act . . . . The legislature may insert in a single act all legislation germane to the general subject as expressed in its title and within the field of legislation suggested thereby.

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48. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
49. *Id.* at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.
50. *Id.* at 253, 651 P.2d at 284, 186 Cal. Rptr. at 40.
52. 215 Cal. 58, 8 P.2d 467 (1932).
Although the Brosnahan majority did not distinguish between ballot propositions and proposed legislation insofar as application of the single subject requirement is concerned, such a distinction should be made. Ballot propositions should be subjected to a more rigorous application of the single subject requirement because they are not reviewed to detect internal inconsistencies, conflicts with existing law, or dubious factual, political, or policy assumptions; in addition, ballot propositions often are poorly drafted and complex. The legislative process, on the other hand, is designed to provide review of proposed legislation through staff analysis, public hearings and legislative debate. It should therefore be expected that legislative originated measures can better sustain lenient application of the single subject requirement.

54. See Fine v. Firestone, 448 So. 2d 984, 988 (Fla. 1984) ("We recede from our prior language in Floridians [Against Casino Takeover v. Let's Help Florida, 363 So. 2d 237 (Fla. 1978)] that expressed the view that there is no difference between the legislative one subject restriction and the initiative constitutional one subject limitation. We find it is proper to distinguish between the two." The court based its distinction on three grounds: 1) Florida statutory single subject language is broader than constitution single subject language; 2) legislative proposals must proceed through legislative debate and public hearings; and 3) strict compliance should be required when amendment of basic charter of government is involved.


56. See Note, The California Initiative Process, supra note 9, at 930-34 (discussing differences between drafting of initiative and legislative proposals). Cf. City of Raton v. Sproule, 78 N.M. 138, 142, 429 P.2d 336, 340 (1967) ("Logic and reason compel that a like, or even stronger, presumption must prevail in favor of the validity of a constitutional amendment which has received both legislative approval and approval of the [voters].").

57. Professor Lowenstein argues to the contrary. He contends that the arguments of complexity and logrolling are overstated. Lowenstein, supra note 43, at 954-63. He also contends that use of a stringent single subject test would work a serious infringement upon the right of initiative. Id. at 965.

Professor Lowenstein's objections are well aimed and well reasoned. His conclusions and criticisms, however, are linked inextricably with his own laudable efforts with the initiative to establish California's Fair Political Practices Commission. Id. at 936, 965 n.115 (recounting Professor Lowenstein's role). The law should not be predicated upon an assumption of altruistic tendencies by those involved in the political process. Professor Lowenstein also fails to give due weight to ballot complexity. See infra note 120 and accompanying text. Whatever deficiencies legislators may have regarding their abilities to evaluate complex materials, they at least have the benefit of staff and institutionalized procedures to call upon for assistance.
b. Content

State constitutions generally do not restrict the subject matter that may be addressed by ballot propositions. A few state constitutions do contain subject matter restrictions, such as prohibitions against the use of ballot propositions on issues involving religion, judicial appointments, the reversal of judicial decisions, and guarantees in the state’s Bill of Rights. In addition, some states prohibit the reintroduction of a subject by ballot proposition until a prescribed period of time has elapsed since that subject was last presented to the electorate by ballot proposition.

In Brosnahan, the California Supreme Court implicitly extended to state constitutional ballot propositions a limitation that previously had been applied only to local initiative or local referendum measures affecting government at the municipal level. Under this limitation, a ballot proposition cannot work an impairment of essential government functions. If a ballot proposition will “greatly impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential,” that proposition is invalid. Despite this general test, the contours of the limitation are difficult to discern.

The propriety of applying the rule prohibiting impairment of essential services to statewide constitutional ballot propositions is suspect. The doctrine was first articulated in Chase v. Kalber, a case involving a local ballot proposition’s effect on a state plan for street improvement. In denying efficacy to the local ballot proposition, the court focused on the conflict between that ballot proposition and the state plan for street improvement:

It is plainly apparent that no part of the proceedings in street improvement could be subjected either to the initiative or referendum without completely destroying the right of property owners whose property is to be affected by such proceedings to be

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60. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

61. Id. at 258, 651 P.2d at 287, 186 Cal. Rptr. at 43.

62. Id.

63. Id. (quoting Simpson v. Hite, 36 Cal. 2d 125, 134, 222 P.2d 225, 230 (1950)).

64. Id. at 258-60, 651 P.2d at 287-89, 186 Cal. Rptr. at 43-45.

heard upon the question whether the proceedings, when first inaugurated, should be suspended for the period of six months, as provided by the street law, or upon the question whether the assessment is erroneous or valid or not valid.\textsuperscript{66}

Based upon this conflict, the court set forth its views regarding impairment of essential services.\textsuperscript{67} It appears, therefore, that the court in \textit{Kalber} did not rely on the “no impairment” concept as an independent basis for nullifying the ballot proposition; instead, the rule can be seen simply as a gloss upon a preemption-oriented analysis designed to resolve conflicts between state and local law.\textsuperscript{68}

The \textit{Kalber} gloss was later uncritically incorporated into the California Supreme Court’s opinion in \textit{Simpson v. Hite}.\textsuperscript{69} \textit{Simpson} involved a county ballot proposition that would have prevented a local board of supervisors\textsuperscript{70} from designating a site for court buildings. As a practical matter, the ballot proposition would have interfered with the county’s obligation under state law to provide quarters for the court in the county. The precise legal question before the court, however, was whether the county action being challenged by the local ballot proposition—the designation of a suitable site for court buildings—was a legislative act as opposed to an administrative or judicial act. Under California law, only legislative acts were subject to local initiative or

\textsuperscript{66} Id. at 573, 153 P. at 402.

\textsuperscript{67} Id. at 574, 153 P. at 402.

\textsuperscript{68} Id. at 574-75, 153 P. at 402. Further support for this narrow view of the “no impairment” doctrine is provided by the court’s reliance in \textit{Kalber} upon J. Dillon, \textit{Treatise On The Law Of Municipal Corporations} (1872). \textit{Id.} at 576, 153 P. at 403. Dillon was a staunch opponent of local autonomy and developed a thesis predicated upon city powerlessness. This thesis received support from the intellectual and scholarly communities during the early twentieth century. \textit{See} Frug, \textit{The City as a Legal Concept}, 93 HARV. L. REV. 1057, 1109-1115 (1980) (Dillon’s thesis involving state control of cities, restriction of cities to “public” functions, and strict construction of city powers was largely accepted).

Several California cases recognize that the true concern in this area is the proper working relationship between state and local government. \textit{See}, \textit{e.g.}, People’s Lobby, Inc. v. Board of Supervisors, 30 Cal. App. 3d 869, 872, 106 Cal. Rptr. 666, 669 (1973) (where state zoning ordinances require public notice and hearing, local zoning initiative is invalid); Mervynne v. Acker, 189 Cal. App. 2d 869, 872, 106 Cal. Rptr. 666, 669 (1973) (local proposition to repeal parking meter ordinances invalid where proposition would interfere with state scheme delegating power over parking meters and traffic control to local government); \textit{see also} Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 596 n.14, 557 P.2d 473, 480 n.14, 135 Cal. Rptr. 41, 48 n.14 (1976) (distinguishing “those decisions which bar the use of the initiative and referendum in a situation in which the state’s system of regulation over a matter of statewide concern is so pervasive as to convert the local legislative body into an administrative agent of the state . . . .”).

\textsuperscript{69} 36 Cal. 2d 125, 222 P.2d 225 (1950).

\textsuperscript{70} Under California law, the board of supervisors is the governing body of a county. \textit{Cal. Const.} art. II, § 4(a).
The court in *Simpson* held that designating suitable court buildings was not legislative and hence not properly addressed by ballot proposition. The rule proscribing impairment of essential government services was not asserted as an independent ground for the decision but as an example of the evils that would result if ballot propositions were allowed to usurp administrative functions properly delegated to local bodies by the state. The court nevertheless set forth the "no impairment" doctrine in black letter terms, largely disregarding the doctrine's limited application in *Kalber*.

It makes sense to invalidate county or municipal ballot propositions that impair essential government functions; by doing so, courts can help maintain the necessary equilibrium in the working relationship between local government and the state. A critical function of a state constitution is to delineate the appropriate balance of power between the state and its political subdivisions (cities, counties). The battles for power between the state and its political subdivisions are similar to the conflict that exists between any central government and the decentralized governmental organs that exercise political power at the local level. Some state oversight to assure fidelity to the state organic law, which sanctioned the local entity, is no doubt proper. That concern, however, should not be facilely extrapolated to state ballot propositions.

If the state judiciary is nonetheless going to apply the "no impairment" test, it is helpful to determine the scope of the test. In addressing the "no impairment" issue, the court in *Brosnahan* emphasized the notion of "inevitability" as the key criterion. Unless the impairment is

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71. *Simpson*, 36 Cal. 2d at 129, 222 P.2d at 228 (1950). The distinction is often difficult to make. In general, the focus is functional. If the matter is of statewide concern and the decisionmaking authority has been delegated to local government, the function is characterized as "administrative"; conversely, if the matter is of local concern, the function is characterized as "legislative." *See* Hughes v. Lincoln, 232 Cal. App. 2d 741, 744-45, 43 Cal. Rptr. 306, 309 (1965).


73. *Id.* at 133-35, 222 P.2d at 228-29.

74. *Id.* at 133, 222 P.2d at 230-31.

75. It has been argued that the constitutional ideal of a republican form of government may provide principled support for the thesis that essential functions of the state cannot be impaired. *Cf.* Sirico, *The Constitutionality of the Initiative and the Referendum*, 65 IOWA L. REV. 637 (1980): "When a locality chooses some form of representative governance, it should attend to the state and federal paradigms mandated by the Constitution. In structuring local decisionmaking, it should consider the wisdom of republican dominance and act accordingly. Conversely, the lessons to be gleaned from studying local plebiscites should aid in evaluating these mechanisms at the state level." *Id.* at 658 (footnotes omitted).
inevitable and certain, without reference to speculation or assumption, the "no impairment" limitation will not apply. It should be noted that the court in Brosnahan was careful to couch its holding in terms that addressed only the "facial" challenges to Proposition 8. Consideration of the potential problems associated with Proposition 8—particularly the effect on the criminal justice system of the ban upon plea bargaining—was deferred because such problems were only speculative. The court left open the question of whether the "no impairment" limitation would apply if the problems forecast by the opponents of Proposition 8 in fact materialized.

76. 32 Cal. 3d at 258-60, 651 P.2d at 287-88, 186 Cal. Rptr. at 43-44.
77. 32 Cal. 3d at 258-60, 651 P.2d at 287-88, 186 Cal. Rptr. at 43-44. The majority’s focus upon the conjectural quality of the petitioner’s forecasts concerning the consequences of Proposition 8 emphasizes that the critical point was the timing of petitioner’s arguments. Id.
78. The court in Brosnahan also avoided deciding the specific quantum of “impairment” that must be found before a ballot proposition will be struck down under the “no impairment” doctrine. Some insight may, however, be provided by the court’s reference to Simpson, 36 Cal. 2d at 125, 222 P.2d at 225, discussed supra notes 71-72 and accompanying text, as an example of the “successful” use of the “no impairment” doctrine to nullify a ballot proposition. At the state-wide level, a ballot proposition would have to interfere seriously with state government before the limitation could be invoked. It is difficult to envision such a situation arising; something akin to paralysis of state government or an essential government function, such as public safety, seems to be required. Under such circumstances, the state constitution itself may prevent an “interpretation” of a ballot proposition that would result in state paralysis. See, e.g., CAL. CONST. art. I, § 1 (guaranteeing the right to pursue and obtain “safety”).

Thus, in order to “impair essential government functions,” it appears that a ballot proposition must negate specifically an existing constitutional guarantee and must, by its terms, require that the paralytic act be undertaken. In such a situation, it seems safe to presume that a court would go to great lengths to avoid interpreting the ballot proposition as requiring such a construction. Cf. Chass v. Kalber, 28 Cal. App. 561, 569-70, 153 P. 397, 400 (1915): “This conclusion follows from the conviction, to which re-examination of the vital question involved herein has unavoidably led us, that the powers referred to and the system established by the legislature for the improvement of public streets cannot coexist, if it be true that the former are applicable to the latter. This proposition, it is true, is to be considered only in aid of the ascertainment of the intention of the people as to the scope of those powers or of determining whether they intended certain limitations in the exercise thereof or that certain acts of a legislative character should not be made amenable thereto. For, in examining and ascertaining the intention of the people with respect to the scope and nature of those powers, it is proper and important to consider what the consequences of applying it to a particular act of legislation would be, and if upon such consideration it be found that by so applying it the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential and, perhaps, as in the case of the power to compel the improvement of streets, indispensable, to the convenience, comfort and well-being of the inhabitants of certain legally established districts or subdivisions of the state or of the whole state, then in such case the courts may and should
The Brosnahan decision did not resolve the issue of whether the “no impairment” doctrine represents a substantive common law restriction upon the people’s right to amend the state constitution. If the “no impairment” concept is accepted as a nonfederal independent doctrine, parts of a state constitution would be immune from popular reevaluation by ballot proposition. Such a result is politically unacceptable. On the other hand, if the “no impairment” doctrine is accepted but linked to state law, it will likely be used only as a rule of construction. If the “no impairment” doctrine is employed as a rule of construction, those individuals supporting a ballot proposition that impairs governmental functions should bear a heavy burden of proof.79

B. Limitations on the Amendment Process Arising Under the Federal Constitution

A state ballot proposition that violates a specific federal norm is invalid.80 Thus, a state ballot proposition that sought to permit police conduct inconsistent with Mapp v. Ohio81 or Miranda v. Arizona,82 prosecutorial conduct inconsistent with Brady v. Maryland,83 or state administrative action inconsistent with Brown v. Board of Education,84 would not be sustained.85 The problem of the contravention of specific federal constitutional norms is not addressed here. Rather, this section examines whether there are general federal constraints upon the use of

assume that the people intended no such result to flow from the application of those powers and that they do not so apply.”

79. See supra note 68; see also Hunt v. Mayor of Riverside, 31 Cal. 2d 619, 628, 191 P.2d 426, 431-32 (1948) (if applying referendum power would have the inevitable effect of greatly impairing the efficacy of some other essential governmental function, it must be presumed that the people did not intend such a result).


81. 367 U.S. 643 (1961) (evidence obtained in violation of Fourth Amendment restraints on searches and seizures is not admissible in state criminal prosecutions).

82. 384 U.S. 436 (1966) (if a person is not advised of certain rights prior to custodial interrogation, statements elicited may not be used by the state in a prosecution against that person).

83. 373 U.S. 83 (1963) (exculpatory evidence known by state must be disclosed to defendant).

84. 347 U.S. 483 (1954) (outlawing racial segregation accomplished by pupil assignment).

85. State law adopted by ballot proposition is subject to federal constitutional constraints. U.S. Const. art. VI, cl. 2 (Supremacy Clause). See Pierce v. Society of Sisters, 268 U.S. 510 (1925) (voter-approved Oregon ballot proposition, which would require that parents send their children to public school, nullified on grounds that it was inconsistent with the Fourteenth Amendment); Pruneyard Shopping Center v. Robins, 447 U.S. 74, 79 (1980) (state constitution treated as state statute for purposes of exercising appellate jurisdiction
ballot propositions that are designed to or have the effect of limiting state constitutional jurisprudence.

Initially, it is necessary to determine what is meant by "state constitutional jurisprudence." If an extremely broad definition is adopted, every ballot proposition addressing a problem previously looked at by a state court would be subjected to rigorous scrutiny. This result is not intended. Rather, the focus here is upon the growing number of state court decisions defining constitutional rights more generously and providing more protection of those rights than the federal Constitution requires, at least insofar as the Constitution is interpreted by the current Supreme Court. In this body of law, state courts have defined due process, equal protection, cruel and unusual punishment, priva-


When contending that a state law is invalid because it conflicts with federal law, litigants should not limit their arguments to the federal Constitution. The Supremacy Clause makes all federal law supreme to state law. Particularly in civil rights cases, the developing international human rights law may, through its restatement as federal common law, apply a content based limitation upon ballot propositions. See Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (law of nations is part of federal common law).

86. See, e.g., State v. Vernon, 385 So. 2d 200, 204 (La. 1980) (state constitution requires that Miranda waiver be shown by proof beyond a reasonable doubt rather than by proof under the more lenient preponderance standard required by the federal Constitution, citing Lego v. Twomey, 404 U.S. 477 (1972)). Similarly, in State v. Davis, 295 Or. 227, 666 P.2d 802 (1983), the Oregon Supreme Court rejected claims that the state based exclusionary rule was based upon "deterrence" considerations and thus subject to a "good faith" exception. This ruling could prove particularly important if the United States Supreme Court recognizes a "good faith" exception to the Fourth Amendment exclusionary rule in one of the two cases recently before the Court involving that issue. Massachusetts v. Sheppard, 387 Mass. 488, 441 N.E.2d 725 (1982), cert. granted 103 S. Ct. 3534 (1983), rev'd and remanded 52 U.S.L.W. 5177 (U.S. July 5, 1984); United States v. Leon, 701 F.2d 187 (9th Cir. 1983), cert. granted, 103 S. Ct. 3535, rev'd 52 U.S.L.W. 5155 (U.S. July 5, 1984).


88. See, e.g., State v. Fain, 94 Wash. 387, 617 P.2d 720 (1980) (en banc) (recidivist statute found to violate state constitution bar against cruel and unusual punishment). See generally Development, supra note 1, at 1383-84.
and other rights, thereby imposing increased restrictions upon the exercise of state power. Are there any general federal constraints upon the use of ballot propositions to limit or even reverse the growth of that jurisprudence?

I. The Guaranty Clause

By article IV, section 4 of the Constitution, the federal government guarantees to each state in the Union a republican form of government. Two questions capture the relevance of the Guaranty Clause to ballot propositions. To what extent, if any, is direct citizen participatory democracy in the form of ballot propositions inconsistent with a republican form of government? Is the Guaranty Clause designed and intended to block majoritarian excesses, such as the use of ballot propositions to disable state constitutional jurisprudence supporting disfavored groups in society? The answer to both of these questions apparently is no, at least insofar as it may be argued that a judicial remedy is available under the Guaranty Clause.

In a number of cases, the Supreme Court has treated the issues raised by the Guaranty Clause as political in nature and perforce committed to one of the other coordinate branches of government for reso-

89. See generally Development, supra note 1, at 1430-43 (discussing cases). Nine state constitutions make protection of privacy explicit. See, e.g., CAL. CONST. art. I, § 1 (by initiative); FLA. CONST. art. I, § 23; see Development, supra note 1, at 1430 n.5 (listing states).


91. U.S. CONST. art. IV, § 4 provides: “The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.” See generally W. Wieck, The Guaranty Clause of the United States Constitution (1972); Bonfield, The Guaranty Clause of Article IV, Section 4: A Study in Constitutional Desuetude, 46 MINN. L. REV. 513, 516-30 (1962).

92. Cf Sager, Insular Majorities Unabated: Warth v. Seldin and City of Eastlake v. Forest City Enterprises, Inc., 91 HARV. L. REV. 1373 (1978) (due process requires that certain types of decisionmaking be made by deliberative governmental bodies rather than by majoritarianism). “The claim [for requiring decisionmaking by a deliberative governmental body] seems quite strong when two conditions are met: first, where substantial constitutional values are placed in jeopardy by the enactment at issue; and second, where substantive review of the enactment by the judiciary is largely unavailable and hence cannot secure these constitutional values.” Id. at 1418.
The Court's seminal Guaranty Clause decision is *Luther v. Borden*, a case involving a claim that one of two contending governments of the State of Rhode Island was a nullity. Unable or unwilling to define the dimensions of a "republican form of government" for purposes of selecting between the contenders, the Court deferred to Congress. In a later case, *Pacific States Telephone & Telegraph v. Oregon*, the Court followed its decision in *Luther* and held that an issue of this type must be committed to Congress for resolution. *Pacific States* is an important case on its facts because it involved the contention that the use of the initiative process—rather than the content of the initiative—violated the Guaranty Clause.

Despite the Supreme Court's decisions in *Luther* and *Pacific States*, it appears that claims under the Guaranty Clause may be justiciable where the violation of the republican norm is clear. Obvi-

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94. 48 U.S. (7 How.) 1 (1849).
95. The rival factions in *Luther* based their claims upon different state constitutions. The entrenched government derived its claim from the 1633 CHARTER OF RHODE ISLAND PROVIDENCE PLANTATIONS. This Charter, limited the right to vote and contained no provision for amendment; it had been retained as the state constitution in 1776. Thus, as noted by Wieck, "[i]n 1842 Rhode Island was in the anomolous position of being the only state in which the people had not drafted or ratified their own constitution." *W. Wieck*, *supra* note 91, at 86.
An attempt was made in 1842 to change this situation. Those dissatisfied with the status quo unilaterally elected a constitutional convention by universal male suffrage (enlightenment had its limits in 1842). The convention drafted a new constitution that was subsequently adopted by a majority of the adult male population. Bonfield, *supra* note 91, at 534.
Initial efforts to establish the new government by force-of-arms failed. *Id.* The challengers then turned to the courts by bringing an action in trespass. The gist of the action is described by Bonfield: "The case which developed out of this incident was an action of trespass brought by Martin Luther against Luther Borden and others. The defendants maintained that the 'Charter Government' had declared martial law due to the insurrection just described. After further alleging that Luther had been involved in the insurrection, defendants concluded that as members of the militia they had rightfully broken into his house to arrest him. Luther answered by contending that prior to the alleged trespass the 'Charter Government,' under whose authority Borden had acted, had been displaced and annulled by the people of Rhode Island. Therefore, his actions at that time were in support of the lawful authority of the state, while Borden was in arms against it." *Id.* (footnote omitted). The fascinating history of *Luther v. Borden* and the political significance the decision had in America in the 1840's is discussed with great care by *W. Wieck*, *supra* note 91, at 86-129.
97. 223 U.S. 118 (1912).
98. *Id.* at 143, 151.
99. The Court, however, failed to address this contention because of its holding on the justiciability issue.
ously, a standard of this type lacks any pretensions of certainty; it does, however, allow federal courts to interdict egregious violations of the republican norm.101 Federal courts, however, have been reluctant to invoke the Guaranty Clause because it is identified with the political question doctrine. As a result, Guaranty Clause issues in federal court have been transformed into procedural, justiciability wrangles. State courts not encumbered by the justiciability doctrinal concerns, have proved generally more willing to consider such Guaranty Clause issues.102

Circumstances, the judicial branch may be the most appropriate branch of government to enforce the Guaranty Clause. Federal courts should be loath to read out of the Constitution as judicially nonenforceable a provision that the Founding Fathers considered essential to formulation of a workable federalism.” (footnote omitted) (emphasis original).

The dogmatism of the Supreme Court’s statement in Luther regarding the justiciability of the “republican form of government” guarantee might be considered to have been implicitly softened by the Court’s reference to the “legitimacy” of the question raised in Luther: “It was long ago settled that the enforcement of this guarantee belonged to the political department.” Luther v. Borden, 7 How. 1. In that case it was held that the question, which of the two opposing governments of Rhode Island, namely, the charter government or the government established by a voluntary convention, was the legitimate one, was a question for the determination of the political department; and when that department had decided, the courts were bound to take notice of the decision and follow it . . . .” Pacific States Telegraph Co. v. Oregon, 223 U.S. 118, 149 (1911).

101. Cf. Baker v. Carr, 369 U.S. 186, 222 n.48 (1961) (Guaranty Clause may be invoked in the case where a state has established permanent military government). Judicial reticence is not necessarily unwise since the dimensions of the republican norm are uncertain. Wieck quotes John Adams on the issue as follows: “Thus the word ‘republican’ may well not have had any single and universal denotation to the men who inserted it into the guarantee clause. It may, in fact, have had no meaning at all. John Adams complained late in life that ‘the word republic as it is used, may signify anything, everything, or nothing.’ He insisted that he ‘never understood’ what the guarantee of republican government meant; ‘and I believe no man ever did or ever will.’” W. Wieck, supra note 91, at 13 (footnote omitted).


It should be noted that tying the Guaranty Clause to the political question doctrine may provide some judicial flexibility. In Baker v. Carr, 369 U.S. 186 (1961), the Court noted: “[I]n the Guaranty Clause cases and in the other ‘political question’ cases, it is the relationship between the judiciary and the coordinate branches of the Federal government, and not the federal judiciary’s relationship to the States, which gives rise to the ‘political question.’” Id. at 216; see also Elrod v. Burns, 427 U.S. 347 (1976) (plurality opinion) (separation of powers principle, like the political question doctrine, does not affect the federal judiciary’s relationship to the states). The legitimacy of state courts considering federal issues that are not capable of being brought in federal court for justiciability reasons has never been satisfactorily assessed. P. Bator, P. Mishkin, D. Shapiro, H. Wechsler, Hart & Wechsler’s The Federal Courts and the Federal System 145-46 (2d ed. 1973) [hereinafter cited as Hart & Wechsler]. A distinction could be drawn between the cases where the application of the political question doctrine rests upon a “textual commitment” as opposed to the absence of “manageable standards.” In the former situation commitment of decision making power to Congress or the Executive should operate to preclude both federal and
The general tenor of both state and federal decisions addressing the Guaranty Clause issue has been to give the clause a narrow reading. In *Kohler v. Tugwell*, the question before the three-judge Louisiana Federal District Court was whether a state constitutional ballot proposition has been adopted in an unrepublican manner because it was misleading. The court did hold that one of the fundamental rights in a republican form of government is the right to vote on an amendment to the state constitution. The court concluded, however, that the proposition under consideration did not violate the Guaranty Clause. The district court reasoned that even though voters may have had difficulties understanding the proposition, those difficulties did not represent state abuse of governmental processes.

A recent decision by the West Virginia Supreme Court does raise the possibility that the Guaranty Clause could play a more important role in the future. In *Cooper v. Gwinn*, plaintiffs sought to compel state prison officials to provide meaningful educational and rehabilitation programs for female inmates of a state prison. The court intimated that the constitutional guaranty of a republican form of government requires state governments to be subordinate to principles of justice, morality, and fairness. It is difficult, however, to determine the actual significance of *Cooper* because the court intermixed its discussion of the federal guaranty issue with its discussion of substantive guarantees arising under the state constitution. Therefore, clarification is necessary before *Cooper* can be viewed as a decision expanding the protection afforded to state citizens under the Guaranty Clause.


104. *Id.* at 985 (Wisdom, J., concurring).
106. *Id.* at 785-87.
107. 298 F. Supp. at 981-82.
108. *Id.*
The Guaranty Clause might be used most effectively if it could be linked with the "no impairment of essential government functions" principle implicitly extended to ballot propositions by the California Supreme Court in Brosnahan v. Brown.\textsuperscript{10} There is substantial historical support for the view that the Guaranty Clause was intended to insure effective republican forms of government.\textsuperscript{11} Thus voter-approved constitutional ballot propositions that substantially impair or restrict the ability of a state to perform integral governmental functions may be subject to federal limitation. Just as the Tenth Amendment\textsuperscript{12} protects states against federal actions which impair state sovereignty,\textsuperscript{13} so may the Guaranty Clause protect the states against internal challenges to that sovereignty.\textsuperscript{14}

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\item \textsuperscript{10} 32 Cal. 3d 236, 258, 651 P.2d 274, 287, 186 Cal. Rptr. 30, 43 (1982). The "no impairment" concept is discussed supra notes 60-79 and accompanying text.
\item \textsuperscript{11} W. WIECK, supra note 91, at 42: "To the extent that the guarantee clause and its section 4 companion, the domestic violence clause, were intended by their drafters to authorize repression of insurrections, they were parts of a contemporaneous process of delegitimizing the resort to violence by the people as an extralegal means of defending the community interest when government failed to do so. In this aspect, the guarantee protected republican government from the people."
\item \textsuperscript{12} U.S. CONST. Amend. X provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."
\item \textsuperscript{13} National League of Cities v. Usery, 426 U.S. 833 (1976). National League of Cities has been so limited by later decisions that it is questionable whether it does anything more than the Tenth Amendment it purports to invigorate. See EEOC v. Wyoming, 460 U.S. 226 (1983); FERC v. Mississippi, 456 U.S. 742 (1982); Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264 (1981).
\item \textsuperscript{14} This Guaranty Clause protection could take on interesting forms in certain situations. See Mountain States Legal Foundation v. Denver School Dist., 459 F. Supp. 357 (D.Colo. 1978). There, the court granted a preliminary injunction that prohibited a school district from spending funds to defeat an amendment to the Colorado Constitution. \textit{id} at 358. In granting the requested relief, the court relied upon the First and Fourteenth Amendments to the Constitution, \textit{id} at 360; however, it also considered the possible use of the Guaranty Clause as an alternative ground for its decision: "The process of amending the powers of representative government was a subject of discussion prior to the adoption of the federal Constitution. In Federalist Paper No. 49, James Madison wrote: 'As the people are the only legitimate fountain of power, and it is from them that the constitutional charter, under which the several branches of government hold their power, is derived, it seems strictly consonant to the republican theory to recur to the same original authority . . . whenever it may be necessary to enlarge, diminish, or new-model the powers of government . . . .' When residents within a state seek to participate in this process by proposing an amendment to the state constitution, the expenditure of public funds in opposition to that effort violates a basic precept of this nation's democratic process. Indeed, it would seem so contrary to the root philosophy of a republican form of government as might cause this Court to resort to the guaranty clause in Article IV, Section 4 of the United States Constitution." \textit{id} at 361.
\end{itemize}
2. Due Process Objections Based Upon Vagueness and Complexity of Ballot Propositions

Ballot propositions qualified by petition are not drafted in a way that inspires confidence in their care for and attentiveness to the problems they address. Written in secret by those who share a common view of societal problems, ballot propositions eschew compromise and tend toward extremism with appalling frequency.115

Ballot propositions are often lengthy and complex.116 In addition, voters rarely know beforehand the effect of an approved ballot initiative on existing legislation. As one commentator has noted:

Because of the high costs of becoming informed, and because campaign advertising carries a low informational content, a voter may not be aware that a particular initiative will, if passed, adversely affect him. An initiative which may appear beneficial, or only indirectly harmful, may in fact be directly adverse to particular voters. If those voters are unaware of this adverse effect, they may vote against their own interests and lose the opportunity to persuade others to their point of view. If the initiative passes, those voters generally will be able to mitigate its adverse impact only by bringing suit or by launching their own subsequent initiative. Both remedies are uncertain, time-consuming, and expensive.117

Finally, there is the fear that voter decisions on ballot propositions—which often are so long and involved that they are incomprehensible to the average person—will be based upon misleading campaign

115. See Comment, The California Initiative Process supra note 9, at 930-34.
116. Id. at 934-37. The difficulties posed by a complex ballot proposition may be ameliorated by a well-drafted ballot title and summary. A well-reasoned comment on ballot titles and summaries as an aid to voter comprehension is contained in Grose v. Firestone, 422 So.2d 303, 305 (Fla. 1982): "Recently . . . we said that the purpose of [requiring a ballot title and summary] is to assure that the electorate is advised of the meaning and ramifications of the amendment. . . . "The requirement for proposed constitutional amendment ballots is the same as for all ballots, that the voter should not be misled and that he have an opportunity to know and be on notice as to the proposition on which he is to cast his vote. . . . All that the Constitution requires or that the law compels or ought to compel is that the voter have notice of that which he must decide. . . . What the law requires is that the ballot be fair and advise the voter sufficiently to enable him intelligently to cast his ballot. . . . "Appellants effectually seek an exhaustive explanation reflecting their interpretation of the amendment and its possible future effects. To satisfy their request would require a lengthy history and analysis of the law of search and seizure and the exclusionary rule. Inclusion of all possible effects, however, is not required in the ballot summary." (citations omitted) (emphasis original). A defective summary may be grounds for invalidating an initiative. See Askew v. Firestone, 421 So. 2d 521 (Fla. 1982).
slogans.118

There are, however, several difficulties associated with a due process attack predicated on voidness due to incomprehensibility. First, there is the problem of the absence of legal standards that are operationally relevant so as to enable courts to identify whether a ballot proposition is incomprehensible due to complexity or vagueness.119

How is comprehensibility to be measured? Does due process require that ballot propositions be drafted so that they can be understood by the average person with a sixth grade education? Should a person with a high school diploma be the standard? The divergence between voter literacy and the clarity of ballot propositions is often marked:

A reading analysis by the Loyola University Reading Center of three Los Angeles City propositions, . . . and 22 state propositions (including nine initiatives) revealed that two ballot propositions were written at the 11th grade level, eight at the 13th grade level, and 18 at the 16th grade level. It was estimated that 60-75 percent of the voters could not read and fully understand the ballot measures as presented. . . . The reading experts ad-

118. An often recounted example of voter manipulation is described in A. SHAMISH & B. THOMAS, THE SECRET BOSS OF CALIFORNIA 37-38 (1971): "My next move was to place an initiative proposal on the ballot to give the bus and truck industry . . . the right to pay 4 per cent tax in lieu of any and all other taxes. We had a fight with that one.

I tried to educate the voting public on the need for standard taxation for buses, pointing out that 1,700 small communities had no other public transportation besides buses. But the railroads wanted to crush the competition of the bus lines, and they campaigned against the initiative with propaganda and advertising. The measure was defeated by 70,000 votes.

Next time it was different.

I was going to beat the railroads at their own game. I convinced the bus owners to put up enough money for a first-class campaign. I hired a well-known cartoonist named Johnny Argens to draw a picture of a big, fat, ugly pig. Then I splashed that picture on billboards throughout the state with the slogan:

DRIVE THE HOG FROM THE ROAD!
VOTE YES ON PROPOSITION NUMBER 2

I also had millions of handbills printed with the same picture and message. During the last weeks of the campaign they were placed in automobiles in every city and town. . . .

The campaign worked. Boy, did it work! Nobody likes a roadhog, and the voters flocked to the polls and passed the constitutional amendment by 700,000! . . .

All because the voters thought they were voting against roadhogs. That had nothing to do with it."

119. Judicial response to statutory provisions that are imprecise or ill-defined has been to give the provision a curative construction. See, e.g., ACLU v. Board of Educ., 59 Cal. 2d 203, 218, 379 P.2d 4, 13, 28 Cal. Rptr. 700, 709 (1963) (a statute otherwise uncertain "will be upheld if its terms may be made reasonably certain by reference to other definable sources"); San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 948, 479 P.2d 669, 675, 92 Cal. Rptr. 309, 315 (1971) (if possible, enactments should be interpreted to uphold their validity). These principles have been applied to ballot propositions. See, e.g., Associated Home Builders, 18 Cal. 3d at 598-99, 557 P.2d at 482, 135 Cal. Rptr. at 50; Higer v. Hansen, 67 Idaho 45, 170 P.2d 411 (1946).
vised the Committee that the average reading level of Los Angeles voters was only that of the eighth grade.\footnote{120}

A second problem with a due process attack on ballot propositions is that the charge could easily be seen as a patronizing view of popular abilities—"sorry, you didn't know what you were doing; therefore, the ballot initiative is invalid." To the contrary, judicial acceptance of ballot propositions has been essentially unquestioning and laudatory of the process. For example, Justice Tobriner of the California Supreme Court, a fearless champion of civil rights and civil liberties, discussed the use of ballot propositions as follows:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard this right of the people," the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process. . . . [I]t has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."\footnote{121}

Another problem would arise if this comprehensibility test were adopted. One of the standard legal fictions under which our society operates—that the people understand the laws which define legitimate conduct in our society—might be called into question.\footnote{122} The fiction that the populace comprehends the law may be a shibboleth that our legal system is unprepared and perhaps unable to disavow. Thus far, the ballot proposition process has enjoyed a high degree of judicial approval.\footnote{123} As a result, courts may prefer not to approach the dark side

\begin{itemize}
\item \footnote{120} Comment, \textit{The California Initiative Process}, supra note 9, at 935 n.67.
\item \footnote{121} \textit{Associated Home Builders}, 18 Cal. 3d at 591, 557 P.2d at 477, 135 Cal. Rptr. at 45 (citations omitted). This felicitous attitude toward constitutional amendments can be contrasted with the attitude of a bygone era which held that "it was heresy to suggest the possibility of change in governments divinely established and ensured." C. MERRIAM, \textit{THE WRITTEN CONSTITUTION AND THE UNWRITTEN ATTITUDE} 6 (1931).
\item \footnote{122} \textit{Cf.} Hockett v. State Liquor Licensing Bd., 91 Ohio St. 176, 180, 110 N.E. 485, 486 (1915) ("The polestar in the construction of the Constitutions . . . is the intention of the makers and adopters."). In the case of ballot constitutional propositions, the people are either the makers or adopters, or both. The courts' use of voter intent to construe a ballot proposition necessarily implies that courts believe voters initially understood the content of the ballot proposition.
\item \footnote{123} This, however, may be changing. Recent decisions by both the California Supreme Court and the Florida Supreme Court have been adverse to initiative proponents. AFL,
of democracy—errant majoritarianism—in the absence of a specific content based norm against which the legitimacy of ballot propositions may be determined.

3. The Fourteenth Amendment and the "Vested Rights" Theory

a. Ballot Propositions and Reduced Expectations of State Constitutional Protection

A crucial issue that arises in the context of ballot propositions is whether persons have a constitutionally protected right to continue to receive the same, consistent level of protection of civil rights and civil liberties once the right has been recognized by the state judiciary as arising under the state constitution. Ballot propositions designed to overrule or circumvent state constitutional jurisprudence are often perceived to be directed against disfavored groups espousing unpopular causes. Recently, ballot propositions have been used to contravene expansive definitions of state constitutional rights in the areas of race relations and criminal justice. Ballot propositions involving these topics have been successful because the subject matter fuels voter intensity. In other areas, state constitutional jurisprudence has remained

CIO v. Eu, 36 Cal. 3d 687 (1984) (initiative which would put state on record as supporting amendment of federal Constitution to require balanced budget taken off ballot); Legislature of the State of California v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983) (reapportionment initiative taken off ballot); Fine v. Firestone, 448 So. 2d 984 (Fla. 1984) (Proposition 13 type initiative taken off ballot because it violates single subject limitation). In Fine the court purported to distinguish the Florida measure from its California counterpart. Id. at 992. In Amador Valley Joint Union High School District v. State Board of Education, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978), California's Proposition 13 was held not to violate California's single subject restriction.

124. At the state level, the emphasis has been upon school busing. See, e.g., Washington Initiative 350, WASH. REV. CODE §§ 28A.26.010-900 (1981) (declared unconstitutional in Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)); California Proposition 1, CAL. CONST. art. § 7(a) (upheld in Crawford v. Board of Educ., 458 U.S. 527, (1982)). At the local level, housing and zoning have been the focus of attention. See Sager, supra note 92.


126. Lowenstein, supra note 7. Professor Lowenstein's study indicates that the major ballot proposition battles in California, evoking large campaign expenditures, have involved economic matters (usury, taxes, utilities (nuclear power)) or social matters (no smoking zones, environment). The outcomes of ballot propositions relating to civil rights and civil
relatively free from popular interference. For instance, courts have expanded state constitutional protections embodied in the right of privacy, the rights of expression and association, separation of church and state, and access to public forums. Indeed these rights occasionally have received popular support at the polling place.

When ballot propositions are used to limit state constitutional jurisprudence, it could be argued that those propositions are invalid on the ground that citizens have a federally guaranteed right to continued protection under the previously granted rights or liberties. Anchoring such a guarantee in the Constitution, however, proves difficult. One possible theory is that existing state constitutional jurisprudence creates "vested rights" secured by the Due Process Clause of the Fourteenth Amendment. Under the "vested rights" theory, a court must determine whether the rights at issue are private or public; only private rights receive constitutional protection.

liberties (see Proposition 18 (obscenity—1972 General Election), id. at 618; Proposition 17 (death penalty—1972 General Election), id. at 615; Proposition 9 (campaign financing and disclosure—1974 Primary Election), id. at 623; Proposition 7 (death penalty—1978 Primary Election), id. at 628; and Proposition 1 (school busing—1979 Special Election), id. at 629) probably were not determined by the amount of campaign spending; rather, those outcomes were determined by voter intensity, coupled with media attention.


131. See, e.g., CAL. CONST. art 1, § 1, amended by initiative in 1972 to provide explicit protection for privacy. See also Siraco, supra note 75, at 648 n.81: Despite the assumptions these tests make about majoritarian voting, plebiscite results sometimes reflect pro-civil liberties sentiments, decisions against middle class self-interest to the benefit of low income groups, political liberalism, and the courage to take stands that corporate lobbies had dissuaded the legislature from taking. In some cases, voters' principled stands have put their elected representatives to shame." (citations omitted).

132. See, e.g., Hodges v. Snyder, 261 U.S. 600, 603 (1923).
In cases involving ballot propositions that limit state constitutional jurisprudence, it is difficult to meet this “private right” requirement. For example, assume citizens were to challenge a ballot proposition that overturned a state court decision mandating busing to achieve school desegregation. Resolution of such a case under the “vested rights” theory would depend upon whether the court holds that the right to a desegregated education is a private or public right. It seems likely that a court would determine that a public right is involved because of the larger social agenda implicated in desegregation cases. Thus, a challenge to such a ballot proposition based upon the “vested rights” theory would be unsuccessful.

Putting aside the issue of its applicability, the “vested rights” theory does not seem to provide an effective solution in the ballot proposition context. Discussing the problem in terms of “vested rights,” “private rights,” or “public rights” hardly advances the inquiry into the constitutionality of a ballot proposition restricting a developed state constitutional jurisprudence. The “vested rights” theory assumes that once certain rights are judicially recognized, they become immune from state legislative reevaluation. Thus, if courts employed such a

135. Courts have authority to implement and to oversee wide-ranging desegregation plans. See, e.g., Milliken v. Bradley, 433 U.S. 267 (1977) (compensatory education programs for victims of school desegregation); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (approving use of quotas, redistricting, and busing to achieve school desegregation). It is difficult to fathom the private rights involved in such a dispute, particularly where the recipients of the benefits often are not the “direct” victims of the wrongful conduct sought to be remedied. See Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1284 (1976). See also Chayes, The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court, 96 Harv. L. Rev. 4, 5 (1982).
136. See Hodges, 261 U.S. at 603; see also McCullough v. Virginia, 172 U.S. 102, 123-24 (1898): “[I]t is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.”

It may be, however, that the only “vested rights” are those that definitely can be moored in the Constitution or in an articulation by the government. See Thorpe v. Housing Auth., 393 U.S. 268, 282 n.43 (1969). See generally Hodges, 261 U.S. at 603; Hospital Ass’n of New York States, Inc. v. Toia, 577 F.2d 790, 797 (2d Cir. 1978); De Rodulfa v. United States, 461 F.2d 1240, 1252 n.61 (D.C. Cir.), cert. denied, 409 U.S. 949 (1972).

Rather than focusing upon the “vested rights” theory, it might be more profitable to address this problem in terms of the constitutional prohibition against state impairment of contracts. U.S. Const. art. I, § 10. When a judgment qualifies for protection under this provision, it should be protected as a contract, not as a judgment. See, e.g., Louisiana ex rel. Nelson v. Policy Jury of St. Martin’s Parish, 111 U.S. 716 (1884) (if a cause of action is of such a nature that a legislature could not impair it before judgment, it is equally protected
theory in assessing ballot propositions, a doctrinal straightjacket would be imposed upon the states. In addition, the theory would distort federal-state relations by giving federal courts ultimate control over revisions of state law any time a person arguably affected by that revision claimed a vested right.

b. Revising State Constitutional Jurisprudence Through Principled Decisionmaking

Relying on the Due Process Clause of the Fourteenth Amendment, several commentators have developed an alternative theory relating to the effect of ballot propositions on state constitutional jurisprudence.137 If adopted, this theory would insulate state constitutional jurisprudence from majoritarian revision but would not generate the complications associated with the "vested rights" theory. Under this alternative approach, only public institutions governed by process-oriented decisionmaking could reappraise judicial decisions designed to protect disfavored minorities.138

If this view were accepted, electoral majorities generally would be unable to use the initiative process to change state constitutional jurisprudence. If, however, constitutional ballot propositions were initiated by a process of principled decisionmaking, those ballot propositions could be upheld. For example, if a particular ballot proposition were initiated after a public hearing before the legislature or a law review commission, the principled decisionmaking requirement might be met even though the measure would become part of the state constitution through popular approval.

Although the theory of "process-oriented decisionmaking" has a nice intellectual ring, two recent cases, Washington v. Seattle School Dist. No. 139 and Crawford v. Board of Education,40 demonstrate that the theory has not been accepted by the Supreme Court. In Seattle after a judgment). A judgment is not, however, a contract entitled to the protection afforded by the impairment clause of the Constitution. Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285 (1883); Blount v. Windley, 95 U.S. 173 (1877). The interests of peace and repose that are the foundations of the final judgment rule are not of constitutional dimension insofar as those interests independently guarantee the judgment against modification by the sovereign that rendered it. Furthermore, federal doctrines against legislative impairment of judgments, although of uncertain dimension, see HART & WECHSLER, supra note 102, at 98-102, are based upon the principle of separation of powers and, as such, are not constitutionally required of the states.

137. See, e.g., supra note 92; L. TRIBE, supra note 102, at 1137-46.
138. See, e.g., supra note 92.
139. 458 U.S. 457 (1982).
140. 458 U.S. 527 (1982).
School District, the Court reviewed a Washington ballot proposition passed in response to a Seattle School Board desegregation plan. In order to neutralize the plan's extensive use of mandatory busing, pupil reassigments, and school pairing, the ballot proposition prohibited the assignment of pupils to schools outside of the student's neighborhood. The proposition did contain a number of exceptions and did not purport to "prevent any court of competent jurisdiction from adjudicating constitutional issues relating to public schools."

The Court found that the ballot proposition, when viewed in conjunction with its exceptions, permitted busing in all contexts except where necessary to achieve racial balance. Moreover, the ballot proposition bifurcated governmental responsibility on the basis of racial considerations: those individuals seeking school desegregation remedies were required to do so at the statewide level, while all other forms of redress were available at the local level. Thus, for all practical purposes, the ballot proposition extinguished any possibility for desegregation. If upheld, the proposition would have resegregated the Seattle school system in the face of and in response to the district's plan for desegregation. Not surprisingly, the measure was declared unconstitutional.

In Crawford, the Court reviewed a California ballot proposition that limited the power of state courts to order busing to the standard required by federal courts under the Fourteenth Amendment. The Court upheld the ballot proposition because the initiative did not do any more than require the California Constitution to assume the same floor regarding mandatory school busing as that imposed by the Fourteenth Amendment. In addition, unlike the Washington ballot proposition in Seattle School District, the California measure did not structure government decisionmaking on the basis of racial considerations. The California proposition merely withdrew a benefit that had previously been conferred—the power of California courts to order mandatory school busing to alleviate racial discrimination caused by

141. The ballot proposition passed with almost 66% of the statewide vote. Seattle School Dist., 458 U.S. at 463.
142. Id. at 461-62.
143. Id. at 462.
144. Id. at 463.
145. Id. at 474-75.
146. Id. at 487.
147. Crawford, 458 U.S. at 529.
148. Id. at 542.
149. Id. at 536 n.12.
de facto racial segregation.\textsuperscript{150}

The \textit{Crawford} decision is significant in that it reveals the Court's unwillingness to look behind a ballot proposition's incantations of race neutral objectives to ascertain whether the measure has a hidden agenda.\textsuperscript{151} In \textit{Crawford}, the Court eschewed such an inquiry by placing particular reliance on the state appellate court's finding that the ballot proposition was not enacted with a discriminatory intent.\textsuperscript{152}

It is unclear whether deference to lower court fact finding in this area is based on normal vertical institutional concerns associated with appellate review of lower court decisions\textsuperscript{153} or on the horizontal institutional concerns commonly described as federalism,\textsuperscript{154} or on both. On the one hand, such deference could be the product of common, institutional reluctance to engage in sustained fact finding inquiry at the appellate level—a policy not itself surprising,\textsuperscript{155} although some discussion by the Court as to why the constitutional fact doctrine was not applied would have been proper.\textsuperscript{156} If this explanation is correct, the validity

\textsuperscript{150} \textit{Id.} at 540. The Supreme Court's decisions in Milliken v. Bradley, 418 U.S. 717 (1974) and Austin Indep. School Dist. v. United States, 429 U.S. 990 (1976), indicate that the mere existence of segregated schools does not evidence prohibited racial discrimination. For courts to mandate busing, the existence of segregated schools must be the result of intentionally discriminatory acts.

\textsuperscript{151} \textit{Crawford}, 458 U.S. at 543-45.

\textsuperscript{152} \textit{Id}. The Court's pronouncement that the California ballot proposition was not the product of racial animus is difficult to square with reality. \textit{See Comment, California Anti-Busing Amendment: A Perspective on the Now Unequal Protection Clause}, 10 \textit{GOLDEN GATE} U. L. REV. 611, 665-81 (1980). Petitioners in \textit{Crawford} filed 75 pages of the Clerk's Transcript with newspaper clippings evidencing that the proposition was specifically designed to maintain segregated schools. \textit{See Reply Brief for Respondents Crawford \textit{et al.} at 24 n.11, Crawford v. Board of Educ., 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1981)}. The intermediate court found that racial animus did not motivate California voters in proposing and enacting the proposition. 113 Cal. App. 3d at 654-55, 170 Cal. Rptr. at 509. That finding, however, was unsupported. By pretending that racial animus was not a substantial factor in \textit{Crawford} the Court avoided a very difficult inquiry into how racial animus and the democratic process can be reconciled.

\textsuperscript{153} The weight given by the Supreme Court to state court findings of fact is incredibly diverse. \textit{See generally} HART & WECHSLER, \textsuperscript{supra} note 102, at 590-95, 601-10. Deference is called for but is subject to ad hoc rejection or avoidance.

\textsuperscript{154} Federalism may be viewed as a normative concept that attempts to prescribe the proper scope of power exercisable by the national government, the states, or both. A meaningful formula, however, has not been devised. Federalism seems to constitute the proper, though indefinable, equilibrium between the centripetal tendencies of the national government and the centrifugal tendencies of the states. At its root, federalism is a balance of power concept. \textit{See Friendly, Federalism: A Foreword}, 86 YALE L.J. 1019 (1977).

\textsuperscript{155} \textit{Cf}. Berenyi v. Immigration Director, 385 U.S. 630, 635 (1966) (Court cannot review concurrent findings of fact by courts below in the absence of a very obvious and exceptional showing of error).

\textsuperscript{156} \textit{See} Napue v. Illinois, 360 U.S. 264, 271 (1959) ("The duty of the Court is to make its own independent examination of the record when federal constitutional violations are
of ballot propositions withdrawing state-created remedies may be influenced significantly by the fact finding process and the tribunal selected to adjudicate the dispute.\textsuperscript{157}

On the other hand, the Crawford decision suggests that federalism concerns play a role in the Court's reluctance to look beyond state court fact finding. In \textit{Crawford}, the Court relied on its earlier decision in \textit{Reitman v. Mulkey}\textsuperscript{158} and in observing that:

\begin{quote}
[a state court is] "armed . . . with the knowledge of the facts and circumstances concerning the passage and potential impact" of the Proposition and "familiar with the milieu in which that proposition would operate . . . ." Similarly, in this case, again involving the circumstances of passage and the potential impact of a Proposition adopted at a statewide election, we see no reason to differ with the conclusions of the state appellate court.\textsuperscript{159}
\end{quote}

It may be making too much of this language to suggest that facially neutral ballot propositions enjoy a safe harbor from federal inquiry into voter motivation. The fact that both \textit{Crawford} and \textit{Reitman} came to the Supreme Court from state courts may be coincidental. Nevertheless, litigation involving the constitutionality of ballot propositions alleged is clear, resting as it does on our solemn responsibility for maintaining the Constitution inviolate."); \textit{see also} Jacobellis v. Ohio, 378 U.S. 184, 190 n.6 (1964); \textit{cf.} Bose Corp. v. Consumers Union, 104 S. Ct. 1949 (1984) (federal district judge's factual findings that the \textit{New York Times v. Sullivan} standards have been met in a libel action must be reviewed de novo).

\textsuperscript{157} For this reason, plaintiffs may prefer to litigate in federal court but find that forum effectively foreclosed. The decision to bring a pre-election challenge to the proposed ballot proposition ordinarily will commit litigants to state court for the duration. Questions involving formal compliance with state requirements for proposition qualification do not raise issues of federal significance. Nor is it likely that a federal court would retain pendent jurisdiction over such questions were those issues attached to a federal question. \textit{See United Mine Workers v. Gibbs}, 383 U.S. 715, 726-27 (1966). The relative insubstantiality of the federal claim may also counsel dismissal of pendent state claims. \textit{See McFaddin Express, Inc. v. Adley Corp.}, 346 F.2d 424 (2d Cir. 1965). Even if the federal claim is substantial, a dismissal or stay of the federal proceeding may be in order, since state electoral practices represent the type of sensitive state social policies that probably call for abstention. \textit{See Elkins v. Moreno}, 435 U.S. 647 (1978); \textit{see also} Badham v. Eu, 568 F. Supp. 156 (N.D. Cal. 1983) (federal court properly abstained in challenge to state reapportionment controversy between Democrats and Republicans where state court determinations would materially alter the nature of the federal constitutional question); \textit{see generally} 17 C. \textsc{Wright, A. Miller} \& \textsc{E. Cooper}, \textsc{Federal Practice }\& \textsc{Procedure} § 4244 (1978). Finally, efforts to compel state officials to follow state law may be effectively foreclosed from being brought in federal court by the recent decision in \textit{Pennhurst State School }\& \textit{Hosp. v. Halderman}, 52 U.S.L.W. 4155, 4159 (U.S. Jan. 23, 1984) (when a federal court instructs state officials on how to conform their conduct to state law, such instruction conflicts directly with the principles of federalism that underlie the Eleventh Amendment).

\textsuperscript{158} 387 U.S. 369 (1967).

\textsuperscript{159} \textit{Crawford}, 458 U.S. at 543-44 (quoting \textit{Reitman v. Mulkey}, 387 U.S. 369, 378 (1967)).
invariably will be conducted in state court rather than federal court because the federal judiciary prefers to yield to state courts on such issues. Thus, the practical effect of *Crawford* will be to relegate to state courts the politically disagreeable task of factually impugning voter motivation.

The Court in *Crawford* passed when given the opportunity to expressly approve or disapprove of the "process-oriented decisionmaking" thesis. Instead, the focus of the opinion was upon the question of whether the ballot proposition imposed a race-specific burden upon minorities. The Court did, however, suggest indirectly that reappraisal of state constitutional jurisprudence is not limited to forums that base their decision upon the principled decisionmaking concept.

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161. The nature of the factual inquiry is unclear. In the somewhat analogous situation of exclusionary zoning, the Court has identified six factors to be considered in determining whether discriminatory purpose fueled a particular course of conduct:

1. the discriminatory impact of the official action;
2. the historical background of the decision;
3. the "specific sequence of events leading up to the challenged decision";
4. departures from the "normal procedural sequence";
5. departures from normal substantive criteria; and
6. the legislative or administrative history of the decision.

Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977). Although several of those factors are not directly applicable to the ballot proposition process, they only need slight modification. For example, campaign advertising and polling could be substituted for legislative or administrative history. Nevertheless, the relative openness of the electoral process, the difficulty in demonstrating cause and effect relationships, and the absence of a decisionmaking "record" would seriously hamper efforts of plaintiffs to show "discriminatory purpose" in the ballot proposition context.

162. *See supra* notes 137-38 and accompanying text.

163. *Crawford*, 458 U.S. at 537-44.

164. In this regard, the Court stated: "[W]e reject] the contention that once a State chooses to do 'more' than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court." *Id.* at 535. In his concurrence, Justice Blackmun, joined by Justice Brennan, also appeared reluctant to embrace the theory that constitutional revision which has an impact on racial minorities can be evaluated only by political bodies employing principled decisionmaking: "[W]e reject[ing] the notion that once a State chooses to do more than the Fourteenth Amendment requires, it may never recede. We reject an interpretation of the Fourteenth Amendment so destructive of a State's democratic processes and of its ability to experiment. This interpretation has no support in the decisions of this Court." *Id.* at 535. In his concurrence, Justice Blackmun, joined by Justice Brennan, also appeared reluctant to embrace the theory that constitutional revision which has an impact on racial minorities can be evaluated only by political bodies employing principled decisionmaking: "[R]uling for petitioners on a *Hunter* theory seemingly would mean that statutory affirmative-action or anti-discrimination programs never could be repealed, for a repeal of the enactment would mean that enforcement authority previously lodged in the state courts was being removed by another political entity. . . . I cannot conclude that the repeal of a state-created right—or, analogously, the removal of the judiciary's ability to enforce that right—'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" (citations omitted). *Id.* at 547 (Blackmun, J., concurring).
II. The Effect of Ballot Propositions Upon State Constitutional Jurisprudence

From the above analysis, it appears that the ability of voters to effect changes in state constitutional jurisprudence is not subject to meaningful, noncontent-based constitutional limitations. As such, ballot propositions can affect not only the vitality of state constitutional jurisprudence, but also the character of decisionmaking in areas of shared federal-state interest and competence. This situation, however, does not lead to the conclusion that state constitutional jurisprudence is the prisoner of majoritarianism. State common law decisionmaking has always been subject to supervision by state legislatures; yet, the prospect of legislative revision of judicial precedents has not seriously threatened the continuing vitality of the common law process. Thus, the potential for majoritarianism will not necessarily generate effective, across-the-board action by popular majorities.

A. The Limited Horizons of Majoritarianism

The success of ballot propositions that reflect majoritarian sentiments antagonistic toward state constitutional jurisprudence rarely depends upon large campaign budgets; rather their enactment depends upon a high degree of voter intensity. Consequently, in order for


167. Large campaign budgets are used to mobilize an apathetic public to support a particular measure. Because an apathetic voter is likely to be uninformed on the proposed measure, such large campaign budgets operate to inform (or misinform—see supra note 118), and persuade the voter in order to secure a favorable vote at the polls. See generally Lowenstein, supra note 7, at 544-47. The type of ballot proposition addressed here generally does not result in significant one-sided spending. See supra note 126. Although the difference between the pro and con positions on a particular ballot proposition may be considerable, the total amount spent on these ballot propositions tends to be small when compared with that spent on other ballot propositions. For example, the budgets for Proposition I, California's 1979 School Busing Initiative, were $363,746 (proponents) and $43,248 (opponents). Lowenstein, supra note 7, at 629. Professor Lowenstein notes that: "The victory of Proposition I was not caused by the one-sided spending in its favor. The amount spent by supporters, while more than eight times what the opponents were able to spend, was not particularly large, and the campaign provoked little public attention. Opposition to school busing was so widespread that campaigning in favor of Proposition I was likely to prove superfluous. An antibusing initiative seven years earlier had been approved by a 63%-37% margin, and a survey early in the campaign period showed 78% opposed to busing, with 18%
such ballot propositions to be approved, generally they must exhibit two characteristics. First, the subject matter of the ballot proposition must address a matter of current popular concern. Good litmus tests here are the standard polls on voter concerns. Issues that do not appear relatively high in the polls are unlikely to generate sufficient voter intensity to carry the measure to election victory. Absent substantial campaign spending, it can be expected that only a small range of issues will be able to generate sustained voter interest. The second characteristic is related to the first: where there are significant factional interests associated with the issue or issues addressed by a ballot proposition, the level of factional intensity must strongly favor the majority faction for ballot propositions to succeed.

Recent experience with ballot propositions shows that the presence of these two characteristics is a prerequisite to election victory. State constitutional jurisprudence has met with consistent majoritarian rejection where that jurisprudence involved increased rights for criminal defendants—hardly a group for which there is much popular sympathy. Crime is an issue that usually ranks high in polls on voter concerns. Moreover, measures to restrict rights of criminal defendants generally do not affect any significant political faction; indeed, it is only when a neutrally phrased "anti-crime" ballot proposition could affect a significant voter faction that any doubt arises about the likelihood that the measure will be passed. For example, ballot propositions designed to impose heavier penal sanctions for criminal activity or to permit more liberal investigative activity by law enforcement officials commonly pass by solid majorities. On the other hand, "anti-crime" measures that involve the expenditure of tax dollars face much stiffer challenges because such propositions are opposed by taxpaying voter

in favor and 4% with no opinion. Not surprisingly, Proposition 1 won easily, by 69%-31%.”

Id. (footnotes omitted).

168. See supra note 125.


170. California Ballot Proposition 17 (reinstatement of death penalty) was approved by 68% of the voters at the 1972 General Election. Secretary of State, Statement of Vote 30 (General Election, November 7, 1972). In the November 1982 General Election, Florida voters approved two ballot propositions initiated in the Florida Legislature. Proposition 2, which passed by a 63.4% margin, modified Fla. Const. art. 1, § 12 to conform the Florida search and seizure standard to the federal standard. Proposition 3, which passed by a 60.6% majority, permits denial of bail if the judge believes the accused poses a threat to public safety. Fla. Const. art. 1, § 14; Florida Tabulator of Official Votes for General Election, Nov. 1982, at 27.
The school busing propositions do not disprove this thesis. Although there undoubtedly is a sizable degree of racial animosity associated with anti-busing initiatives, those initiatives cannot be categorized as purely majority-minority conflicts. In fact, there is some evidence that a significant number of minority citizens disapprove of involuntary busing.

In general, state constitutional jurisprudence outside of the criminal justice area has not been affected by majoritarianism. State court decisions expanding the rights of privacy, association, and religion, for example, have escaped popular reaction. The explanation for this phenomenon appears to be that these decisions (1) generally comport with popular views; (2) address issues of reduced popular concern;

171. For example, California Ballot Proposition 1 (authorizing bond indebtedness for prison construction) was approved by 56.1% of the voters at the 1982 Primary Election. Secretary of State, Statement of Vote 43 (Primary Election June 1982); California Ballot Proposition 8 (commonly known as “Victim’s Bill of Rights”) was approved by 56.4% of the voters at the 1982 Primary Election. Id. at 45. Both of these margins of approval are substantially less than those received by the Death Penalty and Search and Seizure Initiatives. See supra note 170. These figures suggest that groups opposing constitutional ballot propositions should stress fiscal impact wherever possible.

172. There is a tradition of using ballot propositions to frustrate integration in American society. See L. Litwack, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES 1790-1860, 1869-72 (1961) (describing efforts by voters to prevent black immigration into the states). In the 1950's, several state attempts were made to countermand the mandate of Brown v. Board of Educ., 347 U.S. 483 (1954) through the ballot process. See, e.g., Bush v. Orleans Parish School Bd., 138 F. Supp. 337 (E.D. La. 1956), aff'd, 242 F.2d 156 (5th Cir. 1956), cert. denied, 354 U.S. 921 (1957) (declaring invalid Louisiana constitutional amendment making segregation lawful); Wettach, North Carolina School Legislation—1956, 35 N.C.L. Rev. 1, 3 (1956) (amendment of North Carolina Constitution to allow for placement of pupils in order to frustrate Brown v. Board of Educ.). In 1954, Mississippi voters authorized the legislature to abolish public schools at the statewide level and school districts to do the same at the local level. Miss. Const. art. 8, § 213-B. The constitutionality of § 213-B has not been addressed by the courts.

In the 1960’s, attention turned toward Fair Housing Laws. See, e.g., Reitman v. Mulkey, 387 U.S. 369 (1967) (declaring unconstitutional a 1964 California ballot proposition that prohibited the state from interfering with private discrimination).

173. This fact has been acknowledged by the courts. Crawford, 458 U.S. at 545. What little survey research has been done on the subject also has tended to confirm this point. See, e.g., Field, California Poll, Release No. 1031 (June 14, 1979) (Hispanics oppose mandatory busing by 3:1 majority; Blacks evenly split on issue). The Field Poll did acknowledge that the size of the entire sample group was not sufficient to provide a high level of statistical confidence in the findings.

174. See supra notes 86-90.

175. See, e.g., supra notes 89, 131.

176. See, e.g., Development, supra note 1, at 1465-72, 1478-82 (economic regulation). See also Fox v. Los Angeles, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978) (enjoining on state constitutional grounds, illumination of large cross on Los Angeles City Hall during Christmas season).
or (3) often tend, albeit indirectly, to reduce public expenditures.\textsuperscript{177}

State constitutional jurisprudence in areas besides criminal justice also has escaped majoritarian reaction in recent years because litigation to achieve institutional reform, which has a direct and visible budgetary impact, largely has been brought in federal courts.\textsuperscript{178} Thus, state constitutional jurisprudence in these areas avoided the taxpayer revolt of the late 1970's. If state courts increase their use of state constitutions to effect structural institutional reform that results in direct and visible impact upon public treasuries, majoritarian correction by ballot propositions might become more common. At present, however, majoritarian reaction is largely limited to state constitutional jurisprudence involving the rights of criminal defendants.

B. Boomerang Effects

Ballot propositions do not always accomplish their stated purposes. First, problems in draftsmanship can produce unintended consequences in ballot propositions.\textsuperscript{179} In addition, it must not be forgotten that successful ballot propositions become part of the state constitution and ultimately are subject to state court construction and interpretation. This judicial scrutiny can alter the results achieved by ballot propositions.

An example of the role courts play in this area can be seen in \textit{City and County of San Francisco v. Farrell}.\textsuperscript{180} In Farrell, the California Supreme Court examined the Jarvis-Gann Initiative (Proposition 13) passed by the voters in 1978. The initiative was designed to reduce taxes by providing:

Cities, Counties and Special Districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or Special District.\textsuperscript{181}

In interpreting this provision of the initiative, the California Supreme Court held that the term “special taxes” applied to taxes

\textsuperscript{177} See, e.g., Mandel v. Hodes, 54 Cal. App. 3d 596, 615-17, 127 Cal. Rptr. 244, 256-57 (1976) (holding that governor's executive order permitting state employees to take three hours off with pay on Good Friday violated state constitution).

\textsuperscript{178} See Neuborne, \textit{The Myth of Parity}, 90 Harv. L. Rev. 1105, 1115-16 (1977) (observing that civil liberties lawyers believe that civil liberties litigants will fare better in federal court than in state court). \textit{Cf.} Chayes, \textit{The Role of the Judge in Public Law Litigation}, supra note 135 (discussing the increase in federal judicial involvement in public controversies).

\textsuperscript{179} See supra notes 116-18 and accompanying text.

\textsuperscript{180} 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1983).

\textsuperscript{181} California Ballot Proposition 13, § 4 (1978); CAL. CONST. art. XIII.
“earmarked for specific purposes.” Consequently, only a limited class of taxes required approval by a two-thirds vote; taxes deposited in accounts for general funds were free of the supermajority requirement. By giving the term “special taxes” a narrow interpretation, the court sharply reduced the effectiveness of the requirement that taxes be approved by a two-thirds voter majority prior to enactment.

Another representative case in this area is People v. Superior Court (Engert). This case involved a due process vagueness challenge to a penal code provision that permitted the imposition of the death penalty where the jury made a special finding that the murder was “especially heinous, atrocious, and cruel, manifesting exceptional depravity.” In striking down the provision, the California Supreme Court held that a 1972 ballot proposition—which set aside a state court decision in People v. Anderson that had invalidated the death penalty under California’s constitutional prohibition against “cruel or unusual punishment”—was not controlling. The court found that the ballot proposition dictated only that the death penalty did not violate the state constitution per se:

Section 27 itself does not compel the interpretation sought by the People; it states simply that “such punishment”—i.e., death—shall not be deemed to contravene state constitutional provisions. Our determination that the special circumstance here in question is void for vagueness is in no way premised on the fact that death is one of the two punishments that may result from its application. The thrust of our decision is that no person should face the potential loss either of liberty or life based on statutory language so vague that the person’s fate is left to the vagaries of individual judges or individual jurors. Inasmuch as section 27 is directed, by its terms, to insulation of “the death penalty provided for under those [reinstated] statutes” (italics added), it does not, on

182. Farrell, 32 Cal. 3d at 53-54, 648 P.2d at 937, 185 Cal. Rptr. at 716.
183. See also Los Angeles County Transp. Comm’n v. Richmond, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982) (holding that § 4 of the Jarvis-Gann Initiative prohibiting “special districts” from raising taxes without the approval of two-thirds of the qualified electors, see supra text accompanying note 181, applied only to entities empowered by state law to levy a property tax; all other “districts” were exempt from the limitation).
184. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).
185. Id. at 801, 647 P.2d at 77, 183 Cal. Rptr. at 801.
186. The relevant text of the ballot proposition was worded as follows: “The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishment within the meaning of Article I, Section 6, nor shall such punishment for such offenses be deemed to contravene any other provision of this constitution.” CAL. CONST. art. I, § 27.
187. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).
188. Engert, 31 Cal. 3d at 807-09, 647 P.2d at 81-82, 183 Cal. Rptr. at 805-06.
its face, preclude review on state due process grounds. 189

The Engert decision constitutes another example of a ballot proposition being construed narrowly by a state judiciary. The California court determined that the scope of the ballot proposition was limited to the cancellation of a particular state court case—People v. Anderson. The court could have given the ballot proposition another reasonable construction—that the initiative was designed to restore completely the death penalty in California to the extent authorized under the federal Constitution. The court did not pursue that alternative; thus, Engert suggests that ballot propositions cancelling decisions based upon state constitutional jurisprudence will receive rigorous judicial scrutiny.

C. The Sebastiani Reapportionment Decision

The recent decision by the California Supreme Court in Legislature of the State of California v. Deukmejian (Sebastiani) 190 confirms that state courts will resist strenuously any majoritarian efforts to limit state constitutional jurisprudence. Although the Sebastiani initiative was not a constitutional ballot proposition, 191 the decision is instructive concerning the attitude of the judiciary toward efforts to restructure political institutions in a manner that might affect state constitutional jurisprudence.

Sebastiani involved a statutory initiative that would have given voters the opportunity to adopt a reapportionment plan different from the plan previously approved by the legislature. 192 The Sebastiani ini-

189. 31 Cal. 3d at 807, 647 P.2d at 81, 183 Cal. Rptr. at 805.
190. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). The decision is often referred to as the Sebastiani decision because Don Sebastiani, a member of the California legislature, sponsored the initiative and was one of the real parties in interest in the proceedings.
191. Under California law, the initiative may be used to propose either statutes or amendments to the state constitution. See CAL. CONST. art. II § 8: “(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them.

“(b) An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.”
192. The initiative, if adopted, would have realigned the Assembly, Senate and Congressional districts of California and repealed statutes enacted by the Legislature during the 1983-84 First Extraordinary Session. A.B. 2, 1983-84 1st Extraordinary Sess., ch. 6, § 2, ch. 8, § 2, 1983 Cal. Legis. Serv. 34, 120 (West). Specifically, it would have repealed and replaced chapters 1 through 4 of division 18 of the Elections Code, encompassing sections 30,000 through 30,030. Both the Sebastiani initiative and the plan adopted by the legislature were based upon the 1980 federal census.
tiative generated substantial political controversy in California; control of the California legislature for the remainder of the 1980's possibly could have turned upon the outcome of the initiative.

The court in *Sebastiani*, with only one justice dissenting, struck the initiative from the ballot. The court found that the initiative violated the once-a-decade rule, which prohibits more than one redistricting per federal census. The court, however, chose not to decide whether the use of an initiative is a constitutionally permissible method of redistricting.

*Sebastiani* contains several analytical deficiencies. First, the court took too great a leap when it jumped from a constitutional provision mandating a legislative reapportionment to a conclusion that there can be only one reapportionment per census. Second, the court's coyness regarding whether an initiative can ever be used to implement legislative redistricting is both undesirable and unproductive.

The California Constitution does not contain an express prohibition against multiple redistricting during one census period. Rather, the prohibition was recognized in California by way of dicta in the 1907 case of *Wheeler v. Herbert*. Based upon this dicta, the court in *Sebastiani* found that at the time California first adopted the initiative process in 1911, "the once-a-decade rule had already been clearly

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194. The *Sebastiani* plan appeared to favor Republicans, while the plan adopted by the legislature seemed to favor the Democrats. Perhaps, this point could be put more precisely: the legislature's plan was thought to favor incumbents, of which the substantial majority were Democrats.

195. The court's opinion was *per curiam*. Justice Richardson, the anointed conservative on the court at the time, see Barnett, *The Supreme Court of California, 1981-82—Foreword: The Emerging Court*, 71 CALIF. L. REV. 1134, 1173-74 (1983), dissented.

196. Governor Deukmejian had called a special election for Dec. 13, 1983 to submit the initiative to the voters. 34 Cal. 3d at 664; 669 P.2d at 19, 194 Cal. Rptr. at 783. The petitioners in *Sebastiani* sought a court order prohibiting the Governor and other state officials from expending any public funds or otherwise acting with regard to the special election. Id. The only matter set for the special election was the initiative.

197. *Id.* at 663, 669 P.2d at 18, 194 Cal. Rptr. at 782.

198. *Id.* at 673, 679, 669 P.2d at 26, 30, 194 Cal. Rptr. at 790, 794.

199. 34 Cal. 3d at 669-73, 669 P.2d at 23-25, 194 Cal. Rptr. at 787-89.

200. *See supra* note 198 and accompanying text.

201. *See* 34 Cal. 3d at 668, 669 P.2d at 22, 194 Cal. Rptr. at 786.

202. 152 Cal. 224, 92 P. 353 (1907). *Wheeler* involved a legislative change of county lines after the decennial redistricting. Since the boundary change did not alter the existing legislative districts—a point acknowledged in *Sebastiani*, 34 Cal. 3d at 669, 669 P.2d at 22-23, 194 Cal. Rptr. at 786-87—the statements regarding once-a-decade redistricting were pure dicta.

established.\textsuperscript{204} The court concluded that the once-a-decade rule prohibited use of the initiative because the electorate either did not consider the use of the initiative to redistrict or did not evidence an intent to exclude such use, if permissible, from the once-a-decade rule when it adopted the initiative process in 1911.\textsuperscript{205}

A close examination of the court's conclusions regarding the once-a-decade rule and the 1911 adoption of the initiative process can illustrate problems with the court's determinations. Silence in 1911 about whether the initiative process could be used to redistrict does not support the across-the-board, once-a-decade gloss placed on the redistricting provision in \textit{Sebastiani}. In 1911, the once-a-decade principle had not been recognized other than by way of the dicta in \textit{Wheeler}. Thus, unless dicta is considered the law for purposes of ascertaining electorate intent,\textsuperscript{206} the electorate's silence in 1911 regarding the once-a-decade principle is hardly significant, much less decisive. The court's reliance on the 1911 adoption of the initiative process as support for its decision to strike the redistricting initiative from the ballot seems misplaced.

There are other analytic weaknesses with the holding in \textit{Sebastiani} regarding the once-a-decade rule, including the court's unexplained failure to apply standard rules of constitutional construction. The court failed to apply the plain meaning rule, which precludes courts from examining the policy behind a constitutional provision when the language is clear.\textsuperscript{207} Instead, the court considered the policy behind the prohibition against more than one legislative redistricting per census and applied it to an effort \textit{by the people} through the initiative to effect a

\textsuperscript{204} 34 Cal. 3d at 676, 669 P.2d at 27, 194 Cal. Rptr. at 791.
\textsuperscript{205} Id.
\textsuperscript{206} No California court has adopted this rule of construction. If the court in \textit{Sebastiani} intended to do so, it should have discussed the point more thoroughly because the adoption of such a rule would represent a significant development in the field of constitutional interpretation.

There is a rule of construction in California that the failure of the legislature to alter statutory language when the subject is before it indicates an intention that the law remain unchanged except for the alteration being made. Kirby v. ABC Appeals Bd. 47 Cal. App. 3d 874, 877, 121 Cal. Rptr. 572 (1975). This rule has been applied to the state constitution. People v. Mims, 136 Cal. App. 2d 828, 831, 289 P.2d 539 (1955) ("Where a provision of the earlier Constitution had been construed by the Supreme Court it must be presumed that the framers of the present Constitution in readopting it intended it to have the same effect").

\textsuperscript{207} \textit{See} 5 B. Witkin, \textit{Summary of California Law Constitutional Law} \$ 68 (8th ed. 1974) (collection of cases).
redistricting.  

Another weakness in the court’s conclusions about the once-a-decade principle can be seen in its attempt to “harmonize” the legislative redistricting and initiative provisions of the California Constitution.  

The analysis on this point seems somewhat superficial. Having first determined that the initiative power was coextensive with the legislative power, the court simply held:

Well-established principles, applicable both to statutes and constitutional provisions, including constitutional provisions added by initiative, as was former section 1 of article IV, require that in the absence of irreconcilable conflict among their various parts, they must be harmonized and construed to give effect to all parts. There being no contrary intent apparent and no repugnancy between former article IV, section 6, the predecessor of article XXI as heretofore interpreted, and article II, section 8, we conclude that the initiative process may not be used to do that which the Legislature may not do, to redraw legislative and congressional districts during the decade following a federal decennial census at a time when the Legislature has enacted a valid and effective statute or statutes defining those districts.

Although both the Legislature and the people had equal power to redistrict, the court held that the power itself could only be exercised once a decade. Thus, the power to redistrict went to the swifter.

If the above quotation is examined closely, it supports a result different from the one reached in Sebastiani. In particular, the court’s effort to “harmonize” the various constitutional provisions was incomplete since little value was placed on the constitutional authorization for the initiative process. Application of the “well-established principles” referred to by the court, indicates not only that the people have the power to redistrict, but that such a power is not affected by the exercise of an equal power by the legislature. This alternate interpretation would have resulted in a more harmonious reading of the two constitutional provisions than that reached by the court because it would

208. 34 Cal. 3d at 673-74, 669 P.2d at 25-26, 194 Cal. Rptr. at 789-90. Both Cal. Const. art. XXI and the once-a-decade rule from the Wheeler dicta apply only to redistricting by the legislature.

209. See 34 Cal.3d at 676, 669 P.2d at 27-28, 194 Cal. Rptr. at 791-92.

210. Id. at 673-74, 669 P.2d at 26, 194 Cal. Rptr. at 790.

211. Id. at 676, 669 P.2d at 27-28, 194 Cal. Rptr. at 791-92 (citations omitted) (emphasis added). The provisions of the state constitution referred to in the quote involve the requirement of Legislative reapportionment.

212. See supra note 191 for the text of the California constitutional provisions for initiatives.
have "give[n] effect to all parts."\textsuperscript{213}

The other significant deficiency in the Sebastiani decision involves the court's suggestion that there may be a substantive limitation on the use of the initiative process to effect redistricting. The court mentioned the point twice in its opinion,\textsuperscript{214} the second time clearly conveying the message that the use of the initiative process in this context is in some doubt.\textsuperscript{215} If the court has determined that the initiative power to redistrict is coequal to the legislative power—and thus subject to the same once-a-decade limitation—the court's equivocation is mysterious. It suggests Orwellian notions of equality: the initiative power is equal to legislative power when that equation will reduce the effectiveness of the initiative process itself; the initiative is never more equal or equal when it counts. Since the court's actual holding made unnecessary any comment about the power to redistrict by initiative, the matter should have been left open by a neutral exception or should have been discussed specifically. Instead, the court's opinion "teases" the bar and public about a possible new doctrine, and is simply unproductive.

Sebastiani will have an impact upon future judicial evaluation of initiatives designed to limit state constitutional jurisprudence. The Sebastiani decision contained no ringing endorsements of the initiative process. This fact may evidence a growing awareness by courts that beneath the facade of participatory democracy, there is the potential for abuse of the political process. Initiatives ought to be evaluated on the basis of what they do and how they do it; they should not be evaluated against a fantasized image of citizen democracy.

The willingness of the court in Sebastiani to consider a pre-election challenge\textsuperscript{216} also may signal a greater sensitivity to the latent constitutional infirmities in initiative proposals. Delay may be proper under an

\textsuperscript{213} 34 Cal. 3d at 676, 669 P.2d at 27-28, 194 Cal. Rptr. at 791-92. The court in Sebastiani, however, avoided this alternate interpretation by first determining that the initiative power and the legislative power were identical; with this "merger" completed, the court then addressed the "harmonization" issue. This analysis is unconvincing because the court never explained its reasons for merging the two powers before applying the relevant principles of construction. Such single-mindedness surely will provide fuel for those individuals who contend that "result counts for too much and reason for too little" for current members of the California Supreme Court. Barnett, supra note 195, at 1192.

\textsuperscript{214} 34 Cal. 3d at 673, 679, 669 P.2d at 26, 30, 194 Cal. Rptr. at 790, 794.

\textsuperscript{215} Id. at 679, 669 P.2d at 30, 194 Cal. Rptr. at 794: "First, assuming that the initiative is generally available in the redistricting process notwithstanding the command of article XXI that 'the Legislature shall adjust the boundary lines' (emphasis added) . . . ." The court also suggested that legislative redistricting is not insulated from popular supervision. Id. This statement indicates that redistricting by initiative is proper. Nevertheless, the court's language in the above quotation undermines such a conclusion.

\textsuperscript{216} See 34 Cal. 3d at 665-67, 669 P.2d at 20-21, 194 Cal. Rptr. at 784-85.
idealized view of the initiative. Judicial recognition of abuse to the political process by use of the initiative may result in a greater number of pre-election challenges of initiatives in the courts.

Most importantly, the *Sebastiani* decisions may direct courts away from the tradition of interpreting the boundaries of the initiative process liberally. After *Sebastiani*, courts may scrutinize ballot propositions more closely where those propositions could have a substantial and readily ascertainable effect on existing constitutional policies. If the people wish to continue to incur "self-inflicted wounds" through the use of the initiative, they will have to strictly comply with the rules of the initiative process.

**Conclusion**

Ballot propositions compel everyone involved in the formulation of a living constitutional jurisprudence to consider the function and role of state supreme courts in a democratic society. Courts increasingly are called upon to establish social agendas. The function of setting a social agenda is not itself a recent phenomenon; however, courts seem to approach this task much more intensely today than in the past.\(^{217}\)

Judicial activism does not exist in a vacuum; courts today act in a setting in which majoritarianism enjoys increased attention and acceptance.\(^ {218}\) The ascendancy of majoritarianism has been facilitated by technological innovation,\(^ {219}\) and has occurred during a period of increased special interest use of the political process.\(^ {220}\)

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218. A movement from a "representative democracy" to a "participatory democracy" has been noted by trend analysts. See, e.g., J. Naisbitt, *Megatrends* (Warner Books ed. 1984).

219. Several factors support this assertion. First, use of professional signature-gatherers probably aids in the qualification of ballot propositions. See *California Assembly Elections and Reapportionment Committee, Public Hearings on the Initiative Process* 13 (Oct. 10, 1972). Second, infusion of funds from statewide or national political action committees likely influences the electorate's decision in voting on ballot propositions. See *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) (striking down limitations upon ballot measure contributions); see generally Nicholson, *The Constitutionality of Contribution Limitations in Ballot Measure Elections*, 9 Ecology L.Q. 683 (1981). Professor Lowenstein's recent study, which indicates that campaign spending is not necessarily determinative of the success of a ballot proposition is inapposite. Lowenstein, supra note 7, at 511. Lowenstein did find a strong correlation between negative spending and voter rejection. Id. at 544. On the other hand, Lowenstein found neither that affirmative spending is ineffective nor that social disutility results from one-sided affirmative spending. Id. at 542-43.

220. This increase in special interest use of the political process is evidenced by the proliferation of Political Action Committees (PACS). PAC is a popular acronym used to
Courts are aware of the institutional constraints under which they must operate; Yet, courts must be careful not to become mere weathervanes of popular attitudes. In the main, the judiciary responds to this antimony by exercising circumspection and restraint. There is, of course, the possibility of excess. Judicial decisions in a particular area of state constitutional jurisprudence may exceed the existing consensus; this sometimes will generate popular dissatisfaction. That this dissatisfaction may be acknowledged and addressed either internally by a state supreme court through doctrinal reformulation or popularly by ballot proposition should hardly cause one to question the underlying vitality of the judicial process. Indeed, the far greater danger, albeit an unlikely one, is that courts may so consistently adopt ideological positions contrary to the existing consensus that institutional legitimacy is questioned.

Ballot propositions provide information to judges regarding the public's view of judicial decisions. Similarly, ballot propositions enable courts to determine how well they are persuading and educating the public. Thus, it is not surprising that courts generally speak favorably about ballot propositions. Nevertheless, the judiciary must impose constraints upon the ballot proposition process in order to deter practices that might distort voters' signals. Are the voters aroused? How do they feel about the matter? Has the matter been clearly presented to the voters so that courts may see a true relationship between the ballot proposition and the election results? At present, courts restrict their inquiry to questions of this type when considering general attacks upon the ballot proposition.

There is, however, another fundamental concern here. Successful ballot propositions become law and can displace existing state constitutional jurisprudence. Individuals with stakes in that jurisprudence stand to lose protection if a particular ballot proposition is enacted.

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222. All too often, critics measure the "activism" of a court solely by the final judgment reached. Such critics frequently ignore the failure of public institutions to take action required by law or by standards of elementary human decency. See Johnson, The Role of the Judiciary With Respect to the Other Branches of Government, 11 GA. L. REV. 455, 472-74 (1977) (Sibley Lecture by Judge Frank M. Johnson, Jr. discussing the reasons for his extensive remedial decree over the Alabama mental hospital system).

223. See supra note 121 and accompanying text.
Ultimately, the question becomes whether the stakeholders’ claim to protection is more important than the public’s ability to change the law.

Although those protected by existing state constitutional jurisprudence have no state constitutional right to continued protection, a ballot proposition limiting state constitutional jurisprudence is invalid if it violates a specific federal guarantee. However, a ballot proposition of this type is not open to federal constitutional challenge where it does not violate a specific federal guarantee. This approach is eminently sensible. Judicial unwillingness to allow constitutional reformulation through ballot propositions could result in potentially volatile suppression of popular dissatisfaction.

Increased judicial involvement in public disputes necessarily results in greater public scrutiny of the judiciary. The practice of judicial review is not perfect. Ballot propositions can serve as a form of damage control, thereby preventing more severe attacks upon the courts that might result if popular displeasure is not ventilated. It is dangerous to assume that such displeasure would be limited to state judiciaries; the disease probably would prove contagious and perhaps fatal. Still, courts must be prepared to control individuals or groups attempting to use ballot propositions improperly. Neither the legislature nor the people can short-circuit the federal Constitution or state constitutions.

224. See supra notes 80-85 and accompanying text.

225. At least one respected commentator has noted that the very legitimacy of judicial review in a democratic society rests in large part upon the continuing power of the electorate to amend the constitution in order to reverse judicial decisions involving constitutional adjudications. Rostow, "The Democratic Character of Judicial Review," 66 Harv. L. Rev. 193, 197 (1952).