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Something for Everyone? The Future of Comprehensive Criminal Justice Initiatives After Senate v. Jones and Manduley v. Superior Court

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Something for Everyone? The Future of Comprehensive Criminal Justice Initiatives After *Senate v. Jones* and *Manduley v. Superior Court*

Mary-Beth Moylan*

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I. INTRODUCTION

The initiative has a special place in the constitutional structure and politics of California. The California Supreme Court has repeatedly referred to its “solemn duty jealously to guard the sovereign people’s initiative power, ‘it being one of the most precious rights of our democratic process.’” Based on the special nature of this right, the initiative power has been “liberally construed” regardless of the subject matter of the initiative, and it historically has been particularly “liberally

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"construed" in matters involving criminal justice initiatives. Perhaps the sentiment originating in *Brosnahan v. Brown* and quoted in *Raven v. Deukmejian* best sums up the reason for the exceedingly expansive reach afforded to criminal justice initiatives: "In our democratic society in the absence of some compelling, overriding constitutional imperative, we should not prohibit the sovereign people from either expressing or implementing their own will on matters of such direct and immediate importance to them as their own perceived safety." This sentiment extends to all aspects of the initiative process.

Proposing and passing an initiative is an enormous undertaking and one that increasingly requires vast financial resources. The temptation to undertake comprehensive reforms, rather than piecemeal modifications to existing law, is great both because of the cost of accessing the initiative process and because there is an opportunity for coalition-building and greater ease of passage when more than one related change is presented to the electorate. It goes without saying that proponents do not want to place a measure on the ballot that does not have a substantial chance of success. As one consequence of the financial and other resources required to successfully navigate a measure into law through the initiative process, recent decades have seen an increase in initiatives seeking to make several amendments to existing law in one fell swoop. A check on such multi-faceted, or comprehensive reform, is found in article II, section 8(d) of the California Constitution, commonly referred to as the "single-subject rule." The California Supreme Court has time and again recognized that "the single-subject requirement should not be interpreted in an unduly narrow or restrictive fashion that would preclude the use of the initiative process to accomplish comprehensive, broad-based reform in a particular area of public concern." Despite this longstanding policy, the California Supreme Court recently struck down an initiative measure in *Senate v. Jones* prior to the March 2000 primary election based on a single-subject rule challenge for the first time in the history of the rule. This year, however, a comprehensive criminal justice initiative was upheld in *Manduley v. Superior Court*. This article explores these two recent cases, suggests that *Jones* was not a major departure from prior single-subject case law,

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2. *Id.; see generally Manduley v. Superior Court, 27 Cal. 4th 537 (2002); Brosnahan v. Brown, 32 Cal. 3d 236 (1982) [hereinafter Brosnahan II].*
3. 32 Cal. 3d 236.
4. 52 Cal. 3d 336.
5. *Id. at 347-48, Brosnahan II, 32 Cal. 3d at 248.*
6. David S. Broder, *Dangerous Initiatives: A Snake in the Grass Roots*, WASH. POST, Mar. 26, 2000, at B1 (indicating that the industry of initiative passage now requires substantial cash for lawyers, consultants, and paid signature gatherers and that the movement has become a tool of special interest groups, rather than a grass roots check on those with political power).
7. *CAL. CONST. art. II, § 8(d).*
9. 21 Cal. 4th at 1142.
10. *27 Cal. 4th at 537.*

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and analyzes the standard that the California Supreme Court will likely apply to future comprehensive criminal justice initiatives in particular.

II. HISTORY OF THE SINGLE-SUBJECT RULE AND THE REASONABLY-GERMANE TEST

Article II, section 8(d) of the California Constitution was originally adopted by the electorate in 1948, in an apparent response to a lengthy, multi-faceted initiative proposed covering topics ranging from taxation to oleomargarine subsidies that at that time had been the source of considerable controversy.\(^\text{11}\) The ballot argument in favor of the proposed single-subject amendment explained that the principal purpose of the amendment was to attempt to avoid confusion of both voters and petition-signers and to prevent the subversion of the electorate’s will.\(^\text{12}\) Justice Mosk, in *Brosnahan I*, explained that the ballot argument in favor of the single-subject rule “declared, somewhat optimistically, that an initiative confined to ‘one subject and one subject only’ would enable voters to ‘readily understand just what the entire proposition is and not be confused or misled by a maze of unrelated matters, some of which are inadequately explained, purposely distorted, or intentionally concealed.’”\(^\text{13}\) This focus on eliminating voter confusion and ensuring the integrity of the electorate’s will has been given at least lip service in most single-subject rule cases since the passage of the 1948 constitutional amendment. However, the standard employed by the courts and the highly deferential application of that standard in response to complex measures has not always protected voters against confusing and coercive initiatives.

Courts have interpreted the single-subject rule for initiatives as requiring application of a standard equivalent to the single-subject rule applied to other legislative enactments.\(^\text{14}\) This standard is referred to as the “reasonably-germane” test. The test establishes that “an initiative measure does not violate the single-subject requirement if, despite its varied collateral effects, *all of its parts are ‘reasonably germane’* to each other, and to the general purpose or object of the initiative.”\(^\text{15}\) Courts have also explained the test as requiring a common purpose or objective that unifies the various provisions of an initiative measure.\(^\text{16}\) Further,
a “functionally related” test, proposed initially by Justice Wiley Manuel in *Schmitz v. Younger*, and later advocated by Justice Mosk in his dissent in *Brosnahan I*, has been expressly rejected by the majority of the current California Supreme Court as too stringent. The court has recently expressly stated that the single-subject rule for initiatives “does not require that each of the provisions of a measure effectively interlock in a functional relationship . . . [all that is required is] that the various provisions are reasonably related to a common theme or purpose.” Through use of the reasonably-germane test, the California Supreme Court has upheld every initiative measure presented to it on a single-subject rule challenge, save one.

III. JUDICIAL REVIEW OF CRIMINAL JUSTICE INITIATIVES

PRE-SENATE V. JONES

While many subject areas have been addressed by initiatives in the nearly century long history of initiative law-making in California, initiatives relating to criminal justice matters have been on the rise recently. In the last twenty years, four major criminal justice initiatives have been presented to the people including: Proposition 8, the Victims’ Bill of Rights in 1982; Proposition 115, the Crime Victims’ Justice Reform Act in 1990; Proposition 184, the Three Strikes Initiative in 1994; and Proposition 21, the Gang Violence and Juvenile Crime Prevention Act in 1998. Of these initiatives, three have been the subject of single-subject rule challenges decided by the California Supreme Court.

California courts have never struck down a criminal justice initiative for violation of the single-subject rule. In fact, prior to *Jones*, the California Supreme Court had not struck down an initiative of any kind based on a single-subject rule violation. Successful single-subject rule challenges were limited to two decisions by the Third District Court of Appeal addressing initiatives covering “insurance costs” and “public disclosure.” In those cases, the court of appeals found the dual

17. 21 Cal. 3d 90, 97 (1978).
18. 31 Cal. 3d at 9.
20. *Jones*, 21 Cal. 4th at 1157.
21. *Id.*
22. *Brosnahan I*, 31 Cal. 3d 1 (Proposition 8); *Brosnahan II*, 32 Cal. 3d 236 (Proposition 8); *Raven*, 52 Cal. 3d 336 (Proposition 115); *Manduley*, 27 Cal. 4th at 537 (Proposition 21). The Three Strikes initiative was also the subject of California Supreme Court review on constitutional grounds but not on a single-subject challenge. For a detailed history of the Three Strikes legislative and initiative history and the ensuing court challenge see Michael Vitiello, “*Three Strikes* and the *Romero* Case: The Supreme Court Restores Democracy,” 30 LOY. L.A. L. REV. 1601 (1997).
23. In the landmark case *Perry v. Jordan*, 34 Cal. 2d 87 (1949), the California Supreme Court did strike down a referendum based on a single-subject rule challenge, and in that case it set forth the single-subject standard that is still used today in assessing the validity of measures under article II, section 8(d) of the California Constitution.
objectives of the single-subject rule—namely avoidance of voter confusion and elimination of logrolling—frustrated. Despite similar claims of voter confusion and logrolling, the two major criminal justice initiatives that were reviewed by the California Supreme Court prior to Jones, passed single-subject rule muster, although not without vociferous dissent and debate.

A. Brosnahan v. Eu and Brosnahan v. Brown

Proposition 8, the Victims’ Bill of Rights, was the subject of both a pre-election and a post-election challenge. The decisions of the court and the dissenting voices in the Brosnahan cases, with respect both to pre-election review and substantive analysis of initiatives challenged under the single-subject rule, crystallized much of the jurisprudence surrounding future challenges under the single-subject rule. The initiative at issue contained changes to the California Constitution, as well as the California Penal and Welfare and Institutions Codes, relating to a vast array of criminal justice related topics including among other things: restitution, safe schools, relevance of evidence, bail, prior convictions, diminished capacity and insanity defenses, habitual criminals, victim’s statements, plea bargaining, sentencing to youth authority, and mentally disordered sex offenders. In other words, it offered something for everyone.

The majority of the court determined that pre-election review was improper. Specifically, the court noted that “it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people’s franchise, in the absence of some clear showing of invalidity.” As a result of this assessment of the propriety of pre-election review, the majority did not reach the substantive question of the single-subject constitutionality of Proposition 8 until Brosnahan II. Both the concurring opinion of Justice

25. California Trial Lawyers, 200 Cal. App. 3d at 351, 360-61 (finding that a campaign contribution provision placed inconspicuously in the middle of a ballot measure was not reasonably germane to the rest of the provisions of the initiative and would lead to voter confusion); Chem. Specialties, 227 Cal. App. 3d at 671-72 (finding that “public disclosure” was a subject of excessive generality and that there was evidence of logrolling in order to secure passage of the measure).

26. Brosnahan II, 32 Cal. 3d at 236; Raven, 52 Cal. 3d at 336.

27. Brosnahan I, 31 Cal. 3d at 1 (pre-election challenge); Brosnahan II, 32 Cal. 3d at 236 (post-election challenge).


29. Opponents of the measure challenged the measure prior to the election on procedural and constitutional grounds. Brosnahan I, 31 Cal. 3d at 2. The Legislature stepped in with an urgency statute to ensure that the procedural challenge was without merit. Id. at 4.

30. Id.

31. Id.
Broussard and the concurring and dissenting opinion of Justice Mosk in Brosnahan I took issue with this premise, finding instead that the plain language of article II, section 8(d) of the California Constitution contemplated pre-election review of single-subject rule challenges.  

Justice Mosk went on in Brosnahan I to analyze Proposition 8 under both the reasonably-germane and functionally-related tests.  

His concurring and dissenting opinion concluded that sections as disparate as (1) money restitution, (2) abolition of a program for treatment of mentally ill sex offenders, (3) declaration of a right to be safe in school, and (4) removal of the defense of diminished capacity, had no “natural connection” to one another and could not be viewed as constituting a single scheme. Justice Mosk found other flaws with the measure such as the potential for voter confusion and deception relating to the contents of the title and summary when juxtaposed with the contents of the substance of the measure. Specifically, he pointed to the Attorney General’s identification of twelve subjects contained in the initiative and the fact that, though the petition indicated that the initiative encompassed a right for students and staff to be safe in schools, no specific right was mandated by the actual changes made by the initiative. Despite Justice Mosk’s compelling analysis, when the Proposition 8 post-election challenge was heard, his colleagues did not agree.

In the post-election challenge, the majority of the court focused on the liberal construction of the single-subject rule and concluded that Proposition 8 met the reasonably-germane test by unifying its provisions around a common object of “promoting the rights of actual and potential crime victims.” The Brosnahan II majority quoted language from FPPC v. Superior Court, in which the court indicated that “[n]umerous provisions, having one general object, if fairly indicated in the title, may be united in one act.” Further referencing FPPC, the Brosnahan II court indicated that “[i]n keeping with the policy favoring the initiative, the voters may not be limited to brief general statements but may deal comprehensively and in detail with an area of law.” The majority opinion made plain that the functionally-related test, which had been referenced in prior

32. Id. (Broussard, J., concurring); see also id. at 6 (Mosk, J., concurring and dissenting) (stressing that, where the electorate does not have the power to adopt the proposal in the first instance, the measure should be excluded from the ballot). Justice Mosk’s analysis on pre-election review was later followed by American Federation of Labor—Congress of Industrial Organizations v. Eu, 36 Cal. 3d 687, 695-96 (1984) and eventually by Senate v. Jones, 21 Cal. 4th 1142 (1999).

33. Brosnahan I, 31 Cal. 3d at 8-9 (Mosk, J., concurring and dissenting).

34. Id. at 11.

35. Id. at 11-12.

36. Id.

37. Brosnahan II, 32 Cal. 3d at 236.

38. Id. at 247.


40. Brosnahan II, 32 Cal. 3d at 246, 248 (emphasis added).

41. Id. at 246 (quoting Fair Political Practices Comm’n, 25 Cal. 3d at 41).
California Supreme Court decisions was not a constitutional prerequisite to single-subject compliance.\textsuperscript{42} The central theme of the opinion was focused on the importance of comprehensive reform and the ability of the electorate to propose and pass integrated reform.\textsuperscript{43} Professor Lowenstein, one of the few scholars writing on the issue of initiative law in the early 1980s, endorsed the reasonably-germane test in an article published shortly after the \textit{Brosnahan II} decision; he also stressed that “initiatives dealing comprehensively with broad problems must be permitted.”\textsuperscript{44} While Professor Lowenstein did propose a “gloss” to the test, requiring courts to examine the public understanding of the provisions as related to one another, he was very supportive of a deferential standard that the courts had historically employed and were continuing to employ in the \textit{Brosnahan} cases.\textsuperscript{45}

The call for deference and liberal construction of the single-subject rule by the majority of the court in the mid-1980s, as well as by a well-respected legal academic, relegated the petitioners’ arguments of logrolling and voter confusion to ineffective pleas that were summarily dismissed without analysis of materials outside of the measure itself. For example, although the petitioners argued that the vast array of provisions joined in Proposition 8 enhanced the danger of logrolling, the court dismissed this risk as inherent in all legislation whether enacted by initiative or the legislature.\textsuperscript{46} Similarly, discourse concerning the possibility of voter confusion was rebuffed with a statement that voters received the text and ballot pamphlet arguments and an observation that some amount of voter confusion “must be borne” if the initiative process is to be preserved.\textsuperscript{47} The court made abundantly clear that if any presumption or assumption was to apply to review of initiative measures, it should be that the electorate duly considered all provisions of a measure and that the people “knew exactly what they were doing” when passing comprehensive reforms.\textsuperscript{48} On this basis, the majority concluded that Proposition 8’s variety of reforms shared a common purpose and met the “liberal interpretative tradition” employed historically in single-subject rule challenges.\textsuperscript{49}

The dissenting opinions of Chief Justice Bird and Justice Mosk, joined by Justice Broussard, were not complimentary of the majority’s analysis or conclusion (to put it mildly). Chief Justice Bird commenced her thorough analysis of Proposition 8 by stating, “Today, a bare majority of this court obliterates one section of the

\textsuperscript{42} Id. at 248-49.
\textsuperscript{43} Id. at 249-51. It should be noted that the California Supreme Court was under political pressure and arguably partisan attack at the time of the \textit{Brosnahan II} decision. Four justices were facing retention election in November 1982, and Senate candidate Pete Wilson had announced that he would campaign against anyone who voted to invalidate Proposition 8. Uelmen, \textit{supra} note 14, at 1001-02.
\textsuperscript{44} Lowenstein, \textit{supra} note 14, at 965.
\textsuperscript{45} Id. at 970.
\textsuperscript{46} \textit{Brosnahan II}, 32 Cal. 3d at 250-51.
\textsuperscript{47} Id. at 252.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 253.
state Constitution by effectively repealing the single subject rule. Justice Mosk similarly pronounced:

A bare majority of this court have rejected fundamentals of constitutional law that have consistently guided this state in the conduct of its affairs. In lieu of those basic principles, four justices now declare that initiative promoters may obtain signatures for any proposal, however radical in concept and effect, and if they can persuade [fifty-one] percent of those who vote at an ensuing election to say “aye,” the measure becomes law regardless of how patently it may offend constitutional limitations.

The tenor and substance of the debate between the majority and the dissenting Justices concerning the proper interpretation and construction to give the single-subject rule in Brosnahan II is still reflected in the California Supreme Court’s single-subject jurisprudence. Although, in my opinion, to date Justice Mosk’s closing sentiment in his Brosnahan II dissent has not been matched in dramatic appeal. After decrying the loss of article II, section 8(d) of the California Constitution, Justice Mosk concluded that “[t]he Goddess of Justice is wearing a black armband today, as she weeps for the Constitution of California.”

B. Raven v. Deukmejian

By 1990, when Proposition 115 was challenged, the makeup of the court had changed, but the employment of the reasonably-germane test and the liberal construction of the single-subject rule in cases involving comprehensive criminal justice measures had not. In fact, in the six-to-one decision, the court demonstrated the strength of Brosnahan II and its continued willingness to accept multifarious initiatives centered around the People’s intent to take the power of criminal justice decision-making out of the hands of the court and the Legislature. The court, in Raven, examined Proposition 115 under both the single-subject requirement and the prohibition against constitutional revision. Proposition 115 passed the single-subject challenge under the reasonably-germane test, but one provision of the initiative fell at the hands of the constitutional revision rule.
The court determined that the provision limiting a criminal defendant’s rights to those afforded by the United States Constitution was a qualitative change to the California constitution which amounted to a revision. As to the single-subject challenge, even Justice Broussard who had joined in Justice Mosk’s Brosnahan II dissent joined the majority opinion finding Brosnahan II controlling and identifying the single-subject of “promotion of the rights of actual and potential crime victims.”

In Raven, the court identified the major changes to existing law as encompassing procedural restrictions on the rights of criminal defendants at the discovery, preliminary examination, and trial stages of litigation, as well as substantive changes in criminal law in the form of adding of new offenses and provision for more severe punishment for other offenses. The court also observed that, as in Proposition 8, many of the initiative changes were directed toward superseding California Supreme Court holdings, which expanded the rights of criminal defendants. Although the court stressed that a theme of abrogating court decisions alone would not be enough to satisfy the single-subject standard, the court’s reliance on this common thread in both Brosnahan II and Raven suggests that the court may be particularly wary to strike down an initiative that appears rooted in public dissatisfaction with court opinions.

The Raven petitioners, like those in Brosnahan II, raised concerns of logrolling and voter confusion based on the breadth and complexity of the measure. The court in Raven, like the court in Brosnahan II, rejected those arguments. The logrolling argument was dismissed with a reference to the inherent risk of combining minority constituencies or inclusion of riders in all legislation. The court further reiterated its rejection of a standard requiring a “functional interrelationship or interdependence” between provisions or a showing that each provision of the measure could have garnered a majority vote on its own. With respect to assertions of voter confusion, the court once again pointed to Brosnahan II and summarily dismissed the arguments indicating that the voters’ pamphlet—a detailed analysis by the Legislative Analyst, a complete text of the measure, and “customary written arguments and rebuttals”—were enough to establish that the voters understood the initiative.

57. Id. Professor Uelmen points to this “omnibus repealer” clause as a classic example of a provision that was drafted with no deliberation safeguards and one about which the public would likely have been in the dark concerning its impact on the constitution. Uelmen, supra note 14, at 1017.
58. Raven, 52 Cal. 3d at 347.
59. Id.
60. Id.
61. Id. at 348.
62. Id. at 348-49.
63. Id.
64. Raven, 52 Cal. 3d at 348.
65. Id. at 349.
66. Id. The court also noted that “Proposition 115 was the subject of intense public focus... prior to the
Justice Mosk, in perhaps his most thorough review of the history and purpose of the single-subject rule and jurisprudence surrounding it, dissented. In addition to stressing that Brosnahan II expressly did not require giving “carte blanche to initiatives promoters to join together numerous disparate topics into one ‘grabbag’ proposal,” Justice Mosk urged that the reasonably-germane standard, at a minimum, should require some reasonable relationship between the provisions of an initiative and indicated that acceptance of a standard that requires only that the provisions fall under some “label of indefinite scope is simply empty.” Justice Mosk found the subject identified by the majority in both Brosnahan II and Raven (“promotion of the rights of actual and potential crime victims”) to be nothing more than a label of indefinite scope. Therefore, he concluded that the provisions of Proposition 115, like those contained in Proposition 8, were insufficient to demonstrate a single coherent enactment for the purposes of the single-subject rule. Significantly, Justice Mosk’s analysis of proper application of the reasonably-germane test focused on two bases that later informed the court’s application of the reasonably-germane test in Jones: (1) the reasoning and outcome of California Trial Lawyers Association v. Eu, which determined that although all provisions could fall under a general label of insurance reforms, such a broad label was insufficient for single-subject purposes, and (2) Professor Lowenstein’s interpretation of the purpose of the single-subject rule as an outlet for public dissatisfaction which may serve to reform broad policy areas but which does not contemplate “changes across the board.”

IV. ADDING TEETH TO THE SINGLE-SUBJECT RULE?

"Act in haste, repent at leisure. This court may well regret its precipitous decision in this case, and the unfortunate precedent it sets." These ominous words written by Justice Kennard in her dissenting opinion represent the tone and tenor of many court opinions relating to the initiative process in general and single-subject rule challenges in particular. From Justice Kennard’s strong admonition, one would think that Senate v. Jones was a major departure from prior single-election.” Id. However, it parenthetically noted that the portion of the initiative on which the attention was centered related to the measure’s impact on abortion rights. Id. Arguably, focus on such an attenuated provision would have misled voters further concerning the various impacts and effects that the initiative would have on the criminal justice system as a whole. The court did not address how intense public focus on only one tenuously related provision aids public understanding of the measure.

67. Id. at 356-66 (Mosk, J., dissenting).
68. Id. at 356-57, 360.
69. Raven, 52 Cal. 3d at 365.
70. Id. at 364-65.
71. 200 Cal. App. 3d at 351.
72. Raven, 52 Cal. 3d at 361-63 (Mosk, J., dissenting).
73. Jones, 21 Cal. 4th at 1176 (Kennard, J., dissenting).
subject rule jurisprudence. But, was it? Jones tackled two main issues: (1) the propriety of pre-election review for single-subject rule challenges, and (2) the merits of a single-subject rule challenge to an initiative that purported to have as a theme "voter control" or possibly "conditions of [legislative] employment."74

Jones was decided before the March 2000 primary election and resulted in the removal of Proposition 24, the "Let the Voter's Decide Act of 2000," from the March ballot based on its failure to satisfy the single-subject rule of article II, section 8(d) of the California Constitution.75 The majority in Jones found that Proposition 24 embraced "at least two separate and unrelated subjects: (1) transfer of the power to reapportion state legislative, congressional, and Board of Equalization districts from the Legislature to the California Supreme Court, and (2) revision of provisions relating to the compensation of state legislators and other state officers."76 Importantly, the proponents of Proposition 24 circulated four other initiative proposals concurrently with what became Proposition 24, all containing the provisions relating to reapportionment.77 One proponent was quoted in the newspaper as acknowledging that the provisions in the initiative relating to reduction in legislative compensation were included to garner votes.78 Against this backdrop, the Jones court did not expressly introduce a new standard for single-subject review of initiatives, but its willingness to examine a measure based on a single-subject rule challenge prior to the election and its inaugural disqualification of an initiative based on this constitutional requirement, prompted the heated words of the dissenting justices and sent waves through the initiative industry and academic circles. In fact, the court specifically responded to past academic criticism by indicating that recent Court of Appeals decisions, and presumably Jones itself, "demonstrate that the rule is neither devoid of content nor as 'toothless' as some legal commentaries have suggested."79 As stated above, the unique features of this case were its posture as a pre-election challenge and its outcome on the merits. I discuss each in turn.

A. Pre-Election Review

Pre-election review of initiative measures has never been a favored practice.80 The California Supreme Court has repeatedly cautioned that reviewing a measure prior to the election may "disrupt the electoral process by preventing the exercise of the people's franchise."81 Relying on the language of article II, section 8(d) of

74. Id. at 1174.
75. Id. at 1152.
76. Id. at 1146.
77. Id. at 1149 n.2.
78. Jones, 21 Cal. 4th at 1151 n.5.
79. Id. at 1158.
81. Jones, 21 Cal. 4th at 1153 (quoting Brosnahan v., 31 Cal. 3d at 1, 4).
the California Constitution itself, the *Jones* majority nonetheless found that in certain single-subject rule challenges “pre[-]election relief not only is permissible but is expressly contemplated.” While referencing its discussion of pre-election review in *Brosnahan I*, and acknowledging that in that case contemplation was made of pre-election review only upon a “clear showing of invalidity,” the *Jones* court concluded that pre-election review of a single-subject rule violation was proper where there exists a “strong likelihood” of a violation.83

The rationale for the court’s shift in standard for pre-election review seems to be directly related to practical concerns and increasing public criticism of the initiative process. The *Jones* majority opinion referenced “increasing cynicism on the part of the electorate with respect to the efficacy of the initiative process,” the deflection of “attention, time and money” from valid propositions, and voter confusion and frustration at the post-election invalidation of a measure as reasons for entertaining a single-subject challenge pre-election.84 The court’s willingness to base its reasoning on such considerations indicates a return to the original intention of the single-subject constitutional amendment—namely avoidance of voter confusion.85

Justice Kennard’s dissenting opinion in *Jones* highlighted the majority’s departure from its historic pre-election review stance.86 The dissent argued that aside from *Perry v. Jordan*,77 in which a measure was likely to be withheld from the ballot based on a trial court determination of a single-subject rule violation, no single-subject case before *Jones* had been decided on pre-election review, and many had been decided based on post-election review.88 Justice Kennard asserted that, because single-subject challenges require a detailed examination of the substance of an initiative, they should be postponed until after an election when the courts may have more time for deliberation and careful analysis.89

Pre-election review has been pointed to as a potentially powerful reform to the increasingly overwhelming and frustrating California initiative process.90 Professor Uelmen advocates for pre-election review in cases of both single-subject and constitutional revision violations and urges a singular merits review pre-election, rather than the imposition of the fiction of a “strong likelihood”
standard for pre-election challenges. His article asserts that single-subject rule challenges and challenges based on a violation of the prohibition against constitutional revision can be litigated with little evidence, and the benefits to the electorate of having invalid measures stricken from the ballot is great. Whether the court’s willingness to review Jones pre-election and the reforms being called for by most who study the initiative process, will result in a significant departure from the status quo remains to be seen, but, for the moment the direction of both the court and those seeking to reform the initiative process incrementally seems to be synchronized around the pre-election review issue.

B. Merits of the Single-Subject Rule Challenge

In Jones, the majority of the California Supreme Court approvingly acknowledged a suggestion by the petitioners that the initiative measure be “viewed from a realistic and commonsense perspective” to determine whether the provisions of a measure embrace one subject or more. Aside from this small clarification, the court did not expressly depart from its reasonably-germane test. In fact, the court stated that it used the same standard in deciding Jones as it used in upholding prior initiative single-subject challenges, including those in Brosnahan II, Fair Political Practices Commission v. Superior Court, and Legislature v. Eu. In language respectful of the initiative process, the court “[emphasized] that proper application and enforcement of the single-subject rule is by no means inconsistent with the cherished and favored role that the initiative process occupies in our constitutional scheme, but on the contrary constitutes an integral safeguard against improper manipulation or abuse of that process.” So, while departing from the outcome of passed initiative challenges, the Jones court was careful to avoid questioning prior single-subject rule decisions and made an effort to characterize the decision in terms of strengthening the initiative process, rather than limiting the power of the electorate.

Significantly, however, in analyzing the single-subject rule challenge in Jones, the court drew analogies to the two court of appeals decisions which struck down initiatives based on single-subject rule challenges, rather than basing its conclusion solely on distinctions between Jones and prior high court decisions.

92. Id. at 1022-25.
93. 21 Cal. 4th at 1161.
94. Id. at 1157; Uelmen, supra note 14, at 1007.
95. Jones, 21 Cal. 4th at 1157.
96. 25 Cal. 3d 33 (1979).
97. 54 Cal. 3d 492 (1991).
98. Jones, 21 Cal. 4th at 1158.
99. Id.
100. Id. (citing to California Trial Lawyers Ass’n, 200 Cal. App. 3d 351 and Chemical Specialties Manufacturer’s Ass’n, 227 Cal. App. 3d 663).
As Professor Uelmen notes, in the portions of the opinion which attempt to distinguish \textit{Jones} from prior unsuccessful single-subject rule challenges, the reasoning employed is not analytically inspiring.\footnote{Uelmen, \textit{supra} note 14, at 1008.} For example, the single-subject identified by the proponents of Proposition 24 in \textit{Jones} was “voter approval.”\footnote{\textit{Jones}, 21 Cal. 4th at 1162.} The court determined that the provisions requiring voter approval of both changes in legislative salaries and redistricting efforts were not reasonably related to a common theme or purpose, but it found that prior single-subject decisions such as \textit{Fair Political Practices Commission (FPPC)}\footnote{25 Cal. 3d at 33.} and \textit{Legislature v. Eu}\footnote{54 Cal. 3d at 492.} did manifest sufficiently singular themes of “reforming political campaign practices” and “incumbency reform,” respectively.\footnote{\textit{Jones}, 21 Cal. 4th at 1167.} Justice Kennard, in her dissenting opinion, challenged both the definition of the theme and the distinction between the breadth of prior themes and the theme that she recognized for Proposition 24.\footnote{\textit{Id.} at 1174-76.} In attempting to distinguish \textit{FPPC}, the majority stressed that “[u]nlike Proposition 24, the measure challenged in \textit{FPPC} did not seek to combine one major structural change in the state constitutional framework[. . .] with unrelated measures[. . .], but instead embodied a comprehensive package of provisions that were reasonably related to a common theme of reforming political campaign practices.”\footnote{\textit{Id.} at 1167.} This reasoning comes close to suggesting that the proponents of Proposition 24 erred by trying to unite only two provisions. Perhaps if those seeking to reform the reapportionment process and involve voters to a greater extent in the structural conditions of legislative branch employment had incorporated more provisions demonstrating this mission, a common theme or purpose could have been discerned. The propositions upheld in \textit{FPPC} and \textit{Legislature v. Eu} were broad, sweeping comprehensive reforms, similar in scope and complexity to the comprehensive criminal justice initiatives challenged in \textit{Brosnahan II} and \textit{Raven}.\footnote{25 Cal. 3d at 33; 54 Cal. 3d at 492.} Based on the analysis of prior case law and the court’s repeated mantra that the single-subject requirement does not preclude “comprehensive, broad-based reform in a particular area of public concern,” one could construe \textit{Jones} as more supportive of upholding complex multi-faceted initiative measures than those that seek to approach an area of public concern with a scalpel instead of a sledge hammer.\footnote{\textit{Jones}, 21 Cal. 4th at 1157, 1166-68.} Such an analysis would fly in the face, however, of the fundamental purposes behind the single-subject rule: “to avoid confusion of either voters or petition signers and to prevent the subversion of the electorate’s will.”\footnote{\textit{Id.} at 1156.}
It is ultimately around these themes that the Jones majority based its decision and analogized Chemical Specialties Manufacturer's Association v. Deukmejian and California Trial Lawyers Association. The court concluded that "voter approval" was an excessively broad theme, similar to the theme of "public disclosure" in Chemical Specialties that, if accepted, would undermine the single-subject rule. Specifically, the court held that

[w]hen the drafters of an initiative measure join separate provisions dealing with otherwise unrelated "political issues" in a single initiative, the initiative cannot be found to satisfy the single-subject rule simply because each provision imposes a requirement of voter approval, any more than if each provision contained a remedy of money damages or a remedy of injunctive relief.

The proponent’s effort to establish a narrower theme was unsuccessful in Jones because the theme "legislative self-interest" was not born out by the provisions impacted by the initiative. Without directly identifying the similarities between Proposition 24 and the initiative at issue in California Trial Lawyers Association, the court concluded that the concerns expressed in that case—namely voter confusion and deception—were also present in Proposition 24.

Professor Uelmen suggests in his recent article on Jones that the court focused its inquiry concerning the single subject of Proposition 24 indirectly on a "public understanding" test, in the nature of the one advanced two decades ago by Professor Lowenstein and considered in a modified form by the California Commission on Campaign Financing in 1992. Professor Lowenstein’s test is a "gloss" on the reasonably-germane test that requires the court to inquire outside of the text of the initiative and ask whether “in the public understanding” the provisions of the initiative “bear some relationship to each other.” Under Lowenstein’s test, which is intended to compliment the reasonably-germane test that he advocates, even Jones would have passed constitutional muster in that it is conceivable that the two provisions bear some relationship to one another.

111. Id. at 1158-66.
112. Id. at 1162.
113. Id. at 1162-63.
114. Id. at 1163-64 (indicating that since legislative salaries were set by the California Citizens Compensation Commission, the legislative salary provisions of Proposition 24 could not be found to be related to a theme of eliminating legislative self-interest).
115. Jones, 21 Cal. 4th at 1168 (finding that “to combine a provision transferring the power of reapportionment from the Legislature to this court with unrelated provisions relating to legislators’ pay would inevitably create voter confusion and obscure the electorate’s intent with regard to each of the separate subjects included within the initiative, undermining the basic objectives sought to be achieved by the single-subject rule”).
117. Lowenstein, supra note 14, at 970.
The California Commission on Campaign Financing rejected the public understanding test in its 1992 recommendations, but suggested a more objective “reasonable voter” factor to be examined when determining whether an initiative embraces more than one subject.119 Under this test, a court would assess whether a voter would be surprised to learn that a provision was included in the initiative.120 While I agree that the propositions involved in FPPC, Legislature v. Eu, and Brosnahan II, would have satisfied the standard of Professor Lowenstein’s “public understanding” test more readily than Proposition 24, I am not convinced that a more objective “reasonable voter” standard would have distinguished between the subjects of Proposition 24 and the multi-faceted initiatives at issue in prior cases. In fact, the more provisions incorporated into an initiative, the more likely that a voter would not have specific knowledge of each and every component of the changes proposed. Moreover, I think that the deviation of outcome in Jones may have been based on a much simpler premise. Invalidation of Jones was made easy for the court because of the presence of clear evidence of logrolling and attempts at voter confusion, in the form of multiple versions of the initiative and a published admission by a proponent that the legislative salary section was a provision designed to obtain signatures for a reapportionment section that the public largely did not understand.121

In the end, Jones laid the groundwork for single-subject review pre-election, and signaled to initiative proponents that the single-subject rule would be enforced where evidence of voter confusion or logrolling was present. The question was, at best, left open as to whether a modification of the old reasonably-germane standard to include a “public understanding gloss” or some other requirement to look outside the language of the initiative and ballot materials would make its way into the single-subject jurisprudence.

V. THE FIRST POST-JONES CHALLENGE: MANDULEY V. SUPERIOR COURT

Manduley122 represents the first single-subject rule challenge entertained by the California Supreme Court since Jones.123 While some scholars, and no doubt petitioners’ counsel, anticipated a more stringent examination, if not standard, for

120. Id.
121. Jones, 21 Cal. 4th at 1151 n.5.
122. 27 Cal. 4th 537 (2002).
123. Procedurally, Manduley came to the California Supreme Court as the result of a challenge brought by juveniles who were charged as adults, and not entitled to a fitness hearing in juvenile court under the new law. By way of demurrers, the defendants raised several constitutional arguments in response to their prosecution. After the superior court overruled the defendants’ demurrers, the court of appeals reversed finding that portions of the new law violated the separation of powers doctrine by permitting the prosecutor discretion in choosing between two legislatively authorized schemes. Id. at 547. Because the court of appeals found a separation of powers violation, it did not reach the merits of the petitioners’ single-subject rule challenge. Id.
the single-subject rule challenge in *Manduley*, a modified standard did not emerge.\(^\text{124}\) Despite the ominous warning from Justice Kennard about the precedent being set by the *Jones* decision,\(^\text{125}\) the *Manduley* court reaffirmed its standard deferential approach to initiatives and its “liberal construction” of the single-subject rule.\(^\text{126}\)

In commencing its analysis of the single-subject challenge to the Gang Violence and Juvenile Crime Prevention Act of 1998, the court, in *Manduley*, first identified major sections of the initiative measure.\(^\text{127}\) The court found that one major section of the initiative was devoted to findings and declarations.\(^\text{128}\) Three other groupings of sections were then identified by the court: (1) sections three through thirteen, relating to criminal gang activity; (2) sections fourteen through seventeen, amending the Three Strikes law by altering the list of “violent felonies” and “serious felonies” in sections 667.5(c) and 1192.7(c) of the Penal Code, and by changing the “lock-in” dates for certain offenses; and (3) sections eighteen through thirty-four, amending the Welfare and Institutions Code concerning the juvenile justice system, including revisions to confidentiality of juvenile records, pre-hearing release of minors, and procedures and evidence rules in wardship hearings.\(^\text{129}\) While petitioners argued that these divergent groupings might be related to a general goal of “reducing crime,” they further asserted that such an objective was “too broad to satisfy the requirements of the single-subject rule.”\(^\text{130}\) The court rejected petitioners’ characterization of the theme and purpose of the initiative and identified instead the subject of the initiative as “[a]ddressing the problem of juvenile crime and gang-related crime.”\(^\text{131}\) This, the court stated, was a common purpose that united the various initiative provisions.\(^\text{132}\) Relying on a Department of Justice report, the court concluded that, because gang activity frequently was engaged in by juveniles, the Proposition 21 changes to laws involving gang-related crimes and to the juvenile justice system more generally were reasonably germane to one another and to the common purpose of the initiative measure.\(^\text{133}\)

With respect to the final grouping of changes made by Proposition 21, the majority unabashedly determined that alterations to the Three Strikes law also

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124. Uelmen, *supra* note 14, at 1009 (suggesting that the court, without substantially altering the reasonably-germane standard, added an element of public understanding to the test in *Jones*).
125. 21 Cal. 4th at 1176 (Kennard, J., dissenting).
126. 27 Cal. 4th at 575.
127. *Id.* at 574.
128. *Id.*
129. *Id.* at 574-75.
130. *Id.* at 575.
131. *Id.* at 576. It should be noted that, in two places in the majority opinion, the court characterizes the common purpose addressing “violent” crime committed by juveniles and gangs, but in its most definitive statement of the common purpose of Proposition 21, the term “violent” is omitted. *Id.* at 575-76.
133. *Id.*
“[bore] a reasonable and commonsense relationship to the initiative’s provisions regarding juvenile and gang-related crime.” 134 Faced with changes to the laws that made new offenses such as rape, sodomy, oral copulation, burglary, assault with a deadly weapon against a public transit employee, and use of a firearm in connection with a felony, strikes against any offender, regardless of age, the court nonetheless maintained that these changes were reasonably germane to the subject of juvenile and gang-related crime. 135 By using an interesting grammatical tactic—the double negative—the California Supreme Court loosened the reasonably-germane standard slightly. It stated, “[W]e cannot properly conclude that they [the Three Strikes qualifying offense alterations] are not reasonably related to the goal of the initiative.” 3

This sentence construction seems to suggest a presumption of relation, rather than placing the burden on proponents to demonstrate that the reasonably-germane test is met. In other words, the standard used to read that an initiative measure would satisfy the single-subject requirement “if, despite its varied collateral effects, all of its parts are ‘reasonably germane’ to each other, and to the general purpose or object of the initiative.” 136 A fair interpretation of the standard articulated in Manduley might be that a measure will pass the single-subject requirement if the relationship between the provisions is uncertain such that a court cannot definitively say that the various provisions are not reasonably related. This peculiarly places the burden on the court or the opponents to find a lack of relation, rather than placing the burden on the proponents to prove that the sections are reasonably germane to one another and to the subject of the initiative.

While the majority in Manduley engaged in a detailed analysis of how some of the “violent” and “serious” felonies were linked to gang activity and juvenile crime, the court concluded that even as to felonies committed more frequently by adults, “a reasonable and commonsense relationship to the purpose of the initiative” could be ascertained. 138 Relying in part on the collateral effects language of the reasonably-germane test, and in part on the existence of a functional relationship between increasing the list of serious and violent felonies and increasing the number of juveniles who are ineligible to be adjudicated in juvenile court, the majority determined that the Three Strikes amendments were reasonably related.

134. Id. at 577.
135. Id.
136. Id.
137. Id. at 575.
138. Manduley, 27 Cal. 4th at 578.
139. Although clearly rejecting the functional relationship test advocated by Justice Manuel and later Justice Mosk, the Manduley majority applied a component of the functional-relationship test when attempting to justify the inclusion of the arguably non-germane provisions of Proposition 21. Id. at 575. “As we recently have explained, ‘the single subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship.’” Id. at 579. “Thus, the list of violent and serious felonies contained in the Three Strikes law bears both a topical and a functional relationship to provisions regarding juvenile crime.” Id.
to the other provisions of Proposition 21.\textsuperscript{140} Signaling a reaffirmation of some of its pre-\textit{Jones} single-subject rule cases, the majority also recognized that the criminal justice initiatives upheld in \textit{Brosnahan II} and \textit{Raven} were based on subjects far broader than the subject approved of in \textit{Manduley}.\textsuperscript{141}

Perhaps, most importantly, in distinguishing \textit{Manduley} from \textit{Jones}, the majority in \textit{Manduley} offered a glimpse into the narrow circumstances under which the fortified teeth in the single-subject requirement would be revealed. Those circumstances seem to include instances where clear evidence demonstrates logrolling or voter confusion.\textsuperscript{142} The court determined that, unlike \textit{Jones}, the “reasonable and commonsense relationship” between the provisions of Proposition 21 belied a logrolling scenario, where unrelated provisions were joined in order to obtain majority support for provisions that standing alone would not have garnered sufficient votes.\textsuperscript{143} Similarly, the court rejected petitioners’ contention that the inclusion of the Three Strikes modifications were surreptitious and resulted in voter confusion.\textsuperscript{144} In so doing, the court pointed to the inclusion of references to the changes to the Three Strikes law in the Attorney General’s summary and in the Legislative Analyst’s report and followed \textit{Raven}’s analysis that from such references it could be assumed that “the voters duly considered and comprehended these materials.”\textsuperscript{145}

In addition to Chief Justice George, three other justices joined the majority opinion in \textit{Manduley}: Justice Baxter, Justice Chin, and Justice Brown.\textsuperscript{146} Both Justices Baxter and Chin joined Chief Justice George in reaching a different result in the majority opinion in \textit{Jones}, as well.\textsuperscript{147} Reading the two majority opinions together, it appears that, for at least three of the current Justices, the single-subject requirement will still be broadly interpreted when it comes to comprehensive criminal justice initiatives that do not evidence obvious signs of logrolling or attempts at voter confusion. Justice Werdegar, who joined the majority opinion in \textit{Jones} and wrote a separate concurring opinion in \textit{Manduley}, also seems to share the view that a liberal interpretation of the single-subject rule is

\begin{thebibliography}{99}
\bibitem{140} Id. at 577-79.
\bibitem{141} Id. at 576.
\bibitem{142} Id. at 579-80 n.12. The \textit{Manduley} court also explained that whereas in \textit{Jones}, the initiative effectuated a fundamental shift of power from the legislative to the judicial branch, no such similar transfer of power was proposed by Proposition 21. \textit{Id.} at 581. Thus, because of the court’s determination on the separation of powers issue in \textit{Manduley}, the majority was postured to distinguish the language in \textit{Jones}, which suggests that a reallocation of power from one branch of government to another is a single subject that requires its own initiative. \textit{Id.}
\bibitem{143} Id. at 579 n.12.
\bibitem{144} \textit{Manduley}, 27 Cal. 4th at 580.
\bibitem{145} Id. (quoting \textit{Raven}, 52 Cal. 3d at 349).
\bibitem{146} Id. at 538.
\bibitem{147} \textit{Jones}, 21 Cal. 4th at 1142. Justice Brown joined Justice Kennard’s dissenting opinion in \textit{Jones} on the grounds that review of the measure should take place after the election when there would be time for a more deliberative judicial process. \textit{Id.} at 1169-76.
\end{thebibliography}
still required.\textsuperscript{148} In fact, her concurrence, while highlighting the collateral effects argument eluded to by the majority concerning the Three Strikes lock-in date, goes a step further.\textsuperscript{149} Justice Werdegar acknowledged that some of the crimes added to the Three Strikes law by Proposition 21 are "doubtfully germane" to the purpose of the initiative and were not mere collateral effects of the initiative.\textsuperscript{150} Nonetheless, she concluded that the single-subject rule was not violated and that "[r]equiring, in addition, that each and every provision of an initiative be clearly and particularly related to the initiative's purposes would demand of initiative proposers a degree of precision unrealistic in the drafting of measures effectively reforming California's complicated body of statutory law."\textsuperscript{151}

I submit that article II, section 8(d) of the California Constitution justifiably requires that those proposing to reform a complicated body of statutory law have at least the skills necessary to ensure that all provisions clearly and particularly relate to the initiative's purpose and the commonsense to understand that, where unrelated provisions require reform, a separate initiative is the proper mechanism for such changes. Reacting to Justice Werdegar's willingness to overlook unrelated provisions and relax the standard requiring some sort of nexus between the various provisions of an initiative, I feel a bit like the fish in Dr. Seuss's \textit{The Cat in the Hat} in the passage where the cat is engaging in a game he calls "Up-Up-Up with a fish!"\textsuperscript{152} Like many things in life that can be reduced to lessons we learned when we were very young, the lesson for the cat, and the children watching him, in this passage is not to attempt to accomplish too many tricks at once. The single-subject rule should be interpreted to reinforce this same lesson in the initiative world. Instead, Justice Werdegar's allowance of the cat (the initiative proposer) to throw one or two or more unrelated provisions into an already complicated balancing act may just result in someone landing on his or her head—to say nothing of the fish landing in a pot.

In a very different concurring opinion, recently appointed Justice Moreno not only diverged from the majority and Justice Werdegar in interpreting the single-subject rule standard; he also offered some enlightenment on how he might

\textsuperscript{148} Mandulev, 27 Cal. 4th at 584 (Werdegar, J., concurring).
\textsuperscript{149} Id.
\textsuperscript{150} Id. (disagreeing with the majority that just because juveniles and gangs sometimes commit certain offenses, their inclusion as strikes is germane to the purpose of Proposition 21).
\textsuperscript{151} Id.

"Look at me! Look at me! Look at me NOW! It is fun to have fun But you have to know how. I can hold up the cup And the milk and the cake! I can hold up these books! And the fish on a rake! I can hold the toy ship And a little toy man! And look! With my tail I can hold a red fan! I can fan with the fan As I hop on the ball! But that is not all. Oh, no. That is not all. . . ." That is what the cat said . . . Then he fell on his head! He came down with a bump From up there on the ball. And Sally and I, we saw ALL the things fall! And our fish came down, too. He fell into a pot! He said, "Do I like this? Oh no! I do not. This is not a good game," Said our fish as he lit. "No, I do not like it. Not one little bit."

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assess single-subject rule challenges in the future.\textsuperscript{153} In the tradition of Justice Mosk, it seems that Justice Moreno may embrace the functionally-related test or some hybrid test, which has yet to be fully articulated or adopted but is more stringent than the current reasonably-germane test for assessing compliance with the single-subject rule.\textsuperscript{154} In a thorough opinion recounting the history of the court’s treatment of the single-subject requirement, as well as scholarly suggestions for its reform, Justice Moreno questioned the court’s adherence to the rule first announced in \textit{Perry v. Jordan}.\textsuperscript{155} the single-subject rule for initiatives should be examined based on the same standard as the single subject-rule for legislation.\textsuperscript{156} Interestingly, in his first initiative opinion as a California Supreme Court justice, Justice Moreno opened his concurring opinion with cautionary words about the complexity of the initiative process and called for a more strict construction of the single-subject rule.\textsuperscript{157}

Pointing out that the single-subject rule for initiatives was added to the California Constitution in large part to avoid “information overload and voter confusion” and recognizing that the constraints on the initiative process, including a lack of deliberative process and inability for the electorate to propose modifications to qualified initiatives, Justice Moreno made a strong argument that a different standard should be employed for single-subject challenges to initiative measures.\textsuperscript{158} Significantly, Justice Moreno referred to \textit{Raven} and \textit{Brosnahan II} as examples of cases which blindly follow the “liberally interpreted ‘reasonably germane’ test” and “come close to rendering the single-subject rule meaningless.”\textsuperscript{159} Instead of this liberal construction, Justice Moreno urged the creation of a test developed around the objects of the single-subject rule: namely, avoidance of voter confusion and logrolling.\textsuperscript{160} In formulating such a test, Justice Moreno acknowledged the suggestion of Professors Lowenstein and Uelmen that some public understanding component be examined, as well as the suggestion of the California Commission on Campaign Financing that courts confronted with a single-subject rule challenge inquire as to “whether a ‘reasonable voter’ would be ‘surprised’ to learn that a specific provision being challenged was included in the initiative.”\textsuperscript{161}

\begin{footnotesize}
\begin{enumerate}
\item 153. \textit{Manduley}, 27 Cal. 4th at 585-92 (Moreno, J., concurring).
\item 154. \textit{Id.} at 589.
\item 155. 34 Cal. 2d 87 (1949).
\item 156. \textit{Manduley}, 27 Cal. 4th at 586 (Moreno, J., concurring).
\item 157. This observation and position are particularly interesting in light of comments Justice Moreno made in his Senate Judiciary Committee hearing during his federal court confirmation process for his prior position as a United States District Court Judge. Upon his appointment to the California Supreme Court, the Sacramento Bee quoted Justice Moreno during the Senate hearings and painted a picture of a jurist who would likely be extremely deferential (to the point of presuming constitutionality) to initiative statutes and constitutional amendments. Claire Cooper, \textit{Latino Jurist is Named to State Supreme Court}, SACRAMENTO BEE, Sept. 27, 2001, at A1.
\item 158. \textit{Manduley}, 27 Cal. 4th at 586 (Moreno, J., concurring).
\item 159. \textit{Id.} at 586-87.
\item 160. \textit{Id.} at 588.
\item 161. \textit{Id.}
\end{enumerate}
\end{footnotesize}
To make either a determination of public understanding or the expectations of the reasonable voter, Justice Moreno would require that the provisions of the initiative must all be encompassed within a reasonably specific title and summary.\textsuperscript{162} Justice Moreno found that the appellate court case \textit{California Trial Lawyers Association v. Eu},\textsuperscript{163} in which an insurance-related initiative was removed in a pre-election single-subject challenge, appropriately applied the more stringent reasonably-germane test that he contemplates.\textsuperscript{164}

Applying the more stringent relational standard to Proposition 21, Justice Moreno concluded that the amendments to the Three Strikes law did not meet the test.\textsuperscript{165} Examining first the title and summary, Justice Moreno noted that "[n]othing in the title . . . would have placed voters on notice that it would be amending the Three Strikes law, nor that some of the amendments would have only an incidental connection with juvenile or gang-related crime."\textsuperscript{166} Second, Justice Moreno rejected the majority assumption that a passing reference in the Attorney General's summary and a reference in the Legislative Analyst's summary were sufficient to avoid voter confusion as to the contents of an initiative.\textsuperscript{167} Instead of taking an idealized view of voter preparedness, his test takes into account the average voter and concludes that "[t]he less . . . we enforce the single-subject rule, the more we are compelled to rely on implausible assumptions about voters' understanding of a ballot measure's intricacies."\textsuperscript{168} Finally, Justice Moreno looked to evidence of potential logrolling and found that the presence of a separate circulating initiative to narrow the list of strikes under the Three Strikes law might have suggested that proponents of Proposition 21 sought to tack a controversial expansion of the Three Strikes law onto a popular anti-juvenile-crime initiative.\textsuperscript{169} Thus, based on Justice Moreno's opinion, a relational test emerges that examines three questions for determining whether an initiative embraces a single subject: (1) whether the title and summary reflect all provisions contained in the initiative such that voters have notice as to the contents of the initiative; (2) whether all provisions are explained adequately in the summary and other ballot pamphlet information such that an average voter would be aware of the provisions contained in the initiative, and (3) whether there is any evidence, direct or implied, of logrolling. Despite finding none of these three parts satisfied by Proposition 21, Justice Moreno nonetheless found that the initiative satisfied the single-subject rule.\textsuperscript{170}

\begin{footnotesize}
\textsuperscript{162.  Id.  \\
\textsuperscript{163.  200 Cal. App. 3d 351 (3d Dist. 1988).  \\
\textsuperscript{164.  \textit{Manduley}, 27 Cal. 4th at 588-89 (Moreno, J., concurring).  \\
\textsuperscript{165.  Id. at 589-91.  \\
\textsuperscript{166.  Id. at 590.  \\
\textsuperscript{167.  Id. at 590-91.  \\
\textsuperscript{168.  Id. at 591.  \\
\textsuperscript{169.  Id.  \\
\textsuperscript{170.  \textit{Manduley}, 27 Cal. 4th at 591.  \\
\end{footnotesize}
Significantly, Justice Moreno rested his concurrence instead on the functionally-related test, proposed by Justice Manuel in his dissent in *Schmitz v. Younger*, adopted by Justice Mosk in his dissent in *Brosnahan I*, and generally perceived to be a more stringent test. In so doing, Justice Moreno determined that an initiative might also separately pass constitutional muster by satisfying this requirement that its various measures are "reasonably interrelated and interdependent, forming an interlocking "package" designed to accomplish the initiative's purpose." In the case of Proposition 21, Justice Moreno pointed to the symbiotic relationship between section 1732.6 of the Welfare and Institutions Code and sections 667.5 and 1192.7 of the Penal Code. Because the determination of whether a minor would be committed to the Youth Authority or to prison under Proposition 21 requires a reference to both the relevant Welfare and Institutions Code section and the Penal Code sections, Justice Moreno found an interlocking, functional relationship between the provisions being amended by the initiative.

VI. DRAFTING COMPREHENSIVE CRIMINAL JUSTICE INITIATIVES IN THE FUTURE

The good news for initiative proponents seeking to draft comprehensive criminal justice initiatives, or those on any other subject of public concern, is that the reasonably-germane test has been reaffirmed by both *Jones* and *Manduley*. Unless Justice Moreno is able to sway some of his colleagues to revisit the functionally-related test or to look more closely at the recommendations of scholars and commentators concerning a reasonable voter test, the single-subject standard will continue to be a deferential one that requires only provisions that relate to one another sufficiently to formulate a common purpose or theme. The bad news is that the court does seem to be examining initiative measures more closely for single-subject violations, and there is an increased willingness to undertake such reviews prior to the election.

Based on both *Manduley* and *Jones*, drafters and advocates need to be aware that title (both the title provided by the drafters and the one assigned by the Attorney General's Office) and summary will be scrutinized when examining an initiative for compliance with the single-subject rule. Both cases considered the information provided in the Official Title and Summary when assessing whether the measure would be understood to the electorate as embracing a single subject. In contrast, *Raven* did not even reference the Attorney General's title in its opinion.

171. 21 Cal. 3d 90, 100 (1978) (Manuel, J., dissenting).
172. 31 Cal. 3d 1, 9 (1982) (Mosk, J., dissenting).
174. *Id.* at 591.
175. *Id.*
176. *Id.* at 580; *Jones*, 21 Cal. 4th at 1150.
and the limited discussion of voter confusion in that case was quickly dismissed by pointing out that a full legislative analysis and ballot arguments were presented.\footnote{Raven, 52 Cal. 3d at 349.} There is an assumption in Raven, without further inquiry, that the voters must have "considered and comprehended" these provided materials.\footnote{Id.} In his concurrence in Manduley, Justice Moreno seems unwilling to settle for making such an unrealistic assumption.\footnote{Manduley, 27 Cal. 4th at 590-91 (Moreno, J., concurring).}

Moreover, while not the law presently, the "reasonable voter" test proposed by the California Commission on Campaign Financing in its report a decade ago may find a place in future interpretations of the rule.\footnote{CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, supra note 120.} Professor Uelmen discusses this "reasonable voter" test and indicates that the third part of the test is similar to Lowenstein's more subjective "public understanding" test, first introduced by Lowenstein in 1983 but never expressly adopted by the California Supreme Court.\footnote{Uelmen, supra note 14, at 1009-11.} It is possible that some form of these tests, which both incorporate an examination of the public perception of the term "subject" in cases involving single-subject rule challenges, may be employed by the courts in the future.

Drafters of future initiatives also need to be aware of the Speaker's Commission on the California Initiative Process Final Report which was issued on March 4, 2002. Although it makes very modest recommendations, it does suggest changes to the single-subject requirement in the form of an amendment to article II, section 8(d) of the California Constitution as follows:

An initiative measure embracing more than one subject may not be submitted to the electors or have any effect. All of a measure's provisions must be both functionally related and reasonably germane to each other. The Attorney General may not prepare a title and summary for any measure not meeting these requirements, but shall permit a proponent to submit separate initiatives for each subject. The determination as to whether the single subject rule has been complied with shall be subject to expedited independent judicial review.\footnote{FINAL REPORT, supra note 91, at 19-20.}

Finally, and perhaps most clearly, initiative drafters in the future must be aware that the courts are poised to strike down initiatives that show clear evidence of logrolling. The elimination or avoidance of this practice is often cited as a primary reason behind the single-subject rule, and the California Supreme Court's willingness to remove a measure from the ballot recently was the direct result of the presentation of clear evidence of logrolling.
VII. CONCLUSION

This is an exciting time to be watching the California Supreme Court and its initiative jurisprudence. It is also a time to be cautious and aware when drafting complex, multi-faceted initiatives of the subtle changes that have taken place in the analysis of the single-subject rule in the last several decades. While Manduley suggests that deference to comprehensive criminal justice initiatives will still be afforded, Jones suggests that where initiatives are presented that are in flagrant violation of the dual purposes of the single-subject rule, they will be stricken before reaching the electorate for a vote.