Opinion Analysis: Briggs v. Brown (2017) Part 3

Overview

California is the land of the big issue ballot initiative. But with the attempt to solve big issues through the ballot initiative process come big constitutional problems. Justice Cuéllar's dissent in *Briggs v. Brown* addresses a specific problem with Proposition 66: the unconstitutionality of its provision requiring courts to resolve both the direct appeal and habeas corpus petition of a capital case within five years. That dissent raises an important issue concerning big issue ballot initiatives in general: What happens when the central animating provision of a ballot initiative is unconstitutional? What can (or should) the reviewing court do to "save" the rest of the ballot initiative? What happens if removing the central animating provision, while saving the subsidiary parts of the ballot initiative, results in consequences unseen and likely unwanted by the voters?

One issue raised in Justice Cuéllar's dissent is the single-subject rule, which has played an important role in previous debates over the constitutionality of big issue ballot initiatives. A series of California Supreme Court decisions concerning two omnibus criminal law reform ballot initiatives in the 1980s and 1990s largely eviscerated the single subject rule. But the previous debates over the single-subject rule doctrine are quite useful in analyzing the unusual problems raised when the central animating provision of a ballot initiative is held to be unconstitutional, as it was in *Briggs*.

The Single Subject Rule and Omnibus Ballot Initiatives

The single-subject rule bans proposed laws that cover unrelated subjects. It applies both to statutes enacted by the legislature and the electorate. The rule's purpose is to prevent a measure's proponent from combining provisions dealing with disparate subjects for improper tactical purposes, a strategy known as "logrolling." Logrolling in the legislative context is the packaging of several proposals in a single bill so that legislators, by combining votes, obtain a majority for a measure that would not have

been approved if it had been divided into several bills.[1] The initiative single subject rule has the same purpose: preventing the passage of an initiative composed of unrelated elements that could not, on their own, gain voter approval. In the ballot initiative context, there is the additional rationale that the single-subject rule should help "simplification and clarification of issues presented to the voters."[2] Because the average voter does not have time to read lengthy ballot measures, the hope was that the single-subject rule would reduce the possibility that voters would not understand the purpose of an initiative because each initiative would be limited to a single-subject. [3]

While the rules have been renumbered several times, the constitutional text remains essentially intact.[4] The legislative rule in Article 4 section 9 requires every act to "embrace but one subject." The initiative rule in Article 2 section 8 is stated inversely: it bans measures "embracing more than one subject." Both rules are interpreted the same way.[5]

Commentators have criticized the single-subject rule as ineffective. For example, Professor Grodin says it "has proved to be a toothless tiger."[6] In the ballot initiative context, the de-fanging of the single-subject rule can be traced to several California Supreme Court decisions concerning the omnibus criminal justice reform propositions, Proposition 8 and Proposition 115.

Proposition 8, The Victims' Bill of Rights, was adopted by the voters in the June 1982 primary election.[7] Proposition 8 added seven separate subdivisions to the California constitution, repealed one section, added five new sections to the Penal Code and three more sections to the Welfare and Institutions Code.[8] It dealt with numerous aspects of criminal law and criminal procedure.[9] It was challenged on several fronts, including that it violated the single-subject rule. In *Brosnahan v. Brown,* a four-justice majority opinion rejected the single-subject rule and other challenges.

Regarding the single-subject rule challenge, the *Brosnahan* majority rejected the argument that compliance with the single-subject rule required the initiative's defenders to show that each of the initiative's provisions was capable of gaining

voter approval independently of the other provisions.[10] In dismissing this view of the single-subject rule, the *Brosnahan* majority quoted language from a prior California Supreme Court decision: "Aside from the obvious difficulty of ever establishing satisfactorily such 'independent voter approval,' this standard would defeat many legitimate enactments containing isolated, arguably 'unpopular,' provisions reasonably deemed necessary to the integrated functioning of the enactment as a whole."[11]

The *Brosnahan* majority's appeal to this view of the single-subject rule was reasonable. The dissenting justices continued to question whether one thread united Proposition 8 "as a whole." But the *Brosnahan* majority was satisfied that this whole could be explained as follows: "all of the provisions are designed to protect victims of crime and partake of a common theme, namely to strengthen or tighten the laws in aid of crime's victims."[12]

In 1990, the California electorate passed another omnibus criminal law reform initiative, Proposition 115, the Crime Victims Justice Reform Act.[13] Proposition 115 contained 31 sections dealing with numerous aspects of criminal law and criminal procedure.[14] Proposition 115 was challenged on numerous grounds, including the single-subject rule. In *Raven v. Deukmejian*, a six-justice majority rejected the single-subject rule challenge. In doing so, the court again (as in *Amador* and *Brosnahan*) rejected the argument that the single-subject rule required a showing that each one of the measure's provisions was capable of gaining voter approval independently.[15] But in *Raven* the court went further and also rejected the argument "that the single-subject rule contemplates some functional interrelationship or interdependence."[16] In doing so, the court appeared to discard *Amador*'s language about the relation of the parts to the "integrated functioning of the enactment as a whole."[17]

In his *Raven* dissent, Justice Mosk noted this change and explained its significance to single-subject rule doctrine. For Justice Mosk, the ultimate criterion was "whether the initiative measure in question is internally interrelated as a whole and parts."[18] Such an internal relationship is what Justice Mosk called the "reasonably germane" test: "To be sure, the test does not require the several provisions of an initiative to be related to each other in any particular manner. But it does indeed

require them to be related to each other in some reasonable fashion."[19] Without the "reasonably germane" test requirement, the single-subject rule would be reduced to the question of whether the proponents of an initiative could formulate a label that could cover all the provisions contained within it. And as Mosk concluded in his critique, "there is no measure, no matter how heterogeneous, that is incapable of bearing some label, so long as that label is defined broadly enough."[20]

Briggs v. Brown and the Inverse Single Subject Rule Dilemma

Proposition 66 as presented to the voters did not present a single-subject rule problem. As originally formulated, Proposition 66 easily passes Justice Mosk's "reasonably germane" test. The measure's central goal is to hasten capital sentence review, and its provisions all appear to support that goal, particularly because the initiative included a mandatory five-year deadline for California courts to finish both the direct appeal and the habeas corpus petition in capital cases.

But the California Supreme Court effectively struck down the five-year deadline by converting it from a mandatory to an "aspirational" deadline.[21] This creates an inverse single-subject rule problem because without the mandatory five-year deadline, it is no longer clear that the remaining provisions are "related to each other in some reasonable fashion," as Justice Mosk put it.[22] The problem is that without the five-year mandatory deadline, it is no longer clear that the remaining provisions effectuate the initiative's professed central goal, which is to speed up the death penalty process in California.

In Part 1 of this series, I argued that Proposition 66 makes several major changes to the capital habeas review process that add *more* procedure in an area where death-penalty advocates have claimed that procedure is misused by defense attorneys to achieve delay.[23] That would not be a problem if those procedures were connected to the central mandatory five-year limit. With an absolute deadline, the additional layers of procedure cannot be used for delay. But without the mandatory five-year deadline, the probability emerges that the remaining procedures will create new and additional forms of delay in the death penalty process—exactly reversing Proposition 66's stated goal.

Of course, whether the new habeas corpus procedures under Proposition 66 will

result in further delay in the death penalty process (as compared to the previous habeas procedures) is a non-legal empirical question. But it is undeniable that the new procedures add at least two layers of court review and two mandatory statements of decision where none existed before. Defenders of Proposition 66 might argue that, while additional procedural elements have been imposed, the labor of handling them is nonetheless spread out among the more numerous resources of the trial and appellate courts, rather than bottlenecked in the California Supreme Court. But the trial courts are already overburdened with their existing tasks, with the Court of Appeal not far behind. Nothing in Proposition 66 mandates more funding for resources to assist the trial or appellate courts to handle their new tasks.

As Justice Cuéllar's dissent points out, Proposition 66 was sold to the voters on the basis of the professed goal of speeding up the death penalty, the lynchpin of which was the mandatory five-year deadline for completing the direct appeal and habeas corpus petition in the state courts.[24] Given that the five-year mandatory deadline is unconstitutional, the issue becomes how to give effect to the will of the voters, given that the measure's core had to be stricken. The *Briggs* majority avoided facing this issue through the unusual method it took towards resolving the unconstitutionality of the five-year deadline, which was to re-write it as a non-mandatory, advisory deadline.[25] But the Cuéllar dissent ably shows that, while an advisory interpretation of the five-year deadline might reflect the court's preferred interpretation to preserve judicial branch autonomy, an advisory interpretation is utterly unsupported by either the proposition's text or its presentation to the voters.[26] It is a prime example of a legal fiction to say (as the majority opinion in effect does) that the court is effectuating the electorate's will by converting the five-year deadline from mandatory to advisory because the voters are presumed to know that any mandatory deadlines imposed on the courts by the legislature are presumed to be advisory.[27]

The Cuéllar dissent raises the important issue of whether the court should "save" the remaining provisions of a ballot initiative even though its central animating provision cannot be implemented. The Cuéllar dissent delivers a compelling argument against doing so: "When we twist the words of an initiative and ignore its clear purpose under the guise of 'saving' it from being declared unconstitutional, then we are merely offering a pacifier as a substitute for a law the voters enacted,

and encouraging initiative proponents to deceive voters about the actual effectiveness of a proposed law."[28] Additionally, we have the particular irony that "saving" this initiative's remaining provisions will likely have the result of *reversing* the electorate's intent.

Would the electorate have voted for additional captial review procedures without the assurance of an absolute deadline? It is not enough to say that the voters generally wanted to implement changes in death penalty procedure and, on that basis, uphold any of the remaining provisions. Proposition 66 presented a specific goal (speeding up the death penalty) and the changes were premised and sold on that goal. Justice Cuéllar's dissent delves into voter intent and psychology—matters that are notoriously difficult to reverse-engineer. This article suggests that the analysis used for the single-subject rule provides a complementary method of analyzing this problem. The essence of the single-subject rule is that it should preclude "grab-bag" initiatives. And in the case of Proposition 66, because the central animating element has been effectively removed, the remaining provisions now constitute such a "grab-bag" measure.

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[1] *Harbor v. Deukmejian (1987)* at 1096.

[2] *Manduley v. Superior Court (2002)* at 584–85 (Moreno, J., concurring).

[3] *Ibid*.

[4] Cal. Const. of 1849, art. IV, § 25:

“Every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title; and no law shall be revised, or amended, by reference to this title; but in such case, the act revised, or section amended, shall be re-enacted and published at length.”

Cal. Const. of 1879, art. IV, § 24:

“Every Act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title. No law shall be revised or amended by reference to its title; but in such case the Act revised or section amended shall be reenacted, and published at length as revised or amended; and all laws of the State of California, and all official writings, and the executive, legislative, and judicial proceedings shall be conducted, preserved, and published in no other than the English language.”

The legislative version is currently in Article 4 section 9:

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

The initiative version was added November 2, 1948 as Article 4 section 1c:

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

It is currently in Article 2 section 8(d):

“An initiative measure embracing more than one subject may not be submitted to the electors or have any effect.” Note that the title requirement does not apply to initiatives; that presumably is within the Attorney General’s title-and-summary responsibility.

[5] The same interpretive rules apply to both legislative and initiative acts. *Perry v. Jordan (1949)* at 93 ("There is nothing in the argument to the voters when section 1c of Article IV was adopted contrary to such construction or the purposes underlying the 'one subject' limitation").

[6] Joseph R. Grodin et al., The California State Constitution 116–17 (G. Alan Tarr ed., 2d ed. 2016); Karl Manheim and Edward P. Howard, A Structural Theory of the Initiative Power in California (1998) 31 Loy.L.A.L.Rev. 1165, 1207 (single subject rule in California has devolved into a virtual nullity; a rule with few, if any, teeth).

[7] *Brosnahan v. Brown (1982)* at 240.

[8] *Id*. at 298 (Mosk, J., dissenting).

[9] Covered subjects included restitution, safe schools, truth-in-evidence, bail, prior convictions, diminished capacity and insanity defenses, sentence enhancements for habitual criminals, victims' statements, plea bargaining, sentencing to the Youth Authority, and mentally disordered sex offenders. *Id*. at 242–45.

[10] *Id*. at 251.

[11] *Id*. at 251, quoting *Amador Valley Jt. Un. High Sch. Dist. v. State Bd. Of Equal. (1978)* at 232.

[12] *Brosnahan* at 251.

[13] *Raven v. Deukmejian (1991) at 340*.

[14] *Id*. at 357 (Mosk, J., dissenting). The sections dealt with post-indictment preliminary hearings, independent constructions of state constitutional criminal rights, the prosecution's right to due process and a speedy, public trial, joinder and severance of cases, hearsay testimony at preliminary hearings, discovery procedures, voir dire examination, felony-murder statute, special circumstance statutes, torture statute, appointment of counsel, trial dates and continuances, and severance clauses. *Id*. at 342–46.

[15] *Id*. at 349.

[16] *Ibid*.

[17] *Amador Valley Jt. Un. High Sch. v. State Bd. Of Equal., (1978) at 232*.

[18] *Raven v. Deukmejian (1991) at 360*.

[19] *Ibid*, citation and quotations omitted.

[20] *Id*. at 364 (Mosk, J., dissenting).

[21] See Part 2.

[22] *Raven v. Deukmejian (1991)* at 360 (Mosk, J., dissenting).

[23] See Part 1.

[24] Briggs v. Brown (2017) at 874–75 (Cuéllar, J., dissenting).

[25] Briggs v. Brown (2017) at 858–59.

[26] "Yet the question before us is not the workability of an arrangement involving a petition for writ of mandate to enforce the five-year deadline. It is instead whether a reasonable voter would have understood the purpose of the mandate mechanism to make the five-year deadline not merely an aspiration, but an enforceable reality." Briggs v. Brown (2017) at 886 (Cuéllar, J., dissenting).

[27] "To my knowledge, we have never required the voters to sit through a constitutional law lecture before we would be willing to interpret a law as it was written." Briggs v. Brown (2017) at 887 (Cuéllar, J., dissenting).

[28] Briggs v. Brown (2017) at 901 (Cuéllar, J., dissenting).