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California Constitutional Law: Reanimating Criminal Procedure Rights After the "Other" Proposition 8

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CALIFORNIA CONSTITUTIONAL LAW: REANIMATING CRIMINAL PROCEDURAL RIGHTS AFTER THE "OTHER" PROPOSITION 8

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INTRODUCTION

Constitutional rights protecting individual liberty have been subject to cycles of expansion and contraction, at both the federal and state levels. As the Warren era gave way to those of Burger and Rehnquist, the United States Supreme Court retreated from its broad definitions of constitutional criminal procedural rights. Reacting to that trend, in 1977 United States Supreme Court Justice William J. Brennan called for state courts to protect individual constitutional rights under their state constitutions, an approach known as the new judicial federalism.[1] That coincided with a series of rulings by the California Supreme Court preserving or expanding constitutional criminal procedural rights under the state constitution.[2]

Indeed, the California high court had been active in this

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1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: the Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546–48, 550 (1986). *See also* Michigan v. Mosley, 423 U.S. 96, 120–21 (1975) (Brennan, J., dissenting).

2. For example, Justice Brennan pointed approvingly to the California Supreme Court's express rejection in *People v. Disbrow*, 16 Cal. 3d 101, 113–15 (1976) of the federal doctrine of *Harris v. New York*, 401 U.S. 222 (1971), that statements taken outside of *Miranda* could nonetheless be used for impeachment. *See* Brennan, *supra* note 1, at 498–500 (1977). The significance of *Harris* and *Disbrow* is discussed *infra* Part III(C).

area long before Justice Brennan's call to action. Historically, California was a progressive leader in developing individual rights under its state constitution.[3] In particular, the state high court was at the forefront in developing state constitutional criminal procedure.[4] In 1955, the California Supreme Court applied the exclusionary rule to evidence illegally obtained by the government in *People v. Cahan*, six years before the United States Supreme Court applied the federal search and seizure exclusionary rule against the states in *Mapp v. Ohio*.[5] The search and seizure exclusionary rule under the California Constitution provided the defendant more protection than the federal analogue because, unlike the federal rule which covered only the illegal search of the defendant, the California rule allowed a defendant to seek to exclude evidence based on the illegal search of a third party, the so-called "vicarious exclusionary rule."[6] In other cases, the California Supreme Court also expanded the protections against warrantless searches in ways beyond what the federal constitution required.[7]

In 1978, the California Supreme Court in *People v. Wheeler* prohibited the use of peremptory challenges on the basis of race.[8] That was eight years before the United States Supreme Court's federal constitutional decision on that issue in *Batson v. Kentucky*.[9] In 1965, the California Supreme Court required the exclusion of the incriminating extrajudicial statements of a codefendant in *People v. Aranda*.[10] The similar federal constitutional decision by the United States Supreme Court

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3. David A. Carrillo, *The California Judiciary, in* GOVERNING CALIFORNIA: POLITICS, GOVERNMENT, AND PUBLIC POLICY IN THE GOLDEN STATE, 299, 301–02 (Ethan Rarick, ed., 2013). A notable civil rights case extending greater free speech rights under the state constitution than that required by the federal First Amendment is *Robins v. Pruneyard Shopping Ctr.*, 23 Cal. 3d 899 (1979).

4. *See* Kevin M. Mulcahy, *Modeling the Garden: How New Jersey Built the Most Progressive State Supreme Court And What California Can Learn*, 40 SANTA CLARA L. REV. 863, 884–887 (2000).

5. People v. Cahan 44 Cal.2d 434, 442, 451 (1955); Mapp v. Ohio 367 U.S. 643, 651, 655 (1961).

6. People v. Martin, 45 Cal.2d 755, 759–60 (1955).

7. People v. Brisendine, 13 Cal. 3d 528, 548–52 (1975); People v. Norman, 14 Cal. 3d 929, 939 (1975).

8. People v. Wheeler, 22 Cal. 3d 258, 276–77 (1978).

9. Batson v. Kentucky, 476 U.S. 79, 100 (1986).

10. People v. Aranda, 63 Cal. 2d 518, 530–31 (1965).

followed three years later in *Bruton v. United States*.[11]

Finally, the California Supreme Court defined a greater scope for the exclusion of confessions under its state constitution than the United States Supreme Court did under the federal constitution. In 1976, the California Supreme Court held in *People v. Disbrow* that confessions taken outside of *Miranda* could not be used for any purpose.[12] In contrast, the United States Supreme Court had held in 1971 in *Harris v. New York* that statements taken outside of *Miranda*, while excluded from the prosecutor's case-in-chief, could be used to impeach a defendant who took the stand.[13] The California Supreme Court also expanded *Miranda* protections in other cases beyond that required by the federal constitution.[14]

The main proponent for the new judicial federalism on the California Supreme Court was Justice Stanley Mosk.[15] As authority, he pointed to Article I, Section 24 of the California Constitution, which had been adopted by the voters in November 1974. This new section declared that the "rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[16] Although Justice Mosk acknowledged that Article I, Section 24 had been presented to the voters "as a mere reaffirmation of existing law," he also regarded it as confirming the independent state ground theory of constitutional rights.[17] The years between the adoption of Article, I Section 24 in November 1974 and the passage of Proposition 8 in June 1982 were the high-water mark for independent state ground decisions in the area of constitutional criminal procedure by the California Supreme Court.[18]

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11. Bruton v. United States, 391 U.S. 123, 126 (1968).

12. People v. Disbrow, 16 Cal. 3d 101, 113 (1976). See *infra* Part III(C).

13. Harris v. New York, 401 U.S. 222, 224 (1971). See *infra* Part III(C).

14. People v. Houston, 42 Cal. 3d 595, 609–610 (1986); People v. Pettingill, 21 Cal. 3d 231, 247–48 (1978); People v. Jimenez, 21 Cal. 3d 595, 604, 608 (1978).

15. *See* Stanley Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEX. L. REV. 1081, 1088–91 (1985); Stanley Mosk, *California constitutional Symposium: Introduction*, 17 HASTINGS CONST. L. Q. 1, 10–11 (1989).

16. Proposition 7 was a legislatively–referred constitutional amendment, approved in the November 5, 1974 statewide election, which (among other changes) added the referenced text as part of a new Section 24 to Article I; People v. Brisendine, 13 Cal. 3d 528, 551 (1975).

17. *Id.* at 551.

18. As discussed *infra* in Part III, it is to the decisions in these years that the

As with the United States Supreme Court, the expansive trend in the California high court in turn saw its own contraction. The California Supreme Court's self-conscious reliance on state constitutional grounds to grant more protections to criminal defendants than that required by United States Supreme Court decisions drew opposition from the state's prosecutors and victims' rights groups.[19] In 1983, one appellate court noted that the debate over the "use of the doctrine of independent state grounds to avoid the impact" of the United States Supreme Court's decisions in the Fourth Amendment context had "increased to a fever pitch in recent years."[20] Another appellate opinion in 1974 prophetically observed: "A sudden switch to a California ground to avoid the impact of federal high court decisions invites the successful use of the initiative process to overrule the California decision with its concomitant harm to the prestige, influence, and function of the judicial branch of state government."[21]

That is precisely what happened. In recent years, California has become known for removing individual rights from its constitution by initiative. Because of these initiatives, California is now unique for providing no state constitutional protection to its citizens, beyond that required by the federal constitution, in the majority of the areas of constitutional criminal procedure.[22] This trend began in 1982 with Proposition 8, which eventually resulted in the practical elimination of independent state grounds as a basis for constitutional criminal procedure doctrine in California.[23] The most recent example is the ban on same-sex marriage enacted by another Proposition 8 in 2008, which the California Supreme Court upheld against a constitutional challenge in

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California Supreme Court looked to in *Raven v. Deukmejian*, 52 Cal. 3d 336 (1990), in reasserting the independent authority of the state constitution to protect individual rights against Proposition 115.

19. *See e.g.*, the criticism of John Van de Kamp, then District Attorney of Los Angeles in John K. Van de Kamp and Richard W. Gerry, *Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California Constitution*, 33 HASTINGS L. J. 1109, 1110–11 (1982).

20. In the Matter of Lance W., 197 Cal.Rptr. 331, 335 (1983) (depublished by *In re Lance*, 37 Cal. 3d 873 (1985)).

21. *Id*. at 335 (citing *People v. Norman*, 14 Cal. 3d 929, 941 (1975) (citing *People v. Norman*, previously published at 36 Cal.App. 3d 879 (1974))).

22. *See* discussion *infra* Part IV(A).

23. *See* discussion *infra* Part II.

Strauss v. Horton.[24]

This Article examines the jurisprudential issues raised by the removal of individual rights from the California Constitution, specifically criminal procedural rights. As we describe below, the precedent for the removal of the state equal protection right to same-sex marriage in *Strauss* was a series of cases in the 1980s and 1990s. Those cases curtailed state criminal procedural rights based on a series of initiatives, the most significant of which was the so-called Truth-in-Evidence provision enacted in 1982 by Proposition 8.[25] The Truth-in-Evidence provision was initially regarded as confining only the scope of the exclusionary rule in search and seizure violations to no more than the federal rule.[26] But over time, judicial decisions erroneously expanded the Truth-in-Evidence provision to include virtually every aspect of criminal procedure under the state constitution.[27] The end result has been the effective limitation of state constitutional criminal procedural rights by judicial interpretation to amount to no more than that allowed by the federal constitution.

It should be cause for concern that, despite its original limitation to remedies, the 1982 Proposition 8 has been held by later judicial interpretation to abolish individual rights.[28] Surely the power to create or remove constitutional rights must, at the outset, lie outside the judicial branch, just as the power to interpret those rights once established must belong to the judiciary; these principles are elemental in California's system of divided government.[29] Yet until the decision in *Strauss v. Horton*, the California Supreme Court had never expressly acknowledged that even the initiative power could remove individual rights from the state constitution.[30] Before

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24. Strauss v. Horton, 46 Cal. 4th 364, 385–86, 391 (2009). *See* discussion *infra* Part I.

25. *See* discussion *infra* Part III(A).

26. *See* discussion *infra* Part III(B).

27. *See* discussion *infra* Part III(C–D).

28. *See* Strauss, 46 Cal. 4th, at 450.

29. David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 670–73 (2011).

30. True, the opinion in *In re Lance W.* did observe in dicta that "[t]he people could by amendment of the Constitution repeal Section 13 of Article I in its entirety." 37 Cal. 3d 873, 892 (1985). But that was not part of the holding in that decision, so that issue remained an open question until *Strauss*.

An earlier case, *People v. Frierson*, 25 Cal.3d 142 (1979), had upheld a ballot initiative that had the effect of removing a defendant's previously-judicially-

Strauss, the changes to state criminal procedural rights brought about by the 1982 Proposition 8 were discussed by the court in terms of a limitation of remedies, rather than the removal of rights.[31] But the state constitutional ban on same-sex marriage effected by Proposition 8 in 2008 squarely presented the question of whether an initiative constitutional amendment could eliminate individual rights.[32] Of course, since *Strauss* was decided, the issue of same-sex marriage proceeded to a resolution by the United States Supreme Court.[33] Because of this, *Strauss* has receded from view, and little thought has been given to its broader implications now that its main holding has been superseded.[34]

The *Strauss* decision, however, remains important on the larger issue of removing rights under the state constitution, including the restrictions effected by the 1982 Proposition 8. Those restrictions are particularly problematic because in 1990 (eight years after Proposition 8 was enacted), in *Raven v. Deukmejian*, the California Supreme Court reaffirmed the

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recognized right under the state constitution not to be subject to the death penalty. See *infra* note 74. *Frierson*, however, did not analyze the issue of the death penalty under the state constitution in terms of the removal of an individual constitutional right. Rather, *Frierson* addressed the issue in terms of a separation of powers analysis similar to the one the court would later use in *Raven v. Deukmejian*, 52 Cal.3d 336 (1990). See discussion *infra* Part IV(B).

31. *See infra* Part II(B, C).

32. The official title and summary of Proposition 8 in 2008 described the measure thus: "ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. INITIATIVE CONSTITUTIONAL AMENDMENT. Changes the California Constitution to eliminate the right of same-sex couples to marry in California." The analysis by the Legislative Analyst provided additional detail:

> As a result of [a court ruling], marriage between individuals of the same sex is currently valid or recognized in the state. [¶] PROPOSAL [¶] This measure amends the California Constitution to specify that only marriage between a man and a woman is valid or recognized in California. As a result, notwithstanding the California Supreme Court ruling of May 2008, marriage would be limited to individuals of the opposite sex, and individuals of the same sex would not have the right to marry in California.

33. Obergefell v. Hodges, 135 S.Ct. 2584, 2607 (2015) (the federal constitution "does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex").

34. David B. Cruz, *Equality's Centrality: Proposition 8 and the California Constitution*, 19 REV. OF LAW AND SOCIAL JUSTICE 45 (2010) presents a good interrogation of the *Strauss* majority opinion based on the importance of equal protection to the state constitution. However, there is no discussion of the precedential role that the removal of criminal procedural rights played in *Strauss*.

principle that the California Constitution should have an independent role in protecting individual rights, distinct from the protections provided by the federal constitution.[35] *Raven* dealt with Proposition 115, which limited all state constitutional criminal procedural rights to being no greater than the corresponding rights under the federal constitution.[36] *Raven* invalidated this part of Proposition 115 as an unconstitutional revision that fundamentally limited the role of the state courts in interpreting and enforcing state constitutional protections.[37] Nonetheless, by the time *Raven* was decided, decisions applying the Truth-in-Evidence provision had expanded it to the point that it was virtually as far-reaching as the constitutional amendment of Proposition 115 that the state Supreme Court invalidated in *Raven*.[38] Thus, paradoxically, *Raven* held that the electorate's power of constitutional amendment could not achieve through Proposition 115 what judicial interpretation of Proposition 8 had already done: reduce criminal procedural rights under the state constitution to no more than the level required by the federal constitution.

This Article analyzes the conflict in California's constitutional criminal procedure doctrine and proposes that the solution is to contract the current broad reach of the Truth-in-Evidence provision. The argument here is not that the electorate exceeded its power in enacting the 1982 Proposition 8 in the first place—we acknowledge that the current state of the law following *Strauss* is that initiatives can adjust or remove individual rights under the state constitution. Instead, this Article examines the judicial interpretation and application of the 1982 Proposition 8, and concludes that the measure has been unduly expanded beyond its proper scope by erroneous judicial interpretation. Thus, following *Strauss*, the question is no longer whether an initiative can remove constitutional rights (it can)—instead, the question is whether in the 1982 Proposition 8 the electorate intended only to eliminate a remedy, or to eliminate the right itself. We argue that (unlike the initiative in 2008) the 1982 Proposition 8 was

35. Raven v. Deukmejian, 52 Cal. 3d 336, 353–55 (1990).
36. *Id.* at 342. *See* discussion *infra* Part IV(B).
37. *Id*. at 354–55. *See* discussion *infra* Part IV(B).
38. *See* discussion *infra* Part IV(A).

not intended to abolish a right. We show, through an analysis of the line of cases discussed here, how Proposition 8 was erroneously interpreted to achieve a result that *Raven* prohibits.

In particular, our analysis calls into doubt *People v. May*[39], the case that opened the door to over-expanding the Truth-in-Evidence provision.[40] *May* extended the Truth-in-Evidence provision to apply to the state constitutional right against self-incrimination under Article I, Section 15, on the faulty rationale that the exclusion of evidence under the right against self-incrimination is doctrinally equivalent to the exclusion of evidence under the right against illegal searches and seizures.[41] *May* treated exclusion under both rights as doctrinally-equivalent exclusionary rules, which pertained to remedies rather than rights.[42] The *May* court therefore took a right/remedy distinction specific to the jurisprudence of the search and seizure exclusionary rule, and improperly imported it into the area of the right against self-incrimination. By conflating this right/remedy distinction, the *May* court avoided acknowledging that it was removing part of the state right against self-incrimination by so extending the Truth-in-Evidence provision.[43]

May was a controversial decision when it was decided, and its flaws have become even more apparent after the decisions in *Raven* and *Strauss*. Although *Strauss* acknowledges that rights previously granted under the California Constitution can be removed by initiative, *Strauss* also stresses that such a removal of rights should be narrowly construed.[44] As a result, we conclude that the scope of the Truth-in-Evidence provision for California's constitutional criminal procedural rights

39. 44 Cal. 3d 309 (1988).

40. *See* discussion *infra* Part III(C).

41. When this Article refers generally to the constitutional right against self-incrimination we will be referring to the core features of this right as reflected in both the Fifth Amendment to the United States Constitution and in Article I, Section 15 of the California Constitution. Likewise, when this Article refers generally to the constitutional right against illegal searches and seizures, we will be referring to the core features of this right as reflected in both the Fourth Amendment to the United States Constitution and in Article I, Section 13 of the California Constitution. *See* discussion *infra*, Part III(B)(2).

42. *See* discussion *infra* Part III(C).

43. *See* discussion *infra* Part III(C).

44. *See* discussion *infra* Part I (discussing *Strauss*, 46 Cal. 4th, at 446).

should be limited to the area of exclusion under the search and seizure exclusionary rule for two reasons: because the doctrinal rationale for the current rule is unsound, and because it conflicts with *Strauss* and *Raven*.

I. REMOVING RIGHTS FROM THE STATE CONSTITUTION BY INITIATIVE: *STRAUSS V. HORTON*

The California electorate can amend the state constitution with relative ease through the initiative process.[45] This creates the potential for initiatives to reduce or eliminate state constitutional rights.[46] But part of the traditional conception of a constitution is that it establishes a set of basic and inviolable rights.[47] Thus, the very idea of reducing or eliminating individual rights poses problems for constitutional jurisprudence. Although advocates of living constitutionalism are more open to the idea of constitutional change than are originalists, they have traditionally viewed the process of constitutional change as the continual expansion of rights, without considering whether their theory might also permit reductions in rights.[48] Under California law, what restrains the initiative process from making the state constitution a completely malleable entity is the doctrine that "although the initiative process may be used to propose and adopt

45. "[T]he California constitution provides that an amendment to that Constitution may be proposed either by two-thirds of the membership of each house of the Legislature (Cal. Const., art. XVIII, § 1) or by an initiative petition signed by voters numbering at least 8 percent of the total votes cast for all candidates for Governor in the last gubernatorial election (Cal. Const., art. II, § 8, subd. (b); *Id.*, art. XVIII, § 3), and further specifies that, once an amendment is proposed by either means, the amendment becomes part of the state Constitution if it is approved by a simple majority of the voters who cast votes on the measure at a statewide election (*id.* art. XVIII, § 4.)" *Strauss*, 46 Cal. 4th, at 386 (emphasis omitted).

46. For a review of other states' initiative processes see *Strauss*, 46 Cal. 4th, at 391, 454–56. 17 states' constitutions in addition to California's permit constitutional amendments to be proposed through the initiative process. *Id.* at 455. Of these, two states, Massachusetts and Mississippi, expressly prohibit the modification of the state Bill of Rights through the initiative process. *Id.* at 389–90, 455.

47. Justice Scalia, a leading proponent of originalism, expresses this view that a constitution's "whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40 (1997).

48. David Aram Kaiser, *Putting Progress Back Into Progressive: Reclaiming A Philosophy Of History For The Constitution*, 6 WASH. U. JUR. REV. 257 (2014).

amendments to the California Constitution . . . that process may not be used to *revise* the state constitution."[49] In *Strauss v. Horton*, the California Supreme Court considered the issue of what changes would be major enough to constitute a revision, rather than a mere amendment, to the state constitution.[50] In 2008, the year before *Strauss* was decided, the California Supreme Court decided *In re Marriage Cases*—which examined the constitutional validity of the state marriage statutes limiting marriage to a union between a man and a woman—and held that the then-existing marriage statutes infringed on the privacy, due process, and equal protection rights of same-sex couples under the California Constitution.[51] Thus, at the time *Strauss* was decided, same-sex couples held state constitutional privacy, due process, and equal protection rights.[52]

At issue in *Strauss* was the constitutionality of the Marriage Protection Act, which was approved by the voters as Proposition 8 at the November 4, 2008 election, adding Section 7.5 to Article I of the California Constitution: "Only marriage between a man and a woman is valid or recognized in California,"[53] and which banned same-sex marriage under the state constitution. If Proposition 8 was valid, its immediate effect would be to nullify the court's decision in *In re Marriage Cases* and to reduce or eliminate the state constitutional privacy, due process, and equal protection rights then held by same-sex couples. As discussed below, the court examined the question of whether changes to individual rights through a ballot initiative necessarily constituted a revision to the state constitution. The *Strauss* decision ultimately upheld Proposition 8 as a proper exercise of the initiative power.[54]

The main argument by those opposing the Marriage Protection Act was that it should be viewed as a constitutional *revision* (which could not be done through the initiative process), rather than a constitutional *amendment* (which

49. *Strauss*, 46 Cal. 4th, at 386.

50. *Id*. at 385. The court had confronted this issue several times before it arose in *Strauss*. See, e.g., Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208 (1978) and Raven v. Deukmejian, 52 Cal. 3d. 336 (1990).

51. *Id.* at 384 (citing *In re Marriage Cases*, 43 Cal. 4th 757 (2008)).

52. *Strauss*, 46 Cal. 4th at 385–88.

53. *Id.* at 385.

54. *Id.* at 388.

could).[55] As a result, the main analysis in *Strauss* examined the distinction between revisions and amendments to the state constitution. There were two questions: (1) whether the Marriage Protection Act was a revision because it altered the basic governmental plan or framework of the state, and (2) whether it was a revision because it stripped fundamental constitutional rights from individuals.[56] The court concluded that the Marriage Protection Act was not a revision under either approach.[57]

As relevant here, on the question of whether the Marriage Protection Act was a revision because it removed constitutional rights from individuals, *Strauss* affirmed that "the scope and substance of an existing state constitutional individual right, as interpreted by this court, may be *modified and diminished* by a change in the state Constitution itself, effectuated through a constitutional *amendment* approved by a majority of the electors acting pursuant to the initiative power."[58] Although *Strauss* acknowledged that an initiative could be used to reduce state constitutional rights, it left open the question of whether a revision would result when an initiative measure "actually deprives a minority group of the *entire* protection of a fundamental constitutional right or, even more sweepingly, leaves such a group vulnerable to public or private discrimination in *all* areas without legal recourse."[59] But the *Strauss* majority opined that the Marriage Protection Act did not present this issue because it was a "narrowly drawn exception to a generally applicable constitutional principle" of equal protection, which did not "amount to a constitutional revision within the meaning of Article XVIII of the California Constitution."[60]

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55. *Strauss*, 46 Cal. 4th at 386.

56. *Id.* at 388, 445.

57. *See id.* at 441–42, 444. On the question of whether the Marriage Protection act was a revision because it altered the basic governmental plan or framework of the state, the *Strauss* majority concluded that the Marriage Protection Act worked no such change in the government's fundamental structure or the foundational powers of its branches. *See* Strauss, 46 Cal. 4th, at 441–42 (Marriage Protection Act "simply change[d] the substantive content of a state constitutional rule in one specific subject area—the rule relating to access to the designation of 'marriage' ").

58. *See Id*. at 450 (emphasis in original).

59. *Id.* at 446.

60. *Id.*

This part of the analysis in *Strauss* has potentially far-reaching implications.[61] *Strauss* described two increasingly severe scenarios of the removal of rights through a constitutional amendment: (1) one that deprives a minority group of the *entire* protection of a fundamental constitutional right, or (2) one that leaves such a group vulnerable to public or private discrimination in *all* areas without legal recourse.[62] The specific application of the first scenario to the issue of same-sex marriage is not entirely clear.[63] But the second, even more dire, scenario of the outer limit of the initiative process is given a citation to *Romer v. Evans*.[64] In *Romer*, the United States Supreme Court held unconstitutional, on federal equal protection grounds, an amendment to the Colorado constitution that repealed and prohibited state laws barring discrimination based on sexual orientation.[65] The high court described "[t]he resulting disqualification of a class of persons [namely, gays and lesbians] from the right to seek specific protection from the law" as "unprecedented in our jurisprudence."[66] While *Strauss* cited *Romer* as defining the outer limit beyond which no constitutional amendment could go, the California Supreme Court did not explain how far an initiative could go in removing rights before it ceased to be a permissible "narrowly drawn exception."[67]

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61. David A. Carrillo and Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California's Republican Form of Government* 62 UCLA L. REV. DISC. 104, 121 n.57 (2014) ("There is a potential problem with this part of *Strauss*. What is the doctrinal basis for saying that a partial denial of a right does not qualify as a revision, but a complete denial would? This reservation potentially sets up a difficult future dispute over just how much a right needs to be restricted to constitute a revision, or which rights would trigger this sort of scrutiny.")

62. *Strauss*, 46 Cal. 4th, at 446.

63. An application of the first scenario to the issue of same-sex marriage suggests the following interpretation, although a full analysis of this issue falls outside the scope of this Article. *Strauss* had analyzed the deprivation of rights under Proposition 8 only in terms of the removal of the name "marriage," since all the material benefits of marriage were independently available through the domestic partnership act. By that logic, in a situation in which the material benefits of marriage were not independently available, Proposition 8's ban on same-sex marriage under the state constitution would also impact the material benefits and thus actually deprive same-sex couples of the entire protection of the right to marriage, not just the name.

64. Romer v. Evans, 517 U.S. 620 (1996).

65. *See id.* at 626–27, 635–36.

66. *Id.* at 633.

67. *See Strauss*, 46 Cal. 4th at 446.

That question is troubling in the context of the Truth-in-Evidence provision, which has, by judicial interpretation, removed all or nearly all formerly-recognized state constitutional criminal procedural rights. Specifically, in the language of *Strauss*: is the Truth-in-Evidence provision, either in its original form or its subsequent judicially-expanded scope, a revision because it "actually deprives a minority group of the *entire* protection of a fundamental constitutional right" or because it "leaves such a group vulnerable to public or private discrimination in *all* areas without legal recourse"?[68] Under the analysis that follows, we conclude that, *in its apparent original scope*, the Truth-in-Evidence provision is a permissible limitation under *Strauss* because only the remedy was affected rather than the underlying right. But, in its present incarnation, the Truth-in-Evidence provision has become impermissible because, under it, essentially all criminal procedural rights under the state constitution have been lockstepped to the federal constitution—a result that *Raven* would prohibit.[69] So it must be that either the original initiative was invalid in its scope, or it was made invalid by later judicial interpretation that expanded the measure beyond its proper reach. We conclude that the fault with the Truth-in-Evidence provision in its present form lies in the judicial interpretation of the measure, which has extended its scope beyond what an initiative can accomplish and into an impermissible deprivation of a minority group's "*entire* protection of a fundamental constitutional right."[70]

Applying the general *Strauss* principle of a revision limit on changing state constitutional rights to the specific category of constitutional criminal procedural rights raises three main questions. First, are criminal procedural rights in the same category as the equal protection rights at issue in *Strauss*? *Strauss* says they are.[71] Indeed, *Strauss* specifically refers to

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68. *Id.*

69. *See Raven*, 52 Cal. 3d at 354–55. *See infra* Part IV(B).

70. *Strauss*, 46 Cal. 4th at 446.

71. *See id*. at 389 ("There are many other constitutional rights that have been amended in the past through the initiative process, however, that also are embodied in the state Constitution's Declaration of Rights and reflect equally long-standing and fundamental constitutional principles whose purpose is to protect often unpopular individuals and groups from overzealous or abusive treatment that at times may be condoned by a transient majority."); *see also id.* at 450 ("Under the California Constitution, the constitutional guarantees

Proposition 115 and the first Proposition 8 as being relevant to whether individual rights under the state constitution could be removed or reduced:

> As we have seen, in past years a majority of voters have adopted several state constitutional amendments—for example, the measure reinstating the death penalty, and the multitude of constitutional changes contained in the 1982 Proposition 8 and in Proposition 115—that have diminished state constitutional rights of criminal defendants, as those rights had been interpreted in prior decisions of this court.[72]

Second, has the Truth-in-Evidence provision been expanded beyond its intent? The text of the 1982 Proposition 8 does not require it to be interpreted as a *Romer*-level reduction of rights and thus as an invalid revision.[73] Nor do some of the key California Supreme Court decisions. In finding Proposition 8's restriction on same-sex marriage permissible because it was "discrete" and "isolated," *Strauss* refers to the key early Truth-in-Evidence case, *In re Lance W.*, 37 Cal. 3d 873, 891 (1985).[74] In so doing, *Strauss* echoes the court's similar characterization in *Raven*, which also discussed the Truth-in-Evidence provision.[75] The *Raven* court described the

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afforded to individuals accused of criminal conduct are no less well established or fundamental than the constitutional rights of privacy and due process or the guarantee of equal protection of the laws.").

72. *Strauss*, 46 Cal. 4th at 450. In contrast, Justice Moreno, who dissented in *Strauss*, did not want to acknowledge that there had been such a precedent for the diminishing of individual rights under the state constitution through the initiative process. Strauss, 46 Cal. 4th at 492 (Moreno, J., dissenting). Thus he argued that, "[e]ven in the area of criminal law and procedure, in which the initiative process has perhaps made its boldest forays into the field of constitutional rights, this court has stopped short of approving the kind of basic constitutional change at issue in the present case." *Id.*

73. *See Romer*, 517 U.S. 620, 632 (1996).

74. *See Strauss*, 446 Cal. 4th at 444 (referring to "the discrete restrictions on state constitutional protections that had been found not to constitute constitutional revisions" in *In re Lance W.*, 37 Cal. 3d 873, 891 (1985) and *People v. Frierson*, 25 Cal. 3d 142 (1979)); *see also id.* at 437 (discussing the "isolated provisions" at issue in *Frierson* and *In re Lance W.*). *People v. Frierson*, 25 Cal. 3d 142, 184–87 (1979), upheld the constitutionality of a ballot initiative adding Article I, Section 27 of the California Constitution, which states that the death penalty "shall not be deemed to be, or to constitute, the infliction of cruel and unusual punishments within the meaning" of the cruel and unusual punishment clause of the state constitution (formerly Article I, Section 6, now Article I, Section 17).

75. *See Raven*, 52 Cal. 3d at 346, 355.

holding of *In re Lance W*. in the following terms: "[W]e upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment to the federal Constitution."[76] So described, the Truth-in-Evidence provision is the kind of "discrete" and "isolated" restriction of constitutional criminal procedural rights that *Raven* and *Strauss* would permit. But as discussed below, the later judicial expansion of the Truth-in-Evidence provision brings its effect into the realm of an impermissible deprivation of the *entire* protection of a fundamental constitutional right.[77]

If we accept the above-described characterizations of the measure in *Strauss*, *Raven*, and *In re Lance W*., then the Truth-in-Evidence provision should be read to affect only judicially-created remedies, but not the underlying constitutional rights, nor to impermissibly remove the *entire* protection of a fundamental constitutional right. But the Truth-in-Evidence provision has not been so limited. Following the decision in *People v May*, it has been extended beyond the exclusionary remedy of the Fourth Amendment to also encompass substantive *Miranda* rights under the Fifth Amendment.[78] After *May*, the Truth-in-Evidence provision can no longer be considered the "discrete" and "isolated" restriction of constitutional criminal procedural rights the voters intended it to be. In expanding the Truth-in-Evidence provision, the *May* court failed to address the constitutional issues involved. The result is that the decision in *May* conflicts with the jurisprudence of state constitutional rights expressed in *Raven* and *Strauss*. To resolve this conflict, we conclude that *May* was wrongly decided and that the Truth-in-Evidence provision should be confined to the narrower contours defined by *Raven* and *Strauss*.[79]

Finally, if the initiative were not meant to extend so far, is it a separation of powers violation for the judiciary, on its own initiative and by interpretation, to so reduce state constitutional rights? One must conclude that it would be. The fundamental purpose of the judicial interpretive task is to

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76. *Id.* at 355.
77. *See* discussion *infra* Part IV.
78. People v. May, 44 Cal. 3d 309 (1988). *See* discussion *infra* Part III(C).
79. *See* discussion *infra* Part IV(B).

divine and effectuate the intent of the lawmaker. In this instance, the Truth-in-Evidence provision properly should be read to include only the Fourth Amendment exclusionary rule. For the courts to extend an initiative constitutional amendment beyond the electorate's intent is to exceed the judicial function, and to invade the people's lawmaking province. Indeed, if it is beyond the electorate's initiative power of amendment to deprive a minority group of the *entire* protection of a fundamental constitutional right, then it is even farther from contemplation for the judiciary to accomplish that result.

II. PROPOSITION 8 AND THE TRUTH-IN-EVIDENCE PROVISION

A. The Origins of Proposition 8

On June 8, 1982, the electorate approved Proposition 8, an initiative constitutional amendment entitled "The Victims' Bill of Rights."[80] Proposition 8 contained numerous changes to criminal law and criminal procedure.[81] Most importantly, it added the Truth-in-Evidence provision as Article I, Section 28, subdivision (d) of the California Constitution:

> Right to Truth-in-Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this Section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.[82]

As one commentator said, "the origins of Proposition 8 remain obscure to all but its drafters."[83] But it seems clear to

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80. For background on Proposition 8, *see* Grover C. Trask & Timothy J. Searight, *Proposition 8 and the Exclusionary Rule: Towards a New Balance of Defendant and Victim Rights*, 23 Pac. L.J. 1101, 1102 (1992).

81. *See generally* Brosnahan v. Brown, 32 Cal. 3d 236 (1982) for other aspects of Proposition 8.

82. CAL. CONST. art I, § 28(d).

83. Jeff Brown, *Proposition 8: Origins and Impact—A Public Defender's Perspective*, 23 PAC. L.J. 881, 883 (1992).

us that Proposition 8 was part of the reaction against the expansion of protections for criminal defendants by the federal and state courts.[84] Certainly the use of state constitutions to grant more protections to criminal defendants than what was required under the federal constitution was a live issue in 1982.[85] A useful comparison here is a Florida constitutional amendment in 1982, which required that state constitution's search and seizure provision to be "construed in conformity" with the Fourth Amendment "as interpreted by the United States Supreme Court."[86] The Florida constitutional amendment plainly states its intended application to a substantive interpretation of a constitutional right.[87] In contrast, although the rule on evidence admissibility in Proposition 8 ("relevant evidence shall not be excluded in any criminal proceeding")[88] is broad, its relationship to constitutional rights is not so obvious. Because of or despite this fact, the courts have interpreted it expansively over time to include virtually every aspect of constitutional criminal procedure.[89] As discussed in the next section, that erroneously broad interpretation has resulted in the practical elimination of independent state grounds as a basis for constitutional criminal procedure doctrine in California.[90]

B. How Proposition 8 Has Been Interpreted For Search And Seizure

The Truth-in-Evidence provision received its first significant constitutional challenge concerning the issue of search and seizure in *In re Lance W.*[91] In that case, the court considered the impact of the Truth-in-Evidence provision on previous California decisions that required exclusion of evidence obtained in violation of the search and seizure provisions of the federal or the state constitutions, "under

84. *See* discussion *supra* Introduction.
85. *See* Van de Kamp, *supra* note 19, at 1111–12.
86. FLA. CONST. art. 1, § 12 (adopted 1982).
87. *Id*.
88. CAL. CONST. art I, § 28(d).
89. *See infra* Part IV(A).
90. *See infra* Part II(B).
91. *See In re* Lance W., 37 Cal. 3d 873, 879 (1985). The California Supreme Court had earlier denied challenges to Proposition 8 based on the single-issue rule and the revision/amendment rule in *Brosnahan v. Brown*, 32 Cal. 3d 236, 253, 257 (1982).

circumstances in which the evidence would be admissible under federal constitutional principles."[92] Before the Truth-in-Evidence provision, California courts could, via the so-called "vicarious exclusionary rule," exclude evidence illegally seized from a third party under Article I, Section 13 of the California Constitution.[93] The question in *In re Lance W.* was whether the vicarious exclusionary rule was abrogated by the Truth-in-Evidence provision.[94]

The California vicarious exclusionary rule provided more protection than that provided by the federal constitution,[95] because the United States Supreme Court had held that a defendant could only raise a personal Fourth Amendment claim, not one based on the violation of a third party.[96] Thus, the questions before the court in *In re Lance W.* were: 1) whether the vicarious exclusionary rule based on the California Constitution survived the Truth-in-Evidence provision; and 2) whether any right to suppress evidence under the California Constitution survived beyond the minimum set by the federal constitution.[97]

The court concluded in *In re Lance W.* that neither California's vicarious exclusionary rule nor any exclusionary rule broader than that of the federal constitution survived the Truth-in-Evidence provision.[98] In reaching this conclusion the majority pointed to the United States Supreme Court's recent announcement in *United States v. Leon* that the federal exclusionary rule, "although once described as an essential part of the constitutional guarantee has more recently been described by the United States Supreme Court as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the person aggrieved.'"[99]

Importantly, the *In re Lance W.* decision noted that the

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92. *Id*. at 879.

93. *See* People v. Martin, 45 Cal.2d 755, 760–61 (1955); People v. Brisendine, 13 Cal. 3d 528, 549 (1975).

94. *In re Lance W.*, 37 Cal. 3d at 879.

95. *Id*. at 884

96. *See* Rakas v. Illinois, 439 U.S. 128, 139–40 (1978); United States v. Calandra, 414 U.S. 338, 348 (1974).

97. *In re Lance W.*, 37 Cal. 3d at 879.

98. *Id.* at 886–87.

99. *Id.* at 881–82 (quoting United States v. Calandra, 414 U.S. 338, 348 (1974) (internal citations omitted).

Truth-in-Evidence provision had repealed neither Section 13 (the right against unreasonable searches and seizures) nor Section 24 (independent state grounds) of Article I of the California Constitution.[100] Instead, the court concluded that the Truth-in-Evidence provision had a limited impact: "What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."[101]

In re Lance W. therefore framed the issue as whether Proposition 8 eliminated "judicially created" criminal procedure remedies—not whether any constitutional provisions were repealed, nor whether any individual constitutional rights were diminished or eliminated.[102] This distinction was possible because of the characterization of the federal exclusionary rule in *United States v. Leon* as a remedy for the violation of the Fourth Amendment constitutional right against illegal searches and seizures, not as part of the right itself.[103] By viewing the issue as concerning only what remedy is available, not the scope of the underlying right, the majority avoided directly confronting the issue of whether Proposition 8 affected individual liberty under the California Constitution. The *In re Lance W.* court did include a gratuitous observation that "[t]he people could by amendment of the Constitution repeal Section 13 of Article I in its entirety."[104] But the court immediately qualified this dicta by emphasizing that the Truth-in-Evidence provision affected "only one incident of that guarantee of freedom from unlawful search and seizure, a judicially created remedy for violation of that guarantee."[105] Most importantly, the *In re Lance W.* decision said nothing about the effect of Proposition 8 on the right against self-incrimination in Article 1, Section 15 that "Persons may not . . . be compelled in a criminal cause to be a witness against themselves . . . ."[106]

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100. *Id*. at 886.
101. *Id*. at 886–87.
102. *Id*.
103. *See* discussion *infra* Part IV.
104. *In re Lance W.*, 37 Cal. 3d at 892.
105. *Id*. at 892.
106. CAL. CONST. art I, § 15.

Following the decision in *In re Lance W.*, it should have been settled law that the intent of the Truth-in-Evidence provision was to roll back the search and seizure exclusionary rule under the state constitution. The next section explores how, despite the reading in *In re Lance W.* limiting the Truth-in-Evidence provision to "only one incident of that guarantee of freedom from unlawful search and seizure, a judicially created remedy for violation of that guarantee,"[107] the court later expanded Proposition 8 to include the state constitutional right against self-incrimination.

C. How Proposition 8 Has Been Interpreted For Confessions

The next significant set of cases involving the Truth-in-Evidence provision and constitutional criminal procedure involved the California constitutional analog to federal Fifth Amendment *Miranda* doctrine concerning compelled police interrogations. Under federal law, statements obtained in violation of *Miranda* can be used to impeach a defendant who testifies.[108] But the California Supreme Court had provided more protection under the state constitution, holding in *People v. Disbrow* that such statements were inadmissible under the California Constitution.[109] The question of whether the rule in *Disbrow* survived the passage of the Truth-in-Evidence provision was taken up in *People v. May*.[110]

In the first decision in that case (*May I*), Justice Mosk wrote the majority opinion, which held that *Disbrow* survived because the law of privileges (including the *Disbrow* rule) was codified in Evidence Code section 940 and so it fell under Proposition 8's savings clause, which stated that the Truth-in-Evidence provision would not affect any existing statutory rule of evidence relating to privilege.[111] Justice Lucas dissented, contending that the majority was mistaken in preserving "in the form of a 'statutory privilege,' a judicially created exclusionary rule expressly rejected by the United States

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107. *In re Lance W.*, 37 Cal. 3d at 892.

108. Harris v. New York, 401 U.S. 222, 226 (1971). We discuss *Harris* in detail *infra* Part III(C).

109. People v. Disbrow, 16 Cal. 3d 101, 113, 115 (1976). *See* discussion *infra* Part III(C).

110. People v. May, 44 Cal. 3d 309, 311 (1988).

111. People v. May, 729 P.2d 778, 784–85 (1987).

Supreme Court under the federal Constitution."[112] Justice Lucas contended that "[i]t was precisely this kind of reliance upon the state Constitution to avoid applicable decisions of the United States Supreme Court that Proposition 8 was intended to preclude."[113]

In the November 1986 election, the voters did not retain Chief Justice Bird and Associate Justices Grodin and Reynoso.[114] The newly-reconstituted California Supreme Court then granted a motion for rehearing in *May*. In 1988, this time with the new Chief Justice Lucas writing for the majority, the *May II* opinion held that *Disbrow* had been abrogated by the Truth-in-Evidence provision.[115]

The *May II* opinion quoted the language in *In re Lance W.* describing Proposition 8 as eliminating "a judicially created remedy for violations of the search and seizure provisions of the federal or state Constitutions" and stating that

> [i]mplicit in the limitation on the courts' power to exclude relevant evidence to the enumerated statutory exceptions is a limitation on the power of the court to create nonstatutory exclusionary rules, whether denominated rules of procedure, rules of evidence, or substantive rules, for the exclusion of unlawfully seized evidence if those rules afford greater protection to a criminal defendant than does the Fourth Amendment.[116]

The *May II* opinion then applied the same analysis to provisions under *Miranda* doctrine, extending the scope of the Truth-in-Evidence provision to "the constitutional rights to counsel and rights against self-incrimination" because the "reasoning and result" were "equally applicable."[117] The court gave the following rationale: "Both kinds of exclusionary rules are addressed to evidence obtained by police conduct in violation of constitutional provisions. Both are based on the

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112. *Id.* at 798 (Lucas, J., dissenting).

113. *Id.*

114. *See* John W. Poulos, *Capital Punishment, the Legal Process, and the Emergence of the Lucas Court in California*, 23 U.C. Davis L. Rev. 157, 217 (1990); Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. Cal. L. Rev. 809, 812, 858–59 (1986).

115. People v. May, 44 Cal. 3d 309, 319–20 (1988).

116. *Id*. at 311.

117. *Id*. at 311.

same rationale of deterring unlawful police conduct."[118]

The opinion in *May II* treated the substantive law of both search and seizure and of self-incrimination as mere exclusionary rules, instead of analyzing each doctrine in terms of the underlying constitutional values that it protects.[119] That conflation of two distinct areas of constitutional criminal procedural rights had a sweeping impact on the state constitution. As discussed below, this error led to the practical elimination of independent state grounds as a basis for constitutional criminal procedure doctrine in California. This in turn created the kind of impermissible deprivation of a minority group's *entire* protection of a fundamental constitutional right that *Raven* and *Strauss* forbid.

III. HOW PROPOSITION 8 SHOULD BE READ

A. The Current Understanding of Proposition 8 is Flawed

We argue that the Truth-in-Evidence provision should not apply to the state right against self-incrimination for two reasons. First, the best reading of the measure's text is that it applies only to statutory rules concerning the admission of evidence, and not to constitutional rights. Second, to the extent that the measure does affect constitutional rights, fundamental differences between the right against self-incrimination and the right against illegal searches and seizures compel a different treatment of evidence under the Truth-in-Evidence provision.

The relationship between the text of the Truth-in-Evidence provision and specified state constitutional rights is unclear. The Truth-in-Evidence provision states, "relevant evidence shall not be excluded in any criminal proceeding."[120] This is unlike the Florida constitutional amendment mentioned above, which specified that the state constitution's search and seizure provision must "be construed in conformity with the Fourth Amendment . . . as interpreted by the United States Supreme Court."[121] It also is unlike Proposition 115, which expressly applied to all constitutional criminal

118. *Id*. at 311.
119. *See* discussion *infra* Part IV.
120. CAL. CONST. art I, § 28(f)(2).
121. FLA. CONST. art I, § 12.

procedural rights in the California Constitution.[122] Instead, the text of the Truth-in-Evidence provision parallels California Evidence Code section 351, which states: "Except as otherwise provided by statute, all relevant evidence is admissible."[123] Therefore, the text of the Truth-in-Evidence provision is focused on the admission and exclusion of evidence—under the law of evidence, rather than on specified state constitutional rights. This is significant because, although state constitutional rights are sometimes implicated by the exclusion of evidence—as discussed below, particularly the right against illegal searches and seizures—the admission and exclusion of evidence often does not necessarily implicate constitutional rights. Indeed, the Truth-in-Evidence provision has been applied broadly in *statutory* (non-constitutional) areas of the admission of evidence.[124] Thus, the text of the Truth-in-Evidence provision supports the conclusion that it was meant to apply to rules for evidence exclusion, not to reduce or eliminate any constitutional rights.

At one point, the California Supreme Court appeared to reject the argument that the Truth-in-Evidence provision applies *only* to the search and seizure exclusionary rule. In *People v. Harris*, the court noted that the existence of the provision's "savings clause" is a textual indication that its scope was broader than the area of searches and seizures: "Had the intent been limited to rules governing the admissibility of evidence seized as a result of an unlawful search or seizure, there would have been no necessity to except expressly 'any statutory rule of evidence relating to privilege or hearsay, or Evidence Code sections 352, 782, or 1103.'"[125] But this statement was made in a case deciding the effect of the Truth-in-Evidence provision on *statutory* rules concerning the admissibility of evidence. Thus, while the textual language of the savings clause indicates the provision's intention to

122. *See* discussion *infra*, Part IV.

123. Cal. Evid. Code, § 351.

124. *See* People v. Harris, 47 Cal. 3d 1047, 1081 & n.14 (1989) which held that Evidence Code 790, which prohibits the admissibility of evidence of good character of a witness to support credibility unless evidence of bad character has been admitted, was abrogated in criminal cases because of the Truth-in-Evidence provision of Proposition 8. *See also* People v. Wheeler, 4 Cal. 4th 284, 288 (1992) abrogating the felony-convictions-only rule of witness impeachment in criminal cases under Evidence Code section 788.

125. People v. Harris, 47 Cal. 3d 1047, 1082 (1989).

broadly cover *statutory rules of evidence*, it does not in itself indicate whether the provision was intended to cover *constitutional rights*. The Truth-in-Evidence provision's interaction with constitutional rights is precisely the area where the provision is unclear, and *Harris* does not address that issue.

A seemingly plausible alternate interpretation is that the Truth-in-Evidence provision raises the admissibility of evidence at criminal trial to the status of a paramount state constitutional principle that subordinates all other state constitutional rights. But it is difficult to justify such a new principle with the traditional vocabulary of individual state rights. Could one conclude that Proposition 8 (which after all was entitled the "The Victims' Bill of Rights") created a new right for the victims of crime to have all relevant evidence be admitted in court in a criminal trial? Not easily. In fact, the California Supreme Court rejected that interpretation of the Victim's Bill of Rights, on the traditional ground that it is the people of California generally who bring a criminal case against a criminal defendant, not the individual crime victim.[126] Or could one say that the people (through their representative the District Attorney) have the new individual right of admitting all relevant evidence in a criminal trial?[127] Again, this formulation strains against the traditional conception of rights—especially constitutional criminal procedural rights—as individual rights *against* the prosecutorial power of the state.[128]

In any event, the California Supreme Court has never addressed Proposition 8 in such terms. Instead, the court's decisions concerning Proposition 8 in *In re Lance W.* and *People v. May* have been phrased in terms of the elimination of remedies, rather than a wholesale subordination of rights. Nor do *Raven* and *Strauss* discuss the Truth-in-Evidence provision in terms of elevating admissibility over individual constitutional rights. And such a wholesale elevation of a judicial remedy, or a rule of evidence, above all state constitutional rights is incompatible with *Strauss*'s

126. Dix v. Superior Court, 53 Cal. 3d 442, 451–452 (1991) .

127. The people do have at least one constitutional procedural right in a criminal case: the right to a speedy trial. CAL. CONST. art I, § 29.

128. *See generally* Kaiser, *supra* note 48, at 266–67.

characterization of the 1982 Proposition 8 as a "discrete restriction[] on state constitutional protections."[129]

This textual analysis shows there is at best weak support for the current understanding of the Truth-in-Evidence provision. The scope of the Truth-in-Evidence provision therefore should be reconsidered in light of *Raven* and *Strauss*. Specifically, it should be re-examined in terms of the constitutional issues surrounding the Fourth Amendment exclusionary rule. Because of the attenuated relationship between the exclusionary rule and the core right of the Fourth Amendment, the California Supreme Court in *In re Lance W.* properly subordinated the state exclusionary rule for searches and seizures to the Truth-in-Evidence provision.[130] But the *May II* decision incorrectly expanded that rationale to other constitutional rights, particularly the Fifth Amendment *Miranda* protections against self-incrimination, where that rationale has no application.[131] The next section shows how the fundamental difference between the Fourth and Fifth Amendments compels different treatment of each right under the Truth-in-Evidence provision.

B. The Difference Between the Core Constitutional Rights Protected by the Fourth and Fifth Amendments Requires Them to be Treated Differently Under the Truth-in-Evidence Provision

1. Revisiting the Right/Remedy Distinction

The decision in *In re Lance W.* drew a distinction between (1) the "substantive scope" of the California constitutional right against unreasonable search and seizure and (2) the exclusionary rule for excluding illegally seized evidence, which it characterized as a "judicially created remedy" designed to deter police violations of that right.[132] In doing so, the California Supreme Court was following Fourth Amendment jurisprudence and the recent United States Supreme Court decision in *United States v. Leon*.[133] We discuss this Fourth

129. *Strauss*, 46 Cal. 4th at 444 n. 22.
130. *See* discussion *supra* Part II(B).
131. *See* discussion *infra* Part III(C).
132. *In re Lance W.*, 37 Cal. 3d at 882, 886–87.
133. The phrase "judicially created remedy" is quoted from United States v. Leon, 468 U.S. 897, 906 (1984).

Amendment jurisprudence in detail below and show how the California Supreme Court erred in *People v. May* by extending the Fourth Amendment right/remedy distinction into issues involving the Fifth Amendment.

At the outset, we note that the right/remedy distinction is not sharply defined in legal doctrine. For example, there is the well-known legal maxim that there is no right without a remedy.[134] When remedy is discussed at this high level of abstraction, any right must have some remedy associated with it to have any force as a right. But there is nonetheless a meaningful distinction in various instances between the core of a right and a so-called remedy that vindicates the right. If a so-called remedy has a strong relationship to the core right it protects—indeed, if the core right can *only* be vindicated by a certain so-called remedy—then the so-called remedy can be considered to be "mandated" or "compelled" by the core right.[135] In such a case, the remedy is better classed as part of the substantive scope of the right. As we discuss below, the exclusion of compelled confessions under the right against self-incrimination is such an instance. In contrast, Fourth Amendment jurisprudence holds that the search and seizure exclusionary rule, while helping to promote the values associated with the Fourth Amendment right, is peripheral to the core right. But exclusion of a coerced confession at trial is not merely peripheral to the right against self-incrimination; instead, it necessarily flows from the core value of the right.

The decision in *In re Lance W.* appears to assume that the mere fact of "judicial creation" makes the search and seizure exclusionary rule a remedy rather than part of the substantive right.[136] But the happenstance that a rule is first announced in a court decision does not compel the conclusion that it is only a remedy. Constitutional rights and their scope are not self-interpreting. The scope of constitutional rights is developed in judicial opinions. To call all judicial interpretation of constitutional rights into question is obviously untenable.[137]

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134. *See* Marbury v. Madison, 5 U.S. 137, 163–66 (1803).

135. *See In re Lance W.*, 37 Cal. 3d at 889–90.

136. "The fact remains, however, that both rules [the search and seizure exclusionary rule and the vicarious search and seizure exclusionary rule] are of judicial creation, and relate to remedy rather than the scope of substantive rights protected by either Constitution [federal and state]." *Id.* at 887.

137. *See* discussion *infra* Part III.

The *In re Lance W.* court's emphasis on the "judicially-created" nature of the search and seizure exclusionary rule is therefore only comprehensible in light of the specific history of the exclusionary rule. By the time *In re Lance W.* was decided, the U.S. Supreme Court had already held in *United States v. Leon* that the search and seizure exclusionary rule was not mandated by the Fourth Amendment right itself.[138] The result in *In re Lance W.* that the Truth-in-Evidence provision abrogated the California search and seizure exclusionary rule flows naturally from that conclusion. But it does not follow from *Leon* that anything that can be described as an exclusionary rule is an optional judicially-created remedy. As we discuss below, in the context of the right against self-incrimination, the requirement of excluding unlawfully obtained confessions has been held to be mandated by, and therefore part of, the right itself.

Thus, to describe the action of excluding a confession, required to protect the core Fifth Amendment right, as a "remedy" wrongly conflates two distinct constitutional rights on the basis of nothing more than facially-similar terminology and passes over the *substantive* difference between the two concepts. That was the error in *May II*, where the decision simply cited the language from *In re Lance W.* on judicially-created exclusionary rules, assumed that exclusion under *Miranda* was another judicially-created remedy, and failed to engage in a substantive analysis of the underlying constitutional right against self-incrimination under the Fifth Amendment of the United States Constitution and under Article I, Section 15 of the California Constitution.[139]

2. Analogous Constitutional Rights Under the Federal and State Constitutions

Before we turn to our substantive analysis of the constitutional right against self-incrimination, we first address a threshold question: What is the relationship between federal constitutional doctrine and state constitutional provisions with identically or similarly-worded provisions? United States Supreme Court decisions concerning federal constitutional rights are, of course, the final word in the federal system. Now

138. U.S. v. Leon, 468 U.S. 897, 906 (1984).
139. People v. May, 44 Cal. 3d at 316.

that most of the Bill of Rights applies to the states, federal constitutional law provides a "floor" for individual rights, below which states cannot go. But federalism allows the states to raise the "ceiling" by interpreting state constitutional rights more expansively than their federal analogues.[140]

Given that federalism allows for more expansive interpretations of state constitutional rights, the next question is: when would a state court be justified in doing so? The California rule is that Article I, Section 24 of the California Constitution provides authority to interpret rights in the state constitution differently from their federal analogues.[141] It is true that the California Supreme Court sometimes defers to the United States Supreme Court in interpreting analogous constitutional language.[142] But deference is not required: "it is one thing voluntarily to defer to high court decisions, but quite another to *mandate* the state courts' blind obedience thereto, despite 'cogent reasons.'"[143] Thus, California courts remain free to construe state constitutional rights above the floor set by their federal analogues when "cogent reasons" exist.[144]

While federalism thus allows the scope of California constitutional rights to be more expansive than what is dictated by federal constitutional doctrine, federal constitutional doctrine nonetheless remains relevant to discussing rights under the California Constitution. The right against self-incrimination or the right against illegal searches and seizures under the federal constitution and the California Constitution are, in some sense, versions of the same right.[145] The state bills of rights of the original thirteen states influenced the formulation of the Bill of Rights of the federal constitution, which in turn influenced the bill of rights in subsequent state constitutions, such as that of the California

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140. *See* Michigan v. Long, 463 U.S. 1032, 1037–44 (1983); People v. Fields 13 Cal. 4th 289, 298 (1996).

141. *Raven*, 52 Cal. 3d at 353–54.

142. *Id*.

143. *Raven*, 52 Cal. 3d at 353.

144. *Raven*, 52 Cal. 3d at (354).

145. One way of explaining this is to view these constitutional rights as part of a continuous common law tradition. *See e.g.* People v. Disbrow, 16 Cal. 3d at 120, (Richardson, J., dissenting) ("the privilege against self-incrimination is a single common law privilege which existed long before its incorporation into either the United States or California Constitution.") It is beyond the scope of this Article to discuss the theoretical issues raised by such a view.

Constitution.[146] In the next section, we therefore examine some of the fundamental features of the right against self-incrimination and the right against illegal searches and seizures as expressed in federal constitutional doctrine, which are likewise relevant to discussing the fundamental features of these rights under the California Constitution.

3. The Search and Seizure and Self-Incrimination Exclusionary Rules Are Analytically Distinct

The original constitutional rationale for the federal exclusionary rule involved cases in which the seized evidence (such as a defendant's diary or papers) implicated the Fifth Amendment right against self-incrimination.[147] But the federal exclusionary rule was eventually expanded to cover *all* seized evidence, which makes the exact constitutional basis of the federal exclusionary rule uncertain.[148] When the United States Supreme Court first applied the Fourth Amendment to the states in *Wolf v. Colorado*, the Court declined to extend the federal exclusionary rule to the states, because it "was not derived from the explicit requirements of the Fourth Amendment," nor "based on legislation expressing Congressional policy in the enforcement of the Constitution."[149] And when the federal exclusionary rule was finally applied to the states in *Mapp v. Ohio*, several justices dissented, as they regarded the exclusionary rule as "but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future."[150]

Legal scholars have analytically distinguished between

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146. Robert F. Williams, *The State Constitutions Of The Founding Decade: Pennsylvania's Radical 1776 Constitution And Its Influences On American Constitutionalism*, 62 Temple L. Rev. 541, 541–47; ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (Oxford University Press 2009) 65–71; Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 Rutgers L. J. 911, 911 (1993); PAUL MASON, CONSTITUTIONAL HISTORY OF CALIFORNIA 114 (California State Legislature Press 2015) .

147. "The paradigm here was a diary wrongfully seized from a criminal defendant and then read against him at trial: reading the diary in court was itself seen as akin to compelling a defendant to 'witness' against himself, in violation of self-incrimination principles." AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 151 (2012).

148. *See* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) 20–31.

149. Wolf v. Colorado, 338 U.S. 25, 28 (1949).

150. Mapp v. Ohio 367 U.S. 643, 680 (1961).

exclusion under the Fourth and Fifth Amendments. As Professor Amar puts it: "Under the Fifth Amendment, excluding evidence is not a *remedy* for an earlier constitutional violation, but a *prevention* of the violation itself. A Fifth Amendment wrong occurs only at trial, when testimony is introduced '*in a[] criminal case*.'" [151] In contrast, exclusion under *Mapp* "is simply not linked, analytically speaking, to the scope of the violation, which occurs before a criminal trial, not during it."[152]

In *United States v. Leon*, the United States Supreme Court adopted the view that the *Mapp* exclusionary rule is a remedy rather than part of the core constitutional right.[153] The *Leon* majority stated that the "Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands" and "the use of fruits of a past unlawful search or seizure 'work[s] no new Fourth Amendment wrong.'" [154] Because "the wrong condemned by the Amendment is 'fully accomplished' by the unlawful search or seizure itself," "the exclusionary rule is neither intended nor able to 'cure the invasion of the defendant's rights which he has already suffered.'" [155] Therefore *Leon* concluded: "The rule . . . operates as 'a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.'" [156]

In contrast, the Fifth Amendment protections announced in *Miranda* followed the opposite constitutional trajectory. Initially, the United States Supreme Court referred to the *Miranda* protections as "prophylactic factors" rather than as constitutional rights.[157] But in *Dickerson v. United States*, the high court ultimately reaffirmed the constitutional status of *Miranda*, acknowledging that "*Miranda* announced a

151. AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) 24 (citing U.S. Const. amend. V).

152. *Id.* at 158; *See also* Alan M. Dershowitz & John Hart Ely, Harris v. New York: *Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198, 1214–1215 (1971).

153. U.S. v. Leon, 468 U.S. 897 (1984).

154. *Id.* at 906 (citing U.S. v. Calandra, 414 U.S. 338, 354 (1974)).

155. *Id.* (citing Stone v. Powell, 428 U.S. 465, 540 (1976)).

156. *Id.* (citing U.S. v. Calandra, 414 U.S. 338, 348 (1974)).

157. Michigan v. Tucker, 417 U.S. 433, 444 (1974). *See also* New York v. Quarles, 467 U.S. 649, 654 (1984) (citing Michigan v. Tucker).

constitutional rule that Congress may not supersede legislatively."[158] Thus, while the *Mapp* exclusionary rule is now regarded as a mere remedy, rather than as something mandated by the Fourth Amendment, *Miranda* is still viewed as a constitutional rule required by the core constitutional privilege against compelled self-incrimination.[159]

C. Because Exclusion Under The Fourth And Fifth Amendments Is Not Constitutionally Equivalent, May II *Was Wrongly Decided*

The decision in *May II* applied the Truth-in-Evidence provision to the state constitutional right against self-incrimination. That application was flawed because *May II* assumed, without any constitutional analysis, that exclusion under the right against self-incrimination should be treated as if it were equivalent for all purposes to the search and seizure exclusionary rule and therefore be subsumed as a mere remedy. Justice Mosk concisely made this point in his dissent: "Whatever its validity in search-and-seizure jurisprudence—in which the constitutional guarantee is generally believed not to require the exclusion of evidence—the 'right/remedy' distinction seems particularly out of place in the law of privilege against self-incrimination—which . . . necessarily bars admission of certain evidence."[160]

Applying this constitutional distinction (which the *May II* majority failed to do) compels the conclusion that *May II* was wrongly decided. *May II* abrogated the California Supreme Court's decision in *People v. Disbrow*,[161] which itself declined to follow the United States Supreme Court's decision in *Harris v. New York*.[162] *Harris* dealt with the scope of exclusion under the federal Fifth Amendment *Miranda* right.[163] The question was whether the scope of exclusion included a defendant's statements used for impeachment. *Harris* held that statements obtained in violation of *Miranda* can be used for the purpose of impeaching a defendant, if the defendant

158. Dickerson v. United States, 530 U.S. 428, 444 (2000).
159. On restrictions on *Miranda*, *see* Harris v. New York, 401 U.S. 222, 224 (1970); *see also* discussion *infra* Part V(C).
160. *May*, 44 Cal. 3d at 327 (Mosk, J. dissenting).
161. *Id.* at 315.
162. People v. Disbrow, 16 Cal. 3d 101, 113 (1976).
163. Harris v. New York, 401 U.S. 222, 226 (1970).

decides to testify.[164] But the *Harris* court failed to present a constitutional rationale for this holding, and that failure inspired significant criticism of the decision.[165]

There is little basis to defend *Harris*. There is no satisfactory explanation for its implicit equation of exclusion under the Fourth and the Fifth Amendments. Although the *Miranda* doctrine is based on the Fifth Amendment's right against self-incrimination, *Harris* relied on a Fourth Amendment case as precedent.[166] *Harris* cited *Walder v. United States*, which held that physical evidence, seized in violation of the Fourth Amendment and inadmissible in the case-in-chief, could be used for impeachment purposes.[167] Other than that weak reed, the constitutional basis for the *Harris* majority to apply a Fourth Amendment precedent to *Miranda* is unclear. *Harris* held that statements illegally taken in violation of the *Miranda* admonitions are nonetheless reliable—an echo of Fourth Amendment exclusionary rule critics, who objected that illegally seized physical evidence was nonetheless reliable, despite the fact that it was illegally seized.[168] If one is unconcerned about the reliability of illegally seized things, the *Harris* court seems to imply, why worry about the reliability of an illegal confession?

But Fifth Amendment concerns about compulsion are broader than just reliability—government compulsion of the individual is itself a violation of the right against self-incrimination.[169] The conflation of the Fourth and Fifth Amendments in *Harris* ignores the element of government *coercion* implicit in custodial interrogation.[170] Unlike the

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164. *Id.* at 225.

165. For criticisms of *Harris*, *see, e.g.*, Alan M. Dershowitz & John Hart Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 Yale L. J. 1198, 1214–15 (1971); 4 LAFAVE, SEARCH AND SEIZURE (2d ed. 1987) § 11.6(a), p. 485.

166. *Harris*, 401 U.S. at 224, citing *Walder v. United States*, 347 U.S. 62 (1954).

167. *Id*.

168. "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility, and the benefits of this should process not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby." *Harris* 401 U.S. at 225.

169. *See, e.g.,* Jackson v. Denno, 378 U.S. 368, 385–86 (1963).

170. "It is now inescapably clear that the Fourteenth Amendment forbids the use of involuntary confessions not only because of the probable unreliability of confessions that are obtained in a manner deemed coercive, but also because of

evidence that existed independently before the police illegally seized it, the confession did not exist until the police created it. Thus, the confession would not exist but for the fact that the police unlawfully interrogated the defendant. *Harris* is silent on this central Fifth Amendment constitutional concern.[171]

Harris applied just one limitation from the Fourth Amendment exclusionary rule context to *Miranda*.[172] Because *Harris* stated no constitutional rationale for this application, it established no general constitutional rule equating exclusion under *Miranda* with the Fourth Amendment exclusionary rule.[173] *Harris* should therefore be limited to its holding. This is how the California Supreme Court treated the *Harris* decision in *People v. Disbrow*,[174] and properly so. While *Disbrow* acknowledged that *Harris* had limited the scope of exclusion under the federal *Miranda* right, *Disbrow* found *Harris* to be an unpersuasive basis for an impeachment exception to the state right against self-incrimination under Article I, Section 15 of the California Constitution.[175] The California Supreme Court therefore declined to apply the *Harris* impeachment exception to the state privilege against self-incrimination, holding instead that the state constitution granted greater protection than that provided by the federal constitution.[176] That holding was correct because, as discussed above, nothing in *Harris* compelled the conclusion that exclusion under *Miranda* was constitutionally equivalent to the *Mapp* exclusionary rule. *Harris* was therefore unpersuasive in compelling a general reconsideration of the scope of the constitutional *Miranda* rights, and the California Supreme Court in *Disbrow* was acting within its role by declining to correspondingly limit the scope of the state right. But the *May II* decision ignored the constitutional issues analyzed in *Disbrow* and limited the scope of the state

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the 'strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will' [citation] . . . ." *Id.*

171. *Harris*, 401 U.S. at 222.
172. *Id*. at 224.
173. *See generally id.*
174. *Disbrow*, 16 Cal. 3d 101, 113 (1976).
175. *Id*. at 110, fn. 9.
176. *Id.* at 127.

constitutional right under the guise of limiting a remedy.[177]

Thus, there are two major analytical flaws in *May II*. First, *May II* wrongly assumed that exclusion of evidence under the right against self-incrimination is the same as exclusion under the search and seizure exclusionary rule: a mere remedy. As we have shown, however, the exclusion of evidence under the right against self-incrimination is a constitutional rule required by the core of that constitutional privilege. Second, *May II* misread the text of the Truth-in-Evidence provision, which concerns the law of evidence, not state constitutional rights.[178] Thus, both the provision's terms and the relevant constitutional doctrine compel the conclusion that the Truth-in-Evidence provision does not apply to the state constitutional right against self-incrimination.

IV. THE FAR-REACHING EFFECTS OF PROPOSITION 8 CREATE A CONSTITUTIONAL PROBLEM

A. The Constitutional Problem Is The Conflict Between The Cumulative Effects of May *And The Limits on Initiatives Announced In* Raven *And* Strauss

Following the decisions in *In re Lance W.* and *May II*, Proposition 8 has been used to eliminate independent state grounds for the exclusion of illegally-obtained evidence (whether physical evidence or statements), leaving the federal Constitution as the sole basis for exclusion. To understand the ultimate impact of the Truth-in-Evidence provision on state constitutional rights, an overview perspective is required.

In 1989, Justice Mosk reviewed the cumulative effects of Proposition 8 in *People v. Markham*.[179] In that case, the court held that Proposition 8 abrogated *People v. Jimenez*,[180] which had required the prosecution to prove the voluntariness of a defendant's statement beyond a reasonable doubt before introducing it at trial.[181] The *Markham* decision held that,

177. *See* discussion *supra* Part III(B).
178. *See* discussion *supra* Part III(A).
179. *See* People v. Markham, 49 Cal. 3d 63, 73 (1989) (Mosk, J., concurring) .
180. People v. Jimenez, 21 Cal. 3d 595 (1978), *abrogated by* People v. Markham, 49 Cal. 3d 63 (1989), *overruled by* People v. Cahill, 5 Cal. 4th 478 (1993).
181. People v. Markham, 49 Cal. 3d 63, 65 (1989) (majority opinion) .

following Proposition 8, the federal standard applied[182], which only required a preponderance of the evidence.[183] Justice Mosk wrote separately in *Markham* to note that while he was compelled to concur in the majority opinion, "the blame for the sorry situation in which we find ourselves must be placed squarely on Proposition 8."[184] Describing Proposition 8 as "[t]hat ill-conceived measure" that "has struck down California precedents on individual rights as it has encountered them in its path of destruction," Justice Mosk listed the following constitutional criminal procedural cases "interred" by it:[185] *People v. Disbrow*, on prohibiting the use of statements obtained in violation of *Miranda* for impeaching a defendant;[186] *People v. Martin* on the vicarious exclusionary rule;[187] and *People v. Pettingill* on prohibiting any further interrogation by police after a defendant has asserted his *Miranda* privileges.[188]

After Justice Mosk's concurrence in *Markham*, at least one further state constitutional criminal procedural right was abrogated by Proposition 8: *People v. Aranda*, dealing with the right to confrontation under the California Constitution, was abrogated to the extent it required a wider exclusion of evidence than its federal Sixth Amendment counterpart.[189] In *People v. Boyd* the court of appeal held that the Truth-in-Evidence provision abrogated the *Aranda* rule to the extent that it required the exclusion of the incriminating extrajudicial statements of a codefendant, even if the declarant testified at trial and was available for cross-examination.[190] And another appellate decision subsequently held that Proposition 8 further abrogated *Aranda* to the extent it prohibited the admission of a codefendant's statement incriminating the accused in a non-jury trial.[191]

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182. *See id.*
183. Lego v. Twomey, 404 U.S. 477, 489 (1972) .
184. *Markham*, 49 Cal. 3d at 73 (Mosk, J., concurring).
185. *Id.*
186. *Disbrow*, 16 Cal. 3d 101 (1976) (abrogated by *May*, 44 Cal. 3d 309 (1988)).
187. *Martin*, 45 Cal. 2d 755 (1955) (abrogated by *In re* Lance W., 37 Cal. 3d 873 (1985)).
188. *Pettingil*, 21 Cal. 3d 231 (1978) (abrogated by People v. Warner, 203 Cal. App. 3d 1122 (1988)).
189. *Aranda*, 63 Cal. 2d 518 (1965) ; *see* Bruton v. United States, 391 U.S. 123 (1968).
190. People v. Boyd, 222 Cal. App. 3d 541, 562 (4th Dist. 1990).
191. People v. Walkkein, 14 Cal. App. 4th 1401, 1409 (2d Dist. 1993).

Thus, the cumulative result is that state constitutional criminal procedural rights have been effectively limited to no more than that allowed by the federal constitution. The problem presented by this cumulative effect is that this situation conflicts with the California Supreme Court's jurisprudence of individual rights under the state constitution, as expressed in *Strauss* and *Raven*. *Strauss* placed limits on how broadly initiatives may remove individual rights from the state constitution. And in *Raven*, the California Supreme Court invalidated an initiative that sought to limit the ability of the courts to construe criminal procedural rights under the state constitution to be greater than that afforded by the federal constitution. The conflict lies in the fact that the decisions on state criminal procedure accomplish what *Strauss* and *Raven* prohibit: eliminating criminal procedural rights under the state constitution and the judiciary's independent role in interpreting them.

B. The Solution Is to Preserve Proposition 8 But to Apply the Limits On Initiatives from Raven *And* Strauss

The solution to this constitutional dilemma is to apply the limits placed on initiative restrictions on constitutional criminal procedural rights by *Raven* and *Strauss*, with the result that the decision in *May II* should be overturned and the Truth-in-Evidence provision returned to its original scope as only affecting remedies for Fourth Amendment violations. We turn now to an analysis of *Raven*.

In the June 5, 1990 election, the voters adopted Proposition 115 (the "Crime Victims Justice Reform Act").[192] Proposition 115 continued in the vein of Proposition 8 in seeking to curtail California court decisions that had enlarged constitutional criminal procedural rights. The preamble to Proposition 115 stated that it "was necessary to reform the law as developed in numerous California Supreme Court decisions and as set forth in the statutes of this state," and characterized these decisions and statutes as having "unnecessarily expanded the rights of accused criminals far beyond that which

192. Raven v. Deukmejian 52 Cal. 3d 336, 340 (1990). For a discussion of Proposition 115 *see* Rachel A. Van Cleave, *Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L. Q. 95 (1993)

is required by the United States Constitution."[193] Proposition 115 contained numerous changes to criminal procedure and substantive criminal law.[194] The most sweeping part of the initiative was an addition to Article I, Section 24 of the California Constitution, which prevented the California courts from affording criminal defendant greater rights than those afforded by the federal constitution.[195]

Raven struck down this addition to Article I, Section 24, rejecting it as "a constitutional revision beyond the scope of the initiative process."[196] In so doing the *Raven* court reaffirmed the role of the state constitution in protecting constitutional criminal procedural rights beyond those provided by the federal constitution. *Raven* emphasized the historical role that the California Constitution played in protecting the individual liberties of citizens: "As an historical matter, Article I and its Declaration of Rights was viewed as the only available protection for our citizens charged with crimes, because the federal Constitution and its Bill of Rights was initially deemed to apply only to the conduct of the federal government."[197] *Raven* acknowledged that the California Supreme Court had sometimes deferred to the United States Supreme Court in interpreting identical or similar constitutional language found in the state and federal Constitutions, and that "cogent reasons" must exist before the court would depart from the construction placed by the Unites States Supreme Court on a

193. *Raven*, 52 Cal. 3d at 342.
194. *Id*. at 342–46.
195. CAL. CONST. art. 1 § 24, para. 2, in full:
> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and to not suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this State in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

196. *Raven*, 52 Cal. 3d at 351.
197. *Id.* at 352–53.

similar provision in the federal constitution.[198] But the court held that "it is one thing voluntarily to defer to high court decisions, but quite another to *mandate* the state courts' blind obedience thereto, despite 'cogent reasons.'"[199]

The *Raven* court relied on the adoption of Article I, Section 24 in 1974 as confirming that the California court had the authority to adopt an independent interpretation of the state constitution.[200] And it pointed out that Article I, Section 24 had served as "the basis for numerous decisions interpreting the state Constitution as extending protections to our citizens beyond the limits imposed by the high court under the federal Constitution" and cited eight cases.[201] In each of those decisions, *Raven* noted, dissenting justices had argued against an independent interpretation of the applicable state constitutional provision, but "no dissenter ever suggested that deference was compelled as a matter of constitutional imperative."[202] What Proposition 115 proposed to do was different because it imposed "such an imperative for the first time in California's history."[203] *Raven* therefore concluded that it "substantially alters the preexisting constitutional scheme or framework heretofore extensively and repeatedly used by courts in interpreting and enforcing state constitutional protections."[204]

In reviewing the past precedents for limiting constitutional criminal procedural rights under the state constitution, the court referred to its decision on the Truth-in-Evidence provision in *In re Lance W.*[205] Importantly, *Raven* described the holding on the Truth-in-Evidence provision as affecting only the exclusionary remedy: "In *In re Lance W.* we upheld a provision limiting the state exclusionary remedy for search and seizure violations to the boundaries fixed by the Fourth Amendment."[206] But *Raven* did not mention that

198. *Id.* at 353.
199. *Id*.
200. *Id.* at 353; CAL. CONST. art. 1, § 24 states in pertinent part: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."
201. *Raven*, 52 Cal. 3d at 354.
202. *Raven*, 52 Cal. 3d at 354.
203. *Id*.
204. *Id.*
205. *Id*. at 355.
206. *Id.* (citation omitted).

Proposition 8 had subsequently been applied well outside the search and seizure context. Indeed, as Justice Mosk pointed out in *Markham* in 1989 (just one year before Proposition 115), Proposition 8 had been applied against many areas of criminal procedural rights previously protected by the California Constitution.[207] In fact, six of the eight cases that *Raven* cited as examples of the courts' ability to extend greater protections to individuals under the state constitution had already been abrogated by Proposition 8 when *Raven* was decided.[208] Two of those cases involved the exclusionary rule under Article I, Section 13, the state constitutional analogue of the Fourth Amendment: *People v. Brisendine*[209] and *People v. Norman*.[210] But four of these cases involved criminal procedural rights under Article I, Section 15, the state constitutional analogue to the Fifth Amendment: *People v. Houston*[211]; *People v.*

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207. *Markham*, 49 Cal. 3d at 72 (1989) (Mosk, J. concurring). *See supra* Section III(d).

208. The two cases cited by *Raven* that had not been abrogated by the Truth-in-Evidence provision—*People v. Ramos*, and *People v. Hannon*—did not involve the exclusion of evidence. *Ramos* dealt with a statutory requirement in California's death penalty law that the jury be instructed that a sentence of life imprisonment without possibility of parole might be commuted or modified by the Governor to a sentence that included the possibility of parole, the so-called "Briggs instruction." *See* California v. Ramos, 463 U.S. 992, 995, fn. 4 (1983). *Hannon* dealt with a defendant's right to a speedy trial under the California constitution, Article I, Section 15, clause 1. *See* People v. Hannon, 19 Cal. 3d 588, 605 (1977).

209. People v. Brisendine, 13 Cal. 3d 528 (1975) (abrogated by *In re* Lance W, 37 Cal. 3d 873 (1985)). *Brisendine* held that the state constitution was more restrictive of warrantless searches than the federal constitution as interpreted in *United States v. Robinson*, 414 U.S. 218 (1973) and *Gustafson v. Florida*, 414 U.S. 260 (1973). *Brisendine* also reaffirmed the vicarious exclusionary rule for third parties under the state constitution.

210. People v. Norman, 14 Cal. 3d 929, 939 (1975) (abrogated by *In re* Lance W, 37 Cal. 3d 873, 879 (1985) A). *Norman* followed *Brisendine*, and was similarly abrogated by *In re Lance W. See* John K. Van de Kamp and Richard W. Gerry, *Reforming the Exclusionary Rule: An Analysis of Two Proposed Amendments to the California constitution*, 33 HASTINGS L. J. 1109, 1114, fn. 19 (1982).

211. People v. Houston, 42 Cal. 3d 595 (1986) (abrogated by People v. Ledesma, 204 Cal. App. 3d 682, 691 (1988)). *Houston* expanded the Miranda protections under the state constitution beyond that decided by the United States Supreme Court in *Moran v. Burbine*, 475 U.S. 412 (1986). 42 Cal. 3d at 609–10. *Houston* held that whether or not a suspect in custody had previously waived his rights to silence and counsel, the police may not deny him the opportunity, before questioning begins or resumes, to meet with his retained or appointed counsel who had taken diligent steps to come to his aid. *Id.* at 610.

Pettingill[212]; *People v. Disbrow*[213]; and *People v. Bustamante*.[214]

Raven rejected Proposition 115 based on the revision/amendment rule, federalism, and separation of powers concerns. As *Raven* concluded, the central problem with Proposition 115 was that it sought to require the California Supreme Court to interpret the state constitution as to constitutional criminal procedural rights for criminal defendants in lockstep with the federal constitution, thus placing all authority in the United States Supreme Court.[215] By focusing on the federalism and separation of powers concerns, the *Raven* court avoided directly confronting the question of how far an initiative could go in removing previously-recognized rights under the state constitution. That issue was finally confronted in *Strauss*.[216] Thus, while *Raven* focused on the issue of limiting the state courts' ability to *interpret* rights under the state constitution, until *Strauss* it remained an open issue how far an initiative could go in *changing* the state constitutional rights to be interpreted by state courts.

This distinction raises an important question: What if the constitutional amendment of Proposition 115 had been written

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212. People v. Pettingill, 21 Cal. 3d 231 (1978) (abrogated by People v. Warner, 203 Cal. App. 3d 1122, 1124 (1988). *Pettingill* expanded the Miranda protections under the state constitution beyond that decided by the United States Supreme Court in *Michigan v. Mosley*, 423 U.S. 96 (1975). 21 Cal. 3d at 246–51. *Pettingill* held that after a defendant had demonstrated he did not wish to waive his privilege against self-incrimination, the police could not lawfully subject him to a new round of interrogation even if they repeated the Miranda warnings. *Id.* at 238, 246.

213. People v. Disbrow, 16 Cal. 3d 101 (1976) 1 (abrogated by People v. May, 44 Cal. 3d 309, 311 (1988) 2). *Disbrow* expanded the Miranda protections under the state constitution beyond the federal protection of *Harris v. New York*, 401 U.S. 222 (1970). 16 Cal. 3d at 113 3. *Disbrow* held that statements taken in violation of Miranda were inadmissible for impeaching the testimony of a defendant. *Id.*

214. People v. Bustamante, 30 Cal. 3d 88 (1981) 5 (abrogated by Grand Jury of San Diego County ex rel. Miller v. Superior Court (Harrison), 259 Cal. Rptr. 404, 411, n.8 (1989) (unpublished; previously published at 211 Cal. App. 3d 740) 6). Abrogation affirmed in People v. Johnson, 3 Cal. 4th 1183, 1222 (1992). *Bustamante* expanded a defendant's right to counsel at a line-up to include the right to counsel at a pre-indictment line-up notwithstanding *Kirby v. Illinois* 406 U.S. 682 (1972) limits such right to post-indictment line-up only. 16 Cal. 3d at 98–99. *Bustamante* held that a defendant had the right to counsel at a pre-indictment lineup. *Id.* at 99.

215. Raven v. Deukmejian, 52 Cal. 3d 336, 353 (1990).

216. See *supra* Part I.

as "This Constitution *does not afford* greater rights to criminal defendants than those afforded by the Constitution of the United States," instead of "This Constitution *shall not be construed by the court to afford* greater rights to criminal defendants than those afforded by the Constitution of the United States"?[217] Arguably, this re-written version of Proposition 115 might still implicate federalism concerns to the extent that the scope of constitutional rights would still be handed over to the United State Supreme Court and the state court would be *preemptively* prevented from expanding constitutional criminal procedural rights under the state constitution. But there is no obvious obstacle under *Raven* or *Strauss* to rolling back specified constitutional criminal procedural rights in the state constitution. After *Strauss*, the question is not *whether* the electorate may act on constitutional rights, but to what *degree*.[218] Thus, an initiative constitutional amendment could provide, for example, that the right against unreasonable searches and seizures under the state constitution does not include the vicarious exclusionary rule announced in *People v. Martin*,[219] or that the right not to be compelled to be a witness against oneself under the state constitution does not preclude the use of statements taken outside of *Miranda* to be used as impeachment evidence against a defendant who takes the stand, as *People v. Disbrow* held.[220] Selectively removing previously-announced rights under the state constitution is precisely what *Strauss* permitted as a "narrowly drawn exception to a generally applicable constitutional principle."[221]

But how many instances of "narrowly drawn exception[s]" could be included in an initiative constitution amendment before, using the language of *Strauss*, the "entire protection of a fundamental constitutional right" is removed?[222] Thus, as in the example above, what if the authors of Proposition 115 had

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217. CAL. CONST. art I, § 24, ¶ 2. 2

218. "Although the people through the initiative power *may not change* this court's interpretation of language in the state Constitution, they *may change* the constitutional language itself, and thereby enlarge or reduce the personal rights that the state Constitution as so amended will thereafter guarantee and protect." *Strauss*, 46 Cal. 4th at 476 (Kennard, J., concurring).

219. *See* People v. Martin, 45 Cal. 2d 755 (1955).

220. *See* People v. Disbrow, 16 Cal. 3d 101 (1976).

221. Strauss, 46 Cal. 4th at 446.

222. *Id.*

specified and expressly removed *every* previously-expanded constitutional criminal procedure right under the state constitution? Arguably, that would cumulatively achieve the same substantial effect in the limitation of rights, without technically running afoul of *Raven*'s federalism prohibition. But as *Strauss* suggests, at some point an initiative crosses the Rubicon from being a permissible narrowly-drawn exception into being an impermissible removal from a minority group (criminal defendants) of the entire protection of a right (constitutional criminal procedural rights).[223] And following *Raven*, there is a serious question about whether such a provision would be a revision rather than an amendment to the state constitution. These are precisely the constitutional problems created by applying the Truth-in-Evidence provision beyond the realm of the search and seizure exclusionary rule and cumulatively removing so many constitutional criminal procedural rights.

The most obvious solution to the constitutional problems created by the Truth-in-Evidence provision is that it should be declared unconstitutional, just as Proposition 115 was declared unconstitutional in *Raven*. But abrogating an initiative constitutional amendment is a drastic solution.[224] And it is unnecessary here. Even given the cumulatively wide application of the Truth-in-Evidence provision over time, the constitutional problem has not yet reached the same level as the one presented by Proposition 115. But *a* solution is certainly called for.

Fortunately, there is a less drastic solution, which is to overturn *People v. May* and its progeny and limit the Truth-in-Evidence provision's constitutional effect to the exclusionary rule for illegal searches and seizures. This would harmonize

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223. *See id.*

224. *See* People v. McKee, 47 Cal. 4th 1172 (2010) (statutes construed to avoid difficult constitutional issues); Kraus v. Trinity Mgmt. Servs., Inc., 23 Cal. 4th 116, 129 (2000) (courts presume lawmakers understand the constitutional limits on their power and intend that acts respect those limits); People v. Superior Court (Romero), 13 Cal. 4th 497, 509 (1996) ("'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable'").

the jurisprudence of the Truth-in-Evidence provision with *Raven* and *Strauss*. And indeed they can be read together harmoniously. *Raven* and *Strauss* characterize the scope of the Truth-in-Evidence provision as a narrowly-drawn limitation concerning the exclusionary rule for illegal searches and seizures. Thus, all that need be done is to take those decisions at face value, apply them to *People v. May*, and disapprove that decision as an erroneous extension of the Truth-in-Evidence beyond its proper scope.

CONCLUSION

California was a progressive leader in developing constitutional criminal procedural rights under the state constitution. But, ironically, since this state reached the farthest, it exhibited the greatest retractions. This Article has examined the jurisprudential issues raised by the removal of individual rights from the California Constitution, specifically those removed by the Truth-in-Evidence provision of the 1982 Proposition 8. The Truth-in-Evidence provision is a broadly-worded constitutional provision, and like any broadly-worded provision its scope has been debated. As this Article has described, however, the greater problem here is that the wrong interpretation of this provision threatens to render it unconstitutional.

Fairly read, the Truth-in-Evidence provision was intended for the search and seizure exclusionary rule of Article I, Section 13. But it is equally fair to read the Truth-in-Evidence provision as not applying to the rights associated with self-incrimination under Article I, Section 15. Indeed, that is how the California Supreme Court viewed the matter in *In re Lance W* and in *Raven*. And the court has never held that Proposition 8 repealed Article I, Section 15. Despite the continued viability of Article I, Section 15, the Truth-in-Evidence provision has been expanded to render the right against self-incrimination in Article I, Section 15 a nullity.

This state of the law creates a constitutional conflict. Under *Raven*, an initiative amendment that would have lockstepped all state constitutional criminal procedure rights to the federal constitution was struck down as a revision. But by the time *Raven* was decided, the Truth-in-Evidence provision had grown to be virtually as far-reaching as the measure *Raven* invalidated. These two rules conflict. Under

Raven, the electorate could not by initiative link California criminal procedural rights to the federal constitution. But judicial interpretation of Proposition 8 has accomplished exactly that. Which is correct?

To resolve this constitutional conflict, this Article suggests disapproving *People v. May*, the decision that expanded the scope of the Truth-in-Evidence provision beyond the exclusionary rule for illegal searches and seizures. So limiting the Truth-in-Evidence provision has the benefit of both preserving the rights that the Truth-in-Evidence provision erroneously removed, and avoiding the need to hold the provision unconstitutional. Constitutional interpretation analysis should err on the side of preserving rights, rather than assuming the voters intended to abolish them. Removing an individual's right from the state constitution is a significant act, and the repeal of a defendant's right to be free from compelled testimony should be done neither by implication nor by judicial interpretation.[225]

The emerging jurisprudence concerning the removal of rights under the state constitution in *Strauss* further casts into doubt the constitutionality of the expansive reading of the Truth-in-Evidence provision instigated by *People v. May*. While *Strauss* acknowledges that rights previously granted under the California Constitution can be removed, *Strauss* also stresses that such a removal of rights should be narrowly construed. Indeed, the narrow construction of the Truth-in-Evidence provision we argue for here is consistent with traditional canons of construction.[226] The apparent conflict between Proposition 8 (which would require a coerced confession to be admitted because it is relevant), and Article I, Section 15 (which would require exclusion of a coerced confession), is governed by the rule that amendments to the state constitution must be read in harmony with existing provisions.[227] Here, this requires giving effect to both the right

225. *See* Ste. Marie v. Riverside Cnty. Reg'l Park & Open-Space Dist., 46 Cal. 4th 282, 296 (2009) (repeals by implication are disfavored); Flores v. Workmen's Comp. Appeals Bd., 11 Cal. 3d 171, 176 (1974) ("all presumptions are against a repeal by implication").

226. California courts construe provisions added to the state constitution by voter initiative by applying the same principles governing the construction of a statute. *See* Prof'l Engineers in California Gov't v. Kempton, 40 Cal. 4th 1016, 1037 (2007).

227. *See In re* Waters of Long Valley Creek Stream Sys. 25 Cal. 3d 339, 349

against self-incrimination and the command to admit relevant evidence.

If the electorate did not explicitly abolish a constitutional right, then the courts should presume that the voters meant to keep it. From that perspective, *People v. May* had it backwards: rather than effectuating the intent of the voters, a judicial decision that removes state constitutional protection for California citizens when those citizens meant to keep it *frustrates* the electorate's intent, and harms them in their name.

(1979) (if "the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution").