Legislature v. Weber is about power

Overview

The California Supreme Court's decision in *Legislature v. Weber* (S281977) is about power, in three ways: the scope of the initiative's ability to alter branch powers, the distribution of power among the branches and the judiciary's role in maintaining that balance, and how the amendment–revision analysis now incorporates what we would view as core powers questions. In this article we explain why the court's decision to invalidate the Taxpayer Protection Act is best viewed through the core powers lens because the court first identified a core power, found that it was materially impaired or defeated, and employed the judiciary's role of maintaining branch powers to invalidate the act. This decision affirms the judiciary's role in policing separation of powers matters and at least validates our view that there is a core powers element in the amendment–revision analysis.

Analysis

How California's separation of powers differs from the federal model

California's version of the federal model for dividing the government's functions among the legislative, executive, and judicial branches is known as the *core powers* or *core functions* analysis.[1] It focuses not on sealing off the branches, nor on keeping them strictly separate, nor even on maintaining a precise balance of power over time.[2] Instead, California's model permits its government to evolve over time, allows branches to share powers, and focuses on preventing only material impairments to core branch powers.[3] This model is flexible, practical, and adaptable.[4]

California's separation-of-powers doctrine does not require equal shares of power among the branches — it only requires roughly maintaining the existing balance of power and the assigned core powers of each branch.[5] Separated powers in general only means that once divided powers should stay roughly so, and branches should remain in their domains. But California's doctrine goes even further and permits

substantial overlap between the branches. Separating powers does not imply *strict* separation; that would be neither possible nor desirable, and California law neither attempts to keep the branches strictly separate nor to maintain a precise balance of power over time.[6]

This lack of strict separation is so despite the seemingly strict statement in California constitution article 3, section 3 that "Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Yet courts have not read California's constitution to require three distinct powers with a rigid division of functions. Instead, the California view assumes mutual oversight, influence, overlap, and coordination between the branches. The only hard boundaries are "to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government,"[7] and to avoid overreaching by one governmental branch against another.[8] This rhymes with Madison's focus on preventing aggregated power: to safeguard individual liberty by avoiding "[t]he accumulation of all powers legislative, executive, and judiciary in the same hands," which he called "the very definition of tyranny."[9]

California's model contrasts with the federal system as a matter of fundamental — and foundational — constitutional design. The state constitution is not designed to balance power between the branches in the same way that the federal constitution does because the state is a general government, with plenary lawmaking power, and the full measure of each kind of power is by nature and design vested in the respective branches. The California constitution only limits those powers; it does not grant them. Thus, the branches of California's government share common boundaries, and no sharp line between their operations exists.[10] "From the beginning, each branch has exercised all three kinds of powers."[11] In responding to the everyday needs of a general government those powers have "frequent overlap,"[12] and the state's courts have adopted a flexible separation of powers doctrine that focuses on practicality and maintaining the core branch powers.

This is why the California Supreme Court is reluctant to overturn government acts on separation of powers grounds — instances of it doing so "are few and far

between" and such decisions "will not be lightly made."[13] And *Legislature v. Weber* was just such a case.

The scope of the initiative's ability to change branch powers

Legislature v. Weber primarily concerns how much an initiative constitutional amendment can affect the core powers of a state government branch. California's separation of powers model permits its government to evolve over time, allows branches to share powers, and focuses on preventing only material impairments to core branch powers.[14] The resulting rule is that the separation-of-powers doctrine is violated only when the actions of a branch of government defeat or materially impair the inherent functions of another branch.[15] Applying those principles here, the Taxpayer Protection Act exceeds the electorate's initiative amendment power because the measure defeats or at least materially impairs the core legislative power to tax. In the amendment–revision framework, that amounts to a constitutional revision that is beyond the electorate's power because its qualitative effect — stripping the legislature of its taxing power — is too great.[16]

The *Weber* decision first establishes the principle that the initiative can err by violating the core powers doctrine, or stated conversely that a core powers violation is a basis for invalidating an initiative amendment. The court does so in reviewing *Raven v. Deukmejian*, where it struck an initiative measure for bearing two defects.[17] One was internal: it contravened the judiciary's core power of finally construing the state constitution. The other was external: it substantially altered the substance and integrity of the state constitution as a document of independent force and effect by abolishing much of its criminal law protections and substituting those of the federal constitution. By attacking a core branch power the measure in *Raven* effected such a qualitative change in the nature of our basic governmental plan as to amount to a revision.

As in *Raven*, the Taxpayer Protection Act raises two core powers problems. One is the changes made to the legislature's core taxing powers in isolation, and the other is where those powers shift. Materially impairing or defeating the legislature's powers by reducing them would in isolation be its own problem; *moving* those

powers to other actors is also problematic because it aggregates power.

The *Weber* court first established that taxing is a core legislative power by reviewing the wealth of authority holding that the legislature has plenary constitutional taxing power, that it is "supreme" in the field of taxation, and the maxim that the state constitution's provisions on taxation are limits on the legislature's powers rather than a grant to it. The power to levy taxes by law is one of the legislature's constitutional powers.[18] Such a core branch power may not be materially impaired by the other branches.[19] As we would phrase it, the proposed Taxpayer Protection Act is invalid because it materially impairs the core legislative taxing power.

So then: an initiative that defeats or materially impairs a core branch power is a revision, taxation is a core legislative power, and consequently an initiative that materially impairs or defeats that power is an impermissible revision.

The direct attack on the legislature's power is that the measure under review would prevent the legislature from enacting *any* new tax without voter approval. Such a voter approval requirement for any new state tax measure would, in the court's view, constitute a significant interference with administering the legislature's fiscal powers and policies. It is overreaching by one governmental branch (the electorate) against another (the legislature).

The aggregation problem is that the measure would transgress constitutional limits by shifting a power long held by the legislature to the voters, changing something that at least has been shared between them into an exclusive voter power. It would also shift power between the executive branch and the legislative branch in three ways: by more broadly applying a two-thirds legislative vote requirement, by including executive and administrative actions in that rule, and by expanding the referendum power.

Again, either of those conditions (the direct attack or the aggregation) could be a separation of powers problem. Combined, they make for a clear core powers violation by both reducing the legislature's powers and by significantly reworking the distribution of powers. Indeed, the proponent itself argued that these changes would "reorder the balance of powers" by barring certain legislative delegation, by

prohibiting the executive branch from exercising certain delegated powers, and by compelling the legislature to perform administrative acts. That exceeds the "reasonable" degree of regulation of another branch's core constitutional functions that is allowed.[20]

We must concede that, as with our gloss on *Briggs v. Brown*, the court did not in *Legislature v. Weber* expressly adopt our argument that the electorate should be viewed as a branch actor for core powers purposes when it mounts a lateral attack on another branch. Yet again the court's decision in *Legislature v. Weber* is easily viewed and even more easily explained in core powers terms. With the court still neither expressly endorsing or rejecting this model, it remains a viable argument and in our view is the best way of explaining the limits on the initiative's ability to change branch powers.

The distribution of power among the branches and the judiciary's role in maintaining that structure

The California Supreme Court is the separation-of-powers enforcer because only the judiciary has the power to resolve interbranch disputes,[21] and because the state high court is the ultimate arbiter of the state constitution.[22] Only that court can finally resolve an interbranch dispute about the meaning of state constitutional powers. This remains true in the initiative context because the judiciary is the only state government actor empowered to check the electorate.[23]

The court has long served as the enforcer, with disputes about initiative process and substance litigated in court and with judicial decisions acknowledged as the final word on various initiative battles. This reality explains why the decision here is not a judicial power grab, as some have complained. Is there still anyone who doubts the judiciary's power to interpret the law?

Even so, that power has its own limits and logical extremes. Contrast the flexible separation of powers model discussed here with the siloed view of the branches that drives the U.S. Supreme Court's decision in *Trump v. United States*. As Professor Kate Shaw argued in *The New York Times*, the high court effectively adopted Justice

Samuel Alito's comment that nothing in the federal constitution gives Congress the authority to regulate the high court "— period." That view of hermetically sealed branches had long been rejected by both California and federal courts, but it arguably now describes federal separation of powers doctrine.

Not so in California. Justice Liu's majority opinion expressly acknowledges that altering California's governmental structure *is* within the people's power. The opinion's distinct phrasing of the *people* versus the *voters* in our view matters because it tracks the state constitution's text in marking a key distinction between the initiative and the revision powers.

The text of the state constitution distinguishes between two degrees of change power: between the greater political power of the *people* and the lesser legislative powers of the *voters*. Under article 2, section 1, only "the people" are sovereign and may revise the state government. The people's power is their ability to collectively create or reform a government, which article 2, section 1 calls the "political power." By contrast, article 2, section 8(a) empowers the "electors" to adopt statutes and amendments; article 2, section 9(a), section 11(a), and sections 14 and 15 also use *electors* or *voters*. This textual distinction means that the *voters* or the *electorate* acting alone can exercise the initiative amendment power, while only the sovereign *people* (the legislature plus the voters) can use the revision power.[24]

Note the same distinct phrasing in *Legislature v. Weber*: "It is within the *people's* prerogative to make these changes, but they must be undertaken in a manner commensurate with their gravity: through the process for revision set forth in article XVIII of the Constitution." This careful distinction so faithfully tracks the precise language used in California's constitution, and the California Constitution Center's own published views on this issue, that nothing more need be said.

The amendment–revision analysis now incorporates what we would view as core powers questions

We recently argued in *Castellanos v. State of California* (S279622) that the electorate cannot defeat or materially impair the constitutional power of a branch with a statutory initiative. The *Legislature v. Weber* decision adopts that line, albeit

in an amendment–revision framework. Still, the decision is at least consistent with our view that California's core powers analysis should apply to the voters when they act against another branch. That leads us to conclude that the amendment–revision analysis now incorporates the rule that a core powers violation is a revision.

And there is another point of *Castellanos* crossover. In *Legislature v. Weber* the court explained: "It is no answer to say that if the Legislature can grant or withdraw agency authority in this area, so too can the voters under the initiative power. Petitioners do not claim this change is beyond the electorate's power to enact; instead, they claim it is beyond the scope of an initiative amendment to entirely withdraw from the Legislature its power to delegate fee-setting authority to administrative agencies." True enough, given our argument above that entirely withdrawing a core legislative power is a separation of powers violation, or given the court's conclusion that doing so is a revision. Yet the authority to grant or withdraw agency authority *is* an answer in *Castellanos* — the difference is that the Taxpayer Protection Act obliterated the legislature's power, while the measure at issue in *Castellanos* left it intact.

Why it may matter who wrote this

Will Justice Liu also write *Castellanos*? He asked the key questions in both oral arguments, particularly about the balance between republican and democratic government. And this pair of cases is a good opportunity to draw the distinctions we see between impairing and affecting a power, or in Justice Liu's terms between amendment and revision. If Justice Liu does author the majority in *Castellanos* the modern amendment–revision doctrine may be defined by his views; it will at least be written in his voice. It would make analytical sense to use this pair of cases as bookends, highlighting how their distinct underlying facts produce divergent outcomes. A more extreme scenario could see the court using the other half of this pair to impose new restrictions on the initiative power. Stay tuned.

Conclusion

The decision in *Legislature v. Weber* is a rare event from several perspectives. The California Supreme Court generally does not grant pre-election review of ballot measures. Nor does the court often remove measures from the ballot. And there are

few instances of the court holding that something is a revision beyond the initiative power. Indeed, examples of courts blocking voter power are generally characterized by their rarity and extreme facts. (Recall the 2016 "The Sodomite Suppression Act" proposed ballot initiative, where Attorney General Kamala Harris refused to prepare the title and summary, and at her request a Sacramento Superior Court judge relieved her of any duty to advance the measure to the signature-gathering stage.) The takeaway here is that although California's electorate is a powerful — perhaps the most powerful — political actor in the state, even its mastery has limits. At that limit stands the state high court.

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1. *Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 297 ("The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."). ↑

2. *People ex rel. Atty. Gen. v. Provines* (1868) 34 Cal. 520, 540–41 (Sawyer, J., concurring) ("the lines between the several departments are not defined with precision, and there are other powers and duties that partake of the nature of duties pertaining to more than one of these departments, and may as properly be referred to one as the other, or may not strictly belong to either"). ↑

3. *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053 ("Although the doctrine does not prohibit one branch from taking action that might affect another, the doctrine is violated when the actions of one branch defeat or materially impair the inherent functions of another."). ↑

4. *Laisne v. State Bd. of Optometry* (1942) 19 Cal.2d 831, 835 (there can be no complete separation of powers of government in an ever-changing social

order, each department for its own existence must in some degree exercise some of the functions of the others, and there can be no rigid line over which one department cannot traverse). ↑

5. *Carmel Valley*, 25 Cal.4th at 297. ↑

6. *Provines*, 34 Cal. at 540–541 (Sawyer, J., concurring). ↑

7. *Manduley v. Superior Court* (2002) 27 Cal.4th 537, 557. ↑

8. *People v. Bunn* (2002) 27 Cal.4th 1, 16. ↑

9. James Madison, The Federalist No. 47. ↑

10. *Bunn*, 27 Cal.4th at 14. ↑

11. *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76. ↑

12. *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 558. ↑

13. *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 543–544. ↑

14. *Steen*, 59 Cal.4th at 1053. ↑

15. *In re Rosenkrantz* (2002) 29 Cal.4th 616, 662. ↑

16. The California constitution article allows the voters to amend the constitution by initiative (art. 2, section 8(a)), but a revision requires either a

constitutional convention and popular ratification (art. 18, section 2) or submission to the voters by a supermajority of the legislature (art. 18, section 1). An initiative can amount to an improper revision because of its quantitative or qualitative effect. *See, e.g.*, *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 223; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 351–52. ↑

17. *Raven v. Deukmejian* (1990) 52 Cal.3d 336. ↑

18. Cal. Const., art. 4, sections 1, 8(b), 10, 12. ↑

19. *Carmel Valley*, 25 Cal.4th at 299 ("The core functions of the legislative branch include passing laws, levying taxes, and making appropriations."); *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 595 (the power to collect and appropriate the revenue of the state is within the legislature's discretion). ↑

20. *See Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 840 (the legislature generally may adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not "defeat" or "materially impair" a court's exercise of its constitutional power or the fulfillment of its constitutional function); *Bunn*, 27 Cal.4th at 16 (as long as branch acts do not "defeat" or "materially impair" another's constitutional functions a "reasonable" degree of regulation is allowed). ↑

21. Cal. Const., art. 6, sections 1, 10; *Bunn*, 27 Cal.4th at 15 (the essential power of the judiciary is to resolve "specific controversies" between parties by interpreting and applying existing laws); *Quigley v. Garden Valley Fire Protection Dist*. (2019) 7 Cal.5th 798, 808 (although the legislature may impose reasonable restrictions on the fundamental jurisdiction of the courts, the power of the courts to resolve cases is the essential underpinning of the

judiciary's ability to effectively function as a separate department of government). ↑

22. *People v. Jacinto* (2010) 49 Cal.4th 263, 269 (the California Supreme Court is the final arbiter of the meaning of the California constitution); *People v. Birks* (1998) 19 Cal.4th 108, 117 ("[W]e are the final arbiters of the meaning of the California Constitution."). ↑

23. Carrillo, Duvernay, Gevercer & Fenzel, *California Constitutional Law: Direct Democracy* (2019) 92 So.Cal. L.Rev. 557, 611 (the judiciary is only external check on the electorate given the general power of judicial review over initiative measures and the power to resolve separation-of-powers disputes). ↑

24. Cal. Const., art. 18, section 1 ("The Legislature . . . may propose an amendment or revision of the Constitution . . . ."), section 2 ("The Legislature . . . may submit at a general election the question whether to call a convention to revise the Constitution"), and section 4 ("A proposed amendment or revision shall be submitted to the electors . . . ."); Carrillo, Duvernay, Gevercer & Fenzel, *California Constitutional Law: Direct Democracy* (2019) 92 So.Cal. L.Rev. 557, 559–60 (in general the terms *people* and *electorate* are related but distinct: the people is the body of persons who constitute a polity, while the electorate is the subset of the people who can vote); Carrillo, *California Constitutional Law: Popular Sovereignty* (2017) 68 Hastings L.J. 731, 743 (only "the people" (not the electorate) are sovereign and may revise the state government). ↑