No, you can't abolish a constitutional power by statutory initiative

Overview

During the oral argument in *Castellanos v. State of California* (S279622), the justices several times posed this question to counsel: could the voters by initiative abolish workers' compensation? We would have answered that question: "Certainly not, your honor, because the electorate cannot defeat or materially impair the constitutional power of a branch with a statutory initiative." That simple answer flows, as we explain below, from our view that California's core powers analysis should apply to the voters when they act against another branch.

Analysis

Review: the core powers analysis should apply to the electorate

To briefly recap our previous argument on this point, California's separation-of-powers model is known as the "core powers" or "core functions" analysis.[1] In our view, that model can and should apply to the electorate when it attacks a state government branch. When using the initiative, the electorate wields the state's legislative power.[2] That power is "coextensive" with the elected legislature's power — the power of a state government branch.[3] So when the electorate exercises legislative power through the initiative to attack another branch, the electorate should be viewed as a branch actor in the core powers analysis.[4] That analysis is the path best suited to resolving such interbranch power struggles.

Of course, does not automatically invalidate any action by one branch against another. Just as the other three branches often act in overlapping but not conflicting ways, electorate acts may provoke conflict with the policy preferences of other branches without being fairly viewed as attacks on the other branches'

constitutional powers.[5] To borrow language the California Supreme Court has used in other core powers contexts, the initiative may often *affect* other branch powers but does not always *impair* them.[6] So long as such enactments do not defeat or materially impair the core constitutional functions of the other branches, a "reasonable" degree of regulation is allowed.[7]

The core powers analysis answers the court's question

We start with the basic premise that the state constitution is superior to a statute, so a statutory initiative cannot alter a constitutional provision.[8] If the electorate adopted a statutory measure that purported to abolish the workers' compensation system by changing article 14, section 4 of the state constitution, a court could invalidate the initiative on that maxim alone. This would be so regardless of whether the legislature or the voters placed the measure on the ballot. The core powers analysis that follows instead addresses a voter-initiated statutory measure that materially impairs the legislature's constitutional powers with an indirect attack — for example, by (as the justices posited at argument) simply abrogating every existing statutory provision concerning industrial accident protection.

A statutory initiative cannot abolish the entire workers' compensation system because that would materially impair a clear textual power held by the legislature, which is constitutionally empowered to create and enforce a complete system of workers' compensation.[9] Article 14, section 4 *empowers* but does not *mandate* the legislature to provide a complete system of workers' compensation — so the legislature in theory could abolish the system itself. And ordinarily the voters could adopt any law the legislature could, so perhaps the electorate, with the legislature's concurrence or at least acquiescence, could do the same.[10] But at this extreme their overlapping powers diverge, and the voters could not, *against the legislature's wishes*, defeat or materially impair a core power held by the legislature.

Teasing out those scenarios requires understanding the degree and kinds of overlap that are contemplated and permitted by California's separation-of-powers doctrine, which "does not command a hermetic sealing off of the three [or four] branches of

Government from one another."[11] Accordingly, the voters may exercise some degree of power normally wielded by another branch; here, together with their own legislative powers, that means the voters may in general legislate on workers' compensation.[12] That overlap necessarily contemplates the branches acting in conflict sometimes, so the state's twin legislative actors may sometimes adopt divergent policy solutions.[13] The mere fact that the voters and the legislature are at odds does not itself establish a core powers violation. Once again: only attempting to strip another branch of its core functions is barred. So this is a question of degree, not kind.

A voter-initiated statutory measure that abolished workers' compensation would go too far by defeating the legislature's constitutional power to create and enforce a complete system of workers' compensation. Core branch powers may not be defeated or materially impaired by the other branches.[14] That includes the electorate when it attempts acts like this hypothetical measure, which would defeat the legislature's power on this subject by negating all its actions. When using its constitutional power to legislate by initiative, the electorate acts as a branch of the state government with legislative power. Just as neither the executive nor the judiciary would be permitted to abolish the legislature's power in this context, the electorate cannot by initiative statute defeat or materially impair a core power held by the legislature. That answers the question posed at argument: no, the voters could not by statutory initiative abolish workers' compensation, because such an attempt by any branch would defeat the legislature's core constitutional power to create and enforce such a system.

This is consistent with the *amicus curiae* brief filed by center affiliates in *Castellanos* because Proposition 22 only affects but does not materially impair the legislature's constitutional power here. From a core powers perspective, that measure is a permissible overlap or significant effect on the legislature's plenary power over this subject, which the voters share. It is an example of the two legislative actors reaching differing conclusions on the same policy question but leaving both with their respective powers to continue making such policy decisions in general going forward. Given the special relationship between the electorate and the legislature

created by the substantial overlap between their powers, and the fact that the voters can bar the legislature from amending voter-approved statutes, an even greater degree of encroachment may possible between them.[15] Yet defining that limit is unnecessary here, because the Proposition 22 policy disagreement does not go so far as the court's extreme hypothetical of defeating the legislature's power by preventing it from ever legislating on this subject again. Proposition 22 at most affects the legislature's powers without materially impairing or defeating them; thus, *Castellanos* does not present a separation-of-powers problem.

That contrasts with a hypothetical initiative that abolishes the workers' compensation statutory scheme, which would entirely usurp a core constitutional power held by the legislature. It at least would materially impair such a core legislative power by effectively eliminating the legislature's ability to create and enforce a complete system on that subject; a material impairment akin to the attempted action in *Raven*.[16] Either way, the court's hypothetical measure fails the core powers test.

In this context we sometimes invoke two other thought problems posed by the court. Would vesting all judicial power in another branch exceed the electorate's initiative power?[17] Could the legislature withdraw all funding from an agency, or a branch?[18] Contemplating whether the legislature could reduce Department of Motor Vehicles funding to $1 is equal parts interesting, unhelpful, and illuminating. Interesting, because it's plausible enough to require you to think through the ultimate implications of the principles in play. Unhelpful, because those conflicting principles alone cannot supply the answer in extreme scenarios. Then enlightenment: what's needed is a limiting principle, a way to balance the competing powers, or a reason to value one over the other. Indeed, at argument in *Castellanos* a justice asked what limiting principle counsel was proposing. Here, we would use the separation of powers principle to answer the hypothetical and resolve the extreme scenario it posits: no, the electorate could not by statutory initiative abolish the workers' compensation system, because that would be a core powers violation.

Finally, a clever drafter might attempt to avoid these problems by writing this hypothetical initiative as a constitutional amendment. That would raise larger, more

dangerous questions about the limits on the initiative amendment power, and fairly pose an amendment–revision question. Past decisions establish that the initiative can be used to limit individual rights, and to impose significant restrictions on the other branches.[19] Does the fact that the initiative was used to install the legislature's article 14, section 4 power with 1918 Proposition 23 mean that what the initiative gives it may take away? Does it matter that the legislature placed that measure on the ballot? Those are questions for another day.

Conclusion

We note for the record the amicus brief filed in *Castellanos* by center affiliates, the center's previous publications on the initiative and divided powers, and our particular argument about including the electorate in California's core powers analysis. We see the argument here as consistent with those statements. The initiative is a great power that the courts must respect, and it often will give the voters the final word. But the initiative is not all-powerful, and courts must also respect the state's constitutional design, which itself imposes some limits on initiative acts. Only the sovereign people are all-powerful in California; the electorate somewhat less so.

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1. *People v. Bunn* (2002) 27 Cal.4th 1, 14 (the state constitution vests each branch with certain "core" or "essential" functions that may not be usurped by another branch); *Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 297 (the separation of powers doctrine limits the authority of one branch of government to arrogate to itself the core functions of another branch). ↑

2. *California Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 942 ("the power of the people through the statutory initiative is coextensive with the power of the Legislature") (citation omitted); *Dwyer v. City Council of*

Berkeley (1927) 200 Cal. 505, 513 (by adopting the initiative and referendum the voters "have simply withdrawn from the legislative body, and reserved to themselves the right to exercise a part of their inherent legislative power"). ↑

3. *California Cannabis Coalition*, 3 Cal.5th at 942, citing *Legislature v. Deukmejian* (1983) 34 Cal.3d 658, 675; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1042;

   Independent Energy Producers Assn. v. McPherson (2006) 38 Cal.4th 1020, 1032;

   Manduley v. Superior Court (2002) 27 Cal.4th 887, 552; *Santa Clara County Local Transportation Auth. v. Guardino* (1995) 11 Cal.4th 220, 253 (by approving Proposition 62 the electorate "adopted a statute that the Legislature itself could have enacted"), citing *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 775; *Strauss v. Horton* (2009) 46 Cal.4th 364, 453 (no distinction between constitutional amendments that may be proposed through the initiative compared with those that the legislature may propose). ↑

4. This argument was first made in Carrillo & Chou, *California Constitutional Law: Separation of Powers* (2011) 45 U.S.F. L.Rev. 655. ↑

5. The separation of powers doctrine protects each branch's core constitutional powers "from lateral attack by another branch," but "this does not mean that the activities of one branch are entirely immune from regulation or oversight by another." *People v. Bunn*, 27 Cal.4th at 16. ↑

6. *See In re D.N.* (2022) 14 Cal.5th 202, 212 (California's core powers doctrine "does not prohibit one branch from taking action that might affect another" and the doctrine is only violated "when the actions of one branch defeat or

materially impair the inherent functions of another"), citing *Steen v. Appellate Division of Superior Court* (2014) 59 Cal.4th 1045, 1053. ↑

7. *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 57–58. ↑

8. If there be any doubt, see *Jacob B. v. County of Shasta* (2007) 40 Cal.4th 948, 961 ("Obviously, if [a statute] conflicted with [the] California Constitution [], the statute would have to yield to the Constitution."); *Hotel Employees & Restaurant Employees Internat. Union v. Davis* (1999) 21 Cal.4th 585, 602 (a "statute inconsistent with the California Constitution is, of course, void"); *People v. Navarro* (1972) 7 Cal.3d 248, 260 ("Wherever statutes conflict with constitutional provisions, the latter must prevail."); *Carter v. Seaboard Finance Co*. (1949) 33 Cal.2d 564, 579 (California's constitution is "the supreme law of the state" to which all statutes must conform). ↑

9. Cal. Const., art. 14, section 4 ("The Legislature is hereby expressly vested with plenary power . . . to create, and enforce a complete system of workers' compensation, by appropriate legislation"). ↑

10. There are three scenarios here: the voters and the legislature abolish the scheme in concert with a legislatively-proposed statutory initiative, the voters abolish the scheme alone and the legislature stands silent, and the voters abolish the scheme and the legislature objects. The first two scenarios of the legislature participating or making no objection pose a distinct separation-of-powers problem of a branch acquiescing or participating in its power being arrogated. *See Free Enterprise Fund v. Public Co. Accounting Oversight Bd*. (2010) 561 U.S. 477, 497 (the separation of powers does not depend on whether "the encroached-upon branch approves the encroachment"), citing *New York v. United States* (1992) 505 U.S. 144, 182. Because the legislature did object in *Castellanos*, we only flag this issue for completeness and do not analyze it. ↑

11. *Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 338 (citation and internal quotation marks omitted). ↑

12. *Bunn*, 27 Cal.4th at 14 (although Cal. Const., art. 3, section 3 states that those charged with the exercise of one power may not exercise any other, it is well understood that the branches share common boundaries, and no sharp line between their operations exists); *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76 (each branch has always exercised all three kinds of powers). ↑

13. The very act of making law by statute, which both the legislature and the electorate are empowered to do, "embraces the far-reaching power to weigh competing interests and determine social policy." *Bunn*, 27 Cal.4th 14–15. ↑

14. *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 one peculiarly within the legislature's discretion). ↑

15. Cal. Const., art. 2, section 10(c) ("The Legislature may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without the electors' approval."). ↑

16. *United Auburn Indian Community of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 559 (the core powers analysis bars one branch of government from "exercising the complete power constitutionally vested in another" or exercising power in a way that undermines "the authority and independence of one or another coordinate [b]ranch"). ↑

17. *Amador Valley Joint Union High School District v. State Board of*

Equalization (1978) 22 Cal.3d 208, 223 ("[A]n enactment which purported to vest all judicial power in the Legislature would amount to a revision without regard either to the length or complexity of the measure or the number of existing articles or sections affected by such change."). ↑

18. *See Carmel Valley*, 25 Cal.4th at 302. ↑

19. *See, e.g., Strauss v. Horton* (2009) 46 Cal.4th 364 (upholding initiative constitutional amendment that altered individual rights); *Legislature v. Eu* (1991) 54 Cal.3d 492 (upholding initiative constitutional amendment that altered the legislature); *In re Lance W.* (1985) 37 Cal.3d 873 (upholding initiative constitutional amendment that altered both individual rights and the judiciary). ↑