The basic structure analysis for initiative amendments

Overview

Although California voters may amend the constitution by initiative, they cannot use the initiative to revise it. This amendment–revision distinction could be an important limit on the electorate's initiative power. But the California Supreme Court has used this doctrine to invalidate part of an initiative on only two occasions.[1] While the test for determining when an initiative is a revision is well-established, critics argue that it is inconsistently applied.[2] The problem is that the existing doctrine is incomplete: it asks only whether an initiative changed the state constitution's "basic governmental plan or framework."[3] Recent cases have clarified that this excludes examining the principles underlying the constitutional scheme.[4] Without the ability to reference the principles that stitch the state constitution's component pieces together, courts cannot examine constitutional changes in context. This prevents courts from effectively analyzing what constitutes the "basic governmental plan or framework."

I propose adopting an analysis that focuses on basic structure to solve some of these problems. The basic structure analysis calls for courts to first examine the whole constitution to determine if any fundamental principles are implicated by the initiative. The existing analysis suffers from two primary problems: it lacks a metric, and it is unclear. My proposed approach mitigates those problems by offering a standard to measure an initiative against, and by increasing clarity.

Analysis

The existing amendment–revision doctrine

The California constitution permits the legislature to "propose an amendment or revision of the Constitution,"[5] but the electorate reserved only the power to "amend the Constitution by initiative."[6] To define what constitutes a substantial enough change to the constitution to qualify as a revision, the California Supreme

Court developed the amendment–revision doctrine, which considers the breadth of the proposed change and its impact on the constitution's essential elements.[7] When assessing whether an initiative amounts to a revision, the California Supreme Court considers the impact of the constitutional change on the "basic governmental plan or framework embodied in the preexisting provisions of the California Constitution."[8] Drawing the line between amendment and revision often involves the meaning and scope of any constitutional change.[9] The test considers both the quantitative and qualitative elements of the changes.[10] The California Supreme Court has found just one instance each of a quantitative and a qualitative violation.

When assessing the quantitative impacts of the change, the California Supreme Court looks to the number of changes. An initiative amendment that changes the "substantial entirety" of the state constitution's provisions may be a revision, and so might a "relatively simple enactment" that has significant effects on the "basic governmental plan."[11] The state high court held one proposal, which included over 21,000 words and had twelve separate sections and eight subsections, a revision under the quantitative prong.[12]

The question the California Supreme Court asks when assessing a qualitative revision is whether the initiative generates "far reaching changes in the nature of our basic government plan."[13] A change to the "basic governmental plan or framework" is defined as a change in the government's "fundamental structure or the foundational power of its branches."[14] The classic example of a revision is a measure that eliminates the judiciary and vests all judicial power in the legislature.[15]

The one instance of the California Supreme Court invalidating an initiative as a qualitative revision was in *Raven v. Deukmeijian*. The problem was that the measure required California courts to follow federal law when interpreting constitutional rights.[16] The initiative would have "substantially alter[ed] the substance and integrity of the state Constitution as a document of independent force and effect."[17] Because the initiative conflicted with the fundamental principle that the judiciary has the "right to construe the Constitution in the last resort," it was an impermissible revision.[18]

Both the quantitative and qualitative elements are difficult to establish. The substantial alteration necessary to find a qualitative revision cannot be "speculative," but must "necessarily or inevitably appear from the face" of the initiative.[19] A change in a basic underlying principle in the state constitution — even equal protection — is insufficient for a revision.[20] And the number of changes needed to meet the quantitative element is high, but unstated.

The existing doctrine's shortcomings

The amendment–revision analysis suffers from many problems, and all flow from one central flaw: the California Supreme Court has never defined what constitutes California's basic plan or framework. The test therefore tries to measure any proposed change without a ruler.

The quantitative element of the test, which considers the number of proposed changes, is fundamentally uncertain. *McFadden* held that an initiative that affected nearly 40% of the constitution's text and a majority of its articles was too much.[21] *Amador Valley* suggested that affecting eight articles is not sufficient to constitute a revision.[22] Exactly where the line is remains uncertain. Any line drawn will be arbitrary.[23]

The qualitative element is inconsistently applied.[24] Voters approved three different initiative amendments restricting criminal procedural rights — two were upheld as amendments and one invalidated as a revision.[25] Critics have noted that inconsistent results create the impression that the court defends itself more than challenges to other branches.[26] Regardless, the lack of clarity indicates the absence of a clear standard in the doctrine.

A more fundamental problem is that the existing doctrine does not serve its intended purpose. The California Supreme Court has outlined two reasons for the amendment–revision distinction: protecting core constitutional structures[27] and lessening "improvident or hasty" revision.[28] It characterized the distinction as one of magnitude:

> *The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the*

> *people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original instrument as will effect an improvement, or better carry out the purpose for which it was framed.[29]*

The amendment–revision doctrine requires courts to distinguish between which parts of the constitution are of a "permanent and abiding nature" and which are not. Yet the California Supreme Court has never attempted to catalog those features, nor even to provide courts a means for distinguishing between them. Only a few examples exist:

- The California Supreme Court's ability to exercise independent judgement in interpreting the California constitution is permanent.[30]
- Home rule is permanent.[31]
- Fundamental liberty principles like equal protection are not permanent.[32]

The only guidance the California Supreme Court has provided is its definition of the "basic governmental plan or framework" as a change in the government's "fundamental structure or the foundational power of its branches."[33] Those additional synonyms do nothing to clarify what is fundamental or foundational (which also mean the same thing). The upshot is that there is almost no guidance on when courts may or must overturn an initiative on amendment–revision grounds.

Consider an initiative (Proposition X, No Rights for Wrongdoers) that eliminated all of the due process provisions in the state constitution.[34] (Ignore the federal constitutional implications.) The current amendment–revision doctrine likely classifies this initiative as an amendment, and the California Supreme Court likely would uphold it. The decision would point out that the legislature has broad authority to regulate procedure.[35] And the electorate's power is generally coextensive with the legislature's power.[36] Therefore, the electorate by initiative can regulate procedure. Legislation can reach into inherent judicial power.[37] And the electorate has already made major alterations to criminal procedural rights.[38] The California Supreme Court likely would uphold this as yet another permissible modification to the procedural rights that criminal and civil litigants have in

California.

That result is absurd. There should be no question that due process is fundamental to the California constitution.[39] Due process is a fundamental principle underlying the basic precepts of constitutional government itself. Yet *Strauss* bars invalidating Proposition X as a revision, because that decision explicitly rejected the argument that abrogating a "foundational constitutional principle of law" was a revision.[40] Because initiative amendments may now alter "long-standing and fundamental constitutional principles," judicial inquiry into the principles underlying the constitution is precluded.[41] By foreclosing the option to consider fundamental principles as part of the basic governmental framework, *Strauss* permits such absurd results.

Reframing the analysis

Following *Strauss*, plaintiffs must establish three elements to succeed on a qualitative revision claim:

1. The challenger must show that the change is significant and has sufficient breadth. *Strauss* explicitly permits considering both the meaning and scope of any constitutional alteration.[42]
2. The challenger must show that there is a change in the government actor that has the authority to make decisions.[43] It is not enough for the particular individuals to change; power must be either moved to another branch or out of California government entirely.[44]
3. There must be a change to California's basic plan or framework of government that necessarily will result from the initiative.[45] That inevitable change must appear on the initiative's face.

This approach is both a high bar to clear, and it potentially produces a siloed analysis. The high bar serves an interest in respecting the electorate's will, but arguably diminishes the people's sovereign power to reshape government. A siloed analysis results because the court assesses constitutional provisions in isolation from one another. By not viewing the constitution as a whole, the court omits important considerations of underlying principles. These inherent problems in the existing approach can be mitigated by modifying it to include the basic structure approach

discussed next.

The basic structure approach

The basic structure doctrine exists in a number of countries — India, for example.[46] It is analogous to the amendment–revision analysis. The basic structure doctrine can improve the current amendment–revision doctrine by providing the absent measuring stick. This approach would not replace the "basic governmental plan or framework" standard, but it would replace the existing approach to analyzing initiatives under that standard. This method better reflects the original notion of the doctrine and its pre-*Strauss* application.

The basic structure doctrine considers an amendment in the context of the entire constitution. As one decision noted, "the recognition of a basic structure in the context of amendment provides an insight that there are, beyond the words of particular provisions, systematic principles underlying and connecting the provisions of the Constitution. These principles give coherence to the Constitution and make it an organic whole."[47] To determine what exactly those "systematic principles" are, the Supreme Court of India considers a particular feature's location in the constitutional scheme, its object and purpose, and what consequences flow from eliminating that feature.[48] This is both a structural analysis (ascertaining the feature's place in the constitutional scheme) and an originalist or historical intent analysis (determining the feature's object and purpose).[49] The basic structure doctrine does not require courts to catalog all provisions that form the basic structure.[50] It only requires evaluating the provisions at issue.

Adding the basic structure doctrine to the California Supreme Court's process for deciding amendment–revision disputes has several benefits. These include simplifying the analysis, reconnecting the doctrine with its historical roots and practice, and increasing the predictability of its results. The due process example discussed above becomes a much simpler analysis. The first step is to look within the document's four corners and attempt to extract its "normative core" principles.[51] This might involve examining the California constitution's provisions that mention due process.[52] It might also include considering other provisions that are informed by due process.[53] If that is insufficient, then history may offer additional reasons

to justify a particular conclusion.[54] A court might then consider the foundational influence of due process.[55] Given how important due process is, a court could conclude that eliminating a fundamental principle is an invalid revision.

Rather than examining the individual provision, the basic structure approach begins with the document as a whole and considers its "underlying principles," a process more in line with the original notion of the amendment–revision doctrine described in *Livermore*.[56] This is consistent with historical practice. For example, in *Raven* the California Supreme Court considered nontextual constitutional principles.[57] And the basic structure doctrine is centered on principles. Historical analysis comes into play only when the court cannot easily discern a controlling principle. Limiting courts to initially considering only constitutional text and structure will make the analysis more predictable. This is a critical outcome given that this analysis only arises when a court considers overturning an electoral result.

The basic structure doctrine offers a different path to accomplishing the goal of California's amendment–revision doctrine: to grant the initiative its due, and bar it from overreach. The key principle here is what makes a constitutional provision fundamental. Focusing on that core value permits a more explicit weighing of constitutional values, which is less likely to generate the anomalous outcomes that flow from the existing approach.

Conclusion

The core problem with the existing amendment–revision analysis is that it lacks a metric for defining the basic governmental plan or framework. The analysis is too focused on the individual provision at the expense of broader considerations about how different elements of the constitution interact with and reinforce one another. California's constitution is an integrated whole, not a collection of independent clauses. By focusing on the principles undergirding the document, the basic structure doctrine permits courts to weigh the relationships between its provisions. This allows courts to better distinguish between what is fundamental and what is ancillary. Finally, the basic structure doctrine better aligns with the core purpose of courts policing the amendment–revision border: preventing wholesale revisions while guarding the electorate's amendment power.

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Tim Plummer is a research fellow at the California Constitution Center.

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[1] *McFadden v. Jordan* (1948) at 347; *Raven v. Deukmeijian* (1991).

[2] *See* Manheim &Howard, *The Initiative Power* (1997) 31 Loyola L.A. L.Rev. 1165; Carrillo, Duvernay & Stracener, *California Constitutional Law: Popular Sovereignty* (2017)68 Hastings L.J. 731.

[3] *Strauss v. Horton* (2009) at 387.

[4] *See id.* at 442.

[5] Cal. Const., art. XVIII, § 1

[6] Cal. Const., art. XVIII, § 3.

[7] *Strauss* at 387.

[8] *Ibid.*

[9] *Ibid*.

[10] *Amador Valley Joint Union High School District v. State Board of Equalization* (1978) at 223.

[11] *Amador Valley* at 223.

[12] *McFadden* at 334.

[13] *Amador Valley* at 223.

[14] *Legislature v. Eu* (1991) at 509.

[15] *Amador Valley* at 223.

[16] *Raven*at 352.

[17] *Ibid.*

[18] *Ibid*.

[19] *Eu* at 509–10.

[20] *Strauss* at 442.

[21] *McFadden* at 334.

[22] *Amador Valley* at 224.

[23] *See* Carrillo, Duvernay & Stracener, *supra* note 2, at 739.

[24] *See* Manheim & Howard, *supra* note 2, at 1224–29; Carrillo, Duvernay & Stracener, *supra* note 2, at 740.

[25] *See Raven* at 336; *People v. Frierson* (1979); *In re Lance W.* (1985).

[26] Carrillo, Duvernay & Stracener, *supra* note 2, at 740.

[27] *See Strauss* at 387.

[28] *See McFadden* at 347.

[29] *Livermore v. Waite* (1894) 102 Cal. 113, 118–19.

[30] *Raven*at 355.

[31] *Amador Valley* at 245; *see Johnson v. Bradley* (1992) at 399 (setting out core categories of municipal affairs).

[32] *See Strauss* at 443.

[33] *Eu* at 509.

[34] Cal. Const., art. I, §§ 3(4), 7, 15, 29.

[35] *Briggs v. Brown* (2017) at 855.

[36] *Professional Engineers in California Government v. Kempton* (2007) at 833.

[37] *People v. Standish* (2006) at 799–800.

[38] *See Brosnahan v. Brown* (1982) (implementing the truth-in-evidence rule, abolishing the diminished capacity defense, and changing sentencing rules for certain classes of criminals); *Frierson* (re-establishing the death penalty); *In re Lance W.* (altering the remedy for search and seizure violations).

[39] Grossi, *Procedural Due Process* (2017) 13 Seton Hall Cir. Rev. 155, 162; *id.* at 181, fn.120 (quoting Scalia, *The Rule of Law as the Law of Rules* (1989) 56 U. Chi. L.Rev. 1175).

[40] *Strauss* at 442.

[41] *Id.* at 389.

[42] *Id*. at 387.

[43] *See Raven* at 352–53; *Eu* at 508.

[44] *See Eu* at 508.

[45] *See Raven*at 352; *Brosnahan* at 261.

[46] Mate, *State Constitutions and the Basic Structure Doctrine*, 45 Columbia Human Rights L.Rev. 441, 465.

[47] *M. Nagaraj v. Union of India* (2006) A.I.R. 2007 S.C. 71 (India).

[48] Mate, *supra* note 46, at 483.

[49] *Ibid.*

[50] Krishnaswamy, Democracy and Constitutionalism in India: A Structure of the Basic Structure Doctrine (2011) p. 132.

[51] *Id.* at 157.

[52] *See* Cal. Const., art. I, §§ 3(4), 7, 15, 29.

[53] Cal. Const., art. XIII, § 4(c).

[54] Krishnaswamy, *supra* note 50, at 157.

[55] *See* Grossi, *supra* note 39, at 162.

[56] *Livermore*, 102 Cal. at 118.

[57] *Raven* at 354.