The core powers analysis should apply to the electorate

Overview

By granting review in *Legislature v. Weber* (S281977) the California Supreme Court may have committed itself to resolving one of the most difficult questions in California constitutional law: distinguishing between an impermissible constitutional revision and a permitted constitutional amendment. The California Constitution Center recently argued that this question is best avoided until after the election. That's partly because engaging in preelection review likely requires the court to confront the constitutional conundrum presented by an initiative amendment that attacks a core branch power. If resolving that question is truly necessary, we argue here that the best approach is to apply the core powers analysis. If it must be reviewed, this case is a good vehicle for a decision expressly applying that analysis to the electorate when they act in their law-making capacity.

Analysis

The core powers analysis

California's version of the traditional 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]

Yet for all its benefits in practice this core powers analysis has a glaring theoretical omission: it does not account for the electorate. The California constitution provides that "The powers of state government are legislative, executive, and judicial.

Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."[5] It also vests the state's legislative power in the legislature, except "the people reserve to themselves the powers of initiative and referendum."[6] Accordingly, the California Supreme Court has held that the electorate in using the initiative wields legislative power.[7] When exercising its law-making power through the initiative, we argue that a court should view the electorate as a branch actor in the core powers analysis.[8] This conclusion flows from the electorate sharing the state's legislative power, standing in the legislature's shoes. Why then would the core powers analysis *not* apply to such a legislative body?

This conclusion is particularly compelling when (as arguably so in *Legislature v. Weber*) an initiative makes a sufficiently direct attack on the core powers of another branch to raise the specter of a material impairment. Ordinarily, as discussed next, a court has but a few blunt instruments to deploy in any challenge to an initiative. But in our hypothetical attack on another branch, none of those tools is suited to the job so well as the core powers analysis.

The theoretical foundation

California courts have long been hobbled by limited analytical tools for evaluating the constitutionality of ballot measures. The simplest (and least useful) of those tools is the rule that the initiative can only be used for making law; this issue does not occur often and so it has limited application.[9] The single subject rule requires initiatives to focus on just one thing, but because that thing is broadly defined by the generous "reasonably germane" standard this rule will filter out only the most egregiously over-written measures.[10] Finally, the amendment–revision analysis will in theory allow courts to distinguish between permitted amendments and impermissible revisions.[11] Yet like the single subject rule this analysis is easy to apply in obvious cases, and all but useless in close cases.[12]

Expressly endorsing our argument that the core powers analysis can apply to the electorate will not address the shortcomings of those other rules. But it will give courts another, better option rather than trying to apply the amendment–revision

analysis in cases where it is ill-suited, which can amount to fitting a square peg in a round hole.

The shortcomings of the existing framework is shown by *Legislature v. Eu* and *Raven v. Deukmejian*.[13] Both decisions applied the amendment–revision analysis and struggled with that rule's limitations. The key question in that approach is whether the initiative changes California's governmental structure so much that it amounts to a revision. That arguably is a high bar, requiring either *many* changes or *very significant* changes to California's constitutional frame of government.[14] This high bar produced anomalously divergent results in these two cases.[15]

The amendment–revision approach fit poorly in *Legislature v. Eu* because it was difficult to hold that restructuring some of the legislature's procedures and perks was by any measure a profound change to the state government. The result was that this restrictive framing all but guaranteed the result, rather like applying strict scrutiny. Attempting to fit the revision frame onto *Raven v. Deukmejian* was equally awkward, requiring the court to find that changing the source of law for one subject would restructure the California republic.[16]

Both decisions were better viewed as core powers questions. In *Legislature v. Eu* the court could have assessed whether any of Proposition 140's elements affected a core legislative power; the initiative was valid because at most the electorate's acts significantly affected — but did not materially impair — the legislature's core functions.[17] *Raven v. Deukmejian* is the reverse: the initiative was a core powers violation because it materially impaired the core judicial power of applying discretionary judgment to decide what law applies in deciding cases.

In neither example does applying the core powers analysis to the electorate change the result — that is not the goal. The point instead is to improve the analysis applied to reach the right result. Using the amendment–revision rule to resolve initiative challenges that fairly present as separation of powers problems forces courts to apply the amendment–revision analysis out of its proper context, resulting in a misshapen rule that applies to everything badly. A rule of constitutional interpretation should be suited to its task, and some cases are better suited to a core

powers approach. In those cases the courts should employ the superior analytical tool. Using the core powers analysis where it is a better fit reduces the risk of California courts reaching the wrong result in future cases.

Applying the core powers analysis to the electorate

The California Supreme Court has never expressly considered the argument we raise here, nor has it clearly applied a separation of powers analysis to electorate acts. The court did nod at this idea in *Briggs v. Brown* without directly holding that Proposition 66 presented a core powers question by materially impairing the core judicial power of managing the court's docket.[18] Deciding that issue was unnecessary because the court instead held that the initiative's five-year deadline for processing capital cases was merely "directory," not mandatory.[19] Yet neither has the court ever rejected this idea, perhaps because it has never been presented in the right case. As discussed next, *Legislature v. Weber* is a good opportunity for adopting our proposed rule.

Applying the core powers analysis in *Legislature v. Weber*

As in the examples above, applying the core powers analysis may well produce the same ultimate result as an amendment–revision approach. And we stand by the center's argument that the initiative at issue in *Legislature v. Weber* should go to the ballot, due largely to the policies of avoiding constitutional questions and respecting the initiative, which generally counsel against preelection review. But because the court granted review, it may need to confront difficult constitutional questions about the proposed initiative's validity. If it must, then we respectfully suggest that it might proceed as follows.

The proposed measure is invalid because it materially impairs a core legislative power. The power to levy taxes by law is one of the legislature's constitutional powers.[20] As such it is a core branch power, which may not be materially impaired by the other branches.[21] When using its constitutional power to amend our state constitution by initiative, the electorate acts as a branch of the state government with legislative power. In that context the core powers analysis that applies to other

interbranch disputes also applies to the electorate. Applying that approach to the matter at hand shows that the electorate has overstepped the interbranch boundary by attacking the legislature's core taxing power.

The electorate materially impairing core executive powers or core judicial powers is the clearest case for applying the core powers principle because such a case presents the opposition of a legislative power against an executive or a judicial power. The same principle applies in the electorate versus the legislature context: although both the electorate and legislature wield equivalent legislative power, those powers oppose each other.

Some might say that the electorate is arguably exercising the same core functions as the legislature, presenting no conflict unless the electorate's exercise materially impairs either an executive or judicial core function. How, in that view, could an internal dispute between members of the same branch be a separation of powers problem?

That argument fails to consider the California constitution's explicit designation of powers separately to the electorate (the powers of initiative, referendum, and recall) and to the legislature (the power to investigate, to amend the federal constitution, to appoint).[22] In this sense, the electorate is a fourth branch of government that can encroach on the legislature, the executive, or the judicial branches.[23] This analysis better fits the longstanding view of California's separation of powers as a principle that "does not command a hermetic sealing off of the three [or four] branches of Government from one another."[24] At times, each of the branches may exercise some degree of power normally wielded by another branch.[25] So too here — the electorate wields the legislative power through the initiative process. But wielding the power of another branch does not permit using that power to strip that branch of its core functions.

The proposed initiative materially impairs a core legislative power by all but eliminating the legislature's ability, in its sole discretion, to enact tax laws. It does so by requiring every law that increases taxes be validated by plebiscite, which amounts to subjecting every tax law to review by the voters. That by any fair

characterization grants the electorate a veto over every tax law, adding a new electorate power in this context equivalent to the governor's veto — a core executive power.

It matters not that the electorate in theory might approve all or many such tax laws. All such legislative acts would no longer be *laws* but only proposals for the electorate to make into law or not. Although this leaves intact the legislature's power to make other laws, it entirely abolishes the legislature's sole discretionary power to enact laws in a whole subject-matter. It is beyond dispute that this subject, taxes, is a core legislative power.[26] Abrogating such an essential element of the core taxing power specifically, and of the core power to make law in general, is at least a material impairment akin to the attempted action in *Raven*, and may well entirely arrogate the legislature's core taxing power.[27] Either way, the measure fails this test.

Finally, the proposed initiative also alters the electorate's referendum power by removing the exemption that presently applies to fiscal matters. That arguably is a significant increase in at least the referendum's scope and perhaps also in its effect. This increase presents a difficult question about whether the electorate by initiative amendment can alter, as here by increasing, its own direct democracy powers. But given our conclusion that this proposed initiative is constitutionally infirm for impairing a core legislative power, we need not reach this issue.

Conclusion

Rather than requiring the court to strike a difficult balance between the legislature's undisputed prerogatives and the fearsome power of direct democracy, this case presents an opportunity to in one stroke answer the question presented and fill a doctrinal gap, achieving both with a common-sense and accessible approach. Attempting to apply the amendment–revision analysis will be a far more difficult opinion to write and will leave future courts with little help in squaring the circle for initiative measures that attack a branch power. The core powers analysis will not be the right tool for every task, but when a court sees a nail it should have a hammer.

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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, 540–541 (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 (the doctrine does not prohibit one branch from taking action that might affect another; the doctrine is only 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. California Constitution, Article III, section 3. ↑

6. California Constitution, Article IV, section 4. ↑

7. *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"). ↑

8. This argument was first made in David A. Carrillo and Danny Y. Chou, California Constitutional Law: Separation of Powers (2011) 45 USF L. Rev. 655. ↑

9. *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 694 (the people by initiative may place on the ballot only measures that enact law). ↑

10. Cal. Const., art. II, § 8(d) ("An initiative measure embracing more than one subject may not be submitted to the electors or have any effect."); *Briggs v. Brown* (2017) 3 Cal.5th 808, 828 (the single-subject provision does not require that each of the provisions of a measure effectively interlock in a functional relationship; it is enough that the various provisions are reasonably related to a common theme or purpose, and the court accordingly has upheld initiative measures that fairly disclose a reasonable and common sense relationship among their various components in furtherance of a common purpose); *see also* Grodin et al., The California State Constitution 116–17 (G. Alan Tarr ed., 2d ed. 2016) (noting that the single-subject rule "has proved to be a toothless tiger" for initiatives); Carrillo, Duvernay & Stracener, California Constitutional Law: Popular Sovereignty (2017) 68 Hastings L. J. 731, 739 n.35 (describing "the single subject rule" as "largely ineffective"). ↑

11. See *Strauss v. Horton* (2009) 46 Cal.4th 364, 414 (stating the general premise that the initiative power may be used to amend but not revise the state constitution, and then spending many pages attempting to explain the distinction). ↑

12. *See, e.g.*, Carrillo et al., 68 Hastings L. J. at 738–40 (discussing lack of line-drawing methodology and inconsistent results in applying the amendment–revision analysis). ↑

13. *Legislature v. Eu* (1991) 54 Cal.3d 492; *Raven v. Deukmejian* (1990) 52 Cal.3d 336. ↑

14. *Legislature v. Eu* (1991) 54 Cal.3d 492, 506 (amendment–revision analysis has a dual aspect, requiring courts to examine both the quantitative and

qualitative effects of the measure on California's constitutional scheme, and substantial changes in either respect could amount to a revision). ↑

15. For a longer version of this critique of *Eu* and *Raven*, see Carrillo et al., 68 Hastings L. J. 731. ↑

16. The change addressed in *Raven* (and rejected as an impermissible revision) likely was smaller than the change in *Eu*, which permitted not only legislative term limits but a forty percent reduction of the legislature's budget. *Compare Raven v. Deukmejian* (1990) 52 Cal.3d 336, 350–56, *with Legislature v. Eu* (1991) 54 Cal.3d 492, 508–10. Indeed, *Strauss v. Horton* (2009) 46 Cal.4th 364, 408–09, which upheld a state initiative abolishing a right to "the designation of marriage" for same-sex couples, seemingly conflicts with *Raven* striking down an initiative for abolishing certain state substantive rights for criminal defendants. ↑

17. *Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 298. ↑

18. *Briggs v. Brown* (2017) 3 Cal.5th 808, 858 (explaining that "[d]eciding cases and managing dockets are quintessentially core judicial functions."). ↑

19. *Id.* at 859-60. ↑

20. Cal. Const., art. IV, §§ 1, 8(b), 10, 12. ↑

21. *Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 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). ↑

22. *Barlotti v. Lyons* (1920) 182 Cal. 575, 583; *Howard Jarvis Taxpayers Assn. v. Padilla* (2016) 62 Cal.4th 486, 498; *American Federation of Labor v. Eu* (1984) 36 Cal.3d 687, 694 and 697. ↑

23. Other commentators have used this *fourth branch* phrasing and concept.

See, e.g., Peter Schrag, The Fourth Branch of Government? You Bet. (2001) 41 Santa Clara L. Rev. 937. ↑

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

25. *People v. Bunn* (2002) 27 Cal.4th 1, 14; *Davis v. Municipal Court* (1988) 46 Cal.3d 64, 76 (each branch has always exercised all three kinds of powers). ↑

26. *Carmel Valley Fire Protection Dist. v. California* (2001) 25 Cal.4th 287, 299; *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 595. ↑

27. *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"). ↑