

Articles

California Constitutional Law: Popular Sovereignty

DAVID A. CARRILLO,* STEPHEN M. DUVERNAY,
AND BRANDON V. STRACENER**

In 1911, the California Constitution was amended to divide the state's legislative power by reserving to the electorate the powers of initiative, referendum, and recall. Most of the thinking to date on popular sovereignty in California, and about the initiative power particularly, has focused on either a specific application of direct democracy, or on its broad practical effects on the state. No authority has attempted to define the fundamental nature of popular sovereignty in California, nor to craft a complete doctrinal solution for resolving challenges to direct democracy acts. Those tasks are the purpose of this Article.

The Article considers two questions: First, how to classify the electorate's powers in the California state government, and second, how to balance those powers against those of the other branches of the state government when they come into conflict. Answering these questions is important because the courts regularly face the difficult prospect of striking down an electorate act, which is necessarily supported by a majority of the voters. Doing so without the best possible rationale risks delegitimizing a decision against the electorate, and weakens the judiciary's greatest power: its perceived impartiality. Yet no answer to either question can be found in the cases or commentary.

To answer those questions, this Article defines the powers of the people and the electorate, proposes that the electorate be classified as a legislative branch when using its legislative powers, and that the existing separation of powers analysis be adapted to include the electorate. The courts have developed an analysis that applies to one recurring problem in this area: categorizing electorate acts as revisions or amendments to the California Constitution. But that is not the only type of problem that the electorate can create with its legislative power; indeed, the separation of powers problem created by interbranch conflict is both distinct and more serious. Lacking a means to account for the electorate's power, courts adjudicating structural questions or conflicts between the electorate and the other branches of government have struggled to resolve those cases with the only available tool: the revision–amendment analysis. This Article proposes a solution to that problem.

* David A. Carrillo is a Lecturer in Residence and the Executive Director of the California Constitution Center at the University of California, Berkeley School of Law. He received B.A. (1991), J.D. (1995), LL.M. (2007), and J.S.D. (2011) degrees from the University of California, Berkeley.

** Stephen M. Duvernay and Brandon V. Stracener are senior research fellows with the California Constitution Center and attorneys in private practice.

The views expressed herein are solely those of the Authors. This Article received substantial editing contributions from our colleagues Megan J. Somogyi and Alexi Pfeffer-Gillett.

TABLE OF CONTENTS

INTRODUCTION.....	732
I. WHY POPULAR SOVEREIGNTY IS A CAUSE FOR CONCERN	735
II. THE INADEQUACY OF THE CURRENT QUANTITATIVE–QUALITATIVE ANALYSIS.....	738
III. DEFINING THE ELECTORATE’S ROLE IN CALIFORNIA GOVERNMENT.....	741
A. DESCRIBING THE ELECTORATE’S POWERS.....	741
B. DISTINGUISHING BETWEEN THE PEOPLE AND THE ELECTORATE AS POLITICAL ACTORS	743
C. CLASSIFYING THE ELECTORATE’S ROLE IN CALIFORNIA GOVERNMENT	747
D. APPLYING SEPARATION OF POWERS ANALYSIS TO THE ELECTORATE.....	751
1. <i>Primer on Separation of Powers Principles</i>	751
2. <i>Separation of Powers Principles Apply to the Electorate</i>	752
3. <i>Adapting Core Powers to Include Electorate Legislative Acts</i>	756
4. <i>Practical Application of the Proposed Analysis</i>	762
IV. DEFENDING APPLICATION OF CORE POWERS TO THE ELECTORATE.....	764
A. THE CORE POWERS ANALYSIS IMPROVES ON THE EXISTING ANALYSIS.....	764
B. JUDICIAL REVIEW OF ELECTORATE ACTS IS CONSISTENT WITH CALIFORNIA’S GOVERNMENTAL PLAN.....	767
C. JUDICIAL MANAGEMENT OF THE ELECTORATE IS NECESSARY AND PROPER	769
CONCLUSION	773

INTRODUCTION

No one has attempted to define the electorate as an actor in the California state government system in the one hundred plus years since the electorate recovered some legislative powers from the state legislature. Cases defining the powers and limitations of the other branches are legion, as are explanations of how to resolve conflicts between those branches. But the electorate generally is discussed in isolation, from the perspective of whether the electorate has acted within its constitutionally prescribed limits. Courts have principally analyzed the limits on the electorate’s powers in the context of whether to classify an initiative as a constitutional amendment or revision. That approach is

useful for electorate acts that do not infringe on the powers of the other branches. But that analysis is of little use when an electorate act affects the power of another branch of government.

The electorate and another branch are not in direct conflict in every initiative case. But when they are, the implications are profound. Cases have presented a direct conflict between the electorate and the judicial branch,¹ and between the electorate and the legislature.² Conflict on that level requires more than the ordinary analytical effort. A court presented with a challenge to a law has a serious task; when called upon to adjudicate a dispute between two branches of government, the stakes are even higher; and when it is an electorate act that creates an interbranch dispute, the situation is quite dire. The existing revision–amendment analysis, which focuses only on one aspect of the electorate’s power, is little aid to a court confronting a conflict between the electorate and another branch of government. That situation calls for a new, more comprehensive analysis that defines the electorate as a political actor and provides a test for resolving interbranch disputes involving the electorate.

This Article attempts to provide such a definition and test by considering two previously unaddressed, interrelated questions about the electorate’s power in California: How to classify the electorate in the state government structure, and, once the electorate’s role is defined, how best to enforce existing limits on the electorate’s exercise of its legislative power.³ The cases and literature have never defined the electorate. As a result, a number of fundamental questions remain unanswered. Is the electorate a part of the state government, subordinate to it, or a superior force? If the electorate is a part of the state government, to which branch does it belong—or is it its own branch?

Lacking a comprehensive understanding of the electorate and corresponding test for managing its powers is problematic because, like all powers in a government, the electorate can overstep its authority’s limits—particularly where those boundaries are ill-defined and poorly understood.⁴ Thus, having an institutional check on the electorate is just

1. *E.g.*, *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009), *abrogated on other grounds* by *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

2. *E.g.*, *Howard Jarvis Taxpayers Ass’n v. Padilla*, 363 P.3d 628 (Cal. 2016); *Legislature v. Eu*, 816 P.2d 1309 (Cal. 1991).

3. On the subject of one potential limit on direct democracy in California, see David A. Carrillo & Stephen M. Duvernay, *California Constitutional Law: The Guarantee Clause and California’s Republican Form of Government*, 62 UCLA L. REV. DISCOURSE 103 (2014).

4. The problem this Article considers—how to analyze separation of powers issues with the electorate as a branch—is no mere thought exercise. The initiatives in *Raven*, *Strauss*, *Eu*, and *Padilla*, are all examples of the electorate creating a separation of powers issue. *See generally Padilla*, 363 P.3d 628; *Strauss*, 207 P.3d 48; *Eu*, 816 P.2d 1309; *Raven*, 801 P.2d 1077. The fact that all of those cases posed grave constitutional questions shows the need for a solution to these problems. And the fact that this problem has arisen four times in recent history shows that it is not an outlier.

as important as it is for California's other branches of government. Something is needed to address the anomaly created by the electorate's significant legislative powers. Yet the existing California separation of powers analysis only considers adjusting the powers of the *elected* legislature, the executive, and the judiciary.

To fill these doctrinal gaps, this Article makes three proposals.⁵ First, the electorate should be viewed as a legislative branch of the state government when using its legislative powers. Second, when it acts in its legislative capacity the electorate should be included in the core powers analysis, to resolve challenges to electorate legislative acts that may impair the powers of another branch.⁶ And third, the task of restraining the electorate when necessary rests with the judiciary.⁷ This approach reconciles existing state constitutional doctrine with the electorate's role and harmonizes separation of powers jurisprudence with the electorate's direct democracy tools.⁸ An approach like this is necessary to maintain the balance of power in California government, because self-imposed sovereignty limitations are only as effective as the judicial review process makes them; in other words, giving effect to the voters' will requires enforcing the limits the people place on the exercise of that will.

In Part I, we discuss why popular sovereignty is a cause for concern. In Part II, we explain how current doctrine is inadequate to address this concern. In Part III, we define the electorate as a legislative branch. And in Part IV, we suggest that courts apply the core powers analysis to challenges to electorate legislative acts.

5. We think that a doctrinal solution like the one we propose is more plausible than a constitutional change, so we do not analyze an implausible constitutional amendment (or revision) solution.

6. On the California core powers analysis generally, see David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655 (2011).

7. One commentator has argued that there should be a legislative check on the initiative power. See Owen Tipps, Comment, *Separation of Powers and the California Initiative*, 36 GOLDEN GATE U. L. REV. 185, 212–14 (2006). This suggestion is made, more or less, in passing; the author does not detail the source and scope of such power. *Id.*

8. We should define some terms before proceeding. In this Article, the terms “popular sovereignty” and “direct democracy” are not used synonymously. Popular sovereignty is best used to describe the foundational principle of California government, where the people have reserved political power to themselves and delegated some powers to the branches of state government. Direct democracy describes either the general concept of a government directly controlled by the people, or refers to the institutional tools used by the people to effect that control. Similarly, here the “people” and the “electorate” have distinct meanings. The electorate (state citizens who can vote) has direct democracy powers when acting alone, while the “people” (the electorate and the legislature acting together) as a political actor has the greatest powers of revising the state charter and convening a convention. CAL. CONST. art. II, § 1 (“All political power is inherent in the people.”); CAL. GOV'T CODE § 100(a) (West 2016) (“The sovereignty of the state resides in the people thereof. . . .”). “The people, as a political body, consist of: (a) [c]itizens who are electors [and] (b) [c]itizens who are not electors.” *Id.* § 240. As a result, there is a practical distinction between the people and the electorate, because part of the people cannot vote. The “electorate” is “[t]he body of citizens who have the right to vote.” *Electorate*, BLACK'S LAW DICTIONARY (10th ed. 2014). Electors are distinguished from non-elector citizens by the ability to hold office and vote. CAL. GOV'T CODE § 274.

I. WHY POPULAR SOVEREIGNTY IS A CAUSE FOR CONCERN

California must concern itself with managing its electorate's power because (like any other political actor) if left to its own devices, the electorate can abuse its power. The inclusion of an electorate with legislative power in its state government means that California is neither a true republic nor a classical Greek democracy—instead, the state is a hybrid republic that combines elected representatives with powerful direct democracy institutions.⁹ But reserving some legislative power to the electorate does not mean that California avoids the inherent problems of divided government. On the contrary, the electorate's political capacity has deep separation of powers implications that, if ignored, have the potential to destabilize the state government.

The balance of power in a divided government is not naturally self-maintaining. Constant conflict between the branches is a design feature, not a defect, as it attempts to account for the natural tendency of power to concentrate in a single actor.¹⁰ As with the other institutions of government, direct democracy must be checked and balanced so that the electorate does not encroach upon the authority of the other branches of government or aggrandize its own power. This idea may seem counterintuitive at first, as the purpose of divided government is to prevent *government* tyranny. Preventing government oppression is always a concern, but surely if the great purpose of government is to protect its citizens, it must also prevent its citizens from oppressing *themselves*.¹¹ In California that means maintaining the republican features of the state government by cabining the electorate's powers within their bounds and preventing the electorate from usurping the powers constitutionally delegated to the other branches.¹²

9. MARK BALDASSARE & CHERYL KATZ, *THE COMING AGE OF DIRECT DEMOCRACY: CALIFORNIA'S RECALL AND BEYOND* 7 (2008) (“[A] hybrid democracy taking root and seemingly here to stay.”).

10. “[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department, the necessary constitutional means, and personal motives, to resist encroachments of the others.” *THE FEDERALIST* NO. 51, at 117 (James Madison) (J. & A. McLean eds., 1788). In a similar vein, the U.S. Supreme Court has explained that concern over “encroachment or aggrandizement of one branch at the expense of the other” requires “vigilance against the ‘hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power.’” *Mistretta v. United States*, 488 U.S. 361, 381–82 (1989) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

11. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* 20 (1998); see ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL* 67 (2007) (arguing that self-interested enactments by a popular majority, even if temporary, “systemically tend to enjoy a protection against subsequent repeal that impartial ones do not possess,” because such enactments will have a “core group of intensely interested defenders around to defend them from repeal” that impartial enactments lack). In the words of the Roman scholar Juvenal, “[S]ed quis custodiet ipsos custodes?” (commonly translated as, “Who watches the watchmen?”). Juvenal, *Satire VI*, in *JUVENAL AND PERSIUS* 82, 110 (G. G. Ramsay trans., 1928).

12. DENNIS C. MUELLER, *CONSTITUTIONAL DEMOCRACY* 56 (1996). Two potential issues on the subject of republicanism are whether direct democracy can violate the Guarantee Clause under Article 4,

It is true that, in some senses, “[n]o one represents people’s interests better than the people themselves.”¹³ And it may also be true that of all the possibilities, ultimate trust in governance is best placed in the people.¹⁴ But popular sovereignty is a qualified (not an inherent) good; like any other power in a government, it may evolve beyond its limits and come to dominate the other powers.¹⁵ By combining representative republican and direct democracy features, California has the potential to benefit from the best aspects of both systems—or to be paralyzed by the worst features of each. Improving judicial review of electorate acts will help prevent the latter result.

The exercise of popular sovereignty through the mechanisms of direct democracy is best viewed as a part of California’s constitutional system, rather than as an outside actor exercising extrinsic control. Direct democracy, as much as any other governmental institution, has the potential for despotism—its power must, therefore, be checked.¹⁶ In California, the best solution is to employ the existing, well-accepted, and well-developed power of the judiciary to arbitrate disputes between branches of government. The core principle of the American governmental system—the diffusion of power¹⁷—should apply equally to the initiative power. This same principle can be applied to maintain California’s hybrid government through the medium of judicial review.

An improved judicial review model is necessary because, by virtue of its majoritarian nature, direct democracy can potentially facilitate

section 4 of the federal Constitution, and whether state courts have an affirmative duty to enforce the Guarantee Clause against ballot initiatives that affect individual rights. *See generally* Carrillo & Duvernay, *supra* note 3 (rejecting those arguments).

13. MUELLER, *supra* note 12, at 95.

14. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 46, 68–73 (2009) (describing historical arguments on this point). Professor Dinan concludes that the evolution of popular sovereignty is “the product of a sustained confrontation with, and rejection of, Madison’s argument in favor of relying solely on representative institutions.” *Id.* at 95; *see* THOMAS E. CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 37 (1989).

15. *See* CAL. DEPT. OF STATE, *Reasons Why Senate Constitutional Amendment No. 22 Should Not Be Adopted*, in *BALLOT PAMPHLET ON PROPOSED AMENDMENTS TO THE CONSTITUTION OF THE STATE OF CALIFORNIA, WITH LEGISLATIVE REASONS FOR AND AGAINST THE ADOPTION THEREOF*, Sept. 1, 1911, 8, 8 (“[The initiative’s] tendency is to change the republican form of our government and head it towards democracy, and history teaches that democracies have universally ended in turbulence and disaster.”).

16. Russell J. Dalton, *Direct Democracy and Good Governance: Does It Matter?*, in *DIRECT DEMOCRACY’S IMPACT ON AMERICAN POLITICAL INSTITUTIONS* 149, 166 (Shaun Bowler & Amihai Glazer eds., 2008) (“Democracy is not designed to be efficient or effective, and direct democracy is no different.”); BALDASSARE & KATZ, *supra* note 9, at ix (“California’s recent experience illuminates the flaws of direct democracy—the limited checks and balances by other branches of government . . .”); *SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON* 98, 101 (Morton J. Frisch ed., 1985) (referring to a speech by Alexander Hamilton, June 18, 1787: “Men love power. . . . Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many. Both therefore ought to have power, that each may defend itself agst. the other.”).

17. CRONIN, *supra* note 14, at 21; *see also* THE FEDERALIST NO. 51, *supra* note 10, at 117–22 (James Madison).

adverse action against minority interest groups.¹⁸ Although the initiative process has been used to expand individual rights,¹⁹ the different weights placed on issues by different interest groups allow the initiative to have strong anti-minority effects.²⁰ One recent example is the debate over same-sex marriage, which featured an attempt by an electorate majority to reduce individual rights for a minority group.²¹ By drawing initiative results toward the median voter position on each issue, direct democracy naturally favors stability over expansion of individual rights, causing constitutional rights for minority groups to be adopted at a relatively slower rate.²² And so we have a double-edged sword: While it can be used to expand individual liberty, the initiative also presents a significant risk to vulnerable and disfavored minorities.²³

In the next Part, we show why the existing analysis is an imperfect tool for the task of reviewing challenges to initiatives.

18. Ronald Steiner, *Understanding the Prop 8 Litigation: The Scope of Direct Democracy and Role of Judicial Scrutiny*, 14 NEXUS 81, 86 (2009). One California study showed that “[o]n these minority-targeted initiatives, Latinos consistently lose out,” and that “Latinos, indeed, have much to worry about when issues that target their rights are decided via direct democracy.” Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. POL. 154, 171 (2002); see also ZOLTAN HAJNAL & HUGH LOUCH, ARE THERE WINNERS AND LOSERS? RACE, ETHNICITY, AND CALIFORNIA’S INITIATIVE PROCESS iv–viii (2001). A nationwide study concluded that initiatives to restrict civil rights pass more regularly than other types of initiatives. Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245, 251–61 (1997).

19. For example, in 1911—the same year the initiative process was adopted—an initiative amendment expanding suffrage to women was placed on the ballot. See Anna Marie Smith, *The Paradoxes of Popular Constitutionalism: Proposition 8 and Strauss v. Horton*, 45 U.S.F. L. REV. 517, 552 (2011).

20. John G. Matsusaka, *Direct Democracy and the Executive Branch*, in DIRECT DEMOCRACY’S IMPACT ON AMERICAN POLITICAL INSTITUTIONS, *supra* note 16, at 115, 119 (“The evidence is fairly strong that the initiative does in fact bring about policies favored by the majority.”); Amihai Glazer & Anthony McGann, *Direct Democracy and the Stability of State Policy*, in DIRECT DEMOCRACY’S IMPACT ON AMERICAN POLITICAL INSTITUTIONS, *supra* note 16, at 139, 147 (“The initiative works as a form of veto point, forcing policy to the position of the median voter on each dimension, and preventing the construction of logrolling coalitions that can challenge the status quo.”).

21. *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009).

22. Glazer & McGann, *supra* note 20, at 139. Similar to the current slow rate of adoption of individual rights for same-sex persons as a group, Switzerland denied suffrage to women until 1972; in noninitiative systems, the franchise could be extended in a legislative solution as part of a broader political compromise, while in the initiative system the change required approval from a majority of male voters to reduce their political power by expanding the electorate. The result is similar to the low rate of adoption of legislative term limits in noninitiative states in America, as both situations are governed by the principle that interest groups rarely vote to reduce their power voluntarily.

23. CRONIN, *supra* note 14, at 98 (“If we are to give occasional free rein to majority rule at the ballot box, we shall have to give additional consideration to protecting the rights of minorities.”); LAWRENCE LEDUC, THE POLITICS OF DIRECT DEMOCRACY: REFERENDUMS IN GLOBAL PERSPECTIVE 151 (2003) (arguing that when used to target vulnerable minorities, the initiative is a modern example of Madison’s tyranny of the majority).

II. THE INADEQUACY OF THE CURRENT QUANTITATIVE–QUALITATIVE ANALYSIS

The existing judicial approach to resolving conflicts presented by an electorate act, which considers the quantitative and qualitative effects of an initiative, has a fundamental defect: It fails to comprehensively define the electorate's powers, and so it cannot answer all the questions that can arise when considering electorate acts. This analysis suffices for disputes that only implicate the electorate's powers within its own sphere. But it is unsuited to resolving separation of powers questions that arise when the electorate uses its power against another branch. That issue has arisen in the past, and we will see it again. California constitutional law should define the electorate's powers.²⁴

To adjudicate disputes arising from the electorate's use of its powers, the California Supreme Court uses a two-part analysis. It asks whether a measure constitutes an amendment to the constitution (which can be enacted by initiative) or a revision (which cannot). This analysis evaluates both the quantity and quality of changes an initiative constitutional amendment would make.²⁵ An initiative is an impermissible revision if it changes an excessive number of words or articles in the constitution (an initiative measure's "quantitative effect"), or if it makes substantial changes to the state government, regardless of how many changes are made (its "qualitative effect").²⁶

This approach focuses on the distinction between amendments and revisions. While the electorate may amend the state constitution by initiative,²⁷ revisions—structural changes to the constitution—must be proposed either by a two-thirds majority of the legislature or by a constitutional convention, and then ratified by majority vote in a statewide election.²⁸ Other than the *procedural* requirements,²⁹ the California Constitution does place some *substantive* limits on initiatives,³⁰ but it

24. We acknowledge that judicial review is not a perfect solution, and rely on the principle that the perfect should not be the enemy of the good. Cf. M. de VOLTAIRE, LA BÉGUEULE, CONTE MORAL 3 (1772): "Dans ses écrits, un sàge Italien / Dit que le mieux est l'ennemi du bien."

25. *Legislature v. Eu*, 816 P.2d 1309, 1316–17 (Cal. 1991).

26. Bruce E. Cain et al., *Constitutional Change: Is It Too Easy to Amend Our State Constitution?*, in CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 279 (Bruce E. Cain & Roger G. Noll eds., 1995); see *infra* notes 35–36.

27. CAL. CONST. art. XVIII, § 3.

28. *Id.* §§ 1–2, 4.

29. See *id.* art. II, §§ 8, 10.

30. *Id.* § 12 ("No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect."); see *Strauss v. Horton*, 207 P.3d 48, 109 (Cal. 2009) ("During nearly 100 years since adoption of the statewide initiative process in California, a number of constitutional amendments have been adopted that impose some restrictions on the initiative process in this state (see Cal. Const., art. II, § 8, subs. (d), (e), (f) . . .").

provides no guidance on the distinction between an amendment and a revision. Consequently, judicial decisions applying the quantitative–qualitative analysis are the primary source for defining the limits of what the electorate can accomplish by initiative.³¹

The California Supreme Court has explained that “the revision provision is based on the principle that ‘comprehensive changes’ to the Constitution require more formality, discussion and deliberation than is available through the initiative process.”³² Most importantly, a revision requires participation by the legislature.³³ An initiative amendment that works too many changes will violate the quantitative element. But an initiative measure “need not involve widespread deletions, additions and amendments affecting a host of constitutional provisions” to constitute a qualitative revision: “even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision also.”³⁴

The quantitative–qualitative analysis has several problems. It lacks a reasoned methodology for line drawing. Given the difficulty of defining “too many” or “too significant” when distinguishing between revisions and amendments, the process is necessarily subjective and has the potential to generate arbitrary or inconsistent results.³⁵ The quantitative element is particularly susceptible to this effect, generating seemingly contradictory results.³⁶ We considered and rejected the possibility of working with the quantitative approach to solve separation of powers problems. It would be futile, given the inherent vagueness of *significance* as a standard and the unpredictability of how many changes may in the future be deemed too many.

31. See Cain et al., *supra* note 26, at 279.

32. Legislature v. Eu, 816 P.2d 1309, 1316 (Cal. 1991) (quoting Raven v. Deukmejian, 801 P.2d 1077, 1085–87 (Cal. 1990)); see Strauss, 207 P.3d at 97 (citing Eu, 816 P.2d at 1319).

33. CAL. CONST. art. XVIII, § 1.

34. Eu, 816 P.2d at 1316 (quoting Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1286 (Cal. 1978)).

35. There is an argument that defects in the quantitative approach can be remedied by applying the “single subject rule.” But the single subject rule is largely ineffective. Although “there is good reason to construe the [single subject] rule more stringently in the case of [initiatives], where the opportunities for amendment and compromise do not exist,” the single subject rule “has proved to be a toothless tiger” for initiatives. JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION 116–17 (G. Alan Tarr ed., 2d ed. 2016). The bigger problem is the fact that a quantitative challenge can be avoided under the present analysis by placing several propositions on the ballot to achieve what could not be done in a single initiative. Indeed, there is an argument that the electorate already has cumulatively revised the state constitution. Jonathan Zasloff, *Taking Politics Seriously: A Theory of California’s Separation of Powers*, 51 UCLA L. REV. 1079, 1121–22 (2004) (arguing that through the initiative process the electorate has “transformed . . . the basic structure” of state government).

36. Compare *McFadden v. Jordan*, 196 P.2d 787, 789–97, 799–800 (Cal. 1948) (invalidating measure adding 21,000 words to constitution and affecting fifteen of its twenty-five articles), with *Amador Valley Joint Union High Sch. Dist.*, 583 P.2d at 1286 (rejecting claim that changes to eight articles and thirty-seven sections was a quantitative violation).

Things are not much better on the qualitative side, where the test has led to seemingly inconsistent results. In *Strauss v. Horton*, for example, the California Supreme Court held that abolishing the state right of marriage by initiative constitutional amendment was not a qualitative revision of the state constitution—reasoning that the measure did “not have a substantial or, indeed, even a minimal effect on the governmental plan or framework of California.”³⁷ In *Raven v. Deukmejian*, on the other hand, the court found a qualitative violation where an initiative constitutional amendment abolished state substantive rights for criminal defendants because it altered the authority of state courts to independently interpret criminal law.³⁸ Divergent results like those in *Strauss* and *Raven* invite charges of hypocrisy. Worse, comparing the results in *Legislature v. Eu* (upholding legislative term limits and a forty percent reduction of the legislature’s budget) with *Raven* (rejecting an initiative that only affected judicial discretion) invites the conclusion that the courts will protect their interests but not those of other state government branches.³⁹ And it is difficult to reconcile *Raven*—which was decided on qualitative, not quantitative grounds—with *Strauss*, when both cases concern the power of the electorate to define individual constitutional rights.⁴⁰ Finally, by focusing solely on the revision–amendment division, the quantitative–qualitative analysis fails to define the nature of the initiative power. And it provides only half an answer when a court must measure an electorate act against the powers of another branch.

At least some of these issues can be avoided by including the electorate in the California core powers analysis when the electorate exercises its legislative power. This approach requires categorizing the electorate’s powers, which we discuss in the next Part. In the following Part, we show how the core powers analysis may be applied to electorate legislative acts, while retaining the quantitative–qualitative analysis for appropriate use cases.

37. *Strauss*, 207 P.3d at 62 (emphasis omitted).

38. *Raven v. Deukmejian*, 801 P.2d 1077, 1086–90 (Cal. 1990).

39. *Legislature v. Eu*, 816 P.2d 1309, 1318–19 (Cal. 1991). See Cain et al., *supra* note 26, at 279 (“One cannot help but wonder whether the court [in *Legislature v. Eu*] would have ruled the same way had [the electorate] limited judicial terms of office or cut the judiciary’s budget by a third or more.”); see also CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES 41 (Shaun Bowler et al. eds., 1998) (“Perhaps judges are more sensitive to intrusions on their own powers than on those of the coordinate branches of government.”).

40. *Strauss* also potentially conflicts with *Raven* because *Strauss* can be viewed as permitting the electorate to establish a rule of interpretation (regarding the scope of the state constitution’s equal protection provision), which *Raven* prohibited. Prospectively changing a definition certainly is within the electorate’s power, but acts that purport to direct judicial decisionmaking are not.

III. DEFINING THE ELECTORATE'S ROLE IN CALIFORNIA GOVERNMENT

In California, the people and the electorate are distinct political entities with different powers. In the separation of powers context, there are several possible ways to view the people's reserved sovereignty:

- The people could be a fourth branch of the state government.
- The state could have one legislative branch with two subdivisions, the legislature and the electorate, as the electorate and the legislature share the legislative power.⁴¹
- The people could be something else entirely, outside the separation of powers analysis applicable to branches of government.

The "people" exist and exercise their powers in two degrees. The people's powers depend on the nature of the political act in question. Consequently, how the people should be categorized for separation of powers purposes also depends on the political act in question.

A. DESCRIBING THE ELECTORATE'S POWERS

The people of the state of California retained ultimate sovereignty when creating the state government.⁴² Article 2, section I of the state constitution, which has been in the state charter continuously since 1849, provides: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."⁴³ And since 1911, the electorate has held the power of enacting statutes and constitutional amendments by popular initiative.⁴⁴

41. In California, "the power to legislate is shared by the Legislature and the electorate through the initiative process (CAL. CONST. art. IV, § 1) . . ." Prof'l Eng'rs in Cal. Gov't v. Kempton, 155 P.3d 226, 240 (Cal. 2007); see also Bldg. Indus. Ass'n v. City of Camarillo, 718 P.2d 68, 74 (Cal. 1986); BALDASSARE & KATZ, *supra* note 9, at 13 (discussing the "parallel legislature" of governing by initiative") (internal citation omitted); CRONIN, *supra* note 14, at 34, 219.

42. For definitions of the terms "popular sovereignty," "direct democracy," the "people," and the "electorate" as used in this Article, see *supra* text at note 8.

43. CAL. CONST. art. II, § 1.

44. *Id.* art. XVIII, § 3; *Associated Home Builders*, 557 P.2d at 477. In *Associated Home Builders*, the California Supreme Court set forth the pedigree of the state's mechanisms of direct democracy:

The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it "the duty of the courts to jealously guard the right of the people," the courts have described the initiative and referendum as articulating "one of the most precious rights of our democratic process." "It has long been our judicial policy to apply a liberal construction to this power wherever it is challenged in order that the right be not improperly annulled. If doubts can reasonably be resolved in favor of the use of this reserve power, courts will preserve it."

Id. (quoting Martin v. Smith, 176 Cal. App. 2d 115, 117 (1959); Merrynne v. Acker, 189 Cal. App. 2d 558, 563-64 (1961) (internal footnotes omitted) (internal citations omitted) (alterations omitted)).

But the people's powers of alteration and reform, and the electorate's direct democracy powers, are not coextensive. The California electorate has several direct democracy tools. The initiative permits the electorate to place statutes and constitutional amendments on the ballot by petition and to enact such proposals into law by majority vote.⁴⁵ This power is held by the statewide electorate, and it cannot be exercised by a local community (such as a county or city) to enact statewide legislation.⁴⁶ Only the electorate may amend the state constitution, and only through the initiative process; revisions require the legislature's participation, either through submitting a proposed revision to the electorate directly or by convening a constitutional convention.⁴⁷ The referendum is the electorate's power to approve or reject statutes passed by the legislature.⁴⁸ The recall is the electorate's power to remove an elected official from office.⁴⁹ All three direct democracy tools were placed on the ballot by the state legislature as senate constitutional amendments ("SCA 22" and "SCA 23") and were enacted in a special election on October 10, 1911, as Proposition 7 (initiative and referendum) and Proposition 8 (recall).⁵⁰

45. The initiative power is defined by article 2, section 8(a) of the California Constitution: "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." CAL. CONST. art. II, § 8(a); *see also* TRACY M. GORDON, *THE LOCAL INITIATIVE IN CALIFORNIA* 1 (2004); MUELLER, *supra* note 12, at 178. Initially, California had both a direct citizens' initiative and an indirect legislative initiative, but in 1965, the Constitution Revision Commission recommended that the indirect initiative process be eliminated due to disuse, and in 1966 the electorate abolished the indirect process, in part due to its lengthy pre-election circulation period. KEVIN SHELLEY, *A HISTORY OF CALIFORNIA INITIATIVES* 3 (2002); BALDASSARE & KATZ, *supra* note 9, at 10.

46. *City of Malibu v. Cal. Coastal Comm'n*, 18 Cal. Rptr. 3d 40, 48 (Cal. Ct. App. 2004) ("Good governance cannot permit local voters to override a state decision with a local referendum. . . . [W]hether legislative or administrative, to permit local voters to overturn state enactments would upend our governmental structure and invite chaos." (citations omitted)); *see also* *Jahr v. Casebeer*, 83 Cal. Rptr. 2d 172, 176-78 (Cal. Ct. App. 1999) (discussing state preemption and limits on local referenda). Local governments may provide for local initiatives. The Separation of Powers Clause in the California Constitution is inapplicable to government below the state level. *Strumsky v. San Diego Cty. Emps. Ret. Ass'n*, 520 P.2d 29, 34 (Cal. 1974).

47. CAL. CONST. art. XVIII, §§ 1-3; Cain et al., *supra* note 26, at 279.

48. The referendum power is defined by article 2, section 9(a): "The referendum is the power of the electors to approve or reject statutes or parts of statutes except urgency statutes, statutes calling elections, and statutes providing for tax levies or appropriations for usual current expenses of the State." CAL. CONST. art. II, § 9(a); *see also* GORDON, *supra* note 45, at 1; MUELLER, *supra* note 12, at 177. On the distinction between the initiative and referendum powers, *see* *Vandermost v. Bowen*, 269 P.3d 446, 449 n.1 (Cal. 2012).

49. The recall power is defined by article 2, section 13: "Recall is the power of the electors to remove an elective officer." CAL. CONST. art. II, § 13; *see also* GORDON, *supra* note 45, at 1. The electorate attempted to recall sitting governors thirty-two times between 1911 and 2003, but the recall of Governor Gray Davis was the first successful attempt in the state, and only the second time that the governor of any state had ever been recalled. BALDASSARE & KATZ, *supra* note 9, at 11. The first ever successful recall of a state governor was North Dakota Governor Lynn Frazier in 1921. *Id.*

50. BALDASSARE & KATZ, *supra* note 9, at 9. In 1911, article 18, section 1 remained in its original form from the 1879 constitution, which provided in part:

B. DISTINGUISHING BETWEEN THE PEOPLE AND THE ELECTORATE AS POLITICAL ACTORS

The State of California, while being an inseparable part of the United States,⁵¹ still remains a sovereign state.⁵² Sovereignty is the supreme political power that governs the society that constitutes the state.⁵³ Within this state, sovereignty resides in the people.⁵⁴

The text of the state constitution distinguishes between two kinds of popular sovereignty powers: between the greater political power of the people and the legislative powers of the electorate as a branch.⁵⁵ Under article 2 section 1, only “the people” (not the electorate) 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.”⁵⁶

The existing constitutional structure provides two avenues for the people to exercise their power: calling a convention, and enacting a revision. Both require the electorate and the legislature to act together.⁵⁷ This political power was used in the 1849 and 1879 constitutional

Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if two-thirds of all the members elected to each of the two Houses shall vote in favor thereof . . . it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people If the people shall approve and ratify such amendment or amendments . . . by a majority of the qualified electors voting thereon, such amendment or amendments shall become a part of this Constitution.

CAL. CONST. art. XVIII, § 1 (1879).

51. CAL. CONST. art. III, § 1.

52. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (observing that it is incontestable that the Constitution established a system of “dual sovereignty”); *Martin v. Hunter’s Lessee*, 14 U.S. 304, 325 (1816) (“[I]t is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.”); *Moore v. Smaw*, 17 Cal. 199, 218 (1861); *People v. Coleman*, 4 Cal. 46, 49 (1854) (“[E]ach State is supreme within its own sphere, as an independent sovereignty.”); *see also* THE FEDERALIST No. 39, at 197 (James Madison) (Ian Shapiro ed., 1992) (noting that although the states surrendered many of their powers to the federal government, they retained “a residuary and inviolable sovereignty”).

53. *Gilmer v. Lime Point*, 18 Cal. 229, 250 (1861); *Moore*, 17 Cal. at 218.

54. CAL. CONST. art. II, § 1 (“All political power is inherent in the people.”); CAL. GOV’T CODE § 100(a) (West 2016) (“The sovereignty of the state resides in the people thereof”). “The people, as a political body, consist of: (a) [c]itizens who are electors [and] (b) [c]itizens who are not electors.” *Id.* § 240. Electors are distinguished from non-electors only by the ability to hold office and vote. *Id.* § 274. As a result, there is a practical distinction between the people and the electorate, because part of the people cannot vote. The “electorate” is “[t]he body of citizens who have the right to vote.” *Electorate*, BLACK’S LAW DICTIONARY (10th ed. 2014). But the more important distinction, for our present purpose, lies in the degree of power necessary to perform a political act.

55. For further discussion of the degrees of the electorate’s powers, see Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1191–96 (1998).

56. *Cf.* Smith, *supra* note 19, at 539 (discussing Bruce Ackerman’s theory of “higher lawmaking” that pertains exclusively to constitutional founding and major transformations in the existing constitutional structure”).

57. *See* sources cited *infra* at note 60 and accompanying text.

conventions, and again when establishing the Constitution Revision Commissions of 1930, 1947, 1962, and 1993. And there is a distinction in the scope of the political power when proposing a revision or calling a convention. While a revision is limited to the terms proposed by the legislature, the constitution places no substantive limits on a convention.⁵⁸

The “people” in this context refers to the electorate acting with the legislature. Only the *people* have the power to alter or reform the state government.⁵⁹ Neither the legislature nor the electorate acting alone may revise the state constitution or call a convention; both acts may be done only by the two acting in concert.⁶⁰ And the state constitution’s use of different terms to describe distinct acts must be significant. The voters, then, are not the people. If reforming or revising the state government is a power of the people’s political power, and if it requires a joint action by the electorate and their elected representatives to do those things, then the electorate and the legislature acting together, or the convention they call, must be the people.⁶¹ That combination—the electorate and the legislature—is a greater degree of power than the electorate’s alone: acts requiring the full measure of the people’s sovereignty. This is the people’s power.

The electorate holds only limited powers as compared with the people.⁶² The post-1911 California Constitution divides the state’s legislative power between the electorate and the elected legislature.⁶³ Enacting an initiative statute and an initiative constitutional amendment

58. See *Livermore v. Waite*, 36 P. 424, 426 (Cal. 1894) (“The character and extent of a constitution that may be framed by that body [a constitutional convention] is freed from any limitations other than those contained in the constitution of the United States.”).

59. CAL. CONST. art. II, § 1 (“All political power is inherent in the people. . . . and they have the right to alter or reform it when the public good may require.”).

60. *Id.* art. XVIII, § 1 (“The Legislature . . . may propose an amendment or revision of the Constitution”); *id.* § 2 (“The Legislature . . . may submit at a general election the question whether to call a convention to revise the Constitution.”); *id.* § 4 (“A proposed amendment or revision shall be submitted to the electors”).

61. See JAMES MADISON, THE REPORT OF 1800 (1800) (one meaning of “states” like California as political actors is “the people composing those political societies, in their highest sovereign capacity.”).

62. Cases broadly describe the 1911 amendment creating the initiative and referendum as “[d]rafted in light of the theory that all power of government ultimately resides in the people” and that “the amendment speaks of initiative and referendum, not as a right granted the people, but as a power reserved by them.” *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976). But the actual language used is more specific. Article 2, section 1 vests sovereignty in “the people,” while article 2, sections 8(a), 9(a), and article 18, section 3 all vest the initiative and referendum power in “the electors”—a significant textual difference. Cal. Const. art. II, § 1; *Id.* §§ 8(a), 9(a); *Id.* art. 18, § 3.

63. In California, “the power to legislate is shared by the Legislature and the electorate through the initiative process (CAL. CONST. art. IV, § 1).” *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 240 (Cal. 2007); *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 165 (Cal. 1971) (“[T]he entire law-making authority of the state, except the people’s right of initiative and referendum, is vested in the Legislature”); see also BALDASSARE & KATZ, *supra* note 9, at 13 (“As direct democracy has become an increasingly prevalent force in state policy making, it has shifted power away from elected representatives and toward the ‘parallel legislature’ of governing by initiative.” (internal citation omitted)).

are expressly within the power of the *electorate* (state citizens who can vote) acting alone.⁶⁴ This is the electorate's power.

The concept of discrete levels of popular power is supported by judicial decisions discussing the powers in those terms. The California Supreme Court has observed that “the entire sovereignty of the people is represented in the convention.”⁶⁵ The people's organic power of formation or reformation lies in the convention or revision act: “[T]he entire sovereignty of the people is represented in the convention. The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constitution of the United States.”⁶⁶ The electorate cannot call a convention on its own power. To do that, the whole of the state's legislative power is required: Article 18 section 2 provides that a convention to revise the state constitution may only be called after a two-thirds vote of the state legislature and after the delegates for the convention are selected from the electorate.⁶⁷ There are two consequences that flow from the textual distinction between the people's and the electorate's powers. The *people* (the electorate and the legislature) can exercise political power in a convention or by revising the constitution, or exercise only legislative powers when acting alone as the *electorate*.

In contrast, the initiative is a *subset* of the whole legislative power, which is itself a subset of the whole political power.⁶⁸ In addition to prescribing procedures for its use,⁶⁹ the state constitution places significant substantive limits on the exercise of the initiative power,⁷⁰ provisions that would hardly be effective if the *people* used their full political power in the initiative process. Instead, the initiative better resembles one of the constituent elements of the whole political

64. CAL. CONST. art. II, § 8(a) (“The initiative is the power of the electors . . .”); *id.* § 9(a) (“The referendum is the power of the electors . . .”). See *supra* text at notes 45 and 54.

65. *Livermore v. Waite*, 36 P. 424, 426 (Cal. 1894).

66. *Id.* The California Supreme Court has returned to *Livermore's* foundational statement on several occasions. See *Strauss*, 207 P.3d at 132; *Legislature v. Eu*, 816 P.2d 1309, 1338 (Cal. 1991); *McFadden v. Jordan*, 196 P.2d 787, 789 (Cal. 1948). For an argument that this statement is dicta (because *Livermore* was decided before the 1911 direct-democracy amendments), see Joseph R. Grodin, *Popular Sovereignty and Its Limits: Lessons for a Constitutional Convention in California*, 44 LOY. L.A. L. REV. 623, 634 (2011).

67. CAL. CONST. art. XVIII, §§ 1–3; *Strauss v. Horton*, 207 P.3d 48, 79 (Cal. 2009).

68. CAL. CONST. art. IV, § 1 (“The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.”).

69. *Id.* art. II, §§ 8, 10.

70. *Id.* § 12 (“No amendment to the Constitution, and no statute proposed to the electors by the Legislature or by initiative, that names any individual to hold any office, or names or identifies any private corporation to perform any function or to have any power or duty, may be submitted to the electors or have any effect.”); see also *Strauss*, 207 P.3d at 109 (“During the nearly 100 years since adoption of the statewide initiative process in California, a number of constitutional amendments have been adopted that impose some restrictions on the initiative process in this state . . .” (internal citation omitted)).

power—the legislative power.⁷¹ Another distinction that proves the principle is the fact that, although the provisions of the constitution are binding on future legislatures and electorates alike, the electorate cannot restrict its own future initiative power through the initiative process. Only the people could do that.⁷²

At times, the Supreme Court of California has described the initiative power in misleadingly limited terms: a mere “legislative power” that would otherwise fall under the elected legislature and remain subject to the same limitations as legislatively enacted statutes.⁷³ But the state constitution does not limit the subject matter of initiative statutes.⁷⁴ And a fundamental aspect of the initiative power is its ability to override the state legislature, making the electorate’s policy decision the final one:

The people’s reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures, but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus, through exercise of the initiative power the people *may* bind future legislative bodies other than the people themselves.⁷⁵

And of course the electorate has a veto over acts of the legislature through the referendum power. As a result, arguably *more than half* of the state’s legislative power rests with the voters.

71. *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 165 (Cal. 1971) (state’s entire lawmaking authority, excepting initiative and referendum powers, vested in legislature). The legislature’s powers are broader than the electorate’s, because the 1911 reforms restored to the electorate only a shared piece of the whole legislative power delegated to the legislature in the 1849 state constitution. *Howard Jarvis Taxpayers Ass’n v. Padilla*, 363 P.3d 628, 646 (Cal. 2016); *see also* *Legislature v. Deukmejian*, 669 P.2d 17 (Cal. 1983) (electorate’s legislative power through the statutory initiative is coextensive with, not greater than, the legislature’s power). In general, the electorate may not enact a statute that the legislature itself could not enact. *Bldg. Indus. Ass’n v. City of Camarillo*, 718 P.2d 68 (Cal. 1986); *Deukmejian*, 669 P.2d 17. Measures adopted by the electorate through the initiative process are subject to the ordinary rules and canons of statutory construction. *Evangelatos v. Super. Ct.*, 753 P.2d 585 (Cal. 1988).

72. *Rossi v. Brown*, 889 P.2d 557, 574 (Cal. 1995); *see also* *Cty. of Los Angeles v. State*, 729 P.2d 202, 209 n.9 (Cal. 1987) (“Whether a constitutional provision which requires a supermajority vote to enact substantive legislation, as opposed to funding the program, may be validly enacted as a Constitutional amendment rather than through revision of the Constitution is an open question.” (citing *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1289 (Cal. 1978))).

73. *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1364 (Cal. 1991); *see* *DeVita v. Cty. of Napa*, 889 P.2d 1019, 1026 (Cal. 1995) (explaining that to the extent that the initiative is the constitutional power of the electors to propose statutes and to adopt or reject them, it is generally coextensive with the legislature’s power to enact statutes). *See* note 71.

74. *Santa Clara Cty. Local Transp. Auth. v. Guardino*, 902 P.2d 225, 246 (Cal. 1995). But note that the initiative is limited to legislative acts. *Am. Fed’n of Labor v. Eu*, 686 P.2d 609, 627 (Cal. 1984) (“[A]n initiative which seeks to do something other than enact a statute—which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body—is not within the initiative power reserved by the people.”).

75. *Rossi*, 889 P.2d at 574 (internal citations omitted). This passage describes the electorate, as we define it.

It is true that the electorate and the legislature can work together and *not* exercise the people's sovereignty. The legislature may propose amendments for adoption by the electorate.⁷⁶ That has no effect on this analysis, because (unlike in the revision and convention context) there is no constitutional or doctrinal distinction between statutes enacted by the legislature, initiative statutes adopted by the electorate, legislative constitutional amendments, and initiative constitutional amendments—courts review all of these under the same standard.⁷⁷ And the same presumption of validity applies to all legislative acts, whether carried out by the electorate or the legislature.⁷⁸ Accordingly, there is neither a functional nor a substantive difference between those acts in this context.⁷⁹ But, as previously discussed, such distinctions *do* exist between those acts and a constitutional revision or constitutional convention.

C. CLASSIFYING THE ELECTORATE'S ROLE IN CALIFORNIA GOVERNMENT

The powers of the California state government are legislative, executive, and judicial, and each branch of the state government exercises one of those powers.⁸⁰ The California Constitution divides the state's legislative powers, granting some to the legislature and reserving some to the electorate.⁸¹ The electorate only acts through its direct democracy powers, and so it only performs legislative acts. Consequently, there is no reason to classify the electorate as anything other than a

76. CAL. CONST. art. XVIII, § 1.

77. *People v. Super. Ct. (Romero)*, 917 P.2d 628, 639–40 (Cal. 1996) (analyzing two nearly identical three strikes provisions, one legislatively enacted and one initiative measure, to determine legislative and electorate intent); *Bowens v. Super. Ct.*, 820 P.2d 600, 606–07 (Cal. 1991) (“[The Court’s] primary task in interpreting constitutional provisions adopted by initiative is to determine and give effect to the intent of the voters.”); *Evangelatos v. Super. Ct.*, 753 P.2d 585, 601 (Cal. 1988) (“[I]nitiative measures are subject to the ordinary rules and canons of statutory construction.”); *Mosk v. Super. Ct.*, 601 P.2d 1030, 1045 (Cal. 1979), *superseded by* *Adams v. Comm’n on Judicial Performance*, 882 P.2d 358, 370 (Cal. 1994).

78. *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 164–65 (Cal. 1971) (discussing act by legislature); *Brosnahan v. Brown*, 651 P.2d 274, 276 (Cal. 1982) (discussing act by electorate). It is possible that a separation of powers issue could arise from an amendment proposed by the legislature and adopted by the electorate. But that does not involve the full sovereignty of the people. Instead, it presents only the ordinary circumstance of the legislative branch invading the power of another branch of government. Courts should not give special deference to these acts merely because both parts of the state's legislative power act together. A contrary rule would void the amendment-revision distinction entirely. This illustrates the central difficulty with distinguishing between amendments and revisions, because unlike the distinction between an initiative statute and an initiative amendment, the only difference between a legislatively proposed amendment and revision appears to be the title. *Compare* CAL. CONST. art. II, § 8(b), *with* CAL. CONST. art. XVIII, § 1. Yet if we are to maintain a distinction between amendments and revisions, courts must give effect to even these small differences.

79. Obviously, statutes and constitutional provisions are different things. The point is that here, as exercises of power, they are indistinguishable.

80. CAL. CONST. art. III, § 3; *O'Brien v. Jones*, 999 P.2d 95, 111 (Cal. 2000) (Kennard, J., dissenting).

81. The initiative and referendum are plainly legislative powers: “The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum.” CAL. CONST. art. IV, § 1.

legislative branch of the state government.⁸² It necessarily follows that (for separation of powers purposes) when acting alone in its legislative capacity the electorate operates as an independent branch of the state government.⁸³

In its legislative capacity, the electorate has all the hallmarks of a branch of the state government. The electorate holds its powers not by delegation, but from the state constitution. It has discretion in the exercise of its powers, but it does not function entirely independently of the other branches—for example, the legislature can regulate initiative election processes.⁸⁴ Yet unlike the other branches of state government (which have both enumerated and inherent powers), the electorate has no unenumerated powers. Other than the ability to revise the constitution with the legislature (as the people), the electorate has no other branch functions.⁸⁵

The electorate has four powers acting alone: initiative statute, initiative amendment, referendum, and recall. Those are all legislative acts. The initiative is the power to enact laws or constitutional amendments, the referendum is the power to reverse a legislative action, and the recall is essentially a summary exercise by the electorate of the legislative power of impeachment. The electorate has no executive or judicial functions.⁸⁶

82. There is a difficult conceptual question here: Is the electorate one of two legislative branches, or are the electorate and the legislature both parts of the same legislative branch? The electorate and the legislature sometimes act separately, in competition; sometimes they act in concert. We resolve this dilemma by avoiding it: We think the best view is that both (or neither) are true. The electorate may at times act as part of a single legislative branch, as when it combines with the legislature to enact revisions; in that circumstance viewing the electorate as a distinct branch is untenable. But when it acts independently, the electorate competes with the legislature and the other branches, and viewing it as its own branch is appropriate.

83. See *Strauss v. Horton*, 207 P.3d 48, 123 (Cal. 2009) (Kennard, J., concurring) (“[A]lteration of existing statutory and constitutional provisions—by addition, deletion, or modification—is a fundamental legislative power that the people may exercise through the initiative process.”).

84. CAL. CONST. art. II, § 10(e). But the legislature may not through regulation limit or restrict that power. *Ortiz v. Madera Cty. Bd. of Supervisors*, 166 Cal. Rptr. 100, 104 (Cal. Ct. App. 1980) (“Legislative power to adopt procedural regulations does not include the power to enact substantive measures which would extend, restrict or reduce the scope of a referendum.”); *Hill v. Bd. of Supervisors*, 167 P. 514, 515 (Cal. 1917).

85. We distinguish between rights held by members of the electorate as individuals (such as the right to vote) and powers held by the electorate collectively (such as the initiative). In any event, as discussed in Part III.B, we distinguish between the people and the electorate as political actors.

86. One publication opines, without elaboration, that through the initiative process “the electorate can exercise many of the legislative and executive powers traditionally reserved for” the legislature and executive. Jessica A. Levinson & Robert M. Stern, *Ballot Box Budgeting in California: The Bane of the Golden State or an Overstated Problem?*, 37 HASTINGS CONST. L.Q. 689, 693 (2010). We find no support for any electorate executive powers. Although it may be true that by enacting an individual initiative measure the electorate can take actions, some of which ordinarily would be done by the legislature or the governor (or the two in combination), the fundamental nature of the initiative power is to enact laws, which is a legislative function. There is no textual basis for the electorate as a body to exercise any executive functions, through the initiative or otherwise.

Just as a state constitution generally is a restriction on the powers of a legislature,⁸⁷ so too the California Constitution is a restriction on the legislative powers of the electorate.⁸⁸ After a constitutional convention and adoption, going forward the electorate's powers are limited by the people's formative action: "Even under the most liberal interpretation . . . the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body."⁸⁹ When the legislature was created by the 1849 constitutional convention, the people conveyed to it the full breadth of their sovereign legislative powers, and in adopting the initiative power in 1911 they restored to themselves only a shared piece of that power.⁹⁰ This in turn requires the judiciary to follow the people's expressed original intention that limits be placed on the electorate's powers going forward, because the judiciary's duty in upholding the state constitution is to effectuate the intent of the drafters.⁹¹

87. To that end, the California Supreme Court has explained that:

[T]he Constitution of this State is not to be considered as a grant of power, but rather as a restriction upon the powers of the Legislature; and that it is competent for the Legislature to exercise all powers not forbidden by the Constitution of the State, or delegated to the General Government, or prohibited by the Constitution of the United States.

People v. Coleman, 4 Cal. 46, 49 (1854); *see* *Methodist Hosp. of Sacramento v. Saylor*, 488 P.2d 161, 164 (Cal. 1971) ("Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature.").

88. The electorate acts as a legislative entity when it acts through its initiative power. *Prof'l Eng'rs in Cal. Gov't v. Kempton*, 155 P.3d 226, 244 (Cal. 2007). There are only two express constitutional limitations on the electorate's power: Article 2, section 8(d) bars an initiative on more than one subject, and article 2, section 12 bars an initiative that names any individual to any office or names any corporation to any power or duty. CAL. CONST. art. II, §§ 8(d), 12. The courts have also recognized several important implied limitations. Although article 18, section 3 of the state constitution expressly declares that it can be amended by initiative, the initiative cannot be used to revise the constitution. The initiative power cannot be used to order the legislature to adopt a resolution because of the implicit limitation in article 2, section 8(a) restricting it to the adoption of statutes and constitutional amendments. *See* *Am. Fed'n of Labor v. Eu*, 686 P.2d 609, 623 (Cal. 1984). It cannot be used to regulate the legislature's internal operations, because that conflicts with the express grant of power in article 4, section 7(a) to the legislature to regulate its internal operations. *People's Advocate, Inc. v. Super. Ct.*, 226 Cal. Rptr. 640, 643-46 (Cal. Ct. App. 1986). And because article 21 expressly directs the legislature to reapportion legislative districts, the initiative impliedly cannot be used to achieve a second redistricting in the same decade. *Legislature v. Deukmejian*, 669 P.2d 17, 27 (Cal. 1983).

89. *Am. Fed'n of Labor*, 686 P.2d at 623.

90. *Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628, 646 (Cal. 2016).

91. *Strauss v. Horton*, 207 P.3d 48, 62-63 (Cal. 2009) (observing courts' traditional responsibility to faithfully enforce all of the provisions of the California Constitution). Ordinary rules of construction and interpretation applicable to statutes are equally applicable in interpreting constitutional provisions. *Winchester v. Mabury*, 55 P. 393, 394-95 (Cal. 1898). "When interpreting a provision of our state Constitution, our aim is 'to determine and effectuate the intent of those who enacted the constitutional provision at issue.'" *Bighorn-Desert View Water Agency v. Verjil*, 138 P.3d 220, 223-24 (Cal. 2006) (internal citation omitted). True, the people (the electorate acting with the legislature) later changed the state government by enacting the direct democracy reforms and creating the electorate as a political actor. But those new things are still subject to the original limitations, and to the limits contained within the direct democracy tools themselves.

To be clear, the electorate should only be considered a branch for separation of powers purposes in the specific context of challenges to legislative acts by the electorate when they impair the powers of another branch. The electorate is sometimes loosely called a fourth branch of California government, and some may characterize the approach proposed here as an endorsement of that concept.⁹² Not so. “[T]here is no fourth branch of the government recognized by the third article of the Constitution, which is represented by the people”⁹³ This is so because article 3, section 3 provides: “The powers of state government are legislative, executive, and judicial.”⁹⁴ Yet the lack of an explicit reference to the electorate neither makes it a fourth branch, nor precludes the electorate from being considered a branch of state government for separation of powers purposes. Instead, the legislative power of the state is shared by two actors: “The legislative power may be exercised by either of two legislative bodies, inasmuch as Article IV, section 1 declares that it is ‘vested’ in the Legislature and also ‘reserve[d]’ to the people acting through initiative, specifically, initiative statute.”⁹⁵ The electorate is properly viewed as a legislative power in state government for core powers purposes, but not *generally* so.

Because the electorate shares the legislative power of the state with the elected legislature, when acting in its legislative capacity the electorate should be viewed as a branch of the state government with legislative power, and the core powers analysis should apply to electorate legislative acts. The next Subpart will explain how separation of powers

92. The “fourth branch” phrase is common in political science parlance. *See, e.g.*, BALDASSARE & KATZ, *supra* note 9, at 13 (“The initiative process has now become a virtual ‘fourth and new branch of government’ in California” (internal citation omitted)); JOHN M. ALLSWANG, *THE INITIATIVE AND REFERENDUM IN CALIFORNIA, 1898–1998* 1 (2000) (stating that the initiative is “in effect a ‘fourth branch’ of state government”). *But see* GORDON, *supra* note 45, at viii (acknowledging the phrase’s common usage, but challenging its accuracy).

93. *People v. Langdon*, 8 Cal. 1, 15–16 (1857). Note that this broad phrasing in *People v. Langdon* did not concern the question of whether the electorate should be included in a separation of powers analysis. In *Langdon*, the dispute was over whether the governor or the legislature held the appointment power. *Id.* The contention was essentially a version of a Tenth Amendment argument, that either the legislature was encroaching on the executive, or if not, then it must be encroaching on a power held by the people—that is what the court refers to as a “fourth branch,” the people’s reserved sovereignty. *Id.* Because *Langdon* predated both the 1879 constitution and, more importantly, the 1911 direct democracy amendments, it has little to say on the electorate’s role.

94. CAL. CONST. art. III, § 3.

95. *Hotel Emps. & Rest. Emps. Int’l Union v. Davis*, 981 P.2d 990, 1002 (Cal. 1999); *see* CRONIN, *supra* note 14:

The initiative and referendum merely reserve to the people a certain share of the legislative power. Government is still divided into legislative, executive, and judicial departments, and their duties are still discharged by representatives selected by the people. There remains, in effect, only one legislative department, but now with two subdivisions.

Id. at 34–35.

principles can be applied to the electorate, and how that approach is superior to the existing analysis.

D. APPLYING SEPARATION OF POWERS ANALYSIS TO THE ELECTORATE

I. *Primer on Separation of Powers Principles*

Basic separation of powers principles are enshrined in article III, section 3 of the state constitution, which provides that “[t]he 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.”⁹⁶ The “primary purpose of the separation-of-powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government.”⁹⁷

California’s separation of powers doctrine (called the core powers analysis) “recognizes that the three branches of government are interdependent, and it permits actions of one branch that may ‘significantly affect those of another branch.’”⁹⁸ “[A]lthough the state constitution ostensibly requires a system of three largely separate powers, the state separation of powers doctrine does not create an absolute or rigid division of functions; instead the California view assumes that there will be some mutual oversight and influence between the branches.”⁹⁹ The separation of powers doctrine does not “prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch.”¹⁰⁰

Despite the intended interaction of the branches, “the state constitution vests each branch with certain core powers that cannot be usurped by another branch.”¹⁰¹ Consequently, a branch “may not use its powers to ‘defeat or materially impair’ the exercise of its fellow branches’ constitutional functions, nor ‘intrude upon a core zone’ of

96. CAL. CONST. art. III, § 3.

97. *Carmel Valley Fire Protection Dist. v. State*, 20 P.3d 533, 538 (Cal. 2001) (internal citation omitted) (alterations omitted).

98. *Id.* The state’s separation of powers doctrine differs from its federal analogue. See Carrillo & Chou, *supra* note 6, at 665–73 (discussing the differences between the separation of powers doctrines embodied in the California and federal Constitutions); *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062, 1076–78 (Cal. 2005).

99. Carrillo & Chou, *supra* note 6, at 678–79.

100. *Younger v. Super. Ct.*, 577 P.2d 1014, 1024 (Cal. 1978).

101. Carrillo & Chou, *supra* note 6, at 679.

another branch's authority."¹⁰² The judiciary is responsible for policing separation of powers disputes.¹⁰³

2. *Separation of Powers Principles Apply to the Electorate*

Direct democracy can significantly affect the balance of power in state government. It does so directly by reassigning a portion of legislative power from the state legislature to the electorate, and by increasing the incentives for elected officials to improve their functioning both as agents and as arbiters of public policy debates.¹⁰⁴ And the electorate's legislative power goes beyond achieving individual policy outcomes to change the performance of the state government as a whole.¹⁰⁵ In California, the existence of direct democracy can cause a reduced representative presence.¹⁰⁶ Or it might reduce the power of both the executive and the legislature relative to the electorate.¹⁰⁷ Or it may increase the power of the governor.¹⁰⁸ The bottom line is that if power in a divided government is a zero-sum game, then adding another player to the game will change the balance of power.

The current inability to account for the electorate's legislative role threatens the balance of power in California government.¹⁰⁹ For example, the legislature does not have the exclusive power to raise taxes—that power is shared with the electorate, which may raise taxes through a statutory initiative.¹¹⁰ The serial nature of initiative enactments has

102. *Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628, 634 (Cal. 2016) (quoting *Marine Forests Soc'y*, 113 P.3d at 1087).

103. Courts "have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch." *Carmel Valley Fire Protection Dist. v. State*, 20 P.3d 533, 538 (Cal. 2001) (quoting *Kasler v. Lockyer*, 2 P.3d 581, 594 (Cal. 2000)).

104. Matsusaka, *supra* note 20, at 132–33.

105. Shaun Bowler & Amihai Glazer, "Hybrid Democracy" and Its Consequences, in *DIRECT DEMOCRACY'S IMPACT ON AMERICAN POLITICAL INSTITUTIONS*, *supra* note 16, at 5–6.

106. *Id.* at 2; see ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* 61 (2000) ("In a zero-sum game, everyone is an enemy because one person's gains can only come through another's losses. In reality, however, politics is a bargaining game with a productive, creative dimension. By agreeing on distribution, people cooperate to mutual advantage. Focusing only on distribution misleads the observer into thinking that politics is a zero-sum game.")

107. Matsusaka, *supra* note 20, at 118 ("[I]t is clear that the voter is never worse off when the initiative is available."); *Id.* at 119 ("The political actor that always wins (never loses) from having the initiative available is the median voter [T]he primary effect of the initiative is power transfer from both branches of government to the median voter.")

108. *Id.* at 116–17 ("The evidence indicates that direct democracy brings about material changes in the functioning of the executive branch."); *id.* at 118–19 ("some practical considerations suggest that the governor will usually benefit" from direct democracy "by allowing [the governor] to take proposals directly to the voters."); *id.* at 132–33.

109. The separation of powers principle in a government exists to preserve the status quo absent the level of consensus necessary for coordinated action by the dispersed decisionmakers, any of which can exercise a veto by action or inaction. Cain et al., *supra* note 26, at 29.

110. *Kennedy Wholesale, Inc. v. State Bd. of Equalization*, 806 P.2d 1360, 1362–65 (Cal. 1991).

imposed inconsistent fiscal policy imperatives on the legislature. Proposition 13 curtailed state revenues by making it more difficult to raise taxes, while other initiatives require significant budget expenditures to certain programs.¹¹¹ Caught between these competing provisions, the state legislature has increasingly turned to bonds to raise funds. But the state constitution requires that the electorate approve general obligation bonds, which it frequently refuses to do.¹¹² As a result, despite its intended aim of making government more responsive, voter legislation in California has a demonstrated ability to do the opposite.¹¹³

Mitigating those harms requires an effective check on the electorate. We think that is best done by applying the separation of powers principles. Doing so raises two questions: a general one about how to define the role of the electorate in the separation of powers context, and the specific problem of how to maintain the distinction between a revision and an amendment.

Regarding the definition problem, the accepted approach to balancing government powers in California today is the core powers analysis. That analysis does not presently account for the effect of the electorate's role in state government; in particular, it does not address the fact that the California legislative power is divided between the legislature and the electorate.¹¹⁴ Adapting the core powers model to include electorate legislative acts is necessary to account for the electorate's effect on the balance of power in state government. To that end, we propose that when it acts in its independent legislative capacity, the electorate should be included in the core powers model as a branch.

If the judiciary needs a doctrinal method for maintaining the balance of power by accounting for the electorate's effect, then adapting the core powers doctrine offers the best answer in this context. The material impairment principle from the California core powers analysis, described previously, can credibly resolve revision–amendment problems that present a separation of powers issue without requiring the application of

111. For example, Proposition 98, passed in 1998, reserves forty percent of annual general fund revenue for education. See BALDASSARE & KATZ, *supra* note 9, at 15. The California Budget Project estimates that seventy-seven percent of state revenue is nondiscretionary, and the number may be as high as ninety percent. *Id.* at 16; see also Wyn Grant, *Direct Democracy in California: Example or Warning?*, in DEMOCRACY AND NORTH AMERICA (DEMOCRATIZATION) 133, 142–43 (Alan Ware ed., 1996) (observing that the “budget by initiative” trend prevents state government from increasing revenues and from making expenditure cuts); Zasloff, *supra* note 35, at 1121 (noting that the California legislature has less discretionary budget authority than any other state legislature).

112. CAL. CONST. art. XVI, § 2; see Grant, *supra* note 111, at 136.

113. Cain et al., *supra* note 26, at 3; BALDASSARE & KATZ, *supra* note 9, at 16 (“By restricting legislators’ fiscal options, ballot-box budgeting has had the opposite effect from what its proponents intended—making government less responsive and accountable to the public while still vulnerable to the influence of powerful special interests.”); Bowler & Glazer, *supra* note 105, at 18–19 (arguing that greater participation is obtained at the expense of performance).

114. See all sources cited *supra* at note 41.

the quantitative–qualitative test. The point here is not to achieve different results with a different analysis. Indeed, in *Raven*, the only case to date where a California court struck down a proposed constitutional amendment on qualitative grounds,¹¹⁵ the same result would be achieved by framing the analysis in separation of powers terms, as the act in question worked a material impairment of a core judicial power—construing the law. Instead, the advantage is that a separation of powers approach provides a *better explanation* for a given result.

This solution complements the amendment–revision distinction. We argue that the quantitative–qualitative approach alone cannot answer all questions about the scope of the electorate’s powers, nor fully explain the electorate’s role in state government. But it does work for its intended use. Thus, even if our proposal is adopted the quantitative–qualitative analysis still applies to the amendment–revision distinction—only now that analysis is reserved for use where it fits best: policing the distinction between amendments (which the electorate may enact on its own) and revisions, which require the electorate to collaborate with the legislature.

A hypothetical is useful here.¹¹⁶ Say that the legislature reduced the judiciary’s budget to one dollar. Making budget decisions is a core legislative policymaking decision. Yet the action would materially impair a core judicial branch power (really, all of them) and a core powers analysis would invalidate this act as a separation of powers violation. Now assume that the electorate approved an initiative to the same effect: Proposition I, “No Money For You.” It would be difficult to credibly hold that the hypothetical measure accomplishes such far reaching changes in the nature of our basic governmental plan that it is an invalid revision. The measure achieves only one narrow goal, so it meets the quantitative test. And on its face, the act makes no substantial changes to the state government; the judicial branch still exists with all its powers, and it is free to fund itself by increasing fees and cutting costs.

To strike down “No Money For You” using a qualitative analysis, a court would have to square the measure with *Raven* and *Eu. Raven*, which held that restricting the ability of state courts to independently interpret criminal law violated the qualitative standard,¹¹⁷ could apply to

115. *Strauss v. Horton*, 207 P.3d 48, 93 (Cal. 2009) (“*Raven* is the only case in which we have found a proposed constitutional amendment to constitute an impermissible constitutional revision resulting from the measure’s far reaching *qualitative* effect on the preexisting constitutional structure”); *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

116. The classic qualitative violation example is in *Amador Valley Joint Union High School District v. State Board of Equalization*, which posed a hypothetical example of a provision vesting all judicial power in the legislature: “[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.” 583 P.2d 1281, 1286 (Cal. 1978).

117. *Raven*, 801 P.2d at 1086–90.

invalidate the measure. But in *Eu*, imposing legislative term limits and reducing the legislature’s budget was not a qualitative issue.¹¹⁸ Between those authorities, *Eu* is the better fit. *Raven* is inapposite because, even looking to the effects of “No Soup For You,” the judiciary’s powers remain intact. All that the measure accomplishes is a budget reduction, which *Eu* plainly permits.

A court applying the qualitative analysis to strike down “No Soup For You” would need to hold that the effects of the budgetary limitations on California’s “basic governmental plan” are as devastating and far-reaching as those invalidated in *Raven*. But the California Supreme Court rejected that argument in *Eu*:

First, the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged by Proposition 140. Term and budgetary limitations may affect and alter the particular legislators and staff who participate in the legislative process, but the process itself should remain essentially as previously contemplated by our Constitution.

....

... Proposition 140 on its face does not affect either the structure or the foundational powers of the Legislature, which remains free to enact whatever laws it deems appropriate. The challenged measure alters neither the content of those laws nor the process by which they are adopted. No legislative power is diminished or delegated to other persons or agencies. The relationships between the three governmental branches, and their respective powers, remain untouched.

Second, although the immediate foreseeable effects of the foregoing term and budgetary limitations are indeed substantial (primarily, the eventual loss of experienced legislators and some support staff), the assertedly momentous consequences to our governmental scheme are largely *speculative* ones, dependent on a number of as yet unproved premises.¹¹⁹

Thus, using the qualitative analysis here requires holding that reducing a branch’s budget is a qualitative violation because too great a budget reduction is effectively the same as changing the basic plan of the state government. That requires either repudiating or restating the holding in *Eu*. Maybe someone could write that opinion. We think that it stretches the qualitative analysis too far, to the point where it begins to sound very much like a core powers approach—so why not simply acknowledge that separation of powers principles apply here, and apply them?

In the next Subpart, we discuss how the core powers analysis would apply to this example, and provide a better-reasoned (but not necessarily different) result.

118. *Legislature v. Eu*, 816 P.2d 1309, 1318–19 (Cal. 1991).

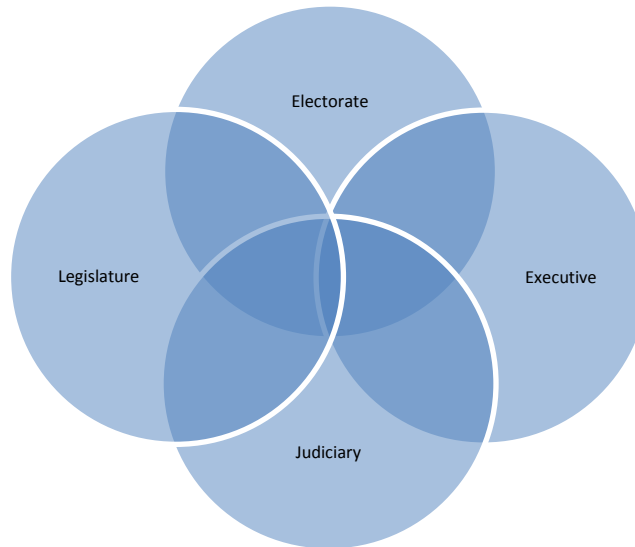
119. *Id.* at 1318.

3. *Adapting Core Powers to Include Electorate Legislative Acts*

It is not necessary to abandon the existing separation of powers model to account for the electorate as a government institution. Instead, all that is necessary is to *include* the electorate in the Venn diagram of the state government, and to apply the existing core powers analysis to electorate legislative acts.¹²⁰

The state constitution vests each branch with certain core functions that may not be usurped by another branch.¹²¹ The electorate in its legislative role is a branch of state government with certain core powers that cannot be materially impaired, and conversely neither may the electorate acting as a legislative branch materially impair a core power of another branch.¹²² That model can be drawn like this:

FIGURE I



This model only explains the relationship of the electorate and the branches of government when the electorate is acting in its legislative capacity. The traditional description of the relationships between the legislative, executive, and judicial branches holds that each branch has

120. Rearranging California's core powers doctrine as we propose does not conflict with federal law, because the states are not required to follow federal separation of powers principles. *See infra* note 125.

121. *People v. Bunn*, 37 P.3d 380, 389 (Cal. 2002).

122. *See In re Rosenkrantz*, 59 P.3d 174, 208 (Cal. 2002).

some direct control over, some direct control by, and some overlapping areas of control with each other branch.¹²³ This also applies to the electorate. The electorate has enumerated means of direct control over the other branches, through recall and referendum, and the other branches have their own means of controlling the electorate. Each of the other branches can affect the electorate as a whole, just as they can affect each other. For example, the executive may exercise a passive veto by declining to enforce or defend a challenged initiative;¹²⁴ the courts exercise judicial review over initiatives; and the legislature may by statute regulate the conduct of elections.

The electorate should be included in the core powers analysis only in a limited context. As discussed previously, the first step in our approach is to identify what power is being exercised, and that determines whether the people or the electorate are involved: the people's whole political power (for a convention or revision) is one category, and the electorate's legislative powers of initiative and referendum is another. In a constitutional convention, the people are exercising the whole political power, and all other branches are subordinate to them—indeed, their very existence is open to debate in convention.¹²⁵ When acting with the legislature as the people, the electorate exercises its whole power to make *any* alterations to the state constitution. But when exercising its legislative powers alone, the

123. *Carmel Valley Fire Protection Dist. v. State*, 20 P.3d 533, 538 (Cal. 2001) (citing *Super. Ct. v. Cty. of Mendocino*, 913 P.2d 1046, 1051 (1996)).

124. *But see Perry v. Brown*, 265 P.3d 1002, 1007 (Cal. 2011) (“In a postelection challenge to a voter-approved initiative measure, the official proponents of the initiative are authorized under California law to appear and assert the state’s interest in the initiative’s validity and to appeal a judgment invalidating the measure when the public officials who ordinarily defend the measure or appeal such a judgment decline to do so.”). The executive’s passive veto, however, remains effective in federal courts, where relevant. *See Hollingsworth v. Perry*, 133 S. Ct. 2652, 2663 (2013) (denying standing to proponents of a voter-approved initiative measure when executive officials elected not to appeal a district court order that declared the initiative measure unconstitutional).

125. RANDY J. HOLLAND ET AL., *STATE CONSTITUTIONAL LAW: THE MODERN EXPERIENCE* 114 (2010).

Nothing in the federal Constitution or Supreme Court decisions purports to limit or direct the organization of state governments, other than the Article IV promise that the United States shall guarantee to every state in the union a “Republican Form” of government, a provision addressed above and which the Supreme Court has left entirely to the Congress and the President to enforce, if it is to be enforced at all. Also, the Supreme Court has declined to require that state governments follow federal separation of powers principles. Thus, . . . the States may choose, for example, a unicameral rather than bicameral legislature (Nebraska), give their Governors a variety of powers, including some the President of the United States is not permitted, [sic] (such as a line item veto), and generally may structure their state court systems as they wish, including the use of elections to select judges. Thus, the organization of state government and the powers accorded the various branches and officials of state government, are a subject about which the federal Constitution has virtually nothing to say and plays essentially no role.

Id.

electorate's power is at its lowest ebb, and it may properly be viewed as a branch of government subject to separation of powers analysis.¹²⁶

A core powers analysis will resolve difficult future cases that the quantitative–qualitative approach cannot address, or at least it will be a better means of deciding those cases. Returning to the previous examples, an initiative amendment that abolished a branch of government is a clear change to the frame of government for which the quantitative–qualitative approach provides an easy answer.¹²⁷ But suppose again that an initiative amendment reduced the judiciary budget to one dollar per year. Under the quantitative–qualitative approach, no change has been made to the frame of government, and as previously discussed, a court with only that analysis at hand would be forced to take a “practical” view of the enactment, invalidating it based on the expected effects rather than the initiative’s plain terms.

Using the core powers approach permits a more honest assessment of the problem: Effectively defunding the state judiciary would materially impair the core judicial power of defining what a court is. The judiciary has the power to define the minimum level of functionality the courts must have to fulfill their constitutional duties.¹²⁸ As the California Supreme Court has observed, the judiciary has “the power to remove all obstructions to its successful and convenient operation” as “one of the three independent departments set up by the Constitution.”¹²⁹ That said,

126. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 72 S. Ct. 863, 870–71 (1952) (explaining the scope of the President’s authority when acting under express or implied authorization by Congress).

127. Again, this problem and its solution are from *Amador Valley Joint Union High School District v. State Board of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978) (“[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.”).

128. In *Lorraine v. McComb*, the California Supreme Court explained:

One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers, and jurisdiction by constitutional provisions, has been the right to control its order of business, and to so conduct the same that the rights of all suitors before them may be safeguarded. This power has been recognized as judicial in its nature, and as being a necessary appendage to a court organized to enforce rights and redress wrongs.

32 P.2d 960, 961 (Cal. 1934) (internal citation omitted).

129. *Millholen v. Riley*, 293 P. 69, 71 (Cal. 1930); *see also Super. Ct. v. Cty. of Mendocino*, 913 P.2d 1046, 1054 (Cal. 1996) (“[T]o say that a court has ‘inherent power’ with respect to a particular subject matter or function . . . appears to mean simply that the court, by virtue of its status as one of the three constitutionally designated branches of government, has the power to act even in the absence of explicit constitutional or legislative authorization.”); *Brydonjack v. State Bar*, 281 P. 1018, 1020 (Cal. 1929) (“Our courts are set up by the Constitution without any special limitations; hence the courts have and should maintain vigorously all the inherent and implied powers necessary to properly and effectively function as a separate department in the scheme of our state government.”). The California Supreme Court has often recognized the inherent powers of the courts. *See Obrien v. Jones*, 999 P.2d 95, 102 (Cal. 2000) (reasoning that the absence of a statutory provision expressly conferring specific authority on the court does not preclude it from exercising such authority under its inherent powers); *Walker v. Super. Ct.*, 807 P.2d 418, 423–24 (Cal. 1991) (citing *Hays v. Super. Ct.*, 105 P.2d 975, 978 (Cal. 1940); *Bauguess v. Paine*, 586 P.2d 942, 947 (1978)) (observing that courts have inherent power to insure the

a constitutional convention could create or eliminate courts and define their jurisdiction; the legislature has the power to enact sentencing laws that courts are bound to follow;¹³⁰ and the legislature and governor enact the state budget, which includes funding for the judiciary.¹³¹ But the legislature may “aid the courts and may even regulate their operation” only “so long as their efficiency is not thereby impaired.”¹³²

Just as the legislature could not constitutionally legislate the judiciary out of existence, a court would be well within its powers to hold that an action reducing the judicial branch budget to one dollar was an invalid exercise of legislative power because it would undermine the authority and independence of the judicial branch.¹³³ This would be so whether the action were a legislatively enacted budget *or* an initiative measure. Undermining judicial authority and independence to that degree would exceed either the legislature’s or the electorate’s power.¹³⁴ And is there any doubt that an initiative constitutional amendment that so undermined the state judiciary would be invalidated? Hardly. As noted

orderly administration of justice). Although some judicial powers are statutory, it is well-established that the courts’ inherent powers are derived from the state constitution, and are neither confined by nor dependent on statute. *Id.* at 423 (citing CAL. CONST. art. VI, § 1; *Bauguess*, 586 P.2d at 947).

130. *People v. Super. Ct. (Romero)*, 917 P.2d 628, 638, 640 (Cal. 1996).

131. *Carmel Valley Fire Protection Dist. v. State*, 20 P.3d 533, 539 (Cal. 2001). Courts are prohibited “from directly ordering the Legislature to enact a specific appropriation.” *Mandel v. Myers*, 629 P.2d 935, 940 (Cal. 1981). Just as the courts cannot compel a legislative appropriation, so too a court generally cannot enjoin legislative inaction:

It is within the legitimate power of the judiciary, to declare the *action* of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the Courts have no means, and no power, to avoid the effects of *non-action*. The Legislature being the creative element in the system, its action cannot be quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil. It is a discretion specially confided by the Constitution to the body possessing the power of taxation.

Myers v. English, 9 Cal. 341, 349 (1858).

132. *Walker*, 807 P.2d at 423 (citing *Millholen*, 293 P. at 74; *Brydonjack*, 281 P. at 1020 (“The sum total of this matter is that the Legislature may put reasonable restrictions upon constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions.”)).

133. *Le Francois v. Goel*, 112 P.3d 636, 642 (Cal. 2005) (“The Legislature may regulate the courts’ inherent power to resolve specific controversies between parties, but it may not defeat or materially impair the courts’ exercise of that power.”); *Carmel Valley Fire Protection Dist.*, 20 P.3d at 538 (citing *Kasler v. Lockyer*, 2 P.3d 581, 594 (2000)) (noting precedent for invalidating legislative measures that would defeat or materially impair courts’ inherent power).

134. Consider this statement of the core powers analysis, but read “legislative” as applying to the electorate:

The triune powers of the state, as shown by the three departments, are thoroughly independent in certain of their essential functions, and at the same time mutually dependent [sic] in others. This truth often gives rise to occasions where the line of separation is not clear and distinct. Accordingly, repeated instances are to be found where the judicial department has submitted to the regulatory power of the *legislative* department. This is particularly true in matters of procedure. But there must come a point beyond which the judicial department must be allowed to operate unhampered by *legislative* restriction.

Lorraine v. McComb, 32 P.2d 960, 961 (Cal. 1934) (emphasis added) (internal citations omitted).

previously, although the ultimate answer surely would be the same under either the existing analysis (invalid as a revision because it fundamentally changes the state government framework) or under the proposed analysis (invalid because it would materially impair the judiciary's power), core powers is a more honest rationale.

More honest, because in reviewing initiative amendments that call for a separation of powers analysis, the question is not whether the frame of government has been altered (as it would be under the existing analysis), but whether the core powers of a branch have been materially impaired. For example, *Strauss* would reach the same result under the core powers approach, since an initiative amendment that affects only the individual rights of citizens does not impair the powers of the electorate as a branch.¹³⁵ Nor does it have any impact on the powers of another branch. Just as the legislature may define the crimes and punishments that courts review for due process and equal protection violations, so may the people act to redefine the very principles the courts use in that review.¹³⁶ *Raven* would also reach the same result, because the effect of the initiative amendment at issue there was to require state courts to disregard the state constitution¹³⁷—a direct attack on the core judicial power of deciding what the law is. *Eu* would likewise come out the same way, and largely for the same reasons: because the legislature's core powers and its ability to function remained substantially intact.¹³⁸

Judicial decisions have already applied something like the material impairment test from the core powers analysis (without calling it that) to limit initiative acts, a principle known as the effect of an impermissible impairment of essential government functions. The general proposition is that the initiative power does not extend to the point “where the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential.”¹³⁹ For this principle to apply the power must not only be

135. See David Aram Kaiser & David A. Carrillo, *California Constitutional Law: Reanimating Criminal Procedural Rights After the “Other” Proposition 8*, 56 SANTA CLARA L. REV. 33, 40 (2016) (“[F]ollowing *Strauss*, the question is no longer whether an initiative can remove constitutional rights (it can)”); *id.* at 44 (explaining the rationale).

136. *Perry v. Brown*, 265 P.3d 1002, 1035 (Cal. 2011) (Kennard, J., concurring) (“[T]he role of California’s judicial branch is to interpret existing state statutory and constitutional provisions, a power and responsibility that is subject to the limitation that the electorate, through the power of the initiative, can amend the state Constitution to override, from that time forward, the court’s ruling.”).

137. See *Raven v. Deukmejian*, 801 P.2d 1077, 1087 (Cal. 1990). For a more in-depth discussion of the *Raven* case, see *supra* Part II.

138. For a more in-depth discussion of the *Eu* case, see *supra* Part II.

139. *Simpson v. Hite*, 222 P.2d 225, 230 (Cal. 1950) (internal citations omitted); *Builders Ass’n of Santa Clara-Santa Cruz Cty. v. Super. Ct.*, 529 P.2d 582, 586 n.4 (Cal. 1974) (“[T]his principle serves to invalidate an initiative which, in limiting one governmental power, impairs or destroys the ability of government to exercise a different and more essential power.”).

“essential,” its serious impairment or wholesale destruction must also be “inevitable.”¹⁴⁰ This rule arose from conflicts between a state or local initiative and a revenue statute or ordinance, on policy grounds:

One of the reasons, if not the chief reason, why the Constitution excepts from the referendum power acts of the Legislature providing for tax levies or appropriations for the usual current expenses of the state is to prevent disruption of its operations by interference with the administration of its fiscal powers and policies.¹⁴¹

But the impermissible impairment principle has not been limited to that context.¹⁴² In general, this principle has been held to require a greater showing of impairment than the core powers analysis. This may be due to the deference shown to the initiative,¹⁴³ and that unique factor may compel a tie-goes-to-the-runner preference that favors the electorate as against the legislature.¹⁴⁴ For example, the initiative power has been upheld against a claim that it “greatly impairs the legislature’s essential function of balancing the budget,” because the challenged initiative did “not either destroy or severely limit the power of the state Legislature to tax or to balance the budget.”¹⁴⁵

140. *Santa Clara Cty. Local Transp. Auth. v. Guardino* 902 P.2d 225, 246 (Cal. 1995).

141. *Geiger v. Bd. of Supervisors of Butte Cty.*, 313 P.2d 545, 549 (Cal. 1957) (“If essential governmental functions would be seriously impaired by the referendum process, the courts, in construing the applicable constitutional and statutory provisions, will assume that no such result was intended.”). The referendum power does not extend to “statutes providing for tax levies or appropriations for usual current expenses of the State.” CAL. CONST. art. II, § 9(a).

142. *See, e.g., Brosnahan v. Brown*, 651 P.2d 274, 287–88 (Cal. 1982) (analyzing the effect of the impermissible impairment principle on Proposition 8, “The Victims’ Bill of Rights”).

143. The power reserved to the people by the initiative and referendum must be liberally construed and in case of doubt the dispute must be resolved in favor of the exercise of those rights. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1283–84 (Cal. 1978); *Associated Home Builders v. City of Livermore*, 557 P.2d 473, 477 (Cal. 1976).

144. *Rossi v. Brown*, 889 P.2d 557, 572 (Cal. 1995) (questioning the existence of a policy for resolving doubts about the scope of the initiative power to avoid interference with the legislative body’s responsibility for fiscal management). *But see Cmty. Health Ass’n v. Bd. of Supervisors*, 194 Cal. Rptr. 557, 560 (Cal. Ct. App. 1983) (holding that initiative cannot be used to limit the taxing power); *City of Atascadero v. Daly*, 185 Cal. Rptr. 228, 230 (Cal. Ct. App. 1982) (invalidating initiative requiring voter approval of taxes as “an unlawful attempt to impair essential governmental functions through interference with the administration of the City’s fiscal powers.”); *Campen v. Greiner*, 93 Cal. Rptr. 525, 529 (Cal. Ct. App. 1971) (invalidating initiative to repeal a city utility tax and prospectively prohibit such taxes without voter approval based on impairment of government power to tax); *Dare v. Lakeport City Council*, 91 Cal. Rptr. 124, 127 (Cal. Ct. App. 1970) (holding that because sewer district maintenance is a vital governmental function, initiative is not available to set manner of fixing charges for sewer facilities); *Hunt v. Mayor & Council of Riverside*, 191 P.2d 426, 431–32 (Cal. 1948) (discussing sales tax ordinance); *Chase v. Kalber*, 153 P. 397, 400 (Cal. Ct. App. 1915) (discussing improvement of city streets).

145. *Carlson v. Cory*, 189 Cal. Rptr. 185, 187–88 (Cal. Ct. App. 1983) (requiring a showing that the “inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential . . .” (alterations omitted)); *see Jensen v. Franchise Tax Bd.*, 100 Cal. Rptr. 3d 408, 419 (Cal. Ct. App. 2009) (rejecting claim that initiative statute was an invalid attempt to modify the state constitution by removing the mental health services budget from the legislature, based on failure to show that it would “destroy or severely limit” the legislature’s power to

The similarity in terminology between “material impairment” and “impermissible impairment” is not coincidental and it is more than facial. Both embody the same principle: measuring the degree of impact on a power. The courts need such a principle for resolving conflicts between the electorate and the other branches, and something like a core powers approach is a natural fit. The proposal to include the electorate in a separation of powers analysis is neither radical nor entirely novel. And if the impermissible impairment principle is practically indistinguishable from the core powers model, why not simply call it that?

The next Subpart demonstrates how the proposed analysis will work in practice.

4. *Practical Application of the Proposed Analysis*

We have proposed that the electorate in its legislative capacity should be viewed in the state separation of powers scheme as a branch of government with significant yet limited legislative powers. Those limitations, imposed by the people themselves in the constitutional conventions, restrict the electorate’s powers to only those described in the constitution and further limit their exercise of that power by prescribing required procedures. By the exercise of their sovereign constitution-making power, the people have circumscribed the subsequent exercise of their sovereignty as the electorate to specified acts, which is no different from the grants to (and limitations on) the powers of the other branches of state government. If the electorate is viewed as a branch of government, and its powers are legislative, then the separation of powers and other principles commonly applied to the legislative branch should also be applied to the electorate acting in its legislative capacity. Indeed, there is no doubt that the core judicial review power of the courts applies to electorate legislative acts. Nor is there any difference between the judicial review standards for legislative acts and initiative acts, or between the standard of review applied to initiative statutes and initiative amendments.¹⁴⁶

formulate a budget); *Campen*, 93 Cal. Rptr. at 529 (invalidating local initiative that threatened city’s ability to meet its financial obligations by limiting the city council’s power to levy taxes).

146. The same interpretive principles apply to constitutional and statutory provisions, whether added by the electorate or by the legislature:

“The principles of constitutional interpretation are similar to those governing statutory construction. In interpreting a constitution’s provisions, our paramount task is to ascertain the intent of those who enacted it. To determine that intent, we ‘look first to the language of the constitutional text, giving the words their ordinary meaning.’ If the language is clear, there is no need for construction. If the language is ambiguous, however, we consider extrinsic evidence of the enacting body’s intent.”

Similarly, in interpreting a voter initiative..., we apply the same principles that govern statutory construction.

From those established rules it is but a short step to applying the core powers analysis as necessary to electorate legislative acts. Rather than struggling to expand the quantitative–qualitative approach, the better course is to apply separation of powers principles to initiative constitutional amendments that affect the relationship between and powers of the branches. If the electorate is viewed as a branch of government when it legislates, then the electorate should be subject to the core powers analysis. The existing analysis views the distinction between a prohibited revision and a permissible amendment narrowly as a question of whether a given act is within the electorate’s powers under article 18. But that does not account for conflict with the other branches of government—which the core powers analysis aptly addresses.

We have already seen a preview of how a separation of powers analysis can be applied to the electorate. The cases in the previous Subpart, applying the impermissible impairment of essential government functions principle, are one example. And the state judiciary has invalidated initiative measures as exceeding the electorate’s power in decisions that could have easily been justified on separation of powers grounds. For example, in *Bramberg v. Jones*, the California Supreme Court struck down an initiative that directed the state legislature to pursue a federal constitutional amendment.¹⁴⁷ While the principal basis for the decision rested on other grounds, the opinion also referenced the inability of the electorate to instruct the legislature other than by enacting initiative statutory measures.¹⁴⁸ This is consistent with the view that, as a branch of the state government, the electorate may not materially impair (or direct) the legislature’s core power of amending the U.S. Constitution.¹⁴⁹

The same analysis can be applied to the decision in *Raven*. As the only case in which a qualitative challenge succeeded, *Raven* is the best example of the need for applying a separation of powers analysis, because the court’s conclusion there is stated in core powers terminology: The measure was a revision because it would implement “a broad attack on state court authority to exercise independent judgment in construing a wide spectrum of important rights under the state Constitution.”¹⁵⁰ Is it intellectually honest to frame the holding in terms of a fundamental change to the basic plan of the state government? That seems to be overstating matters—and the necessity of doing so is exactly the problem with using a qualitative analysis to resolve a core

Prof’l Eng’rs in Cal. Gov’t v. Kempton, 155 P.3d 226, 239 (Cal. 2007) (internal citations omitted) (alterations omitted).

147. *Bramberg v. Jones*, 978 P.2d 1240 (Cal. 1999).

148. *Id.* at 1252 n.19.

149. *See id.* at 1251–52.

150. *Raven v. Deukmejian*, 801 P.2d 1077, 1089 (Cal. 1990).

powers case. The decision in *Raven* is far more amenable to resolution by the well-developed core powers analysis as an attempt by a branch (the electorate) to materially impair a core judicial power (independent judgment). Accordingly, the holding in *Raven* can be fairly restated in separation of powers terms: The measure was beyond the initiative power because it would materially impair the judiciary's core power to exercise independent judgment. This approach is superior because it better identifies the outcome-determinative issue, and because it permits a better reasoned result—one that does not require stretching the deciding principle beyond its capability.

IV. DEFENDING APPLICATION OF CORE POWERS TO THE ELECTORATE

In this Part, we briefly consider and respond to several potential questions about our proposal.

A. THE CORE POWERS ANALYSIS IMPROVES ON THE EXISTING ANALYSIS

This is not a replacement for the quantitative–qualitative analysis. Some future initiative acts will be invalid for violating the revision–amendment distinction by changing too many or too significant a provision of the state constitution. But that distinction does not explain every invalid electorate act, and so the core powers approach is also necessary.

Our proposal is no great departure from past decisions. Applying the core powers analysis to initiative constitutional amendments that present separation of powers issues adds clarity, promotes efficiency, and is a logical extension of existing precedent. It is consistent with judicial decisions that have guarded the electorate's initiative power.¹⁵¹ And it is consistent with the ability of a branch to reasonably regulate the exercise of the electorate's core powers.¹⁵²

The core powers approach is an improvement because it reduces uncertainty and questions about the legitimacy of a court's rationale by providing a clear doctrinal foundation for deciding such cases. For example, under the current approach, the bar for revisions is set relatively high, precluding only changes that alter the basic plan of state government. Under that standard, the classic example of a prohibited act

151. See, e.g., *Strauss v. Horton*, 207 P.3d 48, 107 (Cal. 2009).

152. CAL. CONST. art. II, § 10(d). "Prior to the circulation of an initiative or referendum petition for signatures, a copy shall be submitted to the Attorney General who shall prepare a title and summary of the measure as provided by law." *Id.* "The Legislature shall provide the manner in which petitions shall be circulated, presented, and certified, and measures submitted to the electors." *Id.* § 10(e). "The Legislature shall provide for circulation, filing, and certification of petitions, nomination of candidates, and the recall election." *Id.* § 16. CAL. ELEC. CODE §§ 100–106, 18600–18604, 18610–18614, 18620–18622, 18630–18631, 18640, 18650, 18660–18661, 18670–18671, 18680 (West 2016).

is the complete abolishment of an entire branch of state government.¹⁵³ But the current analysis would not prevent an act that materially impairs the operation of a branch without expressly abolishing it—such as reducing the judicial budget to a de minimis amount, or reducing the legislative term to a single day. A court faced with such an initiative constitutional amendment would be required to expand the qualitative factor beyond its capabilities, with even less of a pretense at a doctrinal justification. Under the core powers approach, by contrast, the ready answer would be that the electorate may regulate a branch’s budget or hours to a reasonable degree, up to the point of materially impairing the functioning of the judicial branch.¹⁵⁴ Accordingly, while some reduction of the judicial budget or the legislative session would be permitted, virtually eliminating it would be prohibited.¹⁵⁵

More clarity in this doctrinal area can enhance judicial efficiency and improve decisionmaking. Applying separation of powers principles for reviewing legislative acts to the electorate’s similar power should reduce uncertainty and decision costs in a given case, and reduce the need for judge-made law in an area with little textual guidance. True, the separation of powers principle shares a disadvantage with the current approach: both require a case-by-case resolution. From that perspective the decision cost savings will be small. But judicial economy is not the only concern here, and there are substantial gains to be made in analytical clarity and the legitimacy of the courts from using core powers. A decision that the electorate has acted outside its role as a part of the state government is a more accessible concept than rejecting an initiative

153. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1286 (Cal. 1978) (“an 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.”).

154. Based on the judiciary’s inherent power of self-preservation as a branch of the state government, if the legislature or the state constitution fail to provide something necessary to the courts’ operation, “a court invested with jurisdiction would have all the powers necessary to its convenient exercise,” and could take such steps “as might be required” to secure its operation. *Millholen v. Riley*, 293 P. 69, 71 (Cal. 1930).

155. This would also be the answer under the core powers analysis if the legislature attempted to abolish the judicial branch by eliminating its funding in the state budget. *Brown v. Super. Ct.*, 655 P.2d 1260, 1264 n.5 (Cal. 1982) (“Funding of courts by legislative appropriation must not be so inadequate as materially to impair their exercise of constitutional functions.” (internal citation omitted)). The state courts have “the power of self-preservation, indeed, the power to remove all obstructions to [their] successful and convenient operation.” *Millholen*, 293 P. at 71. Although the judicial and executive branches cannot require the legislature to appropriate money, in *Carmel Valley Fire Protection District v. State* the court stated that the legislature has an “essential duty to devise a reasonable budget.” 20 P.3d 533, 540–41 (Cal. 2001). And a court would be well within its powers if it held that something like our hypothetical “No Money for You” statute was an invalid legislative act, because it would “undermine the authority and independence of one or another coordinate Branch.” *id.* at 538 (internal citation omitted) (citing *Kasler v. Lockyer*, 2 P.3d 581, 594 (2000)). Cf. *Legislature v. Eu*, 816 P.2d 1309, 1319 (Cal. 1991) (initiative requiring thirty-eight percent reduction in funds for the legislature neither threatens the functioning of that branch nor alters the structure of state government).

measure on the grounds that the electorate, which is entitled to deference, have done too much to change their constitution. When checking the same electorate that votes in judicial retention elections, these appearances matter.¹⁵⁶

The decision in *Strauss*, which rejected a separation of powers challenge to an initiative amendment, does not preclude the proposed approach. In *Strauss*, petitioners argued that the separation of powers doctrine is violated when the initiative process is used to “readjudicate” final judicial decisions.¹⁵⁷ That is very different from arguing that the electorate impermissibly impaired a core judicial power. Instead, as the court pointed out in *Strauss*, the petitioners’ argument rested on “a fundamental misunderstanding” of the initiative at issue, which established “a new substantive state constitutional rule” that applied prospectively.¹⁵⁸ This is nothing new—it is a retroactivity argument applied to the electorate. The answer was the same when this issue arose for an act of the legislature:

Under fundamental principles of separation of powers, the legislative branch of government enacts laws. Subject to constitutional constraints, it may change the law. But *interpreting* the law is a judicial function. After the judiciary definitively and finally interprets a statute, as we did in *Carrisales*, the Legislature may amend the statute to say something different. But if it does so, it changes the law; it does not merely state what the law always was. Any statement to the contrary is beyond the Legislature’s power. We also conclude this change in the law does not apply retroactively to impose liability for actions not subject to liability when performed.¹⁵⁹

Finally, one way of looking at the choice between the revision–amendment analysis and core powers is to ask whether a case calls for a textual or a definitional approach. If the dispute only requires examining the state constitution to determine the electorate’s abilities in isolation, then the revision–amendment analysis works best. But if the dispute involves conflict between branches, then the core powers analysis should apply.

156. CONSTITUTIONAL REFORM IN CALIFORNIA: MAKING STATE GOVERNMENT MORE EFFECTIVE AND RESPONSIVE 280 (Bruce E. Cain & Roger G. Noll eds., 1995) (“Given that the electoral majority that approves [initiative constitutional amendments] is the same one that controls whether justices are confirmed or not, the court is understandably cautious when it comes to overturning the expressed will of the majority.”).

157. *Strauss*, 207 P.3d at 63, 114–15.

158. *Id.* at 115; *Perry v. Brown*, 265 P.3d 1002, 1035 (Cal. 2011) (Kennard, J., concurring) (“[T]he role of California’s judicial branch is to interpret existing state statutory and constitutional provisions, a power and responsibility that is subject to the limitation that the electorate, through the power of the initiative, can amend the state Constitution to override, from that time forward, the court’s ruling.”).

159. *McClung v. Emp’t Dev. Dep’t*, 99 P.3d 1015, 1018 (Cal. 2004); see *Mandel v. Myers*, 629 P.2d 935, 945–46 (Cal. 1981).

What we propose is not a radical new theory; it is entirely consistent with the existing analysis, but it is a better view on it. The proof is in the examples, the best being *Raven*. The analysis in that case focused primarily on the revision–amendment distinction. That was an important point, but not the decisive one. The revision–amendment analysis focuses on the textual limits of the electorate’s power. But the inflection point in *Raven* was the conflict between the electorate and the judiciary. That is necessarily a separation of powers question, and the core powers analysis should apply.

Strauss is a contrary but not contradictory example. The court framed that case as presenting only a textual question: Does the electorate’s power extend to redefining or abolishing individual state constitutional rights? The court could have framed the issue as: Which actor (the electorate or the judiciary) has the power to redefine or abolish constitutional rights? But that question was not fairly presented. There was no impact, as in *Raven*, on the judiciary’s core power to interpret the law. Instead, *Strauss* concerned only the electorate’s core power to amend the state constitution.¹⁶⁰

B. JUDICIAL REVIEW OF ELECTORATE ACTS IS CONSISTENT WITH CALIFORNIA’S GOVERNMENTAL PLAN

This approach may be criticized as undemocratic, as a judicial power grab, and as contrary to the original Progressive intent. To the first and last points, it is true that the Progressives who implemented the 1911 direct democracy reforms argued that the cure for the ills of democracy was more democracy.¹⁶¹ But today that argument rests upon two false premises: First, the government in question was a representative republic, not the hybrid democracy California has now; and second, even with democracy it is possible to have too much of a good thing.¹⁶² Adding more democracy to California now might well cause it to cease to be a republican form of government.¹⁶³

To the point that this approach will tend to reduce the electorate’s powers, and so it is countermajoritarian and contrary to the principle of popular sovereignty, this is true to a certain extent. But that would be true of any solution in this area. And that only raises the question of whether *any* judicial limits on the electorate’s legislative powers are appropriate. Just as individual rights are countermajoritarian, so too is

160. Specifically, the electorate’s power to modify or remove individual state constitutional rights was established in *In re Lance W.* See *Strauss*, 207 P.3d at 92–93 (discussing *In re Lance W.*, 694 P.2d 744 (Cal. 1985)); see also Kaiser & Carrillo, *supra* note 135, at 40.

161. Bowler & Glazer, *supra* note 105, at 6.

162. *Id.* at 6–7.

163. Cf. Carrillo & Duvernay, *supra* note 3 (discussing the limits of direct democracy in California).

judicial review, and both were designed into the state constitution.¹⁶⁴ The judiciary already has claimed the power to enforce the boundary between revisions and amendments. Surely it must also be the case that the judiciary should enforce the people's limitations on the electorate's powers. And it must also be true that the power of judicial review extends to initiative constitutional amendments to the same degree as other parts of the state constitution. To say otherwise would be to preserve for the electorate an ability to override core judicial powers,¹⁶⁵ which are also created by the state constitution and have been upheld by the California Supreme Court against encroachment by the electorate.¹⁶⁶

And arguing that this approach encourages undue judicial influence on the process of government proves too much. There are many reasons to be cautious about calls for a more active bench. But the state judiciary is well aware of the obligation imposed on it by the separation of powers doctrine to respect the separate constitutional roles of the other branches.¹⁶⁷ Applying the core powers analysis to initiative issues as necessary is only a better method for solving a problem that is already in the judicial province. Interpreting the state constitution and determining the law are core judicial functions. Democracy, and particularly the hybrid republican version created by the state constitution, is neither purely competitive nor purely majoritarian. Thus, accepting some countermajoritarian results is necessary if the state is to retain an independent judiciary.

Finally, improving on the existing analysis to provide a better method for maintaining the balance of power in the state government responds to a fundamental concern about the role of the judiciary in American governance: Is it undemocratic for unelected judges to overturn decisions of elected officials? It is not, if judges follow a sound principle of judicial review that properly limits the scope of that review.

164. Sheila James Kuehl, *Either Way You Get Sausages: One Legislator's View of the Initiative Process*, 31 *LOY. L.A. L. REV.* 1327, 1329-30 (1998):

Every time the court finds a constitutional flaw in an initiative, those who voted for it complain that the court has thwarted the "will of the People." The complaint would be well taken but for two things. First, the court is required to thwart the will of the people, the will of the legislature, the will of Congress, the will of city councils, and even the will of mosquito abatement boards, if that will runs afoul of the protections found in the state and federal constitutions. Second, the court must consider the actual language of the initiative and not simply the sound bites with which it was sold to the voters.

Id. at 1336.

165. Refusing to extend the power of judicial review to initiative constitutional amendments to the same degree as other parts of the state constitution would also permit an override of the core powers of the legislature and the executive branch.

166. See *Raven v. Deukmejian*, 801 P.2d 1077 (Cal. 1990).

167. See, e.g., *Butt v. State*, 842 P.2d 1240, 1258 (Cal. 1992); *Mandel v. Myers*, 629 P.2d 935, 940 (Cal. 1981).

That the judiciary must declare the law is well established.¹⁶⁸ That the powers of the state government are to remain separate is a specific provision of the state constitution.¹⁶⁹ To say that it is the judiciary's responsibility to maintain the separation of powers is not overstating its role. On the contrary, if the revision–amendment distinction prevents the electorate from making structural changes, then the separation of powers, as one of the foundational principles of the state government, merits close judicial attention. It is beyond dispute that some acts are within the discretionary legislative power of the electorate. A coherent justification is needed for the judiciary to overturn those acts when the balance of power in the state government is at risk.

The analysis proposed here is one such method. Certainly *a* method is necessary, and this analysis brings the benefits of a well-developed set of principles that fairly account for the competing concerns. The electorate's power to amend the state constitution must be balanced against the legislature's own lawmaking power and the judicial power of interpreting the law. That has all the marks of a classic separation of powers issue. Rather than viewing the matter from a populist, common law, or magisterial perspective, the best approach here is one that properly accounts for the competing values and provides a reasoned method of balancing them in a given case.

C. JUDICIAL MANAGEMENT OF THE ELECTORATE IS NECESSARY AND PROPER

Why burden the judiciary with the responsibility for managing popular sovereignty? Direct democracy is a tool for maximizing optimal government, not an end in itself, and a slavish devotion to the principle of popular sovereignty (or any other principle of republican government) risks unacceptable damage to the whole of government for the sake of preserving the ideological purity of one part.¹⁷⁰ As with any other institution of California government, it is possible to have too much popular sovereignty.¹⁷¹ There must be an actor in the state government charged with keeping the people's power within the bounds set by the state constitution. And it must be the judiciary.

The judiciary is the only actor in the state government with the ability, and the mandate, to act as an effective brake on excesses of

168. *McClung v. Emp't Dev. Dep't*, 99 P.3d 1015, 1017 (Cal. 2004) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)); *Lockyer v. City & Cty. of San Francisco*, 95 P.3d 459, 463 (Cal. 2004).

169. CAL. CONST. art. III, § 3.

170. LEDUC, *supra* note 23, at 49.

171. Bowler & Glazer, *supra* note 105, at 7 (“[W]ith democracy it may be possible to have too much of a good thing.”).

popular sovereignty—just as it does for the elected branches.¹⁷² The ability comes from the power of judicial review,¹⁷³ and the mandate comes from the judiciary’s countermajoritarian constitutional function.¹⁷⁴ Additionally, there are only weak constitutional means for the legislature or the governor to *substantively* control or limit the people’s powers. The legislature cannot amend initiatives without the electorate’s approval,¹⁷⁵ and no provision in the state constitution permits a governor to veto an initiative. And on the principle that political actors are rarely motivated to vote to reduce their own power,¹⁷⁶ it is impractical to expect the electorate itself to reform its own direct democracy powers. That leaves the judiciary. From either a design or a practical perspective, the judiciary is the only institution of California government that can perform the necessary function.

But there are currently only two judicial tools for evaluating the people’s exercise of their legislative powers: the single subject rule and the amendment-revision rule.¹⁷⁷ The single subject rule is a paper tiger, being primarily a post-election remedy for mere procedural defects, and not a method of challenging the substance of the legislative act.¹⁷⁸ We have already discussed the limits of the amendment–revision rule. Further, because invalidating an act of the electorate is viewed as a drastic

172. *Id.* at 8 (“[S]o long as the courts can block discriminatory legislation, the rights of the minority are protected from both direct and representative democracy.”).

173. “The judiciary, from the very nature of its powers and means given it by the Constitution, must possess the right to construe the Constitution in the last resort . . .” *Nogues v. Douglass*, 7 Cal. 65, 70 (Cal. 1857).

174. See *supra* note 164; CITIZENS AS LEGISLATORS: DIRECT DEMOCRACY IN THE UNITED STATES, *supra* note 39, at 52–53 (describing the view that courts should give initiatives a “hard look,” applying a particularly rigorous review for constitutionality).

175. CAL. CONST. art. II, § 10(e).

176. For example, twenty-two of twenty-four initiative states have legislative term limits, while only two of the twenty-six noninitiative states have adopted legislative term limits. *Matsusaka*, *supra* note 20, at 119.

177. See CAL. CONST. art. II, § 8(d); *Id.* art. XVIII, §§ 2–3. This is not to say that there are no other limits on initiative measures. For example, they are subject to the prohibition in article 2, section 12 against granting offices. *Id.* art. II, § 12. Because the initiative is a power to enact “statutes” it includes only legislative acts, such that initiatives may neither direct governmental action nor adopt policy by resolution: “[A]n initiative which seeks to do something other than enact a statute—which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body—is not within the initiative power reserved by the people.” *Am. Fed’n of Labor v. Eu*, 686 P.2d 609, 627 (Cal. 1984) (proposing the initiative to compel the legislature to apply to Congress to convene a constitutional convention invalid as a resolution that did not change California law); see *GORDON*, *supra* note 45, at 12–13.

178. *GRODIN ET AL.*, *supra* note 35, at 116–17; see *Manheim & Howard*, *supra* note 55, at 1207 (“[T]he ‘single subject rule’ in California has devolved into a virtual nullity; it is a rule with few, if any, teeth.”). For an analysis of the single subject rule applied to direct democracy from an economic perspective, see Robert D. Cooter & Michael D. Gilbert, *A Theory of Direct Democracy and the Single Subject Rule*, 110 COLUM. L. REV. 687 (2010) (proposing a democratic process theory of the single subject rule).

measure, it is only rarely invoked.¹⁷⁹ Again, adding a new tool does not mean that more initiative amendments will (or should) be invalidated; but when a court does so, the quality of its analysis is crucial to the decision's legitimacy.

Improving the judicial review process is the best way to proceed.¹⁸⁰ This approach has several advantages. First, it is available, unlike a constitutional change limiting electoral power. In combination, direct democracy and judicial review will potentially resolve the problem historically presented by the federal constitution's assignment to the judiciary of principal responsibility for new rights definitions, which has failed to build the kind of broad support for those new definitions that would be more likely to arise from a community consensus.¹⁸¹ By permitting a greater degree of interaction between the electorate, the judiciary, and the legislature, the system overall has greater potential for building consensus.¹⁸² And although this carries the disadvantage of higher decision costs, close contact between judicial, legislative, and electorate power encourages public debate while providing accessible outlets for popular expression of the resulting consensus views.

What we propose is not revolutionary: Judicial review of ballot propositions in general, and judicial decisions invalidating initiative measures specifically, are not so unusual.¹⁸³ Counterintuitively, judicial review *fosters* popular sovereignty—preserving direct democracy by curbing excesses that could inspire more radical reforms, and by increasing participation incentives through the appearance of legitimacy created by enforcing process fairness.¹⁸⁴ The very purpose of giving courts

179. *Raven v. Deukmejian*, 801 P.2d 1077, 1080 (Cal. 1990) (noting several principles: the court must liberally construe the initiative power to promote the democratic process; the judiciary has the “solemn duty jealously to guard the sovereign people’s initiative power” as one of the most precious rights of the democratic process; and the court must resolve any reasonable doubts in favor of the exercise of this precious right); see *Strauss v. Horton*, 207 P.3d 48, 93 (Cal. 2009) (“*Raven* is the only case in which we have found a proposed constitutional amendment to constitute an impermissible constitutional revision resulting from the measure’s far reaching *qualitative* effect on the preexisting constitutional structure . . .”).

180. A skeptic would charge that this violates the principle of separation of powers and creates the possibility of judicial tyranny. With the well-used ability of the electorate to vote even California Supreme Court justices out of office, judicial oppression is unlikely.

181. MUELLER, *supra* note 12, at 223 (referencing the “bitter debates and clashes among citizens over civil rights, criminal rights, and abortion” to support the assertion that reliance on the U.S. Supreme Court alone to amend the definitions of constitutionally defined rights “has failed to build the kind of support for the new definitions of rights that would exist if they had arisen from a wider consensual agreement in the society.”).

182. *See id.*

183. Steiner, *supra* note 18, at 88 (noting that fifty-two percent of initiatives passed in California, Oregon, Colorado, and Washington from 1960 to 2000 were challenged in court, fifty-four percent of which were invalidated in whole or in part); ALLSWANG, *supra* note 95, at 247 (“[T]he proportion of initiatives that ends [sic] up in the court system has greatly increased in recent years.”).

184. *See* MUELLER, *supra* note 12, at 310–11.

the power of judicial review in a government is to allow that power to be used to prevent infringement of individual liberty by the government or by a popular majority.¹⁸⁵ Indeed, judicial review is the answer to a major criticism of direct democracy: that the majority will vote to undermine the rights of the minority.¹⁸⁶ Judicial review balances this tendency of direct democracy, just as the ability of the federal judiciary to nullify California initiatives that violate the federal Constitution is an essential constraint on the state's sovereignty.¹⁸⁷ The question, then, is which institution will play this necessary role—if it is to be the judiciary, should it be the state or the federal judiciary, or both?

The *state* judiciary should be accorded, and should keep for itself, the respect it is due as a branch of state government. There is little basis for arguing that the responsibility assigned to the state judiciary by the state constitution should (or indeed could) be delegated to the federal courts.¹⁸⁸ On the contrary:

185. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 64–65 (1980).

186. See COOTER, *supra* note 106, at 146–47. Another response to the pro-majoritarian criticism is Professor Cooter's argument that direct democracy factors issues, which does not necessarily harm minorities more than the spliced voting that would occur in the legislature. In factored voting, the minority on one dimension of choice is not necessarily the same group across all issues, with the result that any one person may win on some issues and lose on others. Thus, only some minorities will lose, and only sometimes; under those conditions, majorities will not exploit minorities more under a direct democracy than under an indirect democracy. *See id.* at 146.

187. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding California's constitutional ban on same-sex marriage invalid under the federal Constitution), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded by Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

188. *Kopp v. Fair Political Practices Comm'n*, 905 P.2d 1248, 1255 (Cal. 1995) ("State courts 'are the principal expositors of state law.'" (citing *Moore v. Sims*, 442 U.S. 415, 429 (1979))). *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (discussing the federal court "plain statement" rule that if a state court decision "indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent" state law grounds, the federal courts will not review the decision); *see also Beard v. Kindler*, 558 U.S. 53 (2009) (Kennedy, J., concurring) ("By refraining from deciding cases that rest on an adequate and independent state ground, federal courts show proper respect for state courts and avoid rendering advisory opinions."); *Kowalski v. Tesmer*, 543 U.S. 125, 133 (2004) ("[F]ederal and state courts are complementary systems for administering justice in our Nation. Cooperation and comity, not competition and conflict, are essential to the federal design.' The doctrine of *Younger v. Harris*, reinforces our federal scheme by preventing a state criminal defendant from asserting ancillary challenges to ongoing state criminal procedures in federal court." (alteration in original) (internal citations omitted)).

The California Constitution is the supreme law of our state—a seminal document of independent force that establishes governmental powers and safeguards individual rights and liberties. As the Supreme Court of California, we are the final arbiters of the meaning of state constitutional provisions. Our authority and responsibility in this regard is part of the basic structure of California government; it cannot be delegated to the United States Supreme Court or any other person or body. When we construe provisions of the California Constitution, we necessarily do so in light of their unique language, purposes, and histories, in accordance with general principles of constitutional interpretation established in our case law. Nor do we act differently when the state constitutional provision in issue contains the same language as a federal constitutional provision. In such a case, we are not bound by a decision of the United States Supreme Court or any other court. We must consider and decide the matter independently.¹⁸⁹

It is inadequate to point out other institutional protections, such as the ready availability of the initiative process and the limits of the federal Constitution, because their existence neither invalidates the existence of, nor mitigates the need for, state court protection. Although the state high court is not the only available protection, it is both intrinsically necessary due to the nature of the state judiciary as the ultimate guardian of the state constitution, and it is also necessary as a primary shield for Californians in the event that other protections prove to be unavailable or insufficient. Finally, there is a textual basis for the concept of judicial protection for minorities: The state constitution was drafted with a majority rules principle combined with constitutional protection for minorities.¹⁹⁰ And what state government institution is vested with the power to interpret and declare the provisions of the state constitution? The courts.¹⁹¹

Accordingly, only the California judiciary can perform the necessary function of managing electorate legislative acts.

CONCLUSION

California houses an uncommon mixture of conceptually distinct governmental systems. The positive viewpoint is that California's hybrid government successfully combines direct democracy with representative institutions, without the undesirable tendencies of a republic that includes direct democracy institutions.¹⁹² The negative view is that this

189. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 834 (Cal. 1991) (internal citations omitted).

190. J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER 1849 354–60 (1850).

191. “It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” *McClung v. Emp’t Dev. Dep’t*, 99 P.3d 1015, 1017 (Cal. 2004) (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

192. See BALDASSARE & KATZ, *supra* note 9, at 7 (“[A] hybrid democracy taking root and seemingly here to stay.”); *id.* at 219; Bowler & Glazer, *supra* note 105, at 1.

form of government will potentially allow a small and unrepresentative segment of the electorate to make self-interested policy decisions for the state, at the risk of impairing elected representative efficiency and minority interests.¹⁹³

Taking the pragmatic view, both perspectives miss the point. The long history and extensive use of the initiative, and its strong voter support, all indicate that legislative power in California will continue to be a shared responsibility between the elected representatives and the electorate.¹⁹⁴ Direct democracy is a popular California institution, and voter complaints about it may simply reflect pervasive voter frustration with state government as a whole.¹⁹⁵ A significant majority of the electorate believes voters should have a direct say in making law and public policy through the initiative process, while a similarly large majority believes that the initiative process needs reform, with some of the most favored changes potentially making the initiative a *more* powerful political force.¹⁹⁶ Such an electorate is highly unlikely to approve any limits on its powers, and so direct democracy can be expected to remain a state government institution.¹⁹⁷ This is not necessarily bad news.¹⁹⁸

Adopting the ideas proposed here may require a greater role for the state courts—and properly so. But not *necessarily* so. The California Supreme Court is already the arbiter of the direct democracy provisions in the state constitution. This is so if the matter is viewed from a separation of powers perspective, where the judiciary has a well-defined role to play in defining the powers of the electorate. It is equally true

193. BALDASSARE & KATZ, *supra* note 9, at 221.

194. *Id.* at 219; CRONIN, *supra* note 14, at 9 (discussing longstanding ambivalence about popular versus representative policymaking).

195. See ALLSWANG, *supra* note 92, at 241. Long-time state legislator Sheila Kuehl argues that:

Californians love their initiatives. They do not like reading the long ones. They do not like it when the courts strike them down for their constitutional defects. They do not like finding out later that they were wrong or misled about the contents. But generally, the people of California jealously guard their ability to make and shape the law independent of the legislature. For the most part, the people feel excluded from the long and arduous process of legislation. They read about the new laws on January 1 of each year and shake their heads or wonder at the omissions. The initiative process provides the people with a way to remedy the paralysis and inaction they perceive in the legislature.

Kuehl, *supra* note 164, at 1329–30.

196. CTR. FOR GOVERNMENTAL STUDIES, *DEMOCRACY BY INITIATIVE: SHAPING CALIFORNIA'S FOURTH BRANCH OF GOVERNMENT* 17–27 (2d ed. 2008); GORDON, *supra* note 45, at 1; CRONIN, *supra* note 14, at 78–79 tbl.4.5, 80 tbl.4.6, 199, 234 tbl.9.3; BALDASSARE & KATZ, *supra* note 9, at 23, 31, 217 tbl.1.2; Grant, *supra* note 111, at 139.

197. CRONIN, *supra* note 14, at 199 (indicating that public opinion strongly supports retaining the initiative); *Id.* at 232 (“Initiatives and referenda are here to stay.”).

198. See MUELLER, *supra* note 12, at 99 (suggesting that representative government has greater oligarchic tendencies than direct democracy). Particularly given the modern California dynamic of voter disengagement and a professional political class largely undiscouraged by term limits, a tendency of the direct democracy elements of California government to mitigate the state government’s oligarchic tendencies is a public good.

from a constitutional design perspective, because without a structural means to check the electorate's powers, the entire governmental system can become imbalanced. Only the state high court can say whether it should reconsider its doctrine in this area. If it does, redefining the core powers analysis to include the electorate's legislative powers is a good place to start.
