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Volume 53  
Number 2 *California Supreme Court Issue*

Article 4

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Winter 2-1-2020

## Making Constitutional Sense: A Modal Approach to California's Proposition 66

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### Recommended Citation

Alan Romero, *Making Constitutional Sense: A Modal Approach to California's Proposition 66*, 53 Loy. L.A. L. Rev. 447 (2020).

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# MAKING CONSTITUTIONAL SENSE: A MODAL APPROACH TO CALIFORNIA'S PROPOSITION 66

*Alan Romero\**

*For years, the California Supreme Court has adopted a deferential posture when reviewing state constitutional challenges to a ballot initiative. The decision in *Briggs v. Brown* underscored the degree to which courts are willing to avoid striking down ballot initiatives on constitutional grounds, such as by broadly construing the initiative's language to avoid constitutional problems. In construing the language of Proposition 66 to avoid separation of powers problems, however, Briggs effectively re-interpreted central pillars of Proposition 66 in ways rendering it unrecognizable to Californians who cast votes for and against the initiative. Such recasting of ballot initiatives raises fundamental jurisprudential questions concerning the courts' ability to regulate the people's reserved legislative powers vis-à-vis the initiative process.*

*This Article examines the decision in *Briggs* and evaluates principles of judicial review as applied to popularly enacted ballot initiatives. This Article discusses various methods of constitutional reasoning, and considers challenges and issues when applying these approaches to the constitutional questions raised by *Briggs*. *Briggs* not only raises salient separation of powers issues, but the decision raises practical and political challenges as well. In the end, *Briggs* arguably limited its inquiry to a particular framework of constitutional reasoning without engaging the full breadth of argument archetypes that would have bolstered its decision in light of various constitutional values, institutional constraints, and political realities. In circumstances where the prevailing analytical framework proves unworkable in the long-run, courts should expand their analytical approach to include considerations such as prudence, history, text, ethics, and structure.*

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\* J.D., Columbia Law School; M.P.P., Harvard University; B.A., The George Washington University. As a former student of Philip C. Bobbitt and Akhil R. Amar, I am grateful to them for their inspiration, ideas, and guidance as a legal thinker. I also would like to express my gratitude to the editors of *Loyola of Los Angeles Law Review* for their insights and feedback throughout the editing process. Their contributions undoubtedly made this a better, more incisive article. The views expressed are my own.

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## I. INTRODUCTION

Proposition 66 (“Prop. 66”) has engendered considerable debate over the scope of judicial review as applied to popularly enacted ballot initiatives.<sup>1</sup> On November 8, 2016, California voters narrowly approved Prop. 66, the terms of which expedited the death penalty review process by, among other things, setting forth a five-year timeframe for direct appeals and habeas corpus review.<sup>2</sup> In so doing, however, Prop. 66 raised salient constitutional questions that culminated in the California Supreme Court decision in *Briggs v. Brown*.<sup>3</sup> Rather than strike down Prop. 66, the majority opinion in *Briggs* recast otherwise facially mandatory time constraints imposed on the judiciary, holding that the five-year timeframe was aspirational rather than mandatory.<sup>4</sup> To support its holding, the court relied on longstanding case law that stood for the proposition that judicial revision is the proper means for remedying constitutionally flawed ballot initiative provisions—in deference to the electorate.<sup>5</sup>

The public reaction—not to mention the reaction of prominent legal scholars—was swift and critical in many respects. While the ruling cohered with California case law, it raised more questions than it arguably resolved. From the standpoint of stakeholders, practitioners, and legal experts, the decision raises valid issues implicating practical workability and meaningful guidance for the state judiciary moving forward. Additionally, to avoid the severe outcome of striking down Prop. 66, the court reinterpreted facially mandatory language and left in place a ballot initiative that was significantly different from the measure that voters considered on election night. This move raises considerable questions regarding the proper scope of judicial review in the ballot initiative context, as well as the proper approach to constitutional reasoning when the workability of prior precedents is at issue.

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1. See *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEdia, [https://ballotpedia.org/California\\_Proposition\\_66,\\_Death\\_Penalty\\_Procedures\\_\(2016\)](https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)) (last visited Nov. 17, 2019).

2. *Id.*; Letter from Kermit Alexander to Initiative Coordinator, Att’y Gen. Off. (Oct. 16, 2015), [https://www.oag.ca.gov/system/files/initiatives/pdfs/150096%20%28Death%20Penalty%29\\_0.pdf?](https://www.oag.ca.gov/system/files/initiatives/pdfs/150096%20%28Death%20Penalty%29_0.pdf?).

3. 400 P.3d 29 (Cal. 2017).

4. *Id.* at 59.

5. See *id.* at 37.

In his seminal book, *Constitutional Fate*, Philip Bobbitt articulates a set of modalities of constitutional reasoning, which function as judicial review argument archetypes grounded in longstanding constitutional traditions.<sup>6</sup> This Article considers how these modalities could apply to *Briggs*, with the goal of identifying different ways that *Briggs* could have reached a decision that cohered with core constitutional values.

In Part II of what follows, I sketch out the general background of Prop. 66 and the *Briggs* decision. I discuss the salient provisions of Prop. 66, and how they implicated the legal questions at issue in *Briggs*. In Part III, I survey the different modalities of constitutional reasoning, based on the discussion in Bobbitt's *Constitutional Fate*. I briefly discuss how the doctrinal, ethical, historical, textual, structural, and prudential modalities could apply to the issues raised by the *Briggs* decision. I then conclude with final thoughts.

The purpose of this Article is not so much to critique the holding in *Briggs* but rather to suggest that the court limited its inquiry to a particular framework of constitutional reasoning without engaging the full breadth of argument archetypes that would have bolstered its decision in light of various constitutional values, institutional constraints, and political realities. In circumstances where the prevailing analytical framework proves unworkable in the long-run, courts should expand their analytical palate to include considerations such as prudence, history, text, ethics, and structure.

## II. BACKGROUND

### A. Proposition 66

Prop. 66 was the culmination of a contentious debate in California concerning the state of capital punishment and efforts to reform its appeals process.<sup>7</sup> The Editorial Board of the *Los Angeles Times*, for

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6. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7–8 (1984).

7. See CAL. SEC'Y OF STATE, OFFICIAL VOTER INFORMATION GUIDE FOR 2016, GENERAL ELECTION 104–07 (2016), <https://vig.cdn.sos.ca.gov/2016/general/en/pdf/complete-vig.pdf> (last visited Nov. 17, 2019).

instance, opined that “California’s death penalty is a dysfunctional mess.”<sup>8</sup>

As of March 2020, California is one of twenty-five states where capital punishment remains lawful.<sup>9</sup> In recent years, an average of twenty individuals per year have received death sentences.<sup>10</sup> According to the Secretary of State’s *Official Voter Information Guide*, “[o]f the 930 individuals who have received a death sentence since 1978, 15 have been executed, 102 have died prior to being executed, 64 have had their sentences reduced by the courts, and 748 are in state prison with death sentences.”<sup>11</sup> Yet, no prisoner has been executed in California since 2006.<sup>12</sup>

Complicating matters is the fact that public opinion polls suggest that Californians are largely torn over capital punishment.<sup>13</sup> Recent surveys show that 47 percent of Californians oppose the death penalty.<sup>14</sup> In contrast, 48 percent would like to speed up the process.<sup>15</sup>

On November 8, 2016, California voters narrowly approved Prop. 66 by a margin of 51.1 percent to 48.9 percent.<sup>16</sup> Among other things, Prop. 66 required that habeas corpus petitions first be heard in trial courts instead of the California Supreme Court.<sup>17</sup> The text of Prop. 66 also required completion of direct appeals and habeas corpus petitions within five years, and it also required any counsel representing a

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8. The Times Editorial Board, *Props 62 and 66: California Voters Should End the Death Penalty, Not Speed It Up*, L.A. TIMES, (Sept. 3, 2016, 5:00 AM), <http://www.latimes.com/opinion/editorials/la-ed-prop-62-prop-66-20160826-snap-story.html>.

9. In three of the twenty-five states, including California, governor-imposed moratoriums have halted executions from proceeding. *State by State*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Apr. 1, 2020).

10. CAL. SEC’Y OF STATE, *supra* note 7, at 104.

11. *Id.* at 79.

12. *See, e.g., Inmates Executed 1978 to Present*, CAL. DEP’T CORRECTIONS & REHABILITATION, [https://www.cdcr.ca.gov/Capital\\_Punishment/Inmates\\_Executed.html](https://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html) [<https://web.archive.org/web/20190403083057/https://sites.cdcr.ca.gov/capital-punishment/inmates-executed-1978-to-present/>] (last visited Nov. 17, 2019) (listing Clarence Ray Allen as last inmate executed on January 17, 2006).

13. *Public Opinion: Support for Repealing Death Penalty Grows in California*, DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org/node/6365> [<https://archive.deathpenaltyinfo.org/node/6365>] (last visited Nov. 17, 2019).

14. *Id.*

15. *Id.*

16. *California Proposition 66, Death Penalty Procedures (2016)*, *supra* note 1.

17. *See* CAL. PENAL CODE § 1509 (West 2019).

condemned inmate to file a habeas corpus petition, if any, with the trial court within one year.<sup>18</sup>

Proponents of Prop. 66 argued that expediting the review process promotes justice for victims and the public at large, all while saving taxpayer dollars.<sup>19</sup> Alternatively, opponents underscored that Prop. 66, as presented to the voters, was costly and poorly drafted—potentially undermining important legal safeguards aimed at protecting the truly innocent while creating further delays in the appellate review process.<sup>20</sup>

### B. *Briggs v. Brown*

Prop. 66 raised a number of state constitutional questions that culminated into the legal dispute in *Briggs v. Brown*, a California Supreme Court decision that upheld Prop. 66 but reinterpreted the five-year timeline as advisory rather than mandatory.<sup>21</sup> Soon after Prop. 66 passed, Ron Briggs and former California Attorney General John Van de Kamp filed suit alleging that the measure: (1) interfered with the jurisdiction of state courts;<sup>22</sup> (2) violated the separation of powers doctrine;<sup>23</sup> and (3) violated the single subject matter rule.<sup>24</sup>

One of the issues was a Prop. 66 provision stating, “Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases.”<sup>25</sup> Plaintiffs argued that the term “shall” rendered the timeline mandatory, which implicated separation of powers issues because such constraints unduly infringed upon the judiciary’s core powers.<sup>26</sup> Moreover,

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18. *California Proposition 66, Death Penalty Procedures (2016)*, *supra* note 1.

19. *Id.*

20. *Id.*

21. *Briggs v. Brown*, 400 P.3d 29, 29, 56–57 (Cal. 2017).

22. Petition for Extraordinary Relief, Including Writ of Mandate and Request for Immediate Injunctive Relief; Memorandum of Points and Authorities Immediate Stay or Injunctive Relief Requested at 17–25, *Briggs v. Brown*, 400 P.3d 29 (Cal. 2017) (No. S238309), 2016 WL 11603995 [hereinafter *Petition for Extraordinary Relief*].

23. *Id.* at 25–37.

24. *Id.* at 37–47.

25. *Briggs*, 400 P.3d at 34–35 (quoting CAL. PENAL CODE § 190.6(d) (West 2016)).

26. *Petition for Extraordinary Relief*, *supra* note 22, at 28–32.

plaintiffs challenged Prop. 66's habeas corpus reforms on the ground that it violated article VI, section 10 of the California Constitution.<sup>27</sup>

In a 5–2 decision, the California Supreme Court upheld Prop. 66, interpreting the measure's five-year timeline as advisory rather than mandatory.<sup>28</sup> Accordingly, notwithstanding language stating that "state courts *shall* complete" appeals within five years, the court construed that timeline as only "an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice."<sup>29</sup> The court reasoned that "for over 80 years, California courts have held that statutes may not be given mandatory effect, despite mandatory phrasing, when strict enforcement would create constitutional problems."<sup>30</sup> Accordingly, the court relied on long-standing precedent to support its holding, underscoring that "while the statute is phrased in mandatory terms, the same was true of the statutes at issue in the cases we have discussed."<sup>31</sup>

In his concurring opinion, Justice Liu found it "stunning that Proposition 66's proponents . . . claim that the voters intended the five-year limit to be nonbinding or aspirational when that claim is plainly belied by the ballot materials and advocacy campaign for Proposition 66."<sup>32</sup> Yet, Justice Liu acknowledged there was longstanding precedent "construing similar mandates as nonmandatory when necessary to save their constitutionality."<sup>33</sup> Justice Liu parenthetically noted that the measure's five-year requirement "cannot serve as a realistic benchmark to guide courts . . . as they implement Proposition 66."<sup>34</sup>

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27. *Id.* at 18–25; *see* CAL. CONST. art. VI, § 10 ("The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings. Those courts also have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. Superior courts have original jurisdiction in all other causes.").

28. *Briggs*, 400 P.3d at 34.

29. *Id.* at 59.

30. *Id.* at 56.

31. *Id.* at 58.

32. *Id.* at 62 (Liu, J., concurring).

33. *Id.*

34. *Id.*



Justice Cuéllar dissented and surmised that “[v]oters . . . would not recognize the initiative the majority purports to uphold today.”<sup>35</sup> Importantly, giving effect to such intent “violates the California Constitution’s separation of powers provision.”<sup>36</sup> Justice Cuéllar concluded that in an effort to avoid this problem, the majority “misconstru[ed] this mandatory five-year time limit as nothing more than an ‘exhortation,’”<sup>37</sup> and in doing so, “disregard[ed] the electorate’s clear purpose in enacting Proposition 66.”<sup>38</sup> The notion that the five-year limit was merely an exhortation was “at odds . . . with what the initiative says, how it was designed to work, and how it was sold.”<sup>39</sup>

### III. DISCUSSION: METHODS OF CONSTITUTIONAL REASONING

The opinions above broadly reflect the general contours of what Philip Bobbitt ultimately described as the modalities of constitutional reasoning, a set of argument typologies that could offer legitimate bases for judicial review.<sup>40</sup> A thorough discussion of these modalities is beyond the scope of this Article, but it suffices to note that they summarize analytical frameworks that make up our constitutional grammar.<sup>41</sup> The point of laying out these modalities is not to suggest that one is more apt than another in any given situation.<sup>42</sup> While individual judges may be inclined to gravitate toward particular modalities, or find some more appealing than others, each one is grounded in longstanding constitutional traditions that give it an air of legitimacy.<sup>43</sup>

#### *A. An Appeal to Doctrine*

The majority opinion largely grounded its analysis on longstanding state law precedent that affirmed the judicial practice of recasting ballot initiative language to avoid fatal constitutional

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35. *Id.* at 69 (Cuéllar, J., concurring and dissenting in part).

36. *Id.* (citing CAL. CONST. art. III, § 3).

37. *Id.*

38. *Id.*

39. *Id.* at 70.

40. *See* BOBBITT, *supra* note 6, at 7. The modalities discussed are historical, textual, doctrinal, prudential, structural, and ethical. *Id.*

41. *Id.* at 6.

42. *Id.*

43. *See id.* at 5.

defects.<sup>44</sup> Such reliance is the hallmark of doctrinal reasoning—a common and longstanding approach in which a court cites cases with parallel or analogous facts, holding that the legal rule from those cases applies to the one before it and controls the outcome.<sup>45</sup>

This methodological approach was evident, for example, when the majority opinion in *Briggs* discussed *People v. Engram*,<sup>46</sup> a decision that similarly recast facially mandatory language in flexible terms.<sup>47</sup> *Briggs* gleaned from *Engram* that “section 1050,” which facially set forth mandatory requirements, was read in light of the statute’s broader policy aim, “ma[king] it clear that the electorate did not intend to impose an *unreasonable* limit.”<sup>48</sup> The *Briggs* majority analogized the matter before it with the statute at issue in *Engram*, concluding that “[s]imilar considerations apply to section 1509, subdivision (f)’s time limits for superior court rulings on initial habeas corpus petitions.”<sup>49</sup>

To say that doctrinal reasoning is a legitimate methodological approach is not to say that reliance on case law satisfactorily resolves legal disputes in all circumstances. What should a hypothetical court do when applying precedent proves unworkable, which may happen, for example, when changes to different lines of cases have altered the prevailing legal scheme in material ways?<sup>50</sup> There is nothing novel about this tension.<sup>51</sup> But as Akhil Amar, Philip Bobbitt, Judge John Walker have noted—not to mention as several appellate decisions

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44. See, e.g., *People v. Sandoval*, 161 P.3d 1146, 1158 (Cal. 2007); *Kopp v. Fair Political Practices Comm’n*, 905 P.2d 1248, 1290 (Cal. 1995); *Thurmond v. Superior Court*, 427 P.2d 985, 987 (Cal. 1967); *Garrison v. Rourke*, 196 P.2d 884, 889 (Cal. 1948), *overruled on other grounds by* *Keane v. Smith*, 485 P.2d 261 (Cal. 1971); *Lorraine v. McComb*, 32 P.2d 960, 962 (Cal. 1934); *Verio Healthcare, Inc. v. Superior Court*, 208 Cal. Rptr. 3d 436, 439 (Ct. App. 2016); *In re Shafter-Wasco Irrigation Dist.*, 130 P.2d 755, 758 (Cal. Ct. App. 1942).

45. See Grant Lamond, *Precedent and Analogy in Legal Reasoning*, STAN. ENCYCLOPEDIA PHIL. (June 20, 2006), <https://plato.stanford.edu/entries/legal-reas-prec/>; BOBBITT, *supra* note 6, at 7, 40–42.

46. 240 P.3d 237 (Cal. 2010).

47. *Id.* at 257.

48. *Briggs v. Brown*, 400 P.3d 29, 60 (Cal. 2017).

49. *Id.*

50. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 82–83 (2000); John M. Walker, Jr., *The Role of Precedent in the United States: How Do Precedents Lose Their Binding Effect?*, STAN. L. SCH. CHINA GUIDING CASES PROJECT 5 (Feb. 29, 2016), <https://cgc.law.stanford.edu/wp-content/uploads/sites/2/2016/02/CGCP-English-Commentary-15-Judge-Walker.pdf>.

51. See Amar, *supra* note 50, at 82–83.

have held—doctrinalism cannot encompass the only valid basis of constitutional reasoning.<sup>52</sup> Otherwise, individual court decisions—regardless of constitutional first principles—would reign supreme.

One could view this question as part of a broader issue of how to engage, if at all, other methodological approaches to constitutional reasoning when the preferred or default one proves problematic. As it turns out, there is no need to review extraneous texts to explore these possibilities, as the concurring and dissenting opinions in *Briggs* discuss such approaches at some length.

### B. *Invoking Constitutional Ethos*

With respect to ballot initiatives in particular, case law that supports the *Briggs* decision is premised, in part, on notions of deference to the electorate and direct democracy traditions.<sup>53</sup> Such deference reflects a values-based judgment, and Bobbitt aptly captures this sort of appeal in his discussion of ethical reasoning, explaining that “[t]his form of argument denotes an appeal to those elements of the American cultural ethos that are reflected in the Constitution.”<sup>54</sup>

While not figuring as prominently as doctrine-based reasoning, ethical reasoning is not foreign to our jurisprudence, whether at the federal or state level. For example, the rule of lenity—a canon of construction holding that any ambiguities in criminal statutes must be resolved in favor of the defendant—reflects society’s aversion to erroneously punishing the truly innocent, thereby justifying higher standards of certainty and clear legislative intent before exacting

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52. AKHIL R. AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 238–41 (2012); Walker, *supra* note 50, at 4; BOBBITT, *supra* note 6, at 7; *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 955 (1992) (Rehnquist, J. concurring and dissenting in part) (“Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.” (citations omitted)). Note that lower courts should still be bound by the decisions of its appellate counterparts. The issue contemplated here is the extent to which the California Supreme Court is bound by its prior decisions, not whether lower level courts are bound by California Supreme Court decisions.

53. *See* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1302 (Cal. 1978) (“[I]t is our solemn duty ‘to jealously guard’ the initiative power, it being ‘one of the most precious rights of our democratic process.’” (quoting Associated Home Builders of the Greater E. Bay, Inc. v. City of Livermore, 557 P.2d 473, 477 (Cal. 1976))).

54. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* 12–22 (1991), *as reprinted in* JOHN H. GARVEY ET AL., *MODERN CONSTITUTIONAL THEORY: A READER* 9 (5th ed. 2004). Needless to say, where there is a divergence between California and federal normative values, the ethical appeal as applied to California courts would be to the ethos of California.

criminal sanctions against the accused.<sup>55</sup> This principle is not purely a function of reasoned logic. Rather, it emanates from values imbedded in the American cultural ethos that, over time, manifested into various legal standards and presumptions such as the rule of lenity, proof beyond reasonable doubt, and presumption of innocence. While these standards and presumptions have not been explicitly codified in constitutional text, such principles nonetheless have been constitutionalized.<sup>56</sup>

With respect to California law, whether conscious or not, the democratic ideal surfaces in various state court decisions. For example, the court in *California Ass'n of Retail Tobacconists v. State*<sup>57</sup> explained that “the initiative power must be *liberally construed* to promote the democratic process.”<sup>58</sup> Moreover, one way to explain the courts’ aversion to striking down initiatives is that such aversion helps counter its institutional anti-majoritarian stature,<sup>59</sup> albeit constitutional features of twelve-year terms and retention elections ensure that public accountability figures into the judicial realm.<sup>60</sup>

In that vein, any reluctance to strike down duly enacted ballot initiatives gives effect to the touchstone value of self-governance, with origins rooted in the founding era. Notions of self-governance can be traced back to the Preamble’s opening phrase, “We the People,”<sup>61</sup> a principle subsequently recast by President Lincoln in one of the most influential expressions of American national purpose.<sup>62</sup> As such, any general reluctance to strike down duly enacted ballot initiatives stems

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55. See ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 296–302 (2012).

56. See, e.g., Akhil Reed Amar, *Forward: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 643 n.5 (1996).

57. 135 Cal. Rptr. 2d 224 (Ct. App. 2003).

58. *Id.* at 236 (emphasis in original) (quoting *Legislature v. Eu*, 816 P.2d 1309, 1313 (Cal. 1991)).

59. See Owen Tipps, Comment, *Separation of Powers and the California Initiative*, 36 GOLDEN GATE U. L. REV. 185, 199 (2006).

60. CAL. CONST. art. VI, § 16 (“Judges of the Supreme Court shall be elected at large and judges of courts of appeal shall be elected in their districts at general elections at the same time and places as the Governor. Their terms are 12 years . . . .”).

61. U.S. CONST. pmb1.

62. Abraham Lincoln, President of the U.S., *The Gettysburg Address* (Nov. 19, 1863) (transcript available at [https://rmc.library.cornell.edu/gettysburg/good\\_cause/transcript.htm](https://rmc.library.cornell.edu/gettysburg/good_cause/transcript.htm)).

from an appeal to our cultural ethos, as it helps overcome the counter-majoritarian difficulty.<sup>63</sup>

For the foregoing reasons, doctrinal and ethical modalities are frameworks that cohere with the majority opinion.

### C. *Historical Reasoning: The Past as Guideposts*

Another salient constitutional method is to rely on historical reasoning. Originalism is often associated with this approach, where the interpretive analysis turns on how legal drafters understood what they were enacting in light of historical currents of the time.

Needless to say, notwithstanding the self-governance ethos discussed above, the history surrounding ballot initiatives and direct democracy institutions offers a more complicated account of how pro-democracy trends evolved over time.

#### 1. Founding Era Views of Direct Democracy

In a speech to attendees of the 1788 New York Ratifying Convention, Alexander Hamilton issued the following remarks:

It has been observed . . . that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved, that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure deformity: When they assembled, the field of debate presented an ungovernable mob . . . .<sup>64</sup>

Hamilton's view was not unusual at the time. In Federalist 10, James Madison articulated his vision of republican government, not direct democracy, arguing that "a pure democracy . . . can admit of no cure for the mischiefs of faction. . . . [I]t is that such democracies have ever

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63. The "counter-majority difficulty" is the perceived challenge or conundrum associated with the court's ability to overturn laws that reflect popular will. See Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 283 (2010).

64. Alexander Hamilton, First Speech of June 21 at the New York Ratifying Convention (June 21, 1788) (transcript available at <https://founders.archives.gov/documents/Hamilton/01-05-02-0012-0011>).

been spectacles of turbulence and contention . . . and have in general been as short in their lives as they have been violent in their deaths.”<sup>65</sup>

This is not to say that there was a general consensus among the founders with respect to the proper scope of direct democracy. Thomas Jefferson—ideologically opposed to Federalists like Hamilton—was more sympathetic to notions of popular governance and the political power of the agrarian yeoman, all while remaining skeptical of judicial review.<sup>66</sup> But such sentiments did not translate into full-fledged support for direct democracy. Jefferson held a particular vision of republicanism—one based on agrarianism, anti-elitism, and localized politics—that nonetheless cohered with representative democracy.<sup>67</sup>

In any case, the views of Madison and Hamilton largely prevailed amid the ratification debates and were ultimately incorporated into the constitutional framework.<sup>68</sup> From 1789 to 1913, state legislators—not the general electorate—voted for United States senators from their respective states.<sup>69</sup> Moreover, the electoral college<sup>70</sup> and life tenure for federal judges<sup>71</sup> were non-democratic features of presidential elections and judicial tenure, respectively. While one may make a distinction between federal views and California-specific views on direct democracy, the founding era views should still inform our understanding of the prevailing attitudes that contextualize California’s annexation to the union during the nineteenth century.

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65. THE FEDERALIST NO. 10, at 76 (James Madison) (Clinton Rossiter ed., 2005).

66. See, e.g., Letter from Thomas Jefferson to Mrs. John Adams (Sept. 11, 1804), in 8 THE WRITINGS OF THOMAS JEFFERSON 308, 311 (Paul Leicester Ford ed., 1897) (“[T]he opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.”).

67. See RON CHERNOW, ALEXANDER HAMILTON 456 (2004).

68. *Id.* at 241–42.

69. See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be . . . chosen by the Legislature thereof . . .”), amended by U.S. CONST. amend. XVII, cl. 1 (“The Senate of the United States shall be . . . elected by the people thereof . . .”).

70. See U.S. CONST. art. II, § 1, cl. 1–2 (“The executive Power shall be vested in a President of the United States . . . and, together with the Vice President, chosen for the same Term, be elected, as follows: Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

71. See U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

## 2. Progressive Era Populism

The Progressive Era marked a period associated with nascent political activism and populism in response to the excesses of the Gilded Age, such as extreme inequality, political corruption, and social strife.<sup>72</sup> Governor Hiram Johnson—an architect of California’s initiative, referendum, and recall processes—emerged as a prominent political figure during this period, assuming the populist mantle associated with the Progressive Era.<sup>73</sup>

A core aspect of Governor Johnson’s political appeal was his pro-democracy, reformist agenda. In his first inaugural address, he stated:

It matters not how powerful the individual may be who is in the service of the State, nor how much wealth and influence there may be behind him, nor how strenuously he may be supported by “big business” and by all that has been heretofore powerful and omnipotent in our political life, if he be the representative of Southern Pacific politics, or if he be one of that class who divides his allegiance to the State with a private interest and thus impairs his efficiency, I shall attack him the more readily because of his power and his influence and the wealth behind him, and I shall strive in respect to such a one in exactly the same way as with his weaker and less powerful accomplices.<sup>74</sup>

Here, Governor Johnson alludes to the class-based debates that gained currency during the Progressive Era, focusing in particular on the Southern Pacific Railroad’s grip on state legislative politics.<sup>75</sup>

In this context, the initiative process was introduced and defended as a means to empower the populace amid the rising influence of special interest groups.<sup>76</sup> Governor Johnson explained:

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72. Elizabeth Sanders, *Rediscovering the Progressive Era*, 72 OHIO ST. L.J. 1281, 1283 (2011).

73. See *Origin of the Species*, ECONOMIST (Apr. 23, 2011), <https://www.economist.com/special-report/2011/04/23/origin-of-the-species>; Ruth Rosen, *What Would Hiram Johnson Do?*, SFGATE (Aug. 21, 2003, 4:00 AM), <https://www.sfgate.com/opinion/article/What-would-Hiram-Johnson-do-2595193.php>.

74. Hiram Johnson, *First Inaugural Address* (Jan. 3, 1911) (available at <http://governors.library.ca.gov/addresses/23-hjohnson01.html>).

75. See *id.*

76. See *id.* (“When, with your assistance, California’s government shall be composed only of those who recognize one sovereign and master, the people, then is presented to us the question of, How best can we arm the people to protect themselves hereafter?”).

[W]hile I do not by any means believe the initiative, the referendum, and the recall are the panacea for all our political ills, yet they do give to the electorate the power of action when desired, and they do place in the hands of the people the means by which they may protect themselves.<sup>77</sup>

By “protection,” Johnson meant protection from special interest groups, like the railroads.<sup>78</sup>

Importantly, the justification offered in defense of the initiative during the Progressive Era was distinct from founding era arguments related to direct democracy. Governor Johnson did not so much squarely address the founding fathers’ democracy-related contentions. In fact, one would be hard-pressed to argue that he defended direct democracy on the merits. Rather, he envisioned the initiative, referendum, and recall processes as tools to circumvent special interests that controlled the legislative agenda.<sup>79</sup> In short, the initiative process functioned as a battering ram of sorts against special interest groups like the Southern Pacific Railroad Company.

### 3. The Historical Upshot

When viewed in this way, courts overstate the case, at least from a historical standpoint, when inferring from the institutional features of the initiative process that the electorate is supreme vis-à-vis the state legislature. For example, the California Supreme Court has held that “[t]he people’s reserved power of initiative *is* greater than the power of the legislative body.”<sup>80</sup> This assertion is premised on the following simplified syllogism: (1) the legislature may not bind future legislatures; (2) the legislature may not bind the electorate; (3) the electorate may amend or repeal acts passed by the legislature; (4) the electorate may amend or repeal past initiatives; (5) therefore, the electorate may bind the legislature, but the legislature may not bind the electorate, rendering the electorate supreme.<sup>81</sup>

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77. *Id.*

78. *See id.*

79. *See id.*

80. *Rossi v. Brown*, 889 P.2d 557, 574 (Cal. 1995).

81. *See id.*; *see also* Owen Tipps, *supra* note 59, at 198 (“The inability on the part of the state legislature to amend or repeal initiated laws has led the California Supreme Court to conclude that in this connection the people’s initiative power is superior to the state legislature’s lawmaking power. Specifically, this superiority consists in the fact that whereas the legislature may not pass



A faithful account of early twentieth century history, however, renders this logic overly formalistic. The asymmetry between the legislature and electorate can be explained by the fact that it gives effect to Governor Johnson's notion of a battering ram.<sup>82</sup> The initiative power would be hollow if the legislature—a 1911 pawn for special interests—could readily frustrate via amendment or repeal what the California electorate enacted. As such, codifying this asymmetrical procedural mechanism was the means by which the people could “protect themselves,” as Governor Johnson argued.<sup>83</sup>

A more cogent assessment than what the California Supreme Court has offered is that the direct initiative was grounded in a political movement motivated by a desire to address the particular problem of undue dominance of special interests. From this it does not follow that the electorate was originally viewed as supreme.

#### D. Textualism as a Starting Point

Reasoning on the basis of legal text has some intuitive appeal. Language—including the words that make up statutes or constitutions—are conduits of meaning. Legislative language conveys what drafters sought to codify into law—the bright lines, mandates, licenses, and exceptions that constitute the body of law. The upshot is that language offers direct evidence of legislative intent, which is why text is a legitimate starting point for legal construction.

The key phrase, here, is *starting point*. Textualism should not be the sole interpretive approach because language is an imperfect proxy for conveying ideas or meaning.<sup>84</sup> The textualist approach is of limited utility, for example, when language is ambiguous or does not squarely address a particular salient issue, whereupon it becomes necessary to resort to other interpretive approaches.<sup>85</sup>

With respect to Prop. 66, the term “shall” is significant because it suggests that the legislature intended to codify a mandate.<sup>86</sup> Drafters

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laws that bind future legislatures, laws passed through initiative may and do bind future legislatures because such legislatures are unable to amend or repeal those laws.”).

82. See KEY & CROUCH, THE INITIATIVE AND THE REFERENDUM IN CALIFORNIA 485 (1939).

83. Johnson, *supra* note 74.

84. See BOBBITT, *supra* note 6, at 37.

85. *Id.* at 38.

86. CAL. SEC'Y OF STATE, *supra* note 7, at 213 (“Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts *shall* complete the state appeal and the initial state habeas corpus review in capital cases.” (emphasis added)).

easily could have employed the word “may” but chose not to. Their decision to instead use “shall” gives rise to the inference that a mandate—not an aspiration—was intended. The fact that proponents framed the five-year timeline as a mandate—and presented such a construction to voters—is evidence of the will of the electorate, notwithstanding case law or the nonexistence of an enforcement mechanism.<sup>87</sup>

### *E. An Appeal to Structure*

Textualism can be a significant tool for advancing robust structural arguments—a common interpretive approach in its own right. Structure-based reasoning entails making inferences from constitutionally mandated relationships—whether they involve people-state, county-by-county, or judicial-executive-legislative relations. Such inferences may inform courts about the proper contours of constitutional powers as applied to a set of facts.<sup>88</sup>

A useful starting point for the structural argument is the text of the California Constitution, which sets forth the governing institutional relationships and frameworks that are fodder for interpretive analysis. When it comes to delineating the prerogatives of each branch of government, the California Constitution goes further than its federal counterpart.<sup>89</sup> The California Constitution states that “[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.”<sup>90</sup> By contrast, the United States Constitution does not contain such explicit language, requiring faithful interpreters to read between the lines to glean unwritten constitutional principles.<sup>91</sup> California’s clear

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87. *See id.*

88. BOBBITT, *supra* note 54, at 12–22, as reprinted in GARVEY ET AL., *supra* note 54, at 6 (“First, an uncontroversial statement about a constitutional structure is introduced [for example, \* \* \* the statement that the right to vote for a member of Congress is provided for in the Constitution]; second, a relationship is inferred from this structure [that this right, for example, gives rise to the federal power to protect it and is not dependent on state protection]; third, a factual assertion about the world is made [that, if unprotected, the structure of federal representation would be at the mercy of local violence]. Finally a conclusion is drawn that provides the rule in the case.”).

89. *See* U.S. CONST. art. I–III; CAL. CONST. art. III, § 3.

90. CAL. CONST. art. III, § 3.

91. AMAR, *supra* note 52, at 5 (“For starters, we must learn to read between the lines—to discern America’s implicit Constitution nestled behind the explicit clauses. In short, we must come to understand the difference between reading the Constitution *literally* and reading the document *faithfully*.”).

statement on the issue ameliorates any ambiguity that otherwise could have arisen in circumstances when separation of powers issues are implicated.

Additionally, the California Constitution vests legislative powers “in the California Legislature . . . but the people reserve to themselves the powers of initiative and referendum.”<sup>92</sup> The term “legislative” connotes the power to make new, or change existing, laws. As the court in *Carmel Valley Fire Protection District v. State*<sup>93</sup> affirmed, the core functions of the legislative branch include the power of “passing laws, levying taxes, and making appropriations.”<sup>94</sup> This, combined with the explicit separation-of-powers clause, lends to the conclusion that only the legislature, or the electorate via the initiative and referendum process, may exercise “legislative powers.”

### 1. *Briggs* and the Structural Argument

Although relying heavily on doctrinalism, the majority opinion in *Briggs*, at times, advanced structural arguments, particularly with respect to its separation of powers discussion.<sup>95</sup> In fact, the core powers doctrine, as developed by California case law, is largely a product of structural and textual reasoning. According to *Briggs*, the upshot for the legislature is that “while the Legislature has broad authority to regulate procedure, the constitutional separation of powers does not permit statutory restrictions that would materially impair fair adjudication or unduly restrict the courts’ ability to administer justice in an orderly fashion.”<sup>96</sup> Accordingly, notwithstanding text or legislative intent, legislation may not interfere with the judiciary’s *core functions*, which include the timing by which courts administer their dockets.<sup>97</sup>

A substantial portion of Justice Cuéllar’s dissent also involves structural reasoning and separation of powers analysis in particular.

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92. CAL. CONST. art. IV, § 1.

93. 20 P.3d 533 (Cal. 2001).

94. *Id.* at 539 (citing CAL. CONST. art. IV, §§ 1, 8(b), 10, 12).

95. *Briggs v. Brown*, 400 P.3d 29, 41–59 (Cal. 2017).

96. *Id.* at 56.

97. *See* *Younger v. Superior Court*, 577 P.2d 1014, 1024 (Cal. 1978) (“The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another; it is not intended to 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.” (emphasis added) (citations omitted)).

Justice Cuéllar explained that “[a] statutory limit on the amount of time a court may spend deciding a case is an intrusion on quintessential judicial functions and violates the California Constitution’s separation of powers provision.”<sup>98</sup> As such, two choices were available: (1) strike down the initiative; or (2) recast the mandatory language as an “exhortation.”<sup>99</sup> In the end, in light of longstanding precedent giving deference to duly enacted ballot initiatives, the *Briggs* majority elected the latter.<sup>100</sup> There are, however, structural considerations, as Justice Cuéllar’s indicates, that militate against the majority’s holding. While due deference to the will of the people suggests courts should refrain from excessively engaging in judicial review, the danger of reading legislative text beyond its interpretative breaking point is that recasting legislative enactments also aggrandizes the judicial branch as an institution. Such recasting increases the risk that courts will exercise discretion over matters that historically and logically have fallen within the policy or legislative realm.

## 2. The Relationship Between Legislation and Public Policy

A corollary of the legislative power is the power to deliberate on what the public policy should be on a particular issue. The court in *State Board of Education v. Honig*<sup>101</sup> aptly explained that the “[e]ssentials of the legislative function include the determination and formulation of legislative policy.”<sup>102</sup> Policy judgments entail making complicated trade-offs between practical consequences, such as the pros and cons of setting a new tax rate at 10 percent rather than 15 percent, or how heavily to regulate a particular industry in light of peculiar economic effects.

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98. *Briggs*, 400 P.3d at 69 (Cuéllar, J., concurring and dissenting in part) (citing CAL. CONST. art. III, § 3).

99. *Id.*

100. *Id.* at 59 (majority opinion) (“Accordingly, we conclude that the five-year review limit in section 190.6, subdivision (d) is directive only. Its provision . . . is properly construed as an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice.”).

101. 16 Cal. Rptr. 2d 727 (Ct. App. 1993).

102. *Id.* at 746.

### 3. Public Policy Aims Versus Means

Deciding the general aim of a law is a public policy decision, in and of itself. The jurisprudence on separation of powers has developed such that the legislature or electorate mainly has the prerogative to deliberate on policy aims, particularly the trade-offs between competing visions of what should be done within a policy domain.<sup>103</sup> Increasing the availability of affordable housing, for example, is a general policy objective that is part and parcel of the legislative power—a power that involves exercising judgment over competing policy considerations such as fiscal impacts, economic conditions, geography, and demography.<sup>104</sup>

Where relevant, courts may have to interpret statutes to ascertain what the policy objectives are, and, as suggested above, statutory text is a legitimate starting point.<sup>105</sup> As the court in *Hunt v. Superior Court*<sup>106</sup> explained, “[i]n determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. . . . The words, however, must be read in context, considering the nature and purpose of the statutory scheme.”<sup>107</sup> This task, however, is distinct from deciding policy, which is not a core function of the judiciary.<sup>108</sup>

Notably, the *means* of achieving a particular policy *aim* is, itself, a public policy decision. The former involves tradeoffs between competing methods of achieving a policy *aim*—methods often fraught with economic, moral, logistical, and political implications. Weighing

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103. See *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1283 (Cal. 1978) (“[T]he legislative power under our constitutional framework is firmly vested in the Legislature . . . .”); *Fitts v. Superior Court*, 57 P.2d 510, 512 (Cal. 1936) (“[T]he Legislature is vested with the whole of the legislative power of the state.”); *Carmel Valley Fire Prot. Dist. v. State*, 83 Cal. Rptr. 2d 466, 469 (Ct. App. 1999) (“It is the Legislature’s prerogative to declare public policy and to provide the ways and means of its accomplishment.”) (citing *Lincoln Property Co. No. 41, Inc. v. Law*, 119 Cal. Rptr. 292, 294 (Ct. App. 1975)), *rev’d* 20 P.3d 533 (Cal. 2001); *Martin v. Smith*, 7 Cal. Rptr. 725, 727 (Ct. App. 1960) (“The power to be exercised is legislative in its nature if it prescribes a new policy, or plan . . . .” (quoting 5 EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* 255–56 (3d ed. 2013))); *Tipps*, *supra* note 59, at 195 (“Moreover, the initiative process has increasingly supplanted the state legislature in both enacting legislation and defining public policy.”).

104. See generally AFFORDABLE HOUSING AND PUBLIC-PRIVATE PARTNERSHIPS (Nestor M. Davidson & Robin Paul Malloy eds., 2009) (broadly discussing housing policy issues, public-private partnerships, and intervention tools for policymakers).

105. See BOBBITT, *supra* note 6, at 31–32; SCALIA & GARNER, *supra* note 55, at 56–58.

106. 987 P.2d 705 (Cal. 1999).

107. *Id.* at 716 (citing *Torres v. Automobile Club of S. Cal.*, 937 P.2d 290, 293 (Cal. 1997)).

108. See *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 533, 538–39 (Cal. 2001).

those tradeoffs is akin to the design blueprints, drawings, and measurements that constitute architectural work. The architect certainly develops the overall conception of a proposed building, but the project's success depends in large part on development of sound blueprints and accurate measurements, subject to careful deliberation and foresight.<sup>109</sup> One would be hard-pressed to disaggregate the latter from the architectural process.

In the context of ballot initiatives, whether the electorate actually deliberates on policy is not the critical point. The constitutional framework explicitly reserves certain legislative powers to the people,<sup>110</sup> creating the legal fiction that electors are policy architects.

#### 4. *Briggs* on Public Policy Implications

The majority, concurring, and dissenting opinions in *Briggs* considered, in varying degrees, the policy ramifications of a five-year deadline. The majority opinion, for example, described these effects as follows:

Meeting such a deadline requires the coordination of efforts by multiple courts and other actors. . . . The Legislature must provide funding sufficient for the superior courts to meet their greatly expanded responsibilities under Proposition 66, and for this court and the courts of appeal to expedite review in capital cases without neglecting the other matters before them. . . . [A]s a practical matter, writ relief to require us to enforce the limit is unavailable, because there is no tribunal with authority to issue a writ of mandate to this court.<sup>111</sup>

This passage underscores the policy issues at stake. Any “coordination of efforts” and questions of “funding sufficient for the superior courts”<sup>112</sup> are policy considerations necessarily implicated by the five-year deadline, and any judicial decree to alter this necessarily implicates policy.

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109. See generally CRISS B. MILLS, *DESIGNING WITH MODELS: A STUDIO GUIDE TO ARCHITECTURAL PROCESS MODELS* (3d ed. 2011) (providing step-by-step guide to basic and advanced architectural design process modeling).

110. 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.”).

111. *Briggs v. Brown*, 400 P.3d 29, 57 (Cal. 2017).

112. *Id.*

It is unclear why the detail of setting a five-year deadline (policy means) should remain constitutionally distinct from the broader question of expediting the death penalty review process (policy aim). Both were expounded by the text of Prop. 66. Five years is one of many plausible timeframes—each with its own economic, logistical, and political effects. The decision of five years—and whether that timeframe was mandatory or flexible—was fraught with policy implications that affect the scheme’s viability. In the end, the electorate decided not only that the death penalty review process should be expedited, but also expressed how fast.<sup>113</sup>

It is also unclear why any failure to explicitly set forth a five-year enforcement mechanism is constitutionally significant.<sup>114</sup> A difficult truth for proponents of Prop. 66 is that the initiative offered a poor policy prescription for the vexing challenge of reforming capital punishment. As Justice Liu stated in his concurring opinion,

[t]he realities of California’s postconviction death penalty process mean that without a radical reorganization of this court’s functions, a restructuring of the role of lower courts beyond what Proposition 66 provides, and a significant infusion of resources from the Legislature, the five-year time limit is not remotely close to realistic.<sup>115</sup>

The uncertainty and heightened risk of unintended consequences represent hallmarks of ill-conceived policy, and such policy-related flaws are the sorts of matters that legislative committees are charged with flagging and remedying. Failure to express an enforcement mechanism is one of many flaws with Prop. 66, but it is unclear why this one flaw justifies recasting otherwise mandatory language beyond the fact that previous court decisions have upheld that principle. In the end, *Briggs* effectively assumed the role of policy maker in the course of remedying this shortcoming.

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113. *Id.* at 34–35 (citing CAL. PENAL CODE § 190.6(d) (West 2016)) (“Within five years of the adoption of the initial rules or the entry of judgment, whichever is later, the state courts shall complete the state appeal and the initial state habeas corpus review in capital cases.”).

114. *Id.* at 58 (justifying holding on basis that “nowhere were the voters informed of the details of an enforcement mechanism”).

115. *Id.* at 68 (Liu, J., concurring).

## 5. The Structural Upshot

It is worth taking a step back to consider the structural implications of the court's decision and the extent to which it is contrary to the structural features of the California Constitution.

As previously discussed, judicial deference to the initiative process is based, in part, on the notion that doing so promotes “one of the most precious rights of our democratic process.”<sup>116</sup> However, as Justice Cuéllar stated, it is another matter entirely to “pretend a statute means what it does not simply so it can be saved.”<sup>117</sup> Doing so has the effect of aggrandizing the views of the judiciary above that of the electorate—an institutional dynamic not reflected in the constitutional text or history.

It is unclear what constitutional values are served by preserving a popularly enacted law that is materially distinct, either in purpose or mechanism, from what the electorate enacted. Even if the court preserved the electorate's general intent of expediting the death penalty review process, supplanting the specific policy mechanics chosen by the electorate amounts to a decision to render policy decisions with respect to the specifics—even if the specifics are ill-conceived. This is inconsistent with Governor Johnson's vision of popular sovereignty and California's tripartite constitutional framework.

### *F. An Appeal to Prudential Considerations*

Another approach is giving due weight to prudential considerations. Bobbitt described this approach as a “constitutional argument . . . actuated by the political and economic circumstances surrounding the decision.”<sup>118</sup> This argument can often involve a cost-benefit analysis for gauging the practical effects of one ruling versus another.<sup>119</sup>

Justice Cuéllar's dissenting opinion accords with the prudentialist approach to a significant degree. Concluding that the court's holding would likely result in inconsistent rulings for death penalty

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116. *Bldg. Indus. Ass'n of S. Cal. v. City of Camarillo*, 718 P.2d 68, 74 (Cal. 1986) (quoting *Mervynne v. Acker*, 11 Cal. Rptr. 340, 344 (Ct. App. 1961)).

117. *Briggs*, 400 P.3d at 72 (Cuéllar, J., concurring and dissenting in part).

118. *See* BOBBITT, *supra* note 6, at 61.

119. *Id.*



defendants, Justice Cuéllar's dissent reasons that "[s]uch a scheme would multiply the risk of conflicting rulings . . . . It is simply not reasonable to interpret the constitutional provision to countenance such a result."<sup>120</sup>

### 1. The Import of Institutional Coherence

This reasoning evidences a concern over whether the judicial outcome coheres with society at large, with the implication that coherence is a constitutional value that strengthens the legitimacy of a particular ruling. The upshot is that any ruling that creates further confusion or chaos is disfavored, all else being equal.

Chief Justice Tani Cantil-Sakauye discussed one practical challenge flowing from the *Briggs* decision in the following terms: "[T]he Habeas Corpus Resource Center—that was originally contemplated to provide the attorneys for these habeas corpus petitions—are now having their salaries reduced, even though the effort is that they take on more work. . . . I'm not sure how that's going to work out."<sup>121</sup> The uncertainty moving forward is problematic not so much because the court failed a duty to streamline organizational processes or preserve institutional resources. Rather, the problem arises because institutions of government ideally should function and cohere with one another, and the court's decision arguably frustrated this ideal.

At the very least, *Briggs* likely engenders further confusion for lawyers and other capital punishment stakeholders. The court's decision did not address many of the underlying factors that contribute to delays in the review process, such as the dearth of lawyers with sufficient experience to competently handle capital appeals. As Professor Erwin Chemerinsky poignantly noted, "[t]here simply are not enough lawyers qualified to handle death penalty cases."<sup>122</sup> Nor will the decision address the fact that, in any given moment, there is a

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120. *Briggs*, 400 P.3d at 88.

121. Ben Bradford, *California Chief Justice Expects More Death Penalty Lawsuits*, CAP. PUB. RADIO (Dec. 11, 2017), <http://www.capradio.org/articles/2017/12/11/california-chief-justice-expects-more-death-penalty-lawsuits>.

122. Erwin Chemerinsky, *California's Death Penalty Speed-up Is About to Be Undercut on a Case-by-Case Basis. Here's Why*, SACRAMENTO BEE (Aug. 30, 2017, 5:30 AM), <http://www.sacbee.com/opinion/california-forum/article170028282.html>.

backlog of capital cases that the California Supreme Court already has to adjudicate, in addition to other non-capital cases.<sup>123</sup>

Despite procedural and jurisdictional changes, delays will likely persist. Simply mandating expedited review will not ameliorate the bottleneck that currently stymies the process. And although transferring habeas corpus petitions to superior courts could help reduce the backlog, the net effect would likely turn on whether adequate funding is appropriated, a prospect that, at best, remains uncertain.<sup>124</sup>

## 2. Implications for the Ballot Initiative Industry

Another practical consideration is how majority opinion affects the ballot initiative process and industry, and whether these effects undermine, rather than promote, principles of direct democracy. Significant scholarship already has explored the state of the initiative industry and its influence on well-funded special interest groups in the best position to organize initiative campaigns.<sup>125</sup> It suffices to note that the ruling in *Briggs* could exacerbate, rather than ameliorate, the anti-democratic tendencies associated with the initiative industry. The *Briggs* ruling could potentially disincentivize ballot initiative proponents from deliberating and scrutinizing the constitutionality of what they are endeavoring to do. An expectation that the court likely will find a way to save the initiative when confronted with constitutional challenges, even if that means substantially revising its language, could create a moral hazard of sorts for initiative drafters. When viewed in this way, there is little need to internalize the costs of losing a court battle on constitutional grounds, or its corollary need to seriously think about whether the proposition passes constitutional muster in the first place.

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123. *See id.*; *see also Briggs*, 400 P.3d at 63 (Liu, J., concurring) (“The dearth of attorneys willing to take on these assignments is due in part to the sheer enormity of the undertaking. A single death penalty case can and often does dominate a lawyer’s practice for well more than a decade.”); Scott Martelle, *The Real Reasons California’s Death Penalty System Is So Slow*, L.A. TIMES (July 17, 2014, 11:55 AM), <http://www.latimes.com/nation/la-ol-death-penalty-california-unconstitutional-20140717-story.html>.

124. *Briggs*, 400 P.3d at 66 (“It is unclear whether the Legislature will appropriate funds for this purpose. Nor does Proposition 66 expedite the appointment of capital habeas attorneys. And the constitutionality of Proposition 66’s restrictions on successive petitions (§ 1509, subd. (b)) has yet to be fully tested.”).

125. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 35–36 (1995).

Such moral hazards could inexorably alter the political calculus and communications strategies involved in initiative campaigns. This is particularly true when good-faith efforts to comport with constitutional standards are politically difficult, or at least when the unconstitutional position is much more politically palatable than the constitutional one.<sup>126</sup> In light of this, any inconsistencies with how Prop. 66 was presented to voters and how it was subsequently presented to the court should not be surprising.<sup>127</sup> In an environment where courts are ready to strike down constitutionally problematic initiatives, drafters would be incentivized to cure any fatal constitutional flaws at the outset.

### 3. Whether Courts Should Decide Policy

Another macro-level consideration is the degree to which courts should deliberate on policy questions. Regardless of the state of constitutionally mandated relationships, one may ask whether it is simply prudent for the court to dabble in policy matters.

One colorable argument is that policy decisions are best reserved for the political arena. That is the forum where all relevant stakeholders and experts can weigh in on the wisdom and moral import of proposed legislative options, with opportunities to proceed only upon attaining sufficient consensus. American norms and constitutional history are such that it would be inappropriate for these groups to similarly weigh in on individual justices, because the court is principally a legal, not policy, institution.

The *Briggs* decision potentially incentivizes initiative proponents to shift the burden of deliberating difficult policy questions away from the political branches and onto the courts. One question is whether embracing a scheme where courts deliberate on policy issues is desirable, as this is contrary to arguments originally advanced in favor

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126. See *Briggs*, 400 P.3d at 89 (Cuéllar, J., concurring and dissenting in part) (noting the court's holding "encourages initiative proponents to repeat the bait-and-switch in the future").

127. See CAL. SEC'Y OF STATE, *supra* note 7, at 106 ("[Proposition 66] requires that the direct appeal and the habeas corpus petition process be completed within five years of the death sentence."). But see Oral Argument at 52:02, *Briggs v. Brown*, 400 P.3d 29 (Cal. 2017), [https://jcc.granicus.com/player/clip/490?view\\_id=12](https://jcc.granicus.com/player/clip/490?view_id=12) (government counsel concluding that five-year timeline is not mandatory, reasoning similar statutes in other cases have been construed as not mandatory in absence of enforcement mechanism).

of the initiative process.<sup>128</sup> As discussed above, the initiative process was intended to empower electors vis-à-vis a legislature captured by special interests.<sup>129</sup> While it would be an overstatement to say that the court endorsed a rule aggrandizing the judiciary vis-à-vis electors, the court effectively assumed greater legislative-like discretion, as evidenced by its justification for revising duly enacted initiatives.

As alluded before, a prudential argument is one that is attuned to the “practical wisdom of using the courts in a particular way.”<sup>130</sup> Admittedly, upholding a popularly enacted initiative coheres with direct democracy norms—a benefit that favors saving Prop. 66. However, one could view the procedural uncertainty, increased likelihood of further litigation, and judicial aggrandizement as costs for the judicial system and public at large.<sup>131</sup> These costs disfavor upholding the initiative.

#### 4. A Counterargument Against Prudentialism

A potential counterargument is that California courts already have considered the role of prudence and rejected such considerations as irrelevant for judicial review. An often cited decision for this proposition is *Amador Valley Joint Union High School District v. State Board of Equalization*,<sup>132</sup> which explains that the court “[does] not consider or weigh the economic or social wisdom or general propriety of the initiative.”<sup>133</sup> As it turns out, the majority opinion in *Briggs* cites *Amador* as authority for this proposition.<sup>134</sup>

A prudentialist could respond in several ways. First, citing decisions like *Amador* cannot adequately rebut prudential arguments, particularly with respect to California Supreme Court decision

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128. See, e.g., Johnson, *supra* note 74 (“[Governor Johnson] strongly urge[s], that the first step in our design to preserve and perpetuate popular government shall be the adoption of the initiative . . .”).

129. *Id.*

130. BOBBITT, *supra* note 6, at 7.

131. See Chemerinsky, *supra* note 122.

132. 583 P.2d 1281 (Cal. 1978).

133. *Id.* at 1283.

134. See Reply of Respondents Governor Brown and Attorney General Becerra to Amici Curiae Briefs at 5, *Briggs v. Brown*, 387 P.3d 1254 (Cal. 2017) (No. S238309), 2017 WL 1334868 (“But this Court has repeatedly indicated that such arguments are not relevant to a measure’s validity. (*Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 219 [in adjudicating constitutionality of an initiative, this Court ‘do[es] not consider or weigh the economic or social wisdom or general propriety of the initiative’].).”).

making, because prudentialism, itself, is a modality of constitutional reasoning, not an articulation of what the law is. Second, prudence here refers to effects on fundamental matters of constitutional order and norms, not whether a particular legislative policy, even if duly enacted via constitutional processes, is wise.

In any case, *Amador* addresses issues that are distinct from the ones implicated by prudentialism. Admittedly, *Amador* underscored the “limited nature of [its] inquiry” and dismissed concerns that the initiatives at issue would cause “actual or potential adverse effects” if enforced,<sup>135</sup> reasoning that such considerations would be improper bases for judicial review.<sup>136</sup> It bears emphasizing, however, that *Amador* merely explains that the court could not evaluate the soundness of the underlying law at issue. *Amador* does not squarely address the meta-level issue of whether any resulting disruptions in existing governmental institutions should inform the court’s decision making.

The point here is not that prudence requires an assessment of whether Prop. 66, as presented to voters, is sound policy. The prudential point is that there ought to be greater focus on the institutional consequences of a particular ruling.<sup>137</sup> A prudentialist could ask, for example, how revising Prop. 66 to save its constitutionality bodes for the judiciary vis-à-vis the electorate and legislature in the long run. Such foundational questions are beyond the scope of what the *Amador* court discussed.

#### IV. CONCLUSION

While case law precedent certainly supports the majority opinion in *Briggs*, the court’s decision also raises several questions that complicate the institutional relationships between the judiciary, legislature, and electorate. There were a number of legal tools that the court could have employed to avoid this fate and strengthen its decision.

The court in *Briggs* could have done more to illuminate how its decision implicates the institutional design of the California Constitution, particularly with respect to the separate roles of the

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135. *Amador*, 583 P.2d at 1283.

136. *Id.*

137. See BOBBITT, *supra* note 6, at 63.

legislature and judiciary, and other salient structural features. The historical upshot complicates the import of California case law with respect to the electorate's supremacy vis-à-vis other constitutional actors, particularly in light of how Governor Johnson and his contemporaries viewed the initiative process. While the general pro-democracy ethos of California was implicitly evident in the court's decision, there is a colorable argument that the decision paradoxically undermines such ethos in various respects. Finally, prudential considerations militate against recasting reasonably unambiguous propositions solely to avoid striking them down, as doing so could adversely implicate the constitutional order and long-term institutional coherence.

These considerations are raised not so much to critique the court's decision but rather to address a difficult constitutional conundrum that may well recur in the future.

