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COMMENT

SEPARATION OF POWERS AND THE CALIFORNIA INITIATIVE

But what's one crocodile's tooth, more or less?
-Shel Silverstein, *The Crocodile's Toothache*

INTRODUCTION

In November 2005, the voters of California went to the polls for a special election called by Governor Arnold Schwarzenegger.¹ The Governor called the election so the people of the state could vote on a quartet of initiatives on a range of topics to “reform” California government.² The proposed initiatives addressed state spending limits, redistricting, use of union dues for political purposes, and teacher tenure.³

The Public Policy Institute of California released a survey on October 28, 2005, that measured the attitudes of likely voters on a variety of topics, including the impending special election.⁴ Fifty-four percent of likely voters thought it was a bad idea.⁵ In addition, none of the Governor’s “reform” initiatives enjoyed the support of a majority of the likely voters that participated in the survey.⁶ The survey, released two weeks before the election, proved accurate. The voters of California

¹ See John Wildemuth and Carla Marinucci, *6.8 Million Expected to Vote Today*, S.F. Chronicle, November 8, 2005, at A1.

² See *id.*

³ See *id.*

⁴ Public Policy Institute of California, *Special Survey On Californians and the Initiative Process 7* (2005), available at <http://www.ppic.org/main/publication.asp?i=641> (last visited February 10, 2006). The Public Policy Institute of California is a nonprofit, nonpartisan research organization that is dedicated to improving public policy in the state. See <http://www.ppic.org/main/about.asp> (last visited February 10, 2006).

⁵ *Id.* at 38.

⁶ See *id.* at 32-33.

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rejected all of the Governor's proposed initiatives.⁷

Interestingly, ambivalence toward the issues themselves does not appear to be the source of the initiatives' defeat.⁸ The survey revealed that voters are indeed concerned about the problems that the Governor's proposed initiatives were meant to address.⁹ For instance, even though a majority of likely voters opposed the Governor's redistricting initiative, forty-four percent of those asked felt that California's redistricting process needs major changes.¹⁰ Similarly, sixty-two percent of likely voters opposed the initiative dealing with state spending limits despite the fact that sixty-six percent of those same voters believed that major changes are needed in the way California spends its money.¹¹

Taken together, the results of the survey and the special election suggest that the voters of California simply did not think that the initiative process was an appropriate means for dealing with these issues.¹² Indeed, the Governor himself seems to have conceded this point; after the election his spokesman claimed that the people of California had voted against the election itself rather than against the Governor's ideas.¹³ The spokesman went on to say that "the governor very much sees the results as an indication that voters want the problems of the state to be resolved here in Sacramento by elected officials."¹⁴

The special election of 2005 was the latest act in a constitutional drama that has been unfolding for the last 94 years¹⁵ and that will continue to unfold as an integral part of California's future. Since the advent of the initiative process in California, it has played a key role in the state's legal and political saga, performing its part alongside the state's other three constitutional actors—the legislature, the executive, and the judiciary.

Recognition of this key role has prompted many to refer to the initiative process in California as a fourth branch of government.¹⁶

⁷ Mark Martin, Carla Marinucci, and Lynda Gledhill, *Californians Say No to Schwarzenegger* S.F. Chron. November 9, 2005, at A1.

⁸ See Public Policy Institute of California, *supra* note 4 at v.

⁹ See *id.*

¹⁰ Public Policy Institute of California, *supra* note 4 at 33.

¹¹ *Id.*

¹² See *id.* at 38.

¹³ John Wildemuth and Carla Marinucci, *Governor's Camp Says His Ideas Didn't Lose*, S.F. Chron., November 10, 2005, at A1.

¹⁴ *Id.*

¹⁵ The initiative process was created in 1911 by an amendment to the state constitution. See *infra* part II.B.

¹⁶ See John M. Allswang, *Initiative & Referendum in California, 1898-1998* 1 (2000); see also Peter Schrag, *The Fourth Branch of Government? You Bet.*, 41 SANTA CLARA L. REV. 937, 941

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However, the theoretical implications of this claim remain largely unexplored.¹⁷ One reason for this is that the state separation of powers concerns that are implicated by the naming of the initiative power as a fourth branch of government have not received anywhere near the same level of scholarly attention that federal separation of powers issues have received.¹⁸

This Comment seeks to apply the existing principles of California's separation of powers jurisprudence to the statutory initiative power, beginning from the premise that this power constitutes a fourth and autonomous branch of government. Part I describes the initiative process and how it differs from the manner in which laws are passed by the legislature.¹⁹ Part II details the theoretical and historical origins of the initiative power.²⁰ Part III identifies the sources of the initiative power and the conventional legislative process, and it discusses the differing places ascribed to each in the state's constitutional jurisprudence.²¹ Part IV delineates the existing limits on the initiative power.²² Part V identifies the salient principles of the separation of powers in California.²³ Part VI argues that the lack of a legislative check on the initiative power allows the initiative to completely subsume the state's legislative power, which was not the intent when the initiative power was created.²⁴ Part VII concludes that the state legislature should play a meaningful role in the initiative process in order to avoid a conflict with the separation of powers provision in the state constitution.²⁵

I. THE INITIATIVE PROCESS

The initiative process allows the voters of California (whom the state constitution terms “the electors”²⁶) to adopt statutes and

(2001); Gerald F. Uelmen, *Handling Hot Potatoes: Judicial Review of California Initiatives After Senate v. Jones*, 41 SANTA CLARA L. REV. 999, 999 (2001).

¹⁷ Cf. Karl Manheim and Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1166 (1998).

¹⁸ See Jonathan Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers*, 51 UCLA L. REV. 1079, 1082 (2004).

¹⁹ See *infra* notes 26-74 and accompanying text.

²⁰ See *infra* notes 75-124 and accompanying text.

²¹ See *infra* notes 125-157 and accompanying text.

²² See *infra* notes 158-201 and accompanying text.

²³ See *infra* notes 202-267 and accompanying text.

²⁴ See *infra* notes 268-293 and accompanying text.

²⁵ See *infra* notes 294-308 and accompanying text.

²⁶ CAL. CONST. art. II, § 8.

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constitutional amendments independently of the state legislature.²⁷ Whereas laws enacted by the legislature must travel a long and complicated path that is often, in the words of one legislator, “difficult and tortuous,”²⁸ laws enacted by the voters take effect through a relatively simple procedure of signature-gathering, campaigning, and finally a popular vote.²⁹ Initiated laws are thus spared the arduous vetting and amendment processes that legislatively enacted laws must undergo.³⁰ These legislative processes allow for a great deal of “critical shaping” by interested parties on both sides of the partisan aisle.³¹ The initiative process does not.³²

A. HOW A BILL BECOMES A LAW

The journey of a law passed by the state legislature begins when a legislator decides that a certain change that is needed to statutory law or to the state constitution.³³ The author then submits the idea to the Office of the Legislative Counsel, which drafts the actual bill that ostensibly will enact the proposed change.³⁴ Bill in hand, the author consults with staff, agencies, advocates, and other organizations to ensure that the bill contains appropriate language.³⁵

After the author has completed this first round of vetting, the bill receives a number and goes immediately to the Rules Committee.³⁶ The Rules Committee assigns the bill to the appropriate policy committee based on the bill’s subject matter.³⁷ The staff of the policy committee, alongside the author’s staff, then analyzes the bill to identify any flaws it might have and to recommend appropriate changes.³⁸ Once this analysis is complete, the committee holds a hearing on the bill, at which it listens to testimony both for and against the bill and asks whatever questions it may have.³⁹

²⁷ See *id.*; see also *id.* art. XVIII. §§ 3-4.

²⁸ Sheila James Kuehl, *Either Way You Get Sausages: One Legislator’s View of the Initiative Process*, 31 LOY. L.A. L. REV. 1327, 1327 (1998).

²⁹ See CAL. CONST. art. II. § 8.

³⁰ See Kuehl, *supra* note 28 at 1329.

³¹ See *id.*

³² *Id.*

³³ *Id.* at 1327.

³⁴ *Id.*

³⁵ *Id.* at 1328.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

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If the bill clears the first policy committee, it may then go to a second policy committee where the analysis and hearing processes are repeated.⁴⁰ A bill that is fiscal—meaning that its implementation will cost the state money—is sent to the Appropriations Committee which assesses the impact of that cost.⁴¹ If the Appropriations Committee is satisfied, the bill goes to the Floor of the Assembly or Senate (depending on which house originates the bill) where further analysis, debate, and possible amendments occur.⁴² Once the bill clears the Floor, it then goes to the other house where the entire process begins again.⁴³

The Assembly and the Senate consider a bill for six months, during which time the bill is “poked, prodded, questioned, discussed, debated, and scrutinized.”⁴⁴ At any point along the way, the bill’s journey to the statute books or the constitution may be permanently halted.⁴⁵ If a bill survives passage through both houses of the legislature, it goes to the governor’s desk to be either vetoed or signed into law.⁴⁶ If the bill is a proposed constitutional amendment, it must overcome the final obstacle of a popular vote before it is adopted.⁴⁷

B. HOW TO PASS A LAW WITHOUT LEGISLATORS

Though it accomplishes the same result as the conventional legislative process—the adoption of a law or constitutional amendment—the initiative process does so in a very different fashion.⁴⁸ The California Constitution provides that a proposed initiative may be placed on the ballot by presenting a petition to the Secretary of State containing the text of the proposed law and a requisite number of signatures.⁴⁹ The California Elections Code sets out the specific procedural requirements with which the initiative proponents must comply if the desired law is to arrive safely on the ballot.⁵⁰

The initiative process begins when a proponent drafts a proposed law.⁵¹ The proponent may request the assistance of the Legislative

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 1329.

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See id.*

⁴⁹ CAL. CONST. art. II, § 8(b).

⁵⁰ *See* CAL. ELEC. CODE § 9000 *et seq.* (West 2005).

⁵¹ California Secretary of State Initiative Guide (2002),

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Counsel in drafting the law but is not required to do so.⁵² Once the text of the law is complete, the proponent submits it to the Attorney General who prepares a title and summary.⁵³ The initiative proponent may make substantive amendments to the law for only fifteen days after submission.⁵⁴ In addition, if the Attorney General decides that the proposed law requires a fiscal analysis, the Department of Finance and the Joint Legislative Budget Committee must prepare the analysis within twenty-five working days of receiving the proposed law.⁵⁵

After the proponent has received the official title and summary from the Attorney General, the petition circulation process can begin.⁵⁶ The proponent must collect the required number of signatures within a 150-day period.⁵⁷ In addition, the initiative must qualify for the ballot at least 131 days before the election in which it will be voted on.⁵⁸ Once the signature-gathering process is complete, the petition is filed with the appropriate local elections officials.⁵⁹ These officials then perform a raw count of the signatures on the petition and report the number to the Secretary of State.⁶⁰ If less than 100 percent of the required number is present, the measure immediately fails.⁶¹ If more than 100 percent of the required number is present, the Secretary of State directs the local officials to perform a random sample to determine the validity of the signatures.⁶² The measure qualifies for the ballot once the Secretary of State is satisfied that the petition contains the required number of valid signatures.⁶³

Because the qualification process is somewhat technical and time-sensitive, many initiative proponents employ the services of professional signature-gathering firms.⁶⁴ By paying these firms on a per-signature basis, initiative proponents can overcome much of the difficulty involved

http://www.ss.ca.gov/elections/init_guide.htm (last visited January 29, 2006).

⁵² *See id.*

⁵³ *Id.*

⁵⁴ *See* CAL. ELEC. CODE § 9004 (West 2005).

⁵⁵ California Secretary of State Initiative Guide, *supra* note 51.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *See id.*

⁶⁴ Elizabeth Garrett, *Who Directs Democracy?* 4 U. CHI. L. SCH. ROUNDTABLE 17, 20 (1997).

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in the qualification process.⁶⁵ These firms are part of what has come to be called “the initiative industry.”⁶⁶ This term encompasses not only firms that gather signatures, but also those that draft the proposed law and perform media consulting services during the campaign for the law’s passage.⁶⁷ However, despite the availability of for-profit signature-gathering firms, most measures fail to surmount the obstacles to ballot qualification.⁶⁸

Whereas laws passed by the legislature are subject to input, vetting, and amendment from a variety of sources, laws passed by initiative remain in substantially the same form throughout the process.⁶⁹ Currently no procedures exist by which to test and weigh the legal sufficiency or constitutionality of proposed initiatives before they are placed on the ballot.⁷⁰ The role of the Attorney General is expressly limited to the preparation of a title and summary of the proposed law.⁷¹ The Legislative Counsel has a role in the initiative process only if the Attorney General happens to be a proponent of an initiative; if this is the case, it takes over the duties normally performed by the Attorney General.⁷² Even though the Senate and the Assembly may hold hearings on proposed initiatives, neither body has authority to alter the text of an initiative in any way.⁷³ Initiatives are thus presented to voters on a take-it-or-leave-it basis with language chosen exclusively by the proponent.⁷⁴

II. THE INITIATIVE AS THE OPPOSITE OF REPRESENTATIVE GOVERNMENT

The practical difference between the initiative process and the conventional legislative process results from a difference in theory. The initiative process is a form of direct democracy, which allows citizens to directly exercise lawmaking power.⁷⁵ Direct democracy differs fundamentally from the representative form of government that is

⁶⁵ *See id.*

⁶⁶ *See id.*

⁶⁷ *See id.* at 20.

⁶⁸ *Id.* at 19.

⁶⁹ Kuehl, *supra* note 28 at 1329.

⁷⁰ *See* Philip P. Frickey, *The Communion of Strangers: Representative Government, Direct Democracy, and the Privatization of the Public Sphere*, 34 WILLAMETTE L. REV. 421, 438 (1998).

⁷¹ *See* CAL. ELEC. CODE § 9002 *et seq.* (West 2005).

⁷² CAL. ELEC. CODE § 9003 (West 2005).

⁷³ CAL. ELEC. CODE § 9007 (West 2005).

⁷⁴ Kuehl, *supra* note 28 at 1329.

⁷⁵ *See* Julian Eule, *Judicial Review of Direct Democracy*, 99 YALE L. J. 1503, 1509 (1990).

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generally associated with the American system.⁷⁶ Whereas representative government was designed in large part to curb the tyranny of the majority through the “filtering” of majoritarian preferences,⁷⁷ direct democracy is meant to fully and unreservedly implement the popular will.⁷⁸ Even though the U.S. Constitution does not provide for the exercise of direct democracy, California has followed a different path by placing direct lawmaking power in the hands of its citizens.⁷⁹

A. THE FRAMERS’ REJECTION OF DIRECT DEMOCRACY

The framers of the U.S. Constitution expressed a preference for representative government over and against direct democracy by severely curtailing citizens’ participation in the lawmaking process.⁸⁰ The original U.S. Constitution granted the people no direct lawmaking power.⁸¹ In addition, the provisions that established the Electoral College system⁸² and that provided for the election of U.S. Senators by the state legislatures⁸³ substantially limited the ability of citizens to choose their elected representatives.⁸⁴ Under the original system, the citizens of the United States could elect only the members of the House of Representatives by means of a direct vote.⁸⁵

The underlying reasons for this rejection of direct democracy derived from concerns regarding the threat of “factions” and the tyranny of the majority.⁸⁶ “Faction,” in the words of James Madison, refers to

a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the

⁷⁶ See Marci Hamilton, *The People: The Least Accountable Branch*, 4 U. CHI. L. SCH. ROUNDTABLE 1, 4-10 (1997).

⁷⁷ Glen Staszewski, *Rejecting the Myth of Popular Sovereignty and Applying an Agency Model to Direct Democracy*, 56 VAND. L. REV. 395, 401-02 (2003); Frickey, *supra* note 71 at 425-26.

⁷⁸ See Eule, *supra* note 75 at 1513.

⁷⁹ See CAL. CONST. art. II, § 8(a).

⁸⁰ See Frickey, *supra* note 70 at 423-25; see also Manheim and Howard, *supra* note 17 at 1166.

⁸¹ Hamilton, *supra* note 76 at 7.

⁸² U.S. CONST. art. II, § 1.

⁸³ U.S. CONST. art. I, § 3.

⁸⁴ See Frickey, *supra* note 70 at 424.

⁸⁵ See U.S. CONST. art. I, § 2.

⁸⁶ See Frickey, *supra* note 70 at 424-425.

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permanent and aggregate interests of the community.⁸⁷

Madison's fellow revolutionary Alexander Hamilton aptly summarized the threat posed by factions and what should be done about it:

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 against the other.⁸⁸

According to Madison, representative government accomplishes this objective because it

refine[s] and enlarge[s] public views, by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of our country, and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.⁸⁹

Citizen participation in government was originally limited to the election of representative lawmakers and the President.⁹⁰ However, the operation of the electoral college and the choosing of senators by the state legislatures mediated citizens' exercise of this election power.⁹¹ As a result of this inherent distrust of direct citizen participation in government, the view that the framers would look upon direct citizen lawmaking "with a feeling akin to horror" finds substantial support in both the text and history of the U.S. Constitution.⁹²

B. THE HISTORY OF THE INITIATIVE PROCESS IN CALIFORNIA

Even though the U.S. Constitution does not provide for direct democracy, many states—California included—have pursued an alternate course. Currently about half of the states allow for some form of direct democracy.⁹³ Beginning in 1898 with South Dakota, a wave of state constitutional reforms precipitated by the Populist and Progressive

⁸⁷ *Id.* at 424.

⁸⁸ Thomas Cronin, *Direct Democracy* 7 (1989).

⁸⁹ Frickey, *supra* note 70 at 425.

⁹⁰ *Id.* at 424.

⁹¹ *Id.*

⁹² Eule, *supra* note 75 at 1523.

⁹³ Frickey, *supra* note 70 at 426.

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Movements swept through the western half of the country.⁹⁴ By the time this wave retreated, it had deposited provisions for the exercise of direct democracy in the constitutions of many western states, including California.⁹⁵

The late nineteenth century was a time of rapid industrial growth and corresponding social change.⁹⁶ In California during this time, the Southern Pacific Railroad had come to completely dominate politics and government.⁹⁷ In the thirty years following the adoption of the 1879 version of the state constitution, not a single bill opposed by the railroad company was passed in the legislature.⁹⁸

Eventually, a movement against the railroad's political monopoly took shape and began to grow.⁹⁹ The core of this movement consisted of a group of Republican lawyers and merchants who were dissatisfied with the railroad's grip on power.¹⁰⁰ Through tireless effort, these Republicans eventually elected a reform-minded governor—Hiram Johnson—and a sympathetic legislature.¹⁰¹ In 1911 Governor Hiram Johnson called a special election as a way of delivering on his promise to end the dominance of special interests in the state capital of Sacramento.¹⁰² The result was the adoption of the initiative process in California, which has been subsequently hailed by a prominent justice of the California Supreme Court as “one of the outstanding achievements of the progressive movement of the early 1900s.”¹⁰³

Regarding the purpose of the adoption of the initiative and referendum in California, Hiram Johnson, in his inaugural address, declared:

And while 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 the electorate the power of action when desired, and they do place in the hands of the People the means by which they may

⁹⁴ See Arne R. Leonard, *In Search of the Deliberative Initiative: A Proposal for a New Method of Constitutional Change*, 69 TEMP. L. REV. 1203, 1207 (1996).

⁹⁵ *Id.*

⁹⁶ See David B. Schmidt, *Citizen Lawmakers: The Ballot Initiative Revolution* 5 (1989).

⁹⁷ See Manheim and Howard, *supra* note 17 at 1183.

⁹⁸ *Id.*

⁹⁹ See *id.* at 1185-86.

¹⁰⁰ *Id.* at 1186.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 1187.

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protect themselves.¹⁰⁴

Indeed, the ballot pamphlet that was circulated in support of the 1911 amendment creating the initiative power stated

[The initiative] is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negate such measures as it may viciously or negligently enact.¹⁰⁵

From its inception, the initiative process in California has served as the people's check on their elected representatives.¹⁰⁶ The original understanding of the initiative's purpose envisioned it as a structural safeguard that would ensure that the people's ability to correct abuses of legislative power would remain intact.¹⁰⁷ However, it was not intended as a wholesale substitute for the state legislature.¹⁰⁸

C. THE INITIATIVE TODAY

From the time of its adoption, the California initiative has evolved from a means by which ordinary citizens may put a stop to unsavory or self-serving practices of the state legislature into another tool for well-funded special interests to advance their agenda.¹⁰⁹ In particular, the advent of the "initiative industry" has placed the initiative at the disposal of the very special interest groups whose influence it was meant to curb.¹¹⁰ Moreover, the initiative process has increasingly supplanted the state legislature in both enacting legislation and defining public policy.¹¹¹

For its part, the state's political apparatus has adapted itself to an environment where the initiative reigns supreme.¹¹² Politicians have

¹⁰⁴ Donald S. Greenberg, *Scope of the Initiative and Referendum in California*, 54 CAL. L. REV. 1717, 1741 (1966).

¹⁰⁵ Manheim and Howard, *supra* note 17 at 1188.

¹⁰⁶ *Id.* at 1169.

¹⁰⁷ *Id.* at 1188.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.* at 1190.

¹¹⁰ *See* David Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 35-36 (1995); *see also* Schrag, *supra* note 16 at 940-41.

¹¹¹ *See* Frickey, *supra* note 70 at 429-30.

¹¹² *See* Uelmen, *supra* note 16 at 999.

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begun to take on sponsorship roles for particular initiatives in the hopes that popular support for the ballot measure they sponsor will foster equal support for their campaign for elective office.¹¹³ At the same time, legislators have displayed a tendency to avoid difficult questions of public policy, preferring to let such disputes resolve themselves on the initiative battleground.¹¹⁴

Advocates of the initiative process justify the lack of procedural safeguards by simple appeal to the democratic ideal; they argue that citizens enacting laws on their own, without help from the legislature, is the essence of democracy.¹¹⁵ Further, because legislatures are inherently susceptible to corruption and undue influence by special interests, the initiative process allows ordinary citizens to resolve pressing public issues with which the legislature has been unable or unwilling to deal.¹¹⁶

Critics of the initiative process argue that as a form of direct democracy it is inconsistent with the basic republican form of government enshrined in the Constitution of the United States and therefore is prohibited by the Guarantee Clause in Article IV.¹¹⁷ Such critics also point out that the lack of an opportunity for deliberation and compromise in the initiative process poses a unique threat to the rights of politically unpopular minorities such as illegal immigrants, criminal defendants, and gays and lesbians.¹¹⁸

Regardless of the merits of these arguments for and against, the initiative process in California has become a permanent part of the state's legal and political landscape.¹¹⁹ Voters regard it as a way to include themselves in a legislative process that often seems unduly long and difficult.¹²⁰ As noted above, politicians find it useful as a tool for self-marketing.¹²¹ Well-financed special interests use it as an alternative means of advancing their agendas when the legislature is slow to act on

¹¹³ See Magleby, *supra* note 110 at 29.

¹¹⁴ See *id.*; see also Uelmen, *supra* note 16 at 1000.

¹¹⁵ See Schmidt, *supra* note 96 at vii-viii.

¹¹⁶ See *id.* at 26.

¹¹⁷ The Guarantee Clause, contained in art. IV § 4 of the U.S. Constitution, provides in pertinent part, "The United States shall guarantee to every state in this union a Republican form of government."

¹¹⁸ See Kenneth P. Miller, *Constraining Populism: The Real Challenge of Initiative Reform*, 41 SANTA CLARA L. REV. 1037, 1051 (2001); see also Craig B. Holman and Robert Stern, *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 LOY. L.A. L. REV. 1239, 1246 (1998).

¹¹⁹ See Kuehl, *supra* note 28 at 1329.

¹²⁰ See *id.*

¹²¹ See Magleby, *supra* note 110 at 29.

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or is unresponsive to their needs.¹²² Finally, grassroots citizen groups see it as the only available means to advocate for their issues when the legislature has both ears bent by the aforementioned special interests.¹²³

The initiative process means many things to many people.¹²⁴ Its paramount role in California can hardly be disputed, yet its place within the state's constitutional structure has not been fully explored. Before attempting to place the initiative power alongside the other powers duly vested by the constitution in the other coordinate branches of government, that power and its existing limits must be defined.

III. THE INITIATIVE POWER

The ability of the citizens of California to propose and adopt their own statutes and constitutional amendments via the initiative process derives from a combination of two provisions in the state constitution.¹²⁵ Article IV, section 1, vests the legislative power of the state “in the California Legislature which consists of the Senate and Assembly,” but goes on to provide that “the people reserve to themselves the powers of initiative and referendum.”¹²⁶ Article II, section 8(a), defines this “reserved” power of initiative as “the power of the electors to propose statutes and amendments to the constitution and to adopt or reject them.”¹²⁷

Construing the language of article IV, section 1, California courts have treated the people's statutory initiative power as co-extensive with that of the legislature.¹²⁸ In other words, it is a form of legislative power.¹²⁹ Even though the initiative process and the conventional legislative process are two forms of the same constitutional power, the two differ significantly in terms of the place occupied by each in the state's constitutional jurisprudence.¹³⁰

A. JUDICIAL REVIEW AS THE SOLE CHECK ON THE INITIATIVE POWER

Once a bill passes both houses of the legislature, it must be

¹²² Frickey, *supra* note 70 at 432.

¹²³ See Schmidt, *supra* note 96 at 30.

¹²⁴ See *supra* notes 119-123 and accompanying text.

¹²⁵ See CAL. CONST. art. IV. § 1; see also Cal. Const. art. II § 8(a).

¹²⁶ CAL. CONST. art. IV. § 1.

¹²⁷ CAL. CONST. art. II. § 8(a).

¹²⁸ See, e.g. Santa Clara County Local Transp. Auth. v. Guardino, 902 P.2d 225, 246 (Cal. 1995).

¹²⁹ See *id.*

¹³⁰ See Manheim and Howard, *supra* note 17 at 1202.

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presented to the governor for signature or veto.¹³¹ This requirement constitutes an important check on the legislative power as it is exercised by the state's body of elected representatives.¹³² Indeed, presentment is a function of the fundamental constitutional principle of the separation of powers which serves to guard against an accumulation of governmental power in the hands of a single entity.¹³³ In contrast, laws passed by initiative take effect automatically upon approval by the voters.¹³⁴ No presentment to the governor or the legislature is needed for a proposed initiative to become law once it has survived a popular vote.¹³⁵

Moreover, a law enacted through the initiative process cannot be amended or repealed except through another popular vote.¹³⁶ If the legislature wishes to amend or repeal an initiated law, it must pass a statute that the voters must in turn approve.¹³⁷ The only exception occurs when the law itself allows for legislative amendment or repeal without the need for a popular vote.¹³⁸

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.¹³⁹ Specifically, this superiority consists in the fact that whereas the legislature may not pass 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.¹⁴⁰

The result of these differences is that judicial review is the only check on the legislative power as it is exercised by the people through the initiative process.¹⁴¹ As noted above, the executive branch possesses no check on the initiative power because the state constitution does not require initiated laws to be presented to the governor for signature or veto.¹⁴² Likewise, the state legislature possesses no check on the initiative power because it is powerless to amend or repeal initiated

¹³¹ CAL. CONST. art. IV. § 10(a).

¹³² See *Carmel Valley Fire Prot. Dist. v. State*, 20 P.3d 533, 539 (Cal. 2001).

¹³³ See *id.*

¹³⁴ See CAL. CONST. art. II. § 10(a).

¹³⁵ See *id.*

¹³⁶ See CAL. CONST. art. II. § 10(c).

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See *Rossi v. Brown*, 889 P.2d 557, 574 (Cal. 1995).

¹⁴⁰ *Id.*

¹⁴¹ See Richard B. Collins, *How Democratic Are Initiatives?* 72 U. COLO. L. REV. 983, 999 (2001).

¹⁴² See *supra* notes 131-135 and accompanying text.

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laws,¹⁴³ nor does it play any substantive role in the formulation and proposal of those laws.¹⁴⁴ Review by the judiciary stands alone as a method for keeping the people's exercise of the initiative power within the bounds prescribed for it by the state constitution.¹⁴⁵

B. THE ISSUE OF DEFERENCE

That judicial review is the sole check on the initiative power, given the absence of a presentment requirement or a legislative amendment or repeal power, might lead one to think that California courts closely scrutinize initiated laws when assessing their constitutionality, but often the opposite seems to be true.¹⁴⁶ All exercises of legislative power are entitled to a degree of judicial deference as a matter of comity between co-equal branches of government,¹⁴⁷ but initiated laws appear to enjoy an even greater degree of deference than do laws passed by the state legislature.¹⁴⁸ In particular, while the courts strictly construe the constitutional limits on what the legislature may do,¹⁴⁹ they liberally construe the permissible uses of the initiative power.¹⁵⁰

California courts have developed a tradition of employing highly deferential language in cases that involve legal challenges to initiatives. The following is a typical example: "it is our solemn duty 'to jealously guard' the initiative power, it being 'one of the most precious rights of our democratic process.'"¹⁵¹ Another common passage is as follows:

Although the legislative power under our state Constitution is vested in the Legislature, "the people reserve to themselves the powers of initiative and referendum." [Citation.] Accordingly, the initiative power must be *liberally construed* to promote the democratic process.¹⁵²

Commentators have offered several explanations for this apparent

¹⁴³ See CAL. CONST. art. IV. § 1.

¹⁴⁴ See CAL. ELEC. CODE § 9003 (West 2005).

¹⁴⁵ See Collins, *supra* note 140 at 999.

¹⁴⁶ See Craig B. Holman and Robert Stern, *supra* note 118 at 1250.

¹⁴⁷ See Hunt v. Superior Court, 987 P.2d. 708, 722 (Cal. 1999).

¹⁴⁸ See Manheim and Howard, *supra* note 17 at 1217.

¹⁴⁹ Collins v. Riley, 152 P.2d 169, 171 (Cal. 1944).

¹⁵⁰ See Brosnahan v. Brown, 651 P.2d 274, 277 (Cal. 1982).

¹⁵¹ Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 583 P.2d 1281, 1302 (Cal. 1978).

¹⁵² California Ass'n of Retail Tobacconists v. State, 135 Cal. Rptr. 2d 224, 236 (Ct. App. 2003) (emphasis in original).

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deference.¹⁵³ Perhaps the most convincing was put forth by Joseph Grodin, a former justice of the California Supreme Court, who compared deciding initiative cases to handling “hot potatoes” in that

It is one thing for a court to tell a legislature that a statute it has adopted is unconstitutional; to tell that to the people of a state who have indicated their direct support for the measure through the ballot is another.¹⁵⁴

In other words, a main reason for judicial deference to initiatives is that justices of the California Supreme Court are subject to periodic retention elections.¹⁵⁵ As a result, justices that vote to invalidate laws passed by initiative face the possibility of electoral reprisal for their actions.¹⁵⁶ Otto Kaus, another former justice of the California Supreme Court once famously remarked on the dilemma facing a justice who must decide controversial cases while facing a popular election: “It is difficult to ignore a crocodile in your bathtub when you are shaving in the morning.”¹⁵⁷

This “crocodile in the bathtub” effect provides a convincing explanation for the courts’ use of the aforementioned highly deferential language. The deference to initiated laws serves to insulate the state’s judiciary from the threat of electoral reprisal. As such, the California judiciary’s deference to initiatives must be interpreted as more rhetorical than substantive, for as the next section demonstrates, initiatives in fact possess no greater constitutional weight than conventional legislation.

IV. LIMITS ON THE INITIATIVE POWER

Notwithstanding the apparent deference accorded to initiated laws by California courts, by and large those courts have declined to elevate such laws to a privileged constitutional status.¹⁵⁸ Instead, they have enforced the constitutional limitations on the initiative power in as straightforward a manner as they enforce the limits on what the state legislature may do.¹⁵⁹ The single-subject requirement and the requirement of overall constitutionality each derive from an even-handed

¹⁵³ See, e.g. Manheim and Howard, *supra* note 17 at 1198.

¹⁵⁴ Uelmen, *supra* note 16 at 1000-01.

¹⁵⁵ See CAL. CONST. art. VI. § 16.

¹⁵⁶ See Uelmen, *supra* note 16 at 1000-01.

¹⁵⁷ W.F. Rylaarsdam, *Judicial Independence: A Value Worth Protecting*, 66 S. CAL. L. REV. 1653, 1655-56 (1993).

¹⁵⁸ Uelmen, *supra* note 16 at 1000.

¹⁵⁹ See, e.g., *Wallace v. Zinman*, 254 P. 946, 949 (Cal. 1927).

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application of constitutional principles that apply to all exercises of legislative power, whether initiated or not.¹⁶⁰

A. THE SINGLE-SUBJECT REQUIREMENT

The California Constitution provides that “[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect.”¹⁶¹ The legislature and the voters added this provision to the state constitution in 1948.¹⁶² The impetus for this constitutional amendment came from the legal establishment’s reaction to the so-called “ham and eggs” movement spearheaded by two brothers, Lawrence and Willis Allen.¹⁶³

The Allen brothers were the proponents of what they named the “California Bill of Rights,” an initiative constitutional amendment that would have added 21,000 words to a constitution that was then composed of around 55,000.¹⁶⁴ The amendment addressed a dizzying array of topics: pensions, taxes, voting rights for Indians, gambling, oleomargarine, health professionals, reapportionment, surface mining, and fishing rights.¹⁶⁵

While the petition for this amendment was circulating, the state legislature voted to place its own constitutional amendment on the ballot—the amendment containing the single-subject rule.¹⁶⁶ In fact, arguments used during the campaign for adopting the single-subject rule pointed specifically to the Allen brothers’ “bill of rights” as a prime example of why a single-subject rule should be in place.¹⁶⁷ The voters adopted the single-subject rule in the election of 1948.¹⁶⁸ The so-called “California Bill of Rights” however, was not so lucky; the California Supreme Court’s decision in *McFadden v. Jordan* removed the initiative from the ballot before the people ever had a chance to vote on it.¹⁶⁹

The California Supreme Court first applied the newly minted single-subject rule in *Perry v. Jordan*.¹⁷⁰ The *Perry* court observed that while

¹⁶⁰ *cf.* Manheim and Howard, *supra* note 17 at 1202.

¹⁶¹ CAL. CONST. art. II, § 8(d).

¹⁶² Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936, 936 (1983).

¹⁶³ *See id.* at 949.

¹⁶⁴ Stanley Mosk, *Raven and Revision*, 25 U.C. DAVIS L. REV. 1, 6 (1991).

¹⁶⁵ Lowenstein, *supra* note 162 at 950.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 950-51.

¹⁶⁸ *Id.* at 936.

¹⁶⁹ *McFadden v. Jordan*, 196 P.2d 787, 800 (Cal. 1948).

¹⁷⁰ *Perry v. Jordan*, 207 P.2d 47 (Cal. 1949).

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the legislature had enacted the constitutional prohibition on initiatives “embracing more than one subject” the year before, such a restriction on laws enacted by the legislature had been present in the constitution for a long time.¹⁷¹ At the time, article IV, section 24, read: “Every [legislative] act shall embrace but one subject, which subject shall be expressed in its title.”¹⁷² As to this single-subject rule for standard legislative acts, the California Supreme Court had announced a test in *Evans v. Superior Court*: the rule “is to be construed liberally to uphold proper legislation, all parts of which are reasonably germane.”¹⁷³

The *Perry* court thus applied exactly the same standard to initiated laws that it had to legislatively enacted laws regarding the single-subject requirement.¹⁷⁴ As with acts of the legislature, the single-subject rule is satisfied so long as the various parts of an initiated law or constitutional amendment reasonably relate to each other so as to achieve the general object pursued.¹⁷⁵ Since that time, the California Supreme Court has applied the “reasonably germane” test whenever a statewide initiative has been challenged under the single-subject requirement.¹⁷⁶

B. THE CONSTITUTIONALITY REQUIREMENT

In addition to the single-subject requirement, the California courts have construed the existence of another limit on the statutory initiative power: initiated laws must comply with the same federal and state constitutional standards as legislatively-enacted laws.¹⁷⁷ This means that California courts will strike down an initiative that violates an existing provision of either the state or the U.S. Constitution.¹⁷⁸

Legislature v. Deukmejian is the leading case demonstrating this principle. In *Deukmejian* the California Supreme Court held invalid an initiative redistricting measure as conflicting with an express constitutional provision that sets the rules for redrawing legislative districts.¹⁷⁹ Article XXI of the California Constitution requires that the

¹⁷¹ *Id.* at 92.

¹⁷² *Id.*; the same provision is now contained in art. IV § 9.

¹⁷³ *Evans v. Superior Court*, 8 P.2d 467, 469 (Cal. 1932).

¹⁷⁴ *See Perry*, 207 P.2d at 50.

¹⁷⁵ *Id.*

¹⁷⁶ *See, e.g. Amador Valley*, 583 P.2d at 1289-92; *Brosnahan*, 651 P.2d at 279-84; *Fair Political Practices Commission v. Superior Court*, 599 P.2d 46, 55 (Cal. 1979); *Raven v. Deukmejian*, 801 P.2d 1077, 1083-85 (Cal. 1990); *Senate v. Jones*, 988 P.2d 1089, 1098-1105 (Cal. 1999).

¹⁷⁷ *Legislature v. Deukmejian*, 669 P.2d 17, 27 (Cal. 1983).

¹⁷⁸ *See id.*

¹⁷⁹ *Id.* at 30.

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legislature reset the boundaries of the state's legislative districts at some point during the year following the federal census.¹⁸⁰ In 1983, Governor George Deukmejian called for a special election so the people of the state could vote on a redistricting initiative that, if passed, would have redrawn the districts and repealed the redistricting statutes that the legislature had enacted two years before.¹⁸¹

The California Supreme Court saw this as an attempt to effect a second redistricting by initiative after the constitutionally mandated redistricting had already occurred.¹⁸² The problem with this attempt was that it ran afoul of the long-standing "once-a-decade" interpretation of article XXI.¹⁸³ The court found that the authors of the state constitution intended that redistricting occur immediately following each decennial federal census and not occur again until after the next census.¹⁸⁴ In 1981, the legislature had performed its duty under article XXI to redraw the boundaries of the various legislative districts in the state.¹⁸⁵ As a result, the court held that any attempt to change the districts before the 1990 federal census had taken place was impermissible under article XXI.¹⁸⁶

The initiative proponents, in attempting to evade the requirements of the "once-a-decade" rule, put forth what the court saw as a "novel theory."¹⁸⁷ They argued that article XXI only operates as a limitation on the legislature and not on the initiative power.¹⁸⁸ The court found itself puzzled by the idea that initiatives should be exempted from the same constitutional limitations that apply to legislatively-enacted laws.¹⁸⁹ The initiative power to propose and enact statutes is a form of legislative power "which otherwise would reside in the Legislature."¹⁹⁰ Thus, "it has heretofore been considered to be no greater with respect to the nature and attributes of the statutes that may be enacted than that of the Legislature."¹⁹¹

The California Supreme Court in *Wallace v. Zinman* directly addressed the issue of whether initiated statutes should be accorded

¹⁸⁰ CAL. CONST. art. XXI.

¹⁸¹ See *Legislature v. Deukmejian*, 669 P.2d at 19.

¹⁸² *Id.* at 29.

¹⁸³ See *id.* at 22-26.

¹⁸⁴ *Id.* at 23.

¹⁸⁵ *Id.* at 21.

¹⁸⁶ *Id.* at 29.

¹⁸⁷ *Id.* at 25.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 26.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

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greater deference than laws enacted by the legislature.¹⁹² The court unequivocally stated that initiative statutes are not entitled to greater constitutional status than ordinary laws:

We do not recognize an initiative measure as having any greater strength or dignity than attaches to any other legislation It is only another system added to our plan of state government by a permissive amendment to the constitution, but it was at no time intended that such permissive legislation by direct vote should override the other safeguards of the constitution We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to permit an initiative act of any type to throw out of gear our entire legal mechanism. Our common sense makes us rebel at the suggestion.¹⁹³

The California Court of Appeal followed the *Deukmejian* court's lead when deciding *People's Advocate, Inc. v. Superior Court*. At issue in *People's Advocate* was an initiative known as the Legislative Reform Act of 1983.¹⁹⁴ This initiative sought to make radical changes to the organization and procedures of the state Senate and Assembly and to substantially curtail the future apportioning of funds designated for their operation.¹⁹⁵ Because article IV, section 7, of the state constitution authorizes each house of the legislature to fashion rules for its proceedings, an initiative measure that purports to do the same effects an unconstitutional usurpation of a power explicitly bestowed upon the legislature.¹⁹⁶

In keeping with the principle announced in *Zinman* that initiatives do not possess any privileged constitutional status, the court in *People's Advocate* accorded the initiative at issue no greater constitutional weight than any other statute.¹⁹⁷ Again, the standards applied to initiatives are no different from the standards applied to acts of the state legislature.¹⁹⁸ Neither initiated statute nor legislative act may exceed the bounds set for them by the state constitution.¹⁹⁹

This Comment attempts to follow the path charted in *Zinman*. Just as acts of the state legislature must comply with *all* applicable

¹⁹² *Zinman*, 254 P. at 946.

¹⁹³ *Id.* at 949.

¹⁹⁴ *People's Advocate, Inc. v. Superior Court*, 226 Cal. Rptr. 640, 642 (Ct. App. 1986).

¹⁹⁵ *Id.*

¹⁹⁶ *See id.* at 645.

¹⁹⁷ *See id.*

¹⁹⁸ *See id.*

¹⁹⁹ *See id.* at 647.

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constitutional provisions, so should the people's exercise of the initiative power be made to comply with the state constitution.²⁰⁰ This should include the separation of powers requirement contained in article III, section 3. No legitimate reason exists to exempt the initiative power from this important requirement, particularly in light of *Zinman's* holding that statutory initiatives are entitled to no greater constitutional weight merely as a result of being proposed and passed by the voters instead of the state legislature.²⁰¹

V. THE SEPARATION OF POWERS IN CALIFORNIA

Article III, section 3, of the California Constitution provides that "the powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."²⁰²

This provision was included in the original version of the California Constitution, written in 1849.²⁰³ When drafting the first California Constitution, the delegates followed the practice of other recently constituted states by lifting verbatim the language of existing state constitutions and inserting that language into their own.²⁰⁴

The Virginia Constitution was the first state charter created after the Continental Congress requested that the colonial governments write their own foundational documents.²⁰⁵ The Virginia Constitution naturally became the model used by other states when it came time to fashion their own constitutions.²⁰⁶ Thus, because Virginia had included a separation of powers provision in its constitution, many other states did as well.²⁰⁷ California was no exception.²⁰⁸ The delegates to the state constitutional convention in 1849 relied heavily on the recently-passed constitutions of other states, notably Iowa.²⁰⁹ Iowa had, in turn, relied upon the Kentucky Constitution, which had relied upon the charters of the thirteen original states.²¹⁰

The pedigree of article III, section 3, of the California Constitution

²⁰⁰ *See id.*

²⁰¹ *See Zinman*, 254 P. at 949.

²⁰² CAL. CONST. art. III. § 3.

²⁰³ *Zasloff*, *supra* note 18 at 1102.

²⁰⁴ *Id.* at 1103.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

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can thus be traced back in an unbroken line to the founding generation.²¹¹ According to the thinking of the founding generation, a government of separate yet interacting powers is the best way to provide simultaneously for the public welfare and for the liberty of each citizen.²¹² By diffusing power into distinct branches of government, the American constitutional republic could by design prevent abuses of governmental power.²¹³

In keeping with the spirit of its pedigree, California courts have construed the separation of powers provision of the California Constitution as intended to prevent the concentration of governmental power in the hands of a single individual or group.²¹⁴ According to the interpretation given it by the California courts, this provision establishes a system of checks and balances among the various governmental powers to ensure that one branch of government does not encroach unduly upon the province of another.²¹⁵

A. THE INAPPLICABILITY OF FEDERAL SEPARATION OF POWERS DOCTRINE

Although the broad policy goal underlying the separation of powers is identical at both the state and the federal level, the means through which reviewing courts implement it in their respective jurisdictions are very different.²¹⁶ In other words, state courts are free to develop alternate theories and interpretations of the separation of powers without being bound by federal separation of powers doctrine.²¹⁷ Federal separation of powers jurisprudence can serve as persuasive and instructive authority, but state courts are not required to apply federal precedents when interpreting the separation of powers provisions found in state constitutions.²¹⁸ The primary reason for this lies in the fact that the U.S. Constitution defines the powers of the various branches of the federal government very differently from the way that state constitutions define the powers of their respective branches of government.²¹⁹

For example, the U.S. Constitution expressly vests in the executive

²¹¹ *Id.*

²¹² Cronin, *supra* note 88 at 29.

²¹³ See Eule, *supra* note 75 at 1528.

²¹⁴ *California Ass'n of Retail Tobacconists*, 135 Cal. Rptr. 2d at 254.

²¹⁵ *Santa Theresa Citizen Action Group v. California Energy Comm'n*, 130 Cal. Rptr. 2d 392, 398 (Ct. App. 2003).

²¹⁶ See *Marine Forests Soc'y v. California Coastal Comm'n*, 113 P.3d 1062, 1075-77 (Cal. 2005).

²¹⁷ *Id.* at 1076.

²¹⁸ See *id.*

²¹⁹ See *id.*

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branch the power to appoint

Ambassadors other public Ministers and Consuls, Judges of the supreme court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.²²⁰

In California, however, the legislature has always had power to appoint and remove certain officials.²²¹ Whereas on the federal level the appointment of the officials listed in Article II, Section 2, is an exclusively executive power, in California the appointment power is shared by the executive branch and the state legislature.²²²

Another reason that federal separation of powers jurisprudence is inapplicable to California is that whereas Congress under Article I of the U.S. Constitution may only exercise the powers that are therein enumerated,²²³ state legislatures have plenary lawmaking authority.²²⁴ Article I of the U.S. Constitution is a grant of power to Congress.²²⁵ As a result, each congressional act must be anchored in one of Congress's enumerated powers.²²⁶ State constitutions, by contrast, are not grants of power but rather affirmative limits on a police power that is presumed to be plenary.²²⁷ Thus, each act of a state legislature is valid if not specifically prohibited by the state constitution.²²⁸

The fact that only state legislatures have plenary lawmaking authority, combined with the difference in the powers granted to each branch under the U.S. Constitution on the one hand and the California Constitution on the other, calls for a different doctrinal approach from that used in the federal context when analyzing issues arising under article III, section 3, of the California Constitution.²²⁹

B. THE CORE FUNCTION DOCTRINE

California courts have interpreted article III, section 3, as defining a core zone of constitutionally delegated power for each branch of

²²⁰ U.S. CONST. art. II, § 2.

²²¹ See *Marine Forests*, 113 P.3d at 1084.

²²² *Id.*

²²³ See U.S. CONST. art. I, § 8.

²²⁴ *Marine Forests*, 113 P.3d at 1078.

²²⁵ See Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 230 (2002).

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See *Marine Forests*, 113 P.3d at 1076.

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government that may not be encroached upon or infringed by any other branch in such a way as to defeat or materially impair the exercise of that core power.²³⁰ As a corollary to this basic principle, each branch may act in ways that significantly affect the activities of the others so long as the prohibited defeat or material impairment does not occur.²³¹ In other words, the separation of powers does not require a hermetic sealing-off of each branch from the others; instead, it establishes an interdependent system of checks and balances containing distinct yet porous boundaries between the zones of power delegated to each branch of state government.²³²

1. Each Branch May Affect the Others

A number of decisions illustrate the flexibility that the core function doctrine incorporates into California's tripartite system of government. For example, in *Superior Court v. County of Mendocino*, the California Supreme Court held that the legislature does not violate the separation of powers whenever it enacts regulations concerning an area over which the courts have "inherent power."²³³

The controversy in *County of Mendocino* arose when the legislature, in an attempt to help local governments meet their budgetary obligations, enacted an urgency statute that gave counties the power to designate unpaid "furlough days" on which the local court "shall not be in session."²³⁴ The superior court, ignoring the county's designation, ordered its employees to report for work on two of the designated furlough days.²³⁵ When the county refused to pay the employees for those days at work, the superior court filed suit alleging that the county lacked the constitutional authority to designate days when the court will not be in session.²³⁶

The California Supreme Court upheld the authority of the county to designate unpaid furlough days on which the court will not be in session.²³⁷ The county had received this authority from the urgency

²³⁰ *Manduley v. Superior Court*, 41 P.3d 3, 16 (Cal. 2002); *Carmel Valley*, 20 P.3d at 538; *Superior Court v. County of Mendocino*, 913 P.2d 1046, 1054 (Cal. 1996).

²³¹ *Manduley*, 41 P.3d at 16; *Carmel Valley*, 20 P.3d at 538; *County of Mendocino*, 913 P.2d at 1051.

²³² *In re Attorney Discipline System*, 967 P.2d 49, 55 (Cal. 1998).

²³³ *County of Mendocino*, 913 P.2d at 1054.

²³⁴ *Id.* at 1048.

²³⁵ *Id.* at 1049.

²³⁶ *Id.*

²³⁷ *Id.* at 1059.

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statute passed by the legislature.²³⁸ The legislature, in turn, has the constitutional authority to

adopt reasonable regulations affecting a court's inherent powers or functions, so long as the legislation does not "defeat" or "materially impair" a court's exercise of its constitutional power or the fulfillment of its constitutional function.²³⁹

In light of the long-standing practice by the legislature of designating court holidays—days on which the court is not in session—the supreme court found no reason to conclude that the county's action defeated or materially impaired the superior court's exercise of the judicial power.²⁴⁰

2. *The Powers Are Not Always Distinct*

Under the core function doctrine, executive and judicial officers may "exercise quasi-legislative authority in establishing general policies and promulgating general rules for the governing of affairs within their respective spheres" without offending the separation of powers.²⁴¹ Thus, in *In re Attorney Discipline System*, the California Supreme Court held that its assessment of an additional fee on members of the state bar to fund the state's attorney-discipline system did not impermissibly usurp the legislative power of appropriation.²⁴² Because the judicial power includes inherent authority over the area of attorney discipline, assessment of the fee was within the court's power even though it did, in some sense, replicate a legislative function.²⁴³

Similarly, the court in *Marine Forests Society v. California Coastal Commission* held that provisions of the Coastal Act vesting the power to appoint members of the Coastal Commission in the Senate Rules Committee and the Speaker of the Assembly did not violate the separation of powers because under the state's constitution, the appointment power is not the sole province of the executive.²⁴⁴ Therefore, exercise by another branch of the appointment power does not invade any "core zone" of executive function if such exercise leaves intact the governor's exercise of the appointment power.²⁴⁵

²³⁸ *Id.* at 1048.

²³⁹ *Id.* at 1055.

²⁴⁰ *See id.* at 1059.

²⁴¹ *In re Attorney Discipline System*, 967 P.2d at 57.

²⁴² *Id.* at 52.

²⁴³ *Id.*

²⁴⁴ *Marine Forests*, 133 P.3d at 1062.

²⁴⁵ *Id.* at 1088.

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The proscribed defeat or material impairment of the governor's appointment power did not result from the Coastal Act's vesting of appointment power in members of the legislature for a number of reasons.²⁴⁶ First, the Coastal Commission is an autonomous regulatory agency.²⁴⁷ It is not a close and indispensable arm of the executive such that legislative appointment of its members would trample upon "an exclusively executive prerogative."²⁴⁸

Second, as an autonomous regulatory agency the Commission routinely exercises "a broad variety of functions, including both quasi-legislative and quasi-judicial functions as well as more traditional executive functions."²⁴⁹ The fact that the Commission does more than merely "execute" the laws casts doubt upon the claim that the executive branch should have the sole authority to appoint its members.²⁵⁰

Finally, the Coastal Act itself provides sufficient procedural safeguards to ensure that the Commission operates without undue interference by the legislature.²⁵¹ The presence of such procedural safeguards greatly reduces the possibility that the legislature will defeat or materially impair the Coastal Commission's functions through intrusive oversight or control.²⁵²

Marine Forests illustrates that the core function doctrine is a rather liberal standard. The doctrine allows for a substantial degree of "mixing" governmental powers. It recognizes that one branch may imitate the functions of another so long as the "core zone" of each is not completely subsumed.²⁵³

3. *What May Not Be Done*

Implicit in this formulation of the core function doctrine is the idea that one branch may unconstitutionally reach too far into the realm of another.²⁵⁴ Thus, California 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

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *See id.*

²⁵¹ *Id.* at 1091.

²⁵² *See id.*

²⁵³ *Carmel Valley*, 20 P.3d at 539.

²⁵⁴ *See id.*

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another coordinate Branch.²⁵⁵

In *People v. Superior Court (On Tai Ho)* the California Supreme Court ruled that a state law granting prosecutors a veto over a trial court's order that a criminal defendant participate in a pretrial diversion program was unconstitutional because it violated the separation of powers.²⁵⁶ The court found that the diversion order was a form of sentencing, and as such it was an exercise of judicial power entitled to protection under article III, section 3.²⁵⁷

By contrast, the California Supreme Court in *Sledge v. Superior Court* held that the determination of whether a criminal defendant was eligible for pre-trial diversion is not an exercise of judicial power.²⁵⁸ Therefore a prosecutor could constitutionally refuse to initiate diversion proceedings since that decision invaded no protected area of judicial authority.²⁵⁹

In the context of criminal proceedings,

the separation of powers doctrine prohibits the legislative branch from granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to a court.²⁶⁰

On the other hand, statutes granting discretion to prosecutors to make decisions before filing charges do not violate the separation of powers merely because such decisions inevitably affect “the dispositional options available to the court.”²⁶¹

The California Supreme Court has also held that under the separation of powers a court may not directly order the legislature to enact an appropriation law.²⁶² It may, however, require that funds already appropriated be paid out to satisfy a valid judgment against a state agency.²⁶³

The court in *County of Mendocino* gave a good general overview of the limits on the exercise of each power:

²⁵⁵ *Id.* at 538.

²⁵⁶ *People v. Superior Court (On Tai Ho)*, 520 P.2d 405, 406 (Cal. 1974).

²⁵⁷ *See id.* at 412.

²⁵⁸ *Sledge v. Superior Court*, 520 P.2d 412, 414 (Cal. 1974).

²⁵⁹ *See id.*

²⁶⁰ *Manduley*, 41 P.3d at 13 (emphasis in original).

²⁶¹ *Id.*

²⁶² *Mandel v. Myers*, 629 P.2d 935, 941 (Cal. 1981).

²⁶³ *Id.*

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this doctrine [i.e. the separation of powers] unquestionably places limits upon the actions of each branch with respect to the other branches. The judiciary, in reviewing statutes enacted by the Legislature, may not undertake to evaluate the wisdom of the policies embodied in such legislation; absent a constitutional prohibition, the choice among competing policy considerations in enacting laws is a legislative function. The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds. And the Legislature may not undertake to readjudicate controversies that have been litigated in the courts and resolved by final judicial judgment.²⁶⁴

The doctrine of the separation of powers in California operates to prevent the undue accumulation of power in the hands of a single branch by maintaining distinct yet porous boundaries between the executive, the legislature, and the judiciary.²⁶⁵ When one branch defeats or materially impairs the ability of another branch to perform its constitutionally vested function, the former branch has violated the separation of powers.²⁶⁶ The powers of each branch may to an extent be mixed, but one branch may not completely subsume the powers of another.²⁶⁷

VI. THE NEED FOR A LEGISLATIVE CHECK ON THE STATUTORY INITIATIVE POWER

When the core function doctrine is applied to the initiative power, the provisions of the state constitution defining the initiative power²⁶⁸ appear to conflict with the doctrine of the separation of powers as it is expressed in Article III Section 3.²⁶⁹ The lack of a legislative check on exercises of the initiative power amounts to a complete arrogation of the legislative power. This conflict is created by an ambiguity in the constitutional language that defines the initiative power.²⁷⁰ Applying traditional methods of constitutional construction to this ambiguity yields the conclusion that some form of legislative check on the initiative power must exist if the separation of powers is to be respected and maintained. The intent underlying the creation of the initiative power was not to completely displace the state legislature as a lawmaking body but rather

²⁶⁴ *County of Mendocino*, 913 P.2d at 1051 (citations omitted).

²⁶⁵ *In re Attorney Discipline System*, 967 P.2d at 55.

²⁶⁶ *County of Mendocino*, 913 P.2d at 1054.

²⁶⁷ *See Marine Forests*, 113 P.3d at 1074.

²⁶⁸ *See* CAL. CONST. art. IV. § 1; *see also* CAL. CONST. art. II. § 8(a).

²⁶⁹ *Cf. Manheim and Howard*, *supra* note 17 at 1202-03.

²⁷⁰ *See* CAL. CONST. art. IV. § 1; *see also* CAL. CONST. art. II. § 8(a).

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to merely provide a check on its exercise of the legislative power.²⁷¹ The lack of any meaningful involvement by the legislature in the initiative process renders it wholly inferior as a lawmaking body²⁷² in derogation of separation of powers principles.

The core function doctrine requires the existence of a central zone of legislative power that may be exercised only by the state legislature.²⁷³ The doctrine precludes using the initiative power to defeat or materially impair the legislature's exercise of its core powers.²⁷⁴ The doctrine likewise requires that the initiative power remain free from defeating or materially impairing interference by the state legislature.²⁷⁵

The constitutional legislative power is generally defined as the ability to pass laws, levy taxes, make appropriations, and determine the legislative policy of the state.²⁷⁶ The state legislature may do each of these things with an expectation that the executive and the judiciary will not unduly impede its efforts in these areas.²⁷⁷ The voters of the state, through the initiative power, may also pass laws, levy taxes, and make appropriations with a comparable expectation that their decisions will not be thwarted by the efforts of the other three branches of government.

However, while the people of the state possess a check on their legislators in the form of the initiative process, the door does not swing both ways. The state legislature is powerless in the face of the people's exercise of the "reserved" initiative power. The legislature has no say in what laws are proposed and which ones are passed by initiative.²⁷⁸ In addition, initiated laws are generally beyond the legislature's ability to amend or repeal.²⁷⁹ The result is that the legislature's exercise of legislative power is inferior to the voters' exercise of that same power.²⁸⁰ The legislature has no peculiar lawmaking province of its own—it makes laws that exist at the pleasure of those who exercise the initiative power.²⁸¹ Such a complete arrogation of the legislature's ability to pass laws is repugnant to the principle of the separation of powers.

The conflict between the separation of powers provision and those

²⁷¹ See *supra* notes 104-108 and accompanying text.

²⁷² See *Rossi*, 889 P.2d at 574.

²⁷³ See *Marine Forests*, 113 P.3d at 1074.

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ *Carmel Valley*, 20 P.3d at 539.

²⁷⁷ See *County of Mendocino*, 913 P.2d at 1051.

²⁷⁸ See *supra* notes 48-74 and accompanying text.

²⁷⁹ See CAL. CONST. art. II, § 10(c).

²⁸⁰ See *Rossi*, 889 P.2d at 574.

²⁸¹ See *id.*

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provisions relating to the initiative power derives from an ambiguity in the relevant language. Article IV, section 1, vests the legislative power of the state in the Senate and Assembly, but it also provides that the people “reserve” to themselves the initiative power.²⁸² Article II, section 8(a), defines the initiative power as the ability to propose and pass statutory laws and constitutional amendments.²⁸³

The ambiguity lies in the fact that the limits of this “reservation” are not specified.²⁸⁴ Is the reservation complete or merely partial? Do the people reserve to themselves only a portion of the state’s legislative power, or is the reservation wholesale?

Even though the constitutional language provides no guidance on this question, the decision in *People’s Advocate, Inc. v. Superior Court*, discussed above, militates against an interpretation of article IV, section 1, that the people “reserve” to themselves the whole of the state’s legislative power.²⁸⁵ The court stated,

the petitioners [in the case at bar] seek to trade upon an assumption about the extent of the legislative power of the people. They assume that the initiative power includes the whole of the legislative power The assumption is incorrect Such reserved powers [of initiative and referendum] are exclusively specified in article II, section 8, and are limited to that which has been specifically delegated.²⁸⁶

This passage suggests that a portion of the state’s legislative power exists that may not be exercised by initiative; if that is the case, then the “unreserved” portion of legislative power should be entitled to protection under the separation of powers provision of the state constitution.

Where ambiguity exists, recourse must be had to settled standards of judicial construction in order to resolve it.²⁸⁷ The cardinal goal of judicial construction is to ascertain and effectuate the intent of the lawmaking body.²⁸⁸ In addition, constitutional provisions should if possible be construed so that conflict or repugnancy is avoided.²⁸⁹

As noted above, the intent behind the creation of the initiative power was only to provide the people of California a check on the

²⁸² CAL. CONST. art. IV. § 1

²⁸³ CAL. CONST. art. II. § 8(a).

²⁸⁴ See CAL. CONST. art. IV. § 1.

²⁸⁵ See *supra* notes 194-199 and accompanying text.

²⁸⁶ *People’s Advocate*, 226 Cal. Rptr. at 646.

²⁸⁷ See *Brown v. San Francisco*, 266 P.2d 951, 953 (Cal. Ct. App. 1954).

²⁸⁸ *Richmond v. Shasta Cmty. Servs. Dist.*, 83 P.3d 518, 522 (Cal. 2004).

²⁸⁹ *People v. Western Air Lines, Inc.*, 268 P.2d 723, 732 (Cal. 1954).

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activities of the state legislature.²⁹⁰ The creators of the initiative did not intend to thereby replace the Senate and Assembly as the chief organ for the exercise of legislative power.²⁹¹ As such, an interpretation of article IV, section 1, and its language of “reservation” that assumes a complete rather than partial reservation would contravene the intent of the lawmakers who adopted the initiative process in 1911.²⁹² Interpreting the “reservation” as only partial would not only avoid repugnancy with the separation of powers provision but would also have the salutary effect of implementing the original intent of the creators of the initiative process.²⁹³

VII. CONCLUSION

The purpose behind the creation of the initiative power was to provide the people of the state with an effective check on the actions of their elected representatives.²⁹⁴ It was not to create a second and more powerful avenue for the exercise of the state’s legislative power.²⁹⁵ The initiative power gives the people a useful check on the legislature, but under the current constitution the legislature possesses no check on the initiative power.²⁹⁶ The result is that the initiative power exercises a lawmaking function that is superior to that of the legislature.²⁹⁷ Such superiority is repugnant to the doctrine of the separation of powers as it is expressed in article III, section 3, of the state constitution. Even though the constitution vests the state’s legislative power in two different entities—the legislature and the initiative process—the separation of powers requires that each entity be allowed to perform its core function without completely arrogating the constitutionally delegated powers of the other.²⁹⁸

At the heart of this repugnancy lies the aforementioned wholesale exclusion of the state legislature from the initiative process.²⁹⁹ By placing initiated laws beyond the power of the legislature to amend or repeal, the state constitution violates one of its own precepts—the

²⁹⁰ See *supra* notes 104-108 and accompanying text.

²⁹¹ See *id.*

²⁹² See *id.*

²⁹³ See *id.*

²⁹⁴ See *supra* notes 104-108 and accompanying text.

²⁹⁵ See *id.*

²⁹⁶ See CAL. CONST. art. II, § 8.

²⁹⁷ See *Rossi*, 889 P.2d at 574.

²⁹⁸ See *Marine Forests*, 113 P.3d at 1087.

²⁹⁹ Cf. *Manheim and Howard*, *supra* note 17 at 1202-03.

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separation of powers.³⁰⁰ This lack of a repeal or amendment power renders the state legislature a subordinate rather than coordinate branch of government vis-à-vis the initiative power.³⁰¹ This article III, section 3, does not allow. All branches of government must operate on a level playing field if the principle of the separation of powers is to be respected and maintained.³⁰²

In 1996 the California Constitution Revision Commission recommended to the state legislature that the initiative process be reformed so as to meaningfully include the legislature in the process:

The initiative process should not exclude the legislature from the lawmaking process. The legislature is a lawmaking body, and it has experience in making laws and considering their outcomes. The legislature should—at a minimum—have a role in the initiative process to ensure that initiatives are well-written and meet the purposes for which they are designed. Additionally, once an initiative statute is enacted, there should be a mechanism for evaluating its impact. If an initiative statute is not meeting its intended purpose, or if it is having unexpected consequences, the legislature and the governor should be able to revise the law.³⁰³

Such reforms would bring the California initiative process into alignment not only with separation of powers principles but also with its sister initiative states. California is one of the only initiative states that does not allow for legislative amendment or repeal of initiated laws.³⁰⁴

The special election of 2005 demonstrated the propensity of California's political establishment to rely on the initiative process as an engine for political gain. The root of this propensity lies not in the fount of political ambition, but rather in the constitutional provisions that give the people, through the initiative process, a superior lawmaking power.³⁰⁵ The center of politics will naturally gravitate toward the greatest source of political power; the initiative, as the most powerful form of lawmaking in the state, clearly has taken on this role.³⁰⁶ As long as the initiative process occupies a superior constitutional position, it will appeal to those who wish to realize their agendas directly without having to navigate the often "difficult and tortuous" maze of the state

³⁰⁰ *Cf. id.*

³⁰¹ *See Rossi*, 889 P.2d at 574.

³⁰² *See In re Attorney Discipline System*, 967 P.2d at 55.

³⁰³ Manheim and Howard, *supra* note 17 at 1189.

³⁰⁴ *Id.* at 1197.

³⁰⁵ *See supra* notes 131-145 and accompanying text.

³⁰⁶ *See supra* notes 109-123 and accompanying text.

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legislature.³⁰⁷

Calls for initiative reform began soon after the initiative process was created in 1911.³⁰⁸ This Comment adds to the chorus of those who see problems with the way the initiative in California is currently constituted by focusing on a foundational principle of all republican government—the separation of powers—and by posing and answering the question of the effect that this principle should properly have on the initiative power.

OWEN TIPPS*

³⁰⁷ See *supra* notes 33–47 and accompanying text.

³⁰⁸ See Manheim and Howard, *supra* note 17 at 1188.

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