Senate Bill 1413: The Answer to Senate Bill 60 Plebiscite and Its Constitutionality Under the Inherent Powers Doctrine

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I. INTRODUCTION

Currently, pending legislation could lead to the restructure of the State Bar of California (hereinafter “State Bar”). This legislation emerged after a group of California attorneys attacked the existence of the State Bar in June of 1996. Senator Quentin Kopp led the attack on the State Bar by introducing Senate Bill 60 Plebiscite (hereinafter “SB 60”) which Governor Wilson signed into law on October 12, 1995. A most important directive of SB 60 was to require an audit of the State Bar. Accordingly, the State Auditor conducted a five month
investigation which resulted in several determinations.  

Primarily, the audit revealed that the State Bar has continually ignored opportunities to reduce membership fees. Moreover, it indicated that the State Bar spends the bulk of its revenue on lawyer discipline rather than on programs that promote lawyers’ interests. The audit also concluded that the State Bar could increase its revenues by requiring disciplined lawyers to reimburse the organization for costs of disciplinary actions, instead of increasing membership fees to off-set these expenses. The audit concluded that State Bar members may be paying for services from which they receive no benefit.

Furthermore, SB 60 imposed a plebiscite of all active Bar members on whether to abolish the State Bar as the organization that assists the California Supreme Court in regulating the legal profession. The plebiscite, conducted in June of

6. Id.
7. Rosenthal, supra note 1, at 4. 1995 State Bar Budget, General Fund Expenditures by Program:
   (1) Discipline- 71.3%,$40,047
   (2) Legal Education and Competence-11.6%, $6,502
   (3) Communications- 6.1%, $3,426
   (4) Administration of Justice- 4.8%, $2,704
   (5) Bar Relations- 3.4%, $1,907
   (6) Legal Services & Delivery- 2.8%, $1,578
   Dollars in Thousands.

8. Chaing, supra note 5, at 1.
9. James Towery, Vote No on SB 60 to Retain the State Bar, State Bar Daily, Mar-April 1996, at 2. According to Mr. Towery, non beneficial services include the Ethics Hotline, Continuing Education Services, Public Education Services, and Fee Arbitration Services. Mr. Towery is a partner at the Law Firm of Hoge, Fenton, Jones & Appel in San Jose, California. Mr. Towery served on the State Bar’s board where he spearheaded far-reaching reforms in the attorney discipline system. Id.
10. Rosenthal, supra note 1, at 7. The Plebiscite questions asked:
   Shall the State Bar be abolished as the agency regulating lawyers in this State on behalf of the legislature and the Supreme Court, with its regulatory functions turned over to another body or bodies and some or all of its other activities handled by a voluntary bar association or associations.

Id.

Section 6001 of the Business and Professions Code provides:
1996, indicated that two-thirds of the Bar members opposed such abolishment.\footnote{Letter From Price Waterhouse LLP, to James E. Towery, President, The State Bar of California regarding the tabulation of the State Bar of California Plebiscite [hereinafter Price Waterhouse Letter]. The final results indicated that 21,589 “yes” votes for abolishment and 39,296 “no” votes for abolishment. On May 15, 1996, the State Bar provided Price Waterhouse with a computer tape which contained the names and addresses for the members who were active members as of May 14, 1996. There were 119,327 active members. The 119,327 active members were each mailed a ballot packet. A total of 62,435 ballots, comprised of 60,885 valid and 1,550 invalid ballots were received on June 17, 1996. Only the valid votes were tabulated for the Plebiscite. \textit{Id.}} According to its critics, the major deficiency of SB 60 plebiscite was that it failed to introduce an alternative to the State Bar.\footnote{Interview with Peter G. Keane, Chief Attorney at the San Francisco’s Office of the Public Defender, in San Francisco, California (June 19, 1996) [hereinafter Keane Interview June 1996]. Mr. Keane is a former Vice President of the State Bar, a former Governor of the State Bar, former President of the San Francisco Bar Association, tenure Professor at Hastings College of the Law in San Francisco, and an adjunct Professor at Golden Gate University School of Law in San Francisco. \textit{Id.}}

Although those opposed to abolishing the State Bar defeated SB 60 plebiscite, their victory was nugatory because it failed to trigger one of the three ways to re-structure the State Bar.\footnote{Legislative Analyst’s Office, State Bar Plebiscite Ch 782/95 (SB 60, Kopp), [hereinafter Legislative Analyst’s Office].} Because statutory law established the State Bar and its functions, any changes to the State Bar must be enacted by the Legislature, a constitutional convention, or the electorate through an initiative.\footnote{\textit{Id.} at 1.} Therefore, the results obtained from the SB 60’s plebiscite alone could not affect the present State Bar structure.\footnote{\textit{Id.} at 1.}

Presently, the State Bar acts in competing dual capacities.\footnote{Keane Interview June 1996, \textit{supra} note 13.} In one capacity, the State Bar regulates the legal profession on behalf of the California Supreme Court by setting admission qualifications, adopting rules of professional conduct and conducting disciplinary proceedings.\footnote{\textit{Id.}} In its other capaci-
ty, the State Bar acts as a trade association which promotes, champions, and advocates lawyers' interests. 18

Despite the results of the SB 60 plebiscite, Senator Kopp has introduced Senate Bill 1413 (hereinafter “SB 1413”) that proposes changes to the State Bar structure by allocating these competing roles to two separate entities. 19 Under SB 1413, the Administrative Office of the California Supreme Court would perform the regulatory functions of the State Bar. 20 Thus, the State Bar would transfer to the Administrative Office all powers, duties and functions relating to attorney discipline, the admission to practice law, mandatory continuing education and client security funds. 21 Meanwhile, SB 1413, would give to California State Lawyers' Association 22 (hereinafter “CSLA”) the authority to perform all non-regulatory functions, such as the promotion and advocacy of lawyers' interests. 23

This Comment will examine the evolution of the California State Bar, its intended purpose and the reasons for which its structure is currently under attack. 24 It will also discuss the respective roles of the California Legislature and California Supreme Court in regulating the legal profession under the Inherent Powers Doctrine. 25 Moreover, this Comment will analyze whether the attempt by California Legislature to restructure the State Bar, using SB 1413, is constitutional under the Inherent Powers Doctrine by applying the two-part test established in Brydonjack v. State Bar of California. 26 Finally, this Comment concludes that SB 1413 is constitutional under the Inherent Powers Doctrine. 27

18. Id.
19. SB 1413, supra note 1.
20. SB 1413, supra note 1, at 1.
21. SB 1413, supra note 1, at 2.
22. Id. The California State Lawyers' Association, though not yet in existence, is contemplated as a voluntary, unincorporated association. Id.
23. Id.
27. Id.
II. BACKGROUND

A. STATE BAR’S EVOLUTION AND INTENDED PURPOSE

The State Bar of California is an unified state bar.\footnote{Keller v. State Bar, 767 P.2d 1020, 1027 (1989). An “unified” Bar, also known as an integrated or mandatory bar, is an organization of members of the legal profession of the State. It is a compulsory association of attorneys that conditions the practice of law in a particular state upon membership dues payment. It is to be distinguished from a voluntary bar association in which membership is optional with the lawyers of the state. \textit{Id.} at 1027.} As such, it is a compulsory association of lawyers that conditions the practice of law in California on the payment of membership dues.\footnote{California Bar Final Report, supra note 24, at 147. The unified bar structure was modeled after the unified bar system in Canada. In 1921, Herbert Haley, the co-founder and first executive director of the American Judicature Society, visited Toronto and learned of the unified structure of the Law Society of upper Canada. Mr. Harley brought this idea home with him and began a national bar unification movement in the United States by suggesting the creation of unified state bars in a speech in 1914. In 1918, the American Judicature Society published a suggested unified State Bar Act. In 1920, a committed of the American Bar Association appointed to study state bar organization recommended the creation of the unified bar. \textit{Id.}}

In considering the establishment of a State Bar, the California Legislature saw the unified bar structure as a means of helping the legal profession to better meet its responsibilities to society.\footnote{California Bar Final Report, supra note 24, at 147. Joseph Webb, the first president of the State Bar summarized that the purpose of the State Bar is to place full responsibility upon the Bar, both as to qualifications for admission to practice and conduct after admission, to see that every lawyer recognizes that one who practice law holds a position of public trust. An attorney’s primary duty is to be faithful to that trust, and to organize the Bar upon an efficient and businesslike basis. \textit{Id.} at 147, 148.} The California Legislature believed that an unified Bar would permit the legal profession to protect the public from unethical or incompetent lawyers by improving lawyer admissions and discipline.\footnote{\textit{Id.}} In addition, an unified Bar could provide legal services and accessibility to justice to those with limited financial resources.\footnote{\textit{Id.}}
In 1927, the California Legislature passed the State Bar Act\(^{33}\) (hereinafter "Act") which created a public corporation known as the State Bar of California.\(^{34}\) The Act authorized the State Bar to set qualifications for the admission to practice law, adopt Rules of professional conduct and conduct disciplinary proceedings with the approval of the Supreme Court.\(^{35}\) The Act also authorized the State Bar to promote the advancement of jurisprudence and the administration of justice.\(^{36}\)

B. REASONS FOR CURRENT ATTACK ON STATE BAR

Sixty-nine years after its creation, the California State Bar's unified structure has come under attack due to the continuing disputes over the amount and allocation of annual dues.\(^{37}\) The problem of attributing annual dues to political and ideological activities was raised in *Keller v. State Bar of California* and *Brosterhous v. California State Bar of California*.\(^{38}\) Shortly after, the plebiscite of SB 60 raised compelling contentions for and against the abolishment of the State Bar.\(^{39}\)

1. **Keller v. State Bar of California**

The debate to abolish the California State Bar first arose pursuant to the United States Supreme Court decision in *Keller v. State Bar of California*.\(^{40}\) In *Keller*, the Supreme Court held that the use of compulsory dues to finance political activities violated the First Amendment Right of Free Speech.

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33. CAL. CONST. Article VI, § 9 provides: "The State Bar of California is a public Corporation. Every person admitted and licensed to practice law in this state is and shall be a member of the State Bar except while holding office as a judge of a court of record." *Id.*

34. CAL. BUS. & PROF. CODE §§ 6000 (West 1990) provides: "This chapter of the Business and Professions Code constitutes the chapter on attorneys. It may be cited as the State Bar Act." *Id.*


36. *Id.*


38. Keller v. State Bar of California, 496 U.S. 1110 (1990); Plaintiff's Second Amended Complaint at 2, Brosterhous (No. 52794). Brosterhous is still pending in Sacramento Superior Court.


40. Keller, 496 U.S. at 1152.
of its members.\textsuperscript{41} The Court reasoned that such Bar expenditures were unrelated to the legal profession and did not improve the quality of legal services for the public at large.\textsuperscript{42}

2. \textit{Brosterhous v. State Bar of California}

In \textit{Brosterhous},\textsuperscript{43} a case pending at the time of this writing, plaintiffs are suing the State Bar of California for supporting nonchargeable\textsuperscript{44} activities with their compelled membership and mandatory dues.\textsuperscript{45} Plaintiffs allege that this practice violates their Freedom of Speech and Association guaranteed by the First Amendment to the Federal Constitution and Arti-

\begin{footnotesize}
\textsuperscript{41} Id.
\textsuperscript{42} Id. In \textit{Keller}, plaintiffs asserted that the California State Bar should stop using mandatory bar dues and the State Bar name to advance political and ideological causes or beliefs with which plaintiffs disagreed. Furthermore, they asserted that the State Bar should not file amicus curiae briefs in litigation, and from financing election campaign activities. \textit{Id}.
\textsuperscript{43} Plaintiff's Second Amended Complaint at 2, \textit{Brosterhous} (No. 52794).
\textsuperscript{44} Id. Nonchargeable activities are expenses for activities not reasonably related to and germane to State Bar's purpose. Examples of nonchargeable social services and political programs which the State Bar compels all attorneys to pay include Research, which provides support to the legislative lobbying efforts of the Bar; Bar Relations, which supervises the efforts of the Bar Services and Minority Relations departments. Minority Relations is involved in such activities as promoting the interests of certain lawyers based on their race, ethnicity or gender. Bar Services, which provides support services (such as advise on fund raising and increasing membership) for voluntary, politically active bar associations, California Young Lawyers Association, a mandatory membership group of the Bar; Conference of Delegates, which debates resolutions concerning subjects for future legislative lobbying on a variety of issues. On a year-round basis, the Conference of Delegates also recruits voluntary bar groups for participation in the conference.

Communications and Public Affairs, the department that writes articles about the Bar's political activities and which engages in public relations activities for the Bar; Public Meetings, including such meetings as the Conference of Bar leaders which provides political advocacy training for the leadership of voluntary, politically active bar associations. Legal Services, which provides support to organizations who use the legal system to promote social change and which subsidizes the Legal Services Section, a volunteer subsection of the Bar engaged in legislative advocacy.

Sections and Appointments Administrations, which supports committees of the Bar that engage in legislative advocacy activities and also includes assistance to organizations who use the legal system to promote social change, and Governmental Affairs, which lobbies the Legislature. General and Administrative Expenses, including the expenses of the Board of Governors as well as the administrative expenses for carrying out the Bar's nonchargeable activities. \textit{Id.} at 5, 6.
\textsuperscript{45} Id.
\end{footnotesize}
Article One of the California Constitution. They argue that such actions taken in the name of the State Bar indicate acquiescence, if not support, of all members of the Bar, regardless of actual support or opposition to these activities. Finally, the plaintiffs seek a declaratory judgment from the California Supreme Court declaring which of the State Bar's activities and expenditures are nonchargeable or chargeable. In addition, the plaintiffs seek an injunction to prevent the State Bar from compelling mandatory dues to pay for nonchargeable activities in the future.

3. Attack on State Bar: Proponents' Perspective

During the campaign for SB 60, proponents of abolishing the California State Bar asserted two major contentions in support of their position. First, they argued that the State Bar is not an effective advocate of lawyers' interests. They cited the State Bar's practice of favoring the public interest, particularly public protection, over the interests of lawyers. Moreover, the interests of both the public and lawyers are subordinate to the overriding interests of the State Bar as an organization. This is evidenced by the State Bar's tendency to support the interests of the California Legislature even when they are contrary to those of the public and lawyers. In doing so, the State Bar continues to receive funding from the Legislature through the Dues Bill.

46. Id. at 6.
47. Id.
48. Plaintiff's Second Amended Complaint at 6, Brosterhous (No. 52794).
49. Id. at 7.
50. Rosenthal supra note 1. Proponents include Quentin L. Kopp, see supra; Robert F. Kane, Justice, California Court of Appeal (Rel) Judges Association; Wendy H. Borcherdt, Member, Board of Governors State Bar of California; Peter G. Keane, see supra; Peter M. Appleton, Past President, Beverly Hills Bar Association; and Gert K. Hirschberg, Former Governor, State Bar of California. Id.
51. Rosenthal, supra note 1, at 8.
52. Id.
53. Id.
54. Keane Interview June 1996, supra note 13. Each year, the California Legislature vote and set the fees to practice law in California. The fee amount is within the legislature's sole discretion. Id.
55. Id.
Second, proponents of abolishing the State Bar asserted that the annual mandatory Bar dues were too high. They alleged that the State Bar had become an inefficient bureaucracy, spending money on activities that most members neither needed nor supported.

4. Attack on State Bar: Opponent’s Perspective

Simultaneously, those opposed to the abolishment of the California State Bar asserted three major contentions for maintaining the current State Bar. Their greatest concern was that the self-regulatory aspect of the legal profession would be forever lost if the regulation of the State Bar were transferred to a governmental administration.

This group also pointed out that the State Bar is a powerful lobbying entity which speaks on behalf of all lawyers rather than on behalf of narrow geographic areas or special interest groups. Finally, this group asserted that abolishing the State Bar may terminate critical services to both lawyers and

56. Rosenthal, supra note 1, at 8.
57. Plaintiff’s Second Amended Complaint at 5, 6, Brosterhous (No. 52794). Such activities include the 1) California Young Lawyers Association, a mandatory membership group of the State Bar, 2) Conference of Delegates, which debates resolutions concerning subjects for future legislative lobbying on a variety of issues. 3) Communications and Public Affairs, the department that writes articles about the Bar’s political activities and which engages in public relations activities for the Bar, 4) Public Meetings, including such meetings as the Conference of Bar Leaders which provides political advocacy training for the leadership of voluntary, politically active bar associations, 5) Legal Services, which provides support to organizations who use the legal system to promote social change and which subsidizes the Legal Services Section, a volunteer subsection of the Bar engaged in legislative advocacy, and 6) Bar Relations, which supervises the efforts of the Bar Services and Minority Relations Department. Id.
58. Rosenthal, supra note 1, at 10. There are over 100 organizations that supported saving the State Bar of California. A partial include: Alameda County Bar Association, Antitrust and Trade Regulation Law Section, State Bar, Asian American Bar Association, Association of Business Trial Lawyers of San Diego, Beverly Hills Bar Association, Black Women Lawyers Association of Los Angeles, California Delegation to the American Bar Association House of Delegates, California Indian Legal Services, California Judges Association, Cardozo Society of Santa Clara County, Coalition to Save the Unified Bar, and Defense Lawyers Association of Southern California. Id.
59. Towery, supra note 9, at 1.
the public. These services include the ethics hotline, continuing education, legal services program, client security fund administration, fee arbitration, legal specialization and public education.

C. INHERENT POWERS DOCTRINE

In addition to the concerns of California lawyers, California Courts have their own concerns regarding the abolishment of the State Bar. Specifically, the California Legislature and courts seek to establish which branch has the power to regulate the legal profession. The California Constitution’s Separation of Powers doctrine empowers each of the three branches of government—executive, legislative and judicial—with certain enumerated powers. No branch may attempt to exercise a power granted to a coordinate branch. However, absent ex-

62. Id. The Ethics Hotline is an 800 number that enables the public to report on incompetent or unethical lawyers. Id.
63. Id. The Continuing education service develops standards for continuing education programs. Id.
64. Heiting, supra note 61. The Legal Services program provides assistance to bar associations, the services develop and expand the availability of legal services to low and middle income persons. Id.
65. Id. The Client security fund administration receives, evaluates, and processes applications made to the fund by persons who have suffered monetary losses. Id.
66. Id. The Fee Arbitration Service administers statewide programs for arbitrating and mediating fee and cost disputes. Id.
67. Heiting, supra note 61, at 1. The Legal Specialization service is a certification program adopted by the California Supreme Court which enables lawyers to be certified in particular practice areas of law. Id.
68. Id. The Public Education service provides ongoing information to the public about the State Bar, law, attorneys and the justice system. Others include Lawyer Referral Services, and Prevention and Assistance Programs for Attorneys. Id.
69. Interview with Robert A. Hawley, Chief Assistant General Counsel for the State Bar of California, in San Francisco, California, August 6,1996 [hereinafter Hawley]. Mr. Hawley is also an adjunct law professor at Golden Gate University School of Law. Id.
70. Id.
71. CALIF. CONST. art. III, § 3 provides:
"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." Id.
72. WOLFRAM, supra note 25, at 22. "For the past two centuries and increasingly in recent decades, courts have claimed the power to regulate various areas of
plicit constitutional or statutory language, these branches derive certain powers from the Inherent Powers Doctrine.\(^{73}\) The authority to regulate the legal profession is one such power.\(^{74}\)

Although the California Constitution does not explicitly provide any branch of government with the power to regulate the legal profession, under the Inherent Powers Doctrine, both the legislative and judicial branches claim that power.\(^{75}\)

1. Legislative Claim: Affirmative Inherent Powers Doctrine

The Legislative branch claims the authority to regulate the legal profession under what has become known as the affirmative aspect of the Inherent Powers Doctrine (hereinafter "Affirmative Inherent Powers Doctrine").\(^{76}\)

Because lawyers form an integral and indispensable role in the California system of administering justice, it is well settled that the profession and practice of the law constitutes a unique public trust.\(^{77}\) Accordingly, the membership, character and conduct of those entering and engaging in the legal profes-

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73. Id.
74. Id.
76. WOLFRAM, supra note 25, at 22. The Affirmative Inherent Powers Doctrine began as a doctrine of tradition. American courts have asserted the affirmative power to regulate the legal profession since the inception of Statehood. However, that tradition has frequently been interrupted by Legislative regulation of the legal profession. Id. at 22, 24, 26. In California, notwithstanding the inherent powers of the California Supreme Court to admit applicants to practice law, it is generally conceded that the California Legislature may prescribe reasonable rules and regulations for admission to the Bar which will be followed by the California Courts. In In Re Chapelle 71 Cal.App. 129, 131, 132 (1925). In addition, at one point in time, the California Supreme Court gave the California Legislature "plenary control over the qualifications, oaths or duties of attorneys." Ex Parte Yale, 24 Cal. 241, 245 (1864). In Ex Parte Yale, Yale affirmed the California Legislature's power to prescribe a test oath designed to prevent Confederate sympathizers from serving as lawyers. Id. at 245.
sion have long been the subject of legislative regulation and control. 78 Two cases that illustrate this legislative authority under the Inherent Powers Doctrine are Cohen v. Wright 79 and Ex Parte Yale 80.

a. Cohen v. Wright

In Cohen, the California Supreme Court held that the right to practice law is a statutory privilege, subject to the control of the legislature. 81 The Cohen court ruled that the statute that makes practicing law in California contingent on taking an oath of allegiance 82, is both constitutional and valid. 83 The California Constitution does not expressly prohibit the legislature from requiring persons exercising special privileges, such as lawyers, to take expurgatory oaths like the one prescribed by the provision in question. 84 Hence, absent express constitutional language to the contrary, the Legislature possesses the power to alter or abridge the terms of an office of purely legislative character, and can render the enjoyment of the right to practice law dependent on various conditions. 85

78. Id. at 324. Here, the Court went on to say that the exercise of a reasonable degree of regulation and control over the profession and practice of law cannot be considered as intrusion into the domain of our State organization constitutionally assigned to the judicial department thereof. Id. at 331.

79. Cohen v. Wright, 22 Cal. 293, 319 (1863). In Cohen, the issues were whether a statutory provision which required attorneys at law to file an oath of allegiance was constitutional and valid. On appeal, the respondent argued that the lower courts ruling should be affirmed because the appellant had not taken the oath of allegiance pursuant to § 1 of the “Act to Exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases.” The appellant argued that the Act was unconstitutional and void because it violated the Constitution of California. Id.

80. Ex Parte Yale, 24 Cal. 241 (1864). In Ex Parte Yale, the respondent’s objection was sustained, and the appellant was prohibited to practice law in California Courts as an attorney until he took the oath of allegiance prescribed for attorneys at law pursuant to the Act to Exclude Traitors and Alien Enemies from the California Courts of Justice in Civil Cases. Id.

81. Cohen, 22 Cal. at 319.

82. Id. at 306.

83. Id. at 322.

84. Id.

85. Id. In Cohen, “the statute substantially makes the refusal to take the oath operate as a voluntary withdrawal from the profession, leaving open for the attorney to be readmitted any time by taking the oath, and thus complying with the
b. *Ex Parte Yale*

In *Ex Parte Yale*, the California Supreme Court held that the manner, terms, and conditions of lawyers continuing to practice law, as well as their powers, duties and privileges, are also proper subjects of legislative control. Furthermore, it held that lawyers are subject to all the same limitations as any other statutorily created and regulated profession. The *Yale* court found no provision in the California Constitution explicitly or impliedly restricting the legislature from exercising plenary control over the qualifications of admissions, oaths or duties of attorneys at law. Therefore, the *Yale* court held that the Legislature may lawfully require, as a condition to lawyers admission to practice law, or their continuance in practice, the taking of the oath prescribed in the statute in question.

2. Judicial Claim: Negative Inherent Powers Doctrine

Concurrently, the judicial branch claims the power to regulate the legal profession under what has become known as the negative aspect of the Inherent Powers Doctrine (hereinafter "Negative Inherent Powers Doctrine"). Historically, the admission, discipline and disbarment of lawyers have been

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new condition upon which the right to practice law depends." *Cohen*, 22 Cal. at 322, 323.

86. *Ex Parte Yale*, 24 Cal. at 244.
87. Id. at 244.
88. Id. at 245.
89. Id.
90. Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation - The Role of the Inherent Powers Doctrine*, 12 UALR L. J. 1, 6, 7 (1989-90). Under the inherent powers doctrine, any attempt by a coordinate branch of government to encroach on the prerogative of the Judicial branch is seen as an unconstitutional usurpation of judicial power. *Id.* at 23. In addition, under the Negative Inherent Powers Doctrine, courts have asserted that the legal profession is one of the highest and noblest in the world. The relation between attorney and client is a close one, and involves matters of great delicacy. The attorney is an officer of the court, and is brought into close and intimate relations with the court. Whether a person shall be admitted, or whether an attorney shall be disbarred, is a judicial, not a legislative question. *See generally Alpert, supra* note 75 at 527.
among the inherent powers of the judicial branch. Three cases supporting the Court's inherent powers are *In Re Hallinan*, *Emslie v. State Bar of California*, and *Stratmore v. State Bar of California*.

a. *In Re Hallinan*

In *In Re Hallinan*, the California Supreme Court held that its inherent power over admission, discipline and disbarment of attorneys permits it to initiate disbarment proceedings on its own motion, notwithstanding the disbarment proceedings set forth in the California Business and Professional Code.

The Court ruled that it may initiate an alternative disbarment proceeding on its own motion in cases where a lawyer might be guilty of acts involving moral turpitude even if summary disbarment is not warranted. In such cases, the California Supreme Court refers the matter to the State Bar for an

92. *In Re Hallinan*, 272 P.2d 768 (Cal. 1954). In *In Re Hallinan*, the petitioner was charged by indictment with violating the Internal Revenue Code 26 U.S.C. § 145(b) by willfully and knowingly filing false and fraudulent income tax returns. The jury found the petitioner guilty; he did not appeal, and the time to appeal elapsed. When the State Bar filed a certified copy of the indictment, contending it calls for petitioner's disbarment under California Bus & Prof Code § 6101 and 6102. The matter was referred to the State Bar Board of Governors for a hearing, report and recommendation on the question whether the facts and circumstances surrounding the commission of the petitioner's conviction involved moral turpitude or other misconduct warranting disbarment or suspension even though summary disbarment was warranted. Id.
93. Emslie v. State Bar of Cal., 520 P.2d 991 (Cal. 1974). In Emslie, the petitioner was disbarred because his actions of burglary and grand theft constituted moral turpitude and dishonesty. The petitioner's motion to suppress evidence was denied. The California Supreme Court explained that although criminal law exclusionary rules are not part of administrative due process in State Bar proceedings, circumstances could be presented under which the constitutional demands of due process could not countenance use in such proceedings, of evidence obtained by unlawful means. Therefore, the California Supreme Court required additional standards that the criminal law exclusionary rules be considered in State Bar proceedings. Id. at 992, 993.
95. *In Re Hallinan*, 272 P.2d at 774, 775. CAL. BUS. & PROF. CODE §§ 6101 and 6102 provide for summary disbarment of attorneys who are convicted of a felony or misdemeanor involving moral turpitude. Id.
96. Id. at 774.
investigation of whether, in the commission of the crime, the convicted lawyer is guilty of misconduct that requires suspension or disbarment.97

b. *Emslie v. State Bar of California*

In *Emslie v. State Bar of California*, the California Supreme Court held that legislative standards for disciplinary proceedings are but minimum standards which must be applied.98 Although, the State Bar Act is designed to provide standards whereby those lawyers who prove recreant to their trust may be removed from the profession, the Court retains the inherent power to require additional disciplinary standards if it is not satisfied that the legislative standards are sufficient.99

c. *Stratmore v. State Bar of California*

Finally, in *Stratmore v. State Bar of California*, the California Supreme Court held that the statutory grounds for discipline are not exclusive.100 A statute proscribing reasons for disbarment cannot limit the Court's inherent power to disbar a lawyer for additional reasons for which the Court ascertains that the lawyer is no longer fit to be an officer of the court.101 In *Stratmore*, the Court found that the fact the defendant's misconduct preceded his admission to practice law was irrelevant.102 The Court can discipline a lawyer for conduct "either in or out of his/her profession" which demonstrates the lawyer to be unfit to practice law.103

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97. *Id.* at 774, 775.
99. *Id.*
100. *Stratmore*, 538 P.2d at 229.
101. *Id.* at 230.
102. *Id.*
103. *Id.*
III. DISCUSSION

The California Supreme Court established a two-part test in *Brydonjack v. State Bar of California* (hereinafter "Brydonjack test") to ascertain whether legislation that regulates the legal profession usurps the Court's inherent powers under the Inherent Powers Doctrine. 104

Under the *Brydonjack* test, the California Supreme Court's constitutional functions can be reasonably restricted by the California Legislature. 105 However, the Court's ability to exercise its constitutional functions cannot be defeated or materially impaired by such legislative restrictions. 106 SB 1413 presumably would pass constitutional muster under the Inherent Powers Doctrine if its proposed scheme is found to satisfy the *Brydonjack* test. 107

A. PART ONE OF THE *BRYDONJACK* TEST

1. Constitutional Functions

In order to apply the *Brydonjack* test, the Court must first identify which of its constitutional functions is affected by the legislative restriction. 108 The Court's main constitutional functions are to control the admission, discipline and disbarment of lawyers entitled to practice law in California. 109 The

104. *Brydonjack* v. State Bar, 208 Cal. at 444. Recognizing that the regulation of the legal profession comprehends the existence of common boundaries between the legislative and judicial zones of power, the California Supreme Court set forth the basic test for assessing whether the legislature has infringed on the judicial inherent prerogative. *Brydonjack*'s two part test provides that Legislature may put reasonable restrictions upon constitutional functions of the Courts provided they do not defeat or materially impair the exercise of those functions. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Brostky v. State Bar, 368 P.2d 697 (Cal. 1962). In *Brostky*, the California Supreme Court held that the courts alone have control over admission, discipline and disbarment of persons entitled to practice law before them. In *Brostky*, the Court held that had the Legislature attempted to vest disciplinary authority in the State Bar of California, the constitutionality of those portions of the State Bar Act regarding the said constitutional functions could have been seriously challenged on the ground of legislative infringement on the judicial prerogative. Although the
Court's constitutional functions affected by SB 1413 are admission and lawyer discipline.\textsuperscript{110} In order for SB 1413 to satisfy the first part of the \textit{Brydonjack} test, the Court must ascertain that SB 1413 is a reasonable restriction on those constitutional functions.\textsuperscript{111}

2. Reasonable Restrictions

Although the Court has not explicitly articulated what constitutes reasonable restrictions on its constitutional functions, two cases, \textit{Conway v. State Bar of California}\textsuperscript{112} and \textit{Brydonjack}, implicitly state what such restrictions might be.\textsuperscript{113} In \textit{Conway v. State Bar of California}, the Court held that a statutory provision that authorized the State Bar to order involuntary inactive enrollment in exigent circumstances was a reasonable restriction on the Court's constitutional function of lawyer discipline.\textsuperscript{114} The Court reasoned that the State Bar's decision to order temporary suspensions was reasonable because the decision was subject to immediate and plenary review by the California Supreme Court.\textsuperscript{115}

Similarly, SB 1413 might be deemed a reasonable restriction on the Court's constitutional function of lawyer discipline.\textsuperscript{116} SB 1413 authorizes the transfer of the admission and lawyer discipline to the Administrative Office of the Cali-
fornia Supreme Court. However, the Court will continue to have immediate and plenary review over the Administrative Office's decisions regarding those constitutional functions because the Administrative Office is employed by the Court.

In *Brydonjack*, however, the Court held that a statutory provision which made the admission of qualified applicants to practice law in California contingent on obtaining favorable recommendations from the State Bar Committee was an unreasonable restriction. The Court reasoned that admissions is a function of the California Supreme Court. Because the State Bar Committee possesses only the power to investigate and make recommendations, it cannot appropriate the power of final control, that is, to indirectly deny admissions.

Unlike the statutory provision in *Brydonjack*, the scheme in SB 1413 to appoint a Chief Trial Counsel might be considered a reasonable restriction on the Court's constitutional function to admit qualified applicants to practice law in California. On its face, SB 1413 does not conflict with the

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117. Id.
118. Id.
119. In *Brydonjack*, the statutory provision at issue provides: With the approval of the California Supreme Court, and subject to the provisions of this Act, the board shall have the power to fix and determine the qualifications for admissions to practice law in this state, and to constitute and appoint a committee of not more than seven members with power to examine applicants and recommend to the California Supreme Court for admission to practice law those who fulfill the requirements. *Brydonjack*, 208 Cal. at 441-42.

In *Brydonjack*, after being denied admission to practice law pursuant to the above statutory provision, the petitioner moved for the California Supreme Court to admit him as an attorney and counselor at law in the courts of California. The Court agreed with the petitioner, that a favorable recommendation by the State Bar is not a prerequisite to being admitted to practice law in California. Furthermore, to give the statutory provision such a construction would be to allow an intrusion upon the constitutional and inherent powers of the California Supreme Court. *Id. at 442.*

120. *Id. at 445, 446.*
121. *Id.*
122. Senate Bill 1413 § 6079.5(a) [hereinafter Secton 6079.5(a) of SB 1413] provides: The Supreme Court shall appoint a lawyer admitted to practice in California to serve as chief trial counsel. He or
Court’s authority to regulate the legal profession. SB 1413 does not enumerate the Chief Trial Counsel’s duties, therefore, it cannot be assumed that those duties will conflict with the Court’s constitutional functions. Instead, SB 1413 merely enumerates the qualifications a person must meet to be appointed Chief Trial Counsel. Hence, because SB 1413 does not prescribe how the Court must admit an applicant or discipline a lawyer, the Court will likely construe SB 1413 as a reasonable restriction. Accordingly, the Court could likely find that SB 1413 satisfies the first part of the *Brydonjack* test.

**B. PART TWO OF THE *BRYDONJACK* TEST**

Assuming SB 1413 is a reasonable restriction on the Court’s constitutional functions, the second part of the *Brydonjack* test requires that SB 1413 does not defeat or materially impair the Court’s ability to exercise its constitutional functions.

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she shall be appointed for a term of four years and may be reappointed for additional four-year periods. He or she shall serve at the pleasure of the Supreme Court. The chief trial counsel shall have the following qualifications: (1) Be an attorney licensed to practice in the State of California, be in good standing and shall not have committed any disciplinary offenses in California or any other Jurisdiction; (2) have a minimum of five years of experience, including trial experience, with law practice in broad areas of the law; (3) have a minimum of two years of prosecutorial experience or similar experience in administrative agency proceedings or disciplinary agencies; (4) have a minimum of two years of experience in an administrative role, overseeing staff functions.

*Id.*

123. *Id.*
124. *Id.*
125. *Id.*
126. *Brydonjack*, 208 Cal. at 444.
127. *Id.*
128. Interview with Peter G. Keane, (January 16, 1997), [hereinafter Keane Interview, January 1997].
1. Defeat

SB 1413 does not appear to defeat the Court's ability to exercise its constitutional functions of admission, discipline and disbarment of lawyers. 129 Under the present State Bar structure, the Legislature regulates the legal profession through the State Bar. 130 Within the State Bar, the Board of Governors performs the regulatory functions of the Legislature over its own membership, character and conduct. 131 However, because the State Bar is an organization which is separate and independent from the California Supreme Court, the Court cannot supervise how the State Bar regulates the legal profession. 132 At best, the Court has indirect supervision over the State Bar. 133 The Court has only appellate review over the Board of Governors' regulatory decisions. 134

Conversely, under SB 1413, the Court will have direct supervision over all regulatory functions relating to the legal profession. 135 Under SB 1413, the judicial branch will regulate the legal profession through its Administrative Office. 136 Within the Administrative Office, the Chief Trial Counsel will perform both the Court's constitutional functions and the Legislature's regulatory functions. 137 Moreover, because the Administrative Office is neither separate nor independent from the California Supreme Court, the Court will have initial review over the regulatory decisions of the Chief Trial Counsel. 138

129. Id.
130. Id.
131. Id. In addition to these powers, the Board of Governors is empowered to "aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of administration of justice . . . all matters that may advance the professional interests of the members of the State Bar and such matters as concern the relations of the bar with the public." CAL. BUS. & PROF. CODE § 6031(a). This has been called the "laudable general purpose of the [State Bar] Act." Herron v. State Bar, 212 Cal. 196,199 (Cal. 1931).
133. Id.
134. Id.
135. Id.
136. Id.
138. Id.
In conclusion, by including both constitutional and regulatory functions, over admission, discipline, disbarment, membership, character, and conduct, under the Court's jurisdiction, SB 1413 enhances the Court's ability to exercise its constitutional functions.\textsuperscript{139}

2. Materially Impair

The appointment of the Chief Trial Counsel under SB 1413 is not likely to materially impair the Court's ability to exercise its constitutional functions for two reasons. First, the role of the Chief Trial Counsel is limited to those regulatory functions which the State Bar has traditionally exercised, and any other functions that do not usurp the Court's authority to regulate the legal profession.\textsuperscript{140}

Second, because the Chief Trial Counsel is appointed by the California Supreme Court, the Chief Trial Counsel must adhere to the Court's orders regarding the regulation of the legal profession.\textsuperscript{141} Otherwise, the Chief Trial Counsel can be removed for insubordination.\textsuperscript{142} Presently, because the Court lacks appointment and removal power over the Board of Governors of the State Bar, the Board of Governors is under no obligation to adhere to a Court order.\textsuperscript{143}

Given that the Court will have direct supervision over both the organization that will exercise its constitutional functions and the person who will oversee the exercise of those constitutional functions, the Court could likely find that SB 1413 satisfies the second part of the \textit{Brydonjack} test.

IV. CONCLUSION

SB 60 failed in large part because it did not introduce an alternative to the State Bar.\textsuperscript{144} However, SB 1413 purports to

\begin{flushleft}
139. \textit{Id}.
140. \textit{Id}.
141. \textit{Id}.
143. \textit{Id}.
144. See generally Rosenthal, supra note 1, at 1.
\end{flushleft}
answer the deficiency of SB 60 by eliminating the State Bar's role as the administrative arm of the Court in regulating the legal profession.\textsuperscript{145} Provided that the Court finds that SB 1413 satisfies the\textit{Brydonjack} test, it appears highly likely that the Court will find SB 1413 constitutional under the Inherent Powers Doctrine. Such a finding may eventually lead to the abolishment of the State Bar of California.\textsuperscript{146}

\textit{Tamara Hall*}

\textsuperscript{145} Section 17 of SB 1413, \textit{supra} note 19, at 12.

\textsuperscript{146} \textit{Brydonjack}, 208 Cal. at 444.

\* Golden Gate University School of Law, Class of 1997. \textit{The Race Is Not Given To The Strong Or The Swift, But It Is Given To The One Who Will Endure Until The End.} I would like to thank the following people who believed in my intellect and capabilities: James and Brenda Hall, Ronald Bates, Pierre Towns, Raymond and Savannah Hall, Joseph and Sharon Kay, Dean Jon H. Sylvester; Professors Laree Kiely, Nerissa Skillsman, Cassandra Havard, Rodney Fong, Peter Keane, Robert Hawley, Mary Ann Wolcott, Susan Kupfer and Susan Rutberg; Stephanie Smith, Pamela Jenkins, Daron Watts, George Mallory, Jr., Eddie Harris, Sr., June Powells, Kelly Charles, Sabina Crocette, Monique Olivier, Laura Ziegler, Noelle Matteson, Nadia El Mallakh, and George Holland, Jr.
Senate Bill 1413:
The Answer to Senate Bill 60 Plebiscite
and its Constitutionality under the
Inherent Powers Doctrine

Existing law, the State Bar Act, establishes the State Bar of California for the purpose of regulating the legal profession. Existing law requires all attorneys who practice law in California to be a member of the State Bar. Existing law requires the Supreme Court of California to determine admissions to the State Bar and gives the Supreme Court final authority over disbarment, suspension and other disciplinary measures. Existing law authorizes the State Bar to engage in certain functions and activities with respect to attorney discipline.

This bill would, on and after January 1, 1999, transfer specified powers, duties, and functions relating to the practice of law in California to the Administrative Office of the Courts, and would make conforming changes to the State Bar Act.

This bill provides that on January 1, 1999, all powers, duties, and functions relating to admission to the practice of law, attorney discipline, mandatory continuing education, and the Client Security Fund currently vested in the Board of Governors of the State Bar shall be transferred to the Supreme Court, and the cost of performing these disciplinary functions incorporated into the budget of the Supreme Court. The bill would require the Bureau of State Audits to determine the cost
of those disciplinary functions and would provide for reimbursement of the Supreme Court for those costs from funds derived from licensing fees.

This bill would also authorize the establishment of a voluntary, unincorporated association called the California State Lawyer's Association and would require the Board of Governors of the State Bar to provide a specified mechanism whereby members of the State Bar can elect to have $50 of both their 1997 and 1998 annual membership fee deposited into the California State Lawyer's Association fund which is hereby created to provide for the establishment and administration of the California State Lawyer's Association.


An act to amend, repeal and replace sections to the Business and Professions Code, relating to the State Bar of California.

a. Amend Sections:

1. 6031-
   Advancement of professional interests; Judicial evaluations.

2. 6077-
   Binding effect of rules; Power of board to discipline members for breach.

3. 6079.5-
   Appointment of chief trial counsel; qualifications.
b. Repeal Sections:

1. 6075-

Correlative and cumulative to Court's authority,

2. 6078-

Recommendation of disbarment, suspension, or reproof; reinstatement,

3. 6080-

Records of proceedings; transcripts of evidence; Fact findings; Decision and minute entry.

4. 6081-

Certification of recommendation of disbarment or suspension with transcript and findings; Notice of enrollment, termination of enrollment, or refusal to terminate enrollment of members as inactive.

5. 6081.1-

Transcription of oral testimony.

6. 6082-

Review of board decisions by Supreme Court or Court of Appeal.

7. 6083-

Petition for Review; Time for filing, Burden of proof.

8. 6086-

Rules of procedure by board,
9. Article 5.5-

To repeal Article 5.5 (commencing with Section 6090).

c. Replace Sections:

1. 6001-

State Bar; Public corporation, Powers and attributes; code provisions not applicable to State Bar unless Legislature so declares.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

Section 1.

Section 6001 of the Business and Professions Code is repealed.

Section 2.

Section 6001 is added to the Business and Professions Code, to read:

6001.

(a) Any reference in this chapter to the State Bar of California or to the Board of Governors of the State Bar of California shall be a reference to the Administrative Office of the Courts.

(b) Any reference in this chapter to a “member” or “members” of the State Bar shall be a reference to a person licensed to practice law in this state by the Supreme Court.

(c) Any reference in this chapter to “dues” or membership dues” shall be a reference to “fees” or “licensee fees.”
Section 3.

Section 6031 of the Business and Professions Code is amended to read:

The Administrative Office of the Courts shall administer all statutory powers, duties, and functions relating to admission to the practice of law, attorney discipline, mandatory continuing legal education, and the Client Security Fund, with respect to persons licensed to practice law by the Supreme Court.

Section 4.

Section 6075 of the Business and Professions Code is repealed.

Section 5.

Section 6077 of the Business and Professions Code is amended to read:

The rules of professional conduct adopted by the . . . Supreme Court, are binding upon all . . . persons licensed to practice law in the state by the Supreme Court.

Section 6.

Section 6078 of the Business and Professions Code is repealed.

Section 7.

Section 6079.5 of the Business and Professions Code is amended to read:

(a) The . . . Supreme Court shall appoint a lawyer admitted to practice in California to serve as Chief Trial Counsel. He or she shall be appointed for a term of four years and may be reappointed for additional four-year periods. He or she shall serve at the pleasure of the . . . Supreme Court. He or she shall not engage in private practice. The . . . Supreme Court shall notify the Senate Rules Committee and the Senate and Assembly Judiciary Committees within seven days of the dismissal or
The appointment of the Chief Trial Counsel is subject to the confirmation by the Senate, and the time limits prescribed in Section 1774 of the Government Code for Senate confirmation and for service in office are applicable to the appointment. . . . (b) The Chief Trial Counsel shall have the following qualifications:

1. Be an attorney licensed to practice in the State of California, be in good standing and shall not have committed any disciplinary offenses in California or any other jurisdiction.

2. Have a minimum of five years experience in the practice of law, including trial experience, with law practice in broad areas of the law.

3. Have a minimum of two years prosecutorial experience or similar experience in administrative agency proceedings or disciplinary agencies.

4. Have a minimum of two years of experience in an administrative role, overseeing staff functions.

The . . . Supreme Court may except an appointee from any of the above qualifications for good cause upon a determination of necessity to obtain the most qualified person.

Section 8.

Section 6080 of the Business and Professions Code is repealed.

Section 9.

Section 6081 of the Business and Professions Code is repealed.

Section 10.

Section 6081.1 of the Business and Professions Code is repealed.
Section 11.

Section 6082 of the Business and Professions Code is repealed.

Section 12.

Section 6083 of the Business and Professions Code is repealed.

Section 13.

Section 6086 of the Business and Professions Code is repealed.

Section 14.

Article 5.5 (commencing with Section 6090) of the Chapter 3 of Division 3 of the Business and Professions Code is repealed.

Section 15.

On and after January 1, 1999, all powers, duties, and functions relating to the admission to the practice of law, attorney discipline, mandatory continuing legal education, and Client Security Fund vested in the Board of Governors of the State Bar shall be transferred to the Supreme Court. The cost of performing these functions shall be incorporated into the budget of the Supreme Court. The Bureau of State Audits shall determine the cost of these functions and the Supreme Court shall be reimbursed for these costs from funds derived from licensing fees.

Section 16.

(a) The Legislature authorizes the establishment of a voluntary, unincorporated association called the California State Lawyers' Association to act on behalf of persons licensed to practice law in this state.

(b) For the years 1997 and 1998, the Board of Governors of the State Bar shall include the annual membership fee statement, a check off box by which a member of the State Bar may authorize the deposit of fifty dollars ($50) of his or her annual
membership fees into the California State Lawyers' Association Fund, which is hereby created, to be administered by the board, to provide for the establishment and administration of the California State Lawyers' Association.

Section 17.

All sections of this act shall become effective on January 1, 1999, except for section 16, which shall become effective on January 1, 1997.