UCLA
UCLA Public Law & Legal Theory Series

Title
Taking politics seriously: A theory of California's separation of powers

Permalink
https://escholarship.org/uc/item/2w09d1pz

Journal
UCLA Law Review, 51(4)

Author
Zasloff, Jonathan

Publication Date
2004-04-01

Peer reviewed

eScholarship.org Powered by the California Digital Library
University of California

TAKING POLITICS SERIOUSLY: A THEORY OF CALIFORNIA'S SEPARATION OF POWERS

Jonathan Zasloff*

This Article presents the first comprehensive analysis of separation of powers under the California Constitution, and also lays the groundwork for a more general theory of separation of powers in state constitutional law. Such an effort is of more than academic interest, for the California Supreme Court will soon confront its most important separation of powers case in more than one hundred years: Marine Forests Society v. California Coastal Commission, *which challenges the constitutionality of the most powerful land use authority in the country, and could portend a major change in the balance of power between the Governor and the Legislature. Through an analysis of the structure and meaning of the California Constitution, and a careful reconsideration of the history and purpose of the separation of powers, Jonathan Zasloff argues that the California Supreme Court should fundamentally rethink the separation of powers. Instead of using the doctrine to police the boundaries between the branches, the Court should largely defer to political branch agreements dividing authority between the Governor and the Legislature. Judicial attempts to referee political struggles have gone badly awry, and have been compounded by reliance on* federal *separation of powers precedent that simply does not apply to the state constitution.*

Jonathan Zasloff concludes that this framework, stressing the primacy of politics and the divergence between state and federal constitutions, can serve as a template for separation of powers jurisprudence in the majority of the fifty states, and prevent the doctrine from disrupting carefully crafted political compromises. State courts, he contends, should look more carefully at their own constitutions to create a more realistic separation of powers jurisprudence than their federal counterparts. If "realistic" here means far less jurisprudence than before, then that merely reflects the doctrine's problematic underpinnings.

INTRODUCTION 1080
I. FORMALISM, FUNCTIONALISM, AND THE SEPARATION OF POWERS CLAUSE 1085

* Professor of Law, UCLA School of Law; J.D., Yale Law School; Ph.D., Harvard University. I would like to thank for helpful comments and suggestions Michael Asimow, David Cruz, Robert Goldstein, Bill Rubenstein, Robert Williams, Ernie Young, and as always Katherine Trisolini. Joe Socher, Mal Richardson, and the staff of the Hugh & Hazel Darling Law Library at UCLA provided excellent research assistance, and the UCLA Law School Dean's Fund contributed essential research support.

A. Formalist Versus Functionalist Theories 1085
B. The Core Function Doctrine in the California Court of Appeal 1087
1. *California Radioactive Materials v. Department of Health Services* 1087
2. *Carmel Valley Fire Protection District v. State* 1090
3. *Marine Forests Society v. California Coastal Commission* 1093
C. The Incoherence of the Core Function Doctrine 1095
II. "THAT AT ANY RATE IS THE THEORY OF OUR CONSTITUTION" 1102
III. STRUCTURE AND RELATIONSHIP IN THE CALIFORNIA CONSTITUTION 1108
A. The California Governorship 1110
1. The Governor of the Legislature 1110
2. The Un-Executive 1112
3. Executive Clemency 1116
4. Executive Privilege 1118
5. The Governor as Legislator: Why? 1119
B. Power to the People 1121
IV. NORMATIVE IMPLICATIONS, OR: THE DIRTY SECRET OF THE SEPARATION OF POWERS 1126
V. GROPING TOWARD A SOLUTION 1128
A. The Inapplicability of Standard Functionalist Theories 1129
B. A Test for California's Separation of Powers 1130
C. Judicial Emergency Powers 1131
D. A Second-Prong Scenario 1133
E. Three Heuristics 1135
1. The Veto 1135
2. Standing/Ripeness 1137
3. Timing and Scope 1137
F. Testing the Theory: Reexamining the Coastal Act 1139
VI. SEPARATING THE SEPARATION OF POWERS 1142
VII. COMPARATIVE STATE ANALYSIS 1145
CONCLUSION: TAKING POLITICS SERIOUSLY 1148
APPENDIX 1149

INTRODUCTION

Thank heaven for small favors. The California Court of Appeal recently held that the structure of the California Coastal Commission—arguably the most powerful land use authority in the nation—violated the state constitution's Separation of Powers Clause, casting doubt on the Commission's viability.[1] Constitutional cases beg for judicial overwriting, but the court

1. Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869 (Ct. App. 2002). The Separation of Powers Clause reads in full: "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." CAL. CONST. art. III, § 3.

resisted the temptation: no references to Montesquieu, no overwrought warnings about the "perils to liberty," no attempts at Holmesian rhetoric. The court's opinion was sober and workmanlike—judges carefully attempting to sort through doctrine and coming to a reasoned result.

But if the court thought that it might avoid notice through muted prose, it missed the mark. The decision attracted nationwide attention[2] and spawned a rare special session of the California Legislature, which duly enacted legislation attempting to fix the Commission's alleged structural infirmities.[3] Nevertheless, in stepped the California Supreme Court, a body not known for taking aggressive positions.[4] In granting review, the Court stated that it would scrutinize both the Commission's new enabling statute and also whether all of the Commission's actions since its inception in 1972 should be invalidated—an order so sweeping that it amazed even the property rights lawyers who brought the case.[5] In so doing, the justices set the

2. *See, e.g.*, Dean E. Murphy, *A Challenge in California Over Decisions for the Coast*, N.Y. TIMES, Feb. 19, 2003, at A17; Daniel B. Wood, *For Coastal Commission, A Stormy Future*, CHRISTIAN SCI. MONITOR, Jan. 22, 2003, at 3; Kimberley A. Strassel, Editorial, *California Coastal Decommission*, WALL ST. J., Jan. 27, 2003, at A16; *Morning Edition: Lawmakers Scrambling to Save California's Coastal Commission, Which Has Been Found Unconstitutional by a Court* (NPR radio broadcast, Jan. 7, 2003).

3. *See, e.g.*, Alan Greenblatt, *A Powerful California Commission Survives a Demise*, GOVERNING, Mar. 2003, at 55.

4. Recently, for example, the California Supreme Court refused to consider any of the challenges to the recall election of Governor Gray Davis, even though these arguments have plausible merit. *See* Burton v. Shelley, No. S117834, 2003 WL 21962000 (Cal. Aug 7, 2003); Frankel v. Shelley, No. S117770, 2003 WL 21961996 (Cal. Aug 7, 2003). So reluctant is the California Supreme Court to get involved in political matters that it recently struck down a proposed ballot initiative that would have given it the final authority over legislative redistricting, citing the virtually never-used rule that initiatives must pertain to a "single-subject." *See* Senate v. Jones, 988 P.2d 1089, 1091 (Cal. 1999). My colleague Daniel Lowenstein has suggested that the court took this action not on legal grounds, but because of a distaste for inserting itself into political matters:

> One explanation, albeit a cynical one, is that the members of the court were putting their personal self-interest over their jurisprudential function. Certainly, no member of the court is likely to be happy at the prospect of having to adopt redistricting plans every ten years, especially when the plans are subject to voter approval.

Daniel H. Lowenstein, *Initiatives and the New Single Subject Rule*, 1 ELECTION L.J. 35, 41 (2002). Lowenstein also might have mentioned that the justices would be particularly reluctant to rule on redistricting plans when the justices themselves are subject to voter approval. *See* CAL. CONST. art. VI, § 16(a) (setting forth the electoral terms of California Supreme Court justices).

5. Ronald Zumbrun, the lawyer who won the case at the trial and intermediate court levels, confessed that he had to research the larger question because it had previously not been raised. *See* Claire Cooper, *State Justices to Review Coastal Panel*, SACRAMENTO BEE, Apr. 10, 2003, at A3.

stage for the most important California separation of powers decision in at least six decades[6] and potentially in the state's history.

This is of more than theoretical interest. No single agency has ever wielded such power over land use: The Commission holds final planning authority throughout the California coastline, which is both one of the most environmentally sensitive and one of the most valuable areas in the country.[7] If the California Supreme Court rules against the Commission, it could end the most far-reaching coastal protection program in American history, which has achieved broad and deep public support for nearly thirty years.[8]

This prospect should send lawyers on all sides looking for thoughtful scholarly perspectives on the meaning of separation of powers in California. But their searches will be in vain, because the state's separation of powers has attracted virtually no academic commentary.[9] This Article helps to fill that

6. The last supreme court holding of potentially equivalent significance was *Parker v. Riley*, 113 P.2d 873 (Cal. 1941). The *Parker* court held that the separation of powers did not invalidate the California Commission on Interstate Cooperation, which included members of the California Legislature. *Id.* at 877–78. This specific holding fell under what was then Article IV section 19 of the Constitution, which prevented members of the Legislature from holding "any office, trust, or employment under this State" during their term in the Legislature. CAL. CONST. art. IV, § 19 (repealed 1966). The court held that since the Commission's duties were simply those of investigation and fact finding, and thus incidental to legislative work, the Commission's structure did not violate the constitution. *Parker*, 113 P.2d at 876. *Parker* included a couple of paragraphs of dicta concerning the general meaning of the separation of powers, which has been relied upon by courts in construing Article III section 3. *Id.* at 876–78. Arguably, *Marine Forests Society* is more important because of the nature of the Coastal Commission and the centrality of separation of powers concerns to the holding.

7. CAL. PUB. RES. CODE §§ 30000–30012 (Deering 1996).

8. A recent survey by the Public Policy Institute of California demonstrated broad and deep support for coastal protection. More than 80 percent said that the Commission was regulating either well or not strongly enough. *See* PUBLIC POLICY INSTITUTE OF CALIFORNIA, PPIC STATEWIDE SURVEY 8 (Nov. 2003), *available at* http://www.ppic.org/contents/pubs/S_1103MBS.pdf.

9. Given the impossibility of proving such a negative, it is best simply to mention a few facts (other than the obvious one that I have been unable to locate such an article). John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993), mentions nothing specific to California. Neither does the more recent work by G. Allan Tarr or Robert F. Williams. *See* G. ALLAN TARR, UNDERSTANDING STATE CONSTITUTIONS (1998); ROBERT F. WILLIAMS, JR., STATE CONSTITUTIONAL LAW (3d ed. 1999). The first and second volumes of *West's Annotated California Codes*, which comprise the key provisions on the separation of powers, list no scholarly commentary on the general issue after the 1940s. Two of the more prominent works they do mention, D.O. McGovney, *Administrative Decisions and Court Review Thereof in California*, 29 CAL. L. REV. 110 (1941), and William B. Munro, *Our Vanishing Government of Laws*, 31 CAL. L. REV. 49 (1942), are concerned more with federal issues. A recent state-of-the-art casebook, MICHAEL ASIMOW & MARSHA N. COHEN, CALIFORNIA ADMINISTRATIVE LAW (2003), points to no academic commentary. A recent Symposium, *Separation of Powers in State Constitutional Law*, 4 ROGER WILLIAMS U. L. REV. 1 (1998), provides some general enlightenment, but has nothing to say about California. As I suggest in Part VII, *infra*, the theory presented here

gap, particularly in the area of separation of powers that has generated the most controversy over the last two decades—legislative-executive battles concerning primacy over the administrative state.

A series of U.S. Supreme Court decisions and an outpouring of academic commentary have transformed a sleepy legal backwater into a hotly contested field in *federal* constitutional law scholarship, with significant real-world consequences. This Article considers this federal scholarship in the state context, but takes what might seem a somewhat radical position: generally speaking, California courts should stay out of legislative-executive disputes over the structuring of the executive branch unless specific constitutional provisions are violated or emergency situations arise.[10] I advance four primary reasons for this position:

1. Separation of powers is *textually incoherent* because of the indeterminacy of defining powers. Attempts to distinguish "executive" power from other types of governmental power are essentially impossible, and thus offer no judicially administrable standards for principled decisionmaking.[11]
2. It is *historically muddled.* Despite supposedly plain constitutional language in the Separation of Powers Clause demanding strict tripartite division, the clause's origins and subsequent implementation reveal that plain language is anything but. Judicial intervention based on supposed plain meaning ends up misconstruing constitutional text.[12]

---

can and should apply to the majority of states in the union. Thus, while I focus on California, I hope to move the discourse to a more general theory of state separation of powers law.

10. In Part V, *infra*, I attempt to sketch out more precisely what is meant by "emergency situation." My proposal resembles, of course, the argument found in JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). Choper argues that separation of powers questions between the political branches should be completely nonjusticiable. But my argument diverges from Choper in several important ways unconnected to the obvious difference that his work applies specifically to the federal context. First, Choper argues for complete nonjusticiability, whereas I do not advocate a blanket rule—merely strong deference. Second, Choper rests his argument on the theory of diminishing judicial capital; the countermajoritarian difficulty, he contends, means that courts must pick and choose their spots. This theory is inapplicable in most states because the judiciary is elected. I argue that courts should stay out of these disputes because the legislative-executive distinction is essentially incoherent, it fails to preserve liberal democratic values, and because the political branches have the suitable weapons to maintain balance between themselves in any event. Third, the separation of powers problem on which Choper focuses—executive action without legislative authority—is the exact opposite of the problem highlighted in *Marine Forests Society* and of alleged legislative overreach that emerged in the 1980s and 1990s.

11. *See infra* Part II.

12. *See infra* Part III.

3. It is *structurally inapposite*. The theory of the California Constitution sharply diverges from that of the U.S. Constitution. Careful examination of the state document shows that the Governor is not in fact an executive, but rather a "super-legislator," who exercises vast powers by influencing lawmaking. This means that courts need not intervene because the California Constitution already creates a robust balance of power between the political branches.[13]
4. It is *normatively suspect* because it rests on a demonstrably false assumption that free government requires legislative-executive separation. Such separation, then, is a solution in search of a problem, and applying it creates more problems than it solves.[14]

Courts must take politics seriously. Laws are the product of political compromise between Legislature and Governor: The California Constitution, far more than its federal counterpart, envisions a constant give-and-take between the political branches that judges would do well to stay out of, except in extreme circumstances. And because the California Constitution creates this particularly messy politics, the judiciary simply cannot neatly segment roles between "legislative" and "executive" functions because doing so would ignore the essence of the process. In short, judicial intervention in disputes over control of the administrative state undo carefully crafted political compromises and yield nothing in return except doctrinal chaos.

This framework emphasizing deference and the primacy of politics, I suggest, applies to many states outside California. This Article, then, lays the groundwork for establishing a general theory of state separation of powers law. The majority of state constitutions contain the most important provisions implying strong judicial deference. In recent years, scholars have persuasively contended that state constitutional law should exist as a discipline in its own right: Enough commonality exists between states that the field need not fragment itself into fifty pieces, but state government diverges sufficiently from the federal that it makes no sense to simply fold the study of state charters into traditional American constitutional law.[15] This Article agrees; federal separation of powers law simply does not apply in the state context.[16] State courts should look more carefully at their own constitutions

13. *See infra* Part IV.
14. *See infra* Part V.
15. The leading examples of such an argument are found in TARR, *supra* note 9; Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998); Symposium, *The New Judicial Federalism*, 30 VAL. U. L. REV. 421 (1996).
16. Unfortunately, many states have ignored this basic point. *See, e.g.*, State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228 (Mo. 1997); Dep't. of Envtl. Res. v. Jubelirer, 567

to create a more realistic separation of powers jurisprudence than their federal counterparts. If "realistic" here means far less jurisprudence than before, then that merely reflects the doctrine's problematic underpinnings.

I. FORMALISM, FUNCTIONALISM, AND THE SEPARATION OF POWERS CLAUSE

Understanding the muddle that current California separation of powers jurisprudence has brought us requires some background. In this part, I very briefly set forth the standard picture of the central debate in the field, and then show how recent California decisions fit into the picture. In particular, I hope to show that current California jurisprudence is incoherent because it rests on a key assumption, namely that it is possible to neatly separate executive from legislative and judicial power. That assumption, however, is untrue,[17] and resting on it has only unraveled broadly supported policy choices that do not harm individual rights. In other words, current doctrine makes both bad law and bad policy.

A. Formalist Versus Functionalist Theories

Commentators usually speak of federal separation of powers jurisprudence as falling into either a formalist or a functionalist mode. Formalist approaches seek to identify the intrinsic nature of a particular governmental power. They ask: Has one branch exercised a power that by definition "belongs" to another? If so, then such exercise violates the separation of powers. This approach implies, of course, that judges can neatly divide governmental powers by branch—if not, then the whole exercise would be futile. Such a division need not be simple, but it must yield a correct answer based upon objective criteria; if the criteria are esoteric, hazy, or incoherent, then the very act of assigning functions to branches would represent an arrogation of judicial power.[18]

A.2d 741 (Pa. 1989); State v. Odom, No. 91-07049, 2002 WL 31322532 (Tenn. Crim. App. Oct. 15, 2002); *In re* D.L., 669 A.2d 1172 (Vt. 1995).

17. For a similar conclusion, see, for example, Harold H. Bruff, *Separation of Powers Under the Texas Constitution*, 68 TEX. L. REV. 1337, 1345 (1990) ("Attempts to classify agency functions as legislative, executive, or judicial encounter theoretical problems because the three classic powers overlap.").

18. Prominent examples of formalist writing include: MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE (1995); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357 (1990); Gary Lawson, *The Rise and Rise of the Administrative*

Formalists offer a range of justifications for their position, usually centering on history, political theory, or administrative considerations. They might argue that constitutional Framers intended strict separation, and then engage in historical analysis to demonstrate the point—the jurisprudential assumption being that fidelity to original intent is desirable. Alternatively, they may argue that only strict separation can ensure against tyranny: If one branch assumes the powers of the other, the argument goes, then this development will concentrate too much power in too few hands. And finally, formalists also proceed on instrumental lines: Strict separation, they contend, yields more effective and efficient government. Such an argument applies most saliently when considering the scope of presidential power. Formalists argue that the president needs to have a large sphere of independent action because effective administration demands a unitary executive. They contend that a strong presidency yields more effective administration because of, among other things, the unitary executive's accountability: If administration fails, then the public can hold the president directly accountable.

Functionalist theories, on the other hand, do not attempt to give governmental functions clear labels of legislative or executive or judicial.[19] Instead, these theories seek to determine whether a proposed action or statute undermines the balance of power between the branches. Their arguments, however, track the formalists' in terms of justification. They insist that the Framers maintained a flexible approach to the separation of powers and recognized that neat separation was unnecessary.[20] They contend that instead of strict cabining, the best way to avoid tyranny is to examine the inter-branch balance of power. As for administration, they argue that the devices necessary for the functioning of the modern administrative state simply cannot fit into a clean tripartite separation. Administrative agencies, they point out, combine powers in order to effect their purposes; a true insistence

---

State, 107 HARV. L. REV. 1231 (1994); Lee S. Liberman, Morrison v. Olson: *A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41 (1986).

19. Prominent functionalist writings include: Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451 (1979); Cynthia Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987) [hereinafter Strauss, *Formal and Functional Approaches*]; Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) [hereinafter Strauss, *Agencies in Government*].

20. The outstanding example of this historical argument is found in Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

on true separation would destroy the modern state—hardly the harbinger of effective governance.[21]

The California Supreme Court, perhaps attempting to achieve a happy medium, actually has adopted something of a hybrid. Enactments do not violate the Separation of Powers Clause unless they interfere with a "core function" of another branch. The core function doctrine is functionalist in that it recognizes that it is impossible to hermetically seal one branch from another. This is particularly true in the context of administrative agencies, which (it is said) routinely combine all three governmental powers. But it formalistically requires courts to distinguish between legislative, executive, and judicial actions; judges cannot determine whether one branch has intruded upon the core function of another unless they know what that core function is. The court's current posture, then, might appear to represent a prudent gesture to both interpretive positions.

B. The Core Function Doctrine in the California Court of Appeal

As a practical matter, however, the hybrid doctrine has spawned several bizarre California Court of Appeal decisions, all of which invalidated widely supported laws and interbranch agreements that did not infringe on any individual rights. This development did not result from rogue judges. It derived from the incoherence of the doctrine itself, which generates problems rather than solving them.

1. *California Radioactive Materials v. Department of Health Services*

California Radioactive Materials Management Forum v. Department of Health Services[22] stands as the exemplar of the current approach. *California Radioactive* concerned the proposed Ward Valley "low-level" nuclear waste disposal facility, planned to be located near the City of Needles in the Mojave Desert.

No one wants a nuclear waste dump in their neighborhood, and not surprisingly, such facilities are notoriously difficult to site. In 1987, California entered into the Southwestern Low-Level Radioactive Waste

21. *See, e.g.*, Strauss, *Formal and Functional Approaches*, *supra* note 19, at 526 ("Although formalism has its advantages and functionalism its dangers, the former is simply incapable of describing the government we have.").

22. 19 Cal. Rptr. 2d 357 (Ct. App. 1993).

Disposal Compact (Compact) with Arizona and both Dakotas.[23] As the largest state, California agreed to be the "host state" for the Compact's first thirty years,[24] which presented state health officials with the unenviable job of finding a site. After investigating the various possibilities, the Department of Health Services (Department) finally settled on Ward Valley, setting off a firestorm of protest and creating a cause celebre for the state's environmental movement.

Anyone trying to block a project uses delay as a central tactic, and the anti–Ward Valley forces were no exception. They extended the hearings on the disposal site's Environmental Impact Report,[25] and when the dump operating company applied for a license, they raised a new demand, arguing that license hearings should resemble formal Administrative Procedure Act (APA)–type rulemaking involving discovery and witness cross-examination.[26] The Department, however, rejected this adjudicatory model, insisting on something more akin to city council hearings, which are more informal procedures comprising individual, non-cross-examined testimony and no lengthy discovery proceedings.

---

23. The Legislature ratified and codified the Compact. *See* CAL. HEALTH & SAFETY CODE §§ 25877–25878 (Deering 1988).

24. *Cal. Radioactive*, 19 Cal. Rptr. 2d at 365.

25. The California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000–21177 (Deering 1996); 14 CAL. CODE REGS. tit. 14 §§ 15000–15387 (2003), requires an Environmental Impact Report if a fair argument can be made that a project will have a "significant impact on the environment." For a concise judicial discussion of the CEQA process, see Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., 764 P.2d 278 (Cal. 1988). A comprehensive discussion is found in MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (10th ed. 2002).

26. On the federal level, procedures for "formal" rulemaking are found in sections 556 and 557 of the Administrative Procedure Act (APA). 5 U.S.C. §§ 556–557 (2000). Jerry Mashaw and his colleagues offer a description of the process:

> [T]he process includes what is essentially a pleading stage, in which the agency publishes a proposed rule and entertains written responses from parties interested in communicating their views; a trial stage, in which the agency seeks to assemble, through testimony and documentary evidence, subject to cross-examination and rebuttal by all other participants, facts sufficient to justify its rule; and a decision stage, in which the agency head(s) reviews the evidence and formulates a final rule, all elements of which must be supported by evidence in the hearing record. With some differences, this is the same process that the APA prescribes, where it applies, for the adjudication of individual disputes.

JERRY L. MASHAW ET AL., ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM 488–89 (5th ed. 2003). In contrast, "informal" rulemaking adopts the familiar notice-and-comment procedure established in section 553 of the federal APA. California administrative law overwhelmingly favors the "informal" procedure, although how "informal" this procedure actually is, especially in California, is open to serious doubt, particularly because the state Office of Administrative Law provides a further layer of bureaucratic review to any proposed regulations. *See* ASIMOW & COHEN, *supra* note 9, at 29–53.

At this point, the California Senate Rules Committee intervened, backing the protestors and insisting on trial-type hearings. It could not require such hearings directly, but it did the next best thing: When the Governor sent his nominees for Health Secretary and Director of Health Services to the Senate, and these nominees rejected the idea of trial-type hearings, "they were informed by committee members that their confirmations by the full Senate would be difficult."[27] A few days later, the nominees suddenly grew to appreciate the benefits of formal adjudication, and the logjam broke. Confirmation followed in due course. The new Secretary and Health Service Director kept their part of the bargain, and ordered trial-type hearings.[28]

Now it was the turn of the project proponent to object, and challenge the *modus vivendi* on separation of powers grounds. The court of appeal agreed. "Having enacted a statutory scheme [that is, the Compact], the Legislature has no power to exercise supervisorial control or to retain for itself some sort of 'veto' power over the manner of execution of the laws," it said.[29] Although the court claimed this argument derived from the Separation of Powers Clause of the California Constitution, it cited two federal cases and an irrelevant state case for the proposition.[30]

More broadly, the statement carried with it a principle breathtaking in scope. If taken seriously, the principle would imply that the California Senate could never reject a nominee unless it believed that the nominee once in office would break the law—refusing to confirm on the basis of the way a nominee might exercise discretion would violate the California Constitution because such exercise would be "executive." And it appears as if the court of appeal did take it seriously: "Nothing in the process suggests that the Senate can exact promises or agreements from nominees as to the manner of performance of their duties," it insisted.[31]

---

27. Cal. Radioactive Materials Mgmt. Forum v. Dep't of Health Servs., 19 Cal. Rptr. 2d, 357, 366 (Ct. App. 1993).

28. *Id.* at 367.

29. *Id.* at 379.

30. The federal cases were *INS v. Chadha*, 462 U.S. 919 (1983) and *Bowsher v. Synar*, 478 U.S. 714 (1986). In Part III, *infra*, I discuss why federal precedent is totally inapposite to state separation of powers adjudication. I also discuss the state case, *State Board of Education v. Levit*, 343 P.2d 8 (Cal. 1959). Although *Levit* is an important precedent in state separation of powers jurisprudence, it has absolutely nothing to do with the point the court of appeal was seeking to make. *Levit* involved the Legislature's unconstitutional incursion into the State Board of Education's *constitutional* authority. *Id.* at 22.

31. *Cal. Radioactive*, 19 Cal. Rptr. 2d at 379. Somewhat comically, the court stated that the Legislature could not extract a promise from a nominee because the California Constitution "provides an oath which, among other things, requires that officers swear or affirm to well and

The Senate Rules Committee never claimed that a promise extracted from a nominee would be legally enforceable; indeed, it suggested that the arrangements in the confirmation process were nonjusticiable.[32] But that was not good enough for the court of appeal: It stated that the only way that the Legislature could supervise any executive officer would be to pass a new piece of legislation directing that officer to do a specific act.[33] "The bicameral and presentment requirements of our Constitution" made anything else unconstitutional.[34] One wonders whether the court would have enjoined oversight hearings of executive agencies on the grounds that those, too, represented "supervision." But the case left open a strange possibility: The California Constitution creates a vast zone of executive "discretion" that the Legislature cannot touch, whether through oversight or through the confirmation process. That may have seemed quite broad—but the court of appeal was only getting started.

2. *Carmel Valley Fire Protection District v. State*

A court of appeal decision here or there should not, in and of itself, cause legal problems. But one bad appellate opinion begets another, and soon the California Supreme Court felt that it had to step in.

Carmel Valley Fire Protection District v. State[35] arose as a result of California's seemingly endless budget problems. In 1987, the Legislature, casting about for budgetary savings, decreed that it would no longer reimburse local fire districts for equipment mandated by the California Occupational Safety and Health Administration (Cal-OSHA).[36] This may have made good fiscal sense, but unfortunately for the legislators, the California Constitution makes it quite clear that state mandates to local agencies must be reimbursed by Sacramento.

Back to the drawing board at the capitol, where in 1990, lawmakers enacted a provision stating that local agencies did not have to pay for state mandates if the Budget Act specified that it would not reimburse for such

---

faithfully discharge the duties of office. The Constitution provides: 'And no other oath, declaration, or test, shall be required as a qualification for any public office or employment.'" *Id.* (quoting CAL. CONST. art. XX, § 3) (citation omitted).

32. *Id.* at 376 ("The Senate Rules Committee asserts that the validity of the agreement for further hearings represents a nonjusticiable political question.").

33. *Id.* at 379.

34. *Id.*

35. 20 P.3d 533 (Cal. 2001).

36. *Id.* at 534–35.

mandates.[37] This seemed simple enough: The Government Code essentially "de-mandated" the mandates if it did not have the money to pay for them.[38] But this did not satisfy the Carmel Valley Fire Protection District (and a host of other local fire agencies), which brought suit. The fire districts paid for the equipment "required" by Cal-OSHA even though it had been exempted by the 1990 law.[39] They then turned around and asked for state reimbursement anyway.[40]

The Separation of Powers Clause, they said, prohibited the new law.[41] Essentially, they argued, the California Constitution prohibited the Legislature from interfering in the administration of a law, and Government Code section 17581 did so by impairing the executive's ability to enforce the Cal-OSHA Act, which still formally had the equipment mandate in it. In other words, the Legislature used its budgetary authority to prevent the executive from enforcing Cal-OSHA, thus violating the separation of powers.

The court of appeal in *Carmel Valley* ruled for the plaintiffs and ordered reimbursement, citing *California Radioactive* among other cases.[42] The court reasoned that the new code section "is nothing more than an impermissible attempt to exercise supervisorial control over the manner in which the Department of Industrial Relations executes the laws enacted by the Legislature. . . . [The Legislature] does not have the power to cherry-pick the programs to be suspended—which is precisely what [it] has done."[43] The state argued that the Legislature simply had changed the terms of the statute, passed the revised statute, and presented it to the Governor for his signature.[44] But the "discretion" principle obscurely enunciated in *California Radioactive* had expanded, now even forbidding the Legislature from following the Bicameralism[45] and Presentment[46] Clauses.

---

37. CAL. GOV'T CODE § 17581 (Deering 1999).
38. *Carmel Valley*, 20 P.3d at 534–35.
39. *Id.* at 535.
40. *Id.*
41. *Id.*
42. Carmel Valley Fire Prot. Dist. v. State, 83 Cal. Rptr. 2d 466, 471 (Ct. App. 1999).
43. *Id.* at 470.
44. *Id.*
45. CAL. CONST. art IV, § 8(b) ("No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs."). The majority provision does not apply in the case of the state budget and appropriations measures, which require a two-thirds vote. *See id.* § 12(d) ("Appropriations from the General Fund of the State, except appropriations for the public schools, are void unless passed in each house by roll call vote entered in the journal, two thirds of the membership concurring.").
46. *Id.* § 10(a). The Presentment Clause provides:

> Each bill passed by the Legislature shall be presented to the Governor. It becomes a statute if it is signed by the Governor. The Governor may veto it by returning it with

The California Supreme Court unanimously reversed, noting the obvious point that the appellate tribunal had missed.[47] The high court recognized that the new code section was just that. This action did not so much infringe on executive discretion as change the substantive law that the executive was supposed to enforce.[48] Put another way, the Legislature had done precisely what the *California Radioactive* court had told it to do if it wanted to order executive officers to act differently.

The high court recognized, however, that the fire protection districts had raised an interesting issue. In the court's estimation, the mere fact that the Governor had approved legislation could not imply that such legislation necessarily passed muster under Article III section 3.[49] Instead, it noted that "[w]hen the Legislature has not taken over core functions of the executive branch"[50] and has followed the constitution's formal procedures, "such an enactment normally is consistent with the checks and balances prescribed by our Constitution."[51]

But this formulation, of course, begged the question: What does it actually mean to take over core functions? What are those core functions, anyway? Here, the supreme court recognized that it was on slippery ground. Its formulation implied that even a legally enacted statute, approved by the Governor, could violate Article III section 3 because it intruded on executive prerogatives. But it refused to say exactly—or even vaguely—what those prerogatives were. Not so with the Legislature: That branch's "appropriate function," said the supreme court, is "to define policy and allocate funds."[52] This definition, however, was less than helpful, because it did not consider what happens if the Legislature decides to "define policy" in such a way that invades a "core function" of the executive.

In the end, the supreme court simply punted, refusing to define "core executive function."[53] It nevertheless insisted that such functions do exist and that they are protected by Article III section 3. Moreover, it peppered its opinion with constant references to federal constitutional opinions, sug-

---

any objections to the house of origin, which shall enter the objections in the journal and proceed to reconsider it. If each house then passes the bill by rollcall vote entered in the journal, two thirds of the membership concurring, it becomes a statute.

Id.

47. Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 546 (Cal. 2001).
48. *Id.*
49. *Id.* at 541–42.
50. *Id.* at 541.
51. *Id.*
52. *Id.*
53. *Id.* at 541 n.4.

gesting—without ever saying so—that such opinions constituted authority for state courts, despite the vast differences between federal and state constitutional history, structure, and text.

3. *Marine Forests Society v. California Coastal Commission*

And thus, in *Marine Forests Society* itself,[54] the court of appeal decided that if the supreme court would not define core executive function, then it would do the justices' work for them. As noted above, the *Marine Forests Society* plaintiffs challenged the Commission's composition by first observing that the Governor appoints only four of its members: Four are appointed by the Assembly Speaker, and four by the Senate Rules Committee. Thus, the plaintiffs reasoned, the executive branch does not control the agency even when it exercises "executive" powers such as a cease-and-desist order.[55] Issuing such orders, the plaintiffs contended, represents a core executive function, and thus, the constitution prohibits the Legislature from controlling its exercise.[56]

The court of appeal agreed, but immediately recognized that such an analysis contains an important problem: Clear California Supreme Court precedent expressly allows the Legislature to appoint executive officials.[57] Unlike the U.S. Constitution, the California charter contains no Appointments Clause.[58] Thus, at least in some way, the California Constitution allows the Legislature to "control" executive agents by deciding who those agents are in the first place.

The court of appeal then reasoned that the Coastal Act violated the Separation of Powers Clause because it allowed the Legislature to remove the commissioners at will.[59] "It is the Commission members' presumed desire to avoid removal—by pleasing their legislative appointing authorities—which creates the subservience to another branch that raises separation of powers problems."[60]

---

54. Marine Forests Soc'y v. Cal. Coastal Comm'n, 128 Cal. Rptr. 2d 869 (Ct. App. 2002).
55. *Id.* at 874.
56. *Id.*
57. The California Supreme Court repeatedly upheld this power under the Constitution of 1849. *See In re* Bulger, 45 Cal. 553 (1873); People *ex rel.* Attorney General v. Provines, 34 Cal. 520 (1868); People *ex rel* Aylett v. Langdon, 8 Cal. 1 (1857); People *ex rel.* Ryder v. Mizner, 7 Cal. 519 (1857). It then reconfirmed legislative appointments after the Constitution of 1879 was adopted with no change in the Separation of Powers Clause. People *ex rel.* Waterman v. Freeman, 22 P. 173 (Cal. 1889).
58. *See* U.S. CONST. art. II, § 2, cl. 2.
59. *Marine Forests Soc'y*, 128 Cal. Rptr. 2d at 883.
60. *Id.*

This move raised the important question of why the distinction between appointments and removals should bear constitutional significance—an issue the court ignored. More importantly, however, it neglected to inquire why "executive" power was even at issue in the case. The court conceded that the Commission's cease-and-desist order represented an exercise of quasi-judicial power,[61] so the supposed problem of the Legislature controlling an executive function failed to arise.[62] Nevertheless, the court of appeal insisted that this quasi-judicial power is "incidental to, and reasonably necessary to effectuate, the agency's executive power to implement and execute the law."[63]

If such a statement sounded suspiciously conclusory, it was treatise-like in comparison to the court of appeal's other attempts at demonstrating that the Commission was exercising "executive" powers. It argued that the Commission "executed" the Coastal Act by writing regulations—which it then also had to confess represented a delegation of legislative power to the Commission.[64] It contended that the Commission's investigatory powers reflected its "executive" function—conveniently forgetting that the Legislature does this as well.[65] It noted that the Commission reviewed the coastal programs of local governments, with the discretion to refuse to certify them if they do not conform to the Coastal Act.[66] Such an act of "interpretation," it asserted, lies at "the very essence of the power to execute the law"[67]—except that interpretation is usually seen as the quintessential judicial function.

In the end, the court of appeal came up with an ersatz solution: Since legislative control over these "executive" functions was forbidden by the Separation of Powers Clause, and since the removal power is tantamount to control, the Legislature's removal power had to be circumscribed. Thus, it reasoned that the true problem with the Commission's structure was that its "voting members are appointed by the legislative branch and may be removed at the pleasure of the legislative branch and there are no safeguards protecting

61. *Id.* at 876.

62. The court of appeal correctly concluded that such legislative control over a judicial function did not violate the Separation of Powers Clause because

> [a]n administrative agency may exercise quasi-judicial powers if (1) the exercise of such power is incidental to, and reasonably necessary to accomplish, a function of power properly exercised by that agency, and (2) the essential judicial power remains ultimately in the hands of the courts through review of the quasi-judicial determinations.

Id. (citations omitted).

63. *Id.*

64. *Id.* at 875.

65. *Id.* at 876.

66. *Id.*

67. *See supra* note 62.

against the Legislature's ability to use this authority to interfere with the Commission members' executive power to execute the laws."[68] It thus suggested that the real problem with the Commission was that it was composed of pleasure appointments.

The Legislature took the hint. In a special session, it quickly reconstituted the Commission in exactly the same form except that the legislative appointments lasted for four-year terms. This satisfied the Commission, satisfied the Legislature, and satisfied the Governor, who called the special session and proudly signed the bill. But it hardly satisfied the petitioners, who argued that the Legislature still exerted control over the Commission: After all, if a Commissioner wanted reappointment, he would listen closely to his appointing authority. All looked forward to yet another round of Article III section 3 litigation.

Much to everyone's surprise, the California Supreme Court stepped in and granted review, not only to determine whether the new structure passed muster but also whether any of the Commission's actions over the last three decades could still stand.[69] The breadth of the high court's order surprised even the petitioners, who glimpsed that their long-term goal—destruction of the Commission itself—might actually be within reach.

C. The Incoherence of the Core Function Doctrine

Where the California Supreme Court will come down, however, is anyone's guess—especially because the doctrine upon which it currently relies is indeterminate. "Core function" as currently constituted poses deep and perhaps insurmountable problems because as a theoretical matter, it is impossible to distinguish clearly between the supposedly "separate and distinct" powers of government—a fact that Publius recognized as obvious.[70]

This lack of precision poses the severest difficulties in the case of "executive power," which lies at the heart of separation of powers concerning the structure of the administrative state. On the federal level, formalists argue that because the President holds "the executive power," Congress has strict

68. *Marine Forests Soc'y*, 128 Cal. Rptr. 2d at 884.

69. Marine Forests Soc'y v. Cal. Coastal Comm'n, 65 P.3d 1285 (Cal. 2003).

70. *See* THE FEDERALIST No. 37 (James Madison). Publius wrote:

> Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive and judiciary; or even the privileges and powers of the different legislative branches. Questions daily occur in the course of practice which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science.

Id.

limits on how it can structure the "executive branch" of government.[71] But no one can define what "executive power" means. Is it the enforcement of law through the investigation of potential wrongdoers and the initiation of proceedings to apply legal sanctions to them? Absolutely—but that also characterizes the Legislature's powers of investigation and contempt, and the judiciary's interpretation of laws in order to imprison or fine culpable wrongdoers.[72]

This hardly means that constitutional interpreters should give up construing the contours of the powers of the Legislature, or the Governor, or Congress, or the President, or even the courts themselves. Rather, it means that they must look at the concrete institutions themselves to determine what the contours of those powers might be. The point is to determine, for example, what the President can do, or what the Governor can do, not what is in the core function of the "executive." Attempting the latter brings us into hopeless abstractions.

Nowhere does this apply more forcefully than in understanding the administrative state, for one is hard pressed to find any action of an executive branch agency that cannot be properly characterized as belonging to another branch. For example, formalists argue that "[g]overnmental investigation and prosecution of crimes is a quintessentially executive function."[73] But such an assertion ignores more than two hundred years of practice and theory, which

71. *See* Morrison v. Olson, 487 U.S. 654, 706 (1987) (Scalia, J., dissenting); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Lawson, *supra* note 18. My focus on the problems of defining "executive power" does not imply that I believe the definitions of either "legislative" or "judicial" power to be unproblematic: far from it. For example, one might define legislative power as "setting policy," as the California Supreme Court has, *see* Carmel Valley Fire Prot. Dist. v. State, 20 P.3d 533, 541 (Cal. 2001), but this also defines the judicial role; indeed, much judicial doctrine involves the creation of broad rules designed to apply to many cases over time. Even spending money, supposedly the core of legislative power, is not restricted to the Legislature, as Gerald Frug demonstrated in a now-classic essay. *See* Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978). But whether or not one can define "legislative" or "judicial" power with sufficient clarity is not nearly as important in terms of legislative-executive struggles over structuring the administrative state. So I will leave these other arguments for another day.

72. The U.S. Supreme Court's attempts to untangle the three functions only confuse the matter more. For example, it confidently asserted that "[i]nterpreting a law . . . to implement the legislative mandate is the very essence of 'execution' of the law." Bowsher v. Synar, 478 U.S. 714, 733 (1986). Yet interpretation is also the quintessential judicial function. *See id.* at 748–53 (Stevens, J., concurring).

73. *Morrison*, 487 U.S. at 706 (Scalia, J., dissenting). This argument, as Justice Scalia pointedly noted, also was accepted by the Court. *See id.* at 691.

place these functions in the judicial branch.[74] And this vagueness understates the problem. As Elizabeth Magill explains:

> Prosecutors' ability to enforce the law in the way they see fit is considered an executive function—indeed, it is thought to be implementation of the law in the most basic sense. At the same time, decisions by prosecutors about how to enforce a statute are indistinguishable from lawmaking. That is, given the range of permissible enforcement actions under criminal laws (and many other laws) is extremely broad, it is the prosecutors' pattern of decisions that shape the meaning of the law, not the underlying statute itself. Where prosecutors make law in the course of executing a statute, the command to separate lawmaking from law implementation seems nonsensical.[75]

So prosecution—again, supposedly the heart of executive power—comprises legislative and judicial power as well. Little wonder, then, that courts find it so challenging to assign certain duties as "core functions"; it is essentially an impossible task.

These problems have dogged the idea of "executive power" from close to its inception. In its original incarnation, the idea actually derived from a conception that today we would call judicial. Several writers argued that to have the same body make the laws and then "execute" them would constitute tyranny, but from the context it is clear that these writers were referring to the principle that no man can be a judge in his own cause.[76] This has associated the separation of powers with the rule of law, but such an association immediately runs into a serious objection: The rule of law simply requires no legislative-executive separation.[77]

---

74. A thorough demonstration of this point is found in William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474 (1989).

75. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1193 (2000) (citations omitted); *see also* Bruff, *supra* note 17, at 1352–53 (making a similar point regarding the legislative power of prosecutors).

76. *See* WILLIAM B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 5–7 (1965).

77. *See* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 127–30 (1984) ("While there could be no separation of . . . powers . . . without rule by law, there could be rule by law without such a separation."); Magill, *supra* note 75, at 1198 ("The one independent reason for institutionally separating functions—the rule-of-law idea—can be respected without requiring separation at the institutional level."); Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430, 449–50 (1987) ("After all, Britain's jurisprudential tradition is deeply tied to the rule of law, but it does not hold to an institutional system like our separation of powers.").

Even a commentator as distinguished as Blackstone, who deeply influenced the founding generation,[78] appeared to fall into such an error. Blackstone argued that the legislative authority must be distinguished from the executive, but his reasoning was obscure:

> The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed, in quality of dispenser of justice, with all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject.[79]

Whatever an executive might be, it certainly is not the "dispenser of justice" in most people's minds. That title—whether deserved or not—belongs to a court. And Blackstone was vehement about the importance of separate judicial power: Courts were "the grand depositaries of the fundamental laws of the kingdom."[80]

So then what was the executive power? For Blackstone, it was the "king's prerogative," the contours of which he set forth.[81] But it is hard to square such powers with anything a modern administrative agency does, particularly a state administrative agency. Indeed, it is hard to come up with any coherent theory underpinning all of the different royal prerogative powers. Many of these powers concerned foreign and military affairs—the king had the sole power to send and receive ambassadors, to make treaties and alliances, to declare war and make peace, and to command military and naval forces. Within domestic affairs, the king's various prerogatives—such as designating ports of entry, erecting beacons and lighthouses, approving corporations, coining and regulating money, and fixing standards for weights and measures—usually are considered legislative, or at least only authorized if legislation permits it.

Finally, the king was the prosecutor of the law and possessed the pardon power. This begins to look something like modern executive

78. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102, 112 (2d ed. 1985); *see also* Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U. L. REV. 731 (1976). In fairness, Nolan does not contend that Blackstone "influenced" the founders as much as he popularized and expressed the ideas that they already held. For my purposes here, the distinction is not important; if anything, it buttresses my argument. The point is that Blackstone's work demonstrated the fundamental confusion about the inherent nature of executive power, a confusion that the Framers possessed as well.

79. 1 WILLIAM BLACKSTONE, COMMENTARIES *142.

80. *Id.* at *258.

81. *Id.* at ch. 7.

power—but as has just been noted, more than two hundred years of American history have seen prosecution placed just as frequently—or even more frequently—in the judicial branch.[82] And it is just as easy to place it in the legislative branch.

Blackstone understood the inherent incoherence of executive power; indeed, he reveled in it. Requiring an understandable theory of the executive "forget[s] how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergency of national distress may dictate, and which that alone can justify."[83] But aside from the recognition that executive power derives from national emergencies—making it deeply problematic in the state constitutional context—the point was that executive power was supposed to be "eccentrical" and unconstrained. As Daniel Boorstin has brilliantly argued,[84] this served Blackstone's political purposes beautifully, but it makes it highly suspicious as a way of attempting to understand modern state separation of powers doctrine.

Defining executive power came no more easily to the Framers. Confronted with the problem, Thomas Jefferson simply punted. In 1783, he proposed a new constitution for Virginia with an independent governor.[85] But when it came to defining the essential nature of executive authority, he was uncharacteristically ineloquent: "We give him those powers only, which are necessary to execute the laws (and administer the government), and which are not in their nature either legislative or judiciary. The rest must be left to reason."[86] But Jefferson did not tell his readers what "reason" actually was supposed to do. And directly flouting Blackstone, Jefferson specifically rejected giving the Governor the royal prerogative power,[87] thus leading one to question whether the "chief executive" had any "executive" power at all.

The Constitutional Convention did not advance the theoretical ball. Article II vested the "executive power" in the President, but "'Executive

82. *See* GWYN, *supra* note 76.

83. 1 BLACKSTONE, *supra* note 79, at *244.

84. *See* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 99–105 (1941) (arguing that Blackstone attempted to make the common law "obscure" and mysterious to promote a conservative political agenda).

85. THOMAS JEFFERSON, DRAFT OF A CONSTITUTION FOR VIRGINIA (1786), *reprinted in* THE COMPLETE JEFFERSON, at 110, 114 (Saul K. Padover ed. 1943).

86. Jefferson originally wrote these comments in 1783, but later included them as an Appendix to subsequent editions of the famous *Notes on the State of Virginia*. They are also available to modern readers in THE COMPLETE JEFFERSON 114 (Saul K. Padover ed. 1943).

87. JEFFERSON, *supra* note 85, at 114.

Power' was a general term, sufficiently ambiguous so that no one could say precisely what it meant."[88] Or consider the Take Care Clause,[89] which pro-executive formalists rely heavily upon in their justifications for far-reaching presidential authority.[90] The clause passed without any debate. No one at the convention or in committee attempted to delineate its meaning. It could easily be read as a limiting, not empowering, clause: By "taking care" that the law is "faithfully" executed, it could impose a duty on the executive not to stray from the letter of the law or the legislative intent for it. In other words, it could just as easily be read as eliminating executive discretion as enhancing it.

The difficulty of defining "executive power" lies at the heart of the U.S. Supreme Court's struggle with the most severe separation of powers problems—those stemming from presidential overreaching. In the Steel Seizure case,[91] Justice Jackson's celebrated concurrence outlining the tripartite nature of executive authority conceded that when the President acts in direct contradiction to congressional authority, "he can rely only upon his constitutional powers minus any constitutional powers of Congress over the matter."[92] But Jackson did not specify exactly—or even generally—what those powers were, except to say that they should be "scrutinized with caution."[93] The problem, he conceded, lay in

> the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves. Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from material almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.[94]

Fifty years of experience have not improved on Jackson. Consider the example of an executive order, which surely should have brought illumination concerning what an executive may and may not properly order.

88. RICHARD M. PIOUS, THE AMERICAN PRESIDENCY 29 (1979).

89. U.S. CONST. art. II, § 3 (The President "shall take Care that the Laws be faithfully executed."). The California Constitution has an equivalent provision. *See* CAL. CONST. art. V, § 1 ("The Governor shall see that the law is faithfully executed.").

90. *See generally* Calabresi & Prakash, *supra* note 71, at 616–22.

91. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

92. *Id.* at 637 (Jackson, J., concurring).

93. *Id.* at 638.

94. *Id.* at 634–35.

"Yet however ancient their usage, there is no official definition of what properly constitutes an executive order, nor a well-settled jurisprudence governing the extent of the President's power to act in this fashion."[95]

In light of repeated failures to define it, then, it makes no sense to create a doctrine that relies on "core functions" of the branches—at least, not by abstracting notions of "legislative," "executive," or "judicial" power and then determining whether a particular exercise of authority falls into one box or another. Prosecution again serves as an excellent example. Of course there are major differences between being subpoenaed by a prosecutor and by a congressional committee, or even by a court. But even assuming we can flout history and confidently place the prosecutor in the executive, interbranch differences concern mostly the way in which these governmental bodies operate, not the substantive end that they are attempting to accomplish. A Legislature sufficiently enraged at a citizen is just as fearsome—perhaps more so—as a prosecutor taking his cues from *Les Misérables*.[96] The power to tax is still the power to destroy. It could well be argued that the odds of a Legislature being so driven are far lower than those of a prosecutor—but that is the entire point. Any interbranch difference between acts derives not from slapping a substantive label on them as to whether they are "legislative" or "executive," but from their origin in the lawmaking process.[97] As Richard Neustadt perceptively observed more than four decades ago, the United States does not have the separation of powers, but rather separate institutions sharing powers.[98] The same principle applies to the states: It makes no sense to deal in abstractions.

---

95. MASHAW ET AL., *supra* note 26, at 264–65. This continues in the state context. *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L.J. 987, 1022–23 (1999) (discussing executive orders in New Jersey and noting that the New Jersey Supreme Court has not provided adequate constitutional analysis for them).

96. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 163 (1962). Bickel notes that legislative investigatory power

> imports a visitorial power to invade privacy almost at will. It can also import, and often does, a power to condemn and punish by exposure and humiliation and so to damage and destroy people, materially or otherwise, not much less effectively than by criminal prosecution, although quite without the safeguards that surround the latter.

Id.

97. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 749 (1986) (Stevens, J., concurring) ("[A]s our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.").

98. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960).

II. "THAT AT ANY RATE IS THE THEORY OF OUR CONSTITUTION"[99]

So what of it? Perhaps the California Supreme Court's hybrid formulation is unwieldy, but if so, it is because of the California Constitution, not the court. Put another way, what else are the justices supposed to do? They cannot simply pretend that Article III section 3 and its tripartite distinction do not exist. That means that an honest judge has to draw the line somewhere, and the court is doing the best that it—or anyone else, for that matter—can.

But this line of reasoning assumes far too much, namely that the Separation of Powers Clause's reference to the three powers of government implies at least some degree of interpretive formalism. Looking at the clause's history, however, tells us something very different.

The formalist argument runs into the central problem with all "plain meaning" theories: Upon closer inspection, what appears plain becomes all too murky. This should hardly come as a surprise in light of a clause that uses broad, vague terms such as "legislative" and "executive" power. Untangling the historical threads of Article III section 3 reveals that, if anything, it should be read as implementing a functionalist approach that leaves the central decisions to the political process.

California hardly was the first state to adopt a separation of powers clause in its constitution. State constitution-making during the nineteenth century, in fact, often resembled an extended exercise in cutting and pasting,[100] and California was no exception. One delegate to the 1849 Convention complained about his colleagues' total lack of originality, and insisted that at least the preamble should contain "a few lines at least of our own manufacture."[101] But when it came to the Separation of Powers Clause, the delegate's colleagues not only refused to take his advice, they refused to listen to it. The Constitutional Convention adopted the clause with no debate.[102]

---

99. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

100. *See* TARR, *supra* note 9, at 50–53 (detailing the massive extent of interstate borrowing in making state constitutions).

101. Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 981 (1994) (citing the Report of the Debates in the Convention of California on the formation of the State Constitution in September and October 1849, at 51 (Washington, D.C., J.T. Towers 1850)).

102. *See* J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF THE STATE CONSTITUTION 308 (1850).

The "history" of Article III section 3, then, resembles nothing so much as genealogy. California's framers lifted Article III section 3 verbatim—like many parts of their handiwork—from the recently adopted Iowa Constitution. Iowa, in turn, lifted it from the Kentucky Constitution, and Kentucky got it from the constitutions of the original thirteen states. So if we are considering the phrase's meaning, then we need to go beyond California's founding.

The Separation of Powers Clause derives from the Virginia Constitution of 1776, the first state constitution and the template for its sister states.[103] The key clause in this document reads:

> The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time, except that the Justices of the County Courts shall be eligible to either House of Assembly.[104]

This seems straightforward enough, and it tracks the language of Article III section 3 quite closely.

But a closer look at the document reveals something of what its framers meant by the separation of powers—or more precisely, what they did not mean. The Legislature was to appoint the Governor for a term of only one year, thus giving legislators strong control over the executive power. And the Governor had to share executive power with the "Council of State," which the Legislature also appointed for annual terms.[105] The Council appointed the Lieutenant Governor out of its membership.[106] The Governor could appoint militia officers, or call it into being, only with the permission of the Council.[107]

What about the Legislature? It maintained significant control over the rest of what we would now consider the executive branch and most of the judicial branch, appointing the highest judicial officers in the

103. Originating the Separation of Powers Clause in Virginia's document rests on very firm ground. It was the first of the state constitutions, and was created very shortly after the Continental Congress asked the colonial governments to create their own charters. *See* 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 385 (L.H. Butterfield ed., 1961) (relating a diary entry and a congressional resolution of May 15, 1776, requesting colonies to write their own constitutions); *see also* A.E. Dick Howard, *State Constitutions*, *in* 5 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 2499 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000) (stating that the Virginia Constitution of 1776 was the first state charter).

104. VA. CONST. of 1776, *reprinted in* 10 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS at 51 (William F. Swindler ed., 1979).

105. *Id.*

106. *Id.*

107. *Id.*

state, the Attorney General, and the state treasurer.[108] The judiciary appointed such "executive" officers as the sheriffs and coroners of the counties, albeit with gubernatorial approval.[109] Suffice it to say that if this represented keeping the legislative, executive, and judicial branches "separate and distinct," then it would be an interesting exercise to find a government that was mixed.

In fact, however, for Virginians of the time, their constitutional structure contained no such anomalies precisely because they defined executive power about as narrowly as possible within the constraints of the English language. The early state constitutions that gave birth to what eventually became Article III section 3 endorsed what one scholar has called a "pure" separation of powers theory.[110] Under this pure concept, "each branch of the government must be confined to the exercise of its own function and not allowed to encroach upon the functions of the other branches."[111] Such a doctrine actually implies virtually no executive power. For example, the Governor had no veto, because such a power represented an encroachment on legislative power. Pure theorists also interpreted "executive" literally: The executive was there only to carry out the will of the Legislature. Taking care to see that the laws are faithfully executed meant that the executive could only do that which the Legislature directed him and no more. There was no "inherent" executive power under this concept. It thus also made perfect sense for the Legislature to appoint the Governor and other executive branch officials, since all those officials were essentially legislative agents.[112]

Putting the phrase in historical context should alert us to the dangers of "literal" interpretations of the Separation of Powers Clause. Deriving as it did from a pure conception, the clause coexists uneasily with more modern constitutionalism. The pure theory vanished almost as soon as it appeared. The reason for this revision should be familiar to moderns, who associate separation of powers with the idea of checks and balances. But as

108. *Id.*

109. *Id.*

110. *See* M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 13–14 (2d ed. 1998).

111. *Id.* at 14.

112. For a concise general survey, albeit one that does not distinguish between different theories of the separation of powers, see CHARLES C. THACH, JR., THE CREATION OF THE PRESIDENCY, 1775–1789: A STUDY IN CONSTITUTIONAL HISTORY 25–54 (1923). Thatch notes that with one exception, state constitutions created during the 1770s and 1780s "included almost every conceivable provision for reducing the executive to a position of complete subordination." *Id.* at 28. Thach errs by not recognizing, as does Vile, that this subordination was not necessarily a subversion of the separation of powers but rather a particularly pure form of it.

historians and political theorists have long emphasized, there is no theoretical connection between the two principles. Indeed, they undermine each other: there is no reason why an officer whose power is purely executive should ever be able to check the Legislature. Conversely, different branches check each other most efficiently by sharing responsibility. The veto serves as the classic example, as does senatorial confirmation of presidential appointments. But such checking destroys a pure separation concept.[113]

Some states revised their constitutions to expand the authority of the Governor, creating a partial separation of powers framework—even though they also maintained separation of powers clauses based on a pure theory.[114] Particularly influential in the new trend was the Massachusetts Constitution of 1780, which committed the commonwealth to "the most ostensibly formalist separation of powers clause yet written."[115] It reads:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; The executive shall never exercise the legislative and judicial powers, or either of them; The judicial shall never exercise the legislative and executive power, or either of them; to the end it may be a government of laws and not of men.[116]

The Massachusetts document has had vast influence, even up to the present day.[117] Yet what did it actually mean? Certainly not what it said. The document clearly expanded the independence and authority of the executive, who received a veto power, the ability to convene and prorogue the Legislature, the authority to appoint judges with life tenure, and even the

113. Vile demonstrates this elegantly. *See* VILE, *supra* note 110, at 3, 37, 107; *see also* GWYN, *supra* note 76, at 104 ("Logically the conception of the balance of governmental powers is distinct from that of separation of the governmental functions, and . . . the two concepts had historically been entertained independently of one another.").

114. *See, e.g.*, N.H. CONST. of 1784, art. I, § XXXVII, *reprinted in* 6 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 344 (William F. Swindler ed., 1979) [hereinafter 6 SOURCES AND DOCUMENTS]; GA. CONST. of 1798 art. I, §1, *reprinted in* 2 SOURCES AND DOCUMENTS OF UNTIED STATES CONSTITUTIONS, at 458 (William F. Swindler ed., 1979). Both constitutions maintained separation of powers clauses but also created a governorship that wielded the veto.

115. Flaherty, *supra* note 20, at 1769.

116. MASS. CONST. of 1780, pt. I, art. XXX, *reprinted in* 5 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 92 (William F. Swindler ed., 1979) [hereinafter 5 SOURCES AND DOCUMENTS].

117. *See* Morrison v. Olsen, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (quoting MASS. CONST. of 1780); *see also* Howard, *supra* note 103, at 2500 ("It fell to Massachusetts to perfect the idea of a constitution based upon popular consent.").

title of "His Excellency."[118] But it also provided for a "council, for advising the governor in the executive part of government," which would further assume the Governor's authority.[119]

Did the Governor, then, choose his own executive advisors? No—they were appointed by the Legislature, thus subverting modern formalists' interpretation of the Separation of Powers Clause.[120] In case anyone still might misinterpret the intent, the Massachusetts Constitution vested the assembly with the appointment power over much of the executive branch, including "[T]he Secretary, Treasurer, . . . Receiver-General, . . . Commissary-General, Notaries-Public, and Naval Officers."[121] Put another way, the entire idea of the separation of powers presumed the lack of neat divisions into different types of powers.

So if we know what separation of powers did not mean to late eighteenth century constitution writers, what did it mean? A straightforward explanation is available: "Separation of powers actually meant something more like 'separation of institutions' to the delegates, a separation in which membership in one branch does not overlap and cannot persecute the membership of another."[122] Similarly, "[c]ontrary to our broader understanding today, the doctrine of 'separation of powers' was originally understood essentially as a prohibition on multiple office holding."[123] In other words, history strongly supports a flexible, nonformalist understanding of separation of powers in which the functions of the offices are fluid but the personnel are distinct.

This messiness persisted throughout the early national and antebellum periods, when new states wrote their constitutions. Several states included a separation of powers clause modeled on the revolutionary era language, but did not stop to think about what they meant generally. Instead, their eventual constitutional arrangements wound up being based upon practical politics, not theory.

---

118. MASS. CONST. of 1780, pt. II, ch. II, § 1, art. I, *reprinted in* 5 SOURCES AND DOCUMENTS, *supra* note 116, at 92.

119. *Id.* pt. II, ch. II, § 3, art. I.

120. *Id.* pt. II, ch. II, § 3, art. II.

121. *Id.* pt. II, ch. II, § 4, art. I.

122. SIDNEY M. MILKIS & MICHAEL NELSON, THE AMERICAN PRESIDENCY: ORIGINS AND DEVELOPMENT 30 (1994). Milkis and Nelson obviously are referring to persecution between peak institutions, such as the President, Congress, and the Supreme Court. Since the Framers had not envisioned the modern administrative state, they could not have developed a theory of interbranch persecution that included it.

123. Charles S. Hyneman & Donald S. Lutz, *Introduction to Chapter 2* of 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 19 (Charles S. Hyneman & Donald S. Lutz, eds., 1983).

New Jersey is a good case in point. The Garden State overhauled its constitution in 1844, thereby replacing its original 1776 version. The delegates to the convention took care to insert a Separation of Powers Clause, and then took care to ignore it when actually distributing power. Even in the specific provisions, there was no ideological consensus. The delegates extensively debated the appointment power, and split roughly evenly on five widely divergent positions:

1. The appointment power is by nature executive and thus should be vested in the Governor.
2. As many officers as possible should be popularly elected.
3. Appointment should be closest to the people and the Governor is the closest.
4. Appointment should be closest to the people and the Legislature is the closest.
5. Maintain the status quo, whereby the Legislature appoints all officers by joint ballot. This position argued that there was no inherent executive power.[124]

In the end, politics dictated the result, and the delegates compromised in a way that settled the issue but hardly seemed based upon a formalist conception of the separation of powers. The Governor, sheriffs, coroners, county clerks, and justices of the peace were elected. The Legislature continued to appoint the state treasurer, the keeper and inspector of prisons, and common pleas judges. The Governor received a major increase in his appointment authority, now wielding the power to choose supreme and appeals court judges, the secretary of state, the Attorney General, court clerks, major generals, and anyone not otherwise provided by law. These all required senate confirmation, belying the broad language of the Separation of Powers Clause.

To be sure, the New Jersey Constitution contained an escape clause creating absolute separation "except in instances hereafter expressly directed or permitted."[125] But this shows most concretely the lack of any coherent theory guiding the delegates. What exactly did the Separation of Powers Clause mean if it did not apply to the veto, appointments, or removals? Other states found themselves in the same position. The vast majority of

124. I take this taxonomy from my reading of PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844 (New Jersey Writers' Project ed., 1942).

125. N.J. CONST. OF 1844, art. III § 1, *reprinted in* 6 SOURCES AND DOCUMENTS, *supra* note 114, at 453.

them adopted separation of powers clauses with little debate, and without stopping to consider whether or in what way it would affect anything else.[126]

Little wonder, then, that the leading historian of the separation of powers concludes that the antebellum period—when California adopted Article III section 3—represents a time when the concept had become completely politicized and "almost devoid of ideological coherence."[127] To insist that the plain meaning of the clause dictates a formalist reading, then, wrenches the clause out of its political and historical context. Put more positively, nothing in the text of the history of the clause requires a formalist reading—if anything, it suggests just the opposite.

III. STRUCTURE AND RELATIONSHIP IN THE CALIFORNIA CONSTITUTION

Where, then, does that leave us? If both text and history are vague and even incoherent, we need to create a partial theory to determine the proper relationship between the two political branches of state government.[128] We might start with the rest of the constitution. Separation of powers, after all, is a structural principle: The federal Constitution

126. If there was any debate at all about the propriety or meaning of these clauses, it occurred in the committees whose internal debates were not published. As noted earlier, the California convention of 1849 adopted the clause with no debate. See *supra* note 102 and accompanying text. At the Michigan convention of 1836, the clause was adopted with some debate as to the exact wording, but with no argument or even any explanation about the meaning or effect of the clause. *See* THE MICHIGAN CONSTITUTIONAL CONVENTIONS OF 1835–36, at 344–45 (Harold M. Dorr ed., 1940). At the Iowa convention of 1844, the Separation of Powers Clause apparently was adopted without significant debate. There is no discussion of the clause at all in FRAGMENTS OF THE DEBATES OF THE IOWA CONVENTIONS OF 1844 & 1846 (Benjamin Franklin Shambaugh ed., 1900), although it is referred to by implication in a newspaper editorial attacking the proposed constitution's grant of veto power to the governor as inconsistent with another "express" statement barring the Governor from exercising legislative and judicial powers. *Id.* at 209. In the New Jersey convention of 1844, it was reported out of the "Committee on Subjects not Referred to other Committees," and adopted without debate. PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844, *supra* note 124, at 366, 390.

127. VILE, *supra* note 110, at 192. Vile goes farther than this: He actually argues that both the formalist separation of powers concept and the checks and balances concept had lapsed into incoherence—the latter due to Jacksonian democracy. The growth in popular elections for executive and judicial officers, he contends, undermines the checks and balances concept. *Id.* at 191–92. I agree with this, and it has particular relevance for the California Constitution because of the state's reliance on the initiative. I address this issue *infra* Part IV.

128. I will sometimes use the terms "legislative" and "executive" merely as terms of convenience, not substance. As I argue above and suggest below, these actually are inaccurate ways of thinking about the Legislature and the Governor in California. Nevertheless, they are useful as shorthand.

never mentions the doctrine but implements it through structure. Charles Black famously counseled scholars to look at structure and relationship when searching for constitutional meaning.[129] Robert Schapiro aptly describes this method as searching for the "ethos" of a state constitution.[130]

Scrutinizing the ethos of California's constitution reveals an interesting and counterintuitive story, for the constitution's theory of the Governor is that he actually is a super-legislator, who wields his power through the lawmaking and budgetary processes. To be sure, the document declares that the Governor is vested with "the supreme executive power" of the state,[131] but if we examine what the Governor actually can do, and what he is forbidden from doing, we can see that the rhetoric dissolves. Thus, we find yet another reason to avoid doling out governmental powers on the basis of whether they are executive or legislative and giving them to the "right" branch: the California Constitution's structure firmly establishes that there is no right branch because the Assembly, Senate, and Governor are essentially all doing the same thing.

Yet examining the ethos of the California Constitution does not stop there. Determining the separation of powers philosophy of the document by looking only at the bodies exercising those powers might work well for the U.S. Constitution, but in California it ignores the 900-pound gorilla in the room: the initiative, which gives the electorate the right to change the California Constitution at something close to a whim.[132] The initiative has enormous and unexplored implications for state constitutional interpretation generally, but in the separation of powers area, it powerfully militates against a strong judicial role, for it undermines the central justification for separation of powers in the first place. Both within and without the structure of government, then, the ethos of the California Constitution runs sharply against prevailing doctrine.

---

129. *See* CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969).

130. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 441–42 (1998).

131. CAL. CONST. art. V, § 1.

132. "The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them." *Id.* art. II, § 8(a). The full constitutional provisions are found in section 8. Excellent surveys of the California initiative in the legal literature can be found in Symposium, 41 SANTA CLARA L. REV. 937 (2001); *Symposium on the California Initiative Process*, 31 LOY. L.A. L. REV. 1161 (1998).

A. The California Governorship

The California Constitution sees the relationship between the political branches as political. It foresees a constant political give-and-take between Governor and Legislature. So far, this doesn't amount to much, because this could be seen as reflecting the federal model as well. But the vision of the California Constitution is that the Governor will involve himself more deeply, and wield more powerful political weapons in the legislative process, than his counterpart in the White House. On a daily basis, most of his time will be devoted to the minutiae of legislation because that is where most of his power lies. Conversely, outside of the legislative arena, he will have far less to do. The California Constitution strips from the Governor many crucial powers traditionally thought of as executive. No wonder, then, that the Governor's principal Sacramento office is in the state capitol: According to the California Constitution, that is precisely where he belongs.

1. The Governor of the Legislature

The California budget process has been aptly described as reflecting "executive dominance."[133] Like most "strong executive" states, the California Governor prepares the initial budget, and individual agencies submit their budget requests to the Governor's Department of Finance, not the Legislature. But importantly, this executive dominance is constitutionally required,[134] and the constitution explicitly places agencies under the Governor's control only for budgetary purposes.[135]

The Governor's budget dominance is not merely procedural, for the constitution also gives him the power to remove budgetary line items[136]—an authority explicitly forbidden to the President on the grounds that it is quintessentially "legislative."[137] Governors have used this power to spectacular effect, cutting through legislative budget priorities and leaving

133. Jerry L. McCaffery, *California: Changing Demographics and Executive Dominance*, in GOVERNORS, LEGISLATURES, AND BUDGETS: DIVERSITY ACROSS THE AMERICAN STATES 7 (Edward J. Clynch & Thomas L. Pauth eds., 1991).

134. CAL. CONST. art. IV, § 12(a).

135. *Id.* art. IV, § 12(b).

136. *Id.* art. IV, § 10(e).

137. Clinton v. City of New York, 524 U.S. 417, 447–48 (1998).

lawmakers impotent to do anything about it unless they accede to many of the Governor's fiscal desires.[138]

Gubernatorial dominance of the legislative process is mitigated somewhat by California's professional Legislature, the first one of its kind. During the 1960s, legendary Assembly Speaker Jesse Unruh established a full-time, professional Legislature by constitutional initiative, and quickly built a series of institutions to enable the Legislature to compete with the Governor in policymaking. The later 1960s saw the emergence of permanent professional committee staffs, and then the Legislative Analyst's Office, providing a competitor to the gubernatorially controlled Department of Finance.

The past decade, however, has seen a sharp reduction in legislative influence, mostly due to Proposition 140, a constitutional amendment enacted by the voters in 1990.[139] Republicans sponsored the measure to reduce the power of the Democrat-dominated Legislature, especially Assembly Speaker Willie Brown. The initiative not only created the severest legislative term limits in the country, but also substantially limited the size and pay of committee staffs and the Legislative Analyst's Office—all the while pointedly leaving the Governor's Department of Finance untouched.[140] The measure also banned pensions for legislators but said nothing about gubernatorial compensation.[141] "The Governor always has the upper hand in budget negotiations anyway," remarks Tony Quinn, one of the state's most respected political observers. But after term limits, "You have a situation in the [Legislature] where nobody's in charge."[142]

Proposition 140's impact on legislative competence and authority was devastating. The nonpartisan Legislative Analyst's Office lost 60 percent of

---

138. The expert at this tactic was Pete Wilson. *See, e.g.*, Dan Morain, *Wilson Slashes $1.5 Billion From Budget, Then Signs It; Finances: Legislative Leaders Are Angered Aimed at Forcing Compromises on Programs the Governor Backs*, L.A. TIMES, Aug. 22, 1998, at A1; Dan Smith, *Governor's Tough Tactics Sting Demos*, SACRAMENTO BEE, Aug. 15, 1997, at B3 ("Through his first six budgets as governor, analysts acknowledge, Wilson deftly used the inherent advantage California governors enjoy on budget matters—the line-item veto and a two-thirds voting requirement."). George Deukmejian, however, also skillfully used the power. *See* Lawrence Minard, *A Boy Scout in Lotusland*, FORBES, Feb. 27, 1984, at 110 (noting that in the recent budget, "Deukmejian wielded the line-item veto weapon over 350 times, more than any recent governor, to cut $1.7 billion from the legislature's appropriation" and that the Legislature reacted "with predictable but so far futile rage.").

139. The text of the initiative is now found in CAL. CONST. art. IV, §§ 1.5, 2(a), 4.5, 7.5.

140. CAL. CONST. art. IV, § 7.5.

141. *Id.* § 4.5. This measure applies only to subsequently elected legislators, as those already serving when the measure was passed had vested rights to the pension. Legislature v. Eu, 816 P.2d 1309, 1331–35 (Cal. 1991). This decision, of course, has little effect now, as virtually no one serving in the Legislature in 1990 is currently serving because of term limits.

142. *See* Smith, *supra* note 138.

its funding and staff, and the Legislature's professional policy experts simply disappeared. Peter Schrag, for nearly twenty years the editorial page editor of the Sacramento Bee, comprehensively set forth the measure's legacy:

> Not surprisingly, there has also been a marked decline in the quality of the work done by committee policy staff . . . partly because they are now so shorthanded, partly because the turnover makes jobs less secure, and partly because many of the new members couldn't care less. They don't miss what they've never known. Where once committee bill analyses were, for the most part, relatively objective statements that laid out the arguments on a bill, pro and con, raised unanswered questions, and tried to suggest the likely effects, they now tend increasingly to be taken verbatim from the lobbyists pushing or opposing the measure, or simply from fantasy.[143]

"The net effect," Schrag observes, has been more clout for lobbyists, bureaucrats, and "the governor and the executive branch, who still have budgeting and policymaking expertise."[144] The budget crisis of 2003 highlighted the shift in the balance of power. As the Legislature squabbled over funding issues, informed commentators argued that Governor Gray Davis needed to get involved in order to break the logjam—only the Governor's Office has the expertise and in-depth knowledge of the budget that would allow possible compromises to emerge. So dominant has the Governor's Office become that several prominent observers have argued that the Legislature should revert to its pre-1966 part-time status.[145]

If we look in the legislative realm, then, the California Governor is truly powerful, more so than the President of the United States. But if we examine what is traditionally thought of as the quintessentially executive realm, we find a completely different story.

2. The Un-Executive

At the heart of the formalist theory of separation of powers lies the concept of the unitary executive. As noted earlier, formalists argue that the executive's singularity allows for popular accountability and for energetic, efficient administration.[146] Multiple executives would set administration against itself, depriving government of coherence and direction. Not sur-

143. PETER SCHRAG, PARADISE LOST: CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE 253 (1998) (footnote omitted).

144. *Id.*

145. *See* George Skelton, *Legislature Should Be Cut Back to Part Time*, L.A. TIMES, Aug. 4, 2003, at B5.

146. *See supra* Part I.A.

prisingly, then, formalists reject significant legislative influence over administrative agencies, contending not only that such influence would split administrators between two branches, but also that the Legislature itself necessarily would provide incoherent direction, being split between two branches and hundreds of legislators.

This emphasis on the unitary executive creates an overwhelming problem for formalist analysis in California—namely, that the California Constitution explicitly and repeatedly creates a multiple executive. The Lieutenant Governor, Attorney General, Secretary of State, Treasurer, and Controller all are directly elected and do not answer to the Governor.[147] Nor is such a structure an artifact of history. When California voters created the office of Insurance Commissioner in 1988—an office that falls under the executive branch[148]—they did so in no small part to insulate it from gubernatorial authority.[149] Recent attempts to bring the elected Superintendent of Public Instruction, Treasurer and Insurance Commissioner under the Governor's control have failed miserably.[150]

Multiplicity means far more than merely counting officeholders. It reflects the daily work of California administration. Unless an agency has constitutional status (such as the Public Utilities Commission),[151] its legal representation derives from the Attorney General's office. Thus, the Governor might direct an agency to pursue a particular course of action, but find that it cannot do so because its legal representatives, under the direction of the Attorney General, refuse to cooperate.[152] Newly elected Governor Arnold

147. *See* CAL. CONST. art. V, § 11 ("The Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer shall be elected at the same time and places and for the same term as the Governor.").

148. *See id.* § 14(f) (defining the Insurance Commissioner as a "State Officer").

149. *See, e.g.*, Harvey Rosenfield, *Rebuttal to Argument Against Proposition 103*, *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOVEMBER 8, 1988, at 101 ("[N]o wonder the insurance companies don't want an elected Insurance Commissioner—in the states where people elect insurance commissioners, rates average 30% lower than in California."), *available at* http://holmes.uchastings.edu/ballot_pdf/1988g.pdf. Quoting from the ballot pamphlet is persuasive authority in construing the measure's meaning. *See* Davis v. City of Berkeley, 794 P.2d 897, 902 (Cal. 1990).

150. The Final Report of the 1996 Constitutional Revision Commission recommended that all three offices be appointed by the Governor instead of being elected directly. These recommendations were rejected by the Legislature and have never been revived. *See* George Skelton, *No Shortage of Finger-Pointing Over Quackenbush*, L.A. TIMES, Apr. 27, 2000, at A3 ("The legislature didn't give the commission's two-year study two seconds' thought.").

151. *See generally* CAL. CONST. art. XII (establishing the powers and duties of the Public Utilities Commission).

152. An excellent example of this occurred in 1987, concerning the implementation of Proposition 65, the initiative that required the Governor to prepare and release a list of carcinogenic chemicals. Governor George Deukmejian, a conservative Republican, severely restricted the list

Schwarzenegger has just discovered this principle, much to his chagrin. In the wake of the City of San Francisco's decision to grant marriage licenses to same-sex couples, Schwarzenegger "directed" Attorney General Bill Lockyer to take immediate action to halt the practice. Outside of the question of how the Attorney General could do so if he wanted to, Lockyer's spokesperson responded to the "direction" in a pungent but constitutionally impeccable fashion: "The Governor cannot direct the Attorney General," she noted. "He can direct the Highway Patrol. He can direct 'Terminator 4.' But he can't tell the Attorney General what to do."[153]

The constitution also explicitly grants the Attorney General supervisory power over local prosecution and authorizes the Attorney General in his discretion to supplant the local district attorney as the local chief prosecutor.[154] To be sure, the Governor has vast influence over the direction of prosecutions—but this is through his budgetary authority, which can feed or starve different agencies.[155] In other words, the Governor's authority over prosecution is legislative in character.

As for finances, the Governor does not even have the right to spend money appropriated by the Legislature: That executive task is reserved to the Controller.[156] Nor does the constitution entrust the Governor with ensuring that state funds are invested properly and cared for: That is left to statute, and the Legislature has chosen the Treasurer as the proper authority to make investment decisions.

Not surprisingly, then, the California Constitution noticeably lacks the Federal Constitution's primary element of unitariness: the Appointments

---

with a narrow reading of the initiative. Labor and environmental groups that had sponsored the initiative sued, and Attorney General John Van de Kamp announced that he would refuse to defend the Governor's position. *See* Elliot Marshall, *California's Debate on Carcinogens*, SCIENCE, Mar. 20, 1987, at 1459; Douglas Shuit, *Prop. 65 Toxics List Released; Activists Sue*, L.A. TIMES, Feb. 28, 1987, at A1. The Governor's office had to obtain its own attorneys, costing the taxpayers $45,000. Paul Jacobs & Doug Shuit, *Governor Goes to Court to Try to Foil Ruling on Toxics List*, L.A. TIMES, May 9, 1987, pt. 2, at 1. It did them little good: The trial court ruled for the plaintiffs, calling Deukmejian's position "strained and tortured." *See* Richard C. Paddock, *Appeal Court Rules Against Governor Over Toxics List*, L.A. TIMES, July 21, 1989, at I34. The court of appeal agreed. *See* AFL-CIO v. Deukmejian, 260 Cal. Rptr. 479 (Ct. App. 1989).

153. Lee Romney, *Schwarzenegger Seeks Halt to Gay Marriage*, L.A. TIMES, Feb. 21, 2004, at A1. It is also useful to note that the Governor can only direct the highway patrol because the Legislature has vested this power with the Governor's Office. *See* CAL. VEH. CODE § 2107. Without an Appointments Clause, there is no reason why it could not have vested the authority to direct the highway patrol in any other department of state government.

154. CAL. CONST. art. V, § 13.

155. Kay Levine, Persecution, Politics, and Pregnancy: Enforcing Stautory Rape in California ch. 4 (Jan. 2003) (unpublished Ph.D. dissertation, U.C. Berkeley) (on file with author).

156. CAL. CONST. art. XVI, § 7.

Clause.[157] And not surprisingly, the Legislature has appointed executive officers from the very beginning of the state's history—with continued validation from the California Supreme Court.[158] To be sure, the Governor does control dozens of agencies and appoints thousands of executive branch personnel; but he does so only because the Legislature has chosen to give him the power and not reserve it to itself. As a constitutional matter, the Legislature need not turn over this authority to the Governor.

The absence of an appointments clause means that the Legislature can vest huge swathes of state administration outside of the Governor's office, an invitation that lawmakers have heartily taken up. The chief beneficiary has been the state Treasurer, mostly because of Jesse Unruh's 1974 election to the office, which he turned from "an insignificant ministerial post into a major power center in state government."[159] Literally dozens of commissions are not controlled by the Governor, but chaired by the Treasurer, and invest or control hundreds of billions of taxpayer dollars without input from, or with only a minority voice from, the Governor's office.[160]

One could argue that all the authority on appointments masks the real issue of executive power, which is the ability to remove officers. But this only reinforces the lack of gubernatorial executive power. We know quite clearly what the framers of both the 1849 and 1879 California Constitutions thought on the issue, because they explicitly denied the power to the Governor and allowed removal power to be set by statute.[161] While the constitutional

157. U.S. CONST. art. II, § 2, cl. 2. The Federal Appointments Clause provides:

> [The President] shall nominate, and by and with the advice and consent of the Senate, shall 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: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

Id.

158. *See* sources cited *supra* note 57.

159. JAMES RICHARDSON, WILLIE BROWN: A BIOGRAPHY 223 (1996).

160. A good list of these boards and commissions can be found at http://treasurer.ca.gov/boards.htm.

161. *See* CAL. CONST. of 1849, art. XI § 7, *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, at 447 (William F. Swindler, ed., 1979); art. XX, § 16, *reprinted in* 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS, *supra*, at 469. The 1849 California Constitution provided:

> When the term of any officer or commissioner is not provided for in this Constitution the term of such officer or commissioner may be declared by laws; and if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment.

Id. (repealed 1972).

provisions were repealed in 1972, the California Supreme Court quickly reaffirmed the validity of the principle.[162]

All of this casts great doubt on reading too much into the constitution's injunction that "the governor shall see that the law is faithfully executed."[163] As a matter of constitutional structure, such an assertion is largely inaccurate.

3. Executive Clemency

The California Constitution circumscribes the Governor's pardon authority, which Blackstone had set forth as a core executive function.[164] The U.S. Supreme Court has held that the President's pardon power is effectively unreviewable, although the substantive scope of that power obviously is.[165] The U.S. Supreme Court has held that the President may commute a death sentence to life imprisonment even if no statute provides for it.[166] The only limits on the presidential pardoning power are those found directly in the Constitution.[167] In general, the scope of the presidential pardoning power is vast: "It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."[168]

Not so for the California Governor. The California Legislature can circumscribe the gubernatorial pardon power because it can establish "application procedures" limiting its scope.[169] It is hardly clear how far the Legislature can go in limiting the Governor's power,[170] but the California Constitution suggests that lawmakers have room to maneuver. First, it would hardly make sense that legislatively imposed procedures would constitute

162. *See* Brown v. Superior Court, 538 P.2d 1137, 1138 (Cal. 1975) ("[T]he rule [the previous constitutions] established remains viable by codification in Government Code section 1301, which provides that 'Every office, the term of which is not fixed by law, is held at the pleasure of the appointing power.'"). This certainly comports with the intention of the Constitutional Revision Commission, which authored the change. *See* CALIFORNIA CONSTITUTIONAL REVISION COMMISSION, ARTICLE XX COMMITTEE B REPORT 2—PROPOSED REVISION OF ARTICLE XX 10 (1969) ("The Committee voted unanimously to retain the sense of the first paragraph of the Section. . . . There was no intent to change the substance of the present Section.").

163. CAL. CONST. art. V, § 1.

164. *See* 1 BLACKSTONE, *supra* note 79, at *243.

165. For example, a presidential pardon cannot grant compensation for injuries suffered while in prison or destroy the vested rights of other civil parties against the pardonee. *See* Knote v. United States, 95 U.S. 149, 153–54 (1877).

166. Schick v. Reed, 419 U.S. 256, 267 (1974).

167. *Id.*

168. *Ex parte* Garland, 71 U.S. 333, 380 (1866).

169. CAL. CONST. art. V, § 8(a).

170. No reported case deals with the question.

mere paperwork, because in that event they would be mere surplusage. Moreover, the rest of the section implies a concern about the unchecked exercise of executive grace. Most notably, it forbids the Governor from pardoning someone twice convicted of the same felony unless a majority of the state supreme court agrees.[171] There is even authority obliquely suggesting that gubernatorial pardons may be judicially reviewable if they set "unreasonable" conditions.[172]

Indeed, closer examination of the California Constitution's pardon provision only supports the notion that the Governor is better thought of as a super-legislator, rather than as an executive in the classic sense. Authority does exist for the proposition that the Governor's pardon power is exclusive, unlike the President's.[173] This would seem to support a more formalist notion of separated powers under the California Constitution. But the record of debates during California's Constitutional Convention of 1879—the basis for the present document—suggests just the opposite.[174] An amendment giving the Legislature concurrent pardoning authority was proposed and then rejected.[175] But those who opposed it pointedly did not do so because legislative pardons might invade executive authority. Instead, the notion was that it was a bad policy idea, both for criminal justice and efficiency reasons. One member protested that "we had enough of the legislative power as exercised at the last session, whereby more than eighty prisoners were discharged from the State Prison, two-thirds of whom have since committed high crimes, and have been returned to prison, at an enormous expense to the various counties."[176] In other words, formalist separation of powers arguments were disfavored. No one took issue with the idea that pardoning could be a legislative power. The problem was that the Legislature did it badly—thus, its power was restricted as it was in many other instances.

Similarly, another opponent insisted that

> giving the Legislature power to grant pardons . . . ought not be considered at all. . . . That we certainly cannot do, because it would take up a great deal of the time of the Legislature for which they would

171. CAL. CONST. art. V, § 8(a).

172. *Ex parte* Collie, 240 P.2d 275, 276 (Cal. 1952). *But see* People v. Ansell, 24 P.3d 1174, 1189 (Cal. 2001); Janice Rogers Brown, *The Quality of Mercy*, 40 UCLA L. REV. 327, 328 (1992).

173. Way v. Superior Court, 141 Cal. Rptr. 383, 390 (Ct. App. 1977).

174. In addition to providing important historical background, the convention debates also constitute persuasive legal authority. *See* Fox-Woodsum Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 59 P.2d 1019, 1022 (Cal. 1936).

175. DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 355, 359 (1880).

176. *Id.* at 357.

> have to be paid by the State. They would have to adjourn their committees, and no matter how important the business their time would have to be taken up in consideration of their applications for pardon. Therefore, it appears foolish, and against the principles of economy, to give this pardoning power to the Legislature.[177]

Thus, nothing in the history of the California Constitution's pardon authority implies that this allegedly "core" executive function (at least according to Blackstone) devolved upon the Governor for any reason other than efficiency. Indeed, in California, the pardon simply was not conceived of as an executive rather than a legislative function.

4. Executive Privilege

The issue of executive privilege underscores the degree to which the California Governor's executive power is a mere shadow of the President's. It is unclear, to say the least, the extent to which the President maintains a constitutional privilege. Suffice it to say that we know two things: (1) that there is a constitutional basis for the executive privilege; and (2) that such a privilege is not absolute. In *United States v. Nixon*,[178] the U.S. Supreme Court agreed with the President's counsel that executive privilege had constitutional dimensions. The absence of an express constitutional provision was no bar to the assertion of such a privilege, because "[c]ertain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings."[179] To the extent that the presidential interest in confidentiality "relates to the effective discharge of a President's powers, it is constitutionally based."[180]

California Governors are less privileged, so to speak. No case or any other legal text suggests the existence of such constitutional protection. To be sure, Governors do have important privileges from Public Records Act requests or even subpoenas—but this derives from a statute specifically exempting the Governor's records, and thus could be abrogated by the Legislature if it so chooses.[181] Governors repeatedly have invoked this provision, attempting to block demands for their records, including regulatory documents,[182]

177. *Id.*
178. 418 U.S. 683 (1974).
179. *Id.* at 705–06 (citation omitted).
180. *Id.* at 711.
181. *See* CAL. GOV'T CODE § 6255(a) (West Supp. 2003).
182. Marylander v. Superior Court, 97 Cal. Rptr. 2d 439, 440 (Ct. App. 2000).

lists of applicants for gubernatorial appointments,[183] or gubernatorial calendars and schedules.[184] But in none of these instances has the court given the Governor's privilege any constitutional status—indeed, the Governor has never even raised the issue, probably because such an argument clearly would fail.[185] This position puts California in the minority of jurisdictions, emphasizing again the relative weakness of the California Governor in its executive powers.[186]

5. The Governor as Legislator: Why?

The California governorship, then, comprises a strange combination of strengths and weaknesses. In terms of traditional executive powers, the Governor is a weakling: He has no appointment power outside of legislative approvals, no control over the judiciary, no prosecution power, limited financial power, and he must share many of the powers he does have with a variety of other directly elected executive officers. On the other hand, the Governor controls the budget process, can wield a line-item veto, and unlike the Legislature, remains free of constitutional budgetary limitations.

This may all seem quite backwards: a Governor stripped of many key executive powers and severely limited in others, but possessed of enormous

183. Cal. First Amendment Coalition v. Superior Court, 78 Cal. Rptr. 2d 847, 848 (Ct. App. 1998); Wilson v. Superior Court, 59 Cal. Rptr. 2d 537, 539 (Ct. App. 1996).

184. Times Mirror Co. v. Superior Court, 813 P.2d 240, 241 (Cal. 1991).

185. *See id.* at 248 n.10, in which the court listed the executive privilege decisions of other states, and noted that the majority of them had adopted a constitutionally based executive privilege, but pointedly did *not* hold that California's executive privilege was constitutional in nature. Indeed, it commented that its reference to executive privilege "does not refer to whatever constitutional content the doctrine might have, but rather to the traditional common law privilege that attached to confidential intraagency advisory opinions, a privilege which was later codified in [the Public Records Act]." *Id.* (citations omitted).

186. *See* Doe v. Alaska Superior Court, 721 P.2d 617, 622–23 (Alaska 1986) (finding executive privilege as based in state constitutions' separation of powers doctrines); Hamilton v. Verdow, 414 A.2d 914, 924 (Md. 1980) (same); Nero v. Hyland, 386 A.2d 846, 853 (N.J. 1978) (same); Killington, Ltd. v. Lash, 572 A.2d 1368, 1373–74 (Vt. 1990) (same). *But see* Babets v. Sec'y of Executive Office, 526 N.E.2d 1261, 1266 (Mass. 1988) (refusing to recognize executive privilege). *Babets*' reasoning is instructive in the California case. In *Babets*, the Supreme Judicial Court of Massachusetts noted that the Massachusetts Constitution explicitly recognized a legislative privilege, and reasoned that had the framers of the constitution desired to include an executive privilege, they would have done so. *Id.* While not as direct, it is useful to note that the California Constitution specifically recognizes reporters' privileges not to disclose sources. *See* CAL. CONST. art. I, §2(b). Using the same implication, it stands to reason that if an executive privilege existed, it would have been explicit. To be sure, it makes little actual sense to think of the California Constitution as a seamless document in terms of intention, because its provisions have been framed at such widely different times; such an argument, though, simply underscores the overwhelming influence of the initiative in developing the California Constitution, which undermines a central purpose of the separation of powers. *See infra* Part III.B.

legislative powers. Yet viewed in structural and historical terms, it actually makes perfect sense.

Consider first the underlying reason why the Framers of the Federal Constitution wanted a strong executive in the first place. Publius devoted several essays to the strong executive, most famously *Federalist No. 70*, which declared that "energy in the executive is a leading character in the definition of good government."[187] Yet Publius first argues that "energy" requires unity because in the "most critical emergencies," a decision—any decision—is "most necessary."[188]

This reference to "most critical emergencies" illumines the central cause of the Framers' concern for a strong executive: national security. Reading *Federalist No. 70* reveals that when Publius was talking "President," he was thinking "commander-in-chief." He enunciated four principal attributes of executive power: "decision, activity, secrecy, and dispatch."[189] That is not administration; it is generalship. There is no particular reason why an administrator must act with dispatch and in secret; indeed, modern American administrative law at both the state and federal level would make such actions illegal. But it is hard to see how a general could act otherwise. Little wonder, then, that wartime has produced a stronger executive, and those countries with plural executives have responded to wartime pressures by sharply reducing the size of their executive bodies. The British government collapsed during World War I in no small part because of David Lloyd George's complaint that a twenty-plus member cabinet simply could not conduct military business; when Lloyd George assumed the Prime Ministership, his first action was to reduce the executive to a five-member War Cabinet.[190] More recently, the Israeli government's twenty-plus member cabinet has shrunk into a three- or four-member "security cabinet" to handle its ongoing war against Palestinian terrorism.

It should be obvious, then, that the California Constitution—like many other state constitutions—lacks any emphasis on unity because state executive power lacks any credible national security justification. To be sure, the Governor is the commander-in-chief of the state militia,[191] but such a role seems almost comical in comparison to the President, who com-

187. THE FEDERALIST NO. 70 (Alexander Hamilton).

188. *Id.* I take the locution of "decision—any decision" from HARVEY C. MANSFIELD, JR., TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER 267 (1989).

189. THE FEDERALIST NO. 70 (Alexander Hamilton).

190. *See* JOHN GRIGG, LLOYD GEORGE: FROM PEACE TO WAR 1912–1916, at 481 (1985).

191. CAL. CONST. art. V, § 7.

mands the largest military forces in world history with a budget greater than that of all other nations combined.[192]

The Governor's relative executive weakness, then, makes sense because the very nature of a state constitution undermines the central justification for strong executive powers.

B. Power to the People

The foregoing analysis of the California Governor's constitutional role and authority should cast doubt on any aggressive judicial intervention under the Separation of Powers Clause. We have already seen that the "executive power" aspect of the clause is indeterminate both as a theoretical and a historical matter. But protecting the Governor's "executive" authority is also anomalous given the ethos of the California Constitution itself. The document not only contemplates constant mixing and political jockeying between Governor and Legislature, it gives both branches robust weapons to use in the struggle. On the other hand, it does not contemplate a strong executive role for the Governor. Judicial interventions to enhance such a role thus coexist uneasily with the rest of the founding document. But in fact, this analysis actually ignores the most distinctive aspect of California's constitutionalism: the state's devoted attachment to initiative lawmaking, which even further undermines the strictures of Article III section 3.[193]

"Devoted attachment" actually is a somewhat understated description. One perceptive political analyst has observed that "America's most populous state seems to have given up on representative government."[194] This is not hyperbole. Through the initiative, California's voters have turned state governance into something that would be wholly unrecognizable to the framers of the 1879 Constitution. California initiatives have expanded and cut back on the Declaration of Rights, transformed the state's taxation system, created new constitutional offices and state bureaucracies, and dictated the state's fiscal priorities to such an extent that the California Legislature now has less discretionary authority than any other in the country.[195] All these plebiscites have effected changes in the California Constitution itself: They

192. Fareed Zakaria, *The Arrogant Empire*, NEWSWEEK, Mar. 24, 2003, at 18.

193. *See* Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787, 796–97 (1997) (noting the centrality of California experience to any discussion of the initiative).

194. Nicholas Lemann, *Rule by Proposition*, N.Y. TIMES BOOK REV., May 3, 1998, at 7 (reviewing SCHRAG, *supra* note 143).

195. SCHRAG, *supra* note 143.

have transformed not simply particular policies and law, but the basic structure of government.

To be sure, as a technical matter, not everything goes in California: The constitution allows "amendment" but not "revision" through initiative.[196] In practice, however, this distinction reveals little difference. Indeed, one commentator with unassailable knowledge has observed that "[o]ver the years to an almost universal extent, initiatives have been judicially untouchable."[197] The judiciary bends over backwards to ensure that initiatives stand, even if validation results in absurdities.[198] The constitution loudly declares that "[a]ll political power is inherent in the people,"[199] and the state's courts have enforced this notion in the extreme, ensuring that the people can change the constitution virtually any time they want, virtually any way they want.

Such direct lawmaking flies in the face of everything we know about the Federalists' theory of government, once again severely impairing the applicability of federal precedent.[200] Indeed, Madison noted that the "pure democracies of Greece" differ from the federal constitutional plan because the latter envisions the "total exclusion of the people in their collective capacity from any share in [it]."[201] And that was the entire point. "There are particular moments in public affairs," he argued, "when the people stimulated by some irregular passion, or some illicit advantage, or misled by the artful misrepresentations of interested men, may call for measures which they themselves will afterwards be the most ready to lament."[202] Sound constitutions must "safeguard against the tyranny of [such] passions."[203] It is hard not to agree with Charles Beard when he argues that simple direct majority rule "was undoubtedly more odious to most of the delegates to the Convention than

196. The constitution allows the voters only to "amend" it. CAL. CONST. art. XVIII, § 3 ("The electors may amend the Constitution by initiative."). But the Legislature may, on a two-thirds vote, place a referendum on the ballot proposing "an amendment or *revision* of the Constitution." CAL. CONST. art. XVIII, § 1 (emphasis added). The Legislature may also by a two-thirds vote submit a ballot measure to call a convention "to *revise* the Constitution." CAL. CONST. art. XVIII, § 2 (emphasis added).

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

198. *See* Karl Manheim & Edward P. Howard, *A Structural Theory of the Initiative Power in California*, 31 LOY. L.A. L. REV. 1165, 1206–18 (1998).

199. CAL. CONST. art. II, § 1 ("All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require.").

200. A particularly persuasive demonstration of this point can be found in Julian Eule's now-classic article on the initiative and the federal judiciary. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1522–30 (1990).

201. THE FEDERALIST NO. 63 (James Madison).

202. *Id.*

203. *Id.*

was slavery."[204] Julian Eule observed that "everything about the tone of the Convention suggests that [the delegates] would have looked upon [the initiative] 'with a feeling akin to horror.'"[205] In all, "[i]f the Constitution's Framers were keen on majority rule, they certainly had a bizarre manner of demonstrating their affection"[206]—establishing the electoral college, indirect election of senators, an unelected and life-tenured federal judiciary, an enforceable Bill of Rights, large electoral districts designed to prevent populist candidates from being elected to the House,[207] and—not least of all—the separation of powers.

How should the California Constitution's adherence to direct constitutional lawmaking affect the state's separation of powers jurisprudence? To answer this question, we need to have some idea of what purpose the separation of powers is supposed to serve, an inquiry that is anything but simple—especially because "separation of powers" actually denotes several different ideas.[208] But the overall trend is clear enough: Direct democracy undermines the primary purpose of the legislative-executive split, casting serious doubt on whether the judiciary should play an active role in enforcing that split.

Assuming that it operates as envisioned, the separation of powers serves as a filter against unchecked majoritarianism.[209] Strictly speaking, one might say that this justification does not reflect the separation of powers at all but rather refers to checks and balances. Still, since the creation of the American republic, checks and balances in the United States have always served to justify the division of governmental institutions into legislative, executive, and judicial. On this justification, the separation of powers serves to multiply veto points to make precipitous state action—often driven by demagoguery—more difficult.

---

204. Charles A. Beard, *Introductory Note*, in DOCUMENTS ON THE STATE-WIDE INITIATIVE, REFERENDUM, AND RECALL (Charles A. Beard & Birl E. Shultz eds., 1912).

205. Eule, *supra* note 200, at 1523 (quoting Beard, *supra* note 204, at 28).

206. *Id.* at 1522.

207. This particular point was referred to as the "filtration of talent," and played a critical role in the Federalists' constitutional design. The idea was that large districts would prevent the election of legislators who appealed to a faction, and would allow people only to become congressional representatives through a slow process of advancement, thereby ensuring their civic virtue. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 506–18 (1998).

208. *See* GWYN, *supra* note 76, at 127–28 (identifying five different purposes for the separation of powers).

209. *See* Eule, *supra* note 200, at 1527–28.

But the existence of the initiative directly gives power to the electorate, allowing it to operate without any check or balance.[210] To recall the inquiry of this section, the initiative demonstrates that the ethos of the California Constitution diverges fundamentally from that of its federal cousin. At the very least, then, the initiative also implies that judges construing state separation of powers should not rely on federal precedent. Yet every court in the cases described—including the California Supreme Court—relied heavily on such precedent.

The matter doesn't end there, for the initiative might even cut more deeply into interpretation. If the separation of powers is supposed to protect against untrammeled majorities, yet stands cheek by jowl with a provision empowering untrammeled majorities, one has to wonder whether the separation of powers should have any interpretive force.

We shouldn't push this argument too far. After all, if taken to its logical conclusion, it could yield to judicial deference on just about any state constitutional provision, including California's much ballyhooed Declaration of Rights. Indeed, there is something truly bizarre about a document that proclaims in its very first sentence that certain rights are "inalienable,"[211] and shortly thereafter constructs a simple and easy mechanism for their alienation.[212]

Still, although both bills of rights and the separation of powers are countermajoritarian, they operate in very different ways. The separation of powers, whether in its checks and balances form or mixed, is a filtration mechanism. By dividing power, it seeks to make it difficult for majorities to aggre-

210. One could read the California Constitution as foreclosing just this sort of structural change. Karl Manheim and Edward Howard have observed that the constitution distinguishes between "amendments," which may be enacted by initiatives, and "revisions," which may not. They suggest that basic changes to governmental "structure" imply a "revision," making them unamenable to initiatives. *See generally* Manheim & Howard, *supra* note 198, at 1218–36. They specifically cite the separation of powers as a type of structural feature that could not be altered by initiative. *See id.* at 1221–23. Suffice it to say that California courts have rejected such a posture. Consider the case of the state's most famous initiative, Proposition 13. If a complete revolution in the state's fiscal structure does not constitute a constitutional revision, then nothing does.

211. Article I section 1 of the constitution reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

212. *See id.* art. II, § 8. To be sure, any amendable constitution has a mechanism for alienating rights, but California's is uniquely self-contradictory in that it proclaims inalienability (unlike the Federal Constitution) and yet also has such a complete and easy mechanism for constitutional initiative amendment.

gate.[213] Rights, on the other hand, are trumps: They do not so much seek to filter majority sentiment as to make it irrelevant.[214] When we inquire into the ethos of the California Constitution as a whole, the existence of the initiative does not undermine the importance of rights provisions. Not so with the separation of powers: the initiative destroys the very thing that makes it important and useful. The separation of powers exists so that one body does not have all political power, and in particular exists to make difficult the aggregation of popular majority will. The initiative, on the other hand, ensures that one body—the popular majority—can possess all political power.

To be sure, the separation of powers does not only serve to filter majority sentiment.[215] Hamilton and Madison argued that it enhanced governmental efficiency.[216] Such a justification, however, does not undermine the essential contradiction between the initiative and the separation of powers, at least in California and other similarly structured states. The strongest efficiency argument for the legislative-executive split derives from the Federalists' unitary executive theory. Because "energy in the executive" is necessary for good government, Publius argues that there must be one person at the head of the branch.[217] But as we have seen, whatever the merits of this argument for the federal government, it simply does not apply to California. Thus, it is hard to justify California's separation of powers theory on Federalist efficiency.

---

213. Eule explicitly makes this claim, Eule, *supra* note 200, at 1527–28; so does David Currie, who argues:

> [T]he Distribution of these powers among three separate branches serves as a powerful check against arbitrary action, for it means that three distinct bodies must concur before the individual is effectively deprived of his liberty or property: Congress must pass a law, the President must seek to enforce it, and the courts must find a violation.

David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 19; *see also* Larry Kramer, *The Constitution as Architecture:* A Charette, 65 IND. L.J. 283, 287 (1990) (making a similar argument).

214. *See* Ronald Dworkin, *Rights as Trumps*, *in* THEORIES OF RIGHTS 153, 153–67 (Jeremy Waldron ed., 1990).

215. Two recent leading works stressing this are: JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO (1996) and Harvey C. Mansfield, Jr., *Separation of Powers in the American Constitution*, *in* AMERICA'S CONSTITUTIONAL SOUL 115, 115–27 (Harvey C. Mansfield, Jr., ed., 1991).

216. Good discussions of this point can be found in GARRY WILLS, EXPLAINING AMERICA: THE FEDERALIST 108–15 (1981) and Louis Fisher, *The Efficiency Side of Separated Powers*, 5 J. AM. STUD. 113 (1971).

217. *See* THE FEDERALIST NO. 70 (Alexander Hamilton). Jessica Korn stresses this aspect in her discussion of the underlying purpose of the "American" separation of powers doctrine. *See* KORN, *supra* note 215, at 15–16 ("Since 'energy in the executive is a leading character in the definition of good government,' Publius chooses a separation of powers system in order to endow the new government with the unitary executive necessary for exercising executive power energetically.").

In any event, even if majority filtration is not the exclusive justification for the separation of powers, it is the most important one. It stands to reason, then, that under California's strong initiative system, the judiciary should still assume a strong role in protecting individual rights even though the initiative deeply compromises the utility of the separation of powers.

IV. NORMATIVE IMPLICATIONS, OR: THE DIRTY SECRET OF THE SEPARATION OF POWERS

Understanding the broader ethos of the California Constitution, then, presents us with a central irony: Whereas the U.S. Constitution never mentions the separation of powers but implements it through text and structure, the California Constitution loudly proclaims separation of powers and then undermines it through text and structure. This strongly implies a narrow reading of the clause, and of separation of powers generally.

Those still queasy about this argument for a narrow reading might find the source of their disquiet in the idea that it is, after all, the separation of powers we are expounding. And in one sense, such disquiet is justified, for the foregoing discussion implies that the conflict between the Governor and the Legislature concerning executive branch structure really isn't that much to worry about. The California Constitution suggests as much, history suggests as much, and until thirteen years ago, the courts had, too. Shouldn't this be deeply disturbing? Isn't the separation of powers something so important, so valuable, that it deserves heightened judicial enforcement?

In a word: no.[218] The separation of powers between the political branches stands as a central principle of the Federal Constitution, and jurists routinely cite it as a reason why American liberal democracy has persisted for more than two hundred years. But there is simply no empirical basis for it. As both a legal and a political matter, the absence of the separation of powers yields not tyranny but rather a parliamentary system. Separation of powers formalists have warned of the oppression that will follow if their principles are abandoned. But after waking up from this nightmare, they merely find themselves in Canada.[219]

218. I have made this point elsewhere. *See* Jonathan Zasloff, *The Tyranny of Madison*, 44 UCLA L. REV. 795, 810–15 (1997).

219. Which in some circumstances has its benefits. *See* Hendrik Hertzberg, *Northern Light*, NEW YORKER, July 7, 2003, at 23.

In sharp contrast to the triumphalist assertions of Americans,[220] serious students of comparative politics have long known that parliamentary government has a much better record than presidentialism when it comes to protecting liberal democratic institutions and values.[221] "All in all, . . . the record of the presidentially governed countries range[s]—but for one exception—from poor to dismal."[222] That exception, of course, is the United States, but "all other presidential systems have been fragile—they have regularly succumbed to coups and breakdowns."[223] Depending upon the model used, parliamentary systems are three to four times more likely than presidentialism to maintain liberal democracy.[224]

The reason for this record is plain. Presidentialism carries with it brittleness, and strong incentives for political actors—particularly executives—to act extraconstitutionally. Bruce Ackerman notes:

> [F]rom a comparative point of view, the results are quite stunning. There are about thirty countries, mostly in Latin America, that have adopted American-style systems. All of them, without exception have succumbed to [*caudillismo*], often repeatedly. . . . [which should] "prompt[ ] us to wonder whether their political problem might not be presidentialism itself."[225]

---

220. "Triumphalism" might seem unduly harsh, but it is hard to describe passages such as the following as anything else:

> [T]he Federalist Constitution has proved to be a brilliant success, which unitary nation states and parliamentary democracies all over the world would do well to copy. I give it most of the credit for the fact that ours is the wealthiest, most technologically advanced, and most socially just society in human history, not to mention the fact that we have with ease become a military superpower . . . . The rest of the world is quite rightly impressed with us, and it is thus no accident that the United States of America has become the biggest single exporter of public law in the history of humankind. Almost wherever one looks, written constitutions, federalism, separation of powers, bills of rights, and judicial review are on the ascendancy all over the world right now—and for a good reason. They work better than any of the alternatives that have been tried.

Steven G. Calabresi, *An Agenda for Constitutional Reform*, *in* CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 22, 22 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) (citation omitted).

221. In addition to Zasloff, *supra* note 218, at 810–15, the following discussion relies heavily on Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634, 646 nn.20–21 (2000).

222. GIOVANNI SARTORI, COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES 92 (1994).

223. *Id.* at 86.

224. *See* sources cited in Ackerman, *supra* note 221, at 646 nn.20–21.

225. *Id.* at 646 (quoting Giovanni Sartori, *Neither Presidentialism nor Parliamentarianism*, *in* THE FAILURE OF PRESIDENTIAL DEMOCRACY 106, 107 (Juan J. Linz & Arturo Valenzuela eds., 1994)).

He then sets forth a succinct explanation of how this trend is not merely historical, but endemic to presidential systems:

> Presidents break legislative impasses by "solving" pressing problems with unilateral decrees that often go well beyond their formal constitutional authority; rather than protesting, representatives are relieved that they can evade political responsibility for making hard decisions; subsequent presidents use these precedents to expand their decree power further; the emerging practice may even be codified by later constitutional amendments. Increasingly, the house is reduced to a forum for demagogic posturing, while the president makes tough decisions unilaterally without considering the interests and ideologies represented by the leading political parties in Congress.[226]

Will this always happen? Of course not. But it has happened frequently—far too frequently to make confident assertions about the necessity of presidentialism to the preservation of liberal democracy.

The crucial question then is, what does this finding mean for the process of American constitutional interpretation? It certainly can't mean that judges should take it upon themselves to create parliamentary government in the United States. But it should give us great pause to adhere to rigid separation of powers formalism. Indeed, while the evidence so far clearly points to the conclusion that parliamentarism is superior to presidentialism, all that is necessary for the argument for judicial deference is that it is no worse. And that is unquestionable.

Put another way, even if government completely slides down the slippery slope—if the worst-case scenario occurs—it should not be cause for political concern. And thus, it should not be cause for judicial concern.

V. GROPING TOWARD A SOLUTION

We are left, then, with a principle that is textually anomalous, historically ungrounded, and normatively suspect. Over the past fifteen years, it has served to undo carefully negotiated political compromises between the Legislature and the Governor that burdened no individual rights. It rests on a premise—"executive" power can be neatly distinguished from "legislative" and "judicial" power—that collapses of its own weight and sets forth unadministrable standards. And yet it sits there in the middle of the California Constitution.[227]

---

226. *Id.* at 647.

227. *Cf.* Robert Frost, *The Secret Sits*, *in* A WITNESS TREE 71 (1942). Robert Frost wrote:

> We dance around in a ring and suppose
> But the Secret sits in the middle and knows.

Id.

How, then, should the judiciary respond? Given the obvious inapplicability of a formalist theory to the California Constitution, functionalism seems promising. But the functionalism best suited to adjudicating separation of powers disputes in California—and many other states—is of a particularly muted nature. Unlike prominent functionalist theories, which stress a hard judicial look at governmental arrangements, I propose a strongly deferential judicial posture toward disputes between the political branches. While not advocating the complete nonjusticiability of such disputes, my proposal comes quite close, and emphasizes the superiority of the political process in maintaining the balance of California governance.

A. The Inapplicability of Standard Functionalist Theories

Consider Peter Strauss's justifiably influential functionalist theory of federal separation of powers and the administrative state.[228] Strauss formulates a checks and balances approach in which "it is not important how powers below the apex are treated: the important question is whether the relationship of each of the three named actors of the Constitution to the exercise of those powers is such as to promise a continuation of their effective independence and interdependence."[229]

Strauss contends that courts should determine whether a suitable balance of power exists between Congress and the President in the control over the agency. He suggests that the U.S. Constitution vests the President with substantial control over administrative agencies even if a congressional enactment specifically says otherwise. To justify this argument, he relies substantially on two justifications. First, the Appointments Clause establishes a reserve presidential power that Congress may not abrogate. Second, the Take Care Clause of the Constitution implies it, because "[t]he President is to be a Unitary, Politically Accountable Head of Government"[230] and thus "the unitary responsibility . . . expressed, and sharply intended, does not admit relationships in which the President is permitted so little capacity to engage

228. *See generally* Strauss, *Agencies in Government*, *supra* note 19, at 573. Two other influential scholars making functionalist arguments are Bruff, *supra* note 19 and Farina, *supra* note 19, at 452.

229. Strauss, *Agencies in Government*, *supra* note 19, at 578.

230. *Id.* at 599. Strauss lays enormous emphasis on the unitary executive in his treatment:

> Of the decisions clearly taken [at the 1787 Constitutional Convention], perhaps none was as important as the judgment to vest the executive power in a single elected official, the President. . . . That choice is one of central importance to the arguments of this essay; however the executive power is defined, it is argued, it must be in ways that respect this quite fundamental structural judgment.

Id. at 599–600.

in oversight that the public could no longer rationally believe in that responsibility."[231]

Put in this context, it is quite obvious that such considerations have no force in California because there is no appointments clause and the executive is plural. As noted above, there can be no expectation under California law that the Governor is responsible for state administration because too much administration occurs completely outside of his purview. We must look elsewhere in order to find a suitable theory.

B. A Test for California's Separation of Powers

Instead, we need to think about checks and balances more broadly. The test should be whether a legislative enactment (1) deprives the other branch of a specifically enumerated power or (2) practically disarms the other branch in future political battles.

The first prong of this test concludes that Article III section 3 should be read as reflecting the substantive constitutional provisions relating to legislative, executive, and judicial branch officers. For example, the Legislature could not abolish the Governor's blue-pencil authority because this would clearly violate plain and precise constitutional text.[232] This interpretation would enshrine some concept of the separation of powers in the California Constitution, but in the way that the principle itself works—through clearly delineated constitutional text. It would recognize that for the most part, the California Constitution is silent regarding interbranch relationships, and thus contemplates that those relationships will be worked out between the branches themselves. The political branches have basic authority and the rest is left to the political process.

Essentially, this is a reinterpretation of the core function doctrine. A core function is not the "essence" of legislative or executive power. Rather, core functions are those specific, formal powers that the constitution grants to the political branches. Those formal powers establish basic checks and balances. It could not be any other way; if the political branches relied upon the judiciary to maintain their basic equilibrium, then the system would be thoroughly unstable from the beginning. Core functions comprise the fundamental balance of power upon which separation of powers rests; it stands to reason

231. *Id.* at 648–49 (citation omitted).

232. *See* CAL. CONST. art. IV, § 10(e) ("The Governor may reduce or eliminate one or more items of appropriation while approving other portions of a bill. . . . Items reduced or eliminated shall be separately reconsidered and may be passed over the Governor's veto in the same manner as bills.").

that functions as important as these should be clearly delineated in constitutional text, instead of relying upon the least dangerous branch to enforce them.

The Governor's core function, then, cannot be control over the executive branch, because as we have seen, the Governor does not have real control over the branch by virtue of the plain and precise words of the constitution, and is not really an executive in the way that it has been traditionally viewed. Rather, he wields political power through his participation in the legislative process. Core functions, then, are those things that make the Governor influential in the legislative process.

Such an interpretive posture would also comport with the nature of state constitutions as limiting instruments. Unlike the federal government, which only has the powers granted it under the U.S. Constitution, state governments "inherited the historic authority of general government."[233] Thus, if a state constitution does not place specific limits on governmental bodies, the general rule is that those bodies should be allowed to engage in activities, subject only to the constraints of the political process.

C. Judicial Emergency Powers

The second prong of the proposed test obviously is much more vague. How could a court determine whether an action practically disarms the other branch in future political battles? It is hard to say in advance. Indeed, this category might in fact be a null set. Were this to be the case, it would confirm that the balance of power set forth in the California Constitution's specific clauses remains robust. The second prong essentially then remains an emergency provision for a contingency unanticipated even by a law professor.

But if so, why worry about the second prong at all? Why not simply say that unless a validly enacted statute infringes on a specific power of a constitutional executive officer, courts should not intervene? While alluring, such a posture would, in my view, essentially turn a prudent assumption into a calcified rigidity.

Two central assumptions underlie the framework presented here. First, the California Constitution in its specific provisions establishes an adequate balance of power between peak governmental institutions. Second, even were the Legislature to assume all of the power not specifically spoken for in the constitution, such an assumption would not endanger liberal democratic institutions and values. And as I hope to have shown, there are good reasons for

233. JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 241 (1950).

believing both propositions. But "good reasons for believing" does not equal "undeniably true." Any appropriate legal test should reflect the precision of its subject matter. Although the best evidence to date indicates that the assumptions underlying the test are true, a rigid rule of judicial self-denial means that good evidence must bear the weight of its ironclad cousin. This is expecting too much. The evidence is very good, but it is not good enough to rule out judicial intervention in genuinely extreme circumstances.

As an illustration, consider *United States v. Nixon*,[234] perhaps the only case so named that did not involve the thirty-seventh President of the United States. In *Nixon*, the petitioner was a federal judge removed from office by the U.S. Senate because of alleged bribery. But instead of trying the case itself, the Senate delegated to a committee the responsibility to take testimony and hear evidence. The committee made a recommendation of removal, which the full Senate adhered to without conducting any hearing on its own. Nixon argued that such a procedure violated the U.S. Constitution's command that the Senate "try" all impeachments.[235]

The U.S. Supreme Court rejected the claim, holding that the Constitution grants the Senate the sole discretion to choose impeachment procedures, and thus the controversy was a nonjusticiable political question. Justice Souter's thoughtful concurrence agreed with the result, but stressed that a finding of nonjusticiability does not mean an absolute bar to judicial consideration. "If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, or upon a summary determination that an officer of the United States was a simply a bad guy, judicial interference might well be appropriate."[236]

Finding that an issue represented a nonjusticiable political question, Souter stressed, was not a matter of broad formal rules but rather of balancing factors, and on rare occasions these factors might warrant judicial scrutiny. "[A]pplication of the doctrine ultimately turns, as Learned Hand put it, on 'how importunately the occasion demands an answer.'"[237] Justice Souter then reasoned that the occasion was not so extreme in the case to demand an answer, but cautioned that "the political question doctrine, a tool for main-

234. 506 U.S. 224 (1993).

235. The Impeachment Trial Clause of the U.S. Constitution, U.S. CONST. art. I, § 3, cl. 6, states that the "Senate shall have the sole Power to try all Impeachments."

236. *Nixon*, 506 U.S. at 253–54 (Souter, J., concurring) (internal quotations and citations omitted).

237. *Id.* at 253 (quoting LEARNED HAND, THE BILL OF RIGHTS 15 (1958)).

tenance of governmental order, will not be so applied as to promote only disorder."[238]

Justice Souter's reasoning provides a useful template for the second prong of my proposed test because it recognizes that facts might change—or at least become better known to the judiciary. Justice Stevens, who joined the majority opinion, concurred separately and argued that "[r]espect for a coordinate branch of the Government forecloses any assumption that improbable hypotheticals" mentioned by Souter would ever occur.[239] But surely this goes too far. Conceivably, respect for a coordinate branch could always insulate it from judicial review.[240] Prong two simply suggests that judges should very rarely say never.

D. A Second-Prong Scenario

That said, what does prong two actually mean? We might envision a few scenarios. If the Legislature created a special prosecutorial office the sole function of which of which was to prosecute the Governor, and it remained under the control of the Legislature, then this conceivably could give rise to a violation.[241] The parallel with *Morrison v. Olson*[242] should be obvious, but there are likewise obvious differences between my scenario and *Morrison*. In *Morrison*, the independent counsel could only be appointed by a three-judge panel after a request from the Attorney General and was under the ongoing supervision of the Attorney General—aspects that the U.S. Supreme Court placed heavy emphasis upon in its opinion.

Yet the functional arguments against such an office are powerful. "How frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile—with whether it is worthwhile not depending upon

238. *Id.* at 254 (White, J., concurring) (quoting Baker v. Carr, 369 U.S. 186, 215 (1962)).

239. *Id.* at 238 (Stevens, J., concurring).

240. In his brief concurrence, Stevens commented that the actions of the Senate concerning the impeachment of Samuel Chase "demonstrated that the Senate is fully conscious of the profound importance of that assignment, and nothing in the subsequent history of the Senate's exercise of this extraordinary power suggests otherwise." *Id.* *Nixon* appeared in 1993; suffice it to say that ten years later, confidence that the houses of Congress would avoid politically motivated impeachments based upon flimsy legal grounds should be far less. *See also* Clinton v. Jones, 520 U.S. 681, 684, 693–94 (1997) (Stevens, J.) (holding that a private citizen could sue the President for civil damages and finding that such actions would not unduly disrupt the functioning of the presidency).

241. It should be noted that such an office would not necessarily be superfluous under California law. It remains an open question whether the Attorney General has the constitutional authority to investigate and prosecute the Governor himself—or indeed any state official. *See* People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206 (Cal. 1981).

242. 487 U.S. 654 (1988).

what such judgments usually hinge on, competing responsibilities."[243] Similarly, it would be easy to imagine the devastating effect that such an office could have on the ability of the Governor's Office to function. This would not be a matter of the restricting the Governor's executive ability; rather, it would damage the political balance of power:

> It must be obvious the institution of the independent counsel enfeebles [the President] more directly in his confrontations with Congress, by eroding his public support. Nothing is so politically effective as the ability to charge that one's opponent and his associates are not merely wrongheaded, naïve, ineffective, but, in all probability, "crooks." And nothing so effectively gives an appearance of validity to such charges as a Justice Department investigation and, even better, prosecution.[244]

As another scenario, we might envision a bill passed by the Legislature—call it the Governor-Terminator Act, or GTA—that delegates lawmaking power to a joint legislative committee, which could therefore bypass the Governor's veto.[245] Upholding the GTA would essentially destroy the Governor's role in the legislative process, and thus violate prong two. Of course, by achieving an end run around the veto, it might be better conceptualized as a prong-one violation, but its broad and prospective nature clearly poses a threat to the California Constitution's assignment of super-legislator status to the Governor.[246]

To be sure, the proposed functionalist test does not necessarily yield clearer answers than the formalist analysis. But at least it is asking the right question. It is not a question susceptible of easy answer, because asking a court to determine a political balance of power is usually asking for trouble. "To acknowledge this, however, is merely to recognize an additional reason for the Court generally to leave the resolution of separation of powers disputes to the other branches and respect the compromises they hammer out."[247]

---

243. *Id.* at 732 (Scalia, J., dissenting).

244. *Id.* at 713 (Scalia, J., dissenting).

245. I derive this scenario from Thomas W. Merrill, *The Constitutional Principle of Separation of Powers*, 1991 SUP. CT. REV. 225, 247. It is hard to imagine such a bill not being vetoed, but of course a Legislature bent on the arrogation of power could simply override it. I deal with the interpretive implications of the gubernatorial veto *infra* Part V.E.

246. We might contrast the GTA to the legislative veto provisions famously struck down in *INS v. Chadha*, 462 U.S. 919, 959 (1983). Both the GTA and the legislative vetoes have problems on bicameralism and presentment grounds, because they allow the Legislature to make binding legal pronouncements without gubernatorial assent. But this abstraction terminates the similarity. Legislative vetoes affected small parts of discrete pieces of legislation. They did not remove the President from the policymaking process; indeed, Congress was willing to grant more discretion to the President because it could then retain a check in the form of a veto. And the President retained a critical policy check in that only he could initiate the regulatory decision. Thus, the framework here implies a rejection of *Chadha*, not an acceptance of it.

247. Flaherty, *supra* note 20, at 1830.

E. Three Heuristics

What factors should courts use to try to determine whether the political balance has become unbalanced?

1. The Veto

The most obvious case would arise if the Legislature enacted a measure burdening the Governor's power over a gubernatorial veto. This implies a corollary: As a general matter, agreements between the Governor and the Legislature should receive judicial deference. Mere citations to the Governor's responsibility to execute the laws[248] are not good enough if the Governor already has agreed to the arrangement.

As a test, consider *Bowsher v. Synar*,[249] prominently cited in *Marine Forests Society*. *Bowsher* famously invalidated provisions of the 1985 Balanced Budget and Emergency Deficit Control Act,[250] which authorized the Comptroller General to arbitrate between the Office of Management and Budget (controlled by the President) and the Congressional Budget Office concerning whether proposed budgetary legislation met the deficit reduction goals of the Act. Should these projections miss their mark, the law then directed the Comptroller General to calculate revisions, which would be final.[251] The U.S. Supreme Court held that this structure violated the separation of powers because it gave the Comptroller General the power to exercise executive functions, yet provided that he could only be terminated by a joint resolution of Congress (subject to a presidential veto).[252] Thus, the Court claimed, the removal provision made the Comptroller General subservient to Congress, and thus ineligible to receive such a grant of executive authority.[253] "The Constitution does not contemplate an active role for Congress in the supervision of officers charged with the execution of the laws it enacts,"[254] wrote Chief Justice Burger for the majority in his last opinion. "To permit an officer controlled by Congress to execute the laws would be . . . to permit a congressional veto."[255]

248. CAL. CONST. art. V, § 1 ("The Governor shall see that the law is faithfully executed.").

249. 478 U.S. 714, 722–23, 726–27 (1986).

250. Pub. L. No. 99-177, 99 Stat. 1037 (codified in scattered sections of 2, 5, 16, 20, 31 & 42 U.S.C.).

251. Judicial review of these calculations was precluded by section 274(h) of the Act. 2 U.S.C. § 922(g) (2000).

252. *Bowsher*, 478 U.S. at 721–34.

253. *Id.* at 732.

254. *Id.* at 722.

255. *Id.* at 726.

Bowsher was somewhat puzzling even on its own terms. It is simply wrong to say that Congress does not supervise executive officials, as any administration official who has incurred the wrath of a powerful legislator can attest.[256] Moreover, Congress could not dismiss the Comptroller General except through legislation presented to the President—but of course it could do this in any event, through abolishing the office or writing legislation overturning a specific decision.

But lost in all the discussion was the answer to a pretty simple question: If these provisions so wounded the Presidency, why did a President not normally known for meekness sign the legislation? If the framework "could indeed propel Congress into a general position of dominance over the national government,"[257] why was it necessary for a court to see to it and not the office most directly affected? Separation of powers discourse assumes an air of unreality in part because it describes statutory frameworks as congressional choices when they are, in fact, anything but. Given the governorship's vast powers of general and line-item vetoes, it makes far more sense to focus on its exercise rather than speculate regarding abstract executive power.[258] And that means determining whether a veto was actually used.

---

256. The classic work on this is JOEL D. ABERBACH, KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT (1990); *see also* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT (1989) (detailing how congressional committees can control administrative agencies through oversight). For a recent elegant account detailing how congressional committees vie for control over the bureaucracy, see J.R. De Shazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443 (2003).

257. Strauss, *Formal and Functional Approaches*, *supra* note 19, at 521.

258. Given my focus on the veto power, skeptics might well ask: What about other executive officers? They cannot defend themselves as effectively in the legislative process. Yet this is less of a problem than might initially appear. Some directly elected executive officers have explicit constitutional responsibilities, and legislative action preventing them from discharging those responsibilities presumably would be constitutionally suspect. *See, e.g.*, State Bd. of Ed. v. Levit, 343 P.2d 8, 20 (Cal. 1959). *Levit* concerned a line item in the Budget Act of 1958, in which the Legislature specifically forbid any state funds to be used for purchasing two particular science textbooks. The constitution then in force gave the State Board of Education the exclusive authority to "adopt a uniform series of textbooks for use in the day and evening elementary schools throughout the State . . . and to cause such textbooks, when adopted, to be printed and published." CAL. CONST. art. IX, § 7 (amended 1970). A unanimous California Supreme Court ruled that the Budget Act violated the clear constitutional language. *Levit*, 343 P.2d at 22. "The language employed in [Article IX § 7] is simple and direct and no doubt is left as to the purpose intended. The Constitution does not itself establish the State Board of Education, but it does confer upon that board certain enumerated powers and duties." *Id.* at 20. Noting that the constitution also gave the board "such other duties as may be prescribed by law," CAL. CONST. art. IX, § 7 (amended 1970), the court concluded that "only the duties other than those enumerated, or necessarily implied from such enumeration . . . are made subject to legislative control." *Id.*

Levit forms the appropriate template for other executive officers. If they have no specific constitutional responsibilities, then it makes little sense to create doctrines to protect nonexistent responsibilities. If they have such responsibilities, or have general powers that imply respon-

2. Standing/Ripeness

If, as a political matter, courts should scrutinize statutes more closely if the Legislature passed them over a gubernatorial veto, then they should also adopt the concomitant adjudicatory principle that standing to sue should be restricted to the executive officer whose constitutional right is alleged to have been violated.[259] Private rights of action for separation of powers violations always are somewhat anomalous, because the plaintiff is not the party who actually has a legal grievance. No one has a right to separated powers except for the parties whose legal authority is being stripped from them by improper arrangements.

Thus, granting standing to private litigants merely invites courts to make ill-informed decisions. This is true even in formalist discourse: Why should a private party have any information at all about whether a particular legal arrangement detracts from the President's ability to "faithfully execute the laws"? The party best suited to advance this argument is the executive himself. Similarly, under the test here proposed, the executive himself is best situated to explain to a court why statutory arrangements undermine his power vis-à-vis the Legislature.

Put another way, if an arrangement truly does undermine the executive's power, one good test of this resides in his willingness to litigate the issue. The general balance of power inquiry is a difficult one; if the executive does not think it is worth it to spend political capital to challenge an arrangement, then that decision should weigh heavily with the judiciary.

3. Timing and Scope

It is one thing if the Governor and the Legislature agree on a statute to create a new agency; it is quite another if a new law forbids "a systematic, unbroken executive practice, long pursued to the knowledge of [the Legislature]

---

sibilities, *see* CAL. CONST. art. V, § 13 (detailing the powers and responsibilities of the Attorney General), then it is best to adjudicate these issues through the clauses delimiting those specific responsibilities, not through Article III section 3 or general separation of powers arguments. If the Legislature so restricts an executive officer's budget so as to prevent him from engaging in his constitutional responsibilities, then that would be another matter. *See* Scott v. Common Council of San Bernardino, 52 Cal. Rptr. 2d 161, 170 (Ct. App. 1996). But since for most executive officers there *are* no such responsibilities, this does not figure to arise with any frequency. It has never happened before.

259. It is reasonable to think that governors will not hesitate to use this ability if they genuinely believe their authority to be at stake. *See, e.g.*, Almond v. R.I. Lottery Comm'n, 756 A.2d 186 (R.I. 2000) (rejecting the Governor's contention that legislative appointments to the lottery commission violated the Rhode Island Separation of Powers Clause).

and never before questioned."[260] Breaking with accepted tradition by itself hardly rises to the level of constitutional invalidity,[261] but it may indicate an attack on a gubernatorial power that disrupts the general balance. This would more likely be true if a statutory scheme was particularly broad and general: in other words, if it attempted to deprive the Governor of a wide range of traditionally held powers. Scope matters because it could reflect an attempt to remove the Governor from the policy process entirely. In other words, the timing and scope test asks whether the Legislature essentially is intending to eliminate the governorship.

We can imagine a few scenarios in which the answer might be in the affirmative. For example, if the Legislature passed a statute requiring APA compliance for all executive orders issued by the Governor, it essentially would tie up the Governor's power to make policy outside of the veto and budgetary process. Despite their name, under formalist parlance, executive orders often are legislative in character because they often dictate substantive priorities for action. Ronald Reagan's requirement that the Office of Management and Budget (OMB) review proposed regulations for cost effectiveness,[262] and Bill Clinton's environmental justice mandate[263] were not simply neutral management devices; they set policy.[264] Similarly, were the Legislature to forbid the Governor generally from ex parte contacts with agency heads, it could be seen not merely as a way of ensuring due process but also as a way of depriving the Governor of information he needed to engage in policymaking.[265]

If these scenarios seem somewhat fanciful, they should. For the most part, the structure of California's government is quite robust and reflects a healthy balance of power between branches. These guidelines are intended to provide indications that the normal political process has collapsed in some way. That they seem outlandish indicates that, at least as between the Governor and the Legislature, it hasn't.

---

260. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring).

261. Some, however, might disagree. *See* Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619 (1994).

262. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981).

263. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

264. *See* Herman, *supra* note 95, at 1013–16. Clashes between the Governor and the Legislature on the proper scope of executive orders have occurred in other states. *See, e.g.*, Welsh v. Branstad, 470 N.W.2d 644 (Iowa 1991); Henry v. Edwards, 346 So. 2d 153 (La. 1977); Borquin v. Cuomo, 652 N.E.2d 171 (N.Y. 1995); Rapp v. Carey, 375 N.E.2d 745 (N.Y. 1978). But in none of these cases did the Legislature attempt to ban executive orders altogether.

265. For an informed judicial discussion of this issue, see *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

The problem with the timing/scope prong is that it provides little guidance as to what we mean concretely by a political process "collapse." How much is too much? But this derives less from the test than from the undertheorized nature of separation of powers disputes between the legislative and executive branches. First, as we have seen, it is virtually impossible to distinguish abstractly or concretely the difference between legislative and executive power, and thus, what the baseline should be between the powers of one branch rather than the other. Second, as we have also seen, at least as regards control over the "fourth branch" of administrative agencies, there is simply no reason to believe that legislative dominance poses any threat to constitutional values. Assuming that the Governor would have no control over any of them gives us no reason to doubt the continued existence of rights protection or democratic accountability. The separation of powers principle remains untethered to the critical values it is supposed to defend, and thus, courts will find it hard to know how much is too much.

Thus, California's separation of powers doctrine should resemble a point midway between a functionalist theory and complete nonjusticiability. Only in extraordinary circumstances should a court step in and overturn the decisions that the political branches have agreed upon.

F. Testing the Theory: Reexamining the Coastal Act

Investigating the Coastal Act's history in light of this deferential framework reveals that the legislation constitutes no problem at all. The system worked: The lawmaking process involved all parties and never threatened to disrupt the gubernatorial/legislative equilibrium.

The Coastal Commission first appeared as a creature of initiative, not statute. In November 1972, the voters overwhelming approved Proposition 20, which created a Coastal Commission to last for four years. In that time, the Commission was to draft a coastal plan for the state, and the Legislature was supposed to revisit the issue in 1976 and draft appropriate permanent legislation. That Commission comprised appointees from the Governor, Assembly Speaker, and Senate Rules Committee, forming the precedent for the current version.

By 1976, the broad coalition that had enacted Proposition 20 was ready to make its handiwork permanent, and Governor Brown jumped on the bandwagon, using his State of the State Address in January to call for

stronger coastal protection.[266] Brown never objected to the Commission's structure; indeed, when the Coastal Act ran into trouble in the California Senate, Brown specifically endorsed it and worked overtime to see it through.[267] In fact, he refused to endorse an alternative measure that would have given more authority to the Governor's office.[268]

Subsequent gubernatorial attitudes toward the Coastal Act should reaffirm any belief that it poses no threat to the "chief executive's" authority. Brown's successor, Republican George Deukmejian, often grumbled at what he saw as the Commission's overly pro-environment stance—clearly, an artifact of a structure that permitted the Democrat-controlled Legislature to make a majority of appointments.[269] But even he never brought a legal action challenging its structure. Deukmejian's Republican successor, Pete Wilson, saw himself as a defender of the Act and often worked to strengthen the Commission's powers.[270]

This leaves the third, most vague prong of the test. But whatever its theoretical vagueness, it poses no problem here. There is no tradition of gubernatorial control over land use. Indeed, just the opposite: The Coastal Act represented a sharp break from the state's past because for the first time, a state agency would assume regulatory control that previously had been monopolized by local government. Put another way, because local government had always maintained authority over the coastline, the Coastal Act actually *enhanced* executive power. Thus, challenges to the Commission must adopt the ironic position of attacking a law augmenting gubernatorial authority on the grounds that it impairs the executive.

To be sure, backers and opponents of the Act clashed over structure—but not as between governmental branches. Instead, the key question was whether the Commission would take too much power away from cities and counties. This points to another central irony of the attacks on the Commission.

---

266. *See* Editorial, *The Coast: It Is Now up to Us*, L.A. TIMES, Feb. 12, 1976, pt. II, at 6 (noting and quoting Governor Brown's statement in the State of the State Address).

267. Bill Stall, *Coastal Protection Bill Endorsed by Brown: Governor's Support Comes at Critical Time for Embattled Beilenson Measure*, L.A. TIMES, May 21, 1976, pt. II, at 2; Larry Stammer, *Accord Reached on Strategy to Revive Coast Bill*, L.A. TIMES, June 18, 1976, pt. I, at 1 (Brown threatens to call special session if coastal bill does not pass during regular session).

268. *See* Bill Stall, *Rival Coast Measure Quietly Gains Ground*, L.A. TIMES, May 3, 1976, pt. II, at 1.

269. This was particularly true of Deukmejian. *See, e.g.*, Editorial, *Assault on the Coastal Commission*, L.A. TIMES, May 21, 1989, at V9.

270. *See, e.g.*, Dave Lesher, *Wilson Seeks Shift in Control Over Coast Development*, L.A. TIMES, Dec. 31, 1996, at A1; Editorial, *Wilson's Program on Environment*, S.F. CHRON., Apr. 23, 1991, at A14 ("The state Coastal Commission would also be strengthened to bolster enforcement of existing regulations and hasten completion of mandated Local Coastal Programs.").

Neither the legislative history of the Coastal Act nor that of Proposition 20 provides clear-cut evidence as to why their authors chose the tripartite appointment structure.

But reason suggests that it was included to provide greater accountability. Three appointing authorities means three different pressure points on commissioners. And while not every local government has access to the Governor's office, each one has a representative in each house of the Legislature who can lobby the Rules Committee and the Speaker more effectively than the Governor. If the Commission acts imperiously, cities up and down the coast will sound the alarm to their legislators, who can effectively pressure their own leaders. On this reading, the tripartite appointment structure served as part of a delicate political compromise that facilitated the Act's passage. Insistence on complete gubernatorial control would have doomed the legislation. There is no doubt that this is precisely what the *Marine Forests Society* plaintiffs would have preferred, but one is hard pressed to see why this should trump a broadly accepted political compromise that infringes no individual rights.

The Act's removal provisions highlight the same issue. Opponents consistently warned that the Commission would be unaccountable to any democratically elected official.[271] Removal-at-pleasure, then, represented a powerful way to block a potential runaway bureaucracy. Thus, the court of appeal's insistence that legislative appointees serve fixed terms subverts attempts to prevent the very tyranny that separation of powers allegedly protects against.

Neither the trial court nor the court of appeal even mentioned all the above considerations. The Coastal Act, then, underscores the danger of courts intervening on the basis of abstract principles. Judges pull on the separation of powers thread and declare a victory for liberty; but all they really do is impair the agency's work, undermine its accountability, and tear apart a carefully negotiated political compromise.[272]

---

271. *See, e.g.*, Edmund G. Brown, Sr., *Economic Harm, New Bureaucracy Might Be Result*, L.A. TIMES, Jan. 11, 1976, at V5; Bill Stall, *State's Coastal Plan: Many to Feel Impact*, L.A. TIMES, Mar. 21, 1976, at II ("There is a growing suspicion of commissions not directly accountable to the voters.").

272. For examples of the intricate political maneuvering that created the Coastal Act, see Bill Stall, *Backers of Coastal Bill Win 2 Victories*, L.A. TIMES, May 28, 1976, pt. II, at 1; Bill Stall & Larry Stammer, *Bitterness Easing in Coastal Plan Revision*, L.A. TIMES, Apr. 11, 1976, pt. II, at 1; Bill Stall & Joan Sweeney, *Coast Issue Still Lives Despite Bill's Failure*, L.A. TIMES, June 13, 1976, pt. I, at 3; Bill Stall, *Coastline Bill's Sponsors Make Big Concessions*, L.A. TIMES, Apr. 22, 1976, pt. I, at 23.

VI. SEPARATING THE SEPARATION OF POWERS

Skeptics might argue that this framework represents an abdication of the judiciary, but it is nothing of the kind. Recall that the touchstone of the judiciary's highly deferential pose lies in the recognition that the political branches can protect themselves through their political power. But this view suggests that the judiciary should take a more active role regarding potential infringements of judicial authority. In the same way that the political branches protect their power through the political process, the judiciary protects its power through adjudication. Thus, judicial deference in political-branch disputes becomes heightened scrutiny in the case of threats to the judiciary itself.

Skeptics easily could ask: What do you mean by "judicial authority"? After all, this Article suggests that neat separations—or even messy ones—between legislative, executive, and judicial power are next to impossible and only obscure more important issues. This isn't quite true. My arguments partially turn on the impossibility of adequately defining executive authority, which after all is what the legislative-executive debate over administrative structure is all about. One can believe in relatively workable definitions of legislative and judicial power and still accept the deference argument.

Just as importantly, however, I contend that a proper reading of judicial authority does not turn on whether anyone believes that a particular function is judicial in character, which is where contemporary core function doctrine leads us. Rather, for state separation of powers purposes, it makes more sense to think of judicial authority as those powers which, for policy reasons, the California Constitution has decided to entrust to the judicial branch. Through adjudication, the judiciary protects its turf, which the law gives it not through logic, but practical experience.[273]

To see this more clearly, think of the California Supreme Court's recent decision in *Obrien v. Jones*[274] as reflecting this approach: heightened scrutiny of enactments that undermine judicial authority, not defined as functions judicial in character, but as those which the constitution deems best given to the judiciary for reasons of sound governance. *Obrien* concerned SB 143, the Legislature's attempted restructuring of the State Bar Court, which tries attorney ethics complaints. Before the Legislature's action, the supreme court appointed all five judges to the state bar court, both in the Hearing Department and the Review Department.[275] This structure reflected the long-standing

273. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW (Little, Brown & Co. 1950) (1881) ("The life of the law has not been logic: it has been experience.").

274. 999 P.2d 95 (Cal. 2000).

275. The two departments have functions suggested by their names:

and well-established California Supreme Court authority over the attorney discipline system.

But there is no inherent reason why the judiciary should regulate the bar. The Legislature and regulatory commissions, after all, regulate every other business and profession in the state. Indeed, one could argue that the judiciary should not regulate the legal profession, because that would make it the supervisor of lawyers when it should be in the role of impartial umpire between litigants. Nevertheless, "the power to discipline licensed attorneys in this state is an expressly reserved, primary, and inherent power of this court."[276] This is not unreasonable as a matter of California constitutional law; the state bar is a constitutional entity placed in the judicial article of the California Constitution,[277] although that hardly mandates judicial regulation. Nevertheless, long-standing authority makes attorney discipline a matter of judicial authority.[278]

SB 143 took three appointments away from the court, giving one each to the now-familiar triad of Governor, Assembly Speaker, and Senate Rules Committee. It also abolished the one nonlawyer in the Review Department. Did the legislative restructuring of a traditionally judicial province violate the Separation of Powers Clause? A bare majority of the court thought not. But it could only do so by taking a series of aggressive restructuring steps of its own, steps that would colloquially be described as legislative.

First, the court noted that the Review Department reviewed Hearing Department decisions de novo, thus leaving the final decisions in the control of the judiciary.[279] This independent review standard was judicially created, and ran directly counter to legislation mandating a more deferential review standard.[280] No matter, said the majority, which mandated the stricter standard. Second, the majority observed that no one, from wherever they were appointed, could serve on the State Bar Court unless they passed muster with the Applicant Nomination and Evaluation Committee, appointed by the

---

> Pursuant to rules promulgated by the bar, hearing judges conduct evidentiary hearings on the merits in disciplinary matters and render written decisions recommending whether attorneys should be disciplined. A decision of the Hearing Department is reviewable by the Review Department at the request of the disciplined attorney or the State Bar.

Obrien, 999 P.2d at 98 (citation omitted). Importantly, the Review Department reviews Hearing Department decisions de novo. *Id.*

276. *Id.* at 100.

277. *See* CAL. CONST. art. VI, § 9 ("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.").

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

279. *Obrien*, 999 P.2d at 104–05.

280. *Id.*

court.[281] But this Committee, too, was a creation of the court, again overruling the Legislature's desire that the State Bar Board of Governors rate applicants for appointment.[282] Essentially, then, the court approved the Legislature's statute by rewriting it.[283]

Even this exercise of legislative powers was not good enough for the three dissenters. In a thoughtful opinion, Justice Brown observed that California has always practiced a "sensible doctrine of shared powers, rather than strictly separated powers."[284] But "shared jurisdiction should be distinguished from officious intermeddling."[285] Justice Brown's opinion stands out because it focused on the particular problems of intermeddling with the judicial branch. She noted that the court has "aggressively defended the perimeter of our constitutionally conferred territory, on occasion going so far as to invalidate legislation with little impact on the operations of the courts."[286] Here, the Legislature has "arrogat[ed] to [itself] the staffing of a disciplinary tribunal we have repeatedly referred to as our administrative assistants."[287] The gravamen of Justice Brown's opinion rested on the role of the judiciary:

> What does it say about the constitutional independence of the judiciary if the Legislature can deprive us of the power to choose our own subordinates?
>
> . . . .
>
> . . . It ought to go without saying that "[b]y freeing . . . judges from continuing review by appointing authorities, conflicts of interest are minimized. An independent judiciary is the hallmark of the constitutional state."[288]

In all, Justice Brown recognized that the separation of powers "as an operative principle depends upon the skills with which the political game is played out among the departments of government."[289] In the same way that the political branches play the game through legislation, the judiciary plays it through adjudication. Taking a harder look at the legislation that affects the judiciary is part of the game.

---

281. *Id.* at 98–99.
282. *Id.*
283. *See id.* at 106–10 (holding and order).
284. *Id.* at 118 (Brown, J., dissenting).
285. *Id.*
286. *Id.* at 119.
287. *Id.*
288. *Id.* at 120 (quoting Paul R. Verkuil, *Separation of Power, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 308 (1989)).
289. *Id.* at 122.

Justice Kennard, also in dissent, missed the critical points.[290] Her highly formalistic opinion advanced the thesis that all interbranch appointments should receive heightened judicial scrutiny and "should be permitted only if there exists a special justification for [it] or particular safeguards to protect the appointee from extrabranch influence after appointment."[291] She reached this conclusion by arguing that all interbranch appointments raised the specter of corruption,[292] and for this reason the Framers of the Federal Constitution carefully restricted how appointments could be made. This left her in a difficult position, because the California Constitution quite explicitly lacks such controls—a fact that Justice Kennard acknowledged. She nevertheless insisted—without giving reasons—that the federal experience was "instructive" in construing the state document.[293] Overall, however, as befitted a dissent, she displayed the same solicitude for judicial independence as did Justice Brown, contending that the vetting of candidates by an independent entity "merely ensures that the appointee will possess minimum qualification necessary for the position. It does not reduce or eliminate the appointed officer's subservience to the appointing authority; reappointment will depend on pleasing the appointing authority, not the screening commission."[294]

In all, then, *Obrien* demonstrates not that the three branches should be hermetically sealed, but that the judiciary should use adjudication to protect its political power. The majority rewrote a statute to do so; the dissenters did not rely on the core function doctrine but rather focused on protecting judicial independence and authority. The decision did not protect the "essence" of judicial power, whatever that may mean; it did, however, defend through adjudication the policy choice made by the justices themselves that the California Supreme Court should oversee attorney discipline.

VII. COMPARATIVE STATE ANALYSIS

If I have been persuasive in the previous parts of this Article, it may still elicit a yawn from anyone not fortunate enough to live in California. Why should they care about the machinations in Sacramento and San Francisco?

290. Justice Werdegar joined Justice Kennard's dissent, completing the three-member minority. *Id.* at 117.

291. *Id.* at 114.

292. Justice Brown refuted this point without much difficulty. *See id.* at 119 (Brown, J., dissenting) ("The vice of this statute is not so much that it raises palpable concerns that biased or even corrupt judges will be appointed by the legislative or executive departments—that is at least a possibility under any appointment process, including the one by which article VI judges are chosen.").

293. *Id.* at 113.

294. *Id.* at 115.

But such a response would overlook the powerful lessons that this framework holds for states throughout the nation. The last fifteen years have witnessed a flowering of scholarship on state constitutional law; such a term implies that one can speak of state constitutionalism as a general field of study.[295]

The political framework I advance here buttresses this work. The features of the California Constitution that support it are not confined to the Golden State; indeed, they are common aspects of many states' basic charters:

1. Plural executive
2. Independently elected Attorney General and local District Attorneys with prosecutorial authority
3. Line-item veto
4. Lack of an appointments clause; legislative appointments judicially validated
5. Constitutionally entrenched executive budgetary dominance
6. Initiative—either constitutional, statutory, or both
7. Partial legislative control over pardons
8. Nonconstitutional executive privilege

If a state's constitution contains these elements, its separation of powers doctrine should resemble what I have advocated for California. It is not quite that easy, of course, because California does appear to lie at the extreme of states' options. More typical might be states such as Texas and Pennsylvania, which contain all but two of these elements.[296] Massachusetts, surprisingly, contains all of the elements except for the line-item veto.[297] On the other extreme, we find a state like New Jersey, which has a unitary executive,

295. The field even gets its own casebook. *See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (3d ed. 1999). An insightful discussion of state separation of powers jurisprudence is found in John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205 (1993).

296. Neither state has the initiative, and both have constitutionalized their executive privilege. The standard work on the Texas example is Bruff, *supra* note 17.

297. In some states, the constitution has left some issues simply unclear. *See, e.g.*, COLO. CONST. art IV, § 6 (stating that the Governor shall appoint all officers whose appointment "is not otherwise provided for," leaving it uncertain whether this provision must be constitutional or can be a function of a statute). Colorado otherwise has a full range of provisions turning the Governor into a super-legislator: plural executive, no prosecutorial authority, line-item veto, nonconstitutional executive privilege. The state also has a constitutional initiative. *See also* Romer v. Evans, 517 U.S. 620 (1996) (striking down a Colorado initiative). For other states with similar unclear provisions on appointments, see IDAHO CONST. art IV, § 6; MONT. CONST. art. VI, § 8; N.M. CONST. art. V, § 5; N.C. CONST. art. III, §5(8); UTAH CONST. art. VII, § 10; W. VA. CONST. art. VII, § 8. At least one court has interpreted these provisions to vest the appointing power in the Governor but to allow the Legislature to vest it elsewhere—implying that this could include the Legislature itself. State *ex rel.* Martin v. Melott, 359 S.E.2d 783, 785–86 (N.C. 1987).

gubernatorial control over prosecutions, no initiative, constitutionalized executive privilege, and an appointments clause.[298]

This implies that states should adjust the extreme deference I advocate in a sliding-scale manner.[299] The more that states resemble the California model, the more that extreme deference is warranted. The Appendix to this Article contains the analysis for each of the fifty states, making it possible to gauge the theory's applicability throughout the country.

I do not necessarily mean to suggest that these factors are the only relevant ones in determining state separation of powers jurisprudence. Certainly, however, those states with the first four of the factors represent strong candidates for very strong deference. But even those with only the first three provisions are candidates for strong judicial separation of powers deference, because they split the executive, deprive the governor of prosecution authority, and give him the line-item veto. They thus make their governor effectively similar to the California Governor: a super-legislator.[300] Several states have governors who might lack the line-item veto but also have no power over appointments; thus, even though they might not be super-legislators, they lack control over the executive branch.

In total, this yields thirty-nine out of fifty states. Given the obvious fact that no state governor has any authority in defense and foreign affairs,[301] which profoundly undercuts the necessity of defending executive power in the first place, these provisions all suggest that the vast majority of state governors wield the majority of their power through the legislative process, which should cast doubt on the necessity for political branch separation of powers at the state level to begin with.

---

298. N.J. CONST. art. V, § 4 (Appointments Clause). I am *not* saying that to the extent that states have systems such as New Jersey's, they should adopt formalistic separation of powers analysis; rather, these systems, because they create a governorship with a series of powers traditionally regarded as executive, the deference called for in the California case perhaps need not be as strong. Functionalism is not the equivalent of deference.

299. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 70–72 (1973) (Marshall, J., dissenting) (pointing to a sliding scale of scrutiny for equal protection cases). There is, of course, precedent for doing this within the separation of powers context. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring).

300. One might well ask: if another state's Governor has no necessary control over the executive branch but also lacks a line-item veto, in what sense is he a super-legislator? While it certainly is true that without the line-item veto a governor lacks much of the legislative dominance of those who possess it, super-legislator status remains the case by virtue of the Governor being one person wielding a veto. No other figure in any state government can claim such power.

301. The U.S. Supreme Court in recent years has severely restricted potential state authority in foreign affairs. *See* Am. Ins. Ass'n v. Garamendi, 123 S. Ct. 2374, 2376–77 (2003); Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 388 (2000).

CONCLUSION: TAKING POLITICS SERIOUSLY

Abbie Hoffman famously advised his readers to *Steal This Book*.[302] This Article might appear to be a similar dare, albeit more appropriate for a conservative age. As this Article goes to press, the California Supreme Court will hear *Marine Forests Society*,[303] and likely will use the same core function doctrine that has done so much damage. It might well fill its opinion with citations to federal precedent, compounding the damage while ignoring the text, history, and structure of the California Constitution that it has supreme authority to interpret.

But none of that will preempt this Article. Far from it.[304] The problems of the traditional approach will persist until it is abandoned. No matter what else the California Supreme Court does, attempting to define legislative versus executive power will elude it. It might ignore normative failures of insisting on sharp divisions, but those failures will still exist. And it might overlook the rest of the California Constitution, but that constitution will remain on the books.

In any event, the framework presented here can be instructive for other state courts looking for a coherent way to handle legislative-executive disputes over state structure. Perhaps these courts will adopt the political model, adjusting it as necessary for their local conditions. Perhaps then, courts will cease to unravel effective political arrangements in favor of abstractions. And perhaps then, the California Supreme Court will look to its sister states for guidance. We can hope so.

---

302. ABBIE HOFFMAN, STEAL THIS BOOK (1971) (Izak Haber, co-conspirator; Bert Cohen, accessory after the fact).

303. Marine Forests Soc'y v. Cal. Coastal Comm'n, 65 P.3d 1285 (Cal. 2003) (granting petition for review). This means that a decision should be expected by Summer 2004.

304. In this, I part company with my colleague Eugene Volokh, at least in this context. *See* EUGENE VOLOKH, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS 30 (2003) (noting that writers should generally avoid "[t]opics that the Supreme Court or the Congress is likely to visit shortly"). Traditional core function doctrine will be wrong, regardless of what the supreme court does in *Marine Forests Society*.

APPENDIX
STATE CONSTITUTION MATRIX

	1	*2*	*3*	*4*	*5*	*6*	*7*	*8*	*9*	*10*	*11*
State											
CA	Y	N	Y	2/3	Y	Y	Y	N	N	G - Y, L - Y	Y
OR	Y	N	Y	2/3	Y	Y	Y	N	Y	G - N, L - N	N
WA	Y	N	Y	2/3	Y	Y	N	N	Y	G - N, L - N	N
AZ	Y	N	Y	2/3	Y	Y	Y	N	N	G - Y, L - Y	N
CO	Y	N	Y	2/3	N	Y	Y	N	Y	G - Y, L - Y	N
NY	N	Y	Y	2/3	Y	N	N	Y	N	G - N, L - N	N
MA	Y	N	N	2/3	Y	Y	Y	N	N	G - N, L - N	N
NJ	N	Y	Y	2/3	Y	N	N	Y	Y	G - Y, L - N	N
PA	Y	N	Y	2/3	Y	N	N	Y	N	G - Y, L - N	N
MD	N	N	Y	3/5	Y	N	N	Y	Y	G - Y, L - N	N
VA	Y	N	Y	2/3	Y	N	N	Y	Y	G - Y, L - N	N
TX	Y	N	Y	2/3	Y	N	N	N	N	G - N, L - N	N
MI	Y	N	Y	2/3	Y	Y	Y	Y	Y	G - Y, L - Y	N
OH	Y	N	Y	3/5	Y	Y	Y	N	Y	G - Y, L - Y	N
FL	Y	N	Y	2/3	Y	N	Y	N	N	G - Y, L - Y	N
IL	Y	N	Y	3/5	Y	Y	Y	N	Y	G - N, L - N	N
AL	Y	N	Y	1/2	Y	N	N	N	N	G - Y, L - N	N
AK	N	N	Y	2/3	Y	Y	N	Y	Y	G - Y, L - N	N
AR	Y	N	Y	1/2	Y	Y	Y	N	N	G - Y, L - Y	N
CT	Y	N	Y	2/3	N	N	N	N	N	G - N, L - N	N
DE	Y	N	Y	3/5	Y	N	N	Y	Y	G - Y, L - N	N
GA	Y	Y	Y	2/3	Y	N	N	N	Y	G - Y, L - N	N
HI	N	Y	Y	2/3	Y	N	N	N	Y	G - Y, L - N	N
ID	Y	N	Y	2/3	Y	Y	N	N	Y	G - N, L - N	N
IN	N	N	N	1/2	Y	N	N	Y	N	G - Y, L - N	N
IA	Y	N	Y	2/3	Y	N	N	N	N	G - N, L - N	N
KN	Y	N	Y	2/3	Y	N	N	N	N	G - Y, L - N	N
KY	Y	N	Y	1/2	Y	N	N	N	N	G - Y, L - N	N
LA	Y	N	Y	2/3	Y	N	N	N	Y	G - Y, L - Y	N
ME	N	N	Y	2/3	Y	Y	N	N	Y	G - Y, L - Y	N
MN	Y	N	Y	2/3	Y	N	N	N	N	G - N, L - N	N
MS	Y	N	Y	2/3	Y	N	Y	N	Y	G - Y, L - N	N

MO	Y	N	Y	2/3	Y	Y	Y	N	Y	G - Y, L - Y	N
MT	Y	N	Y	2/3	Y	Y	Y	N	Y	G - Y, L - Y	N
NE	Y	N	Y	3/5	Y	Y	Y	N	Y	G - Y, L - Y	N
NV	Y	N	N	2/3	Y	Y	Y	N	N	G - Y, L - Y	N
NH	Y	Y	N	2/3	Y	N	N	N	Y	G - N, L - N	N
NM	Y	N	Y	2/3	Y	N	N	N	Y	G - Y, L - N	N
NC	Y	N	N	3/5	Y	N	N	N	Y	G - Y, L - N	N
ND	Y	N	Y	2/3	Y	Y	Y	N	N	G - N, L - N	N
OK	Y	N	Y	2/3	Y	Y	Y	N	N	G - Y, L - Y	N
RI	Y	N	N	3/5	Y	N	N	N	N	G - Y, L - N	N
SC	Y	N	Y	2/3	Y	N	N	N	N	G - Y, L - N	N
SD	Y	N	Y	2/3	Y	Y	N	N	Y	G - Y, L - Y	N
TN	Y	N	Y	1/2	Y	N	N	N	N	G - Y, L - N	N
UT	Y	N	Y	2/3	Y	Y	N	N	Y	G - Y, L - N	N
VT	N	N	N	2/3	Y	N	N	Y	Y	G - N, L - N	N
WV	Y	N	Y	1/2	Y	N	N	N	Y	G - Y, L - N	N
WI	Y	N	Y	2/3	Y	N	N	N	N	G - N, L - N	N
WY	Y	Y	Y	2/3	Y	Y	N	N	N	G - Y, L - Y	N

KEY:

1. Plural Executive
2. Does Governor have prosecutorial power
3. Line-item veto
4. Required to override veto
5. Does Governor have control over budgetary process
6. Constitutional initiative
7. Statutory initiative
8. Constitutional executive privilege
9. Does constitution have general appointments clause vesting power in Governor
10. Gubernatorial and legislative term limits
11. Spending limits imposed on Legislature as in California