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# A Structural Theory of the Initiative Power in California

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# A STRUCTURAL THEORY OF THE INITIATIVE POWER IN CALIFORNIA

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*Power to the people.*
Slogan of the Black Panther Party[1]

*Power To The People, right on.*
John Lennon and the Plastic Ono Band[2]

*All political power is inherent in the people.*
California Constitution, Article II, Section 1[3]

## I. INTRODUCTION

The notion of ultimate power in the people was hardly a revolutionary concept when it was proclaimed in the California Constitution in 1849.[4] After all, the preamble to the Federal Constitution of 1787 acknowledges such power as the exclusive authority for the new national government.[5] Even earlier, state constitutions expressed similar sentiments.[6] Indeed, the political theory traces its roots back

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1. GILBERT MOORE, RAGE 287 (1971).

2. JOHN LENNON AND THE PLASTIC ONO BAND, *Power To The People* (Apple Records 1971).

3. 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.").

4. California adopted its first constitution while still a territory. Brigadeer General Bennett Riley, the territory's appointed governor, reported it from convention on October 12, 1849. The people ratified it on November 13, 1849, and it went into effect by proclamation on December 20, 1849. *See infra* Part II.A.

5. *See* U.S. CONST. preamble ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America.").

6. *See, e.g.*, MASS. CONST. of 1780, art. V ("[a]ll power resid[es] originally in the people"); N.C. CONST. of 1776, art. I, § 2 ("[a]ll political power is vested in

to John Locke and beyond.[7] Yet, popular sovereignty as a basic tenet of democratic self-government can be manifested in different ways. The framers of the Federal Constitution, for instance, strongly preferred republican forms of government over pure democracy.[8]

James Madison defined a "republic" as "a government in which the scheme of representation takes place."[9] He, along with Alexander Hamilton, argued that only representative government could both implement the people's will and filter out the passions and prejudices of majority factions.[10] Pure democracy would produce a "'tyranny of the majority.'"[11] The remedy for this "disease" lay in a

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and derived from the people").

7. *See* Mortimer Sellers, *Republicanism, Liberalism, and the Law*, 86 KY. L.J. 1, 5-6 (1997-1998); *see also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1428-37 (1987) (exploring the historical roots of popular sovereignty in America).

8. *See* THE FEDERALIST NO. 10, at 80-81 (James Madison) (Clinton Rossiter ed., 1961).

9. *Id.* at 81.

10. For a definition of "factions," see *infra* note 38. In *The Federalist No. 9*, Hamilton described his preferred model of republican government, which included "the representation of the people in the legislature." THE FEDERALIST NO. 9, at 72 (Alexander Hamilton) (Clinton Rossiter ed., 1961). "They are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided." *Id.* at 72-73. In *The Federalist No. 10*, Madison was even more blunt in his distaste for direct democracy:

> When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. . . .
>
> From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. . . . Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. . . .
>
> A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking.

THE FEDERALIST NO. 10, at 80-81 (James Madison) (Clinton Rossiter ed., 1961).

11. JOHN STUART MILL, ON LIBERTY 10 (Prometheus Books 1986) (1859) ("[I]n political speculations 'the tyranny of the majority' is now generally included among the evils against which society requires to be on its guard."). Mill clearly influenced Madison as *The Federalist No. 10* demonstrates. *See also* THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part."). Madison, in turn, had a similar influence on de Tocqueville. *See* 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (Richard D. Heffner ed., Vintage Books 1980) (1835 & 1840) ("if ever the free institutions of

"proper structure" for government.[12] According to Madison, one of the virtues of the Constitution was its "total exclusion of the people in their collective capacity."[13] Accordingly, some see ratification of the Constitution, and the Federalists' triumph over the Anti-Federalists, as a repudiation of direct democracy.[14]

In accord with these sentiments, and in apparent conflict with notions of popular sovereignty, the Federal Constitution has no mechanism for lawmaking directly by the people. They may neither pass nor repeal laws, nor even amend the Constitution, directly.[15] Any change in positive law must come via elected representatives, either in the national Congress or, in the case of constitutional amendment, in state legislatures or conventions.[16] Indeed, the United States is one of only five democracies that has never held a national referendum.[17]

The lack of direct control over federal laws, taxes, and expenditures has, at times, set the people against their own representatives in what might be described as "popular revolts," albeit usually of the non-violent kind.[18] This is not to suggest that anti-government

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America are destroyed, that event may be attributed to the omnipotence of the majority").

12. *See* THE FEDERALIST NO. 10, *supra* note 8, at 84.

13. *See* THE FEDERALIST NO. 63, at 387 (James Madison) (Clinton Rossiter ed., 1961). In fact, Madison opposed any form of direct popular control over laws. *See* Kenneth Bresler, *Rediscovering the Right to Instruct Legislators*, 26 NEW ENG. L. REV. 355, 364 (1990-1991).

14. *See* Christopher Rohrbacher, *A Conservative Defense of* Romer v. Evans: *Colorado Amendment 2, State Initiatives, and the Guarantee Clause of the United States Constitution* (last modified May 21, 1997) <http://www.spc.uchicago.edu/depts/polsci/research/american/rohr97.html>.

15. Scholars have debated whether Article V prescribes the exclusive means for amending the Federal Constitution. *Compare* David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1 (1990) (arguing that maintaining Article V is the only way to amend the Constitution), *and* Henry Paul Monaghan, *We the People[s], Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (recognizing the widespread belief that Article V is the exclusive method for amending the Constitution), *with* Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984) (pointing out that the framers of the Constitution contemplated a system that allows the people to act outside the parameters of the Constitution), *and* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988) (arguing that the people of the United States retain a right to amend the Constitution in ways not expressly provided for by Article V).

16. *See* U.S. CONST. art. V.

17. *See* David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 42 (1995).

18. While the "revolts" discussed here are typically against unpopular laws,

movements have not resorted to arms, either in formal[19] or insurgent[20] fashions. But discontent in modern times is more often expressed through electoral means, such as anti-incumbency efforts[21] and split voting,[22] and through devolution[23] and down-sizing of government.[24] There have also been repeated calls for initiatives and referenda on the national level to check the power of Congress.[25]

In California, as in twenty-one other states, popular revolt against perceived abuses or incapacity by the legislature can also take the form of direct legislation.[26] This is the initiative process, where

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the judiciary has also been a target. *See, e.g.*, Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1970-72 (1988).

19. The best example of this is the Civil War, but there have been others, such as the Dorr Rebellion, a "popular movement that challenged the existing government in Rhode Island in the 1840s." Christian G. Fritz, *Rethinking the American Constitutional Tradition: National Dimensions in the Formation of State Constitutions*, 26 RUTGERS L.J. 969, 991 (1995) (reviewing DAVID A. JOHNSON, FOUNDING THE FAR WEST: CALIFORNIA, OREGON, AND NEVADA, 1840-1890 (1992)).

20. This includes private anti-government militias and individual actions taken against government symbols such as the bombing of the Alfred P. Murrah Federal Building, actions by agencies such as the Ruby Ridge standoff against the Federal Bureau of Investigation, and the assassinations and attempted assassinations of political figures.

21. *See, e.g.*, Richard A. West, Jr., *We the People: Limitations on Congressional Terms Are Unconsitutional Content-Determinative Regulations*, 46 RUTGERS L.J. 1787 (1994) (discussing anti-incumbency efforts by the American people).

22. *See, e.g.*, MARTIN P. WATTENBERG, THE RISE OF CANDIDATE-CENTERED POLITICS 34 (1991).

23. *See, e.g.*, Todd Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 VAL. U. L. REV. 893, 935-36 (1997).

24. *See, e.g.*, Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 COLUM. L. REV. 1 (1998) (suggesting administrative process as a preferred alternative to current trend of deregulation); Christina N. Smith, Note, *The Limits of Privatization: Privacy in the Context of Tax Collection*, 47 CASE W. RES. L. REV. 627 (1997) (discussing the movement to privatize the Internal Revenue Service).

25. One innovative idea was implemented by Ross Perot during his 1992 presidential campaign—the "electronic Town Hall." This was a system of video and data transmission technologies that enabled voters nationwide to debate and vote on legislation. *See* David Schuman, *The Origin of State Constitutional Direct Democracy: William Simon U'ren and "The Oregon System,"* 67 TEMP. L. REV. 947, 947 (1994).

26. The states (and adoption dates) are: Alaska (1959), Arizona (1912), Arkansas (1910), Colorado (1910), Idaho (1912), Maine (1908), Massachusetts (1918), Michigan (1913), Missouri (1908), Montana (1906), Nebraska (1912), Nevada (1912), North Dakota (1914), Ohio (1912), Oklahoma (1907), Oregon (1902), South Dakota (1898), Utah (1900), Washington (1912), and Wyoming (1968). *See* DAVID D. SCHMIDT, CITIZEN LAWMAKERS 217-77 (1989). In addi-

the voters can propose and enact both statutes and constitutional amendments without participation by their state representatives.[27] Initiatives wholly bypass ordinary legislative processes and are intended for just such a purpose. They can also disable or at least cramp those processes, either by prohibiting their own amendment outright, except by another vote of the people, or by requiring statutory amendments enacted by the legislature to comply with specified conditions.[28] Initiative constitutional amendments are, by definition, are superior to any statute enacted by the legislature.[29] Yet, even initiative "statutes" have a special dignity which sets them above and apart from statutes enacted by the legislature.[30]

It is therefore an understatement to observe that the people, in whom "[a]ll political power" inheres,[31] and their elected delegates are sometimes at odds. Initiatives, both in concept and operation, reflect a distrust for and a limitation on the legislature. The legislature, in turn, does not always yield easily and may endeavor to reclaim lost authority by amending initiative statutes after their enactment, often under the guise of implementing or "furthering" legislation.[32]

The struggle between power in the government and "power in the people" requires substantial mediation, a task which falls on the state's judiciary, usually the California Supreme Court.[33] In recent

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tion, Florida (1968) and Illinois (1970) allow for initiative constitutional amendments, but not initiative statutes. *See id.* at 230-31, 233-35. Kentucky (1915), Maryland (1915), and New Mexico (1911) allow for referendums, but not initiatives. *See id.* at 236, 239-40, 252-53. The District of Columbia (1970) also permits initiatives and referendums for matters within home rule. *See id.* at 228-30. For a more complete description of the various state initiative processes, *see generally* Nathaniel Persily, *The peculiar Geography of Direct Democracy: Why the Initiative, Referendum, and Recall Developed in the American West*, 2 MICH. L. & POL'Y REV. 11 (1997).

27. *See* CAL. CONST. art. II, § 8 (describing the initiative process). A related device is the referendum, which "is the power of the electors to approve or reject statutes . . . ." CAL. CONST. art. II, § 9(a). These devices differ in that the former bypasses the legislature completely, while the latter is triggered only after and in response to legislative enactment of a law.

28. *See* discussion *infra* Part VI.A.

29. *See infra* Parts III.B., IV.A.

30. *See infra* notes 213-219 and accompanying text; *see also* CAL. CONST. art. II, § 10(c) (providing that the legislature may repeal or amend initiative statutes only when permitted by the electors).

31. CAL. CONST. art. II, § 1.

32. *See, e.g.*, Amwest Surety Ins. Co. v. Wilson, 11 Cal. 4th 1243, 906 P.2d 1112, 48 Cal. Rptr. 2d 12 (1995).

33. Between 1964 and 1992, California courts invalidated six of thirty-five initiatives approved by California voters, partially invalidated another eight, and left sixty percent fully intact. *See* CALIFORNIA COMMISSION ON CAMPAIGN

years a spate of cases has answered some long-standing and important questions about initiatives. They have not, however, engaged a basic inquiry into the initiative power or its compatibility with republican theory. Courts, it seems, are often reluctant to question underlying principles of direct democracy, either because they believe themselves jurisdictionally incompetent to do so,[34] or are simply unwilling to take on the very electorate that keeps state judges in office.[35] Critical inquiries, therefore, usually occur only in dissents[36] and in law review articles.

Indeed, the current debate about the initiative power mirrors the larger debate, over two centuries old, about the wisdom of democracy itself. Critics of the California initiative basically echo the critiques by Alexander Hamilton and the early Federalists. Hamilton wrote the following about the ability of lay people to govern themselves: "Why has government been instituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint."[37] Madison expressed similar concern and stated: "But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary."[38] Similarly, initiative critics argue that initiatives are "plagued by voter ignorance, [and] voter apathy."[39]

On the other side, initiative defenders echo some of the rebuttals of the Jeffersonian democrats. Thomas Jefferson noted that "the mass of citizens is the safest depository of their own rights and . . . the

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FINANCING, DEMOCRACY BY INITIATIVE 17-18 (1992).

34. *See* Oregon v. Sawyer, 932 P.2d 1145 (Or. 1997); California Gillnetters Ass'n v. Department of Fish and Game, 39 Cal. App. 4th 1145, 46 Cal. Rptr. 2d 338 (1995); Lowe v. Keisling, 882 P.2d 91 (Or. Ct. App. 1994).

35. State judges, it should be remembered, are typically elected. In California, appellate court justices must stand for retention every twelve years. *See* CAL. CONST. art. VI, § 16. Their tenure is thus far more uncertain than their federal counterparts, who "shall hold their Offices during good Behaviour." U.S. CONST. art. III, § 1.

36. *See, e.g.*, *Sawyer*, 932 P.2d at 1164-76 (Durham, J., concurring in part and dissenting in part).

37. THE FEDERALIST NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. THE FEDERALIST NO. 51, *supra* note 11, at 322. As discussed earlier, Madison was particularly concerned with the threat of faction, which he describes as "a number of citizens whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." THE FEDERALIST NO. 10, *supra* note 8, at 78.

39. Cynthia L. Fountaine, Note, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 737 (1988).

evils flowing from the duperies of the people [ ] are less injurious than those from the egoism of their agents."[40] Proponents of direct legislation likewise argue that the initiative results in "increased government responsiveness to the will of the people, greater citizen participation and a better-informed electorate" and that "[i]t is a safeguard against the concentration of political power in the hands of a few."[41]

Recent experiences with California initiatives have only intensified the debate. Opponents have challenged in court nearly every significant ballot proposition in recent years, many times successfully.[42] Even when these suits are unsuccessful, protracted court challenges often substantially delay or alter an initiative's

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40. Letter from Thomas Jefferson to John Taylor, May 28, 1816, *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 668, 672-73 (Adrienne Koch & William Peden eds., 1944).

41. SCHMIDT, *supra* note 26, at 25-26. Jefferson might be sympathetic with critics of the initiative process in the area of rights for minorities and the politically disenfranchised. Some critics of direct legislation have warned of its potential for isolating and disproportionately harming minorities. *See* Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 2 (1978). This complaint mirrors Madison's insistence upon a federal bill of rights as a bulwark against just such majoritarian abuses. In a letter to Jefferson, Madison wrote:

> Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *cheifly* [sic] to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents.... What use then it may be asked can a bill of rights serve in popular Governments? ... The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion.

Letter from James Madison to Thomas Jefferson, Oct. 17, 1788, *in* 11 THE PAPERS OF JAMES MADISON 295, 298-99 (Robert A. Rutland et al. eds., Univ. Press of Va. 1977) (1788-1789).

42. *See, e.g.*, League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (challenging Proposition 187, which denied benefits to certain immigrants); Service Employees Int'l Union v. Fair Political Practices Comm'n, 747 F. Supp. 580 (E.D. Cal. 1990) (challenging Proposition 73); Quackenbush v. Superior Court, 60 Cal. App. 4th 459, 70 Cal. Rptr. 2d 271 (1997) (challenging proposition 213, which restricted damage recovery by uninsured drivers); Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 51 Cal. 3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990) (seeking enforcement of provisions in Proposition 68, which proposed to regulate political campaign spending); Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978) (challenging Proposition 13 relating to real property taxes).

implementation.[43] Aside from the seemingly perpetual litigation, many feel that the initiative process is "out of control,"[44] either in its structural disregard for minority interests[45] or its patent inability to comprehend complex legislative matters.[46] Understandably, defenders of the initiative process view these legal and political assaults as attacks on democracy itself, obstructions to the "people's will."[47]

The public debate on participatory democracy will go on, mostly in the press and legal scholarship and occasionally in court. But, unless some formal restraint is imposed on the initiative power—an unlikely prospect in the near future—initiatives themselves will continue unabated. Indeed, seventeen initiatives appeared on statewide

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43. *See, e.g.*, Fireman's Fund Ins. Co. v. Garamendi, 790 F. Supp. 938 (N.D. Cal. 1992); 20th Century Ins. Co. v. Garamendi, 8 Cal. 4th 216, 878 P.2d 566, 32 Cal. Rptr. 2d 807 (1994) (challenging Proposition 103, relating to insurance rate reduction and regulation); Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). As the federal district court in *Fireman's Fund* noted:

> Insurers doing business in California certainly have a right to challenge any unconstitutional aspects of the rate making process which have been forced on them by the initiative. But the multiple and overlapping assertions of these challenges in state court, before the Commissioner, and in this court causes this court to question those tactics. Numerous insurers are involved in these multiple challenges, some represented by the same law firms. Some challenges are filed in state court and some are filed in federal. The challenges are at the same time identical, separate and overlapping. Some of that appears to be coordinated and calculated. . . .

*Fireman's Fund*, 790 F. Supp. at 964.

44. *Initiatives: The Monster That Threatens California Politics*, L.A. TIMES, Nov. 12, 1990, at B4.

45. *See, e.g.*, Julia Anne Guizan, Comment, *Is the California Civil Rights Initiative a Wolf in Sheep's Clothing? Distinguishing Constitutional Amendment from Revision in California's Initiative Process*, 31 LOY. L.A. L. REV. 261 (1997); Katherine M. Hamill, Case Comment, Romer v. Evans*: Dulling the Equal Protection Gloss on* Bowers v. Hardwick, 77 B.U. L. REV. 655 (1997); Joseph S. Jackson, *Persons of Equal Worth:* Romer v. Evans *and the Politics of Equal Protection*, 45 UCLA L. REV. 453 (1997); L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 PUGET SOUND L. REV. 281 (1997).

46. Initiative drafters often sacrifice comprehensive explication of an issue to achieve textual simplicity, in the often correct belief that this enhances the measure's likelihood of success at the polls. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 33, at 10.

47. Even judges question the damage done to democracy when courts enjoin or invalidate initiative measures. *See, e.g.*, Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 699-700 (9th Cir. 1997). *But see, e.g.*, Bates v. Jones, 958 F. Supp. 1446, 1452 (N.D. Cal. 1997); Coalition for Econ. Equity v. Wilson, 946 F. Supp. 1480, 1490 (N.D. Cal. 1996).

California ballots in 1996.[48] As of this Article's publication, ten initiatives have qualified for the 1998 primary and general elections[49] and thirty-one more are in circulation and may qualify before the June 25 cut-off date.[50] These numbers do not even include the countless initiatives appearing on local ballots.[51]

Despite some of the philosophical questions raised in this introduction, this Article has a relatively narrow purpose. It is not to explore the relative merits or demerits of republican government versus direct democracy. Those issues are amply explored elsewhere[52] and there is little we could add to justify another law review article. Instead, this Article focuses on one aspect of the broader debate—the exact contours of the initiative power in California, a state at the radical end of the direct democracy spectrum. Despite nearly a century of initiative-making, the precise texture of the initiative power remains unsettled. This Article explores some of those uncertainties.

In the following sections we discuss the history of the initiative process in California, its theoretical underpinnings, the plain text of the constitution, limitations on the initiative power, and its place in

48. Five initiative statutes were on the March, 1996 primary ballot. *See* CALIFORNIA BALLOT PAMPHLET, PRIMARY ELECTION 3 (Mar. 26, 1996) [hereinafter 1996 PRIMARY ELECTION BALLOT]. Twelve initiative statutes were on the November 1996 general election ballot. *See* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION 3 (Nov. 5, 1996) [hereinafter 1996 GENERAL ELECTION BALLOT]. The legislature placed an additional ten measures on the 1996 ballots. *See* 1996 PRIMARY ELECTION BALLOT, at 3 (6 additional); 1996 GENERAL ELECTION BALLOT, at 3 (3 additional); CALIFORNIA SUPPLEMENTAL BALLOT PAMPHLET, PRIMARY ELECTION 3 (Mar. 26, 1996) (1 additional).

49. *See California Secretary of State* <http://www.ss.ca.gov> (last visitied June 17, 1998); California Voter Foundation, *1998 California Election Preview* (visited Apr. 8, 1998) <http://www.calvoter.org/cuf/home.html>.

50. *See* CAL. ELEC. CODE § 9013 (West 1996). The frequent use of the initiatives is a relatively new phenomenon. From the early years of the initiative until 1974, the number of measures that qualified for the ballot was relatively small. From 1912 to 1974, with the exception of a nine year period, the number of measures that qualified was under ten, and the number making it to the ballot was under three. In some years no measures qualified. Since 1974 the average number of initiative measures approved for circulation has been 25. The number actually making it to the ballot has been about four. Of the 76 that have been approved over the last 84 years, 32, or about one-half, have been approved in the last fifteen years. *See California Secretary of State, supra* note 49.

51. Initiative and referendum powers may be exercised at the local level. *See* CAL. CONST. art. II, § 11 (authorizing such powers for general law cities); *Id.* at art. XI, § 3(c) (setting out such powers for charter cities).

52. *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignity, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994); Elizabeth R. Leong, Note, *Ballot Initiatives & Identifiable Minorities: A Textual Call to Congress*, 28 RUTGERS L.J. 677 (1997).

the overall system of governance. We also suggest, somewhat tentatively, that enactment of the initiative power in 1911 may have deviated from prescribed constitutional procedures and may be theoretically suspect.

No discussion of the initiative power, however, can begin without a discussion of the historical forces that led to the adoption of the initiative process in the first place. Such a discussion provides the very denominator of California's initiative power, its case law, and citizens' and jurists' sometimes bafflingly stubborn faith in direct democracy.

## II. ORIGINS OF THE INITIATIVE POWER IN CALIFORNIA

### *A. The Bear Flag Republic*

As long as there have been "Californians," there have been popular skepticism and restlessness with established authorities. The area we now know as California was colonized by Spain beginning in the mid-seventeenth century.[53] After Mexico's independence from Spain in 1821, the area became a department of Mexico—Alta California—with its capital at Monterey.[54] Mexican political and military control was weak,[55] however, and local ranchers, known as "Californios," periodically rebelled against the Mexican authorities.

When Anglo settlers began arriving in small numbers in the 1830s, the Californians generally welcomed them.[56] The Americans began assimilating into local culture and even assumed important government posts.[57] Californians and Americans had a lot in common, particularly their dislike of Mexican military authority, trade,

53. *See* Myra K. Saunders, *California Legal History: The Legal System Under the United States Military Government, 1846-1849*, 88 L. LIBR. J. 488, 488 (1996).

54. ENCYCLOPEDIA OF CALIFORNIA 54-55 (Frank H. Gille ed., 1984).

55. Spanish control had also been weak. As early as 1804, United States Naval Captain William Shaler "said that the Spaniards had removed every obstacle from the path of an invading enemy . . . [and that] '[i]t would be as easy to keep California in spite of the Spaniards as it would be to wrest it from them in the first place.'" CARDINAL GOODWIN, M.A., THE ESTABLISHMENT OF STATE GOVERNMENT IN CALIFORNIA 1-2 (1914).

56. *See* Saunders, *supra* note 53, at 489 ("Estimates of the non-native population do not exceed ten thousand in 1846, with well over two-thirds of that number being Latino."). As late as 1844 "probably not more than 100 Americans resided in all California." WILLIAM J. PALMER AND PAUL P. SELVIN, THE DEVELOPMENT OF LAW IN CALIFORNIA 12 (1983). The foreign population—including Americans—grew to 2000 by 1846. *See id.*

57. *See* GOODWIN, *supra* note 55, at 6-7.

and land laws. In 1836 a group of Californians, assisted by some Americans, staged a revolt and drove the Mexican governor from power.[58] They proclaimed California independent of Mexico and named Mariano Vallejo "commandante general" and Juan Alvarado governor of California.[59] Mexico effectively quashed this revolt when it recognized Alvarado as governor.[60]

Through resistance and defiance of Mexican authority, Californians were able to establish a fair degree of autonomy.[61] It was widely believed, in Washington and abroad, that California was ripe for the picking.[62] Many American settlers professed that "'California was to fulfil[l] its "manifest destiny" and become a part of the United States.'"[63] Indeed, the United States Navy had standing orders to occupy California in the event of war with Mexico.[64]

Based on a false rumor of war, Commodore Thomas Jones of the Pacific Fleet sailed to Monterey on October 20, 1842, and "captured" California in a bloodless coup.[65] The next day, Jones examined official communications from Mexico and, realizing his mistake, simply "gave" back the state.[66]

Captain John C. Fremont of the United States Army Topographical Engineers arrived in California in early 1846 with sixty well-armed men on a "scientific expedition."[67] In an effort to rekindle the earlier revolt, Fremont unsuccessfully sought to provoke both American settlers and Mexican authorities with rumors of Mexican military action.[68]

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58. *See id.* at 8-9.
59. *See id.*
60. *See id.*
61. The Californios were fairly autonomous during the entire secessionary period. *See* Thomas H. Benton, *The Acquisition of California* (last modified Mar. 17, 1998) <http://we.got.net/docent/explore/hbent8.html>; *see also California History: Mexican Period* (last modified Nov. 11, 1996) <http://www.ccnet.com/~laplaza/calhist3.html> (noting the self-sufficiency of the Californios).
62. *See generally* Saunders, *supra* note 53, at 490 (discussing the interest of the United States in California); *see also California History: Mexican Period*, *supra* note 56 (stating a number of factors for the American government's desire to acquire California).
63. Saunders, *supra* note 53, at 490 (citation omitted).
64. *See id.*
65. *See* GOODWIN, *supra* note 55, at 15.
66. *See id.*
67. *The Bear Flag Revolt: The First Step in California's March to Statehood* (last modified May 6, 1997) <http://intergate.rbuhsd.k12.ca.us/adobedocs/page3.html>.
68. *See id.*

War with Mexico was eventually declared on May 13, 1846.[69] On June 14 two dozen insurgent settlers, belatedly joined by Fremont, invaded the small Mexican fortress at Sonoma, the northern-most city under Mexican rule.[70] The rebels captured its occupant, retired General Mariano Vallejo.[71] Vallejo demurred upon capture, preferring instead to join the insurgency, as he had done a decade earlier.[72] As one of the insurgents put it, "We tried to find an enemy, but could not."[73]

The lack of any defense miffed the rebels somewhat. They raised a flag containing a crude rendition of a grizzly bear and the words "California Republic" to prove their conquest.[74] The "Bear Flag Revolt" was bloodless and brief. William B. Ide assumed command of the operation, becoming the first and only "President" of the Bear Flag Republic.[75] Foreshadowing later constitutional tenets, he issued a proclamation pledging "to establish and perpetuate a liberal, a just and honorable Government [that] must originate among its people: its officers should be its servants."[76]

The Republic was short-lived. The "bear flaggers" successfully defended their conquest against Mexican troops on June 24 at the Battle of Olompali.[77] "Casualties were high by California standards": there were two fatalities on each side.[78] The rebels, however, were not so lucky against the United States Navy. On July 7 Commodore John Drake Sloat of the Pacific Squadron sailed into Monterey and

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69. *See id.*

70. *See id.*

71. *See id*; *see generally The United States and California* (last modified June 25, 1997) <http://lcweb2.loc. gov/ammem/cbhtml/cbstates.html> (describing the Bear Flag Revolt).

72. Vallejo eventually returned to Sonoma after California joined the United States. He went on "to serve as a delegate to the California Constitutional Convention, and later as a State Senator." *Raising of the Bear Flag* (last modified June 21, 1996) <http://www.vom.com/bearflag/revolt.html>.

73. John Bidwell, *Frémont in the Conquest of California* (last modified Dec. 7, 1997) <http://shell3.ba.best.com/~sfmuseum/hist6/fremont.html>.

74. *See id.* A picture of the original bear flag can be found at this internet site.

75. *See* Museum of the City of San Francisco, *Gold Rush Chronology 1846-1849* (last modified Aug. 8, 1997) <http://shell3.ba.best.com/sfmuseum/hist/chron1.html> [hereinafter *Gold Rush Chronology*].

76. *After the Raising: The Proclamation* (last modified Feb. 2, 1998) <http://www.vom.com/bearflag/afterrev.html>.

77. *See Olompali State Historical Park* (last modified July 29, 1997) <http://www.indiana.edu/~maritime/caparks/spanmex/ olompali.html>.

78. *The Bear Flag Revolt* (last modified Mar. 6, 1997) <http://www.ccnet.com/~laplaza/calhist4.html>.

raised an American flag over the customs house.[79] He then posted a proclamation declaring California annexed to the United States.[80]

The Republic's brief sovereignty formally came to an end on July 9, 1846, when the Bear Flag was taken down in Sonoma and replaced with the twenty-eight-star American flag.[81] At that time Commodore Robert Stockton, who replaced Sloat, declared California a territory of the United States and appointed a territorial government.[82]

At first there was little resistance to American occupation. But in Fall 1846 harsh military rule lead to a counter-revolt by Californians in the southern part of the state.[83] At the battles of Los Angeles and San Pascual, the Californians were victorious; however, the large American force, led by Stockton and Army General Stephen Kearny, eventually overwhelmed them.[84] They surrendered in the San Fernando valley on January 13, 1847, in what is known as the "Cahuenga Capitulation."[85] Mexico formally ceded the state on February 2, 1848, in the Treaty of Guadalupe Hidalgo.[86] Nine days later, gold was discovered at Sutter's Mill.[87]

After Florida was acquired from Spain, the Supreme Court ruled that Spanish law must be preserved in the territory until such time as Congress affirmatively changed it, or the state was admitted to the

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79. *See* GOODWIN, *supra* note 55, at 13-14.

80. *See id.* at 14. As with Jones before him, Sloat had "secret orders" to take California as soon as war had been declared with Mexico. It had, but Sloat did not know it. Rather, he took the state because he had heard about the revolution in Sonoma and feared that the British, who were sailing toward Monterey with a large naval force, would exploit the political vacuum and claim the state. *See Gold Rush Chronology*, *supra* note 76.

81. Navy Lieutenant Joseph Warren Revere, Paul Revere's grandson, performed the ceremony. *See After the Raising: The Proclamation*, *supra* note 76.

82. *See* Saunders, *supra* note 53, at 491. Stockton appointed Fremont, who was later court-martialed for insubordination, as governor. General Stephen Kearney, who served as governor until June 1847, replaced Fremont. Colonel Richard Barnes Mason succeeded Kearny and was himself succeeded by General Bennett Riley. Riley was the last military governor of the state. In December 1849, a civilian government began functioning. *See id.* at 491-92.

83. *See id.* at 489.

84. *See* GOODWIN, *supra* note 55, at 17.

85. *See The Bear Flag Revolt*, *supra* note 78; *The United States and California*, *supra* note 71.

86. *See* Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, U.S.-Mex., 9 Stat. 922.

87. *See Gold Rush Chronology*, *supra* note 75; *The History of How California Became a State* (last modified Aug. 8, 1997) <http://www.ccnet.com/~laplaza/calhist.html>.

Union.[88] It was felt that this precedent, as well as international law generally, required the same result for California. Accordingly, the legal regime under military occupation was fundamentally a continuation of Mexican law.[89] This included the "alcalde," or mayoral, political structure.[90] However, once the peace treaty was signed with Mexico, military control should have ended, but did not. As a territory of the United States, Congress could have passed legislation for California, but it did not.[91] Instead, Mexican law, as modified to fit local conditions—including mining claims resulting from the gold rush—continued to be enforced by military governors.[92]

Congress was unable to form a territorial government for California because it was embroiled in a bitter debate over California's status—slave or free soil.[93] Settlers, now arriving by the thousands due to the gold rush, demanded recognition and an end to military and Alcalde governance.[94] Yet, congressional paralysis left California in a state of legal limbo for three years. It was not even clear whether California was under military or civilian rule in the three years prior

88. *See* American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 544 (1828).

89. *See* Palmer v. Low, 98 U.S. 1, 15 (1878) (stating that if the United States government could not regulate the form of conveyances of land in California after its conquest by military forces, then Mexican law was preserved). Influential members of Congress required observance of Mexican law. *See* GOODWIN, *supra* note 55, at 21.

90. *See* GOODWIN, *supra* note 55, at 61-63. Although it was unauthorized, the Alcaldes, an increasing number of whom were Anglos, began looking to the common law for substance. *See* Saunders, *supra* note 53, at 494.

91. *See* Cross v. Harrison, 57 U.S. (16 How.) 164, 193 (1853) (validating de facto rule by existing military governor because of inaction by President and Congress).

92. *See* Lux v. Haggin, 69 Cal. 255, 335, 10 P. 674, 719 (1886) ("Between the transfer of California to the United States, by the treaty of Guadalupe Hidalgo, and the admission of this state into the Union, no territorial government was here established. The purely municipal law of Mexico continued in force within this territory until modified or entirely changed by appropriate authority."); *see also* People v. Sidener, 58 Cal. 2d 645, 658-65, 375 P.2d 641, 649-54, 25 Cal. Rptr. 697, 705-10 (1962) (Schauer, J., dissenting) (discussing the history of government in California); Saunders, *supra* note 53, at 493-503 (discussing how military leaders in California chose to continue the existing Mexican legal structure).

93. The debate may also have "edged the country closer to civil war." Pat Ooley, *State Governance: An Overview of the History of Constitutional Provisions Dealing with State Governance* (last modified July 15, 1997) <http://library.ca.gov/california/CCRC/reports/html/hs_state_governance.html>. Some members of Congress also objected to California's annexation on separation of powers grounds. *See* GOODWIN, *supra* note 55, at 20-23.

94. *See generally* GOODWIN, *supra* note 55, at 63-65 (discussing dissatisfaction with Alcaldes).

to its admission to the Union.[95] At least one California official denied that any legitimate government existed at all.[96]

As early as 1847 local newspapers urged the convening of a constitutional convention to cure "'the existing order of things,'" particularly the lack of civil government and recognition by Congress.[97] By 1849 the pressure to establish a formal government became intense.[98] At the suggestion of President Zachary Taylor, Governor Riley called for a constitutional convention to be held in Monterey in September 1849.[99] Forty-eight delegates were selected at local elections, including Mariano Vallejo and seven other original Californios.[100]

In drafting the document, the delegates principally relied on the constitutions of other states, particularly those that had recently written or revised their charters.[101] The delegates most heavily copied the constitutions of Iowa and New York.[102] The delegates also retained several key aspects of Mexican law,[103] including property rights for

95. *See id.* at 221 & n.2 (noting that Governor Riley claimed that he had authority from Washington to establish a civil and "*de facto* military government").

96. *See id.* at 221-23.

97. *Id.* at 63.

98. *See id.* at 75-77.

99. *See* Ooley, *supra* note 93.

100. *See Achieving Statehood* (last modified Mar. 28, 1997) <http://www.ccnet.com/~laplaza/calhist5.html>.

101. *See* GOODWIN, *supra* note 55, at 177, 231-35, 237-43. Books of the various state constitutions were widely available in 1849. The experiences of other states were influential not only in drafting the California Constitution but those of other states as well. *See* Fritz, *supra* note 19, at 982. ("[B]oth of California's conventions and the Oregon and Nevada conventions had access to all the extant state constitutions at the time they met. . . . [This] is suggestive of constitutional borrowing that hardly occurred haphazardly or without serious reflection."); *see also* PALMER & SELVIN, *supra* note 57, at 13-14 (discussing the composition of California's Constitutional Convention); REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 50 (1846) (referring to a "book called 'American Constitutions'" which contained synopses of the several state constitutions then extant) [hereinafter NEW YORK REPORT OF THE DEBATES].

102. *See* Ooley, *supra* note 93 and accompanying text. According to John Ross Browne's *Report of the Debates, 1849*, delegate William M. Gwin said that he had selected the constitution of Iowa, because it was one of the latest and the shortest. *See* J. ROSS BROWNE, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 24 (Arno Press Inc. 1973) (1850). They may also have selected New York because it was the native state of the largest number of delegates—eleven. *See* VIII ROCKWELL DENNIS HUNT, THE GENESIS OF CALIFORNIA'S FIRST CONSTITUTION (1846-49), at 55 (1895).

103. Indeed, the constitution specifically preserved Mexican law. *See* Schedule

women,[104] but rejected others, such as suffrage for native peoples.[105] The constitution also prohibited slavery and allowed free blacks into the state.[106] It did not, however, allow for direct democracy through the devices then known—the referendum[107] and "instruction and recall."[108]

The people of California ratified the constitution on November 13, 1849, by a vote of 12,872 to 811.[109] It was submitted to Congress the following year and, "on due examination, [it was] found to be republican in its form of government."[110] California became the thirty-first state on September 9, 1850.[111]

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to the Constitution, § 1, *reprinted in* 1850 Cal. Stat. 34 ("[A]ll laws in force at the time of the adoption of this Constitution, and not inconsistent therewith, until altered or repealed by the Legislature, shall continue as if the same had not been adopted."). The constitution itself was published in its two official languages—English and Spanish. *See* GOODWIN, *supra* note 55, at 226. This was pursuant to a specification in the document that all laws were to be published in English and Spanish. *See* CAL. CONST. art. XI, § 21 (1849).

104. *See Achieving Statehood*, *supra* note 100.

105. *See* CAL. CONST. art. II, § 1 (1849).

106. *See* CAL. CONST. art. I, § 18 (1849); *see generally* HUNT, *supra* note 102, at 48-49.

107. Connecticut was the first state to use the referendum process, beginning in 1818. *See* SIMEON E. BALDWIN, MODERN POLITICAL INSTITUTIONS 48 (1898).

108. "Instruction" refers to the right of the people to direct their legislators on how to vote. *See* Bresler, *supra* note 13, at 355 (1991). "Recall" refers to a process in which the people vote to remove a public official. *See* BLACK'S LAW DICTIONARY 1267 (6th ed. 1990). Four of the original states allowed for instruction and recall in their constitutions. *See* MASS. CONST. of 1780, pt. 1, art. XIX; N.C. CONST. of 1776, art. XVIII; N.H. CONST. of 1784, pt. I, art. XXXII; PA. CONST. of 1776, art. XVI. The latter two omitted the provisions when they revised their constitutions shortly after the Union formed. *See* Rohrbacher, *supra* note 14; *see generally* Bresler, *supra* (discussing state enactments of the power of instruction). Instruction was also used by state legislatures to control their delegations in the United States Senate, insofar as senators were selected by state legislatures until 1913, when the 17th amendment was adopted. *See generally* Jay S. Bybee, *Ulysses at the Mast: Democracy, Federalism, and the Sirens' Song of the Seventeenth Amendment*, 91 NW. U. L. REV. 500 (1997) (discussing senate election procedures prior to the Seventeenth Amendment) [hereinafter Bybee, *Ulysses at the Mast*].

Although the initiative resembles the early American practice of instruction and recall, it cannot actually be used for that purpose. *See* AFL-CIO v. Eu, 36 Cal. 3d 687, 686 P.2d 609, 206 Cal. Rptr. 89 (1984) (striking from ballot a proposed initiative requiring the legislature to call for a federal constitutional convention to enact a balanced budget amendment).

109. *See* PALMER & SELVIN, *supra* note 57, at 16 n.29. Stormy weather on election day—December 20, 1849—may have accounted for the low voter turnout. *See id.*

110. Act of Admission of California into the Union, 9 Stat. 452 (1850). It was customary in the mid-nineteenth century for Congress to examine the "republican character" of constitutions of states seeking admission. *See, e.g.*, Act

### B. Second Constitutional Convention

What began as a loose alliance of scattered towns and forts soon coalesced into a unified state government. The economy boomed, due in no small part to the gold rush, and the state prospered. Within a few years, the legislature assumed broad dominion over the state's political subdivisions. Yet revolutionary spirit that founded the state seemed to be lost on our political leaders, who became increasingly beholden to special interests.

The post-Civil War period saw rapid industrial expansion, with attendant class consequences—accumulation of vast wealth in a relative few, including corporations,[112] and the creation of a large laboring class.[113] As early as 1857, attempts were made to convene a new constitutional convention to cure perceived defects in the original and to corral the growing power of corporations.[114] Calls for a convention were defeated in 1857, 1859, 1873, and 1875. The last defeat deserves special mention. The Democratic state convention of 1875 was overwhelmingly in favor of a convention "'as the only mode of creating a system of government at once harmonious and efficient.'"[115] Voting at such a convention was accomplished not by the marking of ballots but simply by submitting the ballot of one's choice, the ballot itself stating a voting preference on its face. At the urging of a prominent railroad lawyer, the Democratic state central committee had all the ballots printed with "'For a Convention'" on one side and "'Against a Convention'" on the other.[116] Accordingly, an equal number of votes were cast for each proposition, and a convention was defeated.[117]

Amidst these shenanigans, the depression of 1873-1878 worsened. It caused widespread poverty while the industrial class seemed

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for the Admission of the States of Iowa and Florida into the Union, 5 Stat. 742 (1845).

111. *See* Act of Admission of California into the Union, 9 Stat. 452 (1850).

112. *See* BALDWIN, *supra* note 107, at 63 ("Corporations . . . represent, probably, four-fifths of the wealth and industry of the country, apart from lands occupied as homesteads.").

113. *See* Ooley, *supra* note 93, at n.7 and accompanying text.

114. As one delegate to the 1878 convention put it: "'I have learned . . . that the ship of state is rotten from truck to kelson; that the three great departments of the state are full of corruption; that you cannot trust the executive department; that you should have no confidence in the judicial department; and that the legislative department has sunk beyond plummet reach.'" CARL BRENT SWISHER, MOTIVATION AND POLITICAL TECHNIQUE IN THE CALIFORNIA CONSTITUTIONAL CONVENTION 1878-79, at 95 (1930).

115. *Id.* at 17.

116. *Id.*

117. *See id.*

to prosper and tighten its control on state government.[118] Scandals erupted involving fraud and graft by the railroads and state and local governments.[119] Reform movements and "deep[ ] distrust of the legislature"[120] consequently grew even more intense, resulting in the legislature of 1875-1876 again putting the question of a call on the ballot. It was approved at the 1877 election and our second constitutional convention opened the following year.[121]

The convention of 1878 was dominated by lawyers and farmers.[122] This pleased conservatives at first, but strategic voting by the Workingmen's Party delegates and deep animosity toward the railroads led to the convention imposing severe restrictions on corporations.[123] As word of this spread, the state's leading newspapers grew critical of the delegates. Nonetheless, by the end of the convention the delegates were in an independent mood, often ignoring their political alliances. "[T]he delegates looked upon themselves as more truly the representatives of 'the people' than any subsequently chosen legislators [would be], and thought it their duty to include a large amount of important legislation in the constitution, where it would not be easily subject to change."[124] The document which emerged in 1879

> was forged in an atmosphere of discord, apprehension about conditions in the state, and great hostility toward legislators who were thought to have ignored serious problems while catering to special interests. . . . The Sacramento delegates were not only "determined to cinch capital, tax mortgages, and expel the Chinese, they were also determined to put the legislature in its place. Session after session charges of incompetence and corruption had been made . . . . The

118. *See id.* at 7-11.
119. *See* Ooley, *supra* note 93.
120. JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION 14-15 (1993).
121. California's drive for a new constitution was not unique. During the progressive era, between 1872 and 1913, twenty-six states called constitutional conventions to revise their charters. *See* Ooley, *supra* note 93. The constitution was adopted on March 3, 1879, ratified on May 7, 1879, and went into effect for election of officers on July 4, 1879, and generally on January 1, 1880. *See* SWISHER, *supra* note 114, at 101, 109.
122. Of the 152 delegates, 57 were lawyers and 39 were farmers. *See* SWISHER, *supra* note 114, at 25.
123. *See id.* at 45-65.
124. *Id.* at 65.

> convention set out to chastise the legislature by limiting its sphere of action . . . ."[125]

As Justice Hans Linde has noted, resentment of Sacramento was so strong that some delegates proposed abolishing the legislature altogether.[126] Instead, the convention imposed severe restrictions on legislative and corporate power,[127] so much so that the constitution almost doubled in length.[128] Among the significant transformations of power was the establishment of "home rule" for California cities. This reform sought to decentralize power in the mistrusted state government by guaranteeing local autonomy.[129] Still, it was the problem of railroads that commanded the most attention. Indeed, controlling the railroad corporations "was undoubtedly one of the major purposes for which the constitutional convention was called."[130]

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125. James E. Castello, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 CAL. L. REV. 491, 554-55 (1986) (quoting in part SWISHER, *supra* note 114, at 96).

126. *See* Hans A. Linde, *Who Is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 718 n.37 (1994). As Justice Linde wrote:

> [s]o strong was the sentiment against legislative activism that a Workingman's party delegate proposed an article declaring: "There shall be no legislature convened from and after the adoption of this Constitution, . . . and any person who shall be guilty of suggesting that a Legislature be held, shall be punished as a felon without the benefit of clergy."

*Id.* (citing MORTON KELLER, AFFAIRS OF STATE: PUBLIC LIFE IN LATE NINETEENTH CENTURY AMERICA 113 (1977)).

127. This phenomenon was repeated throughout the country. *See* BALDWIN, *supra* note 108, at 57 ("The chief design of . . . constitution-making for the last ten or twenty years of the century . . . was to reduce the field of statute law, and withold from [the legislature] every subject which it is not necessary to concede.").

128. *See* SWISHER, *supra* note 114, at 101.

129. The drafters designed the 1879 constitution to "'emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.'" Johnson v. Bradley, 4 Cal. 4th 389, 395, 841 P.2d 990, 993, 14 Cal. Rptr. 2d 470, 473 (1992) (quoting People v. Hoge, 55 Cal. 612, 618 (1880)). A constitutional amendment in 1896 authorizing cities to adopt freeholder charters further expanded local power. *See* CAL. CONST. of 1879, art. XI, §§ 6, 8 (amended 1894, 1914). This not only gave chartered cities authority to manage their own affairs, but it further insulated them from legislative scrutiny. *See Johnson*, 4 Cal. 4th at 396, 841 P.2d at 994, 14 Cal. Rptr. 2d at 474 (citing Fragley v. Phelan, 126 Cal. 383 (1899) (stating that 1896 amendment "was intended to give municipalities the *sole* right to regulate, control, and govern their internal conduct")).

130. SWISHER, *supra* note 114, at 45.

### C. The Banana Republic of California

Despite having enacted a new constitution, the spirit of reform quickly disappeared. Liberal Democrats and Workingmen candidates split the vote in the Fall 1879 election, allowing for "a conservative Republican sweep of the legislature and executive branch."[131] "The 1880 legislature . . . effectively sabotaged [reform] provisions of the constitution which were inimical to conservative interests."[132] Virtually every California legislator and judge owed his office to the Southern Pacific. Collis P. Huntington and his Northern and Southern California operatives hand-picked most of the state and local candidates for public office.[133] Even a popular incumbent republican governor who won whenever there was a primary was unceremoniously dumped by the Southern Pacific at the 1906 GOP convention.[134] One member of the legislature observed that "[s]carcely a vote was cast in either house that did not show some aspect of Southern Pacific ownership, petty vengeance, or legislative blackmail."[135] Indeed, "in the thirty years following adoption of the 1879 constitution, not a single bill opposed by the Southern Pacific Railroad was enacted in Sacramento."[136] In addition to its control over politics, the railroad openly traded offices such as judgeships.[137] As a result, what the corporations were unable to achieve through the legislature, they accomplished through litigation.

While the examples of the railroad's dominance in every nook and cranny of the state are legion,[138] a few suffice to illustrate how thoroughly basic precepts of free enterprise, civil rule, and democracy were squelched in California by a single corporation single-mindedly pursuing its financial interests. Southern Pacific successfully blackmailed the city of Los Angeles into ceding sixty acres of land and the then-enormous sum of $600,000 to the railroad by threatening to build new lines that went around, rather than through, the city.[139] The railroad owned the entire Oakland waterfront[140] so

131. *See* Ooley, *supra* note 93.
132. *Id.*
133. *See* GEORGE E. MOWRY, THE CALIFORNIA PROGRESSIVES 12-13 (1951).
134. *See id.* at 57-58.
135. *Id.* at 63.
136. Castello, *supra* note 125, at 555.
137. *See* MOWRY, *supra* note 133, at 59.
138. *See id.* at 62-64 (illustrating Southern Pacific's influence on the general election of 1906).
139. *See id.* at 9.
140. *See id.* at 10.

Oakland's citizens and business people could not get around the railroad's concomitant monopoly on ferry service to and from San Francisco.[141] When, in an effort to break the monopoly, the city claimed shore rights at the end of Main Street, the railroad simply fenced off the area of land it owned in deep water, blocking any threat to its monopoly.[142] Likewise, when a competitor dared to commence ferry service, his wharves were blocked by railroad trams, his boats were rammed, and coal dust was spewed over his passengers.[143] The railroad was the largest landowner in California.[144] It would set its rates for commercial transport in part by forcing less powerful businesses, utterly dependent upon the railroad's transportation monopoly, to open their books.[145] The railroad would then increase its rates if the business was having a profitable month.[146]

The Southern Pacific Railroad dominated California's economy and politics so completely that the state was akin to a third-world "Banana Republic."[147] As with a stereotypical Banana Republic, the Southern Pacific Railroad in California at the turn of the century was simply more powerful than any potentially competing business or civil rival, including the state itself. It had more money and human capital, and it was not timid about using its influence in the most brazen ways to advance its interests.[148]

### *D. The Republican Rescue*

This dominance was not, as one might think, eventually broken by a cabal of determined radicals or revolutionaries based in San Francisco. The revolution was spearheaded by conservative, Los Angeles-based, Republican lawyers, reporters, and professionals influenced by Theodore Roosevelt and William Howard Taft, not Karl Marx.[149] The movement found its broadest support not among labor, but in the Southern California middle merchant classes, who not only coveted a larger share of the profits from Southern California's

141. *See id.*
142. *See id.*
143. *See id.*
144. *See id.* at 11.
145. *See id.* at 9, 11.
146. *See id.* at 9.
147. *See id.* at 1-22.
148. *See id.* at 12. *See also* Persily, *supra* note 26, at 24.
149. *See* MOWRY, *supra* note 133, at 22.

economic expansion,[150] but who also frowned upon political corruption as being inimical to their devoutly Protestant, Midwestern heritages.[151]

When these merchant activists took up the cause of breaking the railroad's grip on the GOP, the remedy of direct democracy was an option. Since 1895 Dr. Randolph Haynes, a determined political reformer, had been agitating with some groundbreaking successes in cities throughout the state for direct legislation.[152] The reform movement that would eventually lead to enactment of the statewide initiative was born in 1907 when an accident of seating led eventually to sweeping political reform just four years later. Edward Dickson and Chester Rowell were two journalists who sat in adjoining seats during the 1907 legislative session, the "worst" ever in terms of how blatantly Southern Pacific ran the show.[153] Rowell worked for Fresno's aptly named conservative *Morning Republican* and Dickson worked for the equally GOP-faithful *Express* of Los Angeles.[154] Again, this was the heyday of progressive Teddy Roosevelt and Taft Republicanism. Together, these two reporters set out to remove the GOP from the grip of the Southern Pacific and bring the party into the national Republican mainstream.[155]

On February 20, 1907, the *Morning Republican* called for a reform movement within the GOP.[156] Dickson started traveling around the state in an attempt to elicit the support of like-minded Republicans for an initial organizational meeting.[157] On May 21 fifteen people attended a meeting that Dickson called and organized at Levy's Cafe in downtown Los Angeles.[158] The group of lawyers, businessmen, and publishers named themselves the "League of

150. Beginning at the turn of the century, California and, in particular, Southern California, was rapidly expanding due to flourishing fruit growers, a dramatic oil boom, and burgeoning industry—including, most notably, the movie industry. *See id.* at 4-9. The rapid development resulted in a state population increase of 60% from 1900 to 1910. *See id.* at 4-7.

151. Los Angeles at the time had more churches per capita than any similarly sized city in the nation. *See id.* at 38.

152. *See id.* at 39. Dr. Haynes's efforts led to the enactment of the initiative in Los Angeles, years before enacted statewide in 1911. *See In re* Pfahler, 150 Cal. 71, 74, 88 P. 270, 271-72 (1906). *See also* Persily, *supra* note 26, at 27-28.

153. *See* MOWRY, *supra* note 133, at 62, 67.

154. *See id.* at 40, 66.

155. *See id.* at 67-68.

156. *See id.* at 68.

157. *See id.* at 69.

158. *See id.*

Lincoln-Roosevelt Republican Clubs."[159] Through their tireless organizational efforts, they ultimately elected their own Republican Governor—Hiram Johnson—and a legislature dedicated to reform.[160]

In 1911 Governor Johnson called a special election to fulfill his promise that powerful private interests would never again dominate state government.[161] Even if they attempted to do so, California voters would have at their disposal a way of reining in such abuses—the power of initiative.[162] As Justice Tobriner stated, "[t]he amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's."[163]

Direct democracy in California thus traces its roots from the era of loose Mexican rule, through a demi-republic, military occupation, statehood, two constitutional conventions, corporate imperialism, and finally to the seminal election of 1911. It is no exaggeration to observe that Californians' right of direct legislation is the child of a long-standing, deeply ingrained mistrust of any instrument of statewide governance, particularly targeting the relationship between state lawmaking representatives and powerful, well-heeled corporate interests.[164]

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159. *See id.* at 71.

160. *See id.* at 135-57.

161. A constitutional amendment adopted in 1902 permitted home rule cities to amend their charters by initiative. *See* CAL. CONST. art. XI, §§ 3(b), (c); *see also* HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 223-26 (1916) (noting that the home rule statute was amended six times, but the 1902 amendment was most significant for the initiative movement).

162. *See* Reports of the California Constitutional Revision Commission, *The Initiative Process* (visited Feb. 22, 1998) <http://library.ca.gov/california/CCRC/reports/html/hs_initiative_process.html>.

> The great legacy of the Progressive Reform Movement in California, Senate Constitutional Amendment No. 22, passed in the Senate on February 9, 1911 by a vote of thirty-five to one, Senator Leroy A. Wright of San Diego casting the only dissenting vote. On February 16, the Assembly passed the amendment with seventy-two votes in favor and no dissenting votes. Placed before the voters at a special election called by Progressive Governor Hiram Johnson on October 10, 1911, the people ratified the Initiative, Referendum, and Recall constitutional amendment by a vote of 168,744 to 52,093.

*Id.*

163. Associated Home Builders of the Greater Eastbay, Inc. v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976).

164. The sentiment persisted beyond the 1911 changes. Two years later, the Seventeenth Amendment to the United States Constitution was ratified, providing for popular election of Senators, rather than selection by state legislatures. *See generally* Bybee, *Ulysses at the Mast*, *supra* note 108 (discussing the adoption of the Seventeenth Amendment and assessing the consequences of direct elec-

As the 1911 ballot pamphlet stated in urging Californians to adopt the initiative:

> It is not intended and will not be a substitute for legislation, but will constitute that safeguard which the people should retain for themselves to supplement the work of the legislature by initiating those measures which the legislature either viciously or negligently fails or refuses to enact; and to hold the legislature in check, and to veto or negative such measures as it may viciously or negligently enact.[165]

The amendment passed and California became one of the early states to allow initiative lawmaking.[166] Within a few years of its adoption, however, it became clear that the electorate had unleashed a monster, at least where achieving an orderly, sensible constitution was concerned. In 1930, the California Constitutional Commission established by Governor C. C. Young reported that "constant amendment" of the organic law had "produced an instrument bad in form, inconstant in particulars, loaded with unnecessary detail, encumbered with provisions of no permanent value, and replete with matter which might more properly be contained in the statute law of the state."[167]

Accordingly, the Commission voted unanimously to call a constitutional convention to revise the constitution and perhaps even the initiative process.[168] The call for a convention was approved by the voters in 1938, but the legislature failed to comply and no convention was held.[169]

The next effort at reform was initiated by Governor Earl Warren in 1947, but the legislative members of the Interim Commission for

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tion).

165. Constitutional Amendment 22, *in* CALIFORNIA BALLOT PAMPHLET, SPECIAL ELECTION (Oct. 11, 1911) [hereinafter 1911 CALIFORNIA BALLOT PAMPHLET] (Comments of Lee C. Gates, Senator, 34th District, and William C. Clark, Assemblyman, 59th District). For this reason California's strict limits on legislative amendment of initiatives invests initiative statutes with "quasi-constitutional" status.

166. Three other states had earlier provided for initiatives: South Dakota in 1898, Utah in 1900, and Oregon in 1902. The initiative process was commonly called the "Oregon System" for many years. *See* Schuman, *supra* note 25, at 948 n.7; *see generally* MARCH FONG EU, A HISTORY OF THE CALIFORNIA INITIATIVE PROCESS 2 (1988) (discussing both the history of the initiative process and popular and recent initiatives).

The referendum process originated much earlier in a popular vote authorized by the Connecticut Legislature in 1818. *See* BALDWIN, *supra* note 108, at 49.

167. Ooley, *supra* note 93, at n.17 and accompanying text.

168. *See id.* at n.17.

169. *Id.* at n.18.

the Revision of the California Constitution again blocked the call for a convention.[170] Various efforts have been mounted since then to temper the use and misuse of the initiative power, but no meaningful reforms have occurred.[171]

Since its inception, approximately 700 initiatives have been proposed for the California ballot, and over 200 have been submitted to the voters.[172] Including those proposed by the legislature,[173] over 425 amendments to the 1879 constitution have been adopted.[174] By 1948 the constitution had grown from 7300 words in the original to 95,000 words.[175] "Indeed the facility of change in our Constitution has nurtured apprehension that the charter is an inadequate protection against the possible political excesses and the possible fears or hysteria of a temporarily irresponsible electoral majority, against what

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170. *See id.* Legislative resistance was apparently due to their fear of reapportionment of seats, a matter that revision was likely to accomplish. *See id.*

171. The only significant changes have been the 1962 addition of language allowing the legislature to place "revisions," as well as amendments, before the voters, and the 1966 deletion of the "indirect initiative." The process adopted in 1911 had originally allowed for both indirect and direct initiatives. The former gave the legislature an opportunity to enact the proposal as law before it went on the ballot. This device had been used only four times in fifty years, and only once successfully. *See id.*

The indirect initiative may be lost but it is not forgotten. The 1996 California Constitution Revision Commission reported to the legislature as follows:

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

CALIFORNIA CONSTITUTION REVISION COMMISSION, FINAL REPORT AND RECOMMENDATIONS TO THE GOVERNOR AND THE LEGISLATURE 30 (1996). Yet, neither these, nor any other reforms recommended by the Commission, have been acted upon or put before the voters.

172. *See* CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 33, at 7.

173. Constitutional amendments may be proposed by the legislature as well as by initiative. *See* CAL. CONST. art. XVIII, § 1.

174. *See* Ooley, *supra* note 93.

175. *See id.* at n.16 and accompanying text. It has shrunk somewhat since then, principally due to the deletion of 14,500 words providing for the San Francisco Panama-Pacific Exposition. *See id.* at n.20.

John Stuart Mill called the 'tyranny of prevailing opinion and feeling.'"[176]

It would be an understatement to observe that the initiative process has been transformed since its inception as a means to curb entrenched politicians and special interests. It is now a favorite tool of politicians and special interests.[177] Perhaps it should not be surprising that the insurance industry spent $88 million dollars on California initiatives in 1988—more than George Bush spent on his entire presidential campaign; or that Southern Pacific Railroad—the target of the 1911 initiative process—has recently sponsored its own ballot measures.[178]

Hiram Johnson would not recognize the electoral device he begat nearly a century ago.[179] It is the driving force in California politics and lawmaking. In major policy areas, it has supplanted the legislature, not checked it,[180] and its dominance is not likely to be undermined any time soon.[181]

## III. THE NATURE OF CALIFORNIA'S INITIATIVE POWER AS EVIDENCED BY THE PLAIN TEXT OF THE CALIFORNIA CONSTITUTION

What is the initiative power? Where does it come from, and what is its relationship to the other branches of government? We ask these questions because, so thoroughly did the Federalists triumph,

176. PALMER & SELVIN, *supra* note 57, at 23.

177. *See id.* at 26. As the California Supreme Court noted shortly after the initiative process was adopted, "[i]t is common knowledge that an initiative measure is originated by some organization or a small group of people." Wallace v. Zinman, 200 Cal. 585, 592, 254 P. 946, 949 (1927); *see also* Persily, *supra* note 26, at 32; *Initiatives: Use and Abuse*, L.A. TIMES, Apr. 19, 1998, at M4 ("[I]t still may be possible for a true grass-roots movement to rise up and right wrongs through the ballot box. But the common use of the initiative in California today is for well-heeled special interests to write their own wishes into state law or the Constitution.").

178. *See* Peter Schrag, *Take the Initiative, Please: Referendum Madness in California*, THE AMERICAN PROSPECT, Sept.-Oct. 1996, at 61-63.

179. *See id.* (stating "[Hiram] Johnson could hardly have imagined how that device, harnessed to modern campaign technologies, could be used by the very politicians and interests it was meant to check.").

180. *See id.*

181. Refinements have been proposed, most notably the 1996 California Constitution Revision Commission. However, none of their proposals has been implemented. *See supra* note 171.

we are not used to thinking about governance in terms different than Montesquieu's tripartite model of divided government.[182]

Under the familiar model, embraced by the federal and most state constitutions,[183] the legislature makes the laws,[184] the executive branch executes the laws,[185] and the judicial branch interprets and applies the laws.[186] Where does the initiative fit in? To arrive at the answer, one must begin with the text of the California Constitution. Article II, Section 1 of the California Constitution provides: "All political power is inherent in the people. Government is instituted for their protection, security, and benefit, and they have the right to alter or reform it when the public good may require."[187] California's constitution thus gives a name to the power of self-governance. The ability of individuals to "create" and regulate government institutions

182. The structure of the federal government is usually traced to two great political theorists of the 18th century: John Locke and Charles Louis de Secondat, Baron de la Brede et de Montesquieu, or simply "Montesquieu." It was Montesquieue's masterpiece, *The Spirit of the Laws*, published in 1748, which had the greatest effect on the framers' conception of republican government. MONTESQUIEU, THE SPIRIT OF THE LAWS (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748). *The Spirit of the Laws* was a comparative study of three types of government: republic, monarchy, and despotism. Montesquieu preferred the first, particularly because the powers of government could be separated in order to ensure individual freedom. *See id.* at 106-25. He noted that liberty could not be preserved where the power to make laws, the power to execute the laws, and the power to interpret the laws were combined in a single organ of government. *See id.* at 117.

183. California's separation of powers principle is even more explicit than its federal counterpart. *See* CAL. CONST. art. III, § 3 ("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 the Constitution.").

184. *See* U.S. CONST. art. I, § 1; CAL. CONST. art. IV, § 1.

185. *See* U.S. CONST. art. II, § 1; CAL. CONST. art. V, § 1.

186. *See* U.S. CONST. art. III, § 1; CAL. CONST. art. VI, § 1. According to Professor Laurence Tribe:

> The upshot is to require, in most instances, that at least two full branches of the federal government cooperate before governmental choices potentially hostile to individual rights or needs can be effected. Passage of a federal law, for example, requires the concurrence of both Houses of Congress and the agreement of the Executive unless Congress can muster a special bicameral majority to override an executive veto; enforcement of the law in turn requires cooperation of the Judiciary and the Executive but no further action by Congress.

LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 2-2 (2d ed. 1988) (citation omitted).

187. CAL. CONST. art. II, § 1. This clause may have been borrowed from the proposed (but twice rejected) Iowa Constititution of 1844, which contained nearly identical language.

is dubbed the "political power." This is the organic power of a sovereign polity. It has been invoked twice in California, in the 1849 and 1879 conventions.

California's exercise of popular sovereignty mirrors that exercised on the federal level, both in the institutions created and the powers delegated.[188] In both cases the people invoked the political power not merely to create and limit the institutions of government, but also to "set bounds to their own power, as against the sudden impulses of mere majorities."[189]

### *A. Philosophical Origins of the Political Power*

The phrase "political power" is best understood as standing for the same philosophical precepts of legitimate government that motivated our federal constitutional framers to begin their charter with the words "We the People." John Locke posited an abstraction to explore the origins of the principle of self-government. Locke was interested in creating a theory of political justice, one that would identify and validate the rights of man and property against a potentially tyrannical state.[190] He began, as did many philosophers after him, in a "state of nature," a hypothetical realm where one might examine such questions as "what is justice" and "what are the legitimate bases for governance of a few over the many" from a theoretically objective perspective.[191] Locke eventually, and famously, concluded that legitimate governments derive their authority only from the consent of those governed.

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188. Both the state and federal governments consist of legislative, executive, and judicial branches. *Compare* U.S. CONST. art. I, § 1 (granting legislative power to Congress); art. II, § 1 (vesting executive power in the President); art. III, § 1 (vesting judicial power in one supreme court), *with* CAL. CONST. art. III, § 3 ("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.").

189. *In re* Duncan, 139 U.S. 449, 461 (1891).

190. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 100-06 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690).

191. Locke wrote, "Where-ever Law ends, Tyranny begins." *Id.* at 418.
*Tyranny* is *the exercise of Power beyond Right.* . . . When the Governour, however intituled, makes not the Law, but his Will, the Rule; and his Commands and Actions are not directed to the preservation of the Properties of his People, but the satisfaction of his own Ambition, Revenge, Covetousness, or any other irregular Passion.
*Id.* at 416-17.

Accordingly, government should be instituted only by and for the well-being of those governed.[192] This may be a commonplace notion today, but it was a radical idea in an era proclaiming the divine right of kings.[193] Locke's influence is seen throughout this nation's most hallowed political texts—most prominently in the Declaration of Independence,[194] but also in the first three words of the preamble to the Federal Constitution.

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192. *See id.* at 384-85.

193. Locke reasoned that in the state of nature people have natural rights to their "Lives, Liberties and Estates." *Id.* at 368. Individuals enter into political society to preserve and protect those rights and transfer to their society and government only so much of those rights as is necessary to do so. *See id.* at 368-71. They agree to allow the majority to make laws for the public good. *See id.* at 343. When the government acts to deprive individuals of their natural rights, it "exercis[es] a Power the People never put into [its] hands." *Id.* at 397. "[I]t can never be supposed to be the Will of the Society, that the Legislative should have a Power to destroy that, which every one designs to secure, by entering into Society...." *Id.* at 430.

> The relevant aspects of Locke's theory of government are as follows. Locke takes the state of nature as his starting point, and argues that autonomous individuals, self-ruling as a matter of natural law, voluntarily agree to band together into a civil society for their own mutual security and advantage. As a central feature of this transaction, each member of the society surrenders his natural right of self-rule to the collective society. This exchange usually . . . results in a binding agreement to abide by the will of the majority of the society's members.
>
> . . . The government, Locke argues, is . . . no more than an agent of the people: it exercises only the powers that have been delegated by the people, and it exercises them then only in a way that the people have authorized.
>
> A government duly appointed by the people and acting within the bounds of its delegated powers is "legitimate"—that is, it has the right, and not merely the power, to make laws binding on society. Conversely, a government that has not been appointed by the people, or that exceeds the scope of its delegated powers—i.e., that exists or acts without the consent of the governed—is not legitimate.

James A. Gardner, *Consent, Legitimacy and Elections: Implementing Popular Sovereignty Under the Lockean Constitution*, 52 U. PITT. L. REV. 189, 201-03 (1990) (citations omitted).

194. THE DECLARATION OF INDEPENDENCE (U.S. 1776). It is also found in earlier pronouncements, such as the Declaration of Resolves of The First Continental Congress, Oct. 14, 1774.

> That the inhabitants of the English colonies in North America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following Rights: Resolved, N. C. D. 1. That they are entitled to life, liberty, & property, and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent.

*Id., reprinted in* 1 JOURNAL OF THE CONTINENTAL CONGRESS 67.

### B. From Political Power to Initiative Power

This Article posits that political power is synonymous with sovereignty. It is a power exercised at its most fundamental level only by the people themselves and not by any institution of lesser delegated authority. But by what mechanism do the people exercise their sovereignty in a populous society? Can they do so through casual means, such as plebiscite or referendum? Or must they do so in a formalized fashion, such as a convention? We believe it is only the latter.

Crafting the California state government in 1849 was surely an exercise of popular sovereignty. No formal political structure then existed—thus resembling, in juridical terms, Locke's state of nature. Nor was there any official mandate for creating a state.[195] In this sense, the constitutional convention was extra-legal, although not illegal, there being no law on the subject. Its authority ultimately derived from several sources. First, it occurred through popular acceptance. The people's election of delegates and ultimate ratification of the constitution, both through election, transmuted a *de facto* government formation into a *de jure* one.[196] Not only had this been demonstrated in Philadelphia in 1787,[197] but it had also been replicated in the several states.

As the California Supreme Court put it, "the entire sovereignty of the people is represented in the convention."[198] A leading nineteenth century treatise concurred—an assemblage was the only occasion for the exercise of true sovereignty—and traced the theory to the Teutonics.[199] "'*De minoribus principes consultant: de majoribus*

195. *See* CONSTITUTION OF THE STATE OF CALIFORNIA 1849, at 5 (Cleland ed., 1949) ("The [1849] convention . . . was not authorized by Congress, territorial legislature, or any other recognized authority. It found its sanction in necessity rather than in law.").

196. *See id.* at 10 ("Without the sanction of President, Congress, or any other authority except the decision of its own people, California organized its government and set up what virtually amounted to a *de facto* if not a *de jure* state.").

197. It should be remembered that the Philadelphia constitutional convention was also extra-legal, and perhaps illegal, in that the delegates' sole charge was to recommend amendments to the Articles of Confederation, a charge they ignored nearly from the first day.

198. Livermore v. Waite, 102 Cal. 113, 117, 36 P. 424, 426 (1894) ("The character and extent of a constitution that may be framed by that body is freed from any limitations other than those contained in the constutitution of the United States. . . . [I]t is . . . the organic law of the state, to which every citizen must yield an acquiescent obedience.").

199. *See* BALDWIN, *supra* note 107, at 259.

*omnes*.'"[200] "We call upon the people to act only on matters of fundamental law. In our constitutional conventions they resume, at long intervals, for a few weeks' time, their delegated powers, and re-found the State."[201]

What then is the relationship between the political power and the initiative power, both of which appertain to the people? The initiative power is a subset of the political power, not its equivalent and not a manifestation of its exercise. Rather, the initiative most closely resembles one of the constituent elements of the political power—the legislative power,[202] a facet of the "creative element" of an already constituted government.[203] However, although "[t]he initiative is the power of the electors to propose [and vote on] statutes and amendments to the Constitution,"[204] it is not identical, either in text or theory, to the same power exercised by the legislature. It is at the same time both superior and inferior to the legislature's power. It is superior in the sense that the legislature may not repeal or amend an initiative statute, unless the enactment so specifies.[205] It is inferior in that the legislature may do more than enact laws and constitutional amendments. For instance, the legislature may pass resolutions, redistrict the state, and call for a federal constitutional convention,

200. *Id.*

201. *Id.*

202. *See* CAL. CONST. art. IV, § 1 ("The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."); Dwyer v. City Council, 200 Cal. 505, 513, 253 P. 932, 935 (1927) ("By the enactment of initiative and referendum laws the people have simply withdrawn from the legislative body and reserved to themselves the right to exercise a part of their inherent legislative power."). This is true also of the power of initiative and referendum at the local level. *See* DeVita v. County of Napa, 9 Cal. 4th 763, 775, 889 P.2d 1019, 1026, 38 Cal. Rptr. 2d 699, 706 (1995) ("[T]he local electorate's right to initiative and referendum is guaranteed by the California Constitution, Article II, section 11, and is generally co-extensive with the legislative power of the local governing body.") (citation omitted).

203. *See* Myers v. English, 9 Cal. 341, 349 (1858) ("The Legislature being the creative element in the system, its action cannot be quickened by the other departments."); Nougues v. Douglass, 7 Cal. 65, 70 (1858) ("The legislative power is the creative element in the government, and was exercised partly by the people in the formation of the Constitution. It is primarily and original, antecedent and fundamental, and must be exercised before the other departments can have anything to do."); Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033, 1045 (1968) ("Citizen participation is not simply a vehicle for minority protection, but a creative element in government and lawmaking.").

204. CAL. CONST. art. II, § 8(a).

205. *See infra* text accompanying notes 213-19.

none of which can be done by initiative.[206] The legislature may also propose revisions to the constitution; an initiative may not.[207] Indeed, "an initiative which seeks to do something other than enact a statute—which seeks to render an administrative decision, adjudicate a dispute, or declare by resolution the views of the resolving body—is not within the initiative power reserved by the people."[208]

Despite the limitations just noted, the initiative power is still a close cousin to the political power itself, at least insofar as the same people who retain the power to create the government in the first place wield it.[209] Indeed, the initiative power is one "reserved" by the people, not one delegated to them.[210] This reservation suggests that the power is an original one, like political power itself.[211] On the other hand, although the people exercise it directly, the initiative power is still fundamentally a legislative power and therefore subject to limits, as is government.

The textual bases for the initiative power may thus be summarized as follows: first, all political power is inherent in the people; second, this political power—the power to make legitimate governments—has been thrice subdivided, with the initiative being a legislative power; third, while the legislative power is principally delegated to the legislature, the direct exercise of legislative power by initiative is reserved to the people; and finally, the people who have reserved the power of initiative are presumably the same people in whom political power is inherent.[212]

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206. *See* AFL-CIO v. Eu, 36 Cal. 3d 687, 708, 686 P.2d 609, 206 Cal. Rptr. 89, 103 (1984) ("Even under the most liberal interpretation, however, the reserved powers of initiative and referendum do not encompass all possible actions of a legislative body."); Legislature v. Deukmejian, 34 Cal. 3d 658, 666, 669 P.2d 17, 21, 194 Cal. Rptr. 781, 785 (1983); Assembly v. Deukmejian, 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982).

207. *Compare* CAL. CONST. art. XVIII, §§ 1, 2, *with* § 3.

208. *AFL-CIO*, 36 Cal.3d at 714, 686 P.2d at 627, 206 Cal. Rptr. at 107.

209. *See* National Paint & Coatings Ass'n v. State of California, 58 Cal. App. 4th 753, 760, 68 Cal. Rptr. 2d 360, 364 (1997) (stating that constitutional provision for initiatives rests on theory that all power of government ultimately resides in the people).

210. *See* CAL. CONST. art. II, § 1, art. IV, § 1.

211. *See infra* Part V.F.

212. Electors obviously have the same qualifications whether they are exercising "political power," as in adopting a constitution by convention, or exercising legislative power, through initiative law-making. Still, "the people's" participation is greatly different. In adopting our current constitution in 1879, over 90% of the electorate voted. *See* SWISHER, *supra* note 114, at 109 (145,093 votes cast out of a potential electorate of 161,000). In contrast, initiative elections draw as few as 36% of the electorate. *See* Reports of the California Constitutional Revi-

The question unanswered by either the textual sources for the initiative power or their philosophical moorings is "so what?" What are the consequences of the initiative power being a *reserved* legislative power, wielded by the same people who have the popular sovereignty to alter the entire governmental system? A survey of relevant case and textual authorities demonstrates that the Lockean notions that led our framers to describe the initiative legislative power as one reserved by the people have enormous, real-world repercussions for ordered California government.

## IV. INITIATIVE-IMPOSED LIMITS ON THE POWER OF THE LEGISLATURE PROVIDE FURTHER DEFINITION OF THE EXTENT AND NATURE OF THE INITIATIVE POWER

California has long provided that the legislature may not amend initiative statutes by another statute unless the initiative permits amendments.[213] In this regard, California is virtually alone among the twenty-two states that have initiatives. This provision of the constitution reflects both this state's adherence to Lockean precepts and its profound, deeply rooted historical distrust of statewide governing institutions. Courts have uniformly explained this provision by reference to the near sacrosanct role that direct legislation plays in the California governmental system as a safety valve for direct participatory democracy.[214] For example, in protecting this "precious or fundamental right"[215] from incursion by the legislature, the judiciary pays little or no deference at all to the legislature's characterizations of

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sion Commission, *supra* note 162.

213. *See* CAL. CONST. art. II, § 10(c) ("The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval."). Of the twenty-two states that use the initiative process for statutes, thirteen allow legislative amendment with concurrence of the governor at any time. *See* PHILIP L. DUBOIS & FLOYD F. FEENEY, IMPROVING THE CALIFORNIA INITIATIVE PROCESS: OPTIONS FOR CHANGE 44-46 (1992). Other states put minor limits on legislative enactment, such as a two year moratorium on amendments, or a super majority vote requirement in the legislature, or both. *See id.* California and Arizona stand alone at the very end of the spectrum; both require, in the normal course of events, a popular vote to amend an initiative statute. *See id.*

214. *See* Huening v. Eu, 231 Cal. App. 3d 766, 777, 282 Cal. Rptr. 664, 671 (1991).

215. Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 51 Cal. 3d 744, 768, 799 P.2d 1220, 1235, 274 Cal. Rptr. 787, 802 (1990); *see, e.g.*, Rossi v. Brown, 9 Cal. 4th 688, 695, 889 P.2d 557, 560, 38 Cal. Rptr. 2d 363, 366 (1995) (quoting Associated Home Builders v. City of Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 45 (1976)).

whether a statute is or is not really an amendment to an initiative[216] or whether a re-enactment of a popularly repealed law is different than the repealed version.[217]

Ineluctably, this restriction on legislative amendment of initiatives means that the people's direct legislative power is greater than the more indirect exercise of that power by intermediaries such as elected representatives.[218] For example, if Californians enact a sweeping insurance reform initiative that permits no amendments, the result is effectively to remove from the legislature a portion of its constitutional power to legislate in the sphere the initiative occupies. Hypothetically, one can envision a scenario where there is little room for a legislature at all.[219]

Looking at the philosophical underpinnings of California's constitution, there can be only one theoretical explanation for this hierarchy. In California, there exists a sliding scale of legislative power: the more the exercise of the legislative power resembles the very core power of self-governance—the closer it gets to the so-called political power—the greater the exercise of that power will be. As the initiative/legislative power is one reserved by the same people who act as popular sovereign, a legislative exercise by those people should, logically, be superior to the exercise of even the same power by a delegatee. Likewise, as a near-cousin of the power of popular sovereignty—the most potent of civil forces—enormous deference should be afforded its exercise. Indeed this is exactly how it works in California.

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216. *See* Bartosh v. Board of Osteopathic Exam'rs, 82 Cal. App. 2d 486, 493-94, 186 P.2d 984, 988 (1947).

217. *See* Martin v. Smith, 176 Cal. App. 2d 115, 120-21, 1 Cal. Rptr. 307, 311 (1959). The 1911 version of Article II, Section 10(c), the prior Article IV, Section 1, was even more emphatic, providing in part that:

> No act, law or amendment to the Constitution, initiated or adopted by the people, shall be subject to the veto power of the Governor, and no act, law or amendment to the Constitution, adopted by the people at the polls . . . shall be amended or repealed except by a vote of the electors, unless otherwise provided in said initiative measure . . . .

218. *See Huening*, 231 Cal. App. 3d at 778, 282 Cal. Rptr. at 672; Franchise Tax Bd. v. Cory, 80 Cal. App. 3d 772, 776, 145 Cal. Rptr. 819, 821 (1978); *Bartosh*, 82 Cal. App. 2d at 493, 186 P.2d at 988; *In re* Nose, 195 Cal. 91, 93, 231 P. 561, 562 (1924) (en banc).

219. *See* DeVita v. County of Napa, 9 Cal. 4th 763, 786, 889 P.2d 1019, 1033, 38 Cal. Rptr. 699, 713 (1995); *Rossi*, 9 Cal. 4th at 699, 889 P.2d at 563, 38 Cal. Rptr. at 369.

### *A. The California Supreme Court Avoids a "Constitutional Armageddon" by Upholding the Electorate's Initiative Power over the Legislature*

The true force of the nearly century-old sliding scale of legislative powers was put to the test directly for the first time only in 1995 in *Amwest Surety Insurance Co. v. Wilson.*[220] California and Arizona are alone in their provision for barring any amendments to statutory initiatives by the legislature.[221] However, for nearly as long as California has had an initiative process, initiative drafters have sought to balance the mistrust of the legislature—which might have impelled the initiative proponents to pursue the direct legislative route in the first place—with a practical recognition that needed technical amendments should be permitted without having to resort to an expensive, cumbersome, and unpredictable statewide election. Thus, for over seventy years,[222] initiative drafters have included language that permits the legislature to enact a legislative amendment if the amendment "furthers" the initiative's "purposes."[223] And yet, what if the legislature enacts an amendment that seeks to frustrate rather than further the initiative's provisions? If the judiciary stepped in and declared an amendment unlawful for failing to further the initiative's reforms, why would that not constitute judicial second-guessing of the policy choices of the legislature as to what does and does not further a reform—a judicial usurpation of the legislative power?

In *Amwest*, drafters of Proposition 103 asked the California Supreme Court to invalidate a legislative amendment to that initiative that exempted surety insurance[224] from its price regulation reforms.[225]

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220. 11 Cal. 4th 1243, 906 P.2d 1112, 48 Cal. Rptr. 2d 12 (1995).

221. *See* ARIZ. CONST. art. 21, § 1; CAL. CONST. art. II, § 10.

222. Defining the first initiative to employ this restriction has proven difficult, but similar language was subject to judicial interpretation as early as 1924. *See In re* Nose, 195 Cal. 91, 231 P. 561 (1924).

223. CALIFORNIA COMMISSION ON CAMPAIGN FINANCING, *supra* note 33, at 94.

224. Surety insurance is essentially an insurance policy that one party, a principal, takes out to protect another party, an obligee, against the principal's default or misperformance of its contractual obligations to the obligee. The surety bond is an agreement providing for monetary compensation for the obligee should there be a failure by the principal to perform specified acts within the specified time period. *See* ALLSTATE INSURANCE COMPANY, INSURANCE HANDBOOK FOR REPORTERS 260 (2d ed. 1985).

225. *See Amwest*, 11 Cal. 4th at 1249, 906 P.2d at 1115, 48 Cal. Rptr. 2d at 15. Proposition 103 was a multifaceted property-casualty insurance reform initiative enacted over an insurer-backed, $88 million opposition campaign in 1988. Its price regulatory reforms include a rollback of insurance prices to 80% of what they were the year before the initiative's enactment, and a provision providing for strict prior

A detailed account of the facts of the litigation provides a modern day case study of why the constitutional framers may have been justified in distrusting any significant initiative amendment role for the legislature. Such an explication likewise demonstrates how courts and advocates have struggled to describe the initiative power's precise features against a backdrop of the more familiar tripartite model of representative government.

Section 8 of Proposition 103, uncodified, contained a provision that allowed the legislature to amend the initiative upon a two-thirds vote, but only when such an amendment "further[ed] its purposes."[226] The day after Proposition 103 passed, a group of surety insurers filed suit in the Los Angeles Superior Court in part on the grounds that surety insurance should not be included in Proposition 103—even though the initiative unambiguously covered surety insurance.[227] The superior court rejected Amwest's request for a judge-made exemption.[228]

The surety industry then took its case to the legislature, which unanimously enacted AB 3798 on consent calendar.[229] The bill would have exempted the $515 million surety insurance industry[230] from Proposition 103's price control reforms.[231] The bill claimed that exempting the industry from Proposition 103 furthered the initiative's

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approval review of any requested insurance rate increases. *See* CAL. INS. CODE §§ 1861.01, 1861.05 (West 1993).

226. 1988 Cal. Stat. A-290.

227. *See* Amwest Surety Ins. Co. v. Wilson, No. C704879, at 3 (L.A. Sup. Ct. 1991). The initiative's broad scope encompassed auto insurance, homeowner's insurance, and surety insurance, among others, and is set forth in Insurance Code section 1861.13 which provides that Proposition 103 applies "to all insurance on risks or operations in this state, except those listed in section 1851." CAL. INS. CODE § 1861.13 (West 1993). Like automobile and homeowner's insurance, surety insurance is not exempted in section 1851. *See id.* § 1851. Thus, surety, like all other kinds not listed, is subject to the initiative's reforms.

228. *See* Vogel Minute Order, Amwest Surety Ins. Co. v. Deukmejian, No. C704879 (L.A. Sup. Ct. 1990). Based on its finding that Proposition 103 applied to surety insurers, the superior court ruled that any relief sought from Proposition 103's provisions must be made through the administrative process set forth in the initiative. *See id.* The court noted that "the fact remains that there is no exemption for surety rates" under Proposition 103. *Id.* Resolution of this statutory question was all that remained in the litigation because the California Supreme Court's decision in *Calfarm v. Deukmejian* mooted the surety insurers' constitutional claims. *See* Calfarm v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 285 Cal. Rptr. 161 (1989).

229. *See Amwest*, No. C704879, at 5.

230. *See* CALIFORNIA DEPARTMENT OF INSURANCE, 122ND ANNUAL REPORT OF THE INSURANCE COMMISSIONER 267 (1989).

231. *See* CAL. INS. CODE § 1861.135(a) (repealed 1988).

purpose by clarifying its application—or non-application—to sureties.

The proponents of Proposition 103 intervened in the pending superior court action and challenged the validity of the exemption.[232] The court[233] applied the usual deferential standard of review for legislation and ruled that the amendment violated neither the California Constitution nor the terms of Proposition 103.[234] The court wrote, "[T]he Legislature's power to amend or repeal [an initiative] is plenary."[235]

The court of appeal reversed,[236] and the California Supreme Court sustained its decision.[237] The key issue was the standard of review. The industry argued that any level of review more stringent than rational basis would lead to a "constitutional Armageddon," whereby the courts would be substituting their judgments for those of the legislature.[238] The initiative's proponents, joined by the Department of Insurance, argued that independent review was required.[239] They argued that, since under Article II, Section 10(c), Californians had the right to bar amendments outright, they also possessed the lesser included power to limit the legislature's amending authority.[240] In other words, the court owed deference not to the judgment of the legislature, but to that of the people, as expressed in the initiative.[241] The Supreme Court agreed:

> In enacting [AB 3798] the Legislature did not purport to interpret the Constitution, but only to amend the statutory provisions enacted by Proposition 103. The issue before us is whether the Legislature exceeded its authority. The "rule of deference to legislative interpretation" of the California Constitution, therefore, has no application in the present case.[242]

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232. *See Amwest*, 11 Cal. 4th at 1250, 906 P.2d 1112 at 1116, 48 Cal. Rptr. 2d at 16.

233. Judge Miriam Vogel presided over the first trial, but was replaced by Judge Janavs when the former was elevated to the court of appeal.

234. *See Amwest*, No. C704879, at 6.

235. *Id.* at 5-6.

236. *See* Amwest Surety Ins. Co. v. Wilson, 40 Cal. App. 4th 225, 241, 25 Cal. Rptr. 2d 611, 620 (1993).

237. *See Amwest*, 11 Cal. 4th at 1268, 906 P.2d at 1128, 48 Cal. Rptr. 2d at 28.

238. *See id.* at 1251, 906 P.2d at 1116, 48 Cal. Rptr. 2d at 16.

239. *See id.*

240. *See id.*

241. *See id.* at 1254, 906 P.2d at 1119, 48 Cal. Rptr. 2d at 19.

242. *Id.* at 1253, 906 P.2d at 1118, 48 Cal. Rptr. 2d at 18. Recall that Article II,

The court then drew an analogy to cases where the legislature is called into special session and enacts legislation that exceeds the subject matter of the call.[243] While any restriction on the power of the legislature must be "strictly construed," and thus all intendments inured in favor of upholding the enactment,[244] when the people exercise their right under Article II, Section 10(c), the court must determine whether an act "furthers" an initiative's purposes or subverts them.[245] In *Amwest* the California Supreme Court held that AB 3798 did not "further the purposes" of Proposition 103, and it declared the statute unlawful.[246]

*Amwest* thus establishes that the electorate's legislative power is constitutionally superior to the legislature's exercise of the same power. The case stands for the proposition that a searching judicial scrutiny will be applied to those statutes that do not otherwise spark heightened review when those statutes are amendments to initiatives.

### *B. Judicial Enforcement of California's Sliding Scale Power Relationship Does Not Violate Other Constitutional Values, Most Notably the Separation of Powers*

As observed previously, it appears that in California's constitutional scheme, the closer one gets to the exercise of the core political power, the more definitive—and therefore powerful—the expression of governing will is. Despite *Amwest*, it may be argued that a judicially enforced hierarchy between the initiative power and the legislature practically, if not theoretically, violates the separation of powers. That question was answered in two of California's landmark initiative

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Section 10(c), of the California Constitution provides in pertinent part: "[The legislature] may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." CAL. CONST. art. II, § 10(c).

243. *See Amwest*, 11 Cal. 4th at 1254-55, 906 P.2d at 1119-20, 48 Cal. Rptr. 2d at 18-19.

244. *Id.* at 1255, 906 P.2d at 1119, 48 Cal. Rptr. at 20.

245. *See id.* at 1268-69, 906 P.2d at 1128, 48 Cal. Rptr. at 28-29 (Mosk, J., concurring).

246. *See id.* at 1265, 906 P.2d at 1126, 48 Cal. Rptr. at 26. Similarly, in *DeVita v. County of Napa*, 9 Cal. 4th 763, 889 P.2d 1019, 38 Cal. Rptr. 2d 699 (1995), the supreme court ruled on the validity of an initiative that placed formidable restrictions on the city council's ability to alter a general plan currently in effect. *See id.* at 799, 889 P.2d at 1042, 38 Cal. Rptr. 2d at 722. Once more, the California Supreme Court directed those who disliked the initiative back to the people directly, thereby once again reaffirming that the people's legislative power is simply greater and more expansive than the same power exercised by elected officials. *See id.*

law cases, *In re Pfahler*[247] and *Associated Home Builders v. Livermore*.[248] In light of the holding in *Amwest*, these two cases fill in key doctrinal gaps about the contours and source of the initiative power in relation to the other powers in our system of governance.

In *Pfahler* the California Supreme Court considered a challenge to the then-new Los Angeles City Charter, specifically, the amendment to the Charter providing for ordinances to be enacted directly via initiative.[249] Petitioners argued, *inter alia*, that Los Angeles's initiative amendment to the City Charter violated Article XI, Section 11 of the California Constitution[250] because it allegedly "interfere[d] with and suspend[ed] the exercise of the police power" granted by the state to the city council.[251] Rejecting that argument, the California Supreme Court held that "[t]he [initiative] amendment does not purport to restrict or suspend in the slightest degree the exercise of the police power vested in the municipality."[252] Rather, the initiative amendment detailed "the manner of [the police power's] exercise."[253] The California Supreme Court explained:

> The rule against the suspension of the police power invoked by petitioner means no more than that the power is a continuous one, reposed somewhere, and one that cannot be barred or suspended by contract or irrepealable law, and never has been held to mean that a law enacted in the exercise of the police power must ever be open to instantaneous alteration [by the City Council].[254]

The court further stated:

> The claim that the power to make police regulations upon a subject covered by an ordinance adopted by the people is taken from the *city* by the adoption of such ordinance finds its source in the erroneous assumption, which is the basis of

247. 150 Cal. 71, 88 P. 270 (1906).
248. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).
249. *See Pfahler*, 150 Cal. at 74, 88 P. at 272.
250. That provision of the constitution provided that "[a] county, city, town, or township may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws." CAL. CONST. of 1879, art. XI, § 11. Through this section, the people of California "have made a direct constitutional grant of the police power of the state to every municipal corporation for local purposes." *Pfahler*, 150 Cal. at 80, 88 P. at 274 (quoting Denninger v. Recorder's Court, 145 Cal. 629, 631, 79 P. 360, 361 (1904)).
251. *Pfahler*, 150 Cal. at 84, 88 P. at 276.
252. *Id.* at 85, 88 P. at 276.
253. *Id.*
254. *Id.*

> many of petitioner's arguments, that the city council is the "city."[255]

Thus, for example, in *Amwest*, the insurer's argument that independent judicial review of AB 3798, pursuant to the dictates of section 8(b) of Proposition 103, inappropriately usurps the legislative power is based upon the erroneous premise that circumscribing the state legislature's power is the same as circumscribing the legislative power.[256] Application of independent review to an initiative amendment does not mean that the statute can never be enacted—such a result would truly circumscribe the legislative power. Rather, invalidating such an amendment simply would mean that "the matter" of the amendment "has been removed from the forum of the [legislature] to the forum of the electorate."[257] The offending amendment would have to be enacted or defeated by the people exercising the direct and paramount legislative power, rather than by the legislature ostensibly exercising its conditioned, delegated amending power.

*Rossi v. Brown*[258] employs similar reasoning. In *Rossi* the California Supreme Court held that the San Francisco County electorate may lawfully repeal a tax ordinance directly employing their legislative power of initiative.[259] In so holding, the court expressly disapproved of long relied upon dicta from *Campen v. Greiner*,[260] in which the appellate court ruled that the legislative powers of a city's electorate were no greater than the same powers of a local city council.[261] In disapproving *Campen* the California Supreme Court observed:

> The *Campen* court overlooked a fundamental aspect of the initiative power. . . . The people's reserved power of initiative *is* greater than the power of the legislative body. The latter may not bind future Legislatures, but by constitutional and charter mandate, unless an initiative measure expressly provides otherwise, an initiative measure may be amended or repealed only by the electorate. Thus,

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255. *Id.* at 85-86, 88 P. at 276.
256. *See* Amwest Surety Ins. Co. v. Wilson, 11 Cal. 4th 1243, 1253-55, 906 P.2d 1112, 1116-19, 48 Cal. Rptr. 12, 16-19 (1995).
257. Dwyer v. City Council, 200 Cal. 505, 516, 253 P. 932, 936 (1927).
258. 9 Cal. 4th 688, 889 P.2d 557, 38 Cal. Rptr. 2d 363 (1995).
259. *See id.* at 714, 889 P.2d at 573, 38 Cal. Rptr. 2d at 379.
260. 15 Cal. App. 3d 836, 93 Cal. Rptr. 525 (1971).
261. *See id.*

> through exercise of the initiative power the people *may* bind future legislative bodies *other than the people themselves.*[262]

The latter italicized portion is key and strikingly similar to *Pfahler.* So long as the people do not, by an exercise of their legislative power, restrict *both* their own legislative power and the legislature's, restricting the legislature's power does not operate to restrict the legislative power at all. It still exists unencumbered in the electorate, who can enact directly what the legislature cannot.

This has somewhat of an awkward result for those used to dichotomous legal worlds consisting only of statutes and constitutional provisions or statutes of differing jurisdictions. In California, it seems, some statutes are more equal than others. Initiative statutes—enacted by the same sovereign, identical in every respect if side-by-side in a code book—are nevertheless more equal than statutes enacted by the legislature.

This was the holding in *Associated Home Builders v. Livermore.*[263] In *Livermore* the California Supreme Court considered the lawfulness of a local initiative that prohibited any further residential building until the completion of certain sewage and school improvements.[264] Under California's Government Code certain notice and hearing requirements had to be followed before land use and other zoning changes such as those enacted by the initiative could go into effect.[265] Thus, the court had to grapple with the question of whether the local initiative was invalid because the local initiative, by its very nature, could not comply with those state law notice and hearing requirements.[266]

In considering this issue, the court had to address its prior ruling in *Hurst v. Burlingame,*[267] in which it reasoned that the people acting directly only had as much—or as little—legislative power as the legislative body; in this case, the city council.[268] Therefore, the *Hurst* court reasoned, if the city council could not do it, the people could not do it

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262. *Rossi,* 9 Cal. 4th at 715-16, 889 P.2d at 574, 38 Cal. Rptr. 2d at 380 (citations omitted) (third emphasis added).

263. 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976).

264. *See id.* at 589, 557 P.2d at 476, 135 Cal. Rptr. at 44.

265. *See id.* at 590-91, 557 P.2d at 476-77, 135 Cal. Rptr. at 44-45.

266. *See id.* at 590, 557 P.2d at 475, 135 Cal. Rptr. at 44.

267. 207 Cal. 134, 277 P. 308 (1929). *Hurst* analyzed the validity of an initiative regulating the location of residences and businesses, which was in conflict with the Zoning Act of 1917. *See id.*

268. *See id.* at 141, 277 P. at 311.

either.[269] The *Livermore* court took the extraordinary step of forthrightly and self-consciously overruling *Hurst*.[270] Recognizing that such a rule as applied to *Livermore* would mean that the city council could enact zoning changes, but the people could not, the *Livermore* court decried *Hurst's* decree of inequality in the name of equality.[271] Having said as much, the court deftly avoided having to strike the government code notice and hearing requirements by interpreting them as not applying to initiatives.[272]

## V. UPHOLDING THE "PRECIOUS RIGHT" OF INITIATIVE—THE JUDICIARY'S RELUCTANCE TO ENFORCE CONSTITUTIONAL-BASED LIMITS ON THE INITIATIVE POWER

The judiciary's efforts to safeguard the initiative power are not limited to statute versus statute or legislature versus electorate confrontations. In virtually every case where there might be a constitutional limit on the people's direct legislative power, courts have narrowly construed that limit as to preserve as much legislative discretion as possible for the electorate.[273] In keeping with the initiative's proximity to the most elemental of governmental powers, courts in California will do virtually whatever it takes to avoid striking an initiative.[274]

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269. *See id.* at 141-42, 277 P. at 311.

270. *See Livermore*, 18 Cal. 3d at 588, 557 P.2d at 475, 135 Cal. Rptr. at 43.

271. *See id.* at 593-94, 557 P.2d at 479, 135 Cal. Rptr. at 47. Any doubt as to the people's ability to directly affect zoning changes or land use decisions of local agencies was definitively put to rest in the California Supreme Court's decision in *DeVita v. County of Napa*, in which the court held that the people's initiative power encompasses the ability to place meaningful restrictions on a local agency's future ability to revise land use elements and zoning in a general plan. *See* Devita v. County of Napa, 9 Cal. 4th 763, 770-71, 889 P.2d 1019, 1023, 38 Cal. Rptr. 2d 699, 703 (1995).

272. *See Livermore*, 18 Cal. 3d at 593, 557 P.2d at 479, 135 Cal. Rptr. at 47.

273. It is important to observe that of all the so-called limits on the initiative power discussed in this Article, only one affects the way an initiative can be presented to the people—the prohibition against initiatives embracing more than a single subject. *See* CAL. CONST. art. II, § 8(d). The people being without the power to enact initiatives embracing more than one subject, if this limit is violated, the entire initiative fails. *See* Brosnahan v. Brown, 32 Cal. 3d 236, 245, 186 Cal. Rptr. 30, 35, 651 P.2d 274, 279 (1982). All of the other limits appearing in the constitution and discussed here—statewide concern, and distinctions between revision/amendment, administrative/legislative, and referendum/initiative—are simply restrictions on the types of initiatives that can be enacted in the first place. *See also* CAL. CONST. art. II, § 12 (prohibiting an initiative from naming a person or corporation).

274. There are some things that the legislature may do that the people exercis-

### *A. The Single Subject Rule Has Been Construed so Broadly as to be a Virtual Nullity*

As many commentators have noted,[275] the "single subject rule" in California has devolved into a virtual nullity; it is a rule with few, if any, teeth. Under Article II, Section 8(d) of the California Constitution, initiative measures must be limited to a single subject.[276] In

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ing their initiative power cannot, but those differences are inconsequential here. For example, because the people's initiative power is solely the power to legislate, it does not reach the enactment of resolutions. Thus, in *AFL-CIO v. Eu* the court held that under Article II, Section 8(a) of the California Constitution, the initiative power applied only to statutes and amendments. 36 Cal. 3d 687, 714, 686 P.2d 609, 618, 206 Cal. Rptr. 89, 101 (1984). The court refused to permit a resolution calling for a balanced federal budget on the ballot. *See id.* Presumably in the same vein, the electorate could not present honorary certificates to noteworthy citizens, hold hearings, or perform any of the other non-legislative tasks expected of our legislature.

Similarly, where other state constitutional provisions circumscribe the legislature power, those rules apply with equal force to direct legislation. Thus, in *Legislature v. Deukmejian*, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983), the court held that the constitutional restrictions regarding the timing of reapportionment applied to direct as well as indirect legislation.

These authorities simply reinforce the conclusion that the initiative power is a power to enact legislation, albeit an unusually potent version of that power. These authorities also more broadly reinforce the preeminent supremacy of the political power, insofar as the constitutional provisions that bind direct and indirect legislation alike were enacted pursuant to this ultimate, government-making authority, supreme even to the initiative power.

275. *See, e.g.*, Marilyn E. Minger, *Putting the "Single" Back in the Single-Subject Rule: A Proposal for Initiative Reform in California*, 24 U.C. DAVIS L. REV. 879 (1991) (noting that the single subject rule has become a virtual nullity); *Initiative Bloat*, SACRAMENTO BEE, Feb. 24, 1998, at B4 ("Because timid courts have failed to enforce the constitutional requirement that initiatives deal with only one subject, too many of the measures that reach the ballot are overly complicated omnibus measures.").

276. *See* CAL. CONST. art. II, § 8(d). California courts and commentators have elucidated three reasons for the single subject rule. First, it prevents initiative drafters from "log rolling"—putting unrelated provisions in an initiative that might attract the support of some disparate interest groups. Second, the single subject rule exists in order to prevent voter confusion as to exactly what one is voting for. *See* John C. Barker, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions*, 19 HASTINGS CONST. L.Q. 1107, 1162 (1992). This rule recognizes that while there is the fiction that the voters, like legislators, are aware of the contents of legislation, that, in fact, where initiatives are concerned, votes are likely to be cast on the basis of sound-bites and electioneering. For example, if an initiative provision involves dog track racing, the regulation of boxing, and insurance reform, the campaign on its behalf might focus on only the insurance reform facets of the initiative, thus deluding the voters into believing that the initiative's entire scope embraced only the insurance reform. Third and finally, the single subject rule prevents the dilution of votes. *See* Minger, *supra* note 275, at 896. Without such a rule, the outcome of initiative elections may not turn with a voter's agreement on a particular issue, but only an overall agreement with most of

*Brosnahan v. Brown*[277] the California Supreme Court held that so long as the various portions of an initiative were "reasonably germane" to the topic generally embraced by the initiative, the single subject rule is satisfied.[278] In so holding, the court rejected the theory, pressed by the dissent in that case, that the single subject rule ought to demand that all of the provisions of an initiative be somehow "interdependent" upon one another, creating a single clock-like mechanism.[279]

The court settled upon the "reasonably germane" standard and rejected any more stringent application of the constitutional rule expressly because the courts view it as their role to "'jealousy guard'" the exercise of the initiative power.[280] There is one primary reason why, both abstractly and in application, the single subject rule has so few teeth. The courts define "subject" very broadly. Essentially, the courts will abide by any subject that is one quantum more specific than "doing good." "Criminal justice" and "insurance reform," for example, have been subjects specific enough for the California Supreme Court to satisfy the single subject rule.[281] The *Brosnahan* court also expressly equates the "object" of an initiative with the "subject."[282] Thus, so long as the court can identify a single overarching aim to an initiative—its object—the single subject rule is satisfied.[283]

### *B. The Referendum/Initiative Distinction Has Been Eliminated*

In *Rossi* the California Supreme Court held that the electorate of San Francisco County may lawfully repeal a tax ordinance directly, employing their legislative power of initiative even when they could not have lawfully accomplished the same repeal by referendum.[284]

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the topics addressed in the initiative. *See id.* at 885-93.

277. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

278. *Brosnahan*, 32 Cal. 3d at 245, 651 P.2d at 279, 186 Cal. Rptr. at 35.

279. *See id.* at 248-51, 651 P.2d at 281-83, 186 Cal. Rptr. at 37-39.

280. *Id.* at 262, 651 P.2d at 289, 186 Cal. Rptr. at 45.

281. *See generally id.*, 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (upholding the "Victim's Bill of Rights," Proposition 8 on June 1982 primary election ballot); Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989) (upholding insurance regulation initiative, Proposition 103 on November 1988 election ballot); Daniel H. Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. REV. 936 (1983) (discussing the various tests used to determine whether a proposition meets the single subject rule).

282. *See Brosnahan*, 32 Cal. 3d at 277, 651 P.2d at 299, 186 Cal. Rptr. at 55.

283. *See id.* at 245, 651 P.2d at 279, 186 Cal. Rptr. at 35.

284. *See* Rossi v. Brown, 9 Cal. 4th 688, 693, 889 P.2d 557, 559, 38 Cal. Rptr. 2d 363, 365 (1995).

The question in that case was whether Article II, Section 9 of the California Constitution, which prohibited the repeal by referendum of a tax ordinance for the usual expenses of the state, meant that the people similarly could not repeal a tax ordinance by initiative.[285] Again, the court sided with an expansive reading of the initiative power. It held that, despite the fact that permitting a repeal of a tax ordinance by initiative would, as a practical matter, eviscerate the constitution's prohibition against the repeal of such ordinances by referendum, the people nevertheless had such initiative power.[286] Here, the supreme court chose, in essence, to open up a giant loophole in the constitutional restriction upon referendum rather than remove a sphere of initiative lawmaking—repeal of taxes—from the electorate.

### *C. The Supreme Court's Deferential Test for Severability, While Serving to Uphold Initiatives, Can Nonetheless Frustrate Voter Intent*

Nowhere is the California Supreme Court's determination to uphold the will of the electorate more evident than in its test for severability. Most initiatives include a so-called "severability" clause; that is, a provision that empowers the courts to sever the lawful portions of an initiative from the unlawful.[287] California courts use a three-part test for determining severability: the lawful provisions must be grammatically, functionally and volitionally severable from the invalid provisions to survive.[288]

Grammatical severability and functional severability are exactly that—if the surviving portion of a law reads sensibly and works—absent the invalid portion—it will be severed. Volitional severability essentially asks the question, "if the voters could have foreseen the invalidation of

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285. *See id.*

286. *See id.* at 711-14, 889 P.2d at 571-73, 38 Cal. Rptr. 2d at 377-79.

287. A typical severability clause might read as follows:

> "If any provision of this act, or the application of any such provision to any person or circumstances, shall be held invalid, the remainder of this act to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby, and to this end the provisions of this act are severable."

This example is drawn from Proposition 73, discussed in text. *See* Gerken v. Fair Political Practices Comm'n, 6 Cal. 4th 707, 713, 863 P.2d 694, 698, 25 Cal. Rptr. 2d 449, 453 (1993).

288. *See* Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 821, 258 Cal. Rptr. 161, 771 P.2d 1247 (1989).

some of the initiative, would they still have voted for it?"[289] This inquiry is an effort to uncover and preserve the will of the electorate. In actual application, however, it can subvert that will in the name of upholding the initiative power.

Such a counter-intuitive result occurred in *Gerken v. Fair Political Practices Commission*.[290] There, the California Supreme Court considered how to mediate the results of the 1988 election in which two competing campaign finance reform measures were approved by the voters. Both Propositions 68 and 73 imposed contribution limitations on candidates, although they differed somewhat in scope and detail. The most significant difference was that Proposition 68 provided partial state funding of elections, while Proposition 73 prohibited public funding and state-paid political mailings.[291]

Where two or more competing measures are approved by the voters at the same election, the initiative receiving the greatest number of votes prevails.[292] Proposition 73 received more votes than Proposition 68. Accordingly, in *Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission*,[293] the court held the latter inoperative. A problem arose, however, when in *Service Employees International v. Fair Political Practices Commissionn*, the Ninth Circuit substantially invalidated the guts of Proposition 73 as unconstitutionally favoring incumbent legislators.[294] After that ruling, the proponents of Proposition 68 petitioned the California Supreme Court to revive their initiative, arguing that, for all intents and purposes, Proposition 73 was no longer in effect.[295]

In *Gerken*, the court refused to revive Proposition 68. It held that so long as any portion of Proposition 73 remained effective, that initiative would still trump Proposition 68, even if what remained of the former was relatively insubstantial.[296] In order to reach this result, the court had to first sever the invalid portions of Proposition 73 from the remainder of the initiative. It held that all three elements—grammatical, functional, and volitional severability—were met.

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289. *Gerken*, 6 Cal. 4th at 714, 863 P.2d at 698, 25 Cal. Rptr. 2d at 453.
290. 6 Cal. 4th 707, 863 P.2d 694, 25 Cal. Rptr. 2d 449 (1993).
291. *See id.* at 711, 863 P.2d at 696, 25 Cal. Rptr.2d at 451.
292. CAL. CONST. art. II, § 10(b) ("when two or more measures are competing initiatives, . . . only the provisions of the measure receiving the highest number of affirmative votes [can] be enforced").
293. 51 Cal.3d 744, 799 P.2d 1220, 274 Cal. Rptr. 787 (1990).
294. 955 F.2d 1312 (1992).
295. *See Gerken*, 6 Cal.4th at 710, 863 P.2d at 697-98, 25 Cal. Rptr. 2d at 451.
296. *See id.* at 711, 863 P.2d at 698, 25 Cal. Rptr. 2d at 451.

The court held that that so long as the electorate's attention was 'sufficiently focused' on the remaining, valid provisions, it would conclusively presume that the electorate preferred this "half a loaf" over the entirety of the other, less popular, initiative.[297] The court reasoned that since the initiative's ban on incumbents' self-promotional mailings was mentioned conspicuously in the ballot pamphlet, the provision was volitionally severable. And since this "substantial" provision of Proposition 73 remained, it was as if the Proposition itself remained valid, *i.e.*, was itself a complete expression of legislative will that would, even in its truncated form, trump the opposing Proposition 68.[298]

Justice Arabian's blistering dissent[299] observed that the court's result ironically left Californians with virtually nothing, despite having voted twice in the same election for meaningful campaign finance reform. In response, the majority pointed to Proposition 73's severability clause, explaining that the result was required by the plain language of the severability clause. According to the majority, a severability clause represents a legislative dictate, as deserving of deference as the substantive portions of an initiative.[300] Failure to apply broadly such a savings clause, even to the exclusion of a more practically satisfying result, would violate the court's traditional deference to winning initiatives.[301]

This result surely represents the doctrinal apotheosis—the dissent would say the doctrinal *ad absurdum reductio*—of the California Supreme Court's deference to popularly enacted legislation. So deferential is the court to every word, and every expression of legislative will of the electorate that such deference actually can serve to impede achieving the voters' substantive objectives.

### *D. The Administrative/Legislative Distinction Has Been Abandoned*

Yet another example of the California judiciary's desire to uphold direct legislation can be seen from its efforts to reduce the application of the so-called "administrative/legislative" restriction on the referendum in favor

297. *Id.* at 715, 863 P.2d at 702, 25 Cal. Rptr. 2d at 454.
298. *Id.* at 717, 863 P.2d at 700-02, 25 Cal. Rptr. 2d at 455 ("we can resolve this litigation by finding that at least one substantial part of Proposition 73 is severable and operative").
299. *See id.* at 725, 863 P.2d at 706, 25 Cal. Rptr. at 461 (Arabian, J., dissenting) ("I dissent from a result that reduces to such an anemic state the exercise of the powers of initiative and referendum.").
300. *See id.* at 719 n.10, 863 P.2d at 702 n.10, 25 Cal.Rptr. at 457 n.10.
301. *Id.*

of an analysis of whether a local initiative is preempted by superior state law.[302]

As the referendum is a legislative power, California courts have held that any referendum—or, by extension, any initiative—that seeks to exercise executive regulatory power is beyond the ability of the electorate. Courts have likewise expressed a practical concern that interference by the electorate in executive functions would be inimical to orderly governance.[303]

However, uncertainty arises when trying to differentiate between an action that is "legislative" and an action that is "executive" in character. In *McKevitt v. Sacramento*,[304] the California Court of Appeal held that there was a two-part test for legislation. Legislation must (1) declare a public purpose and (2) declare a means for implementing that purpose.[305] In contrast, the court set out a three-part test for administrative actions: (1) pre-existing legislative policies and purposes must be evident; and (2) the actions must be necessary to carry out those pre-existing policies or purposes; or (3) an administrative action must be one that "devolve[s]" upon it, meaning that the entity exercising the power does so by the "organic law of its existence."[306]

The problem in distinguishing between legislative and administrative enactments is especially acute in cases where a local initiative is challenged as unlawfully impairing the operation of a superior state law that has delegated certain powers to a local governing body, such as a city council. When the local governing body moves to fulfill this state-imposed duty, and the local electorate moves to overrule the action, should a court try and

302. *See* Simpson v. Hite, 36 Cal. 2d 125, 222 P.2d 225 (1950), discussed *infra* notes 308-314 and accompanying text.

303. *See* Hopping v. Council of City of Richmond, 170 Cal. 605, 611, 150 P. 977, 979 (1915) ("[t]he public discussion which led to the adoption of the referendum [process in the city charter] shows that it was directed at the supposed evils of legislation alone. To allow it to be invoked to annul or delay executive conduct would destroy the efficiency necessary to the successful administration of the business affairs of the City.").

304. 55 Cal. App. 117, 203 P. 132 (1921).

305. *See id.* at 124, 203 P. at 136.

306. *Id.* at 124, 203 P. at 136. While it is impossible to concretely define the third prong of the administrative test, the most likely interpretation is that this is a reference to the inherent powers of regulatory agencies to administer the quasi-legislative or quasi-adjudicatory functions conveyed to them. "[R]ather, '[i]t is well settled in this state that [administrative] officials may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers.'" *Calfarm*, 48 Cal. 3d at 824-25, 771 P.2d at 1258, 258 Cal. Rptr. at 172 (quoting Rich Vision Ctr., Inc. v. Board of Med. Exam'rs, 144 Cal. App. 3d 110, 114, 192 Cal. Rptr. 455, 457 (1983) quoting Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 810, 151 P. 2d 505 (1944)).

divine whether the elected body's action is administrative in character, and thus a referendum to overrule it is an impermissible effort by the electorate to exercise administrative power? Or, should the court view the case as simply about state preemption?

In *Simpson v. Hite*[307] a proposed 1950 initiative would have repealed the Los Angeles County Board of Supervisors' resolution designating a certain site for a courthouse, and designated another site instead.[308] Initiative proponents wanted only a single building for all criminal, civil, and library functions; the board of supervisors, however, approved three different sites.[309] *Simpson* represents a transitional step in the California courts' merging of administrative/legislative cases and cases involving a local initiative trammeling an area of statewide concern.

In adjudicating the lawfulness of the initiative, the court recognized that under state law the various county boards of supervisors are required to find "'suitable quarters'" for courts.[310] The court inferred from this commandment that "the state has acted to establish the basic policy [regarding courthouse placement] and has vested the responsibility for carrying out that policy in a board of supervisors."[311] The court further held: "It would be beyond the powers of a board of supervisors to repeal or amend the state-declared policy; likewise, it is beyond the powers of the electorate of Los Angeles County by initiative procedure to repeal or amend such state policy."[312]

One way to view the court's holding is that the state had vested sole administrative power to determine the location of courthouses in the county boards of supervisors.[313] However, this case is most frequently cited for the proposition that a local initiative cannot impinge upon an area of statewide concern.[314] Thus, another way to view the case is that the state had removed from localities the discretion to determine who gets to make the final decision on courthouse placement.[315] In other words, the state has made its wishes clear as to who ought to have the final word—the county board of supervisors, and not the electorate.

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307. 36 Cal. 2d 125, 222 P.2d 225 (1950).
308. *See id.* at 127, 222 P.2d at 226.
309. *See id.* at 127 n.1, 222 P.2d at 226 n.1.
310. *Id.* at 127, 222 P.2d at 226-27.
311. *Id.* at 130, 222 P.2d at 228.
312. *Id.* at 131, 222 P.2d at 229.
313. *See id.* at 131, 222 P.2d at 229.
314. *See, e.g.*, DeVita v. County of Napa, 9 Cal. 4th 763, 776, 889 P.2d 1019, 1026, 38 Cal. Rptr. 2d 699, 706 (1995).
315. *See, e.g.*, Committee of Seven Thousand v. Superior Ct., 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988) (holding that the local initiative was invalid because it addressed a matter of statewide concern).

As the cases demonstrate, California courts have inconsistently applied the often confusing distinction between administrative and legislative functions.[316] The problem may have been solved in *Committee of Seven Thousand v. Superior Court*,[317] in which the California Supreme Court seems to have rejected the doctrine altogether as unworkable. The court signaled its displeasure with the administrative/legislative distinction and its preference for a more clear-cut statewide concern analysis. "In explaining why the Legislature may bar local initiatives in matters of statewide concern, courts have sometimes resorted to an awkward and confusing characterization of the delegated power as `administrative.'"[318] The court concluded that "this use of an administrative characterization [i.e., in a case of

316. In *Hopping v. City Council of Richmond*, 170 Cal. 605, 150 P. 977 (1915), the city council refused to submit to the voters a referendum overruling certain of the council's appropriation resolutions for the purchase of land and construction of a new city hall. The trial court held the council's resolutions were administrative in character, and consequently not subject to referendum. The California Supreme Court reversed, holding land use regulation is traditionally a legislative matter and, accordingly, that the referendum was a proper exercise of the legislative power. *See id.* at 612-13, 150 P. at 980, 982.

A court of appeal decision, purporting to follow *Hopping*, came to a different conclusion on similar facts. In *McKevitt v. Sacramento*, 55 Cal. App. 117, 203 P. 132 (1921), William Land gave $250,000 to the city of Sacramento for a public park to be named after him. *See id.* at 120, 203 P. at 134. Land's will granted the mayor and the city council authority to spend the money to procure the park and instructed that any left over money be used for "equipping" the park. *Id.* at 120, 203 P. at 134. The plaintiffs, as option holders of several contiguous parcels of land belonging to various individuals, offered to convey to the city certain parcels. *See id.* at 120, 203 P. at 134. The city accepted the offer and the plaintiffs exercised their option. *See id.* at 121, 203 P. at 134. Thereafter, the city submitted a referendum to the voters asking them to repeal the city's resolution of acceptance of the offer. *See id.* The voters rejected the land offer at the election.

Not to be defeated, city officials then passed a different resolution which provided that the funds donated by Mr. Land be spent to reimburse the city for the purchase and improvement of a nearby park called Del Paso Park. *See id.* They would spend any remaining money on obtaining other parks which, not coincidentally, included the original parcel accepted by the city and offered by the option holders that the voters had rejected. *See id.* Citizens of the city challenged the action as contrary to the referendum, and the California Supreme Court faced the question of whether the purchase of the park was an exercise of an administrative power or an exercise of the legislative power, properly subject to referendum. *See id.* at 123, 203 P. at 135. The court defined the legislative power as "[a]cts constituting a declaration of public purpose, and making provision for ways and means of its accomplishment." *Id.* at 124, 203 P. at 136. In contrast, the court characterized administrative acts as "those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence." *Id.* at 124, 203 P. at 136.

317. 45 Cal. 3d 491, 754 P.2d 708, 247 Cal. Rptr. 362 (1988).

318. *Id.* at 511, 754 P.2d at 720, 247 Cal. Rptr. at 374.

a local initiative challenged as impairing state authority] for delegated powers is an unnecessary fiction."[319]

It may be inferred that part of the reason why California courts emphasize a statewide concern analysis over an administrative/legislative distinction analysis is that the latter distinction can be very elusive and, by its uncertainty, such a test poses a greater threat to initiatives than application of the comparatively straight-forward statewide concern test.

Indeed, the only clear cut areas in California where one could make a dependable legislative/administrative distinction are those few circumstances where a superior power is wielded by the state and inferior power is wielded by the local and municipal governments, but even then, such a case could more easily be resolved by a statewide concern analysis. Thus, it seems that at least part of what motivates the judiciary to avoid the administrative/legislative thicket is its self-professed role as the "jealous guardian" of direct legislation.[320]

### *E. The Judiciary Will "Reform" Initiatives*

Another example of the radical lengths that the California courts will go to uphold initiatives is seen in *Kopp v. Fair Political Practices Commission.*[321] Here, the court held that the judiciary may go so far as to rewrite the actual text of an initiative if it can do so with confidence, knowing that the electorate would have wanted the rewrite.[322]

The posture of the case is complicated. In 1988 the voters enacted Proposition 73, which was intended to reform campaign finance laws.[323] The Ninth Circuit struck a portion of the initiative limiting contributions to a certain amount in a fiscal year as unconstitutionally favoring incumbents.[324] The sponsors of the initiative thereafter brought an original proceeding in the California Supreme Court. The court framed the question presented as: "[A]ssuming enforcement of the challenged sections as enacted would violate the federal Constitution, *may*, and if so, *should*, the statutes be *judicially reformed* in a manner that avoids the fiscal year measure?"[325]

The court squarely confronted the argument that such judicial rewrites would violate separation of powers and concluded that

319. *Id.*
320. *See supra* Part V.
321. 11 Cal. 4th 607, 905 P.2d 1248, 47 Cal. Rptr. 2d 108 (1995).
322. *See id.* at 660-62, 905 P.2d at 1283-85, 47 Cal. Rptr. 2d at 143-44.
323. *See id.* at 613, 905 P.2d at 1250, 47 Cal. Rptr. 2d at 110.
324. *See id.* at 614, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 110.
325. *Id.* at 614, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 111.

"[u]nder established decisions of this court and the United States Supreme Court, a reviewing court may, in appropriate circumstances, and consistently with the separation of powers doctrine, reform a statute to conform to constitutional requirements in lieu of simply declaring it unconstitutional and unenforceable."[326] The court's decision is not limited to reformation solely of initiative statutes; nevertheless, it is emblematic of the judiciary's self-adopted role as the final champion of the initiative that such a doctrine was announced in a case where the court was asked to save a key portion of an initiative measure.

### *F. The Judiciary Is Similarly Reluctant to Overrule the Exercise of the Legislative Power by the Legislature when the Legislature Is Exercising Its Constitutional Powers*

The closer one gets to an exercise of the political power that crafted the constitution, the greater the judicial deference. Just as the judiciary will defer to an exercise of the initiative power whenever possible, it will also defer to the exercise of the legislative power delegated to the legislature over the power of direct legislation when the constitution—the embodiment of the political power—so demands it.

The California Constitution provides that the people's power of referendum does not apply to urgency statutes.[327] An urgency statute is one that is "necessary for immediate preservation of the public peace, health, or safety."[328] The urgency statute must contain a "statement of facts constituting the necessity [of the urgency]."[329] When the legislature exercises its discretion under these constitutional provisions, only in the face of a specific constitutional grant of authority to the legislature—a grant derived from the constitutional charter created by the political power—have the courts granted the legislature leeway at the expense of the people exercising their direct legislative power. Thus, courts will uphold the enactment of urgency statutes, enactments which, by their urgency, foreclose the ability of the people to repeal them by referendum[330] "unless it 'appears clearly

326. *Id.* at 615, 905 P.2d at 1251, 47 Cal. Rptr. 2d at 111.
327. *See* CAL. CONST. art. II, § 9(a).
328. CAL. CONST. art. IV, § 8(d).
329. *Id.*
330. *See* Rossi v. Brown, 9 Cal. 4th 688, 703, 889 P.2d 557, 565, 38 Cal. Rptr. 2d 363, 371 (1995).

and affirmatively from the legislature's statement of facts that a public necessity does not exist.'"[331]

Thus, in our "sliding scale" model, only when the constitution itself reverses the normal hierarchy between the people's legislative powers and the legislature's, will the courts permit an expansive role of the legislature at the expense of the exercise of the people's legislative power.

### *G. Summary: The Initiative Power Is Afforded Great Deference Because It More Closely Resembles the "Political" Power*

The constitutional text does not explain exactly why statutes enacted by initiative should have greater dignity than statutes enacted by the legislature.[332] Both enactments are, after all, just statutes. The answer comes from both philosophy and history.

As discussed earlier, this question is no mere formalism but infuses the posture of every case implicating the exercise of the direct legislative power. It also reflects a real world possessiveness that Californians have toward their direct legislation. When an initiative is stymied or overruled, California citizens express a degree and quality of anger and frustration that is absent when a statute enacted by the legislature is similarly voided.[333] As expressed by Locke, "mixing" one's labor with an object evokes feelings of ownership and entitlement. So, too, do Californians feel a sense of propriety over their direct legislation. Thus, both in theory and in fact, the exercise of the initiative power closely resembles a direct effort of self-governance by the governed.

Moreover, direct legislation is really the only facet of government that the people participate in directly, even if it is only an exercise of the legislative power. While the political power referred to in Article II, Section 1 is the theoretical exercise of self-governance, that task is in reality accomplished by a convention of representatives, or an analog, not in the first instance by the people directly.

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331. Davis v. Los Angeles, 12 Cal. 2d 412, 422, 84 P.2d 1034, 1040 (1938) (quoting Stockburger v. Jordan, 10 Cal. 2d 636, 642, 76 P.2d 671, 674 (1938)); *see also* Allen v. Franchise Tax Bd., 39 Cal. 2d 109, 111-12, 245 P.2d 297, 299 (1952); Livingston v. Robinson, 10 Cal. 2d 730, 739-40, 76 P.2d 1192, 1196 (1938).

332. *But see* CAL. CONST. art II, § 10(c) (limiting legislature's ability to amend initiatives).

333. As a result, it has been proposed that legal challenges to initiatives in federal court be heard by three-judge district courts, so that a single judge cannot enjoin the measure. *See* State Initiative Fairness Act, H.R. 1170 (1997).

Furthermore, the only instance where courts will enforce meaningful restrictions on the exercise of the initiative power is where the constitution itself—the purest exercise of the political power—expressly restricts the power, as in emergency situations. But, as seen in *Rossi*, even that restriction will favor the exercise of a power the people have reserved to themselves.[334]

## VI. PRESERVING REPUBLICAN GOVERNMENT—THE "AMENDMENT/REVISION" DICHOTOMY

Many commentators have concluded that initiatives and other forms of direct democracy violate the Guarantee Clause[335] because direct legislation is inimical to representative, republican government.[336] There are two problems with that argument. First, long ago the United States Supreme Court held that Guarantee Clause claims in general, and challenges to initiative lawmaking in particular, were nonjusticiable political questions.[337] State courts seem to follow that lead, even though the political question doctrine is an outgrowth of separation of powers in the federal government and should have no bearing on the power or responsibility of state courts to adjudicate Guarantee Clause claims.

The second problem with the argument is that republican government can take many forms. It is by no means clear as a historical

334. The absence of any significant textual qualification of direct legislation reinforces the proposition that these decisions reflect not a radicalization of the California courts themselves, but rather the most conservative branch's efforts to enforce what is itself a radical constitutionally-based direct legislative scheme. As the California Law Revision Commission has observed, unlike other states, California's initiative scheme—both statutory and constitutional—(1) does not provide for legislative-type hearings on initiatives prior to their appearance on the ballot, but only for informational hearings after their qualification, after it is too late to make any often needed changes; and (2) since the repeal of California's little-used indirect initiative in 1966, the legislature has not been empowered to enact a substantially same proposal once an initiative qualifies, California is, according to the Commission, the only state that does not permit such pre-election amendments to initiatives. The absence of such mechanisms, all of which would enhance the role of the legislature in direct lawmaking, is yet another reflection of the radicalization of California's direct legislative plan, and an explanation for the obediently radical jurisprudence just discussed.

335. *See* U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government. . . .").

336. *See In re* Pfahler, 150 Cal. 71, 93, 88 P. 270, 279 (1906) (McFarland, J., dissenting); Schuman, *supra* note 25, at 957.

337. *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1911).

matter that the clause was meant to prohibit the forms of direct democracy known at the time of the Federal Constitution's ratification—instruction and recall.[338] These devices, along with the "town hall" meetings used in New England states,[339] resemble today's initiative process. Nonetheless, initiative lawmaking surely tests the limits of republicanism and merits the careful analysis that other commentators have provided. It will not be repeated here.

That said, however, the guarantee of republican government has a close analog within the California Constitution itself. It is the exclusion from the initiative power of the ability to fundamentally change the form of state government. These changes, such as altering the distribution of powers, can be accomplished only where "the entire sovereignty of the people is represented in the [constitutional] convention."[340] Republican virtue is thus preserved by denying majority factions the means to alter the fundamental character of their government.[341]

The state constitution has always specified two modes of change: "amendment" and "revision." As presently framed, the constitution provides for its own alteration in three ways: (1) "The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may propose an amendment or revision of the Constitution . . . ;"[342] (2) "The Legislature by rollcall vote entered in the journal, two-thirds of the membership of each house concurring, may submit at a general election the question whether to call a convention to revise the Constitution . . . ;"[343] and (3) "The electors may amend the Constitution by initiative."[344]

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338. *See supra* note 108; *see also* THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 37 (1989).

339. *See* David V. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U. J. URB. & CONTEMP. L. 53, 58 (1991); *Pfahler*, 150 Cal. at 93, 88 P. at 273 (1906) (equating New England model with local initiatives).

340. Livermore v. Waite, 102 Cal. 113, 117, 36 P. 424, 426 (1894).

341. *See also* Ernest L. Graves, *The Guarantee Clause in California: State Constitutional Limits on Initiatives Changing the California Constitution*, 31 LOY. L.A. L. REV. 1305 (1998).

342. CAL. CONST. art. XVIII, § 1.

343. CAL. CONST. art. XVIII, § 2. The constitution of 1849 stated that a convention could be called to "revise and change [the] *entire* Constitution." CAL. CONST. of 1849, art. X, § 2 (emphasis added). This notion of entirety might suggest that anything less than a wholesale alteration of the document would constitute a mere amendment. The proposed Iowa Constitution of 1844 similarly referred to "total revision of the fundamental law." FRAGMENTS OF THE DEBATES OF THE IOWA CONSTITUTIONAL CONVENTIONS OF 1844 AND 1846, at 234 (Benjamin F. Shambaugh ed., 1900) [hereinafter FRAGMENTS OF THE DEBATES].

These provisions establish two mechanisms for revision, which may be proposed by legislature or constitutional convention,[345] and two mechanisms for amendment, which may be proposed by legislature or initiative. Because of these different mechanisms, an initiative may not revise the constitution.

### *A. Original Understanding of the Revision/Amendment Dichotomy*

The California Constitution of 1849 was a short document, roughly equal to the Federal Constitution in length.[346] It was mostly constitutive in character and rights conferring, again similar to the "great outlines" of the federal charter.[347] It contained few provisions of legislative nature.[348] This practice changed with the convention of 1878-1879. Probably because of the delegates' desire to rein in the legislature, they greatly expanded the number of legislative-type provisions—what the delegates called "constitutional legislation."[349] Thus a constitution with a dual function emerged—foundational and legislative. This duality was common among state constitutions in the late nineteenth century.[350]

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However, the draft of the constitution that was adopted by Iowa voters in 1846 dropped that qualifier. *See id.* at 304. Similarly, the California Constitution of 1879 dropped the word "entire." *See* CAL. CONST. art. XVIII, § 2. Whether these were intended as substantive changes is not clear from the historical record.

344. CAL CONST. art. XVIII, § 3. In describing the political power that inheres in the people, the constitution declares that "they have the right to alter or "reform" [their government] when the public good may require [it]." *Id.* at art. II, § 1 (art. I, § 2 in CAL. CONST. of 1849). Whether a distinction between "alter" and "reform" was intended is also unclear from the historical record.

345. California is one of only six states that permit the legislature to propose a revision. *See* Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1479 (1987). The remainder all require constitutional convention. *See id.*

346. The U.S. Constitution consists of a short preamble and seven articles, revised to include twenty-seven amendments. The 1849 California Constitution consisted of a short preamble and twelve articles.

347. This is the term John Marshall used to describe the Federal Constitution in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

348. *See* Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 966 (1994) (describing that a delegate to the 1849 convention stated, it was "'improper to insert legislative enactments in a constitution").

349. *See generally id.* at 962-68.

350. *See id.*; *see also* I JAMES BRYCE, THE AMERICAN COMMONWEALTH 443-44 (3d ed. 1915) ("The framers of these more recent constitutions have in fact neither cared nor wished to draw a line of distinction between what is proper for a constitution and what ought to be left to be dealt with by the State legisla-

The organic or constitutive provisions in the constitution were those "dealing with the frame of and declaring the general principles of the republican form of government."[351] These provisions had a higher dignity than provisions partaking of "direct legislation;" the latter being merely part of the "law of the state."[352] This distinction helps explain why the constitution differentiates between revision and amendment.[353] The former—purposefully cumbersome to implement—includes those fundamental alterations to the basic charter of government. This is where Lockean popular sovereignty is most basically manifested and traditionally expressed by the people assembled in convention. As delegates to the 1878-1879 convention observed,

> the convention work[s] on a different level than the "everyday operations" of the executive, legislative, or judicial branches. Rather, a convention outranks them all; it is their creator, and fixes limits to their spheres of action, and boundaries to their powers. It is occasional, exceptional, brief, and peculiar; it represents the people in their primary capacity, and forms the organic, fundamental, and paramount law of state.[354]

If this understanding is correct, and the California Supreme Court believes that it is,[355] it provides a principled basis for

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ture."); THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 386 (Andrew C. McLaughlin ed., 3d ed. 1898) ("later State constitutions . . . contain a great deal of direct legislation enacted by the people of the State on subjects which in the early constitutions would not be mentioned.") (*quoted in* Los Angeles Gas & Elec. Co. v. Los Angeles County, 21 Cal. App. 517, 519, 132 P. 282, 283 (1913)). In contrast, the framers of the 1849 California Constitution were careful not to load the document with laws of a statutory nature. *See* Ooley, *supra* note 93.

351. Los Angeles Gas & Elec. Co. v. Los Angeles County, 21 Cal. App. 517, 520, 132 P. 282, 283 (1913).

352. *Id.* at 519, 132 P. at 283.

353. It was not uncommon for state constitutions adopted in the nineteenth century to differentiate between amendment and revision. *See, e.g.*, COLO. CONST. art. V, § 1; OR. CONST art. XVII.

354. Fritz, *supra* note 348, at 993.

355. *See* Wallace v. Zinman, 200 Cal. 585, 593, 254 P. 946, 949 (1927) ("We have a state government with three departments, each to check upon the others, and it would be subversive of the very foundation purposes of our government to permit an initiative act of any type to throw out of gear our entire legal mechanism."); Crowley v. Freud, 132 Cal. 440, 443-44, 64 P. 696, 698 (1901) (noting that changes that are "so revolutionary as to be destructive of a republican form of government" must be accomplished, if at all, "through a general revision by a constitutional convention"); Livermore v. Waite, 102 Cal. 113, 117, 36 P. 424, 425-26 (1894).

distinguishing revision from amendment. Changes to the spheres of action of the three branches, and boundaries to their powers constitute revisions, and can only be accomplished by exertions of popular sovereignty in convention.[356] "[C]omprehensive changes to the Constitution require more formality, discussion and deliberation than is available through the initiative process."[357] This is especially true of open-ended changes—changes without "'limitation or restriction'"[358]—such as those that a convention itself might make. In contrast, changes to the legislative provisions in the constitution, now comprising seventy-five percent of the document,[359] could be accomplished more readily—by amendment.[360]

While the differences between a revision and amendment are fuzzy up close, at the horizon they can be differentiated in the following way: any initiative that would alter California's basic governmental structure—its essential plan for self-governance—cannot be accomplished by the legislative power of the initiative any more than it could be effectuated by the legislature alone.[361] Such changes can

356. *See* Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 221-30, 583 P.2d 1281, 1284-89, 149 Cal. Rptr. 239, 242-47 (1978).

357. Raven v. Deukmejian, 52 Cal. 3d 336, 350, 801 P.2d 1077, 1085, 276 Cal. Rptr. 326, 334 (1990) (citing Note, *Preelection Judicial Review: Taking the Initiative in Voter Protection*, 71 CAL. L. REV. 1216, 1224 (1983)); *see also* Stanley Mosk, Raven *and Revision*, 25 U.C. DAVIS L. REV. 1, 4 (1991) (expounding on his concurrence in *Raven*, Justice Mosk notes that the constitution itself "precludes the idea that it was the intention of the people, by the provision for amendments authorized in the first section of this article, to afford the means of effecting the same result which in the next section has been guarded with so much care and precision").

358. Fritz, *supra* note 348, at 993.

359. *See* Ooley, *supra* note 93 (citation omitted).

360. California adopted the New York model of differentiating between the modes of revision and amendment, rather than the Iowa model requiring a constitutional convention for both major and minor changes. Perhaps, the California delegates agreed with a delegate to the convention revising New York's constitution in 1846, arguing for amendments to be proposed by the legislature: "There should be some mode of giving vent to the prevailing mania for Constitution making." NEW YORK REPORT OF THE DEBATES, *supra* note 102, at 1038.

361. In *McFadden v. Jordan*, 32 Cal. 2d 330, 333, 196 P.2d 787, 789 (1948), the court quoted from *Livermore*: "The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment . . . ." *Id.* (quoting *Livermore*, 102 Cal. at 118, 36 P. at 426).

The court then held that the initiative power—being only a legislative power—is equally insufficient to the task of revising the constitution: "The initiative power reserved by the people by amendment to the Constitution in 1911 (art. IV, § 1) applies only to the proposing and the adopting or rejecting of 'laws and

only be instituted by an exercise of "political power" that, both in our federal charter and here, is either the real world analog to the hypothetical state of political nature—the constitutional convention—or an exercise of super-legislative power, where both the people and the legislature act in concert.[362] In the former extraordinary settings, no less than the political power—the basic rights of humankind—are exercised in the creation of a mechanism of self-governance.[363] In the latter, the effect is to replicate, in an *ad hoc* way, the conventions where the legislators are the convention delegates, and the people retain their power ultimately to approve or dispose of the proposed revision.[364]

Thus, the reason that initiative legislation cannot accomplish a revision of the California Constitution is that the initiative power is a mere legislative power, a constituent member of the broader, and more elemental political power.[365] Despite the initiative's facial resemblance to the kind of direct act of self-governance that takes place in a convention, the people exercising their legislative power of initiative could no more vest judicial powers in the executive than could the legislature by passing a bill to that effect.[366] As between the

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amendments to the Constitution' and does not purport to extend to a constitutional revision." *Id.*

362. The constitution may be revised either by super-majority proposal of the Legislature or by constitutional convention, followed in each case by electoral approval. *See* CAL. CONST. art. XVIII, §§ 1,2. Again, observe the similarity between the California and federal systems. Article V of the Federal Constitution provides:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. . . .

U.S. CONST. art. V.

363. *See* CAL. CONST. art. II, § 1.

364. Constitution framers of the mid-nineteenth century apparently felt more secure with conventions than with legislatures. The Iowa Constitution of 1846 required a constitutional convention both for revisions and amendments. *See* IOWA CONST. of 1846, art. 10, § 1. The other state constitution with the greatest influence on the 1849 California Constitution was New York's. Its constitution of 1846 also distinguished between revision and amendment, the former requiring a convention, the latter not. However, the New York Constitution required that the calling of a convention be put before the voters every twenty years. *See* N.Y. CONST. of 1846, art. XIII, § 2.

365. *See* CAL. CONST. art. II, § 1; *see also* CAL. CONST. art. II, § 8(a) (stating "[t]he initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them").

366. *See* CAL. CONST. art. II, § 1.

political power and the reserved initiative power, the political power is greater than the initiative power, insofar as the exercise of the former may alter or eliminate the latter, while the reverse is not true.[367]

### *B. Implementation of the Revision/Amendment Dichotomy by the Supreme Court*

The California Supreme Court first considered the formal requirements for amending the state constitution in 1894, before the initiative process was adopted. In *Livermore v. Waite*,[368] the court held that the legislature had improperly submitted an amendment to the people moving the state capital from Sacramento to San Jose.[369] According to the terms of the amendment, the move would not occur unless the state received certain promised land and money.[370] The court held that the amendment "being conditional in its terms, would be ineffective in accomplishing a change of the seat of government from that already fixed by the constitution."[371] Because the "amendment would fail to become an operative part of the constitution," it could not be submitted to the voters for ratification.[372]

The court's formalism is patent. It held that the constitution "can be neither revised nor amended except in the manner prescribed by itself, and the power . . . must be strictly pursued."[373] In dicta the court drew this distinction between the forms of constitutional change:

> The very term "constitution" implies an instrument of a permanent and abiding nature, and the provisions contained therein for its revision indicate the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. On the other hand, the significance of the term "amendment" implies such an addition or change within the lines of the original

367. Indeed, in a constitutional convention, arguably, there is no act of self-governance. There is an act of creating the mechanism by which self-governance will take place.

368. 102 Cal. 113, 36 P. 424 (1894).

369. *See id.* at 122-24, 36 P. at 427-28.

370. *See id.* at 121-22, 36 P. at 427-28.

371. *Id.* at 122-23, 36 P. at 427.

372. *Id.* at 121, 36 P. at 426-27.

373. *Id.* at 117, 36 P. at 425-26.

> instrument as will effect an improvement, or better carry out the purpose for which it was framed.[374]

*Livermore* concerned an amendment proposed by the Legislature. A half-century later, in *McFadden v. Jordan*,[375] the court held that the same distinction applied to initiatives. Indeed, since the initiative process had been "framed and adopted long after the decision in *Livermore*[,]" the *McFadden* court deemed it to have preserved the *Livermore* standard.[376]

> Consequently if the scope of the proposed initiative . . . now before us is so broad that if [it] . . . became law a substantial revision of our present state Constitution would be effected, then the measure may not properly be submitted to the electorate until and unless it is first agreed upon by a constitutional convention . . . .[377]

The court then held that the California Bill of Rights on the 1948 ballot, was "revisory rather than amendatory in nature and that as such it [was] barred from the initiative."[378] The basis for this conclusion was that the amendment, containing 208 sections and more than 21,000 words, and repealing or altering fifteen of twenty-five existing articles, constituted "extensive alterations in the basic plan and substance of our present Constitution."[379]

Significantly, the court reiterated the strict formalism for constitutional change.

> The people of this state have spoken; they made it clear when they adopted article XVIII and made amendment relatively simple but provided the formidable bulwark of a constitutional convention as a protection against improvident or hasty (or any other) revision, that they understood that there was a real difference between amendment and revision. . . . [T]he distinction appears to

374. *Id.* at 118-19, 36 P. at 426.
375. 32 Cal. 2d 330, 196 P.2d 787 (1948).
376. *Id.* at 333-34, 196 P.2d at 789-90.
377. *Id.* at 334, 196 P.2d at 790.
378. *Id.* at 332, 196 P.2d at 788.
379. *Id.* at 347, 196 P.2d at 797. The court's discussion of the revision/amendment distinction in *McFadden* resembles the single subject analyses of later cases. *See supra* Part V.A. The single subject rule was not employed in *McFadden* because it was enacted at the same election as the initiative reviewed by the court. *See* Wilson v. Superior Court, 185 Cal. Rptr. 678, 695 (Cal. Ct. App. 1982), *vacated on other grounds*, 34 Cal. 3d 777, 780 (1983). One court has observed that "[t]he amendment/revision rationale became much less important after enactment of . . . the single subject rule." *Id.*

> be scrupulously preserved by the express declaration in the amendment [creating the initiative process] that the power to propose and vote on "amendments to the Constitution" is reserved directly to the people in initiative proceedings, while leaving unmentioned the power and the procedure relative to constitutional revision, which revisional power [can only be exercised in convention].[380]

Jurisprudence in this area was simplified by the California Supreme Court's decision in *Amador Valley Joint Union High School District v. State Board of Equalization*.[381] There the court announced a two-part analysis, examining both the quantitative and qualitative effects of an initiative.[382] The former would preclude measures, such as in *McFadden,* which would make wholesale changes to the constitution. The latter would check initiatives that would effect significant change in the constitutional scheme. The court stated: "even a relatively simple enactment may accomplish such far reaching changes in the nature of our basic governmental plan as to amount to a revision. . . ."[383] Such a qualitative change could only come about through the exercise of political power—as in a convention—not by mere initiative power.

Applying this test to the property tax reforms in Proposition 13, the court noted that the initiative affected a single article of the constitution; hence it was not quantitatively a revision.[384] Next, it examined the measure's qualitative effects, both on the distribution of powers between state and local government, and on republican government.[385] It found neither effect substantial or novel; hence, neither was a revision.[386]

*Amador* moved the court significantly away from *Livermore* and *McFadden.* Now the court was ready to uphold fairly dramatic alterations in the distribution of powers. Admittedly, the losers were local governments, rather than a branch of state government. Still, their ability to tax and control their own revenues was now seriously curtailed or, worse yet, transferred to the legislature.[387] After

380. *McFadden*, 32 Cal. 2d at 347-48, 196 P.2d at 798.
381. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978).
382. *See id.* at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244.
383. *Id.*
384. *See id.* at 224, 583 P.2d at 1286, 149 Cal. Rptr. at 244.
385. *See id.* at 224-25, 583 P.2d at 1286-87, 149 Cal. Rptr. at 244-45.
386. *See id.* at 225, 583 P.2d at 1287, 149 Cal. Rptr. at 245.
387. Not only had Proposition 13 limited property tax rates to one percent of acquisition value, but it imposed severe restrictions, such as super-majority vot-

Proposition 13, the legislature began to control municipal treasuries as it had done prior to the reforms of 1879.[388] Indeed, enactments in the wake of Proposition 13[389] seem to undo a principal product of the 1878-1879 convention: home rule.[390]

That the court is more concerned about state powers than municipal powers is confirmed by its decision in *Raven v. Deukmejian*.[391] There the court applied *Amador's* qualitative standard to find that a single, straightforward change to the constitution was an illegal

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ing, on new levies. *See id.* at 227-35, 583 P.2d at 1288-93, 149 Cal. Rptr. at 246-51. Yet, the court held that the initiative "neither destroys nor annuls the taxing power of local agencies." *Id.* at 226, 583 P.2d at 1287, 149 Cal. Rptr. at 245. In addition to restricting taxes, Proposition 13 seemingly conferred plenary power on the legislature to "apportion" the taxes collected among local taxing entities. *See* CAL. CONST. art. XIII A, § 1(a). This seemed to undercut, if not abrogate altogether, the home rule powers of cities and counties because they no longer controlled their own revenues. *See id.* at art. XI, § 5 (stating that cities may govern their own affairs); *id.* at art. XI, § 11(a) and art. XIII, § 24 (municipal tax authority). The court avoided this potentially serious redistribution of government powers, which would have been a constitutional revision, by citing "recent implementing legislation [of emergency bail-out funding which] confirms the Legislature's present intention to preserve home rule and local autonomy respecting the allocation and expenditure of real property tax revenues." *Amador Valley*, 22 Cal. 3d at 226, 583 P.2d at 1288, 149 Cal. Rptr. at 246.

Finally, the court rejected the "republican government" argument. "[B]oth local and state government will continue to function through the traditional system of elected representation." *Id.* at 227, 583 P.2d at 1288, 149 Cal. Rptr. at 246. Responding specifically to Proposition 13's requirement of two-thirds voter approval for new taxes, the court found examples of super-majority voting in the constitution. *See id.* at 228, 583 P.2d at 1288-89, 149 Cal. Rptr. at 246-47. Thus, Proposition 13 "adds nothing novel to the existing governmental framework of this state." *Id.* at 228, 583 P.2d at 1289, 149 Cal. Rptr. at 247.

388. *See* County of Los Angeles v. Sasaki, 23 Cal. App. 4th 1442, 1457, 29 Cal. Rptr. 2d 103, 112 (1994) (stating that Proposition 13 "removed whatever doubt previously may have existed concerning the power of the state to allocate property tax revenue"); City of Rancho Cucamonga v. Mackzum, 228 Cal. App. 3d 929, 945, 279 Cal. Rptr. 220, 228 (1991) (Proposition 13 altered "the preexisting taxing power of charter cities" by giving authority to the legislature to reapportion municipal property taxes.).

389. *See, e.g.*, CAL. REV. & TAX. CODE §§ 97.01, 97.03 (West 1998) (appropriating municipal tax revenues to pay for state education funding obligations) (repealed and replaced by CAL. REV. & TAX. CODE §§ 97, 97.2 (West 1998)).

390. *See* Weekes v. City of Oakland, 21 Cal. 3d 386, 399, 579 P.2d 449, 456, 146 Cal. Rptr. 558, 565 (1978) (stating that home rule "grants to chartered cities the authority to manage local affairs; and . . . imposes a corresponding restriction upon the power of the state Legislature to interfere with or override decisions on municipal matters made at the local level") (Richardson, J., concurring); *see generally* John C. Peppin, *Municipal Home Rule in California: Part I*, 30 CAL. L. REV. 1 (1941) (discussing the origin of home rule in the 1879 constitution).

391. 52 Cal. 3d 336, 801 P.2d 1077, 276 Cal. Rptr. 326 (1990).

revision.[392] Article I, Section 24 stated simply that "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution."[393] One of the sections in the "Crime Victims' Justice Reform Act," Proposition 115, on the June 1990 ballot, qualified Article I, Section 24 by stating that certain criminal procedure rights in the state constitution "shall be construed by the courts of this state in a manner consistent with the Constitution of the United States."[394]

The court found that this "restriction on the independent judicial interpretation of . . . state constitutional rights"[395] amounted to "vest[ing] all judicial *interpretive* power, as to fundamental criminal defense rights, in the United States Supreme Court. From a qualitative standpoint, the effect of Proposition 115 is devastating."[396] Because the challenged provision enacted "such a far-reaching change in our governmental framework as to amount to a qualitative constitutional revision, [it was] beyond the reach of the initiative process."[397]

The court has not always been so jealous of its independent interpretive powers. For instance, in *Crawford v. Board of Education*,[398] the court declined to hear a challenge to Proposition 1, amending the state Equal Protection Clause, Article I, Section 7.

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392. *See id.* at 351-52, 801 P.2d at 1087, 276 Cal. Rptr. at 336.

393. *Id.* at 350, 801 P.2d at 1086, 276 Cal. Rptr. at 335.

394. *Id.* The challenged section read in full:

> In criminal cases the rights of a defendant to equal protection of the laws, to due process of law, to the assistance of counsel, to be personally present with counsel, to a speedy and public trial, to compel the attendance of witnesses, to confront the witnesses against him or her, to be free from unreasonable searches and seizures, to privacy, to not be compelled to be a witness against himself or herself, to not be placed twice in jeopardy for the same offense, and not to suffer the imposition of cruel or unusual punishment, shall be construed by the courts of this state in a manner consistent with the Constitution of the United States. This Constitution shall not be construed by the courts to afford greater rights to criminal defendants than those afforded by the Constitution of the United States, nor shall it be construed to afford greater rights to minors in juvenile proceedings on criminal causes than those afforded by the Constitution of the United States.

*Id.*

395. *Id.* at 351, 801 P.2d at 1086, 276 Cal. Rptr. at 335.

396. *Id.* at 352, 801 P.2d at 1087, 276 Cal. Rptr. at 336.

397. *Id.* at 341, 801 P.2d at 1080, 276 Cal. Rptr. at 329. The court rejected a "single subject" challenge, noting that although the initiative affected numerous changes to criminal procedures, they were all "reasonably germane" to the common theme of criminal justice reform. *Id.* at 346-48, 801 P.2d at 1083-85, 276 Cal. Rptr. at 332-34.

398. 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1980), *aff'd*, 458 U.S. 527 (1982).

That initiative forbade school busing "unless a federal court would [order busing] to remedy [a] violation of the . . . [United States] Constitution."[399] Perhaps isolated, single-right restrictions on the judicial power do not equal a revision, but similar restrictions in a broad area of judicial authority do.[400]

But, the court is not consistent on this score. For instance, in *People v. Superior Court (Romero)*,[401] it went through contortions to find that the "three-strikes" law allowed judges to strike prior convictions on their own motion, despite clear language, both in an initiative, Proposition 184, and a similar statute, that only the prosecutor could do so.[402] The court's novel construction was necessary, lest the laws' transfer of judicial power to the prosecution violate separation of powers.[403]

Despite a score of efforts, the court's revision/amendment jurisprudence remains imprecise. Yet, we have the basic framework in hand and can now apply it to the most far-reaching constitutional revision of all—the initiative process itself.

### *C. Was The Initiative Process Adopted Through Constitutional Means?*

The underlying assumption of this Article is that the 1911 constitutional amendment reserving to the people the power of initiative and referendum was itself constitutional. Much proceeds from that

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399. *Crawford*, 458 U.S. at 527. The court may not have been presented with a revision challenge, so that its declination to hear the case may not shed any light on the issue. The Court of Appeal upheld Proposition 1 as a validly enacted initiative, but it is not clear whether a revision challenge was presented in the Petition for Hearing. *See Crawford*, 113 Cal. App. 3d at 652 n.5, 170 Cal. Rptr. at 507-08 n.5.

Article I, Section 7 was also upheld by the United States Supreme Court against an Equal Protection challenge. *See Crawford*, 458 U.S. at 545.

400. The court in *Raven* employed this distinction to explain its prior decisions in *In re Lance W.*, 37 Cal. 3d 873, 891-92, 694 P.2d 744, 755-56, 210 Cal. Rptr. 631, 642-43 (1985) (upholding a provision limiting the state exclusionary remedy for search and seizure violations of fourth amendment standards), and *People v. Frierson*, 25 Cal. 3d 142, 186-87, 599 P.2d 587, 613-14, 158 Cal. Rptr. 281, 307 (1979) (upholding a provision allowing California courts to impose the dealth penalty in capital cases to the full extent allowed under the Eighth Amendment). *See Raven*, 52 Cal. 3d at 355, 801 P.2d at 1089, 276 Cal. Rptr. at 338.

401. 13 Cal. 4th 497, 917 P.2d 628, 53 Cal. Rptr. 2d 789 (1996).

402. *See id.* at 513-17, 917 P.2d at 636, 153 Cal. Rtr. at 797.

403. *See id.* at 531-32, 917 P.2d at 809-10, 153 Cal. Rptr. at 648-49; *see also* People v. Superior Court, 14 Cal. 4th 968, 928 P.2d 1171, 60 Cal. Rptr. 2d 93 (1997) (stating that notwithstanding intent of three strikes law, courts have power to reduce "wobbler" defenses from felonies to misdemeanors).

assumption, including the entire jurisprudence developed by the state supreme court on initiatives. But what if the initiative process was adopted through unconstitutional means?

Many commentators have concluded that initiatives and other forms of direct democracy violate the Guarantee Clause,[404] although the claim appears to be a nonjusticiable political question.[405] Whether the initiative process is "republican in form" or not, it surely is a significant departure from the standard tripartite model of government, where all legislative enactments must pass through the filter of representative legislatures. Since the initiative process fundamentally affects the processes and form of government, when enacted in 1911 it arguably represented a revision of the pre-existing constitutional structure, not merely an amendment to it.

The California Constitution of 1879, applicable in 1911, did not permit the legislature to put constitutional revisions before the people.[406] Rather, the people first had to approve a call for a constitutional convention.[407] Only that body had the power to propose revisions for adoption by the people. This process, requiring two votes of the people and their collective deliberation in convention,[408] was purposefully cumbersome. Fundamental structural changes to the mode of government were not to be made casually.[409]

> Efforts to expedite constitutional change are ill advised and threaten such constitutional values as popular sovereignty, political stability, and minority rights .... [T]he outcome of a single election is less likely to provide a meaningful expression of the will of the people than the outcome of the complex textual procedures.[410]

404. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government....").

405. *See* Pacific States Tel. & Tel. v. Oregon, 223 U.S. 118 (1912).

406. Proposition 7, approved in November 1962, authorized the legislature to submit constitutional revisions to the people in the same manner as constitutional amendments. *See* CAL. CONST. art. XVIII, § 1.

407. CAL CONST. of 1879 art. XVIII, § 1 (repealed Nov. 3, 1970).

408. *See id.*

409. *See* Elai Katz, *On Amending Constitutions: The Legality and Legitimacy of Constitutional Entrenchment*, 29 COLUM. J.L. & SOC. PROBS. 251, 286 n.157 (1996) ("[I]f an amendment changes the procedurally democratic character of the constitution [it should] rise to the more difficult branch of the two-tiered amending method.").

410. Colantuono, *supra* note 345, at 1500-01.

Nor could the legislature deviate from the prescribed routes to constitutional change and simply put the issue directly before the people. As the court stated in *Livermore*:

> [t]he power of the legislature to initiate any change in the existing organic law . . . being a delegated power, is to be strictly construed under the limitations by which it has been conferred. In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been entrusted to it, but is merely acting under a limited power conferred upon it by the people. . . . The extent of this power is limited to the object for which it is given, and is measured by the terms in which it has been conferred, and cannot be extended by the legislature to any other object, or enlarged beyond these terms. The legislature is not authorized to assume the function of a constitutional convention, and propose for adoption by the people a revision of the entire constitution under the form of an amendment . . . .[411]

To test the proposition that enactment of the initiative process may have constituted a revision, it is useful to compare the pre-existing text with the language adopted by Senate Constitutional Amendment 22 at the special election of October 10, 1911.[412] As well, it is instructive to examine the ballot materials submitted to the voters.

Article IV, Section 1 of the California Constitution of 1879 provided for legislative powers as follows:

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411. Livermore v. Waite, 102 Cal. 113, 117-18, 36 P. 424, 426 (1894). Decisions from other states have reached the same conclusion. *See, e.g.*, Rivera-Cruz v. Gray, 104 So. 2d 501, 502-04 (Fla. 1958) (stating that amendment of the constitution may be effected by legislative action and approved by a vote of the people, while revision of the constitution requires a convention. The legislature may not effect a revision, without convention, by means of wholesale amendment.); Ellingham v. Dye, 99 N.E. 1 (Ind. 1912), *cert. dismissed*, 231 U.S. 250 (1913) (stating "[t]he proposal of amendments to the Constitution is not a power inherent in the legislative department, but must be conferred by a special grant of the Constitution; and in the absence of such a provision, the legislature has no capacity thus to initiate amendments").

412. CAL. CONST. art. IV, § 1 (repealed Nov. 8, 1966). Senate Constitutional Amendment 22 passed by a vote of 35 to 1 in the Senate and 72 to 0 in the Assembly. It was approved by the voters with a vote of 168,744 to 52,093. *See* Ooley, *supra* note 93.

> The legislative power of this State shall be vested in a Senate and Assembly, which shall be designated The Legislature of the State of California, and the enacting clause of every law shall be as follows: "The people of the State of California; represented in Senate and Assembly, do enact as follows:"[413]

As amended, Article IV, Section 1 read:

> The legislative power of this state shall be vested in a senate and assembly, which shall be designated "The legislature of the State of California," but the people reserve to themselves the power to propose laws and amendments to the constitution, and to adopt or reject the same, at the polls independent of the legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature." The enacting clause of every law shall be as follows: "The People of the State of California do enact as follows:"[414]

First observe that the "People of the State of California" are no longer "represented in senate and assembly" when they enact legislation; they act directly. Is this a repudiation of republicanism or fulfillment of democratic ideals? Partisans for and against the measure took different views. Proponents claimed:

> These amendments are not opposed to our form of government, not opposed to the ideals of the fathers of the republic, and are not contrary to the spirit of our institutions. Exactly the opposite is true.[415]

In contrast, opponents claimed:

> The "proposed initiative and referendum" amendment . . . is so radical as to be almost revolutionary in its character. Its tendency is to change the republican form of our government and head it towards democracy, and history teaches that democracies have universally ended in turbulence and disaster.[416]

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413. *Id.*

414. *Id.*

415. 1911 CALIFORNIA BALLOT PAMPHLET, *supra* note 165 (statement of Senator Lee Gates and Assemblyman William Clark in favor of Constitutional Amendment No. 22).

416. *Id.* (Statement of Senator Leroy Wright against Senate Constitutional Amendment No. 22).

Whether or not the measure was anti-republican, it surely changed the character of state government. The power conferred to act "independent[ly] of the legislature" and to "adopt or reject" any legislative act, endowed the people as a super-legislature.[417] Indeed, the argument in favor of Amendment 22 claimed it would give "people power to control legislation of the state [and] the power to pass judgment upon the acts of the legislature."[418] This alone seems to denote a significant alteration in government structure. In analysis one may "[a]sk whether the measure, on its face, reallocates or diminishes authority delegated to a constituent branch of state or local government by the existing constitution. If the answer is yes, no further inquiry is necessary. The measure proposes a revision and is not properly subject to initiative."[419]

Next, one should consider the very term used to confer the initiative power—"reserve." The term itself suggests a new organic act of constituting government, rather than a mere reclamation of a power previously delegated.[420] It is a term one would expect to emerge from a constitutional convention, not one simply adding a mechanism for enacting laws. The people could reserve a power otherwise delegated only through their exercise of political power—by meeting in convention. Unless the 1879 convention had done so, the 1911 electorate would have needed to meet anew in convention.

Perhaps the use of the term "reserve" was merely declaratory of the existing state of things, such that no instrumental or transformative significance should be ascribed to the term. Compare, for example, the Tenth Amendment to the Federal Constitution. It too *reserves* powers; in that case, "to the states respectively, or to the people."[421] Yet, the Tenth Amendment truly is declaratory of the original plan of the Constitution. It was added in order to "prevent misconstruction or abuse" of the Constitution, not to create new rights or limitations.[422] In contrast, the 1911 amendment *reserving* the

417. *Id.*

418. *Id.* (Statement of Senator Lee Gates and Assemblyman William Clark in favor of Senate Constititutional Amendment No. 22).

419. Susan Johnson, *Measure for Measure: Amendment and Revision of the Oregon Constitution*, 74 OR. L. REV. 1065, 1084 (1995).

420. *See* Associated Home Builders v. Livermore, 18 Cal. 3d 582, 591, 557 P.2d 473, 477, 135 Cal. Rptr. 41, 46 (1976).

421. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

422. *See* Resolution Transmitting the Proposed Bill of Rights to the States, Sept. 24, 1789, *in* II BERNARD SCHWARTZ, THE BILL OF RIGHTS: A

initiative power to the people of California was new, not merely a restatement of relative powers defined by the 1879 convention.

As the United States Supreme Court has stated, the people can reserve only those powers they possessed at the time of ratification.[423] Thus, if Californians possessed the initiative power as of 1879, such that it was merely recognized as reserved a generation later, then the convention's efforts to strictly proscribe the mechanism for constitutional change were idle and meaningless gestures.

The state supreme court has rejected the notion that the people emerged from the 1879 convention possessed of the inherent right to initiate constitutional change by popular vote. In *McFadden v. Jordan*[424] the court held that the voters had no "power to initiate directly a revision of . . . the Constitution."[425] Instead, the constitution limited the people's right to affect change; "a wholly new and constitutionally unauthorized procedure for revision" could not occur.[426] The holding in *McFadden* is incompatible with the notion that the people had, by the 1879 constitution, reserved any inherent power to revise the document. It could be done only by prescribed means.

The upshot is that the 1911 amendment establishing the initiative process seems to have changed the pre-existing relationship between the people and their government. It did so in profound ways, perhaps not anticipated in 1911, but obvious now. This change came about not through the exercise of the people's inherent political power—the popular sovereignty that is exercised in convention—but on the pretense that it was a mere amendment.

It should be remembered that popular distrust of the legislature was at least as great in 1879 as it was in 1911. "Most delegates [to the 1878 convention] regarded the legislature as a necessary evil," but the only remedy considered at that time was limiting its sphere of action "to prevent it from doing too much damage."[427]

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DOCUMENTARY HISTORY 1163-65 (1971). The Resolution stated that the twelve proposed amendments contained "declaratory and restrictive clauses." *Id.* Yet, of the twelve, only the last, which became the Tenth Amendment, is written in precatory language; it is the only one not containing the word "shall." The Supreme Court has also confirmed the declaratory nature of the Tenth Amendment. *See* United States v. Darby, 312 U.S. 100, 124 (1941) (stating that the Tenth Amendment "states but a truism").

423. United States Term Limits v. Thornton, 514 U.S. 779, 801 (1995).

424. 32 Cal. 2d 330, 196 P.2d 787 (1948).

425. *Id.* at 350, 196 P.2d at 799.

426. *Id.*

427. SWISHER, *supra* note 114, at 96.

Despite the manifest distrust of the legislature, the 1879 constitution made no provision for initiatives. It entrusted the entire lawmaking process to the legislature, albeit within detailed limits. No pretense was made that such a power could be exercised directly by the people. Such a power would have been considered too radical at the time, perhaps even "communist."[428] The document was far more modest in its reforms, particularly as related to the exercise of power. The new constitution would have been "'simply impossible of execution . . . if, in terms, it sought to repeal all law and leave everything to the right of the strongest.'"[429] Instead, as Henry George observed, the constitution "imposes barriers to future radicalism by a provision in regard to amendments which will require almost a revolution to break through."[430]

In sum, the 1879 constitution never envisioned the initiative process, or anything remotely like it. And because the device adopted in 1911 did not lay "within the lines of the original instrument,"[431] as constitutional "amendments" must, it seems to have been a revision. As such, the initiative process was likely improperly adopted.

So what! Given the ethereal ill-understood nature of how popular sovereigns gain widespread legitimacy, is not the foregoing analysis mere formalism? Even if, through the 20/20 hindsight of the court's revision/amendment jurisprudence, the people acted extralegally in 1911 by wrongly adopting the initiative process through an amendment, is there not a point at which it becomes legitimate through acceptance, history, and usage? A similar point was made by Madison, arguing that the purported illegitimacy of the 1787 Philadelphia convention was irrelevant because adoption of the constitution would "'blot out all antecedent errors and irregularities.'"[432] Finally, what underlying principles of popular sovereignty and republicanism are furthered by recognizing the initiative power only through convention, rather than by popular adoption as an amendment?

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428. Charges, including some in leading newspapers, that the convention was a communist plot arose even before the delegates were elected. *See id.* at 24. The polemic against populist reforms continued during the convention, and after the constitution was reported out, as a means of arguing for its defeat. *See id.* at 110-11.

429. *Id.* at 110 (citation omitted).

430. *Id.*

431. *Darby*, 312 U.S. at 120-21.

432. FRAGMENTS OF THE DEBATES, *supra* note 343, at 310-11.

Answering these questions requires a policy-oriented assessment of the role that initiatives have come to play in California's governance and, perhaps more importantly, of the California Supreme Court's role as the vigorous protector of the initiative. That body is the keeper of the constitutional faith. Yet, "[o]ver the years to an almost universal extent, initiatives have been judicially untouchable."[433] The court's reluctance to enforce limits on the initiative process suggests an acceptance of the existing regime, whether attained in a technically permitted fashion or not. The court, after all, is itself directly accountable to the people, not just in the exercise of their political power in "altering or reforming" government, but also pursuant to their electoral power. In the final analysis, that may be all that matters.

## VII. CONCLUSION

For nearly a century, Californians have with varying degrees of enthusiasm embraced their ability to legislate directly, even while commentators lament the obvious shortcomings of the process as a reasoned instrument of social policy. A comprehensive review of the initiative power's[434] structure reinforces just how radical an instrument it is in California, and, ironically, reveals how faithful the most conservative branch—the judiciary—has been in defending it. Indeed, so radical is the power that its very nature casts doubts as to whether it was lawfully enacted.

Those complaints about the initiative process are louder now than in recent years, from all sides. Perhaps the most penetrating critique comes from those who argue that, given the expense of placing an initiative on the ballot and winning the campaign, initiatives have become largely a tool of the very special interests that were the original targets of the initiative power.

In any event, it is apparent that the jurisprudence, political theory, and history underlying the initiative's frequent use in California translate into a very palpable and stubborn sense among Californians that this is "their" right, no matter what its flaws. This is repeatedly seen in the cases that extol the connection between initiatives and our most popularly sacred—if inaccurate—civil precept: democracy. It is

433. Mosk, *supra* note 357, at 1.

434. During the last few decades, most of the issues placed on the ballot promoted particular interests, and often involved a battle between opposing interests.

hard to know which was the chicken and which was the egg—the court's deference to the power or the people's insistence upon such deference—although Locke would doubtless point to such a sense of ownership as empirical evidence of his precepts. Indeed, one wonders at this point whether Californians would ever accept a government as legitimate if it did not provide for some form of direct democracy.

Whatever opinion one may hold about this much used and much maligned instrument, Californians and their legal institutions have been radicalized by the "people's" power in our state to such an extreme degree that any political or legal effort toward reform must take that into account, not just as a jurisprudential matter, but as a practical matter as well. As one political analyst noted, "America's most populous state seems to have given up on representative government."[435]

435. Nicholas Lemann, *The New York Times Book Review*, N.Y. TIMES, May 3, 1998, at 7 (reviewing PETER SCHRAG, PARADISE LOST, CALIFORNIA'S EXPERIENCE, AMERICA'S FUTURE).